The Litchfield
Historical
Society.
1895
1915-36-0

Sheriffs, under Sheriffs, Bailiffs and Jailors.

1. As to the nature of the Sheriff's office.
2. The manner of appointing them.

The word Sheriff is derived from two Saxon words Shire & Reeve signifying the Governor of a County. The Sheriff is the County officer and at Com. Law is the first officer in the County.

4 Bac. 430 – 1 B.C. 339.

Sheriffs in Eng^d were formerly elected by the people of the County, but now they are appointed by the King, from three persons whom the twelve judges nominate. 1 B.C. 340.

By Stat in Eng^d it is provided that no Sheriff shall hold his office for more than one year. By the form of the warrant he holds it during the good pleasure of the King – tho I suppose says Mr. G. he is appointed annually. 4 C. 32 – 1 B.C. 342.

In Connect the Sheriffs are appointed by the Governor and Council, and they hold their offices during the pleasure of the Governor and Council. Stat. Count. 383

The Sheriff must reside in the County for which he was appointed, and he cannot do any original official act out of his county. But he may go out of his County, and complete an official act. 4 Bac 435.

So if a prisoner escapes, the officer who had him in his body may

on fresh suit pursue him and retake him in another County.
Cloud 37 - 4 Bac 435.

The Sheriff so far as he is a ministerial officer may at Com Law appoint Deputies or Undersheriffs, who may execute any precept which he is authorized to do. These Deputies act as his servants or representatives.

But the Sheriff judicial authority cannot be executed by Deputy.
Hobt. 13 a 15.

By a late Stat in Connect a Sheriff cannot appoint a general deputy without the sanction of the County court. The Sheriff nominates, and the court appoints.

But he may appoint a special Deputy without having a sanction from the County court. Stat. Con. 501.

As the Deputy is the servant or agent of the Sheriff it follows that the Sheriff may remove his Deputy from office at pleasure. But while a Deputy is permitted to remain in office his general power as Deputy cannot be abridged. Salk 95 a 45. Hobt. 13.

Under our Stat in Connect. the court of Com pleas may in certain cases fine, suspend and forever disqualify a deputy from acting.
Stat. Con. 501.

In Eng[d] a Deputy acts in the name of the Sheriff and not in his own name, for he is considered not to be a known sworn and public officer. Hence writs are always directed to the Sh[eriff]

and the Deputy indorses it in the Sheriffs name, and not in his own. Salk. 96 Cook 85.

In Court on the other hand a Deputy acts in his own name, for there he is treated as a known and public officer, and writs are directed to him, and he makes return in his own name. Hut. Com. 24. 212

But tho a Deputy is here regarded as a public officer, yet a writ directed to the Sheriff alone may be executed by a Deputy as in Bag. for in this case he is regarded as the servant or agent of the Sheriff. Kitty 284.

A covenant by a Deputy not to execute process of a certain description, or not to execute it within certain local limits in the County is void as being against law, because tis his duty to execute all processes presented to him. Holt. 4.

But tho a Sheriff may delegate his authority, yet a Deputy cannot delegate his, for he acts in a delegated capacity and so cannot delegate to another. 4 Bac. 442.

But when tis said that a deputy cannot delegate his authority, tis not meant by this that he may not have voluntary aid, or that he cannot command aid or assistance for this he may do, and then persons assisting do not act in an official capacity.

Tis laid down in the 6 mod. that an arrest by a Deputies assistant is not good, but by this is meant that an arrest by an assistant of the Deputy when he is absent is not good. 6 mod. 211

Sheriff and jailor.

If the Sheriff directs a warrant to two persons, either of them alone may execute it. For tis a rule of municipal law that when an authority of a public nature is conferred upon two or more persons this authority is several as well as joint - except when the authority is of a private nature. 1 Inst. 181.

If a deputy is guilty of any neglect of duty the Sheriff may have an action against him immediately; either an action on the case, or if there was a bond of indemnity an action on the bond.

The reason of this is that as the Sheriff is answerable over to the party injured by such neglect, the law raises an implied promise on the part of the Deputy that he will execute his duty faithfully. 1 Rol. 98.

The Sheriff is ex officio keeper of the Common jail in his own county. The jailer then who acts under the Sheriff, is a Servant of the Sheriffs and is appointable and removable by him at pleasure. 4 Co 34. 9 Co 119. Hut. Com. 222.

It is then the Sheriffs business to confine all persons who are not admitted to bail, in the Common jail in his County, but he cannot confine them in any other jail which is not a Common one, he cannot convert a house or stock into a Com jail pro re nata, for in such case he would be liable in an action for false-imprisonment.

Sheriff and jailor 2

A town house, or a bark house is not part of itself a jail.
Hobt 212. Latch 16. 1 Sid 318. Salk 406.

The Sheriff being keeper of the jail it follows that he cannot be arrested in any civil process, for tis absurd to say that the keeper can imprison himself.

No man is liable to an arrest unless he is also liable to be imprisoned, of course he cannot be holden to bail for this is a consequence of arrest.

It has been decided that the process shall abate in connect. in case he is arrested, but I conceive this is not correct, for it ought to have been proceeded with in the same manner as if it had been a summons for the Sheriff is liable to be summoned. Ruby. 48. Stiles. 465. 2 Bac 237.

If however there are two common jails in the same county, and the Sheriff is not keeper of them both, I know not why. in such case he could not be imprisoned. But I know of no case of this kind.

But the question is, what is to be done in Criminal cases? I know of no definite rule on this subject, but I suppose he must be imprisoned in the adjoining county ex necessitate rei, for this is the only mode of bringing him to trial ie. by arrest - but in civil cases he can be held to trial by a summons.

In pursuance of the same principle his wife cannot be imprisoned in any civil case. Hence it follows that if a Sheriff marries a female prisoner he is guilty of an escape. Peters 465.

The marshall of the U. States may be imprisoned in a common jail.

Liability of the Sheriff for the acts and defaults of his Deputies.

The Deputy being a servant of the Sheriff's the acts of the former are the acts of the Sheriff himself according to the well known maxim "qui facit per alium facit per se" of course the Sheriff is regularly liable for them ie. for his Deputies official acts. 1 Kent 314 9 to 98. 5 Bby. 2 Dec. 158.

Hence it is that the Sheriff is allowed to take securities from his Deputies for a faithful discharge of their duty. This bond is only for the Sheriffs own indemnity, for a bond to any other person for the faithful discharge of his duty would be void. Peters 18

I have said that the Sheriff is regularly liable for the acts of his Deputy. The true rule as to this seems to be that the official acts of the Deputy being as to all civil purposes the acts of the Sheriff, the Sheriff is liable civiliter, and not criminaliter; for it is by fiction of law that the acts of the Deputy are the acts of the Sheriff, but

The law never makes one a criminal by fiction. 2 Bond Reg. 1574. Doug 42. 29. R 154. Latch 187. 1 Vent 238.

Thus suppose a Deputy-Sheriff having in his possession a Capias precept, should burn or destroy it – here the Sheriff would be liable civiliter only, tho the Deputy is liable for the tort.

I have said the Sheriff is liable for the official acts of his Deputy, but for private torts of the Deputy the Sheriff is not liable, and the reason is these private torts are not official acts, and are not considered as Sheriffs acts. 1 Rolle 94. Co 6 175. 1 Leon 146.

It has therefore been made a question whether if a Deputy levys an execution issued against A, on the goods of B – whether the Sheriff is liable to B, in trespass. It is said by some that the Sheriff is not liable tho the Deputy is. But it seems now to be settled by modern decisions that the Sheriff is liable in such case.

4 Bac 442. notes. 3 Wils 309. 2 Bl R. 832. Doug 42.

For the Deputy's neglect of duty the Sheriff, and the Sheriff only is liable at Com Law. The under Sheriff is not liable, for neglect of duty to any person but to the Sheriff – but he is liable to him whether there was a bond given or not.

So if he omits to execute legal process, or suffers an escape the Sheriff only is liable, and reason is – Deputy is not a known public officer. Com 403. 406. Latch 18. 5 Co 89. 2 Bac 243. Bro P.D. 603.

I would remark that, what is here called a breach of duty, is meant a neglect of duty, otherwise you cant reconcile the cases. Yet for a wilful tort committed by the Deputy he as well as the Sheriff is liable, an action may be brought against either. The Deputy in this case I suppose is liable as a mere tort feasor, and in the same manner as a mere would be. 1 Salk 18. 1 Ld 1175. 7 Mod 3. 3 Ld 258. 1 Ld 320.

Upon this distinction you will find distinctions confusion in the books, but no contradiction.

I have said a Sheriff might appoint special deputies, & the rule is that when he appoints one of his own choice and selection he is then liable in the same manner as he is for the acts of a general deputy, but if the Pff designates any particular person and requests the Sheriff to appoint him, in such case the Sheriff is not liable to the Pff for the acts of this deputy, but if the Pff has sustained any loss by this appointment, he may have an action against the Sheriff. 4 Mod. 120. Esp D 607.

These rules of Com law are all of them law in Connecticut except the distinction which relates to neglect and torts committed by a Deputy Sheriff.

A Connecticut Deputy Sheriff is liable as well for neglect as for tort, and he is liable immediately, and the party injured may either sue him or the Sheriff. he is liable here for

neglect in the same way as he is in Eng[d] for torts for he is here a known public officer.

I have said a jailor is a servant of the Sheriff - how this a rule that if after the death of the Sheriff, and before his successor is appointed prisoners escape no one is liable, for the jailors authority ceases on the death of the Sheriff. 3 Co 72. Co 8 366.

And if the prisoners do in such case escape there is no other remedy but re caption. 1 Rud. 14.

If a Sheriff having begun execution is removed from office, he must still proceed and complete it - Thus if the Sheriff seises property and posts it and before the time of sale he is removed, still he must proceed and complete the proceep by selling the property. Salk 328. Co 73. Moor 557. 1 Robt A. 373.

The rule is the same as to all officers who are qualified to serve proceep as constables &c.

I will next consider the authority and duty of Sheriffs.

By the com. law of Eng[d] the Sheriff is a judicial as well as a ministerial and executive officer.

In Connect and I believe in none of the States the Sheriff has no judicial authority, his power here is ministerial and executive.

I shall not treat the Sheriff as a judicial officer at all, but as a ministerial and executive one. Now there is a marked distinction

between an executive and a ministerial officer

An executive officer is one whose duty is to execute the laws independant of any authority derived from a superior.

A ministerial officer is one whose duty is to execute the laws in obedience to a superior officer and acts in obedience to that superior officer.

So a Sheriff as conservator of the peace is an Executive officer, but in making an arrest he is a ministerial officer. He must keep the peace by virtue of his own authority but when he serves a process he executes it in obedience to the commands of another.

1. Then as keeper of the peace the Sheriff is the first officer in the county at common law i.e. he is the first county officer, and all our Stat laws on this subject, treat him as the first Executive officer in the County. 1 B. 6 343. Stat Conn 384.

By virtue of this executive authority the Sheriff may apprehend and imprison without any warrant, any person who breaks the peace or attempts to break it, and in Eng by virtue of his judicial authority he may bind them to keep the peace — but in this State he cant bind them to keep the peace.

The Sheriff is bound as executive officer to take all Traitors, felons, murderers &c and keep them for safe custody and he may defend

the county against public enemies. And in consequence of this authority he may command the power of the county or the posse comitatus to assist him, and in this posse comitatus is included all male persons above the age of 15 years except in Engd the peers of the realm. 1 Hut 168. 1 Bl. 343.

In Connect we have a Stat expressly conferring power on the Sheriff which does not vary materially from the power conferred on him by Com law. Stat Con. 384.

Under our Stat Constables have the same executive authority in their seperate towns as the Sheriff has in his County. Stat Con 384.

I have thus far considered him as an Executive officer. Next I shall consider him as a ministerial officer, and it is in this character that his rights and duties are the most frequently called in question.

As a ministerial officer he is bound to execute all legal precep regularly directed to him, and at Com law if he refuses he is liable to fine and imprisonment, and also to the party injured.

But by this is not meant that he is obliged on all occasions to execute precep. Sickness, necessary absence &c will excuse him. So also his previous engagements may excuse him. 1 Bl. C. 344 — Wood 74. Dyer 60. Stat Conn. 385 a. 3.

In Connect a Sheriff is liable for not returning a writ in an

action on the case. But in Engd he is not liable in such an action for not returning it, but a different process issues against him in such case. Dong 446. 10 Mac 58. 206. 308. 6 Eq. 2 Hen & M 233. 8 of D 616.

By our statute he is bound to give a receipt for every writ delivered to him if the party require it, and if he refuses persons may be called to set them names as witnesses to the delivery, and this shall answer the same purpose as his receipt. Stat Comt 385

This provision is seldom carried into effect in mesne process, but only in case of writs of execution, or final process. when it always done.

A known officer, as a sheriff, general Deputy, and Constable is not bound to show his writ before he arrests the person of the Deft or takes his goods. He is not bound to show it even if the Deft demands it and reason is, every person is presumed to know a public officer, and tis their duty to submit to any process to be executed by such officer. But even a public officer must make known the cause of the arrest after the arrest is made by reading it to him or in some other way, and this he should do immediately after making the arrest. 9 Co. 69. Cro. J 485. 83. A 187. 8 of D 604

But a special deputy or special bailiff must show his writ before he makes an arrest, or seizes property if Deft demands it, and

reason is he is not a known officer — and in this case the Deft may use any resistance if the Deputy refuses to show his writ.

But tho he must show his writ if required still he may lawfully make the arrest before showing it if the Deft does not demand him to show it. 9 C 69.

I have said that the Sheriff in his executive capacity might command the posse comitatus for the purpose of taking Traitors, felons &c He may also in his ministerial capacity command the power of the county when resisted in the execution of any lawful precep, and his deputy has the same authority. 2 Inst 193. 453.

There is a provision in our Stat, the necessity of which I do not know, for the com law confers the same authority.

It is provided by our Stat. that in any great opposition to a legal arrest, or in expectation of any resistance, the Sheriff may with the consent or advice of an Assistant or justice of the peace call out to his assistance any number of the militia — now he has this power at com law without the advice or consent of a Justice of the Peace — so it would seem that this Stat abridges the power of the Sheriff, instead of conferring any more upon him. Stat Ch. 384.

This Stat confers the same power upon Constables within the limits

of their respective towns.

As to manner in which a Sheriff may execute process.

It is a settled rule that he cannot break the outer door or window of any dwelling house, for the purpose of arresting the owner or taking his goods in a civil cause.

And the reason given is that his house is his castle, but there is no propriety in this reason, and no reason in the rule, for a man ought not to be suffered to evade the process and execution of the law, in this way — but the rule is settled.

Co. 91 - Co. 8. 99. Cro. 1. Holt 62. 6 T. R. 604.

It is said in some of the old books that if the Sheriff does contrary to this rule break the outer door or window, the execution of the process will be good tho the Sheriff is liable as a trespasser. But this according to later decisions I think not to be law, for the practice now is for the court to discharge the Deft on motion, and this shows that the service is not good. 5 Cogg. 4. Cowp. 1. 2 Bl. R. 823.

The court however will not always discharge the Deft, it is discretionary with them.

Our books do not well explain to us what amounts to a breaking? But I conceive that not only a forcible breaking, but

also the removing of any kind of fastening is a breaking within the meaning of the rule. So lifting a latch or a window, would I think be a battery breaking - it is in case of Burglary and I see no reason why it should not be in this case.

But this privilege of castle is now construed strictly, for it extends only to the outer doors and windows. It follows then that if the officer can enter peacibly, he may break any inner door, a window &c Cro. 6. 7. Hott 62. Com. 327

But tho he may break the inner doors &c yet he must not do it wantonly, for he must first demand the doors to be opened. Cro. 4. Palm. 54.

This privilege of castle extends only to the person, family & goods of the owner or person dwelling in the house - if therefore the Sheriff has process against A who is in the house of B, the Sheriff may break the house of B i.e. the outer doors and windows to arrest A. He ought first to demand entrance however. The rule is the same if A's goods are in the house of B. 5 Co 93. Hott 52. Nid 186.

Again, this privilege of castle is allowed only as against civil process, and not against criminal process in any case for in the latter case Sheriff may break outer doors and windows after having demanded entrance. 5 Co 91. 4 Bac 454.

Sheriff and jailor.

The rule is the same in process to compel a person to find sureties, for the peace or further good behaviour. 12 Co 131. 4 Bac 454.

The rule is also the same in a process for forcible entry and detainer. 4 Bac 453.

And if a person known to have committed a felony is pursued with or without process, the outer door or window may be broken open for purpose of arresting them, and any private person may do the same. But this proceeding without warrant is a hazardous one, for if the supposed person proves not to be guilty of the felony then the person breaking the door will be liable for it, and also liable for false imprisonment.

Again the outer door may be broken for the purpose of suppressing an affray, and to prevent a breach of the peace, and if the persons guilty of committing an affray escape and are pursued, outer doors and windows may be broken in order to arrest them, and this without warrant. 4 Bac 456.

And in one instance of process merely civil the sheriff is justified in breaking outer doors, and this is in executing final process in an action of ejectment, for here he is commanded to give the plff possession, it therefore may become necessary for him to break open the house. 5 Co 91a.

So also upon civil process the outer door of a barn not

adjoining the dwelling may be broken open, and I suppose a door, which is not in actual contact with a dwelling house might be also broken open, tho some contend to the contrary. 1 Roble 698. 1 Hid. 186

It is settled that if the Sheriff Bailiff or assistant is locked in any house the Sheriff may break it open for the purpose of taking them. Palm. 52. Cro. J. 553.

And if a person having been once lawfully arrested gets into his house again, it may be broken to take him again, for him being once taken, the Sheriff has a right to his person. Palm 54. 6 mod 178 1 Roll R 138.

But if a person is illegally arrested by breaking open the outer-door, and while in custody is charged with another process by another person, this last arrest is good, provided there was no collusion or fraud practised by the parties, or the officer, for if there was, both will be illegal. 2 Bl. R. 823. Esp D. 605.

By Stat 29 Car 2 and by our own Stat it is provided that no civil process can be executed on Sunday, and such process is declared to be void, and an officer making an arrest on Sunday is liable for false imprisonment — and I suppose a second arrest by a different person as in the last case would be good, provided there was no collusion practised by the officer. —

Sheriff and jailor

Salk 78. Nat cont. 370.

But a party may be arrested from escaping on sunday in a civil procep and this on the same principle that he may retain him in prison on that day — it is enforcing the actual custody which the officer had before. Salk 628. 6 mod 95. 5 Co R 25. 2 Ld Ray 1028. 2 Bac 245.

If a person is illegally arrested on sunday the court will discharge him on motion in a summary way — as in case of illegal arrest in breaking the outer door &c. 5 mod 95. 6 mod 95.

Upon the law of arrests is founded the law of escapes. An escape is when a person being lawfully arrested, or being under lawful arrest, or being deprived of his liberty, either violently or privately evades such restraint, or is suffered to go at large without being delivered by due course of law. You will perceive then that there can be no escape without a lawful arrest — there must be a previous legal arrest. Co Lp 65. Bac Ab 607.

1. Then of arrest. The arrest must always be made in pursuance of lawful authority, its being made under lawful authority is indispensable to its legality.

But by this is not meant that there must be an

writ or warrant in all cases, for in certain cases arrests may be made by lawful authority where there is no writ or warrant, and these cases I have already noticed. As where the Sheriff acting in his executive capacity is authorized to take traitors, felons &c This he may do without a writ or warrant, and the arrest will be legal.

When an arrest is made by virtue of a writ or warrant, the general rule of the com-laws is that if the court under whose authority the warrant or writ issues has jurisdiction of the subject matter of the proceß, his a lawful arrest. (the mode of the arrest being proper as not on Sunday &c.)
If then the party arrested is suffered to go at large, tis an escape. And here if the proceß is erroneous, if there is an escape tis the same as if the proceß were good and regular - for tis good till judgment has been set aside by some proceeding in the nature of a review, as by an appeal or writ of error.

Proceß then being erroneous merely does not make the arrest unlawful. 8 Co 141. 5 Co 64. Thomas 89. 2 Wils 384. Ejd 333. 391. 659.

But on the other hand, if the court under whose authority the

writ issues has no jurisdiction of the subject matter of the process, the process is void, of course the arrest is void, and therefore there can be no escape. Author? supra. Esp D 608.

This is the general rule of the common law.

But according to a settled rule in Connect. the officer making the arrest is not liable to the party arrested in the latter case, unless the process appeared on the face of it to be void. This is not well settled in England. Kirby 110. 182. 2 Swift 387.

But tho this is a general rule yet the first branch of it is not universal, but the latter is, — for in certain cases where the court have complete jurisdiction, yet the process may be void, for being irregular i.e. void on ground of irregularity.

So if process has too distant a return its void - So in Connect. time of return is 12 days before the sitting of the court, a writ dated before that time cant be made returnable to the next term but one, but must be made returnable to the next term. If its dated within the 12 days before sitting of court, then it may be made returnable to the next term save one. 3 Swib 341. 1 Root 315. Esp D. 328. 308.

But this distinction as to legal and void process is not

precisely adapted to our practice in Connect – for here mesne process does not generally issue from that court to which it is returnable – therefore I take the true rule on this subject in Connect to be this, in case of mesne process, but in case of final it is the same as I have before stated – rule, if the process is issued by competent authority, and returnable to a court having jurisdiction of the subject matter of it, the process is lawful and the arrest lawful, therefore there can be an escape.

But if it is issued by authority not competent, or returnable to a court not having jurisdiction, the process is unlawful and void.

It has been lately settled in Eng^d that an officer having arrested a person on final process cannot delegate his power to a stranger, for in such case he would be guilty of an escape – so as in mesne process. Yet I think says Mr. Gould that the rule ought to apply to mesne process as well as final, so far as it extends to the sheriffs power to delegate his authority – For while a prisoner is in the keeping of the sheriff he is under his protection also, and he ought not to be permitted to deliver his prisoner to a stranger or keeper to take to jail for him, tho this is frequently done in Connecticut. 1 Bos & P. 24.

Sheriff and Jailor

Escape must not only be a lawful arrest but also an actual one and regularly made - otherwise there can be no escape.

Bare words will not make an arrest, but to the purpose of making it there must be an actual touching of the person, or a power of immediately taking the person into custody, and a submission to that power.

Where an officer having a process against a person tells of it, & the person immediately surrenders himself - this will be an arrest tho there was no touching. 2 Esp. R. 604. 2 Bac 236. Bul 1162

If one is arrested at the suit of A, and while he is in the custody of the officer, a second writ in favour of B against the same person is delivered to the officer to serve upon him, this mere delivery and acceptation of the second writ by the officer is an arrest in favour of B - so there need be no touching him in the formal manner to make it good.

Therefore if the prisoner should escape after the delivery of the second writ the officer would be liable for two escapes, for A and B might both have actions against him.

Salk 273. 5 Co. 89.

Sheriff and Gaoler.

It is very questionable whether this rule would obtain in Canada on account of our mode of practice, for if it did the Plff would have no election to take the property or person of the Deft, for if this mere delivery is an arrest it would preclude him from that election which he certainly has a right to in all cases.

This actual arrest must also be regularly and legally made, or there can be no escape - and in civil cases the arrest must be made by virtue of a legal writ or warrant. Cro. 64 - 2 Bac 236.

Further to make an arrest legal it must be made by the authority of the officer to whom the writ is directed. By this is not meant that the officer must himself actually serve the writ, for he may direct or authorize his assistant or follower to do it - but it is meant that the officer to whom the writ is directed must be in company with his assistant or follower i.e. he must be in pursuit of the same object and must not be far distant from him tho he may be out of sight &c - 6 mod 211. Cowp. 65.

Arrests made on Sunday are void by stat, of course if the officer makes an arrest on that day it is illegal, and there can be no escape. 6 mod 95. 1 Salk 78. 8 T.R. 605.

and I suppose the same rule obtains, where an arrest is unlawfully made by breaking open the outer doors or windows, and there can be no escape in such case.

And in pursuance of this rule, it follows if the officer has an opportunity to arrest the Delt and refuses or neglects to do it, & the Delt afterwards evades the arrest the officer is liable in an action on the case, but is not liable for an escape. 2 Ld Ray 831 10 mod 251. 255. 2 mod 93.

I will now consider escapes more particularly.

Escapes are of two kinds voluntary and negligent. 3 B.C. 415 3 Co. 52.

Every person committed to prison is to be kept in close confinement or custody, if then the Sheriff or jailor suffers him to leave the limits of the prison yard even for a moment, he is guilty of an escape. Plow. 36. 3 Co. 4. 3 B.C. 415.

A voluntary escape is one which takes place with the consent of the jailor or other officer having him in custody.

A negligent escape is one which happens without the knowledge or consent of the officer.

The word knowledge I think ought to be left out as being surperfluous. 3 B.C. 415.

1.st As to voluntary escape. If the Sheriff admits to bail any person not allowed to have bail, he is guilty of a voluntary escape. So also if the Sheriff consents to have the prisoner transgress the bounds of the prison yard, even tho' it with a keeper, and even tho' he takes him himself, 'tis a voluntary escape. 3 Co 44. Plows 36- 2 a 3 Bac 337 a 237. The rule is the same if a person is arrested on final process of execution and is not actually committed to prison vers in mesne process. 23. R. 176. 1 Bos & P. 26

When a prisoner is committed on criminal process, he is to be confined within the walls of the prison. But on civil process the Sheriff may indulge him in the limits of the prison yard, on procuring security to save the Sheriff harmless after the escape.

It has been once decided in Eng that if a Sheriff takes a prisoner, by virtue of a writ of Habeas corpus who was confined on final process, before the court he was guilty of an escape - This is a most monstrous doctrine and clearly is not law. 1 Sid 13 2 Bac 238. Bul N.P. 72. 1 Root 72. Kirby 137.

But if the Sheriff brings out the prisoner by writ of Habeas corpus and grants him any unnecessary & unreasonable liberty, he is guilty of a voluntary escape - he must take him in the most direct road, and within a reasonable time.

3 Keble 305. 2d Raym. 241. 899. 788. 6 mod 78. Cro C. 14.

A similar rule obtains when there has been an arrest on final process, and the officer dont commit the prisoner within a reasonable time after the arrest is made — here the officer is guilty of a voluntary escape. 2 J.R. 176. 1 Bos & Pul 24.

If a Sheriff marries a female prisoner he is guilty of a voluntary escape. Plow 17.

If a Sheriff appoints one of his prisoners turn key of the jail, he is guilty of a voluntary escape, for he then puts it into the prisoners power to go when he pleases. Hard R. 311. Keb D 608.

A Sheriff is not bound to grant the liberty of the prison yard to any prisoner — tis a mere matter of indulgence and discretion, this being the case, he can at any time put an end to this privilege — Thus far of voluntary escapes.

I have said a negligent escape is one which happens without the consent of the officer. This needs no explanation. For if the prisoner escapes by violence or flies from the officer, or in short escapes in any manner without officers consent tis a negligent escape. 3 B C. 416. Bilyth Rep. 130. Cro J. 419.

And I would here observe that in an action against a Sheriff for

an escape, the officers indorsement on the back of the writ is sufficient evidence that the writ was delivered to him. Cow. 63.

There is a material difference in the law respecting escapes between an arrest on mesne process, and an arrest on final process.

If a person is arrested on final process and the officer permits him to go at large even for a moment, before he is committed to prison, the officer is guilty of an escape, and the reason is that imprisonment being the coercive means of obtaining payment, and is in operation at the time of the arrest made, if then the officer might suspend this for any hour, he might for any length of time, and in this way the object of the law would never be answered.

2 J. R. 172. 3 B. 6. 415. 8 S. & D. 605.

But a person arrested on mesne process before commitment to prison may be suffered to go at large at common law and the officer will not be subjected provided the Deft is forthcoming - i.e. will surrender himself at the return of the writ.

And the reason of this is, that this process cant be considered as coercive means to obtain payment, for the debt has not been liquidated by due course of law - and further the object of this process is merely to compel Defts attendance in Court, and as a security for the

from which the Deft may eventually recover.

The officer is guilty of no escape till avoidance of the writ is made by the Deft, and if he does not appear at the time of returning the writ, then the officer is liable for an escape.
2 H.P.C. 104. 33.R.37. Salk 408. 2 vid 295. 3 B.C. 415.

There is a difference between Com law and our own on this subject. In Connect the Sheriff is not liable during the life of the execution, on which non est inventus is returned by him. Ruby 269. 382. 434.
2 Root 174. Stat Con. 39.

It may be asked when the officer may make a return of non est inventus - There is no definite rule as to the time - the court have never established one. It would seem that a reasonable time ought to be allowed.

But if the Deft arrested on mesne process is not forthcoming at the return of the writ in Eng and in Connect during the life of the Execution in such case the officer is guilty of an escape, and this escape is a negligent one, tho' no where reported in the books to be a negligent one, yet I think it cannot be otherwise. It must be a negligent escape, for the officer has a right to let him go at large till the return of the writ - this therefore cant be a voluntary escape, for that is a crime. Again the Sheriff has

a right to a bond of indemnity in this case but he cannot take a bond for a voluntary escape. Cro. E. 623. 652. 868. 2 wils 294.

If a person is arrested on mesne process is committed to prison, and the officer suffers him to go at large even for a moment he is guilty of an escape - and the reason of this is that after the officer has committed him he is functus officio, the officer has no concern with him, he is in the custody of the law and must be set at liberty by due course of law. If it is a voluntary escape he never can retake him, & a voluntary return of the def^t will not save the officer. 2 wils 294 Salk 271. Skinner 582. 1 Rest 807.

And in these cases of escape after arrest and commitment on mesne process the Pl^ff does not by proceeding to judg^t against the party arrested waive his action against the Sheriff. 2 wils 294

There is a difference as to the remedies which the Pl^ff has for escape on mesne and final process.

If one arrested on mesne process escapes, the action for the escape at com law is perhaps in the case in which action the damages are presumptive, and the action cannot be perpetrated unless the Pl^ff proves a legal claim against the party escaping. 2 wils 295. 2 Tha 873. Cro E 617. 23. R 129. 4 do 611.

The rule of evidence is somewhat peculiar in this case, for when

Sheriff and jailor.

In action is brought against a Sheriff, the confession of the prisoner out of court that he owed the debt to the Plff is good evidence agt. the Sheriff — this is more hearsay evidence, but the general rule is that hearsay evidence is inadmissible. 1 Esp. R 169. Peake's cases 65.

For an escape on final process the Plff has his election to two actions viz. he may have an action of trespass on the case, or under the Stat of Westm 2. an action of debt, and it makes no difference as to maintaining action of debt whether he has been committed or not. Stra 153. 2 B. & R. 1048. 2 T. R 129. 2 Wm. B 1160. Esp. D. 203.

But the more eligible course for the Plff is to bring an action of debt, for there may be a material difference as to the rule of damages, for in an action on the case the jury may give what damages they please, with or without the debt, or a part of the debt with damages, for he settled they are not bound to give the whole debt in damages. But in an action of debt the jury must give the whole sum with which the debtor was charged in the execution, together with costs, for the Stat requires it.

This cannot be done in mesne process for there the action is settled on the case 2 T. R 129. 2 Wils. 295. 2 B. & R. 1048

Esp. D. 203

And that seems to require that in case of voluntary escape, either on mesne or final process that the Plff shall recover the whole sum, whatever the action may be - you will perceive that it gives the same rule of damages in all cases of voluntary escapes.

Stat Const. 222. new edition 366.

If a person arrested on mesne process is rescued before commitment the officer is excused.

But if the Deft is rescued on final process before commitment the officer is not excused. I see no reason for this distinction, the reason given for it viz. that Sheriff in the latter case has time to call out the posse comitatus for his assistance, seems to me absurd.

3 Bl 416. Bro. J 419. Pro B. 373. Esp D. 610. 2 Bac 240.

After a Deft is arrested on mesne process and committed to prison, if he is rescued the officer is not excused unless it was made by public enemies. A rescue made by rebels and insurgents will not excuse him.

1 Roll 805. 16 84 a. 1 Sha 482. Esp D 610.

When an escape is effected by rescue the Plff may sue the Sheriff when he is liable as well as the rescuers. and in every case he may sue the rescuers, but the Sheriff as I have observed is excused in some cases.

But by suing the rescuers it seems he waives his remedy against

Sheriff and Jailer.

The Sheriff. There is no authority directly in point to support this, but I can conceive his case. Bac. Ab. 610. 657. 659. 6 mod 211. Hutton 98 Cro. Jac. 477 Cro. C. 109. I find it laid down in Hobart and Cro. Jac that the Plff in this case may either bring Trespass, a trespass on the case against the coroners. Hob. 180. Cro J. 486. How I conceive this not to be law. Trespass is not adapted to the Plffs claim, if trespass is the proper action the Deft must be considered as a wrongdoer in the prospective of the Plff, but this cannot be. again the damages are consequential, clearly then the action ought to be case, and further I know of no instance in which trespass and trespass on the case are concurrent. The proper action in this case is trespass on the case.

In an action against a rescous the jury may give either the whole or a part of the Plffs original demand, and if they give part only, the Plff may then sue the original Deft in order to recover the whole sum. But I think the jury are bound in conscience to give the whole demand. 6 mod 211. Bac Ab. 657. 659.

In an action against a sheriff for an escape where rescue is an excuse for him, his indorsement of the rescue on the back of the writ is conclusive evidence in his favour. But if his a false return the Plff may sue him and prove the indorsement to be false, and the rescue

of taking this circuitous method instead of contradicting it, is that an official act of an officer of the law is never to be contradicted unless the pleadings put the falsity of it in issue. Cro. E. 781. Dyer 212. Comb. 295. 1 Mont. 224. 2 Do. 178.

But it may be doubted whether this rule is law in Connect. for a similar rule has been exploded. If a Sheriff makes a false return in Eng. the Plff cannot contradict his return and plead it in abatement, but he may sue him for the false return. But in Connect we permit the Sheriffs return to be contradicted.

Tho the Sheriff is liable in certain cases of rescue, he may have his action against the rescuers, which action is case.

But I trust the Sheriff cannot sue the rescuers unless he himself is liable to the Plff. his right of action against the rescuers is founded on his liability over to the Plff. Hutton 98. 2 Holt 130. Cro. E. 77. 1 Ld. Raym. 399.

Tho the Sheriff is liable for a rescue, after the prisoner has been committed, tis evident that he is liable for a rescue when he is bringing him out on a Habeas corpus. Tho. 482. 5 Co. D. 610.

You will remark that after a person is arrested on final process, & tho he is committed on any process no rescue except it be made by hostile enemies, or occasioned by the act of God will excuse the Sheriff.

And it is settled that fire occasioned in any other way than by lightning, by means of which prisoners escape, does not excuse the Sheriff. 4 Co 54a. 4 T. R. 789. 1 Roll. A. 808. 2 Hen. Bl. 113. 2 Bac. 247. Esp. D. 610.

It was formerly holden to be law that in case of a voluntary escape on final process, the prisoner was absolutely discharged from the Plff's demand, and that his only remedy was against the Sheriff. But this is not now considered as law - & the rule now stands the Plff may either have an action of debt against the Defendant or get a new Execution against him on a scire facias, but by a late act of Parl. the Plff may have a new Execution without a scire facias. Holt 212. 2 Bac 239. 241. 1 Bac 196. 2 Mod 136. 1 Ventr. 4. 269.

But I think says Mr J. that in the above case he may retake him on the original execution. But C. P. 69. 1 Bac 196. 2 Hobart 60. Cro. E. 555.

And if the party escaping was committed on mere process, the Plff may retake by an escape warrant when the escape was voluntary. 5 Co 52. 2 Salk 295. Esp. D. 611.

But when the escape is voluntary the Sheriff cannot himself retake the prisoner, nor maintain any action against him, for he is particeps criminis. 3 Bl. 415. 3 Co 52. 1 Ld Ray 380. 2 Str 1176.

It follows then that if the Sheriff having suffered a voluntary escape retake the prisoner, he is guilty of false imprisonment.
1 Vent. 269. 2 Jo R 176.

As a voluntary escape is always a crime, it follows that a bond taken by the Sheriff to save him harmless of a voluntary escape is void as being against law. 1 Rol. Ab. 196. 2 Bulst 213. 10 Co 110.

I have said that if the Sheriff suffered a voluntary escape he could not retake the prisoner. But the Plff may retake him after he has recovered against the Sheriff, if he recovered a less sum than that which was due by the original Debt, this is in case the escape is voluntary. Buller 96. Esp D. 611.

But the the Sheriff loses all personal control over the prisoner in case of a negligent escape, the Sheriff may either retake the escaper, or commence his action against him immediately for the escape.
3 Co 52. Esp D. 602. 1 Bac Ab. 605. Co 6 284. 53

And if the Sheriff has taken a bond of indemnity against a negligent escape, he must sue on this bond. 1 Dort. 151

But where the Sheriffs Bailiff has had an escape, he can have no remedy, not even against the escaper. The Sheriff may have an action against the escaper in such case and he may give the Bailiff the benefit of it, by permitting him to sue in his name. Esp D 613.
Bro. Ab. Jug

Sheriff and Jailor.

There has arisen a very important question in the U. States viz whether a party escaping can be taken by an escape warrant in another State from that in which he escaped, or whether Bail can retake his principal in an adjoining State by a bail piece. I will answer this question hereafter. Vide Mr Gould's opinion in Dagg Repts.

If a person arrested on criminal process escapes he is punishable by fine and imprisonment. Even in civil process, unless he breaks the prison walls, and then he is punishable for prison breaking. 2 Hawk 129. 4 B. & C. 129.

An officer suffering a negligent escape on criminal process is punishable by fine and if he suffers a voluntary escape in case of a felon he is punishable in the same way as the felon would be. he is in the nature of an accessory after the fact, but the officer cannot be convicted in such case till the delinquent hath actually received judgment. otherwise it might happen that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man.

But before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned in a misdemeanor.

1 B & P. 130. 1 Hale 590. 2 Hawk 134.

If the officer who has suffered a negligent escape has paid the debt for which the party escaping was arrested, he may maintain an action of indebitatus assumpsit against the party escaping for the money so paid. But if a Jailor or undersheriff permit a voluntary escape, and the Sheriff has to pay the debt, it seems not well settled whether the Sheriff may after this maintain an action of indebitatus assumpsit against the escaper. It has been twice decided at Nisi prius that he could maintain the action, but these decisions were afterwards overruled by Ld Kenyon in a similar case. 6 T.R. 612. Peake Cas 146 Salk 18. 2 Ld. R. 154.

This question once came up in this State, but a compromise took place and there was no trial before the court.

But I am clearly of opinion says Ch. J. that the action can be maintained, for the Sheriff is not liable for the acts of his under sheriff criminaliter but civiliter only, and the reason why a Sheriff cannot recover in case of a voluntary escape is because he is particeps criminis, by this is the only reason, I do not see then why in this case he cannot maintain the action.

If after a negligent escape the Sheriff retakes the prisoner on fresh suit, and before any action is brought against him by the Pltff

in the precep, his liability to the Pff is discharged. By fresh suit is not meant immediate pursuit, for it settled that if he retakes at any time before the action is brought against him by the Pff, it will discharge him. Tha. 908. 3 b 44. 52. 1 Brut. 211. 217. 2 Ra 126. 1 Root 106.

According to the common rule of pleading recaption on fresh suit must be pleaded specially - it cannot be given in evidence under the general issue - But by our Stat in Connect it may be given in evidence under the general issue. 2 Ra 126.

But if an action is brought against the Sheriff before recaption, subsequent recaption will not discharge his liability to the Pff. Cro E. 657. Yaange 873. Co J. 607. 1 Roll 808. 3 b 44. 2 Bac 247.

And as a recaption on fresh suit, before an action brought against Sheriff, will discharge him - so also a voluntary return of the prisoner into custody before action brought against the Sheriff discharges him from his liability to the Pff. Com D 554. 2 Ra 126. 1 Bac Ab 413.

But in a case of a voluntary escape recaption is no excuse for the Sheriff, it will not discharge him, for he has no right to retake him, it will be false imprisonment if he does and the rule is the same if there was a voluntary return of the prisoner. 3 b 52. Cro J. 611. 2 Vin 294.

And when there has been a voluntary escape, a subsequent grant to the escape by the Pff will not discharge the Sheriffs liability.

Cathrick 271. Esp 2. 612.

In case of a negligent escape the Sheriff has a right to re-action, for his own security after the action is brought against him by the Plff in the process.

It has been said and I take it to be a true rule that the Sheriff has no right to discharge a prisoner committed on an Execution upon the prisoners paying the contents of the execution to him, for if he does he will be guilty of a voluntary escape, and reason is the Sheriff is not an agent for the Plff to receive the money. Cro. E. 484. 1 Mod 194. 3 Bac 225. 366. 7 Bac 218.

It seems to be a settled rule that if the Plff after a negligent escape discharges the escaper, the jailor cannot retake him the escaper for his fees, he might have detained him in prison for this purpose if the Plff had discharged him while he was there. I suppose the reason of this is that the jailor in a negligent escape is supposed to be the faulty person, and having suffered the prisoner who was a pledge to go out of his hands, he never shall recover. Stra 908. Esp 2 611.

I have said that an escape of a prisoner having liberty of the prison-yard is a negligent escape, and not a voluntary one. Never if a prisoner escapes from the limits of the prison yard, the Sheriff may retake him on fresh suit, and if he retakes him before an action brought against him by the Plff he is discharged, and

rule in the case of the prisoner voluntarily returns. 1 Root 106

But where one having the liberty of the prison yard, there being a bond of indemnity, the he escapes for a moment and instantly returns again, still the Sheriff may have an action on the bond - but if the escape was short and temporary, nominal damages only will be given. 1 Root 127. And is decided that after such escape from the prison yard neither the prisoner nor the bondsmen can compel the Sheriff to re-ceive him again. 1 Root. 128.

Under our law all actions brought against Sheriffs or other officers for neglect of duty, are barred after a lapse of two years, from the time the action accrued.

Now if after there is a negligent escape suffered by the Sheriff and the Plff does not bring his action against him within two years, the Sheriff cannot recover the debt on the bond of indemnity, for there is no consideration. And if judg't has been recovered on the bond and the Stat of limitations runs on the Plff's claim, the Deft may be relieved by an audita querela. 1 Root 151

There is one important rule of pleading which seems to confound the distinction between a voluntary and a negligent escape viz - Under a count for a voluntary escape the Plff may give in evidence a negligent escape, and this evidence will support the declaration, and to this the Deft may plead recaption or fresh suit before the

action, and thus he may do without traversing a voluntary escape.
2 Ld. Raym. 1126.

Now it may be asked is the Plff to avail himself of the distinction between a voluntary and a negligent escape - he is to do it in his application, which is to be done in the nature of a second assignment.
1 Vent 217. 2 Bac 248.

For a negligent escape the Sheriff only is liable, but for a voluntary escape the under Sheriffs are liable. If the Plff sues the under Sheriff for a voluntary escape the Sheriff is discharged. Cro. E. 512.

If after action is brought against the Sheriff for an escape, and before plea pleaded, the original judgment against the Deft is reversed, the Sheriff may plead and tell record and thus discharge himself.

But on the other hand if judgt and Execution have been executed against the Sheriff before judgt is reversed, he may in such case be relieved by an audita querela - he cant be relieved by plea.
8 Co 142. Holt 209. 2 Bac 248. 3 Mod 325. Phelps vs London in Dags. d. in Error.

False Return.

If a Sheriff makes a false return on a writ he is liable in an action on the case in favour of the party injured by such return, and the party injured may either be the Plff or Deft.

So if a Sheriff makes a return of service upon the Deft when in fact he has made no service, an action will lie in favour of the Defendant

1 Wils 336. Esp D. 184

In England the rule is if the Sheriff makes a false return the Deft cannot plead in abatement or contradiction to it, but must sue the Sheriff in an action on the case for this false return.

In Connect the rule is otherwise — the Deft here may traverse falsify the return of the Sheriff by a plea in abatement, and the consequence will be that writ will be defeated, and an injury will happen to the Plff, and he may sue the Sheriff in this case for a false return. Indeed I suppose says Mr Gould an action will lie in such case in favour of both Plff and Deft.

So also if the Sheriff makes a false return of non est inventus, the Plff may have an action against him. Cro E 729. 1 Str 650 Esp D. 616.

There is a rule introduced by one that as to jailors, which I will here notice.

In Connect if a prisoner escapes through the insufficiency of the jail, the County and not the Sheriff is liable for the escape. The jail is built by the County under the direction of the magistracy of the County, and tis not the Sheriffs duty to keep a sufficient jail. Tait Connect 220. 1 Root 450.

The remedy which the Plff has in such case in Connect is by a petition to the County Court against the County praying relief — Reaction

at law will lie in this case. Stat Court. 228. Kirby 318. 1 Root 155. 153 278. 456. 565. 2 Con. 30.

If the petitioner fails he is allowed an appeal to the Superior Court. Stat Court. 228.

In general the County ~~court~~ is not nominally liable, in these cases, for the reasonings and decisions of the court are, that if the debtor is a responsible man and able to pay, the Plff ought to look to him and not to the County. And on the other hand if he is not a responsible man, and is totally unable to pay the debt the Court then say the County shall pay nominal damages only, as the Plff could have got nothing by keeping him there the Deft in jail, and therefore he might as well be out as in. How this is most absurd and ridiculous reasoning — tis also an impolitic rule, for so long as this doctrine prevails, the County has no inducements to keep a good & sufficient jail. Kirby 318. 1 Root 420 - 278. 155. 357. 505.

But I suppose when the party escaping is sufficiently able to pay the debt at the time of the escape, but by reason of the escaping he runs away and evades the payment of the debt — here I think the Plff would recover the whole debt from the County, for the reasoning of the court does not touch this case.

Sheriff and jailor.

Tho the Sheriff is not liable for an escape through the insufficiency of the jail, still if the escape is facilitated by any neglect of the Sheriff, he would be liable for the escape - so where he knows the prisoner has instruments in his prop prison to effect an escape & does not take them away from him.

I will now notice some miscellaneous rules.

If a creditor voluntarily discharges a debtor who is taken in execution, whether committed or not, he can never afterwards retake the prisoner, nor enforce the judgt against him - the debt is lost forever. 7 J.R 420. 420 557. 6 do 525. 9 do 128 Tha. 658. 4 Bibb 2482. Chitty 782.

And tho the discharge of the prisoner is on condition, or a promise, and this condition or promise is never performed, still he never can retake him.

So if the prisoner engages to pay the debt by a certain given time, if the creditor will discharge him from prison, still he cannot retake, tho the debt is never paid.

So again if there is a promise or agreement on the part of the prisoner that that the creditor may retake him, and commit again on the old execution if he does not pay the debt by such a time, still creditor cannot retake him on that execution, but he may institute a new suit against him in this case grounded

on this new promise. 4 Burn 2482. 1 Bl R 557. 6 Mo 525 7 Mo 440. 2 East 243.

And the rule goes still further to be settled that if the Pff in execution discharges the Deft by a written agreement voluntarily the Pffs remedy is gone forever, even tho there is some informality in the writing or contract. Now he can have no remedy in this case unless the informality is such as a Court of Equity will aid. Neither can he have any remedy on the judgt in this case. 1 Bl R 557. 6 Bl R 525.

And further it is settled that if the Pff in this case should take from the Deft a bond under seal, that he the Deft would surrender himself within a certain given time — this bond is void, and Pff has no remedy upon it. And the reason is a voluntary discharge of the person is a total discharge of the Debt. 1 Bos & Pul 242. 2 East 243.

If two joint debtors are taken in execution, a discharge of one of them is a discharge of both — if one is discharged the other must be also. A discharge of one extinguishes the debt and of the other is attained his false imprisonment.

But suppose they are joint and several debtors, and one of them is discharged. I do not find any precise rule as to this point, but I suppose the discharge of both as in the last case, for they become joint debtors by the

Sheriff and Jailor

Judgment. 2 Salk 93. Salk 574. Ld Raym 55. 5 Co 86. Chitty 152.

But it is necessary in the application of this rule to distinguish between a joint indebtedness and a common liability, for if the holder of a bill of Exchange or promissory note sues an Indorser and discharges him, he may notwithstanding this sue any other Indorser to the note, and the reason is they are not joint debtors, each one of the indorsers is bound independantly of the others — hence they may be all proceeded against independantly of the at one time, or any any one of them at a time, and if they are all taken in execution a discharge of one of them does not discharge any of the rest. 2 Bl. R. 1235. Chitty 124. 155. 181. 4 Bos & P. 325. 2 Show 481.

It was formerly holden by Lord Holt that if a sole Defendant imprisoned on execution died in prison the debt was forever extinguished and I suppose the reason of this was that as the Plff had taken his highest remedy, he never should be permitted to have any other; but this is a fallacious reason — and I consider this not now to be law, for there are more numerous decisions otherwise. And now by Stat 21 Jac I it is enacted that in this case the Plff may sue out a new Execution against the prop- by

of the deceased prisoner - Holt. 52. Co 8 850. Co J. 136 143. 2 Bac 354. Kirby 183.

But it was always holden that if one of two joint tenants debtors died the other was not discharged. Co 8. 850. Co L. 131. 5 a 86.

I have said the Sheriff might take a bond of indemnity against a negligent escape - he then has a right to take a bond that the prisoner will remain a faithful prisoner till he is discharged by due course of law. But a bond as to board and fees is void as being against the Stat of 23 Hen 6 generally called the Case and Favour. 10 Co 100. Plow 66. Holt 14. 1 Pow Con. 173. 12 mod 6. 1 P. Wms 195. 10 mod 159. Our Supr. Court have adopted the rule that tis void only as to board ie. he is not bound to remain by this bond to remain a prisoner till his board is paid, &c. 1 Root 156.

Stat. Regulations respecting jails in Connecticut.

Ev person committed to prison for any offence is to bear his own charges or expenses, if he has means and ability to pay them, & his estate if he has any is subject to the payment of them. But if he has not the means in such case he may be assigned in service till he has earned sufficient to pay them. Stat Law. 144. 122. But these expenses in the first instance are paid out of the State

or town treasury and then his estate if he has any is liable to reimburse the treasury.

If a jailor receives from a prisoner any greater fee than are allowed him by law, he is liable to pay treble damages to the prisoner, and may be fined by the County Court. Stat. 22.

When a person is committed on a civil case he must support himself, unless admitted to the poor prisoners oath, the amount of which is that he has not estate to the amount of 17 Dollars not sufficient to pay the sums for which he is imprisoned - on taking this oath he is discharged from prison unless the P[illegible] furnishes a weekly maintainance for him, to be deposited with the jailor. Stat 221. Root 117. But the Debtors estate if he has, or afterwards acquires any remains liable. A new Execution is obtained by scire facias. Before the oath can be administered the Creditor is to be notified to appear and show cause &c 4 days notice must be given him. If no sufficient reason is shown against it, he is to be admitted to the oath by any Magistrate.

If the application is unsuccessful he cannot make another application except to the Chief justice of County Court and a justice, or two justices of the quorum - He can make but two applications.

If the oath is administered in the first instance the creditor may apply to the Chief Justice of C. Court and a justice or to two justices of the quorum quorum nunc, who have power to order the allowance of support to cease. But the charge of his support when so ordered the creditor is to be defrayed eventually by the prisoner, and if the Creditor chooses to continue him in prison, he cannot procure his enlargement without paying that as well as the debt.

Felons and debtors are not to be lodged in the same room, if they are the jailor will be liable to both damages.

When any county is destitute of a jail, any person liable to be imprisoned may by lawful authority be committed to Gaol in the next adjoining County. County Courts in their respective counties have authority to order into close confinement all prisoners committed on execution for debt, damages, fine or costs except when the execution is issued by the Sup.r Court and in such case the Sup.r Courts have the same power. The Sheriff is bound to obey or he is liable as for a voluntary escape. This refusal to obey is deemed a voluntary escape—for the mode of proceeding see Stat 223 But the authority of the two courts extends not to cases in which the

Sheriff and Jailor.

Judgment on which the prisoner is committed does not exceed 17 Dollars. —

Executors and Administrators

Executors and Administrators are the representatives of deceased persons for certain purposes i.e as to their personal estate and as to their debts which affect their personal estate. 1 Com. 139. to Litt 209ª. 2 Bac 439. 3 Bac 29.

An Executor is a representative at large appointed by the last will of the deceased - his duty as Exec^r is to execute that last will. 2 Bl. 503.

To make an Executor it is not necessary that the word Executor be used; it is sufficient that the deceased's intention to make such a person Exec^r appears E.g "I commit all my goods to the disposition of &c" See Lofft 247. Swinb 247. 2 Bl. Com 503. Godolphin 82.3. Off Ex^r 8, 12. Dyer 90. b. 91. Cowins 33.

An appointment of an Executor is essential to the existance of a will. 3 Mod 579. Trevor. chap 1st Mod. 231. Co Litt 111. a. 6. 2 Bac 392. Goodlph. 32.

A disposition of personal prop^y in contemplation of death, not containing an appointment of an Exec^r is called a testament. Wentw Off. Ex^r 2. Lovel. 2. It has been called a codicil in the civil law, and is to govern in the disposition of the property of the deceased. 3 Bac 466. Godolphin. 271. Powell 23. 4. Off Exec^r 2. Lovel 2. 2 Bac 392. So there may be a will without a testament and vice versa. Lovel 2. Naming Ex^r is by implication a gift to him of the goods of the Deceased. Exec^r being bound to pay debts

Exec.rs & Admin.rs

In naming Exec.rs makes a will. 2 Bac 392. 3 Rodyh. 32. 4 Bac Ab. 3.

At Com. Law a testamentary disposition of lands without naming an Exec.r was called a will - while that in case of chattels, then called testament, was - 1 Jun. 5 Bac 492. 20 Sect. 111. Testamentary disposition of lands now called devise - post.

Administrator is a representative not unlike a personal appointed by law the proper agent or minister. 1 Com. 257. 2 Bl 496. He is appointed only in three cases - 1st When no Exec.r is appointed - 2nd When he cannot act as Executor - 3rd When he will not act as such.

Exec.rs and Admin.rs are considered in Chan.y as trustees to those who are entitled to the personal effects of the deceased. 1 P. Wms. 381. 3 Atk. 526 47. Hence the jurisdiction of Chan.y in cases of mere personalty between Exec.rs and Admin.rs and next of kin, legatees &c 3 Bac 28.

Heir is the person appointed by law to succeed to real estate on the death of his ancestor. 2 Bl 201. Devisee the person entitled to real property by testamentary appointment &c Godolph. 271. 3 Bac 466. 2 Bl. 512.

Power of Exec.rs over personal estate is merely that of trustees at law, except so far as they themselves are entitled to it at first. Over real estate Exec.rs &c in Eng.d have not as such any power. 2 Bac 392. 3 Exec.rs 384. As real estate was not originally testamentary. Ford 21. 28. Exec.rs may have the disposal of real estate like other

persons by express appointment of Testator. So if lands are devised to be sold for the payment of debts the Exec^r tho not expressly empowered to sell, is considered in Chan^y as the proper person to sell, no other being expressly empowered. 1 Ath 420. But Admin^r as such has in no case any such power. Neither of them has any right to the real estate as such in any case i.e. of the assets will be afforded in his hands. Secus the heir is the proper person it seems. Powl 299. 1 Ld Ray 304.

Has been said that in Connect^t Ex^r &c as such represents the deceased as to both real and personal property. Not correct. Idea seems to have arisen from heirs being liable as such to pay Testators debts, and from the deceased's real property being liable like personal for all his debts. Exec^rs &c have neither jus ad rem nor jus in re; not even trustees of real estate as Exec^rs &c. may have a power to sell in certain cases granted by Probate; but so may any stranger 2 Roper 184. That intermeddling with real estate does not make Exec^r de son tort. But as testator's death title to lands not devised vest immediately in the heirs, must be in heirs & not Admin^rs &c; but it has been often decided that Admin^r can it not; that he cannot maintain ejectment. Pending the settlement of even an insolvent estate, Admin^r cannot maintain trespass. Law would be if he must account in this case with Admin^r for the damages. Cradock in New Haven County. Heirs therefore may

Exec.rs & Admin.rs

recover the land immediately and Probate may plead even a sale of—lands — Dickenson vs Whittlesey court of Errors 1798.

A deed of land sold upon a power from Probate, by Exec.trix signed by her not as Exec.trix and in which she is not named as such, nor the power quoted upon, does not pass the interest. 1 Root 105. Such deed offered in evidence rejected — Held in Castle Rep.d court Feb.y 1802. Such inscription evidence against in Chan.y 1 Root 109.

Legatee receives his legacy through the Exec.r Plow 525. 3 Bac 483 ff Ex.r 27. 29. Dyer 254.

Devisee takes possession without the intervention of Exec.r Same rule in Connecticut. Why so if Exec.r has the same authority over real as over personal estate.

The personal prop.y is charged by law with all the debts of the deceased, but in Eng.d the real estate is liable, for debts by specialty, and debts of record only. Lord. 93. 2 Bl. 340. 3 Bl 430 2 Ves 375. 2 Atk. 248.

at Com Law or rather since the stat of Westm.r 2. debts of record, or judg.t debts bound real estate from 1st day of the term in which so and goods and chattels from the date of the execution. Decided by stat 29 Chas 2d they bind the lands as against bona fide purchasers only from the day on which judgt is signed and the goods so only from the delivery of the execution to the Sheriff. 3 Bl. 420.

according to the old law judgt bound land in the hands of the heir from the time of the original writ purchased. 3 Bac 26.

Specialty creditors may resort to either the real or personal estate; if they resort upon the personal and it not sufficient to discharge all the debts, the creditors by simple contract are liable to lose all their demands as the case may be without any remedy at law, since they cannot take real estate, and are postponed to specialty creditors. Lovel 93 - 3 Pr 431 2 Pr 377.

But in the last case Chan.r will relieve the simple contract creditors by letting them in upon the real estate for so much as the specialty creditors have taken of the personal property. Here the simple contract creditors stand in the place of the specialty creditors as to so much as cet. supra. Pres. Mort 377. Talbot 53. 2 Chan.a ca. 45. 1 Eq.a cases abr. 44. This relief is afforded by Chan.y ordering a sale of the real property in the hands of the heir. Some indulgence in Chan.y to general legatees. Salk 416 post. If the assets of the sale are insufficient an average is made. The spirit of these Chan.a rules is adopted by our laws, but our laws subjects the whole real estate at all events to simple contract creditors.

If creditors in equal degree & who first obtains judg.t against Exec.r is entitled to his whole demand even to the exclusion of the rest. 2 Pr Wms 40

But where one of the inferior courts has established a different rule. And in case of one of two creditors in equal degree has commenced a suit at law,

Exec^{rs} & Exec^{rs}

brought a Bill in Chan^y as the rule now is, the Exec^r cannot defend his claim by voluntarily paying the debt. 3 P. Wms 401. 3 Atk. 217. Dick. Chan^y 287.

2 Eng. if land is devised to Exec^r for payment of debts Exec^r cannot be that can be sued at law by creditors as having assets. 1 Com 401. 2 P. Wms 416. 2 Com. 106. Rolle 920.

Exr can not be compelled at law to make sale of the land, land not being considered as assets in his hands so as to subject him at law, but Chan^y will compel him the Exr to sell and that even tho the devise is not to the Ex^r. if it is not to any other purpose. 1 Atk 420.

Assets what 2 B 510 If assets then, there are several kinds —

I^{st} Real i.e. such as descend to the heir and make him liable to such debts of the ancestor and claims upon him as binds his real estate. 1 Com 393 1 Barn 32. 2 Wils 254 2 B 244. 302. 340. 3 Lev 286 Bank 127.

II^{d} Personal or assets in the mains i.e. such property of deceased as comes to the Executor as such and makes him liable to Creditors and Legatees. 1 Com 393. 2 B 510.

Again assets are Legal & equitable — Legal are such as go to & come of Course in Justice i.e. according to the order or priority of debts.

Equitable are such as are distributed among all creditors equally pro rata 2 Vern. 175. 129. 1 P. Wms 730. Rep Ch^y 179. 3 P. Wms 341. 2 Atk. B. 412.

An Equity of redemption of a mortgage in fee is equitable assets, for at law the whole estate is forfeited. Prec Ch. 124. 2 Com 61. 1 Bro 411. 2 Atk 394. 3 P. Wms 341. 3 Bro 33.

So an Equity of redemption in case of any mortgage, whether in fee, or

not — is equitable assets. But in case of a mortgage in fee, the mortgagor has no estate save an equitable interest, because there is no reversion.

But if lands in fee be mortgaged for years the reversion is mortgagor's legal assets, and the creditors may have jud^t &c. heir of mortgagor, if assets generally descend^t. & there is a Way of execution till the reversion comes into possession. Vern & M. 125. 1 Vern 410. 2 Salk 354. 2 Vern 134. 2 Atk^k 241. & Contract equity of redemption is legal assets. Reversion expectant on the determination of an estate tail no assets. 3 P. W^ms 285. Vern & M 418.

Contrariety in the authorities as to the quality of assets arising from the sale of lands, devised to be sold or directed to be sold, the rent expressly devised, for the payment of debts whether they are legal or equitable. 2 P. W^ms 416. note.

According to most of the older cases money arising from sale of lands devised to & subject to the power of Exec^rs to pay debts &c is legal assets on the principle that whatever comes to the hands of an Exec^r as Ex^r is legal assets. 1 Leo 224. Hard^t 405. 1 Vern. 63. 2 Do. 106. 248. 1 Ch. Rep^t 124. 186. 2 P. W^ms 552. 416 note. 1 Atk^k 420.

Yet the latest cases and some of the oldest ones considering the Exec^r in this case in the double character of Ex^r and trustee have awarded priority of the latter character, and holden the assets equitable. Finch 196. 2 Vern 133. 4. 1 Atk^k 484. 2 Do 50. 1 Ca. Ab^t 140 note. 135. where D Thurlow

denies the case 1 Atk 426. Powell 129. These cases seem to have overruled the old determinations.

The remedy raised at supra by trustees is equitable assets by reason of their exclusive jurisdiction over proper trusts. 2 Vern 416. note 3 Atkins 133. 4. 2 Atk 70.

But it has been holden that where lands tho charged with the payment of debts do descend to the heir and are not devised i.e. where the interest does not pass by the devise, they are legal assets. 2 Vern 416 note. Bac Ab 131. 2 Atk 293. 1 Ves 430. For the statute against fraudulent devises has given the specialty creditor in such cases an action of debt at law against the heir of obligor. 3 Bac 27.

In conformity with the last rule it has been holden that money arising upon a sale of lands under a bare power to sell for payment of debts is not to be legal assets, because the lands descend the descent is not broken. 1 Atk 484 1 Ves 30 here if the interest pass by the devise. 1 Atk 484. 3 Atk 630.

This determination is explained & rather avoided by Ld Hardwicke who held that the descent was broken by a power to sell as much as by a devise to sell comprising the interest by express words. 1 Ves Sen 30. 1. 41 note. Ld Kit 772. 113. cited 2 Vern 286.

Lands descending to the heir are to be applied to the payment of

bond debts before lands specifically devised can be taken. This rule is reversed where the lands are devised for the payment of debts. 4 Hagg 356

According to our law as in Chan.y simple contract debts are not as such postponed to debts by specialty. No priority founded on any distinction between different securities or evidences of debt, but there is a priority arising in certain cases from the cause or consideration out of which the debt grows and hence the prerogative or privilege of the creditor. Also in case of insolvent estates. Funeral charges the last sickness, and dues to the State. Remainder divided pro rata. Stat. Prer. 170.

If Testator charges debt upon the heir and creditor resorts to personal fund. Ex: may come upon the heir for the amount, i.e. where testators intent is that the personal fund shall not be diminished. Distinct from former rule where personal fund is exhausted by bond creditors and simple contract creditors are allowed to resort to the heir. The latter rule obtains only when there is a deficiency of personal assets.

Real estate real as well as personal estate is liable for all debts of the deceased, but the Ex.r cannot oblige the creditors to receive land in payment 1 Roop. 95.

In England the heir is liable, it ends for specialty

debts to the amount of his assets. Cro 248. Yelv 205. But the obligee may sue the Exec^r &c if he pleases. 3 Bac 25. Plow 441. 3 Co 12. Cro J 450. 3 Leo 189.

To oblige many one heir for part and the other Exec^r for part 3 Bac 25. 3 Leo 318. But if he recovers judg^t against both and has satisfaction from one, the other may be relieved by audita querela. Exec^rs & Admin^rs are bound by contracts of the deceased, tho not named, as far as they have assets. Bac 448. Off Ex^r 117. Cro J 187. Yelv 103. Except when from the nature of the contract it must be performed if at all by the Testator in person. 2 Bac 448. Co E 5 3. Leo 141.

Heir not even bound in special contracts of ancestor, unless reputably named, because according to the old feudal law, no other kind of land goods (not the land itself) were liable to execution for the personal contracts of the Testator. Now therefore not liable except by express words. 3 Bac 25. 1 Wms 180. Plow 440. Holt 60. 2 Bac 324. J 2 Ld Ray 872. Lands they not originally liable to execution. 3 Bac 324. J.

And even when the heir is bound or rather where the obligation descends with the land his body cannot be taken in execution. The execution is ag. the land only. 3 Bac 25. Co Lit 103. 2 Jo. Eyr 81. 1 Ld Ray 562. Keb 13. 1 Wms 208. The land is appraised to creditor not in fee, but till the rents and profits shall discharge the debt. (Mansel at Cambr.)

Ex.rs and Admin.rs 5

against the heir would be melius. 2 Bac 329. 3 Co 12a. Co 4 45 a. Hov 141.
This the only instance in which land could be taken in execution
founded on personal actions at Com L. 2 Bac 328. g. 3 Do 25. 3 Co. 12a.
2 Bl 160. 161. 3 Do 418 i.e. in behalf of a subject. King might always
take land in execution in default of personal assets. 2 Bac 329. Hov 141
3 Co 11.

Land of the debtor while in his own hands, first made liable
by half of 13 Edw 1 to execution for debt &c by Stat Westr 2d. 13th Edw 1st
& Elegit. same year the Stat de mercatoribus was passed enabling
debtor to pledge all his land by a recognizance in nature of a
statute merchant. 2 Bl 160. 3 Do 418. 2 Bac 329. 2 Rolle 475. Person of the debtor
not subjected to execution for debt &c by Stat 25th Edw 3. This gave
the capias ad satisfaciendum. 3 Bac 329.

Exec.rs and Admin.rs are fixed on the contracts of the deceased only
in the detinet not in the debet, because they are liable only in
respect of property which they hold for others not in their own right,
they do not owe. 2 Bac 448 & 6 Co 47. Ld 347.

Charging in the debet and detinet tries cured by verdict under Stats
16 and 17 Charles 2d. 2 Bac 448. Exception when the Ex.r &c is personally
liable as he may be in certain cases. Eg. For rent incurred in a
lease for years after testators death, for here he is charged on his own
profession. 2 Bac 443. Salk 297. M. 6. Rolle 603. Co 8 711. Moore 566. Co 4 111. 546
6 Co 46. 225. 1 Mod 186. Here the testator &c was never indebted.

so he is chargeable in the debet &c in case of devastavit. 2 Bac 444 pl 3 & 398. 1 Rol 603. ie after judgment against him as Exec.r &c. 5 Co 32 1 Brownl 321. de bonis testatoris, for he shall not be charged with the devastavit on mere surmise.

Heir must be sued in the debet and detinet because he has assets in his own right and the debt descends with the land. 3 Bac 29. 5 Co 26.a Plow 440. 2 Jon 344. N.B. 1 Lev 130. Cro E. 712. 1 Vern 176. Charging heir in the detinet only, cured by verdict under Statu 16 & 17 Charles 2d 3 Bac 29. At Com Law the heir could defeat the specialty creditors by aliening the land before action brought. 3 Bac 26. 6 Litt 62. But if he aliened after the writ purchased or bill filed in B.R. the land was liable in the hands of the purchaser — judg.t had relation to the time of purchasing the original writ, or filing the bill in B.R. 3 Bac 26. 2 Ch. Ca 245. 1 Mod 258. So that judg.t ag heir binds the land by retrospect not so in case of judg.t ag the ancestor now by Statu 3 & 4 Wm & Mary the heir in case of such an alienation before action is liable, as his estate is to the value of land sold — But the land sold is not liable in the hands of a bona fide purchaser. 3 Bac 26. 1 Eq. Ca. Ab. 149. 1 P. Wms 777.

Q. If heir aliens after action brought is the rule as at Com Law? It seems so. 3 Bac 26.

Holden that testator cannot bind Exec.r when he is not himself bound. Q. if it extends to bind A. — Opinion is that it

Exec[r] & Adm[r] &c

Exec[r] shall pay £10 to creditor who sues Exec[r] for £10 2 Bac Abr 248 Cro 2 52. Ca. Ent 199. Ban 1938. 3 Sid 484. 486.

Formerly lands devised were not liable to debts of devisor to be taken by bond creditors - here the creditor had no remedy at law, nor in Equity 3 Bac 27. 1 Eq[y] ca. ab[t] 144. 2 Ch. 378. 3 Co 43b. Now by Stat[e] 3 & 4 Will[m] and Mary devises of land are void as against bond creditors. 3 Bac 27. 2 Ch 378. and the bond creditor may have debt vs the devisee and the heir both, and then privity. 3 Bac 27. Eq[y] ca. ab[t] 325. pl 9. Can the Devisee be sued, when the heir is privied? Cro. 248 - no - Bro mort 399. 2 Atk 498. Bro P. 478 2 Ld 125. 1 Vern 29.

But a devise for payment of debts or raising portions for younger children is not within the Stat[e] - such devises are good, and bond creditors cannot defeat them. He is paid only like other creditors pari passu 3 Bac 27 S. P. Ch 430 776 note. 3 Atk 630.

The heir of an heir is liable for the bond debts of the latters ancestor; but the second heir is liable in no case I suppose further than the first heir has assets and not so far I suppose unless he, the second heir has assets of equal amount from the first. 3 Bac 28. 2 Ch[a] Ca 175. 1 Vern 400 1 Ven 344.

Exec[r] & Adm[r] of heir is clearly not liable as such for the bond debts of heir's ancestors, for the heir himself is liable only in respect of the land - his person not charged 3 Bac 28. But 'tis said that if heir alienes the land to defeat creditors Equity will follow the money into

Exors & Admors

The Lands of the Executor or heir. 3 Bac 28. 2 Vernon 62. 75. 2 Bac 396 this case 57.

Heir as such not liable in Convent to pay any debts of his ancestor, but if no remedy can be had ag. Exec. or heir in any be liable in Equity on the principle that Chan. will pursue the assets wherever they are. 2 mod 293. 2 Vern 62. 3 Bac 28. 2 Ca 296. 2 Vern 75. 1 Chan 266.

Heirs as such are liable in Convent at law on ancestor covenant of warranty and according to the decisions which have passed not plenties of assets &c. Qu. Whether he can be liable in the latter case consistently with the decision in Sydee vs Tiffany &c - for the treach accrues in ancestors life time and executor seems the proper person. Exec. in these cases is also liable on bonds &c - heir is not liable at law tho named.

Who may be an Executor.

All persons who can make wills (of which post) and many others may be Exec.rs - Lovel 155. Persons of almost all descriptions may be Exec.rs by volition - 1 Chan 235. 6 with 24. Off Ex. 23. 2 Bac 375. So an infant may be an Exec. 2 Bac 377. Lovel 155. Godolph. 103 - Off Exec. 206. Infants in ventre sa mere - 1 Chan 235. 2 Bac 377. Off Ex. 307.

Infant - If one appoint an infant in ventre sa mere Exec. and the other the survivor of the or more, they are all Exec.rs 2 Bac 377. Godolph. 102. 1 Ld. Ray. 213.

An infant cannot act as Exec. till seventeen. 3 Bac 121 Off Exec. 218. 219. Godolph. &c. 2 Bac 382 till he attain that age Admin. durante minore aetate is

* Administrator durante minore ætate is appointed by a late Statute (38 Geo. 3. C. 87. S. 6) till the infant attains the age of twenty one years.

* appointed. Holt 250. Lovel 155. 2 Bac 381. 5 & 29. & such an Executor just under another Exor. 1 Bouth 76.

Regularly acts of infant Executors under 17 are not binding. 3 Bac 317. Off Exr. 218. 14. good 103. E.G. He cannot sell testators goods, cannot assent to a legacy. 2 Bac 377. Off Exr. 223 &c 1 Bouth. 76. 5 & 29. Acts even after 17 not bound by, assent to a legacy unless he has assets to pay debts. 2 Bac 377. 1 Bouth 76. 1 Chan.a 257. Not bound by receiving debts. 2 Bac 377. Off Exr. 217. —

Infant Exec.r cannot sell testators lease for years, even to pay debts if under 17 - 2 Bac 377. 1 Ath 730. But it has been holden that Exec.r under 17 may sell goods to pay debts. 2 Bac 377. Cro & 254 Lu. or any other person by his order. Lu. contrary to general rule 2 Bl 503. Lovel 153. Infant Exr. of the age of 17 is bound by his acts as Exec.r if done according to the office and duty of an Executor. 2 Bac 377. Off Exec.r 215. 309. Cro 640. 5 & 27. — Moore 146. 852. Com 249. Every discharge a debt or payment. 5 & 27. Off Exr. 310 But infant Exec.r of 17 or after not bound by any acts to his prejudice. — by if he has given an acquittance or release without receiving payment — & if he assents to a legacy ut supra. when he has not assets to pay debts for in these cases if bound, he would be subjected to a devastavit. 2 Bac 378. Cro & 671. 6 Litt 172a. Off Exr. 285. 1 Com 249. 1 Roll 926. & if he gives a release for more than he received. is not binding as to the excess. 1 Com 249. Moore 146. 5 & 27b Where acts are not done according to his office and duty as Exec.r 2 Bac 378.

— Exec.r can in no case commit devastavit

bill 21. 1 Vern 328. 1 Com 249. Forth 76 87 therefore if a bond is forfeited and infant Exec.r releases on receiving the principal only, this release is no bar to ye Case to an action for the penalty. 1 Com 249. 2 Bac 378. 1 Roll 730. Doc. 6.

Infant Exec.r tho 17 years of age when sued must appear by Guardian like others infants or his error cannot make an Attorney. 3 Bac 378 3 Co. 150. 1 Roll 287. Poph. 130. Cro J. 420. 441. for he has no remedy against the Attorney for misleading, as his said for neglect, but against Guardian he has. 3 Bac 150. Pal.r 229. Raym 1241. 1 Mod 46.

But if infant Exec.r sues by Attorney said to be error tho judg.t is for him. 3 Bac 150. 3 Buls 181. But 1 Roll 283. Cro E 541 contra. Distinction probably founded on the rule that Admin.r cannot act till 21.

If infant and an adult are Exec.rs they may both sue by Attorney & the adult may make an Attorney for the infant. 3 Bac 151. 1 Roll 283 Cro E 379. Barth 124. 1 Vent. 102 2 Lev. 1 Mod 47. 72. 296. 12 Mod 282. Sho 784. But if they are sued infant Exec.r must appear by Guardian. 3 Bac 91. Hobs 318 Mod 236. Sho 784. for infant Exec.r may be subject to be liable by misleading to costs & de bonis propriis for which he has no remedy ag. the Attorney, but ag. Guadian he has at supra. But infant Pl.ff is not liable for costs ever. Sho 784. 3 Bac 150. 1 Roll 287.

By our Stat an infant may make wills, and therefore he may be an Exec.r at 17, and by another Stat every Exec.r in Connect. must give bond he formerly Exec.rs here did not give bonds. Stat. Cont. 168.
So that impropely enabling infant of 17 to be Exec.r in Connecticut.

Feme Covert A feme covert may be an Executrix. according to the laws of spiritual courts i.e. the canon law, she is considered as feme sole and capable of suing and being sued alone, and taking upon herself the office of Exec^trix without the consent of husband. 2 Bac 378. Off Exec^r 202. 281. 291. Godolphin 110. 1 Lev 235.

But by the com laws wife cannot take upon herself the office of an Exec^rx without husbands consent. 2 Bac 378. Stubbs 117. Off Ex^rs 203 and in Engl^d the com laws controls the spiritual courts in this case; therefore if husband dissents she cannot act, and if the spiritual court would compel her to accept a prohibition will be gived. 2 Bac 378. Off Ex^rs 203.

If Exec^x right to refuse the office post.

So on the other hand the wifes consent is necessary she cannot be compelled to take the Executorship upon her by her husbands consent against her own. 2 Bac 378. Godolph 109. 110. But if the husband actually administers she is bound by his acts during coverture. 2 Bac 378. Godolph 110. & that if an action is brought against them during coverture she cannot plead ne unques Exec^trix & if the wife administer without husbands consent and action is brought against them, they are estopped to plead that she was never Executrix. 2 Bac 378. Godolph 110.

If feme sole be named Exec^trix and marries before the intermeddles with the property, and yet the husband administer — this is such an acceptance as will bind her, and she can never afterwards refuse it. 2 Bac 378. Godolph 110. Qu. not after coverture? She is probably supposed by the rule not to have intermeddled.

Feme covert Ex^{rx} may without husbands consent, sue and make a will or other testament of such goods as she has as Ex^{rx} 2 Bac 378. Off Ex^r 198. 9. Ja. 1 Ld. 110. 2 Bac 378. 49. 1 Rol 606. 1 Mod 211. 212 contra, and that husbands consent before or after is necessary. But it seems not disputed that she as Ex^{rx} may make an Exec^r of the goods she holds as Ex^{rx} 2 Bac 49. Anon 43 Ass. pl. 2 1 Roll 908. 912. This seems much the same as making a testament for the Exec^r will as such have the disposition of the goods, but these cases belong to another head viz- "who may make wills" &c.

King. The King by the Engl^h laws may be an Exec^r but he may nominate others to take upon them the execution of the trust and they may be said as representatives of the deceased. 1 Com. 235. 2 Bac 374. 4 Ass. pl. 3 Godolph 76.

Corporations. Corporations aggregate cannot be Exec^{rs} 1 Roll 915. contra 1st Because tis a body formed for special purposes - 2^{dly} cannot take the oath to make the probate of the will. 1 Com 235. 12 Ray^d 363. 2 Bac 375. Off. Ex^{rx} 17. 35. The latter reason is the substantial objection for a sole corporation may be Ex^r because it may take the oath, Godolph 85. 2 Bac 375. it seems.

Delinquents. According to the civil and canon laws apostates, traitors, felons, outlaws, and others could not be Exec^{rs} Godolph 85. 2 Bac 375. Off. Ex^{rx} 17. By the Engl^h law no person is disable from being an Exec^r by public offences against the civil law. E.g. outlaws and persons attainted may be Exec^{rs} because they claim and sue in a later court 2 Bac 375. Co Litt 128. 1 Roll 914. 1 Com. 914. But they cannot make wills, for their goods are forfeited.

2 B.C. 499. Now 261.

Persons excommunicated cannot be Exec^rs being excluded from the church they cannot dispose of the goods in pios usus. 2 Bac 375. Godolph 134 Godolph 85. This is the only instance it seems of disqualification by the Eng^h law arising ex delicto. We have nothing to do with excommunication and I suppose no disqualification arising ex delicto.

In respect of Country.

By the Eng^h law an alien may be an Executor or Admin^r 1 Lom 285 Cro. 849 off Ex^r 22. 17 We may have the administration i.e. disposition of leases as well as of moveables; because he holds in autre droit as in by the civil law except in case of military testament which are governed by the jus gentium. Godolph 86. 1 Vern 417.

Whether an alien enemy Ex^r should maintain actions as Exec^r? It seems clear that he may hold the effects. 2 Bac 375, 6. Cro E. 142. 683. Vern 431. Yet 370 Authorities contra, weight of authority that he may sue.

Idiots &c. By the Eng^h law idiots and lunatics are incapable of being Exec^rs or Admin^rs, for they cannot execute the trust nor can they even determine whether to undertake it. 2 Bac 376. Godolph 36.

If an Ex^r become non compos, administration may be committed to another. 2 Bac 376. Salk 36.

Fortune and circumstances.

Prerogative court cannot refuse to grant probate to any person because he is poor or insolvent. 2 Bac 376. Salk 36. 299. Carth 457.

Exrs and Admrs

2 Roy. 361. 1 P. Wms 25. for he derives his authority from testator
etc. c. the prerogative i.e. the spiritual court demand caution & security of the Exec. on proving the will since the testator required none.
2 Bac 376. Carth. 457. 11 Vin. 359. pl. 12. 1 Show. 298. In Convict all Executors whether poor or not must give security for the discharge of their duty, formerly not so in Convict. Stat. 1673.

But Chan. considering Exec. as trustee will compel him like all other trustees to give security if insolvent. 2 Bac 377. Carth. 458. 1 Show. 294. 2 Vern 249.

So when the Exec. tho not insolvent is wasting the assets, Chan. will oblige him to give security. 2 Bac 377. Chan. cases 121.

So a suggestion of insolvency in the Exec. Chan. will stop the debtors of the deceased not to pay the Exec. pendente lite. 2 Bac 377. 1 Chan. ca. 75

What persons may be of admin. stat. All persons not disqualified.
A person cannot act as admin. till 21, for he cannot give bond to the ordinary as an admin. must 3 Bac 121. Lovel 8. 2 Bac 381. Carth 446. 447 2 Roy. 336. Salk 39. 5 mod 395. mod 194. 501. Right to administration may devolve upon an infant as part of his, but he cannot administer till 21. It seems proper to say that an infant cannot be administrator for no one is administrator till administration is granted by the ordinary & different from the case of person under 17 named Exec. he is Exec. by appointment of the testator. 2 Bac 391. 5. c. 29.

Feme covert Executrix may with consent of heirs be administratrix,

for she may clearly be entitled as next of kin. 2 Bac 418 & 2nd I find no distinction as in case of infants there is. Dis incapable also from Mr Reeves rule that femes covert is postponed to others in equal degree commonly. She may be 1 Com 249. 262. If a feme sole Ex^r marries, he is liable during coverture for her acts, committed before coverture even to a devastavit. 1 Bac 293. Cro 663. 1 Rol 351. Moor 761. Cro 205 227. 458. 1 Sid 337.

At law husband in the last case is bound during coverture only. But in Equity creditors may follow the assets into the hands of the husband, after wife's death. 1 Bac 293. 1 Chan^r Cases 80. 1 Vern 309. 2 Ab 61. 118. So too into the hands of the Ex^r of the husband. 1 Vern 309. May not Legatees under will of him also pursue the assets in Equity.

Corporations aggregate I conclude cannot be administrators, for they cannot take the oath. Rals. 163.

Corporations sole I suppose may be as in case of Exec^rs.

A excommunicate cannot be administrator for he cannot dispose of the goods in pious uses. 2 Bac 375. Co Lit. 134. Godolph 85. no such rule here.

A villein may be Admin^r for he acts en auter droit and so may sue. 3 Bac 762. Co Litt. 128. So I presume a felon attainted as in case of Exec^r Wife 2 Bac 375. Rol 914 1 Vern 194. for he sues en auter droit

So an alien may be administrator as well as Ex^r canon qua supra 2 Bac 375 off Ex^r 17. 2n. as to an alien enemy as in Exec^rs Cro. 6 142. 663. Moor 31. Vern 370. 2 Bac 375 & 6. Idiots and lunatics cannot be admin^rs 2 Bac 376. Godolph 86.

Origin of Administrators.

Administration by whome granted, and what persons are

entitled to administration 1st Of origin of administration It has been said that administration ie. disposal of goods of intestates belonged originally in Eng^d to the Spiritual courts. 1 Lev 15 Sid 39. 1 Mod 247. 2 Lev 37. 2 Bac 397.

According to other books, the King was entitled by the old law to seize upon the goods of all intestates as parens patriæ and general trustee, & to dispose of them. 9 Co 38. 2 Bl 494. 2 Bac 397.

According to Selden the care and disposal of intestates goods belonged to this Lord. 1 Com 257. 2 Bac 397. ie. the Lord of the manor

The jurisdiction of Ecclesiastics in testamentary matters, and matters of administration is said to have commenced in the time of Richard 2d. 2 Bac 397. 8 1 Com 257. afterwards it seems that the crown invested the Prelates with this branch of prerogative. 2 Bl 494. 1 Com 257. 2 Inst 490 13 Eq^s ca. 5. except so far as it had been previously granted as a franchise to Lords of Manors & 2 Bl 494. 9 637.

The Bishops in exercising this authority disposed of the goods of the intestate in pios usus or broke their trust. 2 Bl. 494. 3 Mich Rep 173. 4 Mod 277. This power of the ordinary drew after it that of the spiritual of wills - it being thought reasonable that the will should be proved to the satisfaction of him whose right of distributing the goods of the deceased was superseded by it. 2 Bl 494.

The ordinary not being accountable to any one did as he pleased with the whole that remained after deducting the reasonable portion or the two thirds of the widow and children. 2 Bl 495. During the early period of feudal system in Eng^d a man having wife and children could bequeath

only one third of his chattels, and administration extended to no more. If he had no wife or no children, half was at his disposal. If he had no wife nor children, he could bequeath the whole and administration was coextensive with his right of disposal. 2 Bl C 491. 2. 495. Fitz N. B. 122. Ray^d 497.

The ordinary was not bound to pay even the debts of the intestate, but when a will was made Exec^r was always bound to pay Testators debts to the extent of assets it seems. 2 Bl C 495.

While the law stood thus the ordinary disposed of the goods of the intestate as he pleased & not as first others 1 Bl 495 & 6. The first check given to the power of the ordinary was by Stat West 2^d. 13 Edw. 1^st. 5 and 247. 1 Mills 7 Comb 378. This Stat obliged the ordinary to pay the debts of intestate to the extent of assets as Exec^rs were before obliged to do. 2 Bl C 495. 2 Bac 398. It gave creditors an action against them. 1 Com 257. 2 Bac 413 Co Litt 193. 1 Roll 926. This Stat is said to be in affirmance of the Com. law. - 5 & 88^a. 9 & 39^b. 1 Com 257. But what common law? Where is it to be found? 2 Bl C 495. 2 Bac 413. Ray 497.

The Stat West 2^d still left the surplus after payment of debts to the disposal of the ordinary. 2 Bl C 495. The abuse of this remaining power occasioned another interposition of the Legislature, and a Stat was made 31 Edw 1^st enacting that in case of intestacy the ordinary should depute the next and most lawful friends of the intestate to administer &c 2 Bl C 496. 2 Bac 414. 1 Com 258. Lovel 2. Ray 498. This Stat is the origin of Admin^rs i.e. officers of the ordinary or persons appointed by the prerogative Court

Exrs & Admrs

to represent the intestate as to personal property & vide beginning of this title
Nº Administrat^rs at common law exhibited as appears supra et ante. 1 Hen B 679.
arguendo - 10 Coll 105 & 6. 5 Co 82.

Before that Stat, the ordinary had begun to appoint others to act in their
stead, but these could not sue nor be sued. 2 Bac 413. Cro Eliz 133. 10 Co 496 Ray 497.
498. being mere servants or attorneys to the ordinary. 10 W^m 3. This Stat.
31 Ed? 1st enabled Admin^rs appointed under it to sue for the recovery of
debts due to the deceased &c as Exec^rs might and subjected them to actions by
Creditors as Exec^rs were before subjected, and as the ordinary was by Stat of
Westr 2? 2 Bac 496. 2 Bac 414.

But this Stat did not oblige Admin^r to distribute the surplus after
paying debts. 2 Bac 515. Goodfellow 253 and 4. Cro Eliz 233. Carth 125. 2 Ch Rep 447 it seems
1 P. W^ms 8.

2dly. Administrat^r by whom granted. Wherever the right of proving
wills and of administering, and of disposing of the deceased's goods may
have originally vested, the right of granting administration as well
as of granting Probate of wills now clearly belongs, except in certain
special cases to the Spiritual courts in Engd. 2 Bac 398. Ray 405 & 6. 1 Cro 359
2 Bac 494. 10 Coll 906. Ray 497. Salk 37. 2 Bac 402. And a will cannot be given in
evidence in a court of Common Law, to prove title to personal property, till it
has been proved in the Ecclesiastical court Doug 681. Seems of a decise.
Ins C. 700. 708. It has been said that the King is supreme ordinary of the
Kingdom and as such may grant letters of administration. 2 Bac 399

Allen 58. But the right of the King has been since denied. But if a person dies intestate leaving no kindred, the practice is for the King to grant Admin^on by letters patent, and the ordinary admits the patentee to administration. This admission is said however to be not de jure but from courtesy & respect. The ordinary may in such case dispose of the goods in his own. 2 Bac 399. Lovel 5. 84. 2 Ld R 37. for he is not obliged I suppose in this case to appoint an administrator. 2 Bl 495 & 6. 5 Co 28. Eg case of a stranger intestate. 2 Bac 505. 2 Ld R 847. 3 Wms 339. The King according to usage is entitled to his goods.

In certain cases Courts Baron have by immemorial custom the right to grant Admin^on and prove wills, but in no other way. 2 Bac 402. Off Ex^r 43. 1 Atk 41. In connect^n the granting of Admin^on falls within the jurisdiction of Probate. Ctn Admin^on appointed in a foreign State in which intestate dwelt may sue to recover his effects in this State. Burg 270. Laws in Eng^d. 2 Story 35. 36. Q. Eg is not our rule right? 2 Hen B 406. Hob^t 25. 1 Hen B 154. 677. 684. 692. 3 Wms 371. Mitford 137.

3^dly Who are entitled to administration? By Statute 31 Edw 3 supra the ordinary to grant administration to the next and most lawful friends of the intestate. 1 Com 261. These words have been construed to mean the next of blood who are under no disability. 2 Bl 496. 1 Lo 39. Yet it seems to have been always holden (Stat 2 & 1 Car 2^d & 1 Com 241.) that husband was entitled to administration on his wife's estate even Ctn Stat. 2 Bac 414. 4 Co 51. 1 Roll 910. Lovel 2.

Exec.rs & Admin.rs

Has the wife entitled to administer on husbands estate? It does appear that she was according to one case. Ray 498. 2 Bac 414. and that to the exclusion of husbands kindred.

If there were several next friends i.e. friends in equal degree the ordinary might perhaps select the most fit. Ray 498.

The power of the ordinary was enlarged by Stat 21 Hen 8 which allows him to grant administration to whom or next of kin as he thinks, and when two or more are in the same degree gives him the power to appoint which he pleases. Next friend and next of kin seem to have been considered as synonimous - except that the husband and the widow were included in the list-words. 2 Bl C 496. 2 Bac 414. Lovel 2. Com 261. This seems to have been considered as in some measure explaining the 31. Ed 3. Ch. it gave the power of preferring the next of kin to the wife or of joining them. Both Stats together are now the basis of the law on this subject. Lovel 2. 2 Bl C 496.

The Stat does not seem to give the administration to the husband on the wifes death, but he has always been holden entitled. Lovel 2. 2 Bl. C. 504 2 P. Wms 381. Administrators were Stats not liable to distribute to the kindred of the deceased, tho there has been some controversy on the point. 2 Bl C 515. 6 Co 18. Goodlph 253 & 4. 1 Lev 238. 2 Ch. Rep 447.

Now by Act of distributions 22 & 23 Charles 2. Admin.rs are obliged to distribute. But husbands Admin.rs of their wifes are by 29 Charles 2. exempted not to be within 22 & 23 Charles 2. 2 Bl C 515. (of this Stat.)

Hence - If husband dies before administration taken, his representatives i.e. his Exec^rs or Admin^rs will be entitled to administration in his wife's estate to the exclusion of next of kin in Equity, and the ordinary is said by Lovedays to be compellable then to grant it. Lovel 2&3. 2 Bl 504 3 Salk 526, 1 P. Wms 381. 382. Husband is even called next of kin in one or two cases. 1 P. Wms 381

If wife Ex^x to another person dies, administration of the goods which she had as Exec^x goes not to her husband, but to the next of kin to her testator. Lovel 3. 3 Salk 21.

By the Stats 31 Edw^d 3 and 21 Hen^y 8. the ordinary is compellable to grant administration of husbands effects to the widow or next of kin, but he may grant to either at his election or to both. Lovel 3^d 2 Bl 496. 504. Salk 36. Stra 552. 1 Com 261. Ray 93. 1 Show 351. 1 Vern 315.

Where intestate leaves no wife, administration goes to next of kin. - among kindred those in the nearest degree are preferred, but of next of kin in equal degree the ordinary may take which he pleases. Lovel 4. 2 Bl 504. 496. 1 Com 261. Ray 498. Salk 38. This is a general rule exceptions ibid. Administration when granted to two or more may always be joint and in some cases several - Several administration may always be granted of several parts of the goods. Bp Admin^s of one part to wife of another to next of kin as children, brother,

parents &c. Lovel 4. 1 Roll 908. 1 Show 359.

But of an entire thing as a bond for £100 several administrators cannot be granted, if two are appointed they must be jointly appointed. Lovel 4. Salk 36. 1 Sid 100.

The degrees of kindred are computed according to the civil law, not of the canon or common law, therefore children are preferred to parents according to the civil law, the computation from the deceased as terminus a quo does not ascend among claimants but in defect of children, yet both are in equal degree. 2 Bl 504. 2 Bac 415. Lovel 4. 9 Mod 253. 2 Com. 125. The order is thus- 1 Children 2. Parents 3 Brothers. 4 Grandfathers &c Pr Ch 527 1 P. Wms 64. 3 Atk. 762. 1 Atk 455. Females are entitled equally with males in the same degree. 2 Bl. 504. Lovel 4.

In computing the degrees propinquity, not quantity of blood is regarded, therefore half blood is equally entitled with the whole. 1 Bl 505. 2 Com Dig 316. 923. 125. Ath 74.

Do the claims of next of kin or next friends as son and daughter, Brother and Sister, and so forth — extend to their representatives or the representatives as such exclude more distant kindred than their Parents.

The Nats. I believe do not mention Representatives nor

do the books generally as Blackstone, Loveday. Jo Dolphin &c But it seems according to one authority that under the Stats 31 Edw. 3. the right of representation does obtain as in distributions. Ray 498. 2 Bac 414. 2n. The order under 31 Edw 3. is said to have been. 1. Husb. & wife 2. Children and their representatives - 3 Parents - 4 Brothers and sisters and their representatives &c Ray 498. 2n as to representatives.)

If none of the characters just enumerated - ie. husb. & wife - next of kin will accept, a creditor may by custom be Admin. in Eccl. He is the next claimant. 2 Bl C 505. Lovel 5. Salk 38.

If there is no husband wife nor next of kin the King according to usage appoints or rather recommends. Salk 37. vide - and the ordinary appoints of course. Lovel 5. 84.

If an Execr. refuses, or dies intestate leaving goods unadministered, administration must be granted. But in this case the Stats 31 Edw 3. and 21 Hen. 8. do not govern the ordinary - he may grant administration to the residuary legatee in exclusion of the next of kin. 2 Bl C 505. 1 Vent 219. 2 Bac 386. 1 Lev 281. For Stat 21 Hen. 8 requires it to be given to next of kin on the presumption that the deceased intended to prefer him. But here the presumption is not, for the residuum is given to another. But may ordinary appoint any other than residuary legatee, unless he were disqualified? seems not - for the reason just given.

Penny - 2 The 956. Suppose testator died intestate as to part, i.e. no residuary legatee appointed - next of kin would be entitled 3 presume - for as to this part, the case does not differ from common cases of intestacy. 2 Bac 386. Dyer 372. Hob 25. Godolph 230. If residuary legatee is then entitled to admin^r ut supra also does his next of kin not the testators must have the admin^r it seems. Godolphin 230. tho Godolphin speaks only of an Exec^r who is universal legatary, or residuary legatee.

In respect of all these characters ordinary may grant admin^r to such person as he pleases, as he might have done before Stat 31 Edw 3.

The person thus appointed may now it seems be a proper admin-istrator. 2 Bl 505. Hob 278 Lovel 5. tho before the Stat 31 Edw 3^d he was merely an Attorney or a servant to the ordinary ante. 2 Bac 413 & 14 Bury 49^a. in this case the ordinary may grant letters to such persons as collegendum bona defuncti. These do not make them Admin^r but a kind of Bailee a trustee to gather and keep the goods safely, and to do some other acts. Lovel 5. 2 Bl 505. 2 Inst 398. Off Ex^r chap 14.

When an Admin^r durante minore aetate minoris of infant is to be appointed the ordinary is not bound by the Stats on the subject 31 Edw 3 and 21 Hen 8 - for he is but a trustee for the infant - has no interest or benefit in right of the infant. Nor is not therefore obliged to appoint next of kin to testator - infant. 2 Bac 381. Lovel 5. Hob 251. 6 mod 244.

more fully explained supra.

By the Stat. Admin^n belongs to the widow or next of kin or both or on their refusal or incapacity to serve, other person as the court shall think fit. Stat Car. 165. Abbot 52.

On the intestacy of a married man in Connect. Probate has the same power as ordinary in Eng^d to appoint the widow or next of kin or both and to select among kindred in equal degree.

Can husband claim administration except as any stranger in Court it seems not, and so thinks Mr Reeve. We have no stat. relating particularly to femes covert, and no such general stat as that of 31 Edw^d 3^d giving administration to next friend nor any such as 29 Charles 2^d declaring husband's right to administer without distributing, as in any other way. Husband has been called next of kin in Eng^d 1st case 1 P. Wms 381. good reasons. Granting administration to husband in Eng^d not within the Stat Henry 8^th 10 cent 919 yet under this Stat. husband was appointed.

If an unmarried person dies intestate in Connect administration belongs as in Eng^d to next of kin and the Engl^h rules as to degrees of kindred would govern.

Our Stat gives creditors no preference to any other strangers, but by usage they are generally preferred as in Eng^d. If a person having no kindred dies intestate in Connect his property real and personal belongs by Stat to the State. Courts of Probate are to appoint Admin^rs of the prop^y & take charge of it.

this power seems to extend to real estate as much as to personal, But he must sell either it seems. This must be done by the Treasurer of the State. Admin^r is to take charge of it and deliver it over to the treasurer.

Who are entitled to administration.

When an Exec^r in Contract refuses to accept or to give bonds Admin^a is to be granted as is in the first case in Eng^d But our law in this case differs from the Eng^h as to the persons to be appointed. In England Ordinary not bound in such cases by the Stats but may grant to residuary legatee. Here administra^n is to be granted to the widow or next of kin and on their refusal or incapacity to one or more of the principal creditors, and on their refusal to any others whom the court shall think fit. Stats 163.4

Penalty by our Stat of 17 dollars per month for neglecting after 20 days to appear and accept or refuse &c same penalty per month, to neglecting after two months to take an inventory after acceptance. Stat 168.4

In Eng^d if a person named Exec^r does not appear before the Ordinary on being summoned to accept or refuse, he is excommunicated.
2 Bac 413. 4. Godolph 60. 140. 2 Show 25 L. Off Ex^r 86.

By transmitting trusts of Executors &c

If an Administra^r dies his Ex^rs are not Admin^rs to the intestate, Admin^n must be appointed anew. Cowel 6. Off Ex^r 14. 2 Louisiana
2 Bac 385. 6. 2 Bl 506. The administrator cannot transmit the trust

reposed in him to another because he has no interest except what he derives from the ordinary – the trust therefore results to the ordinary. Bro Ab 396. 1 Roll 907. Goodlitt 230. 1 Com 251. So if Admin'r d. de bonis of Admin'r is not of Admin'r to the first intestate – for there is no privity between the second Admin'r and the first intestate. 2 Bl 506. ct. can have no Admin'r unless one is appointed to his estate. Here the second Admin'r is appointed to administer the effects of the first Admin'r only, not of ct, Admin'r must be granted. 1 Com 251.

But the Ex'r of Ab's Ex'r ct. having proved the will is the Ex'r of ct. for the power of an Ex'r is founded on the appointment of the deceased and this appointment is founded on a special confidence in the Exec'r 10th 460. Pr Ch 179 He may therefore transmit it to any one in whom he has equal confidence i.e. after he has proved the will. 1 Roll 907. 2 Bl 506. 1 Leon 275. If J.S. leaves two Exec'rs A & B and A dies leaving C his Exec'r during the life of B, C is not Ex'r to J.S. the whole authority survives to B. 1 Com 251. But if after A's death B dies leaving C his Exec'r C is Ex'r to J. S. 2 Bac 405. Salk 311. 2 Bl 506. Salk 127. Yet the Admin'r of A's Ex'r is not the representative of ct for the Ab'r in this case has no relation to A's no privity between them. 1 Com 251.

The Admin'r is commissioned to administer the goods of A's Executor, not those of ct – 2 Bls 506. Goodlitt 230. 6 Co 9 a. the original testator. Therefore admin'r de bonis non cum testamento annexo must be granted. 2 Bac 385. 386. Vaugh 182. 1 Roll 907. If before Probate A's Ex'r dies leaving an Exec'r the latter is not – A's Ex'r 1 Roll 917. 2. Bac 386

Salk 306. 2 Lev 172.

When ever therefore the course of representa.n from Ex.r to Ex.r is interrupted by any one Admin.r and all the goods are not administered Admin.r must be granted of the goods not administered by the first Ex.r or Admin.r 2 Bac 506. Vide 225. 1 Roll 908.

Admin.r de bonis non may like an original administration be special ie. of certain specific parts of the effects not administered the rest being committed to others. 2 Bac. 506. 1 Roll 908. Salk 36. If A.B. leave A his Ex.r and A dies leaving B an infant his Ex.r and admin.r durante minore aetate of B is granted to C. C is not the representative of A. 2 Bac 381. Cro E 211. Holt 246.

If the manner of proving wills.

The Ordinary may ex officio or at the instance of any party interested cite the Ex.r to prove the will, according to some the Ex.r may be cited at the instance of any person that the latter may know whether he has a legacy left him 2 Bac 403. Godolph 80. In connect to Exec.r duty to appear voluntarily within 30 days after testators death and prove a copie is when he knows of his appointment.

The Ordinary may sequester testators goods, till the will is proved. 2 Bac 403. Godolph 503.

If it be uncertain whether the testator is alive or dead, the fact is to be judged of by the ordinary, and if there is good presumptive evidence of his death, the will is to be proved. E.G. If testator is in distant parts and common fame is that he is dead. 2 Bac 403. Godolph 61 2. But if the testator

Ex'r and Admin'r 17

in having, the Probate is void ab initio, the ordinary having no jurisdiction it seems. 9 Rep 29. 130

The time within which a will ought to be proved, not settled by any precise rule in Eng^d — but left to the ordinary's discretion. But regularly it ought to be insinuated i.e. the existance of the will made known I suppose to the proper person within four months from the death of the Testator. 2 Bac 403. Godolph 61.

Two modes of proving wills in England.

1st In common form, as where the Ex^r presents the will without citing the parties interested and deposes himself that it is the true, whole, and last will of the testator, and the judge upon this proves it. 2 Bac 403. Godolph. 62. This is sometimes done when there is no contest.

2.^dly In form of law. i.e. when the next of kin and widow are cited to be present, and witnesses are examined. 2 Bac 403. Godolph 62.

When Exec^r proves a will in com form, he may be compelled to prove it again and in form of law — seems where the first probate is in form of law. Godolph 62.

Probate of a will in com form may be questioned at any time within 30 years next after. seems when proved in form of law. 2 Bac 403. Godolph 62

mode of proving wills in Convoc^n to examine witnesses, but not ordinarily I conceive to cite next of kin &c

Of Ex^r refusal. The office of Ex^r being private and he being named by testator, not appointed by law he may refuse to accept the Executorship in

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the first instance, and then admin. cum testamento annexo must be granted. 2 Bac 405. 2 Rhow 252. Off Ex. 36. Godolph. 140

But 'tis said that the ordinary may compel the Exr. to prove the will and to make his election to refuse or accept the Ex. but tho he cannot compel Exr. to accept. Godolph. 61. In Convict Exr. not compellable to prove the will, tho he must present it and accept or refuse. Watson. 163

But an Exr. cannot assign his office, it being fiduciary. 2 Bac 405. 2 Rhow 252. Nor can he refuse by any act in pais as by a declaration that he will not accept it; this will not alone bind him - it must be by some act recorded in the Spiritual court. 2 Bac 405. Off Exr. 37. Swinb 272 Co 8 99. In the case in Co 8 92 however when the Exrs refused the record was only that they offered to accept & yet the renunciation was holden binding.

If there is but one Exr. named and he refuses admin. cum testamento annexo must be granted and the Exr. can never afterwards prove the will - act otherwise as Exr. 2 Bac 405. Bro. 144. 1 Roll 907. 1 Rhow 281. Qu. may he waive his refusal and prove the will before admin. granted?

But if one of 2 or more Exrs co-Exrs renounces before the Ordinary and the others prove the will the first may according to Eng. law administer at any time afterwards, even after the death of his co-Exrs, for the Executorship survives. And he is preferred to any Exr. of his co-Exrs, for as the will is proved, the ordinary has no authority to take the refusal during the life of him who proved the will. Watk 3. tho he may

afterwards, 2 Salk 311. and probate by one entitles all to act. 2 Bac 405. Moor 873. Dyer 160. Hard 111. 7 Mod 39. 5 6. 28. Co Litt 292. a. 6 Co 34. 3 P Wms 251. Salk 307.

But according to the civil law the renunciation is peremptory & continues. Salk 311. 3 P Wms 251. to the Exr refusing in the last case may discuss debts due to testator. 6 Co 28 a. 2 Vs 37 a. 2 Litt rec 512. Co Litt 292 a-6

to the Exr who refuses must be named in every action brought by the others. 9 Co 37 a. Salk 307. 4 7 R 565. 2 Bac 981 note 396 - Secus when the action is against the Exrs 2 Bac 396.

After an Exr has administered he cannot renounce. 2 Bac 405 - for by the act of administering he accepts the Exrship - determines his right of electing. Godolph 141. 2 Jones 72. 2 Mod 146. 1 Vent 303. Off Exr 38. 2 Lev 182. 1 Roll 907. and makes himself liable to suits.

General rule - 1st that whatever the Exr does respecting the goods of Testator and which shows an intention in him to accept that office amounts to an admission so that he cannot afterwards renounce.

2d Any act which would make one an Exr de son tort is an administra- and is deemed an election of the Exrship 2 Bac 406. 1 Roll 917. E G taking possession of testators goods, and converting them to Exrs own use. 1 Roll 917. Dyer 166. 1 Off Ex 39. 2 Bac 406.

So taking the goods of a stranger and administering them under an apprehension that they are the testators. 1 Roll 917. 2 Bac 406. Aliter if if he takes goods of Testator claiming them as his own.

So if he receives debts due to Testator or releases Testators debts.

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2 Bac 406. Moor 14. 1 Roll 917, 918. Hardr. 11.

If there are two Ex^rs and one (without the consent of the other) takes possession of a specific chattel bequeathed to him by testator, this is an administration for legatee cannot take his legacy without the consent of the Ex^r 2 Bac 406. 1 Roll 917.

But in these cases if the judge knowing that the Ex^r has administered, will notwithstanding accept his refusal and grant admin^n to another, the grant is good, and the Ex^r cannot afterwards assume the office. 2 Bac 405. 1 Roll 907. Off Ex^r 404. Yet if after admin^n granted only because Ex^r did not appear on summons to prove the will, the Ex^r chooses to accept, he may do it, and admin^n must be repealed. 2 Bac 405. Off Ex^r 40. 1.

And if after Ex^r has refused and admin^n granted to another, it appears to the judge that Ex^r had administered before refusal I suppose, the judge may repeal the administration and oblige Ex^r to accept. 2 Bac 405.

If Ex^r appears and takes the usual oath viz that he will justly execute the office &c 1 Salk 303 he cannot afterwards renounce, for he has by the oath accepted — nor can the ordinary refuse to admit him, even tho after taking the oath he had refused. If he does a man- damus lies. 2 Bac 405. 1 Vent 335.

Of the manner of granting administration, and in what cases it is granted. Stillard includes the different kinds of administrators.

Exec.rs & Admin.rs

It must be granted by writing under seal – not by parol. 1 Com 263 Bubito. Dyer 294 Show 408.

Administr.n is to be granted – 1st. when one dies intestate. 1 Com 258. 9 & 39. Stat. 31 Edw 3. 2dly. when the person entitled by law to the administra.n has a general authority and acts for himself as administrator i.e. not for another who has a superior right.

The ordinary may take bond for due admin.n in all cases, even when tis cum testamento annexo. 1 Com 269. 2 Stra 1197

It may be granted jointly to two or more acte and if one dies, the office survives – Diff.t from the common case of delegated authority as a letter of Attorney to two where on the death of one the authority ceases. But administration is rather an office. 2 Bac 416. 2 Com 240. 263. 2 Vern 514. 1 Salk 462.

Several administration may be granted of distinct thing – not of one entire thing, as a bond for £100. 1 Com 263. 1 Roll 906. Vid 101. Salk 36. 2 Bac 416 & 414. Off Ex.r 12. Godolph 78. 1 Roll 914.

If a person is made Ex.r without any limitation or restriction, he cannot renounce as to part – E.g. he cannot renounce a wife a term, this of leg taken from the rent. He must renounce in toto or not all. 2 Bac 414 Salk 307. Yelv 106. Same rule I suppose in case of administration granted generally.

2dly formerly doubted whether it could be granted to one during the absence of Ex.r out of the realm – now settled that it may be. 1 Com 263 1 Vern 14. 15. 1 Roll 915. Cro Salk 42. Lovel 192. 1 Mod 34. 2 Bac 415. 2 Ld Raym 1091. 3 Salk 23.

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2. when rightful administrat^r is absent from the realm. 1 Roll R 908. 2 Bac 415.

3. A temporary administrat^r may be granted when the rightful administrat^r is an outlaw, or in prison. 2 Bac 415. 1 Roll 905. & they in case of ordinary (for an outlaw may sue and be sued as Ex^r & Admin^r. 2 Bac 375. Godolp 196. Bac title Abatement ordinary. These administrations cease when the absence, imprisonment &c of the Ex^r or rightful admin^r are removed.

4. thly So it may be granted pendente lite of a will to cease when the dispute is decided. Formerly doubted whether administrat^r could be granted in this case. 1 Com 263. Stra 917. 2 Show 69. Bac Abridt 423 2 P Wms 76. 2 Bac 415. Lovel 192. Moor 606. Salk 153 contra.

5. thly In case there be a dispute about the right of administration it may be granted pendente lite. 1 Com 263.

These temporary administrators are capable of suing and liable to be sued while their authority continues - even administrat^rs pendente lite - 1 Com 263. Stra 917. 2 Mod 107. 2 Shower 69. 2 Bac 415.

6. thly If Executor named refuses, (1 Com 258. Mod 279 & 281. Roll 907 l. 35 & 40 l.) administrat^r cum testamento annexo is to be granted (2 Bac 386 & 37 a. 40 a.) not administrat^r de bonis non &c, for none of the goods are administered. Salk 314. 5.

7. thly If Ex^r dies before probate an immediate admin^r is granted

cum testamento annexo &c. not an administrat^n de bonis non administratis. 2 Bac 386. Salk 305 & 4.

& July If the Exec^r having actually administered dies before Probate, an immediate administrat^n &c is not de bonis non &c is granted cum testamento annexo &c, because he died before he undertook the execution of the will. 2 Bac 386. Salk 304. & 5. Molloy 97.

If one makes a will and names no Ex^r an immediate administrat^n cum testamento &c is granted. 1 Lon 25. 8.

If Exec^r But if an Admin^r dies leaving goods unadministered, administrat^n de bonis non is granted. 2 Bac 385. 2 Bl 506. Molloy 97. So if the Execn^r dies intestate after proving the will admin^n de bonis non cum testamento &c is granted. 2 Bac 386. Salk 304. 5. for here the Ex^r has administered in part. By the old rule of law in Eng^d if the original Ex^r or Admin^r had brought an action and recovered judg^t and died without taking execution — administrator de bonis non could not sue out execution, or in any way take advantage of the judg^t, not being privy to it. 2 Bac 386 & 7. Yelv 33. 88. Latch 140. Sid 29. Now by Stat 17 Char 2 and 1 James 2^d the Admin^r de bonis non, may have a scire facias on the judg^t where the readered on a verdict. 2 Bac 386 & 7 & mod 296. Salk 322 & 3. 20 May 1072. When the Exec^r in this, dies intestate testate is said to die intestate. 1 Molloy 97.

Administrat^r de bonis non is entitled to all the personal property of the deceased which remains not administered and in specie. 8 G. Jenns,

houshold goods &c. 2 Bac 386. Salk 306. Skinner 148. So to money received by the original Ex[r] &c as such and kept by him, for it can be identified. Salk 306. But if the original Exec[r] &c takes a note for debt due to Testator, the acceptance of the note is such an alienation of the property that the note vests in the representative of original Admin[r] &c not in Admin[r] de bonis non. 2 Bac 386. 1 Roll 473. 2 Vent 362. 1 Roll 380

10[thly] If the Ex[r] be under the age of 17. Admin[r] durante minore aetate i.e. till he attains 17 years must be granted. 1 Roll 258. 250 2 Bac 381. Off Ex[r] 307. 8 Co 29[b]. Lord 192. 3. 3 Mod 24.

So if the person entitled to Admin[n] is an infant, administr[r] durante &c i.e. till he attains full age must be granted. 2 Bac 381. 1 Roll 262 258. 250. Skin 155. 5 Mod 395. 1 Salk 89. Com R 157. Lord 193.

Administrator durante minore &c being but a Curator for the infant Ordinary may appoint whom he pleases. 2 Bac 381. Skin 155. Holt 250 Law down 8 Co 29[b] that administrat[r] granted during the minority of an infant Ex[r] determines on her marrying a person of full age, as he becomes interested with her in her right as Ex[r] and is of age to act — Denied to be law. 3 Wms 79. 1 Roll 250

If an infant and person of full age executors, administr[n] durante &c is not granted to a third person, for the one of full age may execute the will and administra[n] to a third person is void. Lobel 193

But it is said that the Ex^r of full age may take Admist^n durante &c and declare as Ex^r or Ad^r durante &c. 2 Bac 381. 2 Leo. 239. 240. Brand. 46 & if two infants are Ex^rs one of the age of 17, the other under, the latter may execute the will and administer durante &c is not to be granted. Lovel 198. In this case I conclude the Com Ex^r cannot take Admin^n durante &c, for no person but an adult can be Admin^r

If J.S. dies leaving A his Ex^r and A dies leaving B a minor his Ex^r and C is appointed Admin^r durante &c of B, C is not representative of J.S. tho he acts for B who is J.S. exec^r 2 Bac 381. Leo 8 211

There must be an Admin^n of J.S. appointed durante &c of C. Godolph 230.

Of the authority of an Administrator, durante &c of an infant Ex^r or Admin^r

Said in Com. that admin^n durante &c of one entitled to administer, has for the time all the powers &c of an absolute Admin^r — 1 Com 250. No authority cited. 1 Rob 910.

But it seems to be established that an admin^n durante &c has not such a general property in the effects of the deceased, or such a genl authority as an Ex^r or an absolute Admin^r has — for his authority is generally given him ad commodum et profectum executoris &c vel pro bono et commodo &c — So that he is in the nature of a Bailiff to the infant Ex^r or Admin^r 2 Bac 381. 5 & 29 Leo 6. 715. 1 Com 250. 3 Salk 103. These authorities relate to the case of an Admin^n durante &c of an infant entitled to admin^n The authority of an administrator durante &c

is generally granted ut supra, ad commodum &c pro bono &c notandum.

Yet the his authority is special he may generally do all acts which are incumbent on an Exec.r and which are in legal presumption for the advantage of the infant, and the estate of the deceased - E.g. He may assent to a legacy, if there are other assets sufficient to pay debts, not otherwise. 2 Bac 381. 5 6 29 b Comb. 288 An Ex.r may assent under any circumstances tho at his peril. 3 Bac 487 2 Co 436.

So he may sue and be sued. 2 Bac 381. Co. E. 719. fol. 46. 6 Co 87 b.

But as he can do nothing to the prejudice of the infant, he cannot sell the goods of the deceased, except for the payment of debts which is a case of necessity, a unless they are perishable. 5 6 29 b Co 6 719 3 Leon.d 278. 2 Bac 381. in which case a Bailiff may sell. 9 Leon.d 103. 1 Leon 250. 2 Bac 381.

He cannot make a lease of a term vested in the Ex.rs or Admin.rs 2 Bac 381 & 2. 1 Leon 250. 5 & 29 b 6 Co 67 b Exception to this rule when the admin.r durante &c is granted generally i.e. not ad commodum &c Here he may lease a term vested in Ex.r and it is good till Exec.r attains the age of 17 years. 2 Bac 381. 6 Co 87 a But it is not laid down that Admin.r even in this case may sell the goods of the deceased, except for payment of debts &c ut supra.

When administration may be repealed.

Formerly holden in some cases

that the Ordinary could not in any case repeal Letters of administrat. once granted. 2 Bac 410. he having executed his power. 1 Com 263. 1 Sid 179. 1 Keb 683. Cro 645. Ray 93.

But tis now clearly settled that admin^r may be repealed for various causes. 2 Bac 410. Lovel 18. 19. Latch 67. tho not arbitrarily. 1 Com 263. Lovel 18.

1st. When unduly obtained. 1st If administration is granted on the ground of a supposed intestacy when there is a will which is valid here on Probate of the will, administra^n must be revoked. Lovel 18. 47. Roll 907.

2. Where in a case of actual intestacy, admin^r is granted to one not legally entitled to it as to the next of kin to a feme covert exclusive husband. Here it must be repealed in favour of husband Lovel 19. 3 Salk 38. 1 Com 263 1 Sid 409. so if granted to a stranger when there are kindred not disqualified. 1 Com 263. Salk 38. Lovel 19. 4 Burn Ed 236 so if granted to next of kin own testament &c when there is a necessary legatee. 1 Com 263. 2 Leo 56. 1 Wilson 125.

3. If is now obtained by false suggestion in any kind of fraud, it may be repealed. 2 Bac 410. 1 Sid 293. 370. 2 Roll 63. 72. so when obtained by surprise on the ordinary, as when he grants admin^r on a wrong suggestion, tho' possibly not fraudulent. Hut 91. Lovel 19.

4th If so if it be obtained in an irregular manner, as without citing the parties required by law to be cited. 1 Com 263. 1 Leo 305. 4 Burn Ed 236 Lovel 9 so if obtained without giving security to account &c 2 Bac 410

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or within the fourteen days. 2 Bac 410. 2 Rolle 64. [illegible] in Rolle 15 days.

So if after administration granted a new administ^n be obtained by party without a repeal of the first, and the second administ^n releases, his administ^n must be repealed — the release is void. 1 Lev 264 2 Jon 339 6 Co 19^a

II. Administrat^n duly obtained may be repealed in consequence of matters ex post facto. E.g. If the original admin^r should become a lunatic or otherways incapable. 1 Lev 268 1 Leo 156. 1 Sid 373. 1 Rol 846.

So e contra if the person legally entitled is incapable at intestate's death, and admin^n is for this reason granted to another, this admin^n may be repealed on the former becoming capable. Lovel 18. 194 Burns Eccles = = 236. 1 Lev 268. 1 Sid 372 378.

Admin^n tho said may be repealed without a sentence of revocation, as by granting a new administra^n which is itself a repeal. — Lovel 19. 4 Burns E.L. 237. Cro 846. 1 Sid 371.

Of the consequences of repealing administra^n

General rule that where the only objection to an admin^n granted is that it is to a wrong person, the grant is but voidable. 2 Ray 684 Lews R 96. Salk 38. not void. Therefore if the administration is regularly granted, tho to a wrong person, and is afterwards repealed on a citation by the Ordinary, all the intermediate lawful acts of the first & the first admin^r are good. as if he gives the goods of intestate to

Ex.ors & Admors 21

& another, for this is a lawful act i.e. such as a rightful Admor may do. 1 Com 264. Lovel 50. Co 6 460. 66 18.b Moor 369. In this case of the first admor was a creditor to the intestate, he may retain like any rightful admor to satisfy his debts. Salk 38. 2 Ray 684. Com R 96. 2 Roll 412

But if an Admor whose letters are repealed by citation make a gift of the intestates goods by deed before the repeal, the gift is void as against Creditors by stat 13 Eliz. the good ag. the second admor 6 Co. 18.b Lovel 50.

Yet in the last case if the first administration is set aside on an appeal to the higher Ecclesiastical jurisdiction, the intermediate acts of the first administrator, i.e. between the appeal taken and the repeal I suppose are valid. 3 Bac 64. 33 A 125. A repeal on citation is only a revocation of the former letters of admor but does not affect the original sentence, but a contrary sentence on an appeal nobilitates the sentence appealed from, which is suspended by the appeal itself, and after a repeal is considered as if it had never existed. — 6 Co 18.b Lovel 50. Co 6 460. 3 Keb 206. 3 7. 3 3 X 129. 190. 1 Com 264. Here is the rule in Connect. Mr Reeve certifies it doubtful. Ray 224. 2 Lev 91 Note the cases in 6 Co 18.b & Ray 224 where the appeal was after performance on citation.

2 And if the first admor in the last case had obtained judgt against a debtor of the deceased before the repeal, the Debt may

Ex? by Admin?

he chuses against it by audita querela. 1 Lev 264. 1 Vent 95. 2 Saund 149 Yelv 62. 2 Bac 412. 2 Keble 668. 10 Mod 21. 366. So if the debtor is taken in execution on this judgt he may be discharged on motion. 2 Bac 412 Yelv 83. Bowst 91.

Administration granted by incompetent authority as by the Bishop of a wrong diocese is void. Salk 38.

Agreeably to the rule that an appeal upon citation does not make void intermediate acts, it has been decided that if one dies intestate, and a will is forged and proved as his will, and this probate is afterwards revoked on citation, and admin? granted, all lawful acts i.e. such as a rightful Ex? might do remain good - by. A creditor who paid the supposed Ex? is not obliged to pay the same debt to the rightful admin? 2 J.R 125.

But the rule that after a repeal on citation all lawful acts ut supra remain good applies only to cases of actual intestacy not where the deceased left a valid will. 1 Lev 264. 2 Bac 411.

Ex? of deceased has left an Exec? but the ordinary not knowing the fact grants admin? and the Ex? afterwards proves the will, he shall avoid all mesne acts done by the administrator. 2 Bac 411 1 Lev 238. 264. Sho 411 Plow 277. 281. 2 Leo 183. 2 Jones 72. 2 Ander 150. 1 Vent 303. For the Ex? had an interest of which the ordinary could not deprive him — the ordinary had no authority to grant admin-

-istration for he can grant it only upon a dying intestate, the admin^r is void. But Justice seems strongly to disapprove of this rule. 3 Bl R 130. 131. Loud 47. 177. Swin 330. Salk 37. 2 Ld Ray 1710.

So if deceased left two wills of which the former was revoked by the latter and the Exr of the former proves it; yet on the probate of the second by the rightful Exec^r - all the mesne acts of the first Exr are void. 2 Bac 411. Roll g 19. Com R 152. Buller Just. & Gross Just. deny this rule. 3 Bl R 130. 131. and cites 2 Leo 90. 1 Leo 158. Qu. Where not the two last, cases of intestacy? 2 Bac 411. 412.

When the first admin^r is repealed on citation, the authority of the first Administ^r ceases on the appeal, and he is liable for all the goods in his hands to the rightful admin^r & also for all lawful acts. 2 Bac 412. 2 Saund 137. 1 Com 264. But his lawful acts pending the citation as well as before are good. Salk 38. 66 18^b.

The effect of an administrat^n being ab initio void, or of its being made ab initio ~~void as if it be~~ so by a repeal on an appeal is that all the acts of the first Administrator are considered, as to may be treated as, the acts of a stranger - E.g. He may be sued as a hoc patet. 2 Bac 411 Noy 279. 1 Com 264. 238. 2 Atk^ns 150

Yet in the last case if Administrat^r has paid debts, legacies or funeral charges, which the rightful Exr &c ought to have paid

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the Admin.r shall recover the amount so paid in damages i.e. retain or be allowed so much in mitigation of damages. 2 Bac 411. Plows 279 1 Roll. Abr. Cases 126. 1 Vent 349. Fitzg 338

So in these cases when the admin.n is void or made so, at supra, a voluntary payment of a debt to the original Ord. does not discharge the debtor, even tho a release is given — he must pay it over again. 2 Bac 411. Roll 919. 1 Com 264. 1 Vent 349. But Justice contends against this rule in case of a repeal of admin.n &c on the probate of a will, tho not in case of a repeal of any kind upon appeal. 3 R 13 A 191.

But it has been holden that if a debtor pay money on a judg.t and execution to one who is Exr de facto, having a probate under seal, he shall never be forced to pay it again. So doubtless if paid to an Admin.r de facto &c on a judg.t &c. 2 Bac 411. 26 Charles 2.nd in B. R. Ally. Where then is the necessity of an audita querela? 1 Bac 198.

If after admin.n granted a new admin.n is obtained by fraud without a repeal of the first, and the second admin.r releases, and his admin.n is then repealed the release is void. 1 Com 264. 6 to 19.a Dyer 334. 2 Ld. Except as against creditors? 6 to 19.a

What acts an Exec^r may do before Probate.

As the Ex^r derives all his interest from the will, the property of the Testators effects is vested in him before Probate, on the death of Testator. Proving the will is called a necessary ceremony 2 Bac 402 Tis properly a necessary evidence of Ex^rs right. 2 Bac 412. 2 Bac 507. 1 Com 238. Off Ex^r 33 Plow 288. 1 Roll 917. Cro Litt 292. Goddolph 141. Lovel 173 2. 1 Salk 460. Hence a plea that Plff who sues as Ex^r has not proved the will is bad, should be that he is not Ex^r, and then it would be necessary for Plff to produce the Probate. Hutton 31. 2 Bac 396. Salk 3 & 6.

This evidence of Exec^rs right viz probate is necessary his said because on the probate there is an inventory exhibited and other acts to be done which are for the benefit of Creditors and Legatees. 2 Bac 412. Salk 308 Hutton 30.

As therefore the Ex^r derives his right from the will, he may before probate do many acts which will be valid. 1 Com 238. 2 Bac 412 413. Off Ex^r 33. Goddolph 141. But an Ad^r can do no valid act till letters of admin^n granted, for he derives his whole authority from the appointment of the ordinary. 2 Bac 412. 2 Bac 507. Lovel 173 Skinner 87. Salk 308.

By void acts are meant acts affecting the effects or the rights of claimants — there are indifferent acts which any person may do.

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The Exec^r may before probate (for example) take possession of the testators goods, and may enter the heirs house (if he can do it without breaking) and take securities belonging to Testator. 2 Bac 419 Lovel 173. Godolph 144. Bulwer. 177. Off Ex^r 33. 2 Abr^d 277. But he may not break even an inner door it seems — for he may not break a chest. Lovel 175.

So before Probate he may assent to a legacy and the assent is binding. 2 Bac 418. Off Ex^r 34. 49. 1 Com 238. Godolph 144. Pat sec 481 Co Litt 292. and vests the interest in legatee. So he may pay debts and legacies — receive debts, give releases and take them. 2 Bac 418 Off Ex^r 33 & 49. Hutton 31. 1 Com 238. Plow 281^a 5 Co 28^a. Lovel 174. 96 39^a Co Litt 292. But if one entitled to administration should receive debts and give releases before admon granted, he might after obtaining admon recover them again, for the right of action was not in him. Moor 119. 126. Swinb 281. 5 Co 28^a.

So Ex^r may before probate sell, give away or otherwise dispose of the goods of the deceased. 2 Bac 418. Lovel. 174. Off Ex^r 34. 5. 49 1 Com 238. Plow 280. Same in case of Admin^r

So if a bond of Testators be conditioned for payment at a certain day, which happens after testators death but before Probate — it must be paid by the day to Ex^r or at London the penalty is forfeited. —

2 Bac 493. Off Ex^r 34. Lovel 174. So on the other hand of the bond were made by testator, Ex^r must pay by the day, tho before probate, a the forfeiture accrues. Lovel 174. Now by Stat 4 some penalties are changed in courts of law on payment in court of the principal, interest and costs. 2 Bac 413. 3 do 691. 2.

A person named Ex^r is said to be a complete Ex^r to all purposes except that of bringing actions — this said that he cannot bring actions before Probate. 1 Salk 301. 5 to 28.^a Plow 278.^b 280.^b 281.^b Lovel 177. 8 9 to 39.^a 10 to 52.^a to 2 Litt 292.^b Off Ex^r 151. 1 Mod 213. 2 do 146. Godol 4th 145.

But even this restriction is to be taken with two important qualifications. Indeed it seems to be inaccurately expressed. For 1st. It does not apply at all except to two cases viz. to actions of debt and other actions on testators contracts; and to such actions for torts as accrued in the life time of the Testator. Lovel 174. Therefore he may before probate maintain trespass, trover, replevin &c for injuries done to the effects after testators death; since in this case he may declare upon his own possession. 2 Bac 413. 441. Off Ex^r 95. 5 a. Lovel 174. 1 Com 233. Gyle^s 33. 53. 125. 2 Rolle 268. Salk 302. 307. He may indeed in this case maintain an action in his own name without describing himself Ex^r Lovel 174 2 Bac 413. Salk 154. When a proof of letters testamentary is not

necessary. 2 Bac 441. 6 Mod 92. 1 Roll 243. 2 Roll 668.

So before Probate he may distrein or avow for rent when a Reversion of a term for years comes to him from Testator, and rent accrues after the Testators death. Salk 312. 307. Lovel 174. 2 Bac 413. 1 Com 238. 1 Vent 370. 1 Roll 912. because the rent accrues after the reversion is vested in him as to that of the rent accrued during testators life.

So before Probate he may maintain debt &c on a sale of Testators goods by himself - for here the contract is his - not Testators. 1 Com 238 Lovel 174. Cro Eliz 41. 52.

2 With respect to actions of debt and other actions on the testators contracts &c ut supra tis not true as laid down in 5 Co 28. 9 Co 39. &c that Ex^r cannot before Probate bring an action, even in these cases. Tis clearly agreed that he may in these cases commence an act^n before Probate, but he cannot maintain the action or declare before Probate. His writ may bear teste before probate - sufficient if he produces his letters testamentary at the time of declaring when he must make profert. These remove the impediments ut initio. 2 Bac 413. 1 Roll 917. 1 Com 238. Skin 23. 3 Lev 53. 1 Vent 370. Bay 491. Comb 371. Salk 302. 303. 307.

Of Co-Executors - If there are several Ex^rs they - a devise

in law but as one person, representing the Testator. Their interest is joint entire and indivisible. 2 Bac 395. 1 Com 240. Godolph 134.

Therefore it is a general rule that the act of one is deemed the act of all. Hence the possession of one is the possession of all — a sale or gift of the effects by one is valid, being regarded as the contract of all. A release by one of debts, actions, &c is binding. 2 Bac 395. Lovel 21. Swinb 318. 1 Com 240. Off Ex. 95. Godolph 134. 1 Roll 924. Dyer 23b. Cro E. 347.

If one grants all his interest in Testators term for years to a stranger — the whole passes — for each has an entire and indivisible interest. 2 Bac 395. Dyer 23b. Godolph 135. 134. Lovel 21. So if one release his part of a debt due to testator. Godolph 134. Different from the case of joint tenants for each Ex. is possessed of the whole — no parts or moities in their possession.

So one cannot grant his interest in Testators effects to his Co-Ex. nothing passes by the grant, for each was possessed of the whole before. 2 Bac 395. Godolph 134.

So one Ex. cannot have an action of account of the profits of the estate against the others. 1 Com 89. 240. Dyer 23b. Godolph 135. 1 Roll 118. Pl. Placita 24. But Exs have a right to plead different pleas. Godolph 135. Therefore a warrant of attorney to confess judgment ag. all is ill, and the judgt will be set aside on motion. 1 Com 240. Tho 22. 1 Roll 929. 2 Bac 397. Pate 4 Anne 46.

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But one of two Admrs cannot make a valid release, nor convey an interest so as to bind the other — both must join. 1 Com 240. 1 Atk 460 Lovel 21. to the authority of Admrs is entire and joint. This rule formerly doubted. Godolph 134.

Exception to last rule, when the Admrs may sue in their own right as in case of Exp. declaring on their own proper cause. Here they are considered as principals, not as representatives, hence one may release the right of action. 1 Atk 462.

If one of two Exrs dies the power survives. 2 Bac 416. 1 Com 240. 1 Vern 9 3 Atk 509. So in case of 2 Admrs de bonis non. 1 Com 263. 2 Bac 416. 2 Vern 514 1 Atk 56. Lovel 21.

And that one Exr may compel his Coexr to account with him in Chan. for a moiety of the effects. 2 Bac 396. Ab 283. 2 Vn.

So if the Exrs are made residuary Legatees, one may sue the other in the Spiritual court for a moiety; for he is in the character of Legatee. Godolph 135. Off Exrs 99. 2 Bac 396.

General rule, one Exr is not chargeable for the wrong of his coadjutor and is no further liable than for the assets which come to his hands. 2 Bac 396. Godolph 134. Off Exrs 102. Ro E. 318.

Yet if all the Exrs join in giving a receipt for money actually received by one only, all are liable at law to Creditors as if they had all received — each is liable for the whole. 2 Bac 396. 1 Atk 318. Leons in Equity, there the actual receiver only is liable — for receiving is the substance, joining matter of form only.

A all the Exs make but one person in law they are regularly all to sue and all to be sued. 2 Bac 396. Godolph 134. off Exr 95. 4 Jac 307. 96 37.

If an action be brought against one Exr, a plea that another is no Exr without averring that the latter has administered is ill, for if the no Exr has not administered, Plff is not bound to know that he is Exr. 2 Bac 396. Yelv 161 1 Mo 792.

But if one Exr sues alone - tis sufficient for Deft to plead that there is another Exr without averring that he has administered, because the fact is not supposed to be within his cognizance. 2 Bac 396. 381. in actions by Execrs all must join, tho one has not proved the will or is within age, or has refused before the ordinary. Saund 291. 96 37. Yelv 190. Hewtons Ca 95. Salk 3. Ra. of Execrs 29 or 26.

If an action is brought ag one of several Exrs and he does not plead the mistake in abatement, he loses the advantage of it. 2 Bac 396 Curtis Ct. arguendo. So if one of two Exrs sues alone - tis pleadable in abatement only. 1 Saund 291. g. Yelv 130.

If in cases of two Execrs one refuses to accept or prosecute, yet he must be named - Salk 307. 96 37. Godolph 134. and there must be summons and severance. The object of summons and severance is to prevent the Exr not acting from releasing. The effect of the summons &c is to take away his privity to the suit - to make him no party. 2 Bac 396. 7. 2 Roll 198. off Exr 96. 104. Cro Dit 139. Cro E 652. Hutton 128.

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Put if a trespass is committed of the goods of Testator while in the possession of one of several Exrs he alone may sue for it Godolph 184. Off Exr 104. 2 Bac 397 n. for here he need not sue as Exr but on his own possession. 2ue. holden contra Leon 209. 2 Bac 397. for the possession of one is the possession of both. 1 Atk 462.

Of an Exr de son tort.

An Exr de son tort is a person who without any authority from the deceased, or the ordinary does such acts as belong to the office of an Exr & admr 2 Bac 387. 2 Bl 507. Off Exr 71. Godolph 90 1 Com 264. Lovel 51. 2 Sid 99.

In general any unlawful intermedling with the goods of the deceased will make a stranger an Exr de son tort. 2 Bl 507. 5 & 39 H 34. Off Exr 171 E.g. taking possession of goods and converting them to his own use paying debts out of the goods — receiving and suing for debts due to the deceased, and in general all acts of acquiring, transferring or possessing the goods. 2 Bac 387. 1 Roll 918. Dyer 105. 157. Holt 49. 5 & 39 H 34a. Value of the goods taken &c not material. 2 Bac 390. Dyer 166. 2 Sid 100. Milking cows is sufficient.

In paying legacies out of the goods — taking a specific legacy without Exrs consent — or by pleading when sued as Exr any other plea than, he assumes Executor; for by any other he admits himself Exr. 2 Bac 387 Godolph 91 & 2. Off Exr 174. 1 Roll 918. 1 Com 264 & 5.

The widow of the deceased becomes Exx. de son tort by taking more apparel than is convenient for her degree. 2 Bac 387. 1 Roll 918. 1 Com 264, 5
The widow of the deceased becomes Exx. 2 Syn 166. If one stranger takes possession of the effects, and delivers them to another, the latter is Exr. de son tort. 2 Bac 97.

By Stat 43 Eliz. if goods of the intestate assigned by fraud to a third person, or a release given (by fraud) of a debt — the donee or releasee is Exr. de son tort. 2 Bac 387. 8. 1 Com 265. Co 8 406. 810. If one intermeddles with the effects even in pursuance of directions from the deceased he is an Exr. de son tort. 2 Bac 97.

So if a fraudulent gift of deceased himself will make donee Exr. de son tort as to creditors from the necessity of the case — not as to next of kin — legatees — Exrs &c. for he good as ag. them. In this case if in any perhaps. Exr. de son tort may be in convent. 1 Roll 10. 2 Bac 605. 1 Roll 549 Yelv. 197. Prof. 271. 2 Bac 97.

But one may do many acts relating to the effects of the deceased, without making himself Exr. de son tort — ex gratia feeding & taking care of the deceased's cattle — paying debts of the deceased with ones own money — repairing the buildings when suffering for want of repairs — providing necessaries for his children. 2 Bac 388. 1 Com 265. Goodlph 94. 2 Bac 97. Lood 57.

So taking the effects under a claim of property, unless the claim is merely colourable — mere artifice. 1 Com 264. 2 Syn 166. for here he does not undertake to act as Exr. &c 1 Roll 104. So intermeddling with real estate does

not make one Ex. de son tort 1 Root 104. even in Connecticut

What acts are sufficient to make an Ex. de son tort is a question of law. 2 DR 99. The rule or at least the true principle of discrimination is this - if the act of the stranger is such as fairly warrants the inference that he claims the management and disposal of the assets, he is Ex. de son tort - secus not. In the first case the act is done such as belongs to the office of Ex. &c 2 Bac 388. Moor 126. Dyer 166 b

The above rules as to what acts make an Ex. de son tort apply in their full extent only to cases where there is no rightful Ex. or Admr. and to those where there was none at the time of intermeddling.

For after Probate of the will or after the Ex. has otherwise administered, or after administration granted, common acts of intermeddling, as taking possession &c converting, converting, will not make an Ex. de son tort. For there is a rightful Ex. &c and the goods taken after probate are assets in the hands of the rightful Ex. &c 2 Bac 388. 5 b 33. b 34. a Salk 313. pl. 19. they having come to his hands. Swinb 289. 380. Yet the wrong doer is liable as a trespasser to Ex. &c Salk 202. 307. 2 Bac 413. 441.

But even after Probate one not only intermeddles but claims to be Ex. &c he is chargeable as Ex. de son tort. 2 Bac 388. 5 b 34. a Salk 313. 2 Ld. R. 44 and it seems from Salk 313, that this claim may be inferred, so as to subject him, from certain acts - such as receiving and paying debts, tho' not from common acts of intermeddling viz. such as are in the nature

of common trespass.

If the intermeddling is before Probate &c or in case of intestacy before administration granted, the stranger intermeddling is Exr de son tort. tho the act is nothing more than taking possession. 2 Bac 388 and he is liable as such to creditors, unless he delivers over the goods to the rightful Exrs &c before action brought. 2 Bac 388. 5 & 6 Ed. 6. Salk 313. 297. 1 Roll 918. Cro Eliz 565 Hobb 49.

The ground on which Exr de son tort is liable to creditors is that from their acts creditors have cause to presume that they are legal representatives, and they have no right to disprove this presumption, when their own wrongful acts have caused it. 2 Raym 999. 2 Bl 507. 12 mod 471.

An Exr de son tort is liable to all the trouble of an Executorship without having any of the profits or advantages of it. 2 Bl 507. He is liable to be sued as Exr but he cannot sue as such. 2 Bl 507. He cannot retain for a debt due to himself as other Exrs &c may. 2 Bl 507. 8. 2 Stra 1106 - even against creditors of an inferior degree. 2 Bac 390. 378. 9. 5 & 6 Ed. 6. moor 527. Roll 922. Cro Eliz 630. 12 mod 441. 471. 1 Com 266. Yelv. 137. 2 mod 51.

But if he pays debts with his own money, he may retain to the amount so paid. 1 Com 266. 1 Sid 76.

If after intermeddling he obtains letters of administration he may retain for his own debt; 1 Com 266. 2 Stra 1106. 2 Vent 180. 3 Keb 337. 1 Roll 923 Cart 164. - against creditors of an equal or inferior degree, for the letters of administration purge the wrong, except that he is still liable to be sued by

the name of Exr de son tort - he having, however after admin.r granted the priviliges of a rightful admin.tra

A mble apparently contrary to the last is that an Exr de son tort after taking letters of admin.r may be charged as Exor for that he shall not discharge himself by any thing ex post facto. 2 Bac 391. Cro 8 102. 365. 565. 810. 3 Leon 198. But this means nothing more it seems than that even after administration obtained he may be described in a just against him as Exr and that he cannot by being thus described abate the writ, for as to other purposes the wrong is purged. 2 Bac 391. ut supra.

An Exr de son tort is liable as far as he has assets to the rightful Exr or Admin.r - to all creditors of the deceased, and to legatees. 1 Leon 266 - 1 Exr 257. Carth 104. 5 Mod 30. 9 Holt 49. 10 Mod 919. 2 Bac 391. Lord 57.

When sued by rightful Exr &c he is described not as Exr but as a stranger or intruder - as a common trespasser &c 2 Bac 388. Carth 103 & 4. Salk 295 ant 314. 1 Leon 266. Cro 384. 2 Bac 379. But if Exr or Admin.r is a creditor to the deceased, he may bring debt ag the Exr de son tort with the advantage that none of the assets came to his hands. Salk 304. 2 Bac 379. 1 Roll 940 Yates 389.

In actions by creditors he is named Exr generally. 2 Bl 507. 5 Mod 31. Cro 197 Mod 208. 1 Leon 266. 1 Exr 254. 5 Leon 201.

generally he is liable only to the extent of assets received and as against creditors he is allowed all payments made to other creditors in equal or inferior degree. He may plead plene administravit and give such

payment in evidence to support the issue. 2 Bl C 507. 8. Moor 527. 5 Co 30. 8 Mod 180 Carth 104.

But as against the rightful Exr he can not by pleading such payments bar the action; the plea of such payments is therefore ill. Yet on the general issue, he shall recover ie be allowed in mitigation of damages, the amount of such payments: unless perhaps the rightful Exr is by such payments prevented from retaining for his own debt. 2 Bl C 507. 508. 12 Mod 441. 471 Off Exr 14. 179. 181. 8 vin 274. 5 Co 30. Carth 104. 2 Bac 390. 391 n, 1 Vent 34 j. 350 2 Atk B 29. These lawful acts however bind the prop.y thus disposed of against rightful Exr &c

The Exr de son tort is generally chargeable only to the amount of assets received at suppa, yet if he pleads he argues Exr to an action by a Creditr he is liable for the whole demand. 1 Com 266. Off Exr 257. 2 Bac 390. Roy 69 Co 64 72. Said however that in these cases, where the value of the assets received is very trifling, the Exr de son tort may be relieved in Equity. 2 Bac 390. 2 Vern 147. 8 If he pleads in this case plene administravit, he shall not be charged beyond the assets received. 1 Com 266. Dyer 166.6

If there be a rightful Exr to an Exr de son tort they may be sued jointly & severally. 1 Com 266. Off Exr 255. Even in the case of a rightful Administration, for an Exr and Admin.r cannot be joined in actions.

At Com law the Exr and Admin.r of an Exr de son tort were not liable to Creditors, tho they were in Chan.y 1 Com 266. 2 Mod 293. Now by Stat 31 Charles 2. the Exr and Admin.r of an Exr de son tort are liable at law to Creditors.

Admr vs Exr

2 Bac 391. 2. Dod 51. 4 Burn E. Laws 191.

The Exr de son tort is mentioned in our Stat book, page 164. title Estates, if any person &c shall alienate a chattel &c" Yet it seems doubtful whether in common cases such a character can exist in Connect. as the proceedings against him would tend to defeat the average law in cases of insolvency, of which prob. but before the estate solvent, this cannot be known before - hand. After the Exr &c is precluded from representing the estate in - solvent, there is not this objection. Then perhaps such a character may here exist as to creditors, whose claims have been duly exhibited - as where the time for exhibiting claims has expired - the estate not having been represented as insolvent - Qu. Whether this can be before the expiration of 18 months - from the notice, even as to creditors within the State. Stat Comm. 168. for the time may be prolonged by probate - Qu. whether for the expiration of 2 years 1 Root 164. as to creditors out of the State. Decision of County Ct. and Sup. Court in 1796. as to an action brought ag. Admr on discovering new estate.

In one instance there may originally be an Exr de son tort in Connect. in case of a gift by deceased himself to defraud creditors from the necessity of the case. His rightful admr &c cannot recover it, being bound by the gift. 1 Root 549. Ye. 197. Cro J. 271. 2 Ld. Ray. 97. 2 Bac 605.

These Lectures on Executors and Administrators were delivered by Mr Gould and copied from his notes — They have never been completed; the remaining heads to be treated upon, and the order, is thus taken from Mr G's notes —

1. Of making creditors Exec^rs &c
2. Of making Debtors do —
3. Exec^rs right to surplus -
4. Duty of Ex^rs &c —
5. Payment of debts also legacies -
6. Donatio causa mortis -
7. Devastavit. - X
8. Actions by & ag. Ex^rs &c - where act^rs survives & contra - X
9. Distribution —
10. What things go to the wife not to Ex^rs &c. —

&c to some of these heads particularly those marked thus X see a good treatise in Selwyns Nisi Prius Vol 2. from page 675 - to p^g 1[illegible]

Bailment

Bailment is a delivery of goods by one person to another upon a contract expressed or implied that they shall be redelivered to the Bailor, according to his directions when the purpose for which they were delivered is answered.
Jones 348. 2 B.& P. 457.

Thus if A, is about to be absent and delivers goods to B to keep till he returns, a contract is implied that he will redeliver them when Bailor calls for them. So also when cloth is delivered to a Taylor to make a garment, there is an implied contract that it shall be redelivered when called for, and made in a workmanlike manner.

The person who delivers the goods is called the Bailor, the person to whom they are delivered the Bailee.

In general the decisions have usually conformed to what appears to be the true principle, but opinions and dicta are very various on this subject. The decision of Lord Holt in the case of Coggs and Bernard, and the treatise of Sir Wm. Jones seem to be the only sources of knowledge on this subject.
2 Ray 915-918.

Every Bailment vests a qualified property in the Bailee i.e. a right superior to all others except the owners. This is a material rule and ought to be remembered. Lord Coke made a distinction between Pawnee and Bailee, he said that Pawnee had a special property in the thing pawned, but that a

Bailee has no such special property. How this is not true, for every Bailee has a special property, tho perhaps in some cases the Owner has the strongest interest. That every Bailee has a special property appears not only from authority but principle. For it is well settled that a Coachman carrier has a lien on the property of Bailor till he receives his pay. So we see when the bailment is such that it may be countermanded at pleasure, the Bailee has no property as it relates to Bailor, but he certainly has as to all the rest of the world. Hay says 1 H.B. it is settled that the finder of goods may maintain trover against any person who takes them away, other than the owner, and yet property is special to trover. So there is no consideration for it takes effect. 4 Co 83b 1 Salk 89a. It is a qualified property which the finder has. 1 Bac 240. Jones 112. Str 505. 7 D 899.

From the nature and obligation of bailment it follows that the Bailee must not only keep the goods, but must keep them safely, for the specified terms, and that he is liable for any loss or damage which happens to them during the bailment. Yet he is not liable at all events, for it is general rule that he is not liable for any loss or damage which happens without any fault of his own. To determine whether there is any fault in the Bailee, we must consider first the nature of the bailment 2d. The ordinary of the thing bailed, and 3d. The conduct of the Bailee.

To see to consider the nature of the bailment, because one thing requires greater care than another, and the nature of the bailment may make a difference when the subject is the same. So Grain stores may be left in

Bailment.

the field, but not jewels. So the value and quantity may make a difference. To ascertain the degree of diligence necessary, is more difficult than any thing else in Bailment.

Different degrees of diligence are required in different Bailees, and the ascertaining the diligence required in the several cases will be by rules that I shall lay down, which are founded in the true principles of bailment. 1st The most general rule is that the Bailee is bound to keep, (if delivered to use) to use the goods with a degree of care proportioned to the nature of the bailment, according to all the circumstances of the case. Powell.

In some cases more than ordinary care is required - In some cases the care will be ordinary only, and in others less is sufficient.

In order to understand this rule we must define the different degrees of care and neglect. Ordinary diligence then is that which rational men in general, use in taking care of their own goods or affairs, or in other words tis the care which every man of common prudence uses in the management of his own concerns. Powell 9. 10

The different degrees on each side of this standard are not precisely ascertained. Where it is greater than ordinary care ie. above it, tis called more than ordinary. — When it does not amount to ordinary care ie. below it tis called less than ordinary. Of course much is to be left to the sound judgt and discretion of a jury.

To every degree of ordinary care there is a corresponding degree of fault or neglect. Thus the omission of ordinary care is called ordinary neglect lois culpa - Powell 11. 13. 31.

how the omission of the care which very attentive and diligent men use, is called Slight neglect and the omission of the care which inattentive and thoughtless men take or use, is greater than ordinary neglect and is called gross neglect. Jones 11. 13. 30.

This last degree viz. gross neglect is evidence of fraud in the Bailee, viz. tis a violation of good faith in the Bailee and that amounts to fraud in law. This however is not universally true, for if a Bailee treats his own goods of the same kind, exactly in the same manner, plainly this circumstance rebuts all presumption of fraud. 2 Raym. 915. Jones 30. 64. 5.

Gross negligence is prima facie evidence, or presumption of fraud.

Now to sum are not all the degrees of care and neglect. In order to apply these general observations to particular cases tis necessary to observe the three following rules. 1st When the bailment is for the benefit of the bailor only, nothing more is required of the Bailee than good faith i.e. he is liable for nothing but gross neglect, which amounts to a violation of good faith, as in case of goods kept gratuitously for another. 4 Mod. 91 was holden in this case that he must keep them safely at his peril - but this is not law. Jones 21. 22. 32. 16. 65 51. 55. 64. 161 Pow 247. There is however an exception to this general rule viz. where the Bailee makes himself liable for less than gross neglect by special agreement, for he may become an insurer eg. all casualties, as destruction by lightning &c but where the acceptance is general, and there is no special agreement, there the rule applies. 2 Raym 915. Jones 223

2ndly On the other hand where the Bailee only is benefitted he is liable for slight neglect i.e. he is bound to use more than ordinary care, for the maxim is, he who is benefitted ought to bear the risk – as in case of gratuitous loan. Jones 15. 30. 89. 90.

3dly Where the Bailment is advantageous to both parties, here only ordinary diligence is required i.e. he is liable only for ordinary neglect. E.g. Cloth left with a Tayler to make. – Jones, 01. 115. 14

These three rules apply only to cases of implied contracts i.e. where the liability of Bailee is implied by law, for the parties may make an express contract different. –

Now Bailment in which the obligation of the Bailee is implied by law is called Bailment under general acceptance. But where the obligation is express as written then the acceptance is called special.

Different kinds of Bailment.

According to Common law they are divided into 6 kinds probably taken from the Roman law, and I shall adopt them tho they are not logical, because the books constantly refer to them.

The first species of Bailment is called a "depositum" or deposit. This is a delivery of goods to the Bailee to be kept by him for the use of the Bailor without reward. This is often called naked bailment, and the Bailee is called the depositary, or vulgarly the naked Bailee. Esp. 618. 2d Day 9 12. Bell 72.

The 2nd kind of Bailment is called in Latin "Commodatum". This is a gratuitous loan of goods which are useful to be used by the Bailee, and to be

Specifically restored This is the reverse of the former kind, for this is advantageous to Bailee only — as where one lends his horse without receiving hire. The Bailee in this case is usually called a Borrower, and Bailor Lender. 2 Ray 913. Jones 50. Bac 72. Pow Con 249.

This is sometimes called a loan for use, but there is a difference between this species of Bailment and that — a loan for hire we in law called a mutuum — a mutuum indeed is not strictly a Bailment, because it is a loan in consumption. So the specific thing cannot be restored, but merely an equal quantity of the same kind — Thus if one lends a barrel of flour, to be paid in flour, it is a mutuum it therefore follows that in this case the property vests absolutely in the Bailee and he is liable for any loss which may happen whether there is any negligence or not. Mors of horse is loaned. Dodt & Mut 129. Jones 89. 1 Bac 241.

3d Species of Bailment is called in law Latin Locatio et conductio. This is a delivery of goods to be used by the Bailee for hire, a reward to be paid to the Bailor. This is advantageous to both parties — tho Sir Wm Jones ranks it under the 5th class, as he supposes it for the benefit of the Bailee. This I think is improper says Mr Gould. 2 Ray 913. Bac 72. Jones 50. 119.

4th Kind of Bailment is called vadium in Latin i.e. a pawn and is a delivery of goods as a security of a debt due from Bailor to Bailee, Bailor is called Pawnor and Bailee Pawnee.

This hire is advantageous to both parties. Jones 104. 2 Ray 913.

Bailment.

5th Kind of Bailment is a delivery of goods to be carried, or for some other act to be done about or with them by the Bailee, for a reward to be paid by Bailor. This is the reverse of the third kind. Under this head is ranked the delivery of a cargo — so also delivery of goods to a waggoner, a cloth to a taylor, or materials to mechanic on which some labour is to be performed or bestowed. This Lord says Mr Gould that this kind does not come under the 5th class, as Sir Wm Jones has laid down, for there Bailee pays Bailor, but here the reverse — Common carriers, Brokers, Factors, Agents, Attorneys, &c &c come under this head. 2d Ray. 913. 917.

6th Kind is called mandatum — This is a delivery of goods to another to keep or to do something with, without any reward, only difference between this and 5th kind is that here there is no reward seems in 5th class. The Bailee is commonly the mandatory. Jones 73. 2d Ray. 913.

I will now proceed to treat of the different species of Bailment in the order in which I laid them down.

1st Kind is a deposit, and the Bailment is advantageous to the Bailor only. Accordingly to the general rule then laid down, the Bailee a depositary is bound only for good faith, and is therefore liable for gross neglect only. 2d Ray. 913. 2 Vern 1099. 1 Mar. & B 158. Jones 52. 64. Doct. & Stud. 129.

Gross neglect is prima facie evidence of fraud. 2d Ray 915.

This rule that the depositary is liable only for gross neglect is well settled in the books tho there are some expressions in the books from which we

might infer that he is liable for something less than gross neglect. But the rule is established as I have laid it down. 2 Bos & Pul. 247 - for an exception of this kind.

But the depositary is not in all cases liable for gross neglect; he is not liable at all for neglect as such i.e. neglect in the abstract, if liable at all, it is on the ground of fraud, or violation of good faith. Thus if the depositary treats his own goods of a similar kind in the same manner as he does those bailed to him, he is not liable at all, for if he was, it would be on the supposition that he practised fraud upon himself - which is absurd. 2 Raym. 914. 655. Stra. 1099. 4 Burr. 2300

The foregoing rules apply where the acceptance is general i.e. where the law implies a contract.

Jones says there is another exception to this rule, he says if the bailment takes place by the officiousness of the depositary he ought to be liable for ordinary neglect - for by means of this officiousness, he may have prevented the Bailor from delivering his goods to a more careful man. This distinction is rather too refined says Ch. J. and is not recognized by any authority. Jones 67.

In Southcote's case this rule as to depositary's liability is contradicted i.e. the contrary rule is laid down - but is now settled

that the doctrine in Southcotes case is not law. The decision in that case was correct, and that is all, for there is not a single correct principle laid down in the whole case. 2d Ray. 655. 911 note 718. Bac Ab 72. Sha 1099.

There has been a distinction taken between a special agreement by Depositary to keep safely where there was a valuable consideration, and where there was none, and that in the former case he was bound for gross neglect, and in latter not — but this is not law, for it is now settled that the delivery of goods is a sufficient consideration, but there is an absurdity in this distinction, for from the very nature of this kind of bailment, the depositary is to receive no reward. — 1 Bac 241. Doct & Stu 129. 2 Ray 917. 12 mod 487. 3 Recves Hist 245. 394.

It is also holden in Southcotes case that if goods are put in a locked chest, and the Bailor keeps the key, the depositary is liable only for the chest and not for the goods. But this doctrine is denied by Lord Holt in Coggs and Barnards case, for he says, that the depositary is liable for the goods as well as the chest in such case, for he said he has as much power over the goods as over the chest. Now it seems to me as to this, that neither of these rules thus generally expressed are correct. The true criterion appears to me to be this viz: if the depositary knows the contents of the chest, he ought to be liable for both chest & goods.

where bailor keeps the key, for if he knows the contents what difference does it make who keeps the key, he a Bailee? certainly not. But on the other hand if he does not know the contents of the chest, he ought not to be liable for them but only for the chest itself, because not knowing what goods they contain, he does not know what kind of care and diligence to use in keeping it. Ld Ray. 909. Jones 1. 4

A depositary may by express agreement be subjected to any loss, but it may be remarked that tho there is an express agreement to keep safely, he is not liable at all events, for he is not liable when the loss is occasioned by the act of God as by lightning, tempest &c neither is he liable if it occasioned by acts of open violence, as by robbery — but this will subject for acts of secret violence — as for theft. It follows then that he is not subjected in this case except for some default in him. 4 Co 83. Doct & Stu. 190. Holt 34. 2 Ray. 915. Jones 75.

If a depositary retains goods after a demand of redelivery, or in any way converts them to his own use, he is liable to the Bailor either in an action of Detinue, Trover, or Assumpsit founded on the contract, — Unlawful detainer is a conversion. Cro E. 781. 1 Rol. 728. 1 Com 220.

2 Kind of bailment is called Commodatum. This is a gratuitous loan of goods to be used by the Bailee and be specifically restored.

Bailment. 4.

This species of Bailment is advantageous to the Bailee only, and is the reverse of the former kind – therefore the Bailee in this case is bound to more than ordinary care, and is liable for slight neglect. Thus Suppose A. lends his horse to B. to be used by B, and he is stolen out of B's stable – here Bailee is liable, but it is said if the stable is locked he would not be liable. 2 Ray 916. Bol. N. 72. 1 Bos & P. 250. Jones 91.

And it is a general rule that the borrower is liable for loss, occasioned by theft, unless he proves extraordinary care on his part. Jones 92.

But the Borrower is not liable to loss occasioned by such force as he cannot resist, as by Robbery &c 2 Ray 916.

But he may be liable for loss occasioned by Robbery if he wantonly and rashly exposes himself to be robbed – for this is his own fault.

No authority but Jones 95 – to this point.

Again it is clear that a borrower is not liable for inevitable accidents, as Tempests &c But I suppose he might even in this case if it was occasioned by his own rashness or folly – as if he should borrow a boat, and sail out in a very rough and stormy time, and the boat should be lost.

But it is also clear that he may make himself liable for inevitable accidents, by a previous breach of trust, and this is true of any Bailee. Thus if A should borrow a horse of B, to go to Goshen and should go to

Watertown and the horse should there be killed with lightning &c Bailee or borrower would be liable. Suppose he should die at Watertown with some disease as the colic? This would unquestionably give rise to a question of damages tho he would be liable in a action of trover, for he became liable the moment he set out for that place.

So also if A should borrow a horse for one week and should keep him over that time he would be liable for inevitable accidents. This rule applys to all kinds of bailment. 2d Ray 915 1 Mass Con 249 255 3 Mac 237. 6 Co 9 244. 2d Ray 917.

3 Kind of bailment is a delivery of goods to the Bailee to be used by him for hire and a reward paid by him to Bailor. By this contract the Bailee acquires a qualified property in the thing bailed, and the bailor gains an absolute right to a reward or price to be paid. Jones 119.

It may be remarked that in every kind of bailment the bailee acquires a qualified property in the thing bailed. In this case the bailment being advantageous to both parties, nothing more is required of the Bailee than ordinary care - he therefore is liable only for ordinary neglect.

It is however said by Lord Holt in case of Coggs and Barnard that the Bailee in this case is bound for the utmost diligence &

that of course he is liable for slight neglect — now this is clearly not correct, for if it is there is no difference between the liability of a hirer and borrower — but there certainly is a difference in their liability 2 D Ray 916.

Again as the parties in this case are in equilibrio, the risk ought to be equal on both sides.

This same rule as laid down by Holt is also laid down by Buller and Powel. B.N.P. 72. 1 Bac Cont. 251.

But the dictum of Holt for it (a) nothing more is the foundation of Buller and Bowels rule — and therefore not correct. But Holt & Powel both make a distinction between an hirer and Borrower. 2 Ray 916

Jones has traced the dictum of Holts to Bracton, and from Bracton to a Roman jurist, and he does not consider the Roman law as a support of the dictum of Holts — nay Jones expressly denies this doctrine by Holt. So that it appears to be settled that nothing more is required of a Hirer than ordinary diligence, and that he is liable for ordinary neglect only.

The Hirer must use the thing hired with ordinary care i.e. with such care as prudent men in general use.

Hence a Hirer is generally excused for loses occasioned by —

Robbery - unless he should rashly expose himself.

If the hirer puts a hired horse into a stable which is locked and the horse is stolen he is not liable - but he is liable if the stable is not locked. But in Connect I think says Mr Gould that he would not be liable if the stable was not locked - because men of common prudence do not lock their stables, it would therefore be ordinary care in him if he did not lock the stable. Jones 126.

There has been a question whether a Bailor who lets a chattel for hire to be used by the Bailee is bound to keep it in repair during the bailment. But this was settled that he is not bound, but Bailee must keep it in repair himself. Doug 720. 1 Bac 581. 1 Raund 321.

4th Kind of Bailment is called a Pawn or pledge and is a delivery of goods as a security of debt - one from Bailor to Bailee. This in its general nature is analagous to mortgages, but differs from a mortgage in several particulars. The maxim which applies to mortgages also applys in Pawns viz: once a mortgage always a mortgage - so once a Pawn always a Pawn. This maxim is not correctly expressed, it means that if the conveyance is intended as a security of a debt, by agreement made by the parties that it shall not be redeemable either before or after the day will bind. This is all that is meant by the

maxims — and in that sense it applyes to Pawns.

When one delivered an absolute bill of sale of goods to another, and the Vendee gave a writing in which it appeared that the goods were delivered as a security of debt, and tho the writing stated that if the debt was not paid on such a day the goods might be sold — still this was decided to be a pledge. 1 Hen. 7. B 11.

In case of Pawn the contract is advantageous to both parties, the general rule therefore is that Pawnee is bound only to ordinary care and liable only for ordinary neglect. 2d Ray. 917. Salk 522. 1 Raym 6252 Jones 105.

But in Southcotes case it was holden that Pawnee is bound to keep the pawn only with the same care as he keeps his own goods but this is making Pawnee same as depositary — and is not law. 4 6 83. 6 Litt 39.

1. Pawnee is liable only for ordinary neglect, it follows that he is not liable for loss occasioned by robbery. 2 Ray. 916. Salk 522. Jones 107.

But tis holden in Southcotes case that if the pawn is stolen the Pawnee is not liable. Jones denies this and says he is liable. Now say I tho' I think neither of these opinions are correct — for he may be liable and he may not and this will depend on another enquiry viz. whether he has used or exercised care or not, for tis settled that he is bound to use only ordinary care, and whether he has used it or not is always a question of

fact to be left to the jury, and if ordinary care was not used, he will be liable for the theft, but if he has used ordinary care he will not be liable for theft. 2d Ray. 917. 1 Salk 527.

At this day this is supposed to be what Jones says down in another case, for he says a borrower is liable for theft unless he uses extraordinary care, so that we know which that theft may take place the there is extraordinary care but in this case supposes that it cannot take place if there is ordinary care used — so that he is contradictory. If the rule is different from what I have stated. Jones 72.

A Pawnee acquires a qualified property in the thing pawned, and this property is determined & ended by payment or tender on the day of payment and if this is done it vests revest the pawnors interest.

1 Bac 237. Cro J 244. 3 Keb 72. 4 Co 83.

But payment or tender at the day is necessary, to purpose of revesting the legal title in the Pawnor, and if he does not make payment or tender on that day, his legal title is gone forever.

If Pawnee claims after payment or tender he is liable for any loss or injury which may happen to the property, even tho it by inevitable accident, for he ceases to be bailee. Esp D 625. 1 Bos & P 358. 1 Salk 528. 2d Ray 917 Jones 111. 72.

If the Pawnee refuses to deliver the goods after payment or tender according to the contract the Pawnor may maintain Trover ag. him and not Replevin or detinue, and the rule is the same, if after tender

a payment the Servant of the Pawnee should refuse, if the Servant has authority sufficient to transact this business. Cro J 244. 1 Com 220 Salk 44. 1 Bac 237. he may also maintain action of assumpsit. Bul N.P. 72.

According to the current of authority - a refusal to restore the goods to the Pawnor upon tender is an indictable offence at Common Law, and this is for purpose of preventing any imposition on debtors, who are necessitated to pawn their goods. Salk 522. 379. Carth 277. 2 Mod 210 1 Bac 243. 4 Com 258.

Buller is reported by Sir Wm Jones to have said that on a tender and refusal the thing pawned ceases to be a pawn and becomes a deposit - but Buller says down no such rule, and Jones is expressly denies the rule, and clearly it is not law, for in such case he becomes a wrong doer and not a depositary. Jones. 111.

By a tender of the money the interest in the money becomes the Pawnees so that after a refusal to receive it he has a right to demand it of Pawnor at any time and the Pawnor is then a depositary of the money for Pawnee, and must keep it for him, and therefore is liable for it in case of loss like any other depositary.

In some cases a Pawnee has a right to use the pledge, and in other cases he has no such right, and this right of the Pawnee to use the pledge must exist upon an express consent given by the Pawnor, or on his presumed consent. Whenever there is an express consent

by the Pawnor, there can be no question as to his right to use the pledge.

But there are some rules to be observed to determine whether there is a presumed consent. Jones 11. 111. 12

This presumption of consent exists generally, if at all, or does not exist as the pledge is likely to be made better or worse, or not at all injured or affected by the use.

There are few things which may be said to be made better by using But some examples are, put in the books. As to say of a hunting dog it preserved he is made better by being used, as it prevents him from losing his art & skill - and if this is true says Mr. Jones I should think to use a horse which is pawned would in many cases be useful i.e. it would make him better - for even he might become stiff &c

It also said that where the pledge will not be injured by use, there is an implied consent by Pawnor that Pawnee may use it - As if pledge consist of jewels, rings, trinkets &c he may use them - I think says Mr Jones that these articles may be made worse by using, but it settled that he may use them. But if he does use them, he does it at his peril for if they are lost even by robbery, he will be liable to Pawnor, for it by mere indulgence of Pawnor that he was them and not by any right of Pawnee. 2 Roy. 917. Salk. 522. 7 Mod. 137. 2. Bott. 72.

And it was well settled that if the Pawnee is at any expense in keeping the pledge, he has a right to use it for the purpose of indemnifying

himself. So if horses or oxen are pledged, they may be used. Bl 2 825. 2d Ray 916. Jones 114.

And the rule is laid down by Jones, the 9 find it no where else, that a depositary may use the goods bailed, where he is at any expense in keeping them. No authority for this rule, but I think it a just and reasonable one says Mr Gould. Jones 114.

But if the pledge is made worse by using the Pawnee has no right to use it. But I should suppose says Mr Gould that he ought to have this right even in this case, if he is at any expense in keeping the pledge, for he cannot recover any thing for keeping the pledge. The Examples under this rule are such where there there is no expense in keeping them as wearing apparel. Pawnee must not use them. Bac V 72. 2d Ray 917. 4 Com 258.

I conclude that if the Pawnee in the last case does use the pledge he is liable in the first instance in an action of Trover, for the unlawful user is a conversion, and there is no need of tender or payment in that case to forfeit them. 5 Bac 257. 1 Com 251.

Ld Holt says that the law as to pawns will apply to goods bound, ie. that the law as to the liability of a Pawnee will apply to a finder of goods.

Powel lays down the same rule and says that the finder of goods is bound to use ordinary diligence and care, and is liable only for ordinary neglect.

Bailment

Whitt says Mr. G. that Holt's opinion is correct and that he ought to be bound for ordinary care.

Ld said in Ca & Kg. that a finder is not bound to keep the goods safely, and is not liable for negligent keeping. now if the court meant in this case that trover will not lie ag. the finder of goods for negligent keeping, the principle is correct, for trover will not lie for a mere non feasance - But if the court meant that a finder of goods is not bound to use ordinary care, they were certainly incorrect. - 2 Ld Ray 917. 1 Rol 2 52.

That trover will not lie for non feasance. vide Esp D. 599. 1 Bac 243. Salk 655. 5 Mod 282. Holt 251. 86 146. Esp D. 590. n 70.

In Connect there can arise no doubt on this question, for here by that the finder has a lien upon the goods found, and the true owner is compellable to pay him for his trouble and expense in saving goods - therefore it becomes advantageous to both parties here - and consequently according to the general rule he is liable for ordinary neglect.

A finder of goods has no lien upon them at com law, for his trouble and expense in keeping, and if on demand from true owner he refuses to deliver them up, trover will lie ag. him. 2 Bl. R. 1117. 2 Mod 3 B 251. 1 Mod 65. Esp D 585.

The case of salvage under the maritime law is different, for there the finder has a lien for his trouble and expense. 2 Ld Ray 393. 5 Bac 270.

There remains a question whether the finder of goods can in any way

* In showing the impropriety of the decision in this case Mr Gould states as the ground of his opinion some analagous cases, to which may be cited the case in 2 D.R. 479. When it was said that it was no defence to an action that Pfyl is trader & has committed an act of bankruptcy, of which Deft had notice, no commission having issued nor proceedings had for that purpose; for though voluntary payments under such circumstances would not be protected yet he was induced by coercion of law & not voluntarily. The Assignees if any commission should afterwards be taken out —

recover for his trouble and expense against the owner, if he can. It must be by an action of Indebitatus assumpsit. But says Att. G. I conceive he is without a remedy.

To support this action you must show a special existence and request implied of the party and also an implied consent — but this cannot be done — it is a mere voluntary curtesy for which no action will lie, & tho it may be a moral duty on finder to pay, still this will not raise a legal one. 2 Han. P. 254. 258. 9 Holt. 116. Esp. D. 87. 95

But a refusal by the finder to deliver the goods to the true owner is not a conversion per se, but only prima facie evidence of a conversion, and will be conclusive unless rebutted — the true owner must give satisfactory proof that he is true owner, and the finder ought not to be subjected in an action of trover, unless the owner adduces sufficient proof that he is true owner, and the court and jury are to determine what is sufficient evidence. 2 Bulst. 312. Esp. D. 596

* A singular question has arisen in this State — A. lost goods, B. found them and C. claimed to be the owner, and made a demand for them, and upon a refusal, he brought trover ag. B. and proved by false testimony that he was the true owner, and the court gave judgment in his favour ag. B. afterwards A. the true owner brought an action of trover ag. B. for the same goods, B. plead a former recovery by C. but the court held this plea insufficient, and gave judg.t in favour of A. ag. B. I have never seen a similar case in the books says Att. G. but I am

clearly of opinion that this decision is erroneous and not law, which will appear, if compared with analagous principles. I think the same law will not compel me & B to pay damages twice for one cause of action, if so B, may be sued by the whole of Alphabet. —

Again it is settled that if A pays a will for a dead person, and under this will proceeds to settle the estate, and collect debts &c and afterwards a true will is found, the rightful Ex[r] can not compel the debtors who have paid, to pay their debts over again, but he must resort to the false Ex[r] to whom the debt were paid. And the rule is the same if one takes out letters of administration and afterwards a will appears — These are analagous cases. 3 Ld R. 125. 1 Ha. & B. 669 Doug 161. Cook Bank[t] 370. 2 Ha. & B 408. Root 545

* Qu. Executor — Assignee —

If perishable goods are pledged, and are destroyed by their own natural decay, the money may be recovered by Pawnee, for the debt or duty with costs & damages. Salk 522. 4 Com Dig 258. 9.

And rule is the same under the maritime law in case of a Ransom bill — So if the hostage should die or be retaken by his own State, still the ransom bill is binding and can be recovered. The Hostage is a pledge for the security of what is stipulated in the Ransom bill. 3 Burr 1784. 1 Bl R 563. Doug 619.

If the money due by Pawnor to Pawnee is not paid at the day of payment, the property of the pledge becomes absolute in the Pawnee but law. But the Pawnor has an equity of redemption same as in

mortgagor, and may redeem after bas day by paying principal interest and costs. 3 Atk 395. 1 Bac 238. 2 Ves 691. 98.

And the rule is the same, even tho there was an agreement, that there should be no redemption. The maxim once a mortgage always a mortgage applies here. 2 Ves 693. 1 Bac 288.

A factor tho he has a right to sell and buy goods for his principal has no right to pawn them. So that if he does pawn them, the Pawnee has no lien as against the principal.

A lien on personal property is a personal right and cannot be transferred.

Suppose then that B, the factor of A. pawns A's goods to C, now if A tenders the amount of the lien which B had on the goods, he may then bring an action of trover ag. C. Str 1178. 5 Mod 640. 1 Hen. Bl 362.

But after the day of payment has elapsed, the Pawnee gains an absolute right to the pawn and may sell it, and Pawnor cannot redeem, tho under - stands in mortgages. 1 Rol 205.

A question has been raised whether a pawnee can be compelled to restore to Pawnor the surplus of the pledge after it has been sold. No authority to this point but I think no claim of this kind could be supported says Mr. Gould ie. that Pawnee is not obliged to restore the surplus.

There is another question. viz whether a Pawnee may before

the day of payment assign the pledge with the lien. ie the assignee hold same as pawnee having the lien. Comyns says he may and cites Bro. Abr. 4 Com 258. Dean 124

But there are authorities which say he cannot, and which I think to be the correct doctrine. Leo. J. 244. Yelv. 178. 5 T.R. 666. Again this lien is a personal right and cannot be transferred, and tis a rule that a pawn. cant be forfeited by the offence of pawnee ie. his interest in the lien cannot be forfeited and the reason is he cannot transfer it, for tis a principle that he may forfeit what he can convey by contract. Co. Litt. 8. 2 Ld. R. Leo. 6. 556. 2 Bac 376. Brook says Pawnee cannot obtain. 1 Bac 238. Again, the interest of the Pawnee in the pledge cannot be taken in Execution for his debt, it would seem therefore that he could not pledge it to secure his debt. 1 Bac 238.

On the other hand the Pawnee cannot forfeit the pledge by an offence yet the Pawnor may forfeit it, and may also assign his right of redemption. 1 Salk 29. 4 Com 259. Yelv. 179.

I think then says M.G. that these examples settle the point that a Pawnee cannot assign the pledge before the day of payment and there is also another reason why he should not viz the bailment is a fiduciary contract, and he may assign to a person whom pawnor would not have trusted.

There is a case in Brown which would seem to oppose this doctrine, but which in fact does not. In that case Pawnee assigned before

day of payment. Pawnor brought a bill in equity to redeem ag. pawnee & Court said he should not unless he would pay the original sum which he borrowed and also what the pawnee had paid. The court in this case went upon the ground that as Pawnor did not bring his bill till after day of payment had expired, it was same as if Pawnee had espigned after the day had expired. 2 Ban. 691. Pr. Cha. 420.

It was formerly deemed essential that the pawn should be delivered at the time the money was lent and that if it was not, the pawn was only a license to hold the goods. But tis now settled that tis not necessary that pawn be delivered at that time — any time afterwards is good. 1 Bac 238 2 Leon. 4 Yelv. 164. 1 Ves. 350. 357

If A. delivers goods to B as a security of a debt due from A to B — B becomes Pawnee and A has no right to countermand the delivery, but it would seem to me that B cannot be considered a Pawnee unless there was some agreement made between B & A. 2 Leon. 30. Yelv 164. 3 Lev. 49. = contra. B.N.P. 95.

If A. delivers goods to B. for naked donation to B, he may countermand the delivery at any time for there is no consideration. A parol gift without delivery hands has no right to donee. 2 Roa. 955. Esp. D. 577 2 Leon. 30.

It was formerly supposed that if there was no day of payment fixed the Pawnors right to redeem continued only during the joint lives of the parties. But tis now settled that the Pawnor has a right to redeem

at any time during his own life, and that on his death the right of redemption ceases. 4 Com 258. Cro J. 244. Yelv. 176. 1 Bulst. 29

And if in this case the Pawnee delivered the pledge before his death to J. S. a stranger, without consideration the Pawnor must make payment or tender to Pawnee's Exr: and if then J. S. refuses to deliver the goods to Pawnor he is liable in trover. Cro J. 244. Yelv. 178.

But suppose the Pawnee in the last case delivered the goods to J. S. for a reasonable consideration - now whether the Pawnor must make a tender to the Exec: or to J. S. depends upon the question whether a Pawnee has a right to assign before day of payment; which question we have considered Yelv. 178. 1 Bulst. 29. contra

When there is no day of payment fixed if the Pawnor doesnot redeem during his life time his Exr: cannot redeem after his death. 1 Bulst. 29 Cro J. 244. 1 Bac 239 Yelv 178. 3 Bac 239.

If a day of payment is fixed, the death of Pawnor does not affect the right of redemption and his Exr: may redeem. Bulst. 29. 1 Bac 239

5 Kind of Bailment is a delivery of goods to be carried or some other act to be done about them by the Bailee for a reward to be paid by the Bailor. This kind of bailment includes a delivery to a private character, and also a delivery to one who exercises a public character or employment.

Kind 1st of a delivery to a Private person. A Bailment of this kind is one made to a private person, or to any one not exercising a public

employment. E.g. delivery of cloth to a Tayler to make into a garment, delivery of cattle to an agisting farmer &c. This species of bailment being advantageous to both parties, the bailee is bound only for ordinary care, and liable for no less than ordinary neglect. D. Rayd. 918. 12 mod 481. 1 Vent 121. 1 Bro. Cont. 254. Jones 128. 133. 138.

A private Bailee is then regularly excused for robbery. And in case of loss by theft, if the property was kept with reasonable ie. with ordinary care, the private Bailee is excused. 1 Roll 4. Jones 128.

Jones says if the thing bailed is distrained by Bailees Landlord, and sold, the Bailee is liable, for tis ordinary neglect — and you will remember that by Engl. law, the Landlord has a right to distrain any goods found on the demised premises. Jones 141. 3 B.C. 8.

This rule is common to every Bailee who receives compensation ie. where both parties are benefitted by the bailment. But if silver is delivered to a silver-smith to be wrought into any implement, he is said not to be a bailee — but tis a mistenance, and the property vests absolutely in the Smith and if tis lost he is liable at all events. This rule I find laid down by no writer except Jones — tho there are some analogous cases to be found in the books. Jones 89. 143. 2 B.C. 404.

Under this species of bailment to a private person, when goods are delivered to a person to do some act of skill with them, in his professional character for hire, the law implies a two fold contract — 1st That he shall use

Parliament

the property after his labours has been bestowed upon it and 2dly that the labour so bestowed shall be skilfully done — so a Taylor engages not only to restore a garment after he has made it, but also that it shall be skilfully made, and if he fails in either he is liable.

But if the act to be done is not in his professional business, the law implies no contract that it shall be skilfully — but it does that it shall use ordinary care. So if a horse is delivered to a Taylor to be shod. But there may be an express contract to do it with skill, and then he will be bound. 1 Co. 601 Jones 128. 13 J.

Jones lays down another rule viz that ordinary care does not require that a private Bailee should insure the goods bailed against fire, and that if property is lost by fire he is not liable — Now I should suppose says Mr G. that this would depend upon usage, and that he would be bound to insure in those places where it is usually done, and charge the premium to his principal — but that he is not bound to insure in those places where it is not customary to insure property of such description as he may have bailed to him. Jones 142.

But if he suppose the goods lost or destroyed, after the work is begun, and before it finished, through want of that care which the law requires, can the Bailee recover for his labour? Mr G. thinks he cannot recover, for his labour is of no benefit to the bailor, and his not being benefitted is occasioned by the fault of the Bailee. —

In this case the goods are lost by his ordinary neglect, and he is of course liable to the Bailor for the value of the goods. 3 Burr. 1592. 1792.

2nd Of Goods bailed to a public character, or to a person exercising a public employment. E.g. Baitment to an Innkeeper and Com. Carrier.

The liability of Com carriers requires a distinct consideration. A common carrier is any person who makes it his business to carry the goods of another for hire but merely going a journey for a merchant ten or twelve times a year will not make a person a common carrier.

A common Waggoner, a Boler, a Com Hogman, a Com Lighterman if he receives hire for the goods which he carries are com carriers. So a Stage driver may be a common carrier if he carries goods for another for a reward. 2 Raym 913. 1 Ld Ray 271. 1 Mod 85. 4 Mod 84. Jones 150. Ray. 220.

It was formerly supposed that only land carriers could be com. carriers, but it was in the 25th year of the 2nd extended to masters of vessels. 1 Bent 190. 238. 2 Holt 17. Raym 936. Jones 149. 152.

And now ship owners are deemed to be common carriers, if their ship is generally used for carrying goods, and Bailor may at his election sue either the master or the owners. Bul N 69. Salk 440. 1 Ld R. 78. Burk 62. 3 Lev. 258.

But by Stat of 7 Geo. 2d the owners are liable only to the amount of the value of the ship and freight, if the loss was occasioned by the mis conduct of the master and mariners.—

& they are not of course liable for value of goods lost, for they may recover the value of ship and freight. 13 A. 78.

A common carrier makes an implied contract with the public, that he will carry the goods of any person who may offer, provided he has conveniences for that purpose, and is tendered his hire. And if he refuses in such case the person refused may have an action on the case against him for damages.

And the rule is the same as to an innkeeper. If he has convenience & refuses to entertain a traveller, that an innkeeper is not obliged to entertain his neighbors. Bull NP. 3 Bac Abr. 336 (6). Hard 163.

But a common carrier has a right at any time to make a conditional acceptance. He may refuse to take goods unless the owner will give him notice what are the contents of a box &c or that money is contained among the goods and if money, jewels, or other valuable article is offered, he may demand a price proportioned to the value. i.e. have so much per cent, instead of carrying by the weight of the article. 4 Burr 2298. Esp D 622.

In case of common carriers the bailment is advantageous to both parties but there was nothing to supersede the general principle, the Bailee i.e. the common carrier was to be bound for ordinary care & diligent only and liable for ordinary neglect, and so the law is laid down in Story,

and he was excused for robbery. Jones 141.

But as the habits of the Engh became more commercial, the laws became more rigid, and it was determined in time of Eliz. that he is liable for robbery. 12 Rich. 39. vison 462. 1 Roll. R. 1 Bac 345.

And it is now settled that a common carrier is liable for the loss of goods in any way, except it occasioned by the act of God, by public enemies, & by the act of the Bailor himself, and these are the only grounds which will excuse him. 2 Ray. 918. 1 Ld Raym. 264. Salk 18. Holt 151. 1 Wils 281. 3 Burr 1593. 3 Ch R 70.

Coke says the reason of this rule is because he receive a reward for his service, but this is not the true reason. The true foundation of this rule is Public Policy, which has wrought an exception to the general rule. Jones 145. 2 Ray. 918. Salk 143. 1 Ld R 34.

Where he receives no reward he is not liable as Com Carrier, tho he may bear some other kind of bailee. 2 Salk 485. 1 Burr 604. Esp D. 621.

Now a common carrier is in the nature of an Insurer against all events except those mentioned, and so is every bailee an insurer against the risks for which they are liable.

By the act of God is meant inevitable accident, or as Lord Chancellor defines it — "is such an act as could not happen by the intervention of man. 1 Ld R. 33. Show 128.

But fire occasioned in any other way than by lightning is not deemed to be the act of God. 1 Ld. Raym. 734. 2 Show. 4. 3 Mod. 113. Cyc. 628.

Held where goods were lost in a ship by means of a rat's gnawing a hole through the side, the carrier was held liable. Bac. Abr. Vol. 1. 281. Jones 147.

A common carrier is not excused by a loss occasioned by a mob, or by rebels for they are not deemed public enemies within the rule. Pirates whom the high seas are public enemies. But fresh water pirates i.e. such as infest sea ports and harbours are not public enemies but robbers merely. 1 Vent 237. 3 Keb. 18. 1 Mod 85. 1 Vent 190.

If a tempest should make it necessary to throw goods overboard, carrier is excused — one case where box of jewels were thrown overboard, and master was liable — this must proceed on the ground, that it was not necessary for the safety of ship, they being of no weight of consequence. 1 Roll R. 79. 2 Roberts 567. 12 Co. 63. 2 Bulst 280. Cyc. 628. Jones 151. Allyn 93.

But as to common carriers by water there is a rule introduced by the maritime law different from common law rule — for it's a rule of mercantile law that if goods are thrown overboard for the purpose of saving the lives of those on board, the master, owners, freighters and lighterage must average the loss. Beaus Lex. Mer. 148. 3 Bac. Abr. 794. 2 Ld. Raym. 1467. 1 East 220. 1 Root 60. Hut. Court. 291

If a common carrier voluntarily exposes himself to danger, by an act of God, he is not excused E.g. Hoyman put to sea in a storm. Sha 128.

So also he is excused by the act or default of Bailor himself E.g. Bailor put a piece of wine into waggon, in a fermenting state and it burst - Bailor was excused. B.N.P. 69.

Et vice versâ if the carrier waggon is safe and the Bailor places the goods upon him - Carrier is not liable. 2 Show 127. 2. 1 Bac 344.

But in order to charge a common carrier as such it is necessary that the goods should be lost or injured while in his possession & under his immediate and sole care - So if Bailor should send his servant to take care of goods put on board a Hoyman and they should be lost, carrier would not be liable, but if the goods should be delivered to a carrier and he should ask a passenger to keep an eye upon them, this would not excuse the carrier in case of a loss - So that the rule seems to be this viz. If the common carrier does not have control over the goods, he is not liable as a common carrier. So if a passenger carries baggage in a stage, as he has the control over it I think carrier would not be liable in case of a loss, for he had no control over it. B.N.P. 70. Sha 690. 1 Bac 344. Esq 330.

Et common carrier tho ignorant of the contents of the box &c

is liable for loss unless he discharges himself by special accept-ance. B.N.P. 70. Str. 695. Carth. 485. 2 East 128. Jones 148.

And by two decisions, the carrier is liable for loss, tho' misin-formed by the owner of the contents, unless he makes a special ac-ceptance. 1 Vent. 238. Ally. 33. 3 Keble 135. Doct. & Stu. 190.

But this is clearly not law, and these decisions have since been overruled. 4 Burr. 2300. Str. 1145. 1 East 610. Jones 148.

A special acceptance is any express contract made between Bailor and Bailee how far the Bailee shall be liable. And to make this special acceptance it is not necessary that there should be a personal communication between bailor and bailee - for if a common carrier publishes in the newspaper his terms & one employs him, the jury will suppose he does it on those terms ex-pressed in the advertisement. This however is not always so, for it may be proved that Bailor never saw the advertisement, nor knew its contents - then he could not assent to its conditions. B.N.P. 71. 4 Burr. 2298. Carth. 485. 1 Hen. B. 298. 8 Mod. 358.

A common carrier is liable for only so much property as his vessel extends to, because as to any thing else, he does not act as com. carrier - as where A. gave a bag containing £200. and

told the carrier that it contained but £100 – and paid commission for only 100 – the bag was stolen, and the carrier was liable for £100 only. Barth 485. B.N.P. 70. 1. 1 Ld Ray. 298.

The master of a stage coach when receiving reward only for passengers, and not for baggage, is not liable for the baggage as a common carrier, tho he may be for neglect in another character.

And even when he does receive hire for the surplus baggage and the owner rides too, then the coachman or master is not liable for the baggage as a common carrier, because the care of the baggage has the controul over it, tho he may be liable for neglect in another character. Com R. 25. 1 Salk 282. Bull N.P. 70. 1 Bac. 349.

It is not necessary in order to subject the bailee that he should have received his hire before he carried the goods, nor is it necessary that there should have been an express contract to pay the hire, because the law implies a contract, and Bailor would be liable to him on a quantum meruit. 1 Bac 39. 1 Bur 943.

Neither is it necessary that the goods be lost in transitu, in order to subject the carrier, for if he leaves them at an Inn, when the wage is to deliver them to the consignee he is liable if they are lost before

the consignee obtains them, prima facie, but if the custom was to leave the goods at the inn, and they should be lost, the Carrier would not be liable. 3 Wils 439. 2 Bl Rep. 916. Comm. Dig. Exp D 628. 4 Bac 581. Exp D 683.

If the consignee directs by whom the goods shall be sent to him he and not the consignor must bring the action against the Bailee. If Consignor selects the carrier he must bring the action, but if the consignee makes himself liable for the risk when the consignor selects – either may bring the action & vice versa. 1 Show Com. 341. 359. 3 Ld Raym. 85. 3 Salk. 2680. 12 Mod 85 q. 6 do 330.

All the owners of the ship must be joined as Defts when they are sued because they are liable quasi contractu – as to torts, then all or any of the wrong doers may be sued – The Captain may be guilty of a tort, but the owners being absent are not, but when some of the owners are not joined, it must be taken advantage of by plea in abatement. the reason formerly. 1 Salk 440. 5 Bac Abr 264. 5 Bac 651

As to a Post masters not being liable see title master and Servant.

At common law a Post master was a common carrier, but when by Stat 12 Car 2d. Post masters were made officers of government, they ceased to be liable as com. carriers. Jones 153. 2 Ld Raym 646. 1 Salk 17.

Common carriers are to be liable on the custom of the realm, and this was to be counted upon - years now, for the custom of the realm is nothing but the common law of the realm. 1 Bac 348. Holt 18. mod 227. 1 Vent 33

1st action brought is on the case. Trover will not lie because that supposes a tort. This special action on the case, may sound in delicto or ex contractu whether he was guilty of a misfeasance or not - But trover will not lie for a nonfeasance - yet it will lie for a misfeasance - as destroying the goods, breaking open trunks &c converting goods to his own use. Salk 655. Holt 451. 5 Burr 2827.

4th Innkeeper seems to be a bailee of the second class under the 5th kind of bailment - Espinasse class Innkeepers under the 2d general kind of bailment viz Commodatum - but says ch. J. this is clearly incorrect, as will be seen by recurring to the definition of the two kinds, and the character of the Innkeeper, who is public bailee, who keeps the goods not to use but for his guest. Bailee puts the innkeeper under the 6th class, but this too is incorrect, for tho the Innkeeper has no particular price for the goods, yet he is supposed to charge the guest for the inanimate goods in the rest of his bill. Esp 625. Jones 193.

6th Kind is a mandatum and is a delivery of goods to the Bailee

to be carried, or for some other act to be done about them by the Bailee, without any reward from bailor.

A depositary keeps the goods without a reward, and his duty lies in custody, but a mandatory's duty lies in forbearance i.e. in doing

Jones 73. This kind of bailment is advantageous to the bailor only & the Bailee is liable only for grosp neglect. This was the kind of bailment in the case of Coggs and Barnard, tho in that case there was an express engagement to keep or carry safely. 1 Bro. C. 255. 1 Ken. B. 158. Ld Ray. A mandatory may expressly engage to be liable for any event, but he is impliedly liable only for grosp neglect.

A Quere has arisen whether an express promise by a mandatory is binding upon him as a contract or for neglect. Grosp neglect in one bailment is the same as in another and Ld Loughborough is incorrect in Hen. & B. where he lays down a dictum that a violation of the stipulations is grosp neglect, for grosp neglect is eternally the same viz. the omission of what mankind in general use in relation to their affairs. The mandatory is therefore liable on his contract says M. G. when he makes an express one and not liable on grounds of grosp neglect.

The difficulty here has been that there was no consideration, but Ld Holt says the delivery of the goods is consideration enough at common law.

For the delivery to the mandatory is an act that will be disadvantageous to the Bailor if in the event the mandatory dont carry them, as accepted - that is abundant consideration not only in this but in other bailments. 2 Kay 909. 9 Geo. 128 contra Bro 7667.

Jones makes a distinction viz. that the duty of a Bailee is greater, in the case of pasanee than in the case of custody, because the nature of the thing implies it, and he cannot more care is necessary to carry from one place to another than simply to keep. He says that the liability is greater in the mandatory than in the depositary, but this is incorrect. - Jones 73. 4. There is no judicial decision on this, for it is decided that where there is no express engagement the mandatory never is liable beyond gross neglect, tho Jones says he is liable for a want of all necessary care to accomplish the business to be done. Hut. 81. 158.

Another too refined idea in Jones is, that a bailment to carry to one place without hire, is different from a command to labour without reward. Jones 87.

Where the act to be done is in the line of the Bailees business he is liable for a want of all necessary care, but this means all necessary care in the pasanee of the thing, and not in relation to external things, in guarding against the wrong acts of others, as a

Bailment.

Bailee engages to use all necessary care in making up cloth, but this does not extend to the acts of a ruffian who burns the cloth, or steals it, unless this is owing to his neglect. Coggs 910. Bac Ab. 73. Jones 75. 1 Bouv 6 258.

Some general rules as to Bailment generally.

1st As to Bailees lien upon the goods bailed. A lien properly so called exists only in favour of the 4th & 5th classes of bailees, for a lien is a direct claim to, or incumbrance upon some specific property by way of security for some debt or duty. This dont exist on all of the 5th kind, but does on all of the 4th kind, because the object of delivering bailees is to give a lien on them as security for the money due. Cro. J. 244. Yelv. 178. 2 Atk 522. 1 Ves Ch. 419. Esh. D. 583.

The 5th have a lien because they are to restore some specific property in most cases and this lien as to 5th kind is created & exists by virtue of a condition implied by law. In the 4th the lien is express by the contract, not by the condition. 6 Holt 42. 3 Bac 165.

2nd Wherever a lien exists in favour of the Bailee, a third person who obtains possession of the goods wrongfully cannot avail himself of that lien, and upon refusal to deliver them up to Bailor he may maintain trover for them. And Bailor need not tender the money due to Bailee. E.G. A pledges goods to B for a debt to be paid in 6 months, C obtains goods wrongfully in 3 months - A may then maintain action against C even without tendering the money to rightful Bailee. 3 East 55. 2 D.R. 485.

A common carrier has a lien on the goods which he carries, and if the goods of A, are wrongfully taken by B, and given to a common carrier for the purpose of transportation, and he does transport them, the common carrier may retain the goods both ag the Bailee and the owner of. And rule is the same if goods are stolen and delivered to Com. carrier — he may retain 'till he is paid. Reason given for this rule is, that he is obliged to carry the goods by law — but this would seem not not to be the true reason, for he may insist upon his pay before he transports the goods, but its not customary to receive the pay till afterwards. 2d Ray 867. 752. 5 Com 2826.

An innkeeper has a right to retain the horse of his guest, for the horse's bills, but not for his guest's keeping. But he may retain the person of his guest, 'till he has paid all his bills. B.C.P. 345. 2d Ray 868. 8 Co 147. Salk 388.

And the rule laid down last as to common carriers is true as to an Innkeeper. So if my horse is wrongfully taken and put in an Innkeeper's stable — he may retain him not only against the person who put him there, but also against me the true owner. Esp D. 584. Yelverton 149. 179. 3 Bac 183.

But if the innkeeper lets him go even for a moment; he loses his lien, for an abandonment to opposite party is ipso facto an extinguishment of the lien. And the same is true if he lets the person of his guest go — and if he does he cannot retake him again himself — and this rule is common to all persons who have a lien on goods as Factors &c. Str. 557. Esp D. 584.

Bailment.

So also a Taylor or other mechanic has a lien on the goods bailed, till he has received his reward or wages - and the principle reason assigned why common carrier may retain, does not apply here, for a tailor is not bound to make a garment - he may refuse if he pleases - but the true reason here is that commerce and trade require that he should have a lien. 8 Co 147. 2 Holt 42 Yelv. 67. 1 Bac 240.

I should doubt says Ch.J. whether a taylor who has been in the habit of giving credit could hold this lien unless he gives notice that he shall depart from his customary way.

But an agisting farmer has no lien for his compensation on the cattle bailed, for he is not bound to receive them - but the true reason is commerce and trade does not require it. B.N.P. 45. Lev 6197. Esp D 585

The Captain of a ship has no lien upon the ship itself for his services, or for repairs - his contract is with the owners and he depends upon their personal responsibility for his pay. - Doug 97

I have thus far been speaking of cases where the law gives a lien, but in any case a man may give a lien i.e. one may be created by express stipulation where the law gives none and on the other hand a lien may be waived by express contract in those cases where the law implies or gives one, for the law will not imply a contract where the parties make one - so where a Farrier took a horse to cure of some disease, and the price was agreed upon, it was holden that he had no lien upon him, for there was an express agreement that he should have no more. Esp D 585. 2 Ald 92. Yelv 66. 5 Bac 291.

A factor also has a lien implied by law on the goods of his principal not only for a special, but also for a general balance. 2 Bl. R. 1154. 1 Burr. 489 Comyns 254. 3 D. 119.

But he cannot transfer his lien to another, nor can he create a new lien in favour of another on the goods - his right is fiduciary, and this is true of all other Bailees. 2/5 D. 604. Stra 1178. 1 Hen. B. 362.

A bailee of the 1st kind has no lien, for he has no compensation, and a bailor is generally bound to deliver up the article on demand, but if an article is lent for a limited time, he may retain it, till the time expires, but this is not a lien.

A bailee of the 2d kind may detain the property during the time for which it was hired - but this is no lien. So a mandatory has no lien, he is a mere volunteer. Yelv 172. 1 Bac 240.

How far the rights of third persons are affected by a contract of Bailment. It is said in Rolle that if one person hires the property of another, the Bailee must deliver the property according to the terms of the contract to the person who delivered to him. Now I think that the bailee may deliver it either to the true owner or to Bailor says Ch. J., and that nothing more is meant by the rule. 1 Roll 607. 1 Bac 242. 2 D. Day 367. Ey. 599.

If however the Bailee in this case dies, and his Ex.r gets possession of the property, he must deliver it to the true owner, and not to Bailor, and the reason is, that Ex.r is not privy to the personal trust of his testator. -

Bailment.

1 Rule 609. 1 Rac 237.

Rights of a Bailee creditors and the rights of those who purchase the property of Bailee supposing it to be his.

To determine questions under this head we must revert to the Stat. respecting fraudulent conveyances. The Stat 13 Eliz relates to creditors and is a general rule that if a purchaser leave goods in the vendors possession under a bill of sale or absolute contract, a creditors of vendors may lawfully levy an Execution on them as being the vendors, and the purchaser cannot hold them — and reason is such sale by leaving them in vendors possession, hold out false credit, and is ground for practising fraud on other persons. 3 Co 81. 2 Rac 60. Cowp 432. 1 Atk 180. 2 Ves 587. 7 do 71.

But this rule is confined to an absolute sale, for if the want of immediate possession by the vendee is inconsistent with the deed of sale, tis not of course fraudulent if suffered to remain in vendors possession.

So if there is a condition to be complyed with — vendee has no right of possession till tis performed, and says Ld. C. I suppose rule is same even tho condition is subsequent. 2 Ves 575. 7. Cowp 432. 7. 2 Ves 462. 1 Atk 167 Nor is a sale of goods within the rule, where from the nature of the case immediate actual possession cannot be given — So of Ships is sold while at Sea. 2 Ves 462. Esp D 542.

In this case I suppose a delivery of bill of sale would be a delivery of Ship.

The Stat. 13. Eliz. relates to creditors and is in affirmance of the common law,

* The case adverted to by Mr Gould may be found in 5 Esp. Rep. 22 Dodson where an opinion is given by L. Ellenborough contrary to Edwards v Harben. This doctrine is largely treated of by Powell in his treatise concerning Mortgages - pages - 29. 30 & 50 - The Statutes of Eliz. extend not only to absolute but conditional conveyances - do -

2d Coke says this is affirmance only as to prior creditors, but Lord Mansfield says this both as to prior and subsequent ones. Cro. 484. 3 Co 83.

Want of immediate possession by vendee when there is an absolute sale, is by some authorities considered per se fraudulent. 2 Bl R. 596. 7 D 71. This rule is however very questionable. I find but one case where it was so holden viz. Edwards vs Harben in T.R. It is I think only a badge of fraud, and so it was deemed in Twines case - and I have seen an opinion of Lord Ellenborough and Ld Eldon, in a late volume of East's Rep^ts wherein he questions the authority of Edwards and Harbin. *

Our Sup^r Court have always decided that it was only a badge of fraud, till a late case in which three of the Judges determined that it was per se fraud. This case is now before Court of Errors.

Another Eng^h Stat 21 James 1. provides that if a bankrupt has the goods of another in his possession, order, or disposition with the consent of the owner, they shall be considered a belonging to the bankrupt, and shall be taken for his debts. 1 Atk 166. 1 Ves. 348. Doug 308. 7 D R 228. 8 D 82. 1 Bos & Puller 82.

This Act extends to all cases where Bankrupt has possession with owners consent. It is immaterial how he became possessed if there was consent of owners. Cro 232. 1 Bos & P. 82. Esp D. 569.

The creditor of a bankrupt trader has a right to take the goods, on the ground of false credit which is holden out by him, and not on ground of fraud. Hussey 364. 1 Atk 181. Esp D 566.

It is not however deemed to extend to goods possessed by a bankrupt in right of another - so if he is in possession as Ex^r of a testator's goods

of the principal are not liable for debts of the Factor, nor the Factor separate property for her Bankrupt Husbands debts 1 Atk 159. 3 P. Wms 187. 3 Bac 618.

This Stat extends to mortgages as well as to an absolute sale of goods, if the vendor remains in possession, and becomes a bankrupt - for here is a false credit holden out. 1 Atk 165. 1 Ves 348. 260. 8 Ves 566. 16 Ves 356.

This Stat however does not extend to a ship sold at sea. But it has been holden that it is incumbent on the purchaser to take possession immediately on her return, and that if he does not, and vendor becomes a Bankrupt he will be liable. 1 Atk 160. 1 Ves 361. 2 Bac 462. 483. 491.

And in many cases it is not necessary that there should be an actual manual delivery of the goods to take a case out of the Stat, for under certain circumstances a Symbolical delivery is sufficient - so if a cargo or a store of goods are sold, a delivery of the key of the store or ship is sufficient - this is deemed a delivery of goods. 2 Bac 71.

The bankrupt at the time of becoming such must be in possession, order, or disposition of the goods, he must have such possession as will make him appear to be the real owner of the goods, and he must also have the consent of the owner. So that a temporary possession for a particular purpose will not bring a case within the Statute.

So lending a horse to a Bankrupt to go to mill is not within Stat. So if a man should lend his horse on a journey and should leave him at an Inn and Innkeeper should become a bankrupt - the horse could not be taken - for this is not sufficient evidence of ownership - no, not even if Innkeeper should owe him for the owner

did not give his consent, that he might. 1 Bos & Pul. 82. 1 P Wms 318. 3 Bro 185. 1 Atk 185.
It follows then that if from the nature of the business in which the possessor of the goods is engaged, all presumption of ownership is excluded, the true owner will hold them.

If a Factor becomes a bankrupt the goods of his principal cannot be taken. Neither can silver and gold in hands of Goldsmith if it belongs to other persons. 1 Bos & Pul. 82. 1 P Wms 380.
Thus far as to the creditors of Bailees.

And by Stat 27 Eliz. same provision is made as to Purchasers, and the same rules laid down as to Creditors will apply as to Purchasers, so that if a creditor can hold, a purchaser can. Cowp. 434.
But it is necessary to take notice of some cases which do not come within either of these Statutes.

Suppose Bailee is not a banker of goods and does not become a bankrupt then the rule is that the true owner i.e. the Bailor is entitled to the goods against any creditor or purchaser, even an Execut. Creditor — unless they were sold in Market overt. E.g. if I let my house to B. & sells him, even at any time take him from purchaser and if he refuses to deliver him up, Trover will lie against him, and this is law in Connecticut.
And the rule is the same if the house is taken by virtue of an execution, and sold at the post, still I may take him. 1 Wils 5. 2 Stra 1187. 3 Atk 44. Salk 285. 2 T. R. 276. 4 T. R. 618.

There is an exception to this general rule viz. where the property bailed

is money, bank bills, & any thing which passes as money. This is founded on principles of policy. 3 Burr 1516. 1 Bl R 485. 1 Burr 452. Salk 126.

Our Stat in Connect as to fraudulent conveyances is same as Engl. We have no Stat like 27 Eliz 1st but the principles adopted here in relation to Bailments to insolvent persons is similar to those adopted in the construction of that Stat in Engd.

It seems to be agreed in Connect. that where there is no actual fraud, a creditor of the Bailee shall not hold the property against the Bailor, unless the Bailee is insolvent. But if Bailee is not insolvent he cannot hold ag. Bailor, and the rule is the same as to Execution creditor. -

And where he is insolvent, a Purchaser or creditor cannot hold unless there is a clear evidence of ownership, and unless there was consent of possession given by Bailor E.G. Suppose a man should hire his horse to an insolvent person to go a journey - creditor cannot take him - Suppose this person should sell him - purchaser could not hold him.

If A employs B to drive cattle to New York and B should sell them, purchaser cannot hold.

In letting a cow for use, for one or two years - now lessee cannot sell this cow i.e. purchaser cant hold her, and his creditors cannot take her.

But on the other hand, if A should send B, to purchase goods, & B should purchase them and sell them out, here B's creditors may take them as the A, is actual owner.

Bailment.

What actions Bailor and Bailee may have against each other and against strangers.

It is a general rule that Bailor may maintain an action against any stranger, who takes away or injures the thing bailed while in possession of the Bailee. Bailor has general property in himself. Latch 214. 2 Bulst 268. Holt ch. 4. 5 Bac 164. 260.

Bailor if he has title to the goods may maintain an action against a wrong-doer, tho he never had actual possession of them — so if goods of A are deposited with B, and A makes a bill of sale of them to C. now if J. Stiles should injure them before C. should get possession — C may have an action against him. Latch 214.

For the purpose of maintaining an action of the kind, the Plff must have either an actual or a constructive possession of the goods at the time the injury was done.

A constructive possession is a right of present possession.

So if goods are bailed for a limited time, the Bailor cannot maintain replevin or trover against a stranger for taking them away or injuring them during that time — because during that time he has no right of property. 4 Bl 489. 7 Co. 12. 486.

If the goods of one man while they are in possession of another, are given to a 3d person by deed without delivery, and a stranger afterwards takes them away or injures them before the Donee gets possession, he cannot

maintain any action against this stranger, for he has no actual or constructive possession — for a parol gift without delivery dont vest the title. Fra 955. Esp D 577.

But a delivery of goods to Donee's servant is a delivery to Donee himself, & in such case Donee may have an action. Low 294. Esp D 14.

And if goods are delivered by bailee to any person by the donee's direction this is a sufficient possession, for a delivery according to his direction is a delivery to himself. Esp D 14.

And slight acts will amount to a delivery, for the purpose of giving donee an action. As a delivery of the key of the door where the goods are, is sufficient. Fra 955.

If the Bailee gives any goods of Bailor to a stranger — Bailor cannot maintain trespass against the stranger for receiving them, nor in the first instance can he maintain trover, but on demand and refusal to redeliver after the time has expired, for which they were bailed — Bailor may have trover against him, but if he redelivers to Bailee before action is brought by Bailor a during the pendency of a suit by him, I suppose it will bar his action. 5 Bac 164. 261. 10 231. 2 Raym 861. 1 Roll 666.

Both Bailees and I conceive all agisti ll. j. may maintain trespass or trover for full value against any stranger who destroys the goods or takes them away. So a command special owner, an agisting farmer, hirer and borrower, factors, agents and mechanics of all kinds may maintain

Settlement 19

these actions 2 Ray 270. Bull N.P. 33. 1 Mod 31. 1 Salk 443. 1 Bac Ab. 262

But the ground of Bailees right to maintain an action is said to be his own liability over to Bailor — and hence it has been doubted whether a depositary or mandatary under a general acceptance can maintain these actions. 13 Co 69. 5 Bac 164. 1 Inst 89. 5 Bac 262. Norfolk 438.

But it seems perfectly clear to me says Mr. J. that every Bailee may maintain an action ag. any person who takes the goods from him wrongfully, for several reasons 1st every Bailee has a special property in the thing bailed, and if so the law will protect it. Jones 117. 1 Bac 240. 5 Bac 262. 7 T.R. 396. Esp. C. 577.

2nd It is well settled that a mere finder of goods may have an action against any person who takes the goods, & injures them while in his possession — hence a finders interest is not greater than that of a depositary. Str. 505.

Again it is settled that if a servant is robbed of his masters goods without any default of his, he may maintain an action against the hundred under the Stat of Winton, or an appeal of Robbery ag. the Robber himself but the servant is not liable over to his master in case of robbery — the liability of Bailee over to Bailor is not therefore the true reason why he may support an action. 4 Mod 404. Comb. 263. 12 Mod 54. 13 Co 69. 2 Saund. 380. Jones 138, 129

Again Bulle lays down the rule without any qualification, that a special property is sufficient to maintain replevin or trover. Bull N.P. 33. 7 T.R. 396.

again, it has recently been settled that an uncertificated Bankrupt after

Question discussed before Moot-Hall
Litchfield - 1810 -

Can a finder of goods who afterwards loses them bring trover against a subsequent finder? Is his special property de-
-vested?

the act of Bankruptcy, may maintain an action ag. any wrong-doer who takes the property. 1 Bos & Pul 44. 7 T R 391.

A depositary may be liable over to Bailor for the wrongful act of another, & he may not, and so of a common carrier, so that liability of common carrier over to Bailor is not the ground why he may have an action ag. the wrongdoer, you cannot go into an inquiry whether Bailee is liable over to Bailor, when Bailee sues the wrongdoer – this is a thing which cannot be determined in that action.

Neither Policy requires that Bailee should have a right to maintain the action – for suppose I should deposit goods with a person in Bag[d] or N. York, now I am at a distance, and a speedy remedy is required, and if depositary cannot bring an action against a wrongdoer, I may lose my goods.

I am therefore fully convinced with Ch. J. that a lawful possession will give a right of action in this case, and that the person in whom the special property is, is as against all persons but him who has the general property considered as owner of it.

And it settled that if Bailee delivers goods to a stranger – this stranger may have an action ag. any 3[d] person who violently violates his possession. 5 Bac 260. 10 Co 242. 1 Roll 607.

A[n] auctioneer may maintain an action in his own name on a contract for goods which he sold as auctioneer, even tho the purchaser knows that the goods belonged to another. 1 Hen[s] & Bl 81. 2 Doug 91. 8 Co R 190.

In most cases bailor or bailee may maintain these actions. Bailor is sometimes prevented, as I have stated for a want of possession either actual or constructive as where he has hired or bailed a thing for a limited time. It is a rule that when either of them may sue, there can be but one recovery for the same wrong, and a recovery by one bars an action by the other. 13 Co 69. 5 Bac Ab 165-263

And to said in Rolle that if both commence an action ag. the wrong-doer, he who first recovers shall oust the other of his claim. 2 Roll 569. I doubt the correctness of this rule says 1 W. G. - I think the commencement of an action by one, may be pleaded in abatement to an action by the other. 1 Salk 127. 3 Bac Ab 5.

If the Bailor recovers from the wrong doer he can't then sue the Bailee, for he can have but one satisfaction. 2 Raym. 1217. Salk 11. 3 Gelt 68. 5 Bac Ab 280. 13 Co 24. 35.

And if the Bailor commences his action ag. the wrong-doer - I think, says 1 W. G. it discharges the Bailee, tho I find no authority for this, but there are analagous cases - Thus before a person is committed to prison, and is rescued: now the Off or Sheriff may sue the rescuers, and the Off may sue the Sheriff or the rescuers, and if he commences his action against the rescuers, it bars an action ag. the Sheriff. Cro J 610. 12. Co 6. 77 a. 109. Hutton 98.

But on the other hand if the Bailee commences his action against the wrong doer - he then makes himself liable over to Bailor, for I go on the ground that a commencement of an action by one bars an action by the other. I have said that there can be but one recovery for the same wrong tho the Bailee may have a special action on the case for an injury

done to him, tho Bailor has recovered full value. Eg. A, lends horse to B. C, takes him from B. now A, sues C, and recovers full value, yet the Bailee may have suffered a material injury by having the horse taken from him, and if so he may sue C, and recover damages. 3 Wils 61. 65.

And if the Bailor himself takes the property from Bailee before he has a right to it. Bailee may have an action against him - It must be an action on the case for special damage as I conceive says Ch. J. and not trespass or trover. (vide Ch. Hoves)

If the Bailee delivers the goods over to another against the orders of the Bailor - he is ipso facto guilty of a conversion, and trover will lie ag. him, tho the time for which they were bailed has not elapsed. 4 T.R. 260. Ep 580.

Bailor generally cant maintain any other action ag. Bailee but case but his actions may be in three forms - 1st for negligence - 2nd Trover, 3d in assumpsit express or implied.

But on the other hand Bailor cannot regularly maintain trespass ag. Bailee because his possession was originally lawfully acquired. 1 Bac 287. B.C.L. 72. Co. J. 244. Cro E. 781. 1 with 282. 2 Do 319. 3 East 62. 8 Co 146.

If however Bailee destroys the goods he is said to extinguish the bailment and then trespass will lie against him - Eg. A, lets horse to B. and B kills him. It must be a voluntary act - Jeffries says Mr Gould. 1 Burr. 57. 5 Co 13a. 2 Bl 465. 3 Salk. 140. 6. 2 Roll 555. Roll 555.

Innkeepers.

Inns are public houses of entertainment for travellers - the owner of which is called the host, and the person entertained is called the Guest.

By the Com law any person might set up a house of entertainment under certain restrictions.

In this country, and in this State - Inns, and Innkeepers are regulated by Statute. By the com law they could not prevent such houses from being kept, yet if they became too numerous, they might be restrained, and the host might be fined and indicted. 1 Salk 405. Cro 944 9. 2 Rolle 84. Palm 367. 1 Roble 506.

A public house is different from that where liquors are sold in order - the latter is regulated by Statute.

Inns have certain privileges which are peculiar to them. In common houses if the Sheriff gets within the outer door he may break open the inner one, but the inner door of an Inn cannot be broken open to execute civil process. The rooms in an Inn are so many seperate mansions. Co Littleton 47. 3 Burl. 270.

It is the duty of Innkeepers to entertain Travellers - to furnish them with every proper accomodation.

If the host suspects the ability of his guest he may refuse to entertain him. But if a reasonable compensation is tendered him he cannot

and if he does the traveler may maintain an action against him, and he may be indicted, for it is a public offence.

The host is bound to furnish his guest at a reasonable price ie as much as wage has ascertained. If he goes further than this he is guilty of extortion and an action lies to recover it back again. The party may likewise be indicted - for tis an offence. 9 Co 87. 1 Salk 18. 388. Carth 158. Cro J. 389. 609.

If the host furnishes the guest with corrupt wine he is liable to an action in favour of the guest and likewise to an indictment. 1 Roll 95.

It may be asked whether the host is obliged to furnish the guest with all he wants - On this point there is no case in the Books. It is clear that if he furnishes him, so that he gets drunk, he may be indicted for keeping a disorderly house. The host however must judge of this at his peril.

In an action against a host for not receiving and entertaining a Guest, it will be a good defence that his lodgings are full.

The particular situation of his family may likewise be a ground of defence, as sickness &c. Slight indisposition or small inconvenience will not avoid.

By the common law an officer might impose a guest on a host nolens volens.

The host is bound to take the horse, tho the owner does not put up with him - as where a man on a journey takes his horse to a tavern

and lodges with a friend himself - here the host is bound to take the horse but not any baggage unless the owner accompanies it. - 1 Salk 388. Moor 806. 2 Brownl. 204. 254.

The liability of Innkeepers in case of loss is same as common carriers, ie. they are liable for all losses occasioned by any means except by the act of God - the kings enemies - and the owner.

If a man puts up at the house of a friend, and it be broken open & robbed, he has no remedy ag. the friend who entertains him. But this is not the case with Innkeepers - they cant have the defence which private persons have. The host may be perfectly innocent, nay, may use extraordinary care, and yet be liable for the loss of his guests goods.

This proceeds not on the ground of justice and equity; but on the ground of policy.

If a Public house should be struck with lightning - the host would not be liable, but if it should be robbed by a mob, he would be liable. Hob. q. Dyer 266. Poph. 78. Latch 179.

Those things which may be given as an excuse for not entertaining, will not avail any thing in case of loss, provided the guest is actually received.

If an Innkeeper is absent from home, and a guest is received by his Servant, this circumstance will not excuse a loss. Cro E 622. 1 Rol. 4. There is one case in which is said the host is not liable

for a loss; and that is where a man comes to a tavern which is full, and he tells the landlord that he will shift for himself, if he will let him stay — here the host received the guest upon his own responsibility. Dyer 158.

If a host requires his guest to place his goods in a particular place, telling him at the same time that he will not be responsible unless he does, yet this will not excuse the host, if the goods are stolen or lost, at least the current of authorities make him liable. Some authorities to the contrary. quaestio vexata. Dyer 266.

Where the guest would not have them in his room, it was holden to be no defence on the part of the Innkeeper if they were stolen. Moor 78 - 207. 3 Co 33. Dyer 266.

If the host commits the goods to the guest and tells him to look them up in such a chamber — still he will be liable if they are lost. 3 or 8 Co 33.

If the guest be robbed by a stranger or fellow traveller, that he requests to sleep with him, host is not liable. In this case he must really be his companion, and not one whom he incidentally meets with in his journey.

In the case of the stranger 'tis sufficient to exculpate the Innkeeper, if the guest request him to permit the stranger to lodge with him. 3 Co 33. Co 8 285. 285.

If the guest does not inform the Landlord of the articles committed

to his care, still this does not remove the liability of the Landlord.

If the guest misinforms the host, it will excuse him as to those things about which the misrepresentation was made. So if the guest tells him that his portmanteau contain a pair of pantaloons, when in fact they contain money - here if the whole is stolen the host will be liable only for the portmanteau and pantaloons. Moor 158.

If a horse be sent to grass by the order of the guest and is stolen from the pasture - the host is not liable as Innkeeper, tho he may be as Bailee. 3 Co 32. 1 Roll A. 2 Brownlow 255.

The man who can claim these rights must be a guest - a guest is a person on a journey, or one who has come to the end of his journey. An inhabitant of the same town cannot be considered as a guest - consequently if a Landlord invites a neighbor to sup with him, and he should stay all night, and should be robbed, the Landlord would not be liable.

If goods merely be left at an Inn and the owner puts up with a friend together with his horse - the Landlord would not be liable - but if his horse is left at the Inn - the Innkeeper would be liable. 1 Roll R. 3. 3. 38 Cro 9. 188. Moor 877.

If a man at the end of his journey stays at a Tavern weeks and pays a tavern price he is a guest - if he does not pay tavern price he is then a Boarder. Latch 127. Dyer 158. Ough 179.

If a man puts his horse up at a tavern designing himself to stay

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at a friend's house, the host must answer for him if he is stolen. Roll 3.

If a man's servant puts up at an Inn and has goods stolen from him while there either the master or the servant might commence an action. Co J 224. 4 Co. 162.

It does not from this follow that the owner may in all cases have an action against the Innkeeper. A may take B's horse wrongfully, and have him at a tavern, and he be stolen — here B can have no action ag. the landlord — A can bring an action against the landlord. Roll 3

Remedy of Innkeepers.

Innkeepers have a remedy which no other persons have, and this is in consequence of their own peculiar liability. They also have the com. remedy of suing if the guest does not pay.

In connect there is a Stat. rendering it necessary to sue immediately for liquors — but by the com law they are in the same situation as other commodities.

In consequence of his liability he has a lien upon the property and person of his guest — This is com law remedy — This detention is not by writ but by force, and arises from the liability of the Innkeeper, because if he does not entertain when requested, he is liable to an indictment.

This right to use force in detaining his guest is a principle of the com law which has never been resisted.

He has not like an officer a right to call a assistance, but should others aid they would not be liable in an action of assault &c.

A horse may be detained for the expense of his keeping, but whether he can be detained for the expenses of the guest does not clearly appear from the authorities.

It is however certain that the guest cannot be taken for the keeping of the horse, for the horse himself may be detained. 2 Rol Ab 85. Carth 150 Salk 388. 1 Show 269. 3 Bac 185

It has been said that if a man goes into an Inn and leaves it without paying his bill he is a Trespasser but this cannot be law for he is permitted to enter a public house - but if after entry he commits some wrong act he is a trespasser ab initio. 8 Co 147.

If A. takes B's horse and without any licence from B, leaves him at a tavern, the Innkeeper has a lien upon him for the keeping, and B. cannot retake him unless he pays for his keeping. 3 Bac 185. Poph 128. Yelv 67.

If A goes to B's tavern and puts out his horse being unable to pay, B tells him if he would deliver up the horse he would pay for his keeping. This is a good promise, for there is a good consideration, inasmuch as the Innkeeper loses the detainer. Such a promise is not within the Stat. of Frauds & Perjuries, tho it does not abolish the liability of A. because it takes away his

If A owes B £100, and B sees A and C tells him if he will abandon the suit

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he will pay the $100 now this promise is not good against B, because he within the Stat. of Frauds and Perjuries. 3 Bac 185. Hutton 101.

The innkeeper who retains a horse, cannot use or sell him and by the common law he might in the event be a bill of cost to him. But by the customs of London after a horse has eaten out his head he may be sold. — Moor 877. 1 Bac 556. 3 Bac 186. 1 Vent 71. 2 Roll 85.

If the guest leaves the Inn without paying his bills, he may be taken on fresh suit, but if after he leaves the Inn a weeks time elapses and he is not pursued, and then returns to the Inn, he cannot be retained upon the former bill tho he may be sued. 3 Bac 186. 1 Bac 556.

If there be an agreement that the man may take away his horse, and he afterwards returns, he may be retained.

These rights belong exclusively to Innkeepers. Who then are Innkeepers. By the common law no man was an Innkeeper unless he had a sign up. But this is not the case here; if he carries on the business of a tavern, no matter whether he has a sign up or not.

If a man keeps a house to lodge and entertain people for a particular purpose - he is not an Innkeeper — as a man who lodges people during the Session of a court, or being in the neighborhood of a spring, entertains people. —

Every State has a Stat regulating Innkeepers. Where the common law

court having cognizance of all frauds. If the contract had been executory in both sides Chan.r could give no remedy. The true reason is in the first case contrary to the Stat. of frauds and perjuries. Chan.r has power to give it on the ground of their jurisdiction over frauds.

It is a general rule that there must be an assent to all contracts or they are not valid. They must not be made under duress &c. In executed contracts it is said this assent is not necessary to be presumed. If I Stiles makes a deed of land to Jon Nokes living in Kamschatka - Jones title vests immediately whether he assents or not, but there must be a dissent to destroy a contract. The law presumes an assent in a purchase to pay the value of the goods, tho he gets trusted and dont enquire the price. Tho a man turns his wife out of doors and swears by all his household gods that he wont give her necessaries, the law will enable the person trusting her for necessaries to recover; not purely on an implied assent of the husband, but on a supposition that it was the husbands duty to support her. When a man performs for another what it was the latter ones duty to perform, the former may recover, and that is the ground of recovery, not an implied assent. Contracts may be absolutely void or they may be voidable.

The Judge doubts whether any acts of an infant are void, tho the books say differently. A promise of marriage to an infant is voidable. Want of capacity is one ground of void contracts - both a legal and actual want of capacity - some of these are voidable - Illegality is another ground of void contracts. Physical impossibilities is another ground of void contracts.

Contracts.

The principal object the law has in view is to prevent [illegible] and the [illegible] mistake & fully apparent between the parties make an other day — or two more days off than. If the last days no fraud is supposed actually to exist, but only a great error or mistake in one or both parties, this is the case in the civil law. Where a man is compelled to make a contract by duress or per minas it is void — fraud too practised on the man makes the contract void. Where the fraud was in the consideration, courts of law would not set aside the contract as void, the Key would let damages be recovered. Contracts that tend to defraud third persons are void at wicks. You must go to Chan.y for redress in many of these contracts. They will always place the injured person in statu quo before the contract, that is their object is not the punishment of the offender. At Law of an usurious contract be proved the whole debt is lost, but Chan.y will only make that void which is usurious the rest of the contract continues good — persons dont go to Chan.y when they can prove this usury at courts of law.

Chan.y will not always confirm contracts made when one of the parties is drunk, so as to be too generous.

The actions of assumpsit, of debt, and account is brought on valid contracts.

After I have considered the nature and different kinds of contracts, I shall then consider the several kinds of actions for enforcing valid contracts, under which will be considered assumpsit, Debt, covenants, and Accounts.

Then treat of the defences to be made to these actions, under which will

be considered the doctrine of payment, and performance - tender - accord and satisfaction, awards, and release. -

Consent is an essential requisite to a valid contract. By assent or consent is meant the acquiescence of the mind in something proposed or assumed.

This imbraces three things - 1st A physical power of assenting - 2dly A moral power of assenting and 3dly A deliberate and free use of those powers. Of course the absence of any of these capacities in either of the parties to a contract renders it void. Doct 10.

Therefore 1st The contracts of Infants and Lunatics are void - 1 Roc Con 11. 4 Co 126. 2 Ch Cas 21. Finch 102. 2 Roll Ab. 728.

Formerly it was thought that, the deed of a lunatic &c was only voidable, and that non est factum could not be pleaded to it. Dears Cases. 46 123 Cases. Part. Cases. 152. But was adjudged 3 Mod 296. 301 that a surrender by a person non compos, being actually void, a contingent remainder depending on the estate of the person non compos, was not destroyed by such a surrender. 2 Roy. 316. 3 Lev 284. 1 Vent 198. Comb 488. 468. Carth 211. 250. 485.

And a deed of land given to a lunatic &c is also void if not a deed of gift - because it appeared in a suit in Chancery instituted in behalf of a lunatic that Deft had conveyed lands to Pltff in consideration for money given by the lunatic & court decreed the Deft to account for the money and to pay damages. It seems therefore that the deed must have been void. 1 Chan. Cases 113 1 Roc Con 12.

But a deed of gift made in favour of a Lunatic is not void, but only voidable. Powel says the consent of the Lunatic is presumed since the gift

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is intended to be beneficial. Com. Dig. 12. Judge Reeve thinks wafent necessary in this case.

If the lunatic recovers from his incapacity he may avoid his contract. But if he die during the continuance of his incapacity or without agreeing to the contract, after recovering his reason, his heirs may avoid the acceptance says Powel. Pow. C. 13. 14. Co Litt 2. 2 Bent 203

J. Reeve thinks his heirs cannot avoid the contract of the deceased, but can only refuse to accept the land themselves 2 BC 291. 2.

But tho as a general rule contracts of Lunatics &c are void yet it is said that the framers or makers of such contracts cannot themselves after they recover their reason take advantage of their own incapacity ie. they shall not be permitted to stultify themselves. The progress of this notion is curious. In the time of Edw? 1st non compos was a sufficient plea to avoid a bond. Under Edw? 3 a question arose as to the propriety of allowing this plea and it was asked how the Deft could remember his contract if out of his senses when he made it, and under Hen 6 this idea was seriously adopted by the Judges in argument. On these loose authorities the notion appears to have founded. Powel advocates the maxim and gives a reason which deserves but little notice ie that insanity is a disability which can be easily feigned.

Fitzherbert rejects the maxim as contrary to reason, and in support of his opinion cites the registrum brevium in which there is a writ for aliens to recover lands aliened during insanity. This is indeed a high authority.

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Blackstone heats the idea as idle, tho he dont deny it to be law. J Reeve thinks it would not now be considered as law in Eng. Vaux Cart. 44 to 23. 2 B & C 91. 2

In Connect a man may stultify himself - so decided by our court of Errors last session

Tho a man cannot stultify himself, yet an Attorney general acting for the King as parens patriae may avoid the grants of a Lunatic during his life - the proceedings are as follows - Commissioners are appointed to find an office on the writ de idiota or Lunatico inquiendo. After office found, a writ of scire facias is issued by the King commanding the person concerned to come in and shew cause &c 3 Atk 170. 3 P. Wms 108. 9. 11. 1 Wms 24. 5. 2 P. Wms 118. 2 Ves 414.

Or in some cases if a suit is brought on a bond of a Lunatic - the King may send a supersedeas to the Justices. 4 Co 126.

Further, the next heir, or those persons interested may after the death of the idiot or non compos take advantage of his incapacity and avoid the grant. 2 B & C 92. Peake 20 21

But person non compos may bind himself by an agreement made in a lucid interval. 1 P Wms 29. 2 Ves 412. 414. If in such cases it be a question whether the grant was made during a lucid interval - Chan.r direct an issue to try the fact.

2 Atk 87 The contracts of drunken persons are not void at law in any case, for tho this is a temporary insanity, yet it is of a mans own procuring. 1 Vern 29. 3 P. Wms 131. note a. 2 Ves. 3 not Lunacy frequently brought on by a man himself as when induced by a long continued habit of drinking.

Qr is Chan.r if intoxication even a ground of relief, unless some unfair

advantage has been taken. 1 Vesey 19. 1 Pow 30. Seems if the intoxication is procured by the other contracting party. 2n. is not this a fraud, and is it not therefore a ground of interference by Courts of Law. Seems so from a dictum in 2 P. Wms 343 In both the same reason, and evidence ought to have the same effect in both Courts.

3dly Weakness of understanding is not of itself an impediment to making a valid contract, either at Law or Equity. For neither Courts of Chancy nor Law measure the size of mens understandings or capacities. the inquiry would be too vague. 3 P. Wms 129. 1 Pow. 30. 1 Vesey 56. 63. 65.

But if there be any fraud or imposition in procuring a bond from a weak man Chancy will afford relief. 3 P. Wms 129. 1 Pow Cont. 31. 2n. It is not always a fraud to deal with a weak man — seems not. Pow 31. so where the parent of a young nobleman had entrusted a servant to take care of an infant heir on his travels, and the servant continuing with him till he was 27. prevailed on the heir to give bond of £1000, which bond the servant himself prepared. Sir Joseph Jekyl relieved against this contract on ground of fraud because the young man by reposing a confidence in the servant was put off his guard.

Upon the same principle the contracts of paralytic men would be liable to be relieved against in Equity, if the provision in their deeds is something extraordinary or if conveyance is made without consideration or for a consideration which is totally inadequate. Pow 32.

So also if a deed without consideration or a deed made by a man in extremis or by a weak man rendered uneasy at the time of contracting — it would

be relieved against in Equity. 1 Vern 32. 2 Vern 144. And an agreement unreasonable, exorbitant and made with a person of weak intellects will not be specifically decreed. 2 Vern 227. 1st ca chan[a] 3. 2 Rep. Chan. ca. 415. 425.

Upon the same general principle viz want of capacity to assent, contracts made by infants except for necessaries, are regularly not binding, and the exception itself is founded in necessity only — admitted on no other principle. — no discretion i.e. no physical power of assenting — For the distinction vide tit. Parent and Child. 1 Vern 32. 59.

Femes Covert. The contracts of a feme covert are also regularly void, for want of a moral capacity to assent — her will subject to her husband, her contracts in general bind neither him nor herself. 1 Vern Cont. 57. 112.

But there are other grounds on which her disability principally rests, — her want of property, or want of control over it. Husbands rights &c 1 Vern 93. For distinction vide tit Husb. & wife.

If tenant in tail agrees to alien his lands, he is bound by the contract, tho to the disinherison of the issue in tail and Chan[r] will compel him to levy a fine and convey according to contract — for the inheritance is in his power. 1 Vern 112. 1 Chan[r] ca 171.

Who may bind others as well as themselves, by their assent to contracts.

The tenant for life, trust of an estate may by an agreement to which the trustees are not parties, bind them as well as his own interest, and the trustees may be compelled in Chan[r] to join in executing the agreement. 1 Vern 112. 113. 1 Ch[s] ca. 173. 208.

A Trustee may also bind the estate of the cestuy que trust in by a conveyance to one having no notice of the trust. 1 Vern 113. 1 Ch R 135. 2 Ch R 344. 1 Ch R 663. 3 Ch R 516. 1 Hen. B. 394. 447. Cas Mort.

So an ancestor seized in fee may by an agreement to alienate his estate bind his heir and the latter after the former's death may be compelled to pay. and the purchase money will go regularly to the personal representative. 1 Vern 115. 2 Vern 213. Powers Chancery.

So an agreement to convey an inheritance made by tenant for life may be enforced in Chan. against the heir, where the agreement at the time of making it was clearly advantagious to the latter. 1 Vern 115. 116. 4 Bro Parl. 435.

So a mother acting as Admin. to her husband may under special circumstances bind her children. 1 Vern 123. 2 Vern 210.

So the contracts of a woman before marriage bind the husband whom she afterwards marries. 1 Vern 128. 2 Vern 448. 1 Roll 351. 12 mod 160. 161. 248. Husb & Wife.

If tenant in tail agrees to convey the inheritance and dies, his issue cannot be compelled to execute the agreement tho he might have been. They claim from the donor, per formam doni and the tenant might have docked the entailment, yet he cannot deprive them of their legal right. 1 Vern 135. 1 Salk 236. g. 2 Vent 350. Holt 210. Chan. cases 171. 2 Ch Chan. 278. 2 Vern 684. Issues of the issue receive the consideration for which the ancestor agreed to convey. The former by this act accepts the agreement and is bound in conscience to execute on his part. 1 Vern 126. Chan. cas 171.

So an agreement by tenant in tail to dispose of the lasting improvements

& the estate cannot be enforced against his [illegible] after his death tho it might have been against himself - E.g. an agreement to fell timber trees. 1 Vern 127 1 Ca Ch 50. 1 Salk 194.

The Exec.rs & Admin.rs of every person are implied in himself and are bound by his contracts, of course without being named. 1 Vern 128. 2 P. Wms 197. vide Ex.rs & Ad.rs

An Attorney being duly authorized may by agreement bind his client and will not himself be bound. 1 Vern 128. 3 Ch. Ca. 277. 2 Eq. Ca. Ab. 31. 5 Bro P. Cases 547. vide Master & Servant.

But if an Attorney makes in behalf of his client a contract which he is not authorized to make, the Attorney himself is bound, and the client is not. 1 Vern 128. 2 Vern 127. Master & Servant.

If a joint tenant agrees to alien his part and dies before the agreement is executed, the survivor cannot be compelled to perform it. His claim to the whole is prior to that of the party claiming under the agreement to any part. 1 Vern 129. 2 Vern 63. Does the agreement amounts to a severance of the joinsture in Equity. The jus accrescendi is then destroyed. 2 Vern 634. 1 Ves Sen. 159. 1 Vern 129. Does not the agreement always amount to a severance in Equity, if it be such as being made by a tenant in severalty could be enforced in Chan.y?

How a part may be given to a contract.

Assent may be either express or tacit. 1 Vern 131.

Express assent is declared by some sign intended to signify it E.g. speaking writing, gesture &c and may be either precedent, concomitant or sub-

— subsequent to the principal act, which is done in execution or ratification of the agreement. 1 Bro 131. Ex. first master sends servant to buy goods, secondly he buys himself, and promises on delivery to pay — thirdly, servant buys without previous authority, and the master ratifies. ——

That a implied assent may arise in several ways Ex. from silence or inaction, as if a Junior mortgagee being present while mortgagor is contracting with another to make a second mortgage of the same subject, and knowing of the contract is voluntarily silent — in this case he loses his priority on the ground of an implied assent that his own should be postponed. 1 Bro 132. 3 P. 2 Vern 151. 1 P. Wms 393. 1 Vern 372 Powell M. 185. 1 Vesey 6. 1 Bro Chan. 357. Vide Mortgages.

So if a lessee being present when lessor makes another lease of the same land to a Stranger, and knowing the contract makes no mention of his own lease, the second lessee being ignorant of the first, will even at law be preferred 1 Bro 132. Powell M 183. 3 P. 2 Vern 150. 1 Eq. Ca. ab 355. 2 Vern 239.

Equity will enforce such an implied assent even against an infant — seems he would practise a fraud Ex. Infant mortgagee. 1 Bro 134. Amcott v. 23 And it has been holden that the first mortgagee being a witness to the second deed of mortgage is sufficient evidence of his knowing the contents, unless he answer the contrary. 1 Bro 134 3 P. Powell M. 182 Denied by 4 Hard. & and Hamilton Vesey 6. 1 Bro Ca. 357. Rule dangerous — of postponing for collusion of first mortgagee. —

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not to exercise this implied agent in the power thereby to affect by it, in accepting that he knew not only that this power existed in connection with the subsequent contract but that his silence to exhibit by consent or assent into silence his intent is not affected by it. Bros 134-5.

Upon the same general principle, if the holder of a note which has been dishonored omits to give reasonable notice to the indorser, he is considered as agreeing to discharge the indorser, and to rely upon the maker. 1 Bos 1856. 198 167. Law Mercantile Law 654. Chitty 98-9. 1 C. 124. 202.

This is general the law with regard to a tacit agreement whenever it is necessary for the purpose of giving effect to some principal contract founded on an express agreement. Eg. If one makes a sale of horses growing on his land, he tacitly agrees that such shall have free ingress and egress to take them. So one who lets a house tacitly consents that upon shall have free access to it. Bros 136. 2 Bos 55. Finch d 63. Co Litt 56.

So there is one species of tacit agreement annexed to all contracts viz that if either of the parties shall fail to perform his part he will pay the other all damages sustained by the non performance. Bros 1st. 2 Bos 1011. 236 166. Mod. B. 94.

When one usually employs another to trade for him on terms he tacitly consents to every particular contract of the same kind that the usual practice in this way use. Bros 133. Smith v Stewart

And in every case of assignment, release, surrender, gift &c there is a tacit assent on the part of the assignee &c unless the contrary appears — Presumed to assent to what is advantageous. 1 Bos 138. 9.

So the heirs acceptance of property descending to him is presumed. 1 Bos 139

So if drawee of a bill refuses to accept according to the tenor, but pays to the owner of the draweer, the law implies an agreement by the latter to repay the amount. 1 Bos 139. Chitty 103. 122. 168. 180. 209. 3 Burr 1674.

So if a husband turns away his wife, this act amounts to a tacit assent on his part to be bound by her contracts for necessaries. 1 Bos 139. 1 Ed. Cas. 4th ed. 2 Wife.

Upon a sale of personal chattels there is an implied warranty by vendor that the chattels are his. 1 Bouvier 109. 373. 8 Pet 632. 3 Cr. 57.

What circumstances invalidate an assent given. Ignorance of law in some cases invalidate the assent given to a contract. 1 Bos 137. 140.

So a mistake or error of one party as to his own rights is occasioned by the fraud of the other, the contract is not binding. 1 Bos 140. But to void on the ground of fraud. 1 Bos 289. 4 Dessau 534. 1 Wash 19. 20. Eq. Heir induced to believe that his ancestors will was duly executed, when it was not, releases his right for a small consideration.

But on a Constitutional point of right, both parties being ignorant on which side it lies, a contract is made by the party really entitled, and there the contract is good. But the parties agree on the ground of their rights

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being in their minds doubtful and knowing that one of them must be a loser each voluntarily put aside to the risk. E.g. the common case of a compromise between litigant parties. 1 Ves 142. & 3. 18 Ves 140. 26. 2 Ves 567.

But if the party really entitled is ignorant of the extent of his rights, says Powell (the most learned of authors of the subject contracted about) and of the means of informing himself, he seems not to be bound, as the case may be. E.g. Case of bequest to a daughter of £10.000 when her portionage part was £40000, she accepted the former, and released the latter - release set aside. 1 Ves 144. 145. 3 Ves 316. 2 Ves 200. 197. 198. 1 Vesey. 400.

And in the case of Lansdown vs Lansdown, both parties being deceived by the opinion of another as to the right in question, the contract was set aside in Chancery. This was the case of the Schoolmaster 2 Ves 196. Moseley 364. not like the case of compromising a doubtful right - There both parties agree on the ground of it being doubtful - each voluntarily submits to the risk of being the loser - Here both are deceived, tho there is no fraud. But generally speaking, ignorance of law is clearly no ground for avoiding a contract. Evans 2 Ves 445.

Wagering contracts are in general binding upon the parties at common law and is not essential to the validity of such a contract that the event upon which the wager depends be in every contingent - sufficient that it be equally uncertain to both parties - in that case ignorance does not invalidate the agreement. 7 Ves 148. Vesey 37.

As to cases in which the agreement of an intended

purchaser of an estate is invalidated by erroneous representations respecting the circumstances or qualities of the subject - there being no fraud in the case, this distinction is to be observed, if the mistake respects that circumstance or quality which appears to have furnished the principal motive to the purchase, the purchaser is not bound - The ground of this agent fails - Eg. an agreement to buy land for a mill seat, and there proves to be no stream. 1 Bro 147. 149. 2 Do 196. 201. 1 Vesey 400. 2 Vern 185. 1 Do 32. not enforced in chancery. 1 Bro 149. Seem if the mistake relates to a particular, which appears not to have been principally in the contemplation of the purchasers: Joe is then bound by his agent and his relief lies in compensation for the difference of value. 1 Bro 148. 49 Enforced in Equity.

But if on an agreement for a purchase, the purchaser makes it an express condition that the subject shall possess certain qualities or incidents, the absence of them will invalidate his agent - agreement not enforced against him. 1 Bro 150.

And in some cases the intention of the parties as to their agent may be inferred from circumstances, and the want of agent may be inferred in the same way. E.g. sale of a female slave in days of a man, who is unable. contract void. 1 Bro 1. 0.

And according to Powell if an unsound horse is sold for a fair price it would not be void through mistake, want of agent may be inferred.

contract is void. 1 Raym 0. 2a void. vide Cowp 818. Doug 23. 1 T R 133. 3 T R 7[illegible]
In like warranty according to our Decisions - 2 Root 407. 2 Salk 1 120. 160
Peak 115. 123. 1 Ves 342. 2 East 314.

Of the subjects of Contracts.

Under this division we are to enquire in relation to what subjects contracts may be made so as to bind the parties. 1 Ves 152

Ves this head a distinction is to be observed between contracts executed and executory. 2 R C 449. Executed and executory what 1 Ves 253
Cowp 1 Ves 172.

1 to the first - No person can by contract executed convey a thing in which he has not an actual or potential interest at the time of the conveyance, for one cannot transfer to another what is not his own.
1 Ves 152. 1 Vern 492.

A grants to B all the wood he shall hereafter buy - void. 1 Ves 152
Ves. 132. Holt. 132. Co Litt 309 b

So if a lease to B the land of another - Lessee may bind to that for rent that Lessor had nothing in the land at the time of the lease - not habeat &c 1 Ves 153. Co Litt 47 b Esh 233. 306. 3 Lev 146.

Lev 1 is said if the lease were by indenture - Lessee then estopped -
Esh 233. 306. Vin 817. 7 T R 587.

Upon the same general principle if A sells to B a horse upon condition of payment 6 months hence – A cannot sell him to another before the expiration of the 6 months – property is changed. And the sale to another before the expiration of the 6 months would have to be made good by B's failing to pay at the time, for at the time of the sale the interest is not in A. Poo 154.5. Woo 482.

A man can only grant that to which he has only an inchoate title to be perfected in future. Eg A contingent remainder 10 Coo 135. 4 Kent 248. Cyc 221. (No such contingent interests are descendable devisable and in Equity assignable) Fearn 444. 450 441. 13 Ves. 202 & 3. 209. 3 Pr W 88. 1 Ves 330 18. Ves. 222. 605.

But a thing of which one is potentially the owner ie. a thing accessory to another actually vested in him at the time of bargaining, may be disposed of by a contract executed. Eg. The profits of one's land for 3 years to come. So of the future profits of any subject actually vested in bargainor at the time. 10 Coo 6 1 Bay 7. 4 Hoff 132.

2 and 4. Rights not vested actually or potentially may be the subject of executory contracts. These being no other than stipulations precedent and preparatory to the contract by which the interest is to be conveyed. For the one cannot actually convey what he has not

he may oblige himself to convey what he may acquire in future - E.G. A covenants to purchase Dacre and convey it to B. A authorizes B to leave the land of which he shall be seized on such a day. In these cases a mere future act is to be done to execute the contract. Two 153. 7. Bac Abr 79

Sometimes no future act is to be done to give effect to the contract. It must then take effect if at all as a contract executed, which cannot be. E.g. A covenants to stand seized to the use of B of the lands he shall hereafter purchase. 1 Bro. 159. 160. 284. Bac 80. 2 Bl 443.

So if one of two joint tenants levy a deed of the whole land, and his covenant at common dies, the moiety of the latter does not pass. 1 Bro 160. Bac Abr. 80.

It has been held in in Conn. however that if one makes a deed with covenant of seisen &c of land of which he is not the owner and afterwards purchases it, he is estopped to allege that he had no title. 1 Root 222 2 Bl 295. to Litt 265.

And the rule is the same in Eng as to leases. Sa. 4 276. Powell 495. 2 Ridle 364. 1 Eq Cas Aby 729. 6 mod 258. 2nd Eq. 1048. 1550. Esp 238. 306. 3 K 870. 3 4.

So of mortgages. Powell Mat. 97. 2 ver 11. 1 Ch 760.

Quere as to the case of a freehold conveyed by deed with covenants - In Penn is it held at common law? 1 Bro 6 Ab. 3 Dl 370. 371. Co Litt 384. 2 Bl. 295.

to right can be acquired nor any obligation created by a contract to perform what is naturally impossible. Such contract is void since in the nature of things it cannot be performed. 1 Bos 160. 161. 1 Roll 420. Cro Eliz 206. 2 Co. Covenant to enclose one of lands in the moon.

But the law distinguishes between things physically impossible, and those which are not so, and are impracticable to the party contracting. An agreement to perform the latter is binding. Eg. A contracts to sell an estate which belongs to B — here A is liable in damages for non-performance, tho' the Chan.r will not decree a specific execution. 1 Bos 161. 162.

In the former case it must be evident to all parties at the time that performance is unattainable — it cannot therefore be the intention of either that it should be performed. Eg. the case. E.g. an agreement to deliver two grains of corn on Monday and so on in progression doubling the quantity every Monday in the year. Deft liable to pay something. Eg. an agreement to pay for a horse, barley corn for the first nail and so on — Holden liable to pay the price of the horse. 2 Ld Raym 1164. Cro Eliz 305. 11 vent 269. 1 Leo 111. 1 Vent 295. 1 Rolle 569.

Is not this making a new contract for the parties? The general rule is that if the thing stipulated for is not delivered its value is the rule of damages. 2 Burr 1010. Str 406. 2 East 211.

Why is not such contract void on the ground of fraud?

A. Such is not void on the ground that the performance is impossible

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Impossibility or Difficulty. The distinction between a near and remote possibility is not regarded in executory contracts. E.g. A covenant by A that if he dies without issue, he will settle his lands on B is binding. Specifically enforced in Chancery. 1 Bro 168. 4.

And if one covenants expressly and absolutely to do a thing not impossible in itself, his being prevented from performing it by inevitable accident does not discharge him. E.g. covenant to be at Ringsend at a certain time with a ship — prevented by tempest &c. 3 Burr 1639. 1 Brattl 366. Doug 259. vide covenant.

The thing stipulated to be done must also be morally possible i.e. lawful, or the contract is void. For no one can be legally bound to do an act which the law prohibits. 1 Bro 164. 5.

Transactions may be said to be against law — 1. In a proper sense. 2. in an improper sense. 1 Bro 165.

1st under the first head a contract is against law when the agreement is to do something which is in its own nature or nature prohibited.

1 Bro 165. 1 P. Wms 189.

Of the first kind are all contracts which have for their object something prohibited by the laws of nature — as to commit murder, theft &c. 1 Bro 166. b. A contract therefore to pay A. a certain sum if he will kill one J. S. is void. 1 Bro 166. 1 Hawk 103. 1 Brattl 218. Doug 39.

Secondly, Contracts are against law in proper sense when they have for their object something which tho not against the law of nature or the divine law, is contrary to the law of the land, or the municipal law.

Co Litt 206. 1 Roc 166.

And a contract may be contrary to the law of the land as being 1st repugnant to the public welfare 2. as being against some maxim or principle of law - 3d as being opposed to some positive Statute. 1 Roc 166 Roc 39. 1 Hen. B 322. 327. 332 17. 22. 23. 7 TR 543. 8 Do 89. 1 Bos & P. 272. 2 Wils 341.

1st All contracts the object of which is a general restriction upon one's trading in a particular way are against law as being opposed to the welfare of the State - void. 1 Roc 166. 7. Allyn 67. Owen 148. 2 Holt 211. Ray 292 Roc 6 872. 1 Sid 303

So are all contracts in general which militate against national policy. 1 Hen B 322. 327. 7 TR 543. 8 Do 89. Roc 39

So the same as to contracts the object of which is a general restriction upon the exercise of a trade even for a limited period. 1 Roc 167. 7 TR 548. Moor 115. Cro 9. 96. Co Litt 206. 1 Bl Com 181 &c.

So if a husbandman agrees not to cultivate his land. 1 Roc 167. 11 Co 53.b

But an agreement not to exercise a trade in a particular place, may be binding such contracts may be useful. 1 Roc 167. 8. Cro J 596. 2 Bulst 186. Palm. 172. Roc 18.

But a contract of the latter sort is not obligatory unless bonds are given upon sufficient consideration - And upon this ground the case Strabridi it seems lies upon the party claiming under the contract. The restriction is against the existance of consideration. 1 Roc 168. Stra 139. Hill 67. Moor 115. 242. Palm. 172. 1 Bl Com 181. 192. 1 Wms Saund 27. 85. 130.

And it is not necessary it seems that the trade which one agrees not

A man should be his trade by profession. If he not, still the validity of the contract depends on the foregoing distinctions. No man ought to preclude himself from engaging in any useful trade. 1 Bos & Pul. 10. 2 T. R. 192.

Upon the same general principle a bond or agreement of unlawful maintenance is void - against the public welfare. 1 Bos & Pul. 172 Carter 229. 2 Brod 212. 4 B.C. 135.

And a bond ie. a penal bond taken by a Sheriff for his fees is void. He may not by contract secure more, or a recompence for more than the law allows. Founded on the supposed danger of oppression. 1 Bos & Pul. 172. 10 Mod 15. 7. 1 T. R. 195.

A contract with an alien enemy is also regularly void as being against the public welfare - because a communication with a public enemy may endanger the public safety. 1 Bos & Pul. 178. 2 Roll. 173. 1 T. R. 85. 3 Bos & Pul. 548.

Upon the same principle an insurance upon the property of an alien enemy is void. It promotes the commerce of the enemy, and gives our own citizens an interest in the security of that commerce. 3 T. R. 548. 1 Bos & Pul. 85. 1 Brod & Pul. 96. 475. Doug. 283. 6 T. R. 35.

But the rule that contracts with an alien enemy are void is not universal. Ransom contracts with such enemy are obligatory - ie. a contract by the captured, who on condition of being discharged agrees to pay to the captors a certain sum as a ransom. Also the master of a ship may by such contract bind his owners, as well as himself. Aide of the crew of captors. Doug. 619. 3 Burr 1734. 1 B. & P. 563.

Note the same the the hostage dies, a the captor is taken with the

hostage - the latter being only a pledge. The duty exists independent of the hostage. Doug. 619. 1 B.R. 563. 3 Burr 1734.

That as I conceive such contracts in general made with an enemy or arise out of a state of hostility and tend to mitigate the evils of war are binding. Doug 625, 6. Eg. Treaties of peace between belligerent states, truces, capitulations, &c between military commanders.

For the same reason marriage brocage bonds bonds are void since they militate against the general welfare of the state by producing many unhappy marriages. Marriage-brocage bonds are contracts to pay another in consideration of his procuring a third person to marry the contracting party. 1 Vez 174. 1 Chan. R. 287. Show Par cases 76.

2. Contracts are unlawful as being against some maxim of law.

Under this head may be classed all contracts which are made in order to give effect to corrupt purposes ie. purposes which are opposed to the principles of morality and public decorum. Thus are against the maxim which prohibits every thing that is contra bonos mores. 1 Vez 158.

So contracts made with a view to evade the law are void. e.g. a man A, betted with B, who had great influence at court, that he A, would not obtain a certain Bishopric - the wagering was back was void because the object of it was the purchase of the Bishopric. 1 Vez 158. Eq. Ca. 39.

So a wagering contract entered into to cover money is also void. Ca. 40. Vez 134.

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for a wager with a Judge respecting the event of a suit which is pending before him is void as having a tendency to effect bribery. 1 Bro 184.
But a wager between Plff and Deft in a cause that a decree of Chan^r would be reversed was holden valid, and not to be against any legal maxim.
Cro 37. 1 Bro 184.

Contracts which have an unfair influence on third persons are void both in law and equity as being immoral E.g. Contract to reward a person for attending at auctions, in order to enhance the price of goods. 1 Bro 186.

N.B. Contracts are unlawful as being opposed to some positive Statute
Co Litt 206.

So a promise to save a Sheriff harmless in consideration of his liberating a person within his ward is void as being against a positive Stat. 1 Co 100b
Cro E 66. 1 Bro 187.

So every agreement, contract, and security for more than legal interest is void as against the Stat. 12 Anne. And tho in general the illegality of the consideration of a contract can be taken advantage of only as between the parties to the original transaction, yet in case of money even an innocent indorsee shall not recover against the acceptor of a bill or maker of a note. Kyd Bills & Ex. 280. Doug 636. 644. This has arisen from the construction given to the words of the Stat "void to all intents and purposes whatever" B.R. 736. Doug 736. 1 Bro 189.
Yet in this case the indorsee may sue the indorser. Str 1155. Doug 744. Kyd 268.
An agreement by a Bankrupt or any person on his behalf to pay a sum of money to a creditor for signing his certificate is void as against the Stat 5 Geo. 2. Smith v Bromley Doug note.

If a promise by another person in behalf of the Bankrupt were not void there would be room for practising fraud by securing the compassion of the Bankrupts family.

This agreement is void in the hands of an innocent indorsee v supra Rigt 283. And agreements of this kind are void tho the money stipulated to be paid is for the benefit of all the Bankrupts creditors, for otherwise oppression might arise from a combination of the creditors to exact hard conditions of the Bankrupt. 1 Bro 199. Gardener vs Barkley Doug 685.

But an agreement in consideration of a creditor withdrawing a petition against the allowance of a Bankrupts certificate is valid. Wms 620 1 Bro 194.

Contracts for insuring lottery tickets are void being against the Stat 14 Geo. 3d.

2dly Contracts are not unjust in a proper sense when made to prevent the performance of ones duty. 1 Bro 195. Eng. et covenant or bond by an under Sheriff not to execute process without another special warrant. Holt 12. 1 Bro 856.

3dly Contracts are not unlawful in a proper sense when made to encourage violations of duty ie. acts of misfeasance. to a bond of indemnity against action &c for a libellous publication by the proprietors of a Newspaper is void. 1 Bro 196.

If A is bound with B as his surety to J.S. in a bond upon usurious consideration, and B is bound to A, in a counter bond to save A harmless and A being sued on the bond pays the money can he recover of B, or

the counter bond? If A, is not known to the fact of the consideration being unlawful he can recover. 2 Leon. 166. 5 Bac Ab. 416. Cro E. 642. Roy 73. Cowp. he cannot. 3 Leond 63. Cro E. 588. note. 5 Bac Ab. 417 note. Com D. army. B. Otherwise the Act would be evaded for by contract the lenders would always secure the surety.

If one of two partners in an illegal contract pays the whole partnership debt without the express consent of the other, he cannot have an action against the other partner for a share of the money so paid. 2 Wm B 379. Cowp. if with consent and privity of the other. 3 T R 418. 4 Burr 2069. Sed qu. 2 Wm. B 381. and 2 wilson — Collins vs Blantern — where it is decided that if A, give a note to B, in consideration of B's not appearing as prosecutor and giving evidence against five persons indicted for perjury, and B, procure a bond of indemnity to A, for giving such note, the bond is void for it is a contract made to tempt a man to transgress the law — No man shall stipulate for iniquity — no polluted hands shall touch the pure fountains of justice. Procul, Procul — este profani. Doct & Stud. folio 12.

A bond to indemnify a Sheriff in case of damage by unbeseeching a writ is void, because it tends to violation of duty. Bac 196.

An agreement made in consideration of the jailors suffering one charged in execution to go at large — debt not being satisfied is also void. 2 Salk. 218 Bac 177. So if suffering a voluntary escape or committing a trespass is the consideration of a contract it is void. Bac 177. Plow 60. 64. et vide Dyer 118. 119. Cro E 5. 5. 4

So a wager between two that one of them will do an unlawful act is void.

e.g. a wager that a person will seduce such a woman 1 Sm 198.

There is a distinction between a bond to do something which is rendered unlawful by stat, and one to do that which is against com. law. In the first case it is void in part, in toto — in the latter case it may be void in part and good in part. The reason is said to be, that otherwise acts of Parliament might be eluded. Again it is said the Stat is like a tyrant, where he comes he makes all void — but the com law is like a cunning fellow and makes void that part only in which the fault is. 2 Wils 95. 1 Hob 14. 4 Bac 438. 9. 1 Mod 35. 6.

It is also that Stat is strict law, but com. law distinguishes according to com. reason. 1 Sm 199. 200.

For tho' it is an axiom of law that a fact in pais dehors a specialty cannot be averred against it nor that a deed cannot be defeated by any thing less than a deed, still the vicious nature of the consideration of a bond may be shown — for that strikes at the contract itself and shows that in truth it never had any legal entity. 2 Wils 350. 1

It would be absurd for the law to say that the contract is illegal & void, yet you shall not show its illegality. This is true where the contract is void by Stat or Com law. 2 Wils 350. Cowp 564. Co Litt 697. 623 Salk 168. a 188. 1 Comyns Comb 121. an obiter dictum.

If contracts to do that which the law prohibits are executed they are in many instances valid — for the parties to the transaction renounce the benefits which the law might afford. Ex gratia. I game with a man

and lose my money lastly - I cannot recover it back unless I sue within the time prescribed by the Stat of Limit. 1 Saw 202.

On this subject a distinction is to be observed. Where the contract is against a prohibition which is founded on public expediency - here if either party has performed his part of the contract - the law assists him to relief as the parties are in pari delicto - potior est conditio defendentis. 1 Saw 202 Talbot ca. 41. Eg Contract to do an immoral action - melior est conditio possidentis. 1 Saw 204.

But where the contract is prohibited by a Stat. for the sake of protecting one set of men from the extortion and oppression of another the party injured, after the transaction is finished may obtain redress. 1 Saw 205. not in pari delicto - Eg. v. If money is paid to operate as a bribe it cannot be recovered back 2n. If the contract on the other side or part is executory v. infra. 1 Saw 203-6.

Money paid by an insurer of lottery tickets - or on gaming policy - the risk having been run - cant be recovered back. 1 Saw 203. Doug 468. Volenti non fit injuria.

2 Obs. But if more than legal interest is paid on an usurious contract, the borrower may recover the excess of interest over principal & legal interest. 1 Saw 205. So if money is paid by a Bankrupt or his friend to procure a certificate - it may be recovered back again. 1 Saw 205. But in case of an illegal contract so long as nothing is done by either party either may resort - Eg. of an agreement to pay a certain sum for contraband goods.

& if the money is actually paid to procure an illegal act to be done which still remains executory the money may be recovered back E.g. Premium paid for an illegal insurance may be recovered before the risk run. 1 Bro 207. Walker vs Chapman cited Doug 471. Sean after risk run, supra.

In some cases the illicit nature of the subject renders the contract void, and sometimes the security only. By all contracts for money lost at play are void. But with respect to money won or lent at play the securities only are void, and an action of assumpsit will lie in the latter case on the implied contract. 2 Burr 1077. 2 Bro 207 8. This difference arises from the words of the Statute.

Mr Pascal thinks a similar construction ought to be put upon different clauses of the annuity act, and combats the decision in 1st Ves 332 with much ability. In his argument he cites a case in which it was decided that putting a verbal contract into writing under seal, did not determine the verbal contract = the action might still be brought on either. He cites another case to the point that giving a note did not preclude a person from pleading an action on prescription. Bro 2d. 1920. 21 Jur. how can this be law? It is settled that a simple contract is determined by giving bond for the same debt. Bro 228. 6 Co 45. 2 Jon 21. B.N.P. 155. Esp 164 3 Bac Ab. 194.

If the subject of a contract be self evidently unlawful the contract is void. E.g. agreement to wash ones hands, comb his hair, or change his linen. Bro 232. Contracts which tend wantonly to injure the feelings of

third persons are also void. E.g. Wagering contract that a woman has committed adultery - or that an unmarried woman has had a bastard. The law will not allow one to libel another under the form of an action. 1 Bos 232. Cowp 735. So it was held that a wager relative to the sex of the Chev.r D'Eon would not support an assumpsit. - Cowp 729. 1 Bos 288.

Shd an action upon a contract that wantonly tends to introduce indecent evidence will not be retained in a court of justice. 1 Bos 238. E.g. wager that a woman has a defect in a particular part of her body.

Of the general nature of Contracts.

1.st Contracts are executed & executory - For definitions of these vide supra. 2 B.C. 1148. 1 Bos 234. 175: 265.

Contracts executed do not in general retain the name of agreements, but are denominated by some term appropriated to each species - as sale, grant, lease, assignment, mortgage &c. 1 Bos 234. Executed contracts are those which change the property - convey a chose in possession. E.g. A. agrees to change horses with B. immediately, or upon some event that shall give the contract full effect. A man having lands under engagement disposes thereof, from the time such engagement ceases. In case of executed contracts neither party hurts the other. 1 Bos 175: 234. 2 B.C. 448.

Executory contracts are articles, memorandums, promises &c preparatory to more solemn and formal alienations of property, or precedency - They convey choses in action. E.g. Promise to change horses next week. 2 B.C. 448. 1 Bos 234.

Here either one trusts the other, or both trust each other. A loan of money is made on a promise to secure it by mortgage - here only one trusts. 1 Vern 235.

2 dly Contracts whether executing or executed are either express - constructive or implicative. 1st Express i.e. where each party stipulates in positive terms 1 Vern 236. 2d Constructive i.e. those which the law raises from an imprisonment, tho it does not prima facie import them. 1 Vern 236. So a lease of tithes to a parishioner for a year, is not good as such without a deed - yet the law construes it as an agreement to discharge from tithes. 1 Vern 236. Cro J. 137. 669. Yelv. 131. 2. Lev 24. Sir Raymond 14. Skin 113.

So recitals in a deed amount to agreement by construction. E.g. the following words in a deed Poll "Whereas I am proposed &c I agree" amount to an agreement that I am proposed &c and a covenant to perform all agreements in the deed - extends to this as well as others. 1 Vern 237. 1 Lev. 122.

So a recital upon marriage articles that "Whereas the Deft was to pay to the Plff £1000. the Plff covenanted" &c will support an action of covenant, & Plff will recover payment. 1 Vern 238. 2 Vern 57. et vide 3 B. & Bg & ca. ab. 651. 2.

So an exception in a deed indented is an agreement, for general words bind both parties - E.g. A. lets land to B, excepting the close of E. Cro E. 657 1 Vern 238. But it seems that the agreement in this case imports merely that the land excepted shall not pass by the demise - tis not an agreement that lessee shall not occupy. So a dispersion as to the land excepted is no breach of covenant. Cro E. 657. Vaux 947. 1 Roll A 102 pl. contra 1 Vern 69. 1 Lev. 117. 1 Vern 239.

But if the exception be of something delivers which the lessor had not before, this is an agreement that Lessor shall have it. E.g. A lets land excepting a way or profit. 1 Rows 241. distuebing the lessor would be a forfeiture of an obligation to perform all covenants.

To a covenant on the part of the lessor that Deft may cut wood for fire-bote and hedge bote without making waste a cutting more than is necessary, is the agreement of lessee, by construction. 1 Leon. 324. 1 Rows 241.

To a reservation of rent is the agreement of both parties — on the part of the lessor for the reservation and of lessee for to take the land at the rent proposed. 1 Rows 242. Co 2 b 57. 2 Dyer 57. E.g. Lease containing the words "yielding & paying". binds the lessee by his acceptance. Styles 407. 431. 1 Vent 70. 1 Roll 519. A lease "without impeachment of waste" gives the lessee the trees growing on the estate demised. Holt 132. 1 Rows 248.

To the words "it shall be lawful for lessee to carry away the corn growing at the end of the term" are sufficient to transfer the property. Holt 132. 1 Rows 243.

In all these cases the intention of the parties is the only thing that the law respects. 1 Rows 243. 4.

So of an obligation have a condition indorsed upon it in the hand of the obligee — it will be considered as a part of the agreement. 1 Leon. 246

3. Implicative contracts are such as arise by act and operation of law out of circumstances. E.g. Money had and received — paid by mistake. 1 Rows 244

So where one hath the custody of goods belonging to another, the law

implies a contract to take care of them according to the nature of the Bailment. As the several sorts of Bailment and the degrees of care required in each case vide title Bailment. 1 Bow 246.

Where a Sheriff levies money on a levari facias &c and does not deliver it, the law implies a contract on his part — debt lies upon it. Hob 206. 1 Bow 255. If one man cloaths another's wife, the law implies that he intends to give her the cloaths. 3 Co 3 b 4. Winch 22. 1 Bow 256. So if a man delivers wares or stuff to another's wife (knowing her to be a feme covert) this a gift. 1 Bow 256.

The law implies an agreement that the grantee of a subject shall have every thing necessary to the full enjoyment of it. E.g. Grant of trees is an agreement to suffer grantee to come and cut and carry them away. Plowd. Com 15. 1 Bow 257.

Again, if a man licence another to lay leaden pipes in his land — the law implies an agreement that grantee may enter and dig up the land to mend the pipes. 1 Saund 322-3. 1 Bow 257.

If A. sells land to B who afterwards becomes a bankrupt before all the purchase money is paid — Equity implies a contract that the land shall stand charged with that part of the purchase money, which has not been paid. To give this agreement effect Equity considers the purchaser as a trustee for vendor. Bro Ch. R. 423. 4. 3 Atk 272. 1 Bow 257.

If a lessee continues peaceably to enjoy the thing leased, after the time stipulated for has elapsed, the law implies an agreement on the part of lessor to suffer him to be tenant from year to year, and on the part of the lessee to pay

the rent originally agreed upon. 1 Bos 258.

III. Contracts are either absolute or conditional.

1st Absolute, as where one party obliges himself without any condition, or qualification to perform a duty. 1 Bos 259.

2d. A conditional agreement is one whose obligatory force depends in some respect upon some uncertain event. 1 Bos 259. 1 Bos 260. Park on 712.

If A and B, bargain and agree that B shall go on A's land and see his corn and if he likes it, he then shall have it — here my Proval is a conditional contract which is binding on A, if B, likes the corn, not otherwise. 2dly. as to its obligation on A. vide 2 R. Cook on Stoly. 1 Bos 261.

So a contract to pay for land as much as A shall say it's reasonably worth is a conditional contract which binds both parties after A's judgment is expressed. Dyer 91. 1 Bos 261.

Conditions are either precedent or subsequent. Precedent are such as must happen before the estate can vest or the contract become binding. 2 B.C. 154.

Subsequent are such that on the failure or non performance of them a contract may be defeated. Eg. Limitation of an estate for life to A on his marriage, this is condition precedent. Grant of an estate in fee reserving the right of entering and avoiding the estate on non payment of rent. this is condition subsequent. 2 B.C. 154.

Conditions are also either lawful or unlawful. unlawful conditions, and those which are repugnant to the nature of an estate created by the

contract are void. Eg. a grant of an estate in fee to J.S. on condition that he kill A.B. – A feoffment in fee on condition that feoffee shall not alien, or shall not take the profits. 1 Rep 261. 2 Bac 156. 7. Co Litt 206. Cro J. 596. 2 Roll 233.

If a man be bound to pay £100 to J.N. with condition that he do an act malum in se, as kill J.S. the obligation totally is void. Object in both these cases is to remove temptation – in the former from obligee – in the latter from obligor. 1 Rep 260. 2 Bac 340. Co Litt 206.

But a covenant or bond with a condition that feoffee shall not take the profits &c is good – because here is no total bar to alienation, or taking profits. 1 Rep 262. 3 Mod may by incurring the forfeiture. Stated infra.

Conditions are also possible and impossible.

If the condition be impossible at the time of making the obligation, the condition is void, the obligation single. 2 Bac 340. 1 Rep 266. Plow 32. Eg If a feoffment be made to J.S. on condition that he go to Rome in 24 hours – the condition is void – the estate absolute.

If a condition possible at the time of making a contract executed, be annexed to it, and become impossible afterwards by act of God, or of the law, or of obligee, the estate of feoffee (as case may be) is not avoided Eg Feoffment on condition that feoffee go to Paris – feoffee dies immediately – the estate is absolute. 1 Rep 265. Co Litt 206.

But if such a condition be annexed to a contract executory – the penalty of the obligation is saved – Eg. ct bond with condition that obligor appear the next term in court – obligor dies before the day. 1 Rep 265. 2 Bac 341.

In the first case the estate was settled on the feoffee, liable to be defeated by a subsequent condition, which never could happen. In the latter case no advantage could be taken of the bond until there be a default and no prudence or foresight could guard against the contingency. 2dly. vide 3 Burr 1699 where it is decided that obligor if his covenant be absolute is liable even tho he is prevented by act of God from fulfilling.

If an impossible or unlawful condition ut supra be also a condition precedent, here as the condition is void, the estate which depends upon it is also void. But if such condition be subsequent the estate is then absolute. 2 Bac 156. 7. 2 Bro 266.

It is said that if an impossible condition is incorporated with the bond, or recognizance &c the obligation is itself void - But if indorsed or underwritten, secus. 1 Salk 172. 2 Bro 267.

If on bargaining for an estate, the conveyances are agreed to be made, & the money paid at such time and place, those circumstances are not conditions but merely modal - they admit of compensation, but do not annul the contract. Hogs maxims 89. 1 Bro 268. 9.

Of the consideration necessary to support contracts.

A contract is an agreement upon sufficient consideration to do or not to do a particular thing. 2 Bac 442

According to this definition a consideration is of the essence of every contract. Consideration is the material cause of a contract, that, in

expectation or on account of which each party is induced to give his assent. 1 Pow 330. 2 BC 443.4

Two kinds of consideration, good, and valuable. 1st a good consideration is such as that of kindred & natural affection between near relations. 2 BC 444. 297. 3 Co 83. 1 Pow 361. 10 Com 427.

Such a consideration in contracts executed (1 Salk. 337.) is sufficient as between the parties. Eg. Grants by deed from father to son. But as against Creditors of Grantor and bona fide purchasers, generally deemed fraudulent and set aside. 2 BC 297. 3 Pow 222. 339. 1 Eq. Cas Ab. 84. 2 Atk 152. And an executory contract on such consideration may be enforced in Chan. in many cases. 1 Pow 361. 369. 10 Com 427. 2 Vern 176.

2dly valuable - consists of something valuable as money, goods, labour, marriage &c 2 BC 297. 3 Co 83. Indemnity to promisee for becoming surety 1 Burr 482. Contracts on valuable consideration may be made in either of four ways, 1st. By stipulating there do ut des - as loans on bond or promise - sales on contracts express or implied to pay &c

2. Facio ut facias, as when labour or service is to be performed on both sides or forbearance on one side and some act on the other, a mutual forbearance.

3dly Facio ut des, as an act to be performed for reward.

4thly Do ut facias - counterpart of the last, or the last inverted, as giving or agreeing to give something for an act to be done. 2 BC 444.5. 1 Pow 335. 6. Contracts are divided into two kinds - 1st Special contracts, 2d simple contracts. 7 J. 2 351 n. A special contract is one which is entered into and evidenced

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by Specialty i.e. by deed or writing sealed. 2 BC 465: 2 Sm. Leadit 171.
A simple contract by the Engl: law is a contract by parol or one written but not sealed — a contract in writing and not sealed, and a parol contract are upon the same footing in point of solemnity: 7 DR. 351 note: 2 BC 465-466.
In connect. all written contracts sealed or not are treated as specialties, here therefore simple contracts are always verbal. And the Engl: law relating to specialties applies here to written contracts not sealed as well as to sealed.
1st It is clear that an executory contract by parol is not binding without a consideration. 1 Saus 330. 355: 2 BC 445: Salk 129. Raym 302. 309. 3 Lev 30 & 336. 2 Roll Rep 309. 1 Salk 126. 1 Ventr 326. 333. 5 DR 143. Ludam factum, and ex nudo pacto non oritur actio. E.G. a promise to give me £ 100. to labour without reward &c
2d. But by Wilmot Justice in Pillans &c a contract in writing is good without consideration at Common law. 3 Wils 1670. 2 BC 446.
This proposition not defensible - 1 Saus 333. 342. 2 Do 242.
Ever just by Blackstone of a promissory note (2 BC 446) - But as between the original parties, actual consideration is necessary, and at Common law must be proved. Chitty 51. 52. 5 G. 1 Doug 341. 7 DR 351. n. Doug 514. 7 DR 121. Ryd 155. 3 DR 421. 7 T. 7. 1 Ventr 335. 4 and 242. Stra 674. Burl 274.

When a negotiable note is negotiated, promisor cannot aver the want of consideration. Because a third person becomes the holder and the law merchant governs. 1 Saus 341. 2 DR. 71. 1 Ventr 335. Same & plaintiff or third persons

Policy merely then assuming a contract to exist does not supersede the necessity of consideration.

2d Q. Not I conceive that in strictness and judgement of law, consideration is necessary to the validity of a sealed instrument or specialty - the 1st Deft need not prove consideration & 2d Deft cannot at law avow the want of it. For 1st from the solemnity of the instrument a consideration is implied - 1 Rous 232. 3. Bland 308. 8 Burn. 1637. 1 Rom 16. 334. 2 B 6446. Hard 200. 2d Consideration being implied if Deft might disprove it, he might contradict his deed, which cannot be. 1 Ran 340. 2 Ab. 225. Plow 434. 1 Hen 8 444. D Reg 729. 1550.

Suppose that the want of consideration appears on the face of the specialty - void I apprehend - so considered it seems. 2 B 577. 4 Bac 2072. 3 Bo 1634 732 477. 3 Bo 438. so decided in our court of Errors. 1 Ran 368. 7 640. 2 Litt 152. Result. that on principle a consideration is necessary to the validity of a specialty. But that his binding unless the want of consideration appears on the instrument or some other instrument of equal solemnity which is parcel of the contract.

So considered on all hands in Comnet in Pettibone v Bacon Court of Errors 1797. Action on note (a Court specialty.) Bond given at the same time disclosed the consideration. Action holden to lie, because there was a sufficient consideration disclosed.

1 Ran 341 2, that on voluntary covenants under seal, only nominal damages recovered at law - This supposes the contract obligatory. But is the want

If consideration expressed to appear in the instrument? What does he mean? Probably that on the writ of enquiry the want of consideration may be proved to mitigate damages, not to affect the right of action.

The rule that a consideration is necessary to every contract applies in its full extent to executory contracts only. A contract executed by the delivery of the subject is good without consideration as between the parties as a gift. 1 Bac 298. Doug 20. 21. Bl 577.

Holden in Connect. that the consideration expressed in a deed of land is conclusive evidence between the parties of the existence and nature of the consideration - Presumptive only as to the amount and receipt of it. Mass 477. 477.

Decided that indeb. assumpsit lies not for the price - consideration being acknowledged to be received. Brace vs Catlin.

A consideration may arise in two ways - 1st from something advantageous to the party promising or undertaking - 2dly From something disadvantageous to the party in whose favour &c 1 Vern 342. 1 Salk. 336. 1 Com 149. So a promise a rule - 2 Mansfield - Swanston 290. 294

1st From something advantageous to promisor &c E.g. A consideration of my selling my horse to J.S. to day he promises to pay hereafter - Here the consideration is something advantageous to him. The quantum of consideration is immaterial, to him the law does not regard proportions - sufficient if any consideration Bl. a peppercorn. 1 Vern 213. 2 Vern 152. 1 Salk 280. 2 Levy 5 18. Less of a rath - no value. Idle, insignificant considerations are not deemed considerations. Vern 855. Bl 94. 2 Salk 28. Cro E 206.

for any thing however trifling to be done by him in whose favour &c is sufficient consideration. E.g. A leases to B, B assigns to C rent be comes due and C promises to pay it, if A will shew him the lease - Shewing the lease gives A an action on the promise. 1 Bos 348. Cro E 67. 150. Cro C 70. Dyer 272.

The mere relation of landlord and tenant is sufficient consideration for a promise by the latter E.g. declaration stating Deft to be tenant &c and that in consideration thereof he promised to carry away from the farm, thrashing &c - holden sufficient. 5 B. R. 373

2dly Draw something disadvantageous to him in whose favour &c E.g. A having a bond against B, delivers it up to be cancelled on B promising to pay the contents. 1 Bos 344. 348. Holt 4 & 5. Cro J. 342. Cro E 74. 75. 849. 881. Holt 216. 1 Salk 22. Cro 128.

General rule. A contract is not supported by a consideration altogether past and executed - E.g. In consideration that one has bailed my servant a discharged me of a trespass, or built me a house gratis. I promise to pay &c not binding. No subsisting consideration - no benefit or disadvantage to either by the promise. 1 Bos 348. Dyer 272. 1 Bos & Pul 302. Cro E 442. 1 Salk 11. 2 Ld Raym 738. Esp 95. 87.

But tho a part of the consideration be past yet if a part is subsisting, the contract may be good E.g. Lessor in consideration that lessee had occupied and paid the rent promised to save the latter harmless - good. The occupat &c was past. yet lessee continued in possession and was to pay future rent. 1 Bos & Pul 349. 350. 2 Ld Raym 738. Cro E 64. Cro C 409. 3 Salk 96.

So a contract on consideration executed is good if there was a previous legal duty or promise - E.g. one in consideration of a previous indebtedness promised

to pay - Where the duty continued - so when Deft promised in consideration of Pltff having buried his child. Hut 43 Eliz. 1 Rep 350, 1. 1 Roll R 413. Idem 2 198. 2 Lay 260. Cro E 138.

So if there was a prior moral obligation on promisor, this is a sufficient consideration - E.g. Promise to pay a just debt, barred by Stat. of limitations. 16 445. 1 Rep 351. Cro 290. 294. 1 South 336. Lay 259. Esp 95. Bul 147.

So promise by putative father to pay for past nursing of his natural child - not sufficient to raise an implied promise. 2 East 506.

So consideration past will support a contract if the consideration is at the request of the promisor - for the contract thus subsequent completes itself with the previous request E.g. Promise to pay in consideration that pltff had at my request killed my servant. 1 Rep 351. 2. 2 Vent 268. 6 Salk 96. 1 Bulst 120. Dyer 272. Cro 6409. Holt 105. Cro 718. Cro E 42. 282. Esp 95. 1 South 336.

Et mere stranger to a meritorious act done by another cannot support a contract upon it in his own favour - for he does nothing advantageous to promisor or disadvantageous to himself. - Stranger to the consideration - E.g. A, in consideration that B will acquit him of a bet pays promises B, to pay, 6 £ 100. 1 Rep. 348. 358. 3 T R 330. 1 Vent 6. Raby 168. Chitty 220. Cro 3 697. 7 Bell 4141. 597. Ld Raym 142. 1 Vent 318. 332. 3 Mod 117. Comb 443. 4 Mod 24. 3 B & Ald 35. 6 5 Bac 260. 261. 186. 4 Vin 15. 6 Bun 2680. Esp 576. Bul 35. 1 T R 659.

But a consideration moving from one side support a contract in favour of a near relation - E.g. Promise to A, in consideration that he would perform a vow to pray his daughter. 1 Rep 358, 1 Vent 318. 332.

When forbearance of a suit is the consideration there are two requisites
1st It must be either general ie total or for a certain period 2dly It must
be of an action in which the promisor or person said to be liable is chargeable. 1 Wms 353. 4. Ves & B 206. Esp 95.

1st Ergo promise to pay a debt in consideration that Plff would abstain
from suing, no time being limited and forbearance not being expressed to be
total, not good. 1 Wms 353. 4. Ves & B 19. 455. But promise to forbear a year or a
reasonable time is good. Ld Ashleydge what is reasonable time. 2 Wms. Esp 95.
Skelton 108

2dly Promise by a mother to pay a debt due from her son who was dead, if Plff
would forbear to sue her not obligatory. No consideration. She not liable.
Forbearance no favour to her. no disadvantage to promisee. 1 Wms 354. 5.
Wandp. 73. 3 Salk 96.

So if one is arrested on void process, and another in consideration of his
release promises to pay &c not bound. No consideration. 1 Wms. 355-6. Esp 96
Privateers, groundless, Wand 73.

A promise by A to pay B debt if the creditor will forbear to sue A for 6
months, not good at common law, for he might sue B immediately. ergo no
prejudice to creditor. 1 Wms 356. Wand 73.

But a promise in consideration of forbearing a suit is good, if there is a
colourable ground for the suit. E.g. Infant having bought silk and velvet
died. His Exor in consideration of forbearance promised to pay. good at
common law. Here was colour for a suit. the being Exor. 1 Wms 356. Selch 142.
Esp 272.

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When a promise is in consideration of performance &c the original cause of action is not to be enquired into - it acknowledged by the promisor. Wms 357. Holt 18.

Covenants viewed with a reference to their consideration may be divided into three kinds. Doug 665.

1. Where that which is stipulated on one side is in consideration of performance of what is stipulated on the other, the considerations are termed mutual - E.G. I agree to pay 5£ for doing a certain act - & hence the doing &c is a consideration precedent to his right to the payment. Wms 357. 1 vent 177. 214. 3 Salk 95. 13 mod 380. 1 Hen B 274. 5. T. et seq. 760. 10. If he sues for the price he must aver performance &c (7 R. 130.) or what is equivalent to it, an tender, or that he was prevented by Defts 1 R 638. 5 545. 2 Raz 686. Doug 259. Stra 1286. 5 Com 50. 1 Roll 456 - for that he was at the place, ready to perform and Deft absent. 1 East 203. 619. 7 R 125. Stra 458. and so prevented from performing.

2dly. Where performance on both sides is to be concurrent - neither can compel the other to perform, but he has performed his part or offered &c, and was at the place appointed ready, the other being absent - or is ready and demands performance and the other refuses. E.G. to promise to deliver a load of wheat, on such a day for such a price. 1 Saund 320. 5 Com 50. 1 East 619. 621. 7 R 125. Salk 121. Doug 659. 665. 688. 4 T R 761. 1 Hen B 364. 8 R 366. Stra 539. If a place is appointed for performance tis sufficient that Pff was there ready and Deft absent - no tender necessary. 1 East 208. 208. 7 R 125. Stra 458. Salk 113.

Doug 688. 4 T.R. 761.

If in this case Deft was to perform on request, that Plff was ready & requested and Deft refused is sufficient. 1 East 103.

If then the agreement is that one shall do an act, for doing which the other shall pay, the doing is a condition precedent. supra. But if according to the terms, the money is to be paid on a day which is to arrive a may arrive (1 Saund 320a&b) before the act can be performed, the doing is not a condition precedent. Hence action lies for the money before the thing is done. 1 Salk 381 8 Mod 142. 5 viner 71. 2 Ray 662. 1 Wms 338. Salk 171. 7 Co 10b. 1 Ventr 147. 1 Saund 319. 2 Wms Saund 389. 7 T.R. 180. Some indeed the payment is a condition precedent: so if in the last case where a day is fixed for payment, and no time is fixed for performance on the other side. 1 Saund 320a

But if the day appointed for payment is to arrive after the time fixed for doing the act, performance of the act is a condition precedent and must be averred in an action for the money. 1 Wms 338. Salk 171. 3 Salk 95. Dyer 76. 1 Roll 114. 15. Contra - civil law 1 Saund 320b.

3dly. But where the promises are mutual i.e. where the promise on each side is the consideration of that on the other performance is not a condition precedent on either side: either may sue without averring performance. 1 Wms 359. 360. 1 Ventr 177. Doug 665. 1 Ventr 214. Holt 98. 1 Lev 293. 3 Bulst 197. Wood 102. Salk 24. 5 Mod 411. Hence in Equity. Here Plff must aver performance or readiness to perform, the covenants &c are mutual in Equity will not interfere. 1 Ventr. 445. 412. 2 Freeman 35.

9 East 393

said by Lord Ellenborough in this case "that all the
cases of conditions precedent have been where the
thing to be done was a strict indivisible condition"

Contracts.

If the agreement is in this form - "I promise to pay £100 in 6 months, you transferring stock and e converso" the promises are not mutual and neither can compel performance till he has performed. Salk 112. Holt 663. (vide 2 B & P 312-2 a. 40 to this case in Black[e] vide 8 T R 372. & 3. 4. & 5.) 1 Bouth 382. 12 and 503. 1 Han B 270. 4 T. R. 761.

Where the covenant &c goes only to part of the consideration on both sides and a breach of it may be paid for in damages tis independant. 1 Saund 320 b 2 a. Will action lie unless Plff has performed in part. 1 Saund 320 c. 6 T R 570. 1 Han B 273.

The question whether promises are mutual or dependant is to be determined by the meaning and understanding of the parties - to be collected from the spirit of the agreement and the nature of the contract i.e. from the order in which the intention requires their performance. Doug 665. 1 T R 645. 7 Ves 480. 6 Ves 570. 668. Salk 171. 6 T R 378. 1 Saund 320 a note.

When the promises are mutual i.e. independant - tis no bar to an action that Plff has not performed his part. Doug 665. 2 B & P 312. 1 Bouth 382. 3 Leo 41. 1 Leo 16. Cowp 56. Each may have a cause of action against the other at the same time. The English courts have leaned of late against construing promises independant. 4 T R 761. 8 Ves 371. Grose Just. arguendo Willes Rep 496. 1 East 619. Mutual promises must both be binding or neither will and both must be made at the same time seem nuda pacta. 1 Ves 360. Salk 24. Holt 438.

The mere act of entrusting property with another on his undertaking to do something respecting it is a sufficient consideration. 2 Day 909. 919. 910. 920. Esp. J. 667. 5 T R 143. 1 Ves 364. Com 193. Salk 26. 3 Salk 11. 583. 4. Esp. Delivery of money to be

delivered over to another without reward.

The preservation of the honour and peace of a family holden sufficient consideration in Chan.r Eq. of agreement between father and son and natural child to prevent family disputes &c. 1 Vern 362. 1 Eq Ca Abr 3.

So the compromise of a doubtful right holden sufficient in Chan.r 1 Vern 368 1 Eq Ca Abr 10. 1 Vern 4. 2 Vent 359. 2 Chan Ca 284. Settling boundaries of land 1 Vern 368. 2 Eq Ca Abr 152.

Not necessary in contracts that the consideration be expressed in direct terms, sufficient if one can be collected out of the whole agreement. 1 Vern 368. 1 Eq Ca Abr 58. Eg Agreement for settling boundaries.

But if an express consideration appear upon the face of a contract, the better opinion is that no other can be implied – expressum facit cessare tacitum. 9 Co 46. 1 Vern 368.

All cons. also found in the consideration of a contract does not in general vitiate it, but fraud in the execution does. 2 Bl Ca 804. 2 Ca Ca 39. 1 Ca Ca 27. 2 Bac Ca 611. 2 Swift 112. A point wanted in the second case – but in the first it had got his end that fraud avoids every kind of act. 1 Vern 395. 4 Co. 22 b. 5 Co. 26 b. 9 Co. 66 b. 286. 306 ff. How is this to be understood?

But Chan.r will relieve against contracts for fraud in the consideration. 2 Vern 445. vid 2 Vern 203. 3 Co 29 b. At law the party defrauded must resort to his special action for the fraud.

In one case however the court of B.R. seems to have considered fraud in the consideration of a covenant a good defence. The circumstances of that case however were peculiar. Perhaps other points in it influenced the decision. 3 T.R. 438.

But are courts have holden that a total fraud in the consideration of a note i.e. where the promisor has received nothing, is a good defence at law. Root 58. 315. Eq. Susquehanna ab. Bands - ergo in such cases relief cannot be had in Equity. Knight vs Hagan.

Seem where the fraud is partial - here the relief is in Equity for courts of law must give judgment for the whole amount, or for Deft, cannot apportion.

But tho the fraud is total, yet if the obligation is not in suit or if all the obligations are not in suit, relief may be had in Equity - seem the promisor would remain in jeopardy till promisee would bring the case to trial at law.

Contracts and agreements required to be written.

The common law distinction between special and simple contracts, ante. There is also a distinction between written and unwritten contracts introduced in certain cases by Stat of Frauds &c 29. Car 2d. 1 Bac 72. 3 B & P 159. 1 Bos 264.

Our Stat on the same subject was enacted in 1771. and is (as far as it extends to the same objects) substantially a transcript of the Engl.

Under the Stat of Frauds &c the following contracts or agreements will not support an action or suit in law or Equity, unless the contract &c or some note or memorandum is in writing signed by the party to be charged or by some other person by him authorized. 1 Bos 270. Stat Law 216. 1 Bac 72. 2 B & P 159.

1 Promises by Ex. or Admr. to answer out of his own estate for any debt or duty of his Testator &c i.e. such a promise, not in writing does not

paid him in his private capacity.

2dly Promises by one to answer for the debt, default, or miscarriage of another.

3. Upon consideration of marriage.

4. Contracts or sales of lands. tenements &c or any contracts for the sale of any interest in, or concerning them. Contracts or Sales, i.e. contracts for sales, or Sales. 5thly Contracts not to be performed within one year, from the time of making them.

A clause in the Engl. Stat relating to contracts for the sale of goods &c of £10. value, not material here. Extends as well to executory contracts as to contracts of sale to be executed immediately. Rob III. 2 W.B. 63. 7 DR. 4

By the Engl. Stat all parol sales or leases of lands &c Rob 240-7 or of any interest in them, operate as leases for a term not exceeding 3 years or estates at will only, except leases for a term not exceeding three years, reserving as rent 2/3ds of the improved value. 4 DR 680. 3 DR 16. now holden tenancy from year to year 3 DR 9. In Connect all parol leases &c are invalid.

2d Engl. by Stat 11 Geo. 2d an action of indeb. assumps. lies on a parol demise. Ex. p. 20. post. The object of the Stat was to prevent persons from proving agreements of the above description by parol evidence — it being supposed that there was danger of fraud and perjury in doing it. 1 Wms 269. &c

Qualifications of the foregoing rules.

1st As to promises by Exrs &c it has been said of the Exr &c has assets to answer &c, his parol promise shall bind him. Assets constitute a consideration, and advantageous to himself so as to charge the duty to him personally. 1 Wms 126

Cow 284. 289. 5 3 R 8. Cro Eliz. 1 vesey 125. Ru. no authority vide infra. 7 3 R 350. 1 Rob. 206. 7.

But proof of a sufficiency of assets will clearly not raise an implied promise to charge the Ex.x personally. 5 3 R 695. once holden contra by Lord King - Case cited Cow 288. 7 3 R 350. 1.

Administrators submitting a claim against them to arbitrament, once holden (obiter) to be an administration admission of assets. 1 3 R 692. this opinion overruled 5 3 R 6. 7. 1 Rob 692. 453 for an Admr may be desirous of ascertaining the existance or amount of a claim, without knowing that he has assets. But if on such submission the arbitrator awards that the admr shall pay a certain sum he cannot afterwards deny assets to that amount as against the other. Is equivalent to a finding of assets to that amount. 7 3 R 453. Same rule as to Executors.

Once holden that payment of interest by Ex. was an admission of assets to the amount of the principal - or rather that it throws the onus probandi on Ex. - Unreasonable - overruled 5 3 R 8. Acceptance of bills of exchange by Executor Ex. is an admission of assets. Chitty 52. 83. 112. 1 Hen B 622. 2 Bos 1. 2 Str 1260. 3 Burr 1223. 13 R 187. Bills & Notes per by holders Ex. Chitty 111. 112. Scott 1. &c. - In bond that the promise by Ex.x to be in writing, he is not bound unless some sufficient consideration be proved on oath as forbearance - simple contract only - The object of the Act was not to be to make Ex.x liable at all events, when the promise is written, but in those cases only in which before the Act he would have been liable on a parol promise. Rob. 202. Vesey 126. 7 3 R 350 n. Ru. In Contract as every

writing is a specialty. To take advantage of this clause Deft must have been Ex'or when he made the promise. Rob 201. Stark 330. Not necessary to averr assets, Deft is subjected if at all de bonis propriis. Rob 205. 6. Held there must have been an existing debt which bound the Ex'or as Ex'or - else there can be no consideration. Rob 206. note 2. Sand 136. Cro J 347.

2dly To answer for the debt &c of another. Under this clause, this general distinction is to be observed — if the promise made for the benefit of another is original, tis binding, tho parol - else if collateral. 2 Roll 1087. Cro 227. 1 Wils 306. Esp 101. 2. 3 Burr 1888. Eleguendo.

A promise is said to be original - 1st when the third person for whose benefit tis made is not liable at all to the promisee, so that there is no debt &c on his part. Rob 209. 216. and 2dly when his liability is extinguished on the promise being made. Rob 223. 224. Questioned post (Statute of the Statute) - 3dly Where there is a new consideration arising out of a new and distinct transaction and moving to the promisor. - Rob 232. But where the promise is merely in aid of a subsisting and continuing liability on the part of such third person - or to procure credit for him - i.e. where the promise is intended to furnish an additional remedy - tis collateral and within the Statute. Authorities to this distinction are 5 Mod 205. 2 Wils 94. Ro 306. 2 Roll 1085. 1086. Salk 27. Cro 460. Esp 101. 2. 1 Bos & P. 158. 1 Wm B 120. Exceptions - 1st A says to a merchant "deliver goods to J.S and charge them to me" or "deliver them on my account" or "deliver and I will pay you" - original for J.S. is not liable at all. A is

the original debtor. 2 Wms 81. 1 Hen B 120. 2 Ray 1087. Rob 209. 216.
But if it has said "deliver - ut supra, and if he does not pay I will, tis collateral. Cowp 227. Here the intent is that the charge should be in the first instance against the receiver. 1 Hen B 120. 2 Ray 1086. Salk 28. 8 f 102. Cowp 228.
If I lend my mother in law with head and I will see you paid - holden collateral. Rob 223. 2 Ray 224. because of the intent as in last case. Wms 2 158. cited 2 Wms 80. 81. Salk 28. contra obiter - 2 Ray 254. Ld Mansfield once held that such a promise before the delivery of the property was original - there being then no liability on the 3d person. cited Cowp 228. 9. overruled vide 2 Wms 81. Rob 209. 200. When the promise is in this form the court are at liberty in collecting the intention, to consider all the circumstances of the case, and the situation of the parties. 1 Bos & P 158. Rob 212. 40 223
If you do not know J.S. you know me and I will see you paid. collateral J.S. to be first charged. 2 Wms 80. 8 f 101. 2.
If a promise by me that in consideration of your letting a house to J.S. he shall redeliver him - collateral - This is undertaking to answer for default of another - Rob 232. to procure him credit - J.S. is liable on the bailment. Salk 27. Rob 219. 232. Cowp 748. 2 Ray 1085. Holt 606. 3 Salk 15. 1 Bac 75. 6.
If promise is by one of several persons already liable, not within the Statute of Frauds. Promise to pay costs by one of two Defts Rob 229. 5 Mod 205. Comb 362. 2 East 325. 5 Mod 213. 2 Stra 1184. to come in infra -
If no general rule a promise that a third person shall do an act, for not doing which he would be liable - tis collateral - 2 Ray 1085. —

But if A. promise B. that in consideration that C. shall pay, and if not he A. will - C. not being privy to it - the promise is original - C. not liable - Rob 228. Peto 302. To make the promise collateral it is necessary that the party for whose benefit it is should not only be liable but that he should be or become liable at the time when the promise is made and upon the same contract which promisor makes or appears - E.g. last case Dr Ray 2 1085-7 Rob 219. & 222 & 232.

2dly. A promise in consideration that promisee will extinguish a debt against a third person - original - not in aid of a continuing liability in the third person - or to obtain credit for him. E.g. Bran J.B. lend and I will pay the debt. Rob 228. 4. 5. 1 Mod R 130. 8 Burr 2500 admitted - Qu. Collateral not used in the stat. Debt &c of another are the words. Rob 224. Lodge. whether the rule is not correct - What is promisor to pay? not J.S.'s debt - it is extinguished - the former debt ag. J.S. is only a rule of damages. Where promisor is purchaser of the debt, it is clearly not within the Statute. Rob 226. 1 Mod R 130. 2 East 325.

3dly. So in Williams vs Leper where Landlord came to distrein J.S. goods for rent - the Deft to whom they had been assigned promised to pay the rent if W. would not distrein. Holden good tho' J.S. remained liable. W. had a lien which he gave up in favour of Deft on his promise to pay - Consideration arising out of new and distinct transaction and moving to the promisor. 3 Burr 1556. W. was in consideration of the goods being discumbered in Defts favour. Like a promise to pay another for resigning his property to promisor. Salk 25-28. 2 East 325. Dr Ray 759. 3 Esp 86.

Contracts.

A promise to pay a certain sum in consideration of Plff withdrawing a suit against J.S. for assault and battery or any tort-holden original. The debt due from J.S. - did not appear that there was any default in him. Vide 2 Day 457. 1 Wils 305. 7 T.R. 264. Robs 209. 233.4 There must exist a debt or duty ascertained or capable of being ascertained, at the time of the promise. Robs - supra.

But a promise to pay in consideration of promisee staying a suit brought against J.S. for a debt - is collateral. Debt subsists against J.S. - no lien taken away - Robs 200. 2 wils 94. 3 Burr 1887. et seq. 2 T.R. 201. Both 233.4. 2 H.B. 312. Suppose this promise to be in consideration of promisee's withdrawing - would it not be good in Engd - as a release disables the Plff even to bring another suit - original - 3 B. & P. 296. So that J.S.'s liability is extinguished. A. Consent not good - like release has no such operation.

Promise to pay J.S.'s debt if Plff would release J.S. taken on mesne process, collateral I suppose, for debt continues, and J.S. may be arrested again. Suppose J.S. absconds - mesne. I conclude if he had been taken on final process and were then released, for releasing would discharge the debt. 4 Burr. 2492. 1 B. & P. 557. 6 D. & E. 525. 7 D. & E. 421. Rest. of contra.

A person who had stolen property being taken (tho not under legal process) his father promised to pay for the goods in consideration of the son being discharged - promise holden not good in Council. compounding felony. The Statute has nothing to do with it - no debt, default or miscarriage within the Statute supra. 1 Wils 305.

some have supposed that where there arises a new consideration, a parol promise to answer for the debt &c of another is good, whether the consideration moves to promissor or not, and whether the debt is discharged or not. 3 Burr 1887. Arguendo. Amb 330. Forbearance of a suit not law - collateral - original cause of action continues. 2 Wils 94. Bull NP 281 Rob 233-2. Statute migatory. Com law rule the same Rob 233. Fitz 378. Rob 207.8 202. 7 TR 350. And tho the promise is in writing it is not good without consideration.

A written promise to pay the debt of another if he does not is discharged by promissee granting forbearance to the debtor. Kirby 397. If the promise is original, the common action of indeb. ass.t (not stating the special agreement) is proper - seems where it is collateral, special declaration necessary. Rott 216. Judicial confession by Deft excluding the necessity of proof will prevent the application of the Stat - &c. tender pleaded and money paid in court. Rob 238. Peak 15. 1 Burr 378. 3 Leo 363. 2 Ray 1085.

When according to the above rules the promise must be written in order to be binding - not necessary in declaring to aver that it is - sufficient if it appear in evidence. Ray 450. Bull 279. Rob 202. 156. 1 Bac 75. 3 Burr 1870. This rules holds as to all the contracts contemplated by the Stat. 12 mod 540. 4 Bac 655. Cro 289. 2 Root 146. Ergo, demurrer to the declaration supposes a promise in writing. 1 Root 77. 8. 7 TR 350 note Qu. in connect as all written contracts are specialties.

Form of such contract is pleaded by Deft in bar of another action. Rob 202 Bull 279. Ray 450. 2 Wils 49. But it is necessary in declaring to shew a con-

sideration. 7 DR 350. Ad 202. 207. A parol contract to pay the debt of another and also to do some other thing is void in toto. If one part of an entire contract is void, the whole is so. 7 DR 201. 204. 1 New R 130. Instruthen 420. 425. note Rob 173 note. Rob 112 note 231.

3dly Agreements in consideration of marriage - This clause relates not to marriages promises to marry - these are good tho by parol. Bull. 280. Fath 179. 1 Ves 65. 411 contra. 2 Ch Cas 286. Stra 34, Rob 190.

It relates only to agreements in consideration of marriage i.e. such as are made in contemplation of marriage by way of marriage settlement or family provision - These to bind must be written. 1 Ves 277 8. 10 Ves 160 618. Ante Chan 526. 2 Ch Cas 386. Bal 330. Stra 34.

Are exceptions to this rule - only in case of part-performance.

Formerly doubted whether a parol agreement would not be good if it was stipulated that it should be reduced to writing. 1 Ves 279. 1 Cas Ch 195. But such stipulation it seems makes no difference - does not take the case out of the Statute. 1 Ves 281. Pre Chan 402. 2 Vern 504. If however such stipulation is made and the execution of it prevented by fraud of the other party, and the marriage takes effect - Equity will relieve. 1 Eq. cas ab. 19. Rob 198. 186 7. And a parol promise on marriage is a sufficient consideration to support a settlement made in pursuance of it after marriage. so to support a promise in writing after marriage. Stra 286. 2 Eq 46. Vern jun 196. Rob 197. 200. A letter signed by one party is a writing within the Statute. 1 Salk 179. 1 Ves 279 8. 2 Brod 32. 3 Do 318. 1 Vern 201. 2 Do 322.

2 Vent 361. 1 Very jun. 330. 1 Vern 287. 8. Pr Chan. 560. 3 Atk 509. Rob 190. 1. 105 & 1 Eq ca 9.

But it must appear that the other party accepted the terms contained in the letter and acted in contemplation of them in proceeding to marry. Otherwise not binding. E.g. Where the party to whom the letter was sent was ignorant of the promise in it, at the time of the marriage - not decreed. 13 Ath 179. 193. 2 Ch Rep 165. Rob 192. 3. 107. 8. 1 Vern 287 & 2 Eq ca 9 and 8. E.g. Where A wrote a letter to his daughter which was not shown to her intended husband. 13 Ath. 193 Here no agreement. It must furnish distinctly the terms of the agreement. 13 Ath 179. Pr Ch. 560. Fin 426. 1 Atk 442. Rob 191. 106. 1 Vern 290. 2 Eq ca ab 17.

A letter written to one's own agent stating the terms of an agreement made by him, held an sufficient. 3 Atk 503. Rob 121.

4 Geo Contracts for the sale of lands &c or for any interest in them. 1 Roll 5 Eq. A thing annexed to land, if sold in contemplation of severance is not within the Stat. 2 Ray 782. Bul 282. 1 Bos & P 397. Ex. Trees growing - crops &c Rob 126. 6 East 602 n 2. contra 8 Bro P C 151. Bostick vs Leach. court of Exrs 1809.

Formerly doubted as under last head whether a parol contract would not bind if it was part of the agreement that it should be written. 1 Vern 283. 1 Chan 151. 1 Eq Ca ab 19.

Now settled that this makes no difference. 1 Vern 281. 3. 1 Peere 370. Rob 147. 1 Chan 221. 6 Bro Pa Cas. 45. Pr Ch 402. 2 Bro Ch 565 555. Parol promise to pay for land bought is good. Rob 77. 8. 179. Lee. Grace vs Cattin. Ct of Exrs 1804.

Once decided in Connect that a parol agreement by Guardian at the time of granting to pay for a deficiency in the supposed contents was within the

Contracts.

Statute. Riley 22. 1 Scott 73. Contra since Young vs Northop. Dags cases 23. Reversed by court of Errors June 1842 on common law principles.

But parol agreements for sale of lands &c are binding in some cases, the Stat. notwithstanding. Nature of such agreements under the Stat. good if shown to be consistent with the spirit of the act and the rules of evidence. &c inherent imbecility in the contract. the difficulty in proving. The Stat merely introduces a new rule of evidence to prevent frauds and perjuries. That the Stat ought to be liberally expounded vide 12 R. 601.

1st When there is no danger of fraud or perjury in enforcing the agreement, case will not be within the spirit of the act &c. If on a bill filed for specific performance the Deft in his answer confesses the agreement no danger of fraud or perjury in acting on such proof. 1 Ves 292. 27. 1 Vesey 221. 441. 2 Ch. Ca. 208. 374. 2 Eq. Ca. Ab. 100. 155. 3 Ves 8. 18 R 600. 2 Br. Ch. Ca. 568. et contra, 586.

Bowden says Where the contract is in writing, that is in the answer. 1 Ves 292. If the Deft in last case does not insist on the Stat. he is clearly bound. to if he expressly submits to a decree of performance 1 Ves 156 Setton 1 Pl. If Pltf alledges a written agreement, evidence of a parol agreement will be good, if Deft does not insist on the Statute. Qu. as to the first example if Deft tho admitting the agreement at supra insists on the Stat. can the agreement be enforced? 2 Ch. Ca. 208. 374. 2 Eq. Ca. Ab. Stat Chan. would decree it tho the Deft had insisted in not performing it. 2 Eq. Ca. Ab. 155. Deft did insist on the Stat. by pleading, yet he having confessed the agreement in his answer, the plea was overruled - agreement decreed. 2 Br. Chan. Ca. 568.

In the 1. Blackst. R. 600. rule laid down generally that an agreement confessed is out of the Stat. per Ld Mansfield. Decided contra at law ie. that if Deft having confessed the agreement by answer in Chan.y insists on the Stat, he is not liable on the agreement. 2 Hen. B. 63. 2. 6 vesey jun.r 548. Rob 157. 238. so by Lord Rosslyn. 4 vesey jun.r 28. 6 T.R 37 on 36-37. Rob 160. 1. so by Baron Eyre. 2 Bro Chan.y 563. 4.

So 2 Br. Chan 559. plea of the Stat was allowed tho the agreement was not denied. But this decision was on the special circumstances of the case. Ib. 564. The agreement was incomplete - only general heads of instructions to an Attorney - particular terms not settled - Rob. 160. 6 Bro 3. cas 45. cited 2 Bro Chan.y 567. 568. Here the agreement was not confessed. It remains quaere vexata. 1 Scotts 170. 1. Milford 211. Rob 160. 2d edn Rob 235. It seems to be now nearly established that Deft may admit and plead the Stat - ante 6 vesey jun.r 548. Rob 147. note.

If insisting on the Stat prevents a remedy on the agreement when confessed, the rule itself that confession in the answer takes the agreement out of the Stat. seems nugatory. Because no agreement can be enforced under it unless Deft is willing that it should be. 1 Vic Chan.y 567.

It is also a question unsettled whether a Deft in Chan.y on a bill for specific performance of a parol agreement for sale of lands &c is bound either to confess or deny it in his answer. 1 Scotts 168. 170. Decided by Ld Thurlow that he is - case cited by Ld Thurlow 2 Bro Chan.y 560. 2 Ath 155. 4 vesey jun.r 24. Milford 211. 212. Contra Rob 156. 7. 160.

Ld Thurlow is of the same opinion and that the only effect of the Stat. as to proof of the agreement is to prevent the Plff from proving it

abinde. 2 Bro Ch. 567. 1 Watts 170. Ad 157. So that if Defft denies it Plff cannot prove it by parol. 6 Ves jun 39. Vide Macclesfield, Hardwick Mansfield & Thurlow that confession takes it out of the Statute. Ld Loughborough, Eyre, & Eldon seem to be of a contrary opinion. 2 Ves 566. because compelling Defft to answer a parol agreement lays him under temptation to commit perjury. What then? Does not this objection hold equally in every case in which Defft in Chan? is bound to answer? If he is bound to confess or deny - seems to follow that his confession takes the agreement out of the Stat. and that insisting on the Stat. will not avail him. For if it would, ex hyp. compel him to confess or deny? Robt 160. 1 Watts 171. Has also been holden in Engd that a party to a parol agreement for sale of lands &c tho he denies it by answer, shall be bound by it if a previous confession out of court can be proved. 3 Atk 407. 1 Ves 293. 2 Ves.

Upon the above principle viz that there is no danger of fraud or perjury, a parol contract for the purchase of lands at a vendue sale before a master in Chan? under the order of the court is binding. 1 Ves 271 & 4 Ves 215. 221. 1 Ves & B 289. 1 Bro Chan? 334. Ad 115. So a parol agreement between the solicitors in Chan? in a suit between mortgagor and mortgagee was decreed. 3 Bro Chan 334. Robt 115 note.

Otg in according to the Engl authorities a parol contract respecting an interest in lands &c if inseparable from circumstantial facts in proving which there is no danger of perjury is binding - Eg sale of lands by absolute deed but bond at the execution gives obligation to vendee to the exact

amount of the consideration – remains in possession – pays the taxes – does not account for profits – pays no rent – pays interest on the obligations. From these facts a trust is implied for vendor i.e. he is considered as mortgagee by virtue of a parol agreement implied. Powell 165. Talb 60 2 Wood & 429. 2 Vesey 396. 2 atk 71. In Chan 5 26. 2 Vern 494. 1 P Wms 381. 2 Do 549 1 Com 188. Sanford vs Washburn Supt Ct. Reversed by court of Errors. Object dicta

The construction of our statute ought to follow the Eng; the latter having received a construction when ours was enacted, unless flatly contrary to the spirit of the Statute.

An agreement between the owner of land and the occupier that each shall have one half of the crop is good tho not in writing it seems. 1 Bos & P 397. 2d Other exceptions to the Stat are admitted on the principle that an act made to prevent fraud ought not to receive such a construction as would protect and encourage it. 1 BR 600. 1 Pow 294. 296. 1 Smith 171. 2. Rob 131. 2. 8. So that where a party by not performing a parol agreement will occasion greater pecuniary loss on the other than would result from a mere breach of the agreement itself, he is generally holden to it in Chan. Rob 131. 2. 8

Ergo – a parol agreement performed or partly performed on one side at the request or with the consent of the other party will bind the latter – Eg. A, leases to B, by parol for 20 years – B enters under the lease and begins to build or incurs expense in improvements – contract enforced in Chan. 1 Smith 172. 1 Ves 77. 5. 1 Bro 296 & 0. 1 BR 600. 1 Com. 159. 1 Vesey 221. Cha 783. 2 atk 100. 2 Com 373. 619. 1 Do 368. 1 Vesey 83. 221. 297. 1 Bac 74. Kirby 399. 2 Vesey jun 341. 3 Vesey jun 378. Rob 132. 138.

otherwise A would take advantage of his own fraud, for his accepting or permitting part performance by B, not intending to perform himself is in itself a fraud. 3 Wood. 433. 435. 9 mod 37. 2 Eq. ca. ab. 48. Pr Chan. 561. 1 Bro Chan. 417. 1 Bac Abr 397. Besides, the acts done (of acquiescing) afford presumptive evidence of the agreement and thus the danger of perjury is diminished. 1 Ves 319. Qu. as to last observation. Rob Pr. 2. 398.

In such a case the agreement has been enforced tho the terms of it were not precisely settled by the parties. 1 Ves 297. 2 Eq. ca ab. 48. 17. 5 viner 528.

Delivering possession of land in pursuance of a parol agreement is a sufficient part performance by tenor. 1 Ves 299. 300. 1 Vern 363 455. Bunt. 91. 2 Eq. ca ab. 48. 6 Bro Parl. ca 182. 1 Roots 77. 5. 7 Leney pin. 347. Pr Ch. 518. 2 Leney 347. 1 Sha 783. Ath 178.

And taking possession under the agreement is deemed sufficient notice to a subsequent purchaser — so that the first purchaser under the parol agreement will hold against him. 1 Ves 312. 1 Vern 365. 2 Ves 363.

So payment of money as part of the consideration of a parol agreement has been holden to be such a part performance as to take the agreement out of the Statute. 1 Ves 304. 5. 5 viner 528. 3 Atk 2. 1 Leney 93. 222. 1 Bac 64. 1 Bunt 175. Rob 155. 4 Leney pin. 720. 3 Leney 718. Rob 133. 4. 155. 2 Eq. ca ab. 46 contra.

Cases objected to the last rule Pr Chan. 560. 2 Eq. ca ab. 46. where on a parol agreement for a purchase and a lease, money was paid as earnest. 1 Atk 175. 1 Roots 59. But this was not in part performance — not subsequent to, and in pursuance of the agreement. a mere solemnity in making

the contract — a form in stipulating. In this case Lord damages may be recovered at law for nonperformance. 1 Vern 308. 2 Ca. Payment of earnest does not take the case out of the Statute. Pre Chan 560. 1 Vesey jun 720. Rob 154. 5.

Questioned whether the receipt of the money in part performance may be proved by parol. 1 Vern 307. 8. If not the rule itself seems idle. In 3 Atk. 4 it was proved by parol. Ld Hardwicke. Rob 153. 4. note.

An a parol agreement in part performed by vendee will be decreed ag. the heir of vendor. Vern 309. 3 Atk 2. Finch 300. But the act done must be such as would prejudice the party claiming, unless the agreement were enforced — Hence part performance by one of the parties will not entitle the other to a decree. 1 Vesey jun. 341. Rob 138. 169. 6 Bro P C 45.

But the act claimed to have been done in part performance must (to take the agreement out of the Statute) be such as in the opinion of the court would not have been done, but with a view to perform the agreement. Hence it affords no presumptive evidence of the agreement not in part performance. Eg. Lessee agreed to take a lease &c and continued in possession. 3 Vesey J. 378. Rob 139. 162. 171. Vern 309. 1 Bac 74. 3 Atk 4. Pre Chan 45. 61. 1 Vent 175. 2 Bro Chan 561. 1 Pre Ch 412. 1 Atk 12. 6 Bro P Cas. 45. Amb. 586.

Giving possession &c sufficient — even of giving directions for conveyances to solicitor, going to view the estate &c These are merely introductory or ancillary to it. 1 Vent 175. 6 Bro P Cas 45. 3 Vesey jun 34. 379. Rob 139. 140. 162. Amb 586. 1 Bro Chan 419.

Marriage is not of itself considered as part performance of a parol contract in consideration of marriage as between the parties

to the marriage, for by the terms of such contracts, they are not to have effect, unless the marriage takes place. To consider marriage then as a part performance would take every case out of the Stat, and leave the contract as at Com. Law. 1 Vern 309. 2 Bac 74. 1 Ch Cas 261. Prec 738. 10 Mod 418.

But it is said that parol contracts in consideration of marriage by a third person, as a father to one of the parties is taken out of the Stat by the marriage, it being with his consent. 1 Vern 309. 2 Fon 178. Sears a parol on the parties. 1 Vern 298. 9. 2 Chan. Cas 378. 2 Freem 201.

So where the wife was allowed by the husband during coverture to receive the interest of a certain sum which the husband before marriage agreed to settle to the wife's seperate use — the agreement was adjudged binding on the ground of part performance. 1 Vern 304. 1 Chan Cas 297. 2 Ch. Could husband be bound by his own part-performance? No prejudice to the wife. Note the plea was bad, decided on the special circumstances.

So cutting down timber in pursuance of marriage agreement was holden a sufficient part performance. 1 Vern 304. 2 Eq. Ca Ab. 29.

The Court of Exrs have holden that part performance, in paying money does not take a parol agreement out of the Stat. Once holden by Supr. Court that a compleat performance on one side did. Ruby 399. and the Supr. Court have since decided part-performance sufficient. 2 Day 125. that payment of part, and making repairs takes out of the Statute.

Upon the same principle ie to prevent fraud, even a written contract respecting an interest in lands or any other subject may be contradicted by

proving the parol agreement, if there was a fraud in the execution of the instrument. E.g. Grantee having obtained a deed refused to execute defeasance according to agreement. 3 Atk 389. 1 Salk 153. 1 Ld Raym 620. Rob 194. 1 Vern cont. 428. 2 Atk 203. 1 Eq. Ca. Abr. 20. 1 Vern 294. case of a marksman. 3 Atk 389. So in charge-rol contract may be proved, where it is only inducement to an action for fraud - action not on the contract. 2 Day 581.

The same may be done in case of a mistake in the execution. 1 Salk 188. 193. 1 Vern. 487. 2 Atk 213. 1 Vern 438. 3 Atk 389. 2 Vern. 376. 6 Mod 671. Finch 399.

So a written agreement ut supra may be contested by a parol one to rebut an Equity. E.g. Written agreement - afterwards discharged by parol. 2 Vern 299. 1 Vern 240. 1 Vern 294.

In Eng by Stat 11 Geo. 2. indeb. assumpt. for use and occupation lies on a parol lease and the agreement as to the rent may be given in evidence to ascertain the damages. Doug 232. Esp 20. 165. 3 Bl R 327. 2 Bl R 1249. 1 Bl R 378. Esp 20. 165. 3 Bl R 327. 2 Bl R 1249. 1 Bl R 378. 1 Wils 314. 1 Hen Bl 235. At com. law assumpsit would not lie for rent this debt would. Esp 20. Hutton 34 / 24 Doug 284. In Conn. such lease does not create a tenancy at will - mere licence. But assumpsit lies on a quantum valebat. Possession must not be adverse. Esp 20. 21. 1 Bl R 378.

5th Statute Contracts not to be performed within one year from the making. E.g. A promise to pay or do an act two years hence.

Holden that this clause does not extend to any agreement concerning lands or tenements or hereditaments. 1 Vern 276. 1 Vern 15. G. vide 3 Bl R 327.

Why? Because I suppose the preceding clause has made all the provisions intended to be made as to contracts of this kind. They are generally of

no place whereunto to be performed. Suppose then a parol contract of this kind (confessed) or partly executed - Binding I conclude. 1 Root 89.

"When the performance is to take place on a contingent event which may or may not happen within a year - not within the Statute. E.G. On the return of a ship. Salk 280. Bul.[d] 280. Sha 586. 3 Burr 1278. 2 Ray[d] 916. 917. 673. 3 Salk 9. 2 Holt 396. Skinner 358. Robt 486 7.

So a promise to leave a sum of money to promisee by will. Bull 280. 3 Burr 1278. and to make the contract binding there is no need of the contingency's actually happening within a year, for the contract is good or not so, ab initio. 2 Ray 917. 3 Burr 1281.

This clause then extends only to contracts which according to their express terms are not to be performed within a year. 3 Burr 1281.

And even as to these it seems that where the promise is made upon a continuing and accruing consideration it is good, if to be performed within a year from the time when the consideration is complete. E.G. Parol promise to pay for boarding ones child 2 years - holden good. 1 Root 89 - 2 Dall.

Rule applying to all or several of the different contracts contemplated by the Statute.

The construction of the Statute is the same in Chan[y] as at law - the remedy or relief may be different. 1 Bl 600. 3 Bl 430. 31. 1 Swanst 22. Intention of legislature govern both, and construction is merely the discovery (1 Burr 370) of that intention. Agreement, note, a memorandum in writing what? Any writing I suppose which is intended to furnish evidence of the contract is an agreement, note, or memorandum within the Statute. Ergo, a letter written by

one party, is a note &c. 1 Pratt 179. 1 Bos 287. 8. Robs 105. 6. 2 Bro Chan. 32. 3 Do 318. 1 Swan 201. 2 Do 82. 3 Atk 503. A letter written to ones own agents stating the terms of an agreement made, holden sufficient. Rob 121.

But it must distinctly furnish the terms of the agreement - Deeds not binding. 1 Pratt 179. Pr Wms 560. Stra 926. 10 Atk 12. 1 Bos 290. 2 Eq ca. ab 17. But the terms may be made certain by reference to other documents or extrinsic facts, E.g a Custom. 3 Bro Ch 318. Rob 107. 115. 1 Vesey jun. 330. 2 Bos & P 238. It must appear that the other party accepted the terms and acted upon the offer. 1 Pratt 179. 2 D. & W. 65. 1 Bos 287. 8. 9 and 3. Deeds no agreement. 1 Bos 289. 5 Taun 527. Rob 107. 3. 122. 3 Where the writing refers to something extrinsic, by which it is to be made certain (at all) if the subject is not made sufficiently certain by the thing referred to itself - no parol evidence admitted to make it more so. Rob 108 note. 1 Vesey jun. 326. So an advertisement written or printed by one of the parties and containing the terms, is a sufficient note &c on his part. Ruby 14. 8 Ves 599. 3 Burr 1921. And the consideration as well as the promise must appear in the writing, an "agreement" required by the Stat. to be in writing. 5 East 10. 6 Do 307. Rob 116. 207. Deeds as to contracts for sale of goods under the Engl. Statute, "note or memorandum in writing" 6 East 307. Rob 117. do an instrument intended as a deed, but failing to operate as such from the omission of some requisite, or by a change in the relative situation of the parties may be considered in Equity as an agreement, or evidence of an agreement. Eg. Bond to intended wife to convey land to her. 2 P. Wms 342. Rob 209. An agreement must import the privity and assent of both the parties - hence a mere entry in a

Steward's book no evidence of an agreement between Lord and tenant. 1 Mk 497. Rob. 109.

Signing what. Not only a subscription in usual form, but the name of the party to be bound written in any part of the instrument if intended to give authenticity to it is a sufficient signing, provided there is an acceptance by the other party. 1 Wils 118. 2 Eq. Ca Ab 52. 1 Vesey 6. 3 Atk 503. 1 Ves 288. 4. 1 Bott 167. E.g. I A.B. agree with C.D. to sell to him Blackacre &c. Esp. 23. Ther 399. 2 D. May 376. Rob 120. 3. 3 Leo 1. 86. 9 Vesey jun 249. 2 Barn & Adler 238. 1 Esp R 190. Secus where the name written in the body of the instrument is not intended to give to it authenticity. E.g. A, having agreed to lease to B, by parol, wrote instructions for drawing the lease in these words "The lease to be renewed" A, to pay taxes" &c no signing by A. A's name was inserted merely to explain the stipulations, not to authenticate. 1 Bott 166. 167. 1 P Wms 771. 1 Ves 285. Rob 121.

It seems to have been formerly supposed that one party making alterations with his own hand in the draught of the agreement was a sufficient signing. 1 Ves 221. 1 Bott 165. 166. But this opinion is overruled. 1 P Wms 770. 1 Bott 166. 1 Ves 284.

But signing the writing as a subscribing witness, the signer knowing the contents is a sufficient signing to bind him to any stipulations recited in the writing on his part. E.g. Where marriage articles, reciting that the mother, one of the parties had agreed to advance £1000 as a portion &c were signed by her as a witness — she was holden that she bound thereby not a party — for the signing was intended to give authenticity. 1 Vesey 6. 1 Ves 318. 1 Ves 284. The signer

may be considered as having adopted the agreement. Ridg. t. 23. 4.

Who must sign? — Sufficient if the party against whom &c has signed, if he has had evidence in his power of the acquiescence of the other. E.g. A. draws an agreement and procures B to sign, tho he himself does not, B is bound. 1 Bro 286. 2 Vern 379. 1 Eq. ca. ab. 20. 2 Bro Ch. 564. Jersey 351. 2 Chan. ca. 164. 2 Eq. ca. ab. 32. 7 Jersey 265. Ridg. t. 124. note. 195. and vide Ridg. 147 note.

In the last case it is said A is also bound, for procuring B to sign made B's subscription a signing authorised by A, and a signing by the procurement of one party is equivalent to a signing by his agent. 1 Bro 287. 1 Eq. ca. ab. 21. 10. 2 Chan. ca. 164. Qu. do if the party not signing brings a bill for specific performance he is bound doub. for he thus recognises and virtually affirms the agreement as to himself. 1 Ves 82. Ridg. 124. So auctioneer subscribing highest bidders name to the condition of sale is sufficient signing for both parties. So there subscribing he acts as agent for both. Bull. 280. 1 Bl. R. 599. 3 Burr 1921. 93. R. 151 contra, and this is not an agreement in writing — that was a sale at auction of the aftermath of land. This rule holden to apply only to sales of goods. 1 Esp. R. 107. 1 Bro 406. 306. 1 Ves. jr. 344. 2 Ves. jr. 249. Ridg. 115.

Has been doubted indeed whether sales by public auction are contemplated by the Statute at all — the transaction being public and so no danger of perjury. Bull. 280. 1 B. R. 600. 3 Burr 1921. A printed name may be a sufficient signature. Ex. A trader bills of parcels with his name printed Bro &c 238. Ridg. 124. So the name is printed by his procurement, and delivered as his signature. It is not necessary that the authority of an agent, signing

for his principal should be in writing. It requires only that the agreement be in writing, signed &c vivâ viâ contra. 8 Wood Dr 427. 9 Vesey jun. 251.

If part of an entire contract is within the Stat. the whole is so. E.g. Promise to pay another's debt and to do some other act. 7 JR 291. Not necessary that the identical contract stated be signed. Sufficient if it is acknowledged by a letter that is signed. Ast 121. 3 Br Chan 7 318. 3 Atk 503. The law writing of an agreement with ones own hand does not dispense with the necessity of a signing. 1 Ves jun 770. Ab 121.

Of certain transactions which amount to contracts in Equity but not in Law. Generally Equity adverts to the substantial object of agreements without reference to the forms which they assume. 1 Pow 318.

Any written contract expressive of an intention to stipulate in relation to a subject collateral to the contract itself is in Equity an agreement respecting this collateral subject. 1 Pow 313.

So a bond with condition to convey certain lands for so much money, is an agreement to assure those lands and Equity will decree specific performance. 1 Pow 314. Moseley 99. 2 Vesey 378. 10 mod 517. 18. Gwin 62.

So when a husband gave a bond to his wife conditioned to leave her £1000, if she survived him — this bond tho realeased at law by the intermarriage yet subsisted as an agreement in Equity, and bound both real and personal estate of husband. Vern 480. 2 Atk 97. 1 Pow 314. 317.

So of a bond from A to B conditioned that the former convey her lands to B, in consideration of marriage — they intermarry. 2 P. Wms 243. 1 Pow 316.

And tho an instrument originally valid become void at law by matter

ex post facto yet it will be construed a good agreement in Equity. 1 Vern 314.

So if A lend money to B, and for security take a warrant of Attorney to confess judgt &c & and this security become defective at law by the death of A - yet tis an agreement in Equity, and will charge B's land. 1 Vern 315. 2 Vern 154.

Again, if one of two joint obligors pay the money on forfeiture, and suit the bond in suit against his co obligor - the latter may at law plead the payment - But Equity will consider the whole transaction as an agreement and on this ground will either compel a contribution or restrain from pleading payment - 1 Vern 315. 2 Vern 371. 374.

So an assignment of a chose in action, as a bond which in law is not assignable is valid in Equity, even tho made without consideration. 1 Vern 317.

In Equity tis a covenant of which they will decree specific execution. 2 Ray 683. 3 Keb 304. 2 Vern 540. 594. 3 Chan R 40. Chan ca 232. 2 Vern 608. 1 Eq 26. 609. 621 argu. Co Litt 214. Co 2 280. 2 Roll 45. Chitty 2. 3. 7. 1 Wms 113.

Indeed the assignment of a chose amounts even in law to a covenant that assignee shall receive the money, and if assignor receives it, or releases, he is liable on the contract. 2 Ray 683. 1242. 3 Keble 304.

How an agreement may be proved in Equity.

1st. It may be proved either by a writing containing the express terms, a parol agreement part performed. 1 Vern 319.

2dly By circumstances from which an agreement may be inferred.

3dly From an instrument from which agreement may be inferred tho not express. 1 Vern 328. Eg. A seized of copyhold estate desiring that the son of his heir at law should have it, and a surrender not being practicable, took a bond

of his heir - that she would surrender the estate to her son. The court considered this bond not as something in lieu of lands, but as a medium of securing it to the son. 1 Vern 324. 1 Chan Cas 15. 2 Eq. Ca ab 22. pl 20. 1 Eq. Ca ab. 13. grand 62.

In Equity will presume a further agreement where the instruments produced are unintelligible and absurd on any other supposition. E.g. In a subsequent agreement there are traces of an intermediate one, that money arising from the sale of land be invested in other lands to be settled to uses similar to those to which lands were limited in the other agreement. 1 Vern 325. 7 Br Par. cases 21.

Of the Construction of agreements.

To construe an agreement is to discover the intention of the parties. 1 Vern 370. The intention is to be ascertained from external signs, which every man must be supposed to use according to their common acceptation. 1 Vern 373. If a term be raised for a particular purpose in pursuance of marriage articles - it shall in Equity when that purpose is answered fall again into the inheritance, and shall be liable to pay only those debts which affect the inheritance. 1 Vern 372. 1 Salk 172. 1 Vern 341. Pre Ch 252.

If there be a trust to raise money out of the profits of an estate, implies in Equity a sale, if necessary to raise the money. 1 Vern 372.

Expressive words are generally to be understood in their most known and proper signification - mos est norma loquendi. 1 Vern 373. Vern 169.

If I agree with B for 20 lbs of ale - he shall not have the casks. So if one covenant to give another a cup of wine - he shall not have the cup

Seems if the contract be for pipkins of wine or hhds of wine. 1 Bos 86. 1 Bos 374.

The words dedi et concessi shall be construed as referring to present time. 1 Bos 374.

A lease for 12 months - means 48 weeks, for in law by month is meant lunar month. But a lease for "twelve-month" is good for a year - this being the ordinary import of the word. 2 Bl 141. 1 Bos 374. 6 Co 61.

If a man grant 20 acres in such a field, in which the acres are known by estimation, they shall be taken as so known. But if I grant 10 acres out of a field which by estimation contains 20 - the grantee shall have the 10 according to the Stat. measure, for 10 acres are not known by estimation, tho the whole field is. 1 Bos 375. 6. 8 Johns 55.

Words which have different significations in different places are to be understood in the sense attached to them in the place where they are used. 1 Bos 376.

If words are equivocal or ambiguous, then pt. they are to be understood according to the subject of them - so if common is granted within such a ville, part of which is held in severalty and part in common, the grantee shall have a right in the latter only. 1 Bos 377.

So if I grant common but of all my manor, yet this extends only to commonable beasts, and commonable places. 1 Bos 377. And if one grant common for all beasts without number, yet the grantee may not put in so many beasts as to leave grantor no pasture.

And a grant of all my trees does not extend to apple trees, or other trees in my garden, if there be other trees upon my ground. 1 Bos 378.

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If there be a provision in a lease, that lessee should not molest or put out a copyholder &c this includes an expulsion or molestation as to his copyhold lands only — so a disturbance in other lands is no breach. 1 Rolls 378. Cro 842. 921.

If a man warrant land for years, he will not be bound by this covenant to defend against tortious entries. 1 Rolls 378. nor will he be liable unless the eviction be alledged to have happened by means of an elder & sufficient title. 4 Rep 80. Cro 85. 1 Wms Jones 197. 8 Rep 91.

And the construction of a contract may be varied by accidental circumstances affecting the subject contracted about. E.g. A bargains and sells land to B. by indenture, and before enrolment both join in granting a rent charge to C — this after enrolment will be confirmed the grant of B and confirmation of A — for after enrolment the land is considered as having belonged to B. from the making — But if the deed never be enrolled, then it shall be construed the grant of A, and confirmation of B. because the land never passed from the deed being effectual. This is to give effect to intention. Co Litt 46 b.

(And the construction of the same kind of contract will vary according to the manner in which it is carried into effect. E.g. Tenant for life and Remainder-man or Reversioner join in feoffment by deed — here the livery of the freehold is conveyed to make from Reversioner or Remainderman — from each according to his estate. But if a feoffment is made by parol — then the transaction is construed to be a surrender by the tenant, and feoffment by him in remainder &c seeing nothing would pass by parol, and we are to construe an instrument — ut magis valeat quam pereat. Rep 77 a. 6 Rep 15 a. Co Litt 302 a. b.

1 Pow 380. 381.

Note a surrender is the yielding up of an estate for life or years to him that hath the immediate Reversion or Remainder. In the case above, the remainder might be transferred by grant without livery and there was there would be privity of estate between the tenant and the transferee of the Remainder – there would be no occasion for livery in the surrender, the posession of the tenant is that of the Remainderman. 2 Bl 326.

And the same words in the same contract when applicable to subjects of different natures will receive different constructions Eg. limitations of freehold and lease hold comprised in the same form of words. 1 Pow 381. 1 P. Wms 665. Cas Talbot 3.

2 Obj We are to consider the effect and consequence of particular constructions. to if one construction would render the contract ineffective and pointless, a different one is to be adopted. 10 Vesey 325. Eg. A lease to A for life rendering rent at Michaelmas – here altho the and after his death to his Executor "until" michaelmas – here altho the word until is generally exclusive, the Exec.r shall have it for the whole day of Michaelmas because otherwise no rent would be due. 3 Leon 211. 1 Pow 382.

So where the language of marriage articles would if taken literally give the ancestor power to cut off his issue from the provision intended by a fine a recovery – Chancery will give effect to the articles by way of strict settlement. 1 Pow 383.

If A takes an obligation of B in the name of C. for the use of the children of A – here a release given by C to B of all demands "on his own account"

does not release the obligation supra, because the words "on my own account" must have been intended to distinguish the demands which B had in his own right from those he had in the right of others. 1 Leo 272. 1 Vent 384.

3dly The actions and circumstances attending a transaction. 1 Vent 385. Thus if two bargain for wheat, their former dealings may be resorted to, to shew the sort and quantity contemplated. 1 Vent 385.

So if annuity granted pro consilio impenso et impendendo. if A.B. be a physician, it shall be construed to relate to counsel in physic — if a lawyer, of his counsel in law. 1 Vent 385. So if licence J.S. to erect a shop near my dwelling house, he being a smith — he shall not by virtue of these words erect a joiners shop. Bac. maxims 71.

If a man grant omnia bona sua, the goods which he has as Executor do not pass, for they are not his, strictly speaking. 3 Mod 278. 1 Vent 388.

So if the condition of a bond be that A shall not hunt, endanger, or molest, B. in lands goods &c upon any account, this does not restrain from pursuing the obligee for felony — for this is not a tortious molestation. Leo 6 705.

If a man covenant that another shall enjoy lands for 7 years, an ejectment by a stranger is no breach — for the Law will not suppose a man to act so absurdly as to covenant against the tortious acts of strangers. Hob 34. So a covenant to save harmless against all persons will be understood against a lawful entry. Leo 8 218. But if it were to save harmless

against a certain person, it extends even to wrongful entries of that person, for there is no absurdity in this. H. 1 Rep 390.

If A have a judgt. of £1000 against B, and B leave A a legacy of £5 and A on receipt of this legacy give the Exr. of B a release thus - "I received of Exr £5. left me as a legacy and do release to him all demands which I can have against him as Exr" the words "all demands" will be restrained to the cause of giving the receipt viz the legacy this will be supposed to have been in the mind of the speaker. 1 Eq. ca. ab. 170. pl 4. n. a. 1 Leo 101. 1 Rep 391.

If A lease covenant to leave a building well repaired and lease three days afterwards, on recovering £6. against lessee and receiving the same give a general release of all actions, duties and demands, this will not be a bar to action of covenant broken for not leaving in repair &c Eq. 9. 170. 11. 1 Rep 391. Yet "all demands" is the most general phrase in releases.

If a man be bound by deed to pay another a certain sum at Michaelmas following — a release by obligee of all actions, will bar this duty — tho no action could be had at the time of giving the release. Litt Sec 512. 518. Cok 243. for it is debitum in presenti, solvendum in futuro. But a release of "all actions" does not bar an action for rent which is to become due at a time subsequent to that of giving the release, for there is no debt till the rent becomes payable. Co Litt 292. Cok 249.

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To a release of all demands will not release rent before it becomes due, for till then there is no demand - Jones with rent already due. 2 Salk 578. Esp 244. vide Vern 392. where he says rent not yet due is a cause of demand, and that by a release not only all demands, but causes of demands are released. 1 Vern 392. 1 Leo 99. 1 Sid 141. et vide Lut 606. 3 Rep 153. Co Litt 291.

If A give bond to pay £100 to daughter in case he have no son living at the time of his ~~decease~~ decease and die, his wife being ~~enseint~~ enseint with a son - although the estate is not recoverable at law, yet Equity will afford relief, on the ground that if the father had known all the circumstances, he would have qualified his agreement - &c 2 Freem 223. 1 Vern 394. he could not wish to deprive the son of the estate.

4 Hobly A contract ought to be taken most strongly against the agent or contractor, and in favour of the other party. 2 BC 380. Vern 395. So if Tenant in fee grant to any one an estate for life generally, it shall be construed for the life of the grantee. So if two tenants in common grant a rent of 20 shillings, that is several and the grantees shall have 20/. 9 Co.

Black.e says principle of self preservation will make men cautious not to prejudice their own interest, and besides this rule is necessary to prevent ambiguity. Powell thinks as the intention ought to be the object, the construction ought to be favorable to the grantor,

since no one can wish to incur inconvenience. 1 Vern 396. 2 Ch Ca 380.

The words of an indenture (ie one cut or indented like the teeth of a saw or in a waving line) executed by both parties, are the words of both. But the words of a deed poll (i.e one made by one party and polled or shaved even) are those of Grantor only. 2 Ch Ca 380. Cro Eliz 42

Where however a contract contains something in its nature odious, as in cases of contracts which carry a penalty, or charge the parties unequally — the construction is made to favour the contracting party. E.g. Equivocal words in a bond. 1 Vern 397. Dyer 17.5 Rep 22a vide exception 5 Co R 23.b

Therefore if a man be bound to another on condition to pay £10. before the feast of St. Thomas, and there are two feasts of that name, the money shall be due on the last. Dyer 17a

So if the condition of a bond consists of two parts in the disjunctive, and both are impossible at the time of making the bond, but one afterwards becomes impossible by act of God — the obligor is entirely discharged. 1 Vern 398. 5 Rep 22. Lowndes 26. Wms Jones 29. Salk 170. 1 Saunders 490.

Again words are taken most strongly in favour of the contracting party — where a different construction would make work a wrong to third persons - e.g. Tenant in tail makes a lease for life, it shall be taken for life of Lessor, lest the reversioner should be injured. 1 Vern 400 Ch Ca 42. 2 Ch Ca 380.

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A grant made by the King at the suit of the grantee shall be taken most beneficially for the King. Therefore it is usual to insert that it is not at suit of Grantee, but ex speciali gratia, certa scientia, et mero motu regis. — 2 BC 347.

To a King's grant shall not enure for any other purpose than that which is expressed — nothing implied, E.g. Grant to an alien, does not make a denizen. 2 BC 347.8.