Contracts

General view of the subject. A contract is an agreement entered into between two or more parties, to do or not to do a particular thing. It should not be understood to define a valid contract, but a contract merely. Contracts are either executory or Executory. There is a wide difference between them.

When we speak of an executory contract, we mean a thing actually done, or the performance of an agreement future between the parties. I think there may be an executory contract, when there has been no agreement between parties, but more of this hereafter.

An Executory Contract is an agreement entered into to do a thing, which remains to be done. Ex. I agree to sell a horse to J. S. This is an Executory Contract.

Contracts are often executed on one side only. J. S. agrees to convey a piece of land to J. R., upon consideration of $500. to be paid by J. R. J. S. pays the money, & J. R. then refuses to convey.

An executory contract without consideration void, but executory contracts without consideration, are good standing, with the exception of creditors. Thus J. S. voluntarily conveys Blackacre to be sold afterwards, & parts of his bargain says there was no consideration; he well held it against J. R. but must yield to creditors, but if J. S. had merely promised to convey this land to B., he would not have been bound by it.

When contracts are executory on one part only, Court of Chancery will compel a performance on the other. Ex. J. S. agrees to convey a piece of land to J. R.; J. R. agrees to pay him $500. J. S. agrees to pay the money, & J. S. refuses to convey. In this case, Court of Chancery will compel
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Here to convey, whereas as a Court of Law. It would receive damage or not the land. But it may be objected, this being a past agreement is void by the Stat. of Francis, Beinge, which requires it to be in writing. To this it may be replied, that it is a rule of law that where the contract is executed on the one part, or in other words that part execution of a contract takes it out of the Statute. The Act of Charon, on this case, go upon the ground of Fraud or the common most of the Contract...

It is laid down, that in every contract there must be an object either express or implied. This is correct as applicable to express contracts, for those which are implied, the law always presumes an object.

The law points out a man's duty in certain instances, will compel him to do it. This rule obtains in express contracts. It will raise a presumption of object.

The executed cause there is no need of object. I am well aware that the law pays there must be, but the rule that when a deed of land is executed, it vests the property in the grantee, whether he object to it or not. This is the true ground, the title rests as well without as with a deed of the grantee, it will continue until he objects. Again, must there be an object to implied contracts? Upon this point it is sufficient to observe, that the law will compel a man to do his duty; for this purpose the law pays an object on how to do it, e.g., a man is obliged to furnish his wife with necessaries, but supposing he turns her out of doors, then forbids her trusting her, still he will be liable to the person who furnished her with necessaries for her support; the reason is it is his duty to maintain her, the law will raise or presume an object. Hence establish a man's duty the law will ever take the liberty to enforce performance.
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Contracts may be valid, void or voidable. To a contract lays no foundation for any thing, or voidable does, e.g. an adult edicta a contract with an infant, is bound by it, the the infant is not liable to his contract.

In treating this subject I shall first consider contracts into by persons wanting capacity, then that they are void at law, and what may be avoided in Equity. Second, consider contracts, which are defective in themselves, so as to render performance impossible, thirdly, those whose performance is turned physically impossible, fourthly, those contracts, which are defective from mistake: fifty, contracts entered into under particular circumstances, as divers of various kinds, which are void at law. And even something else will avoid a contract in Chancery, as where one enters into a contract through fear, or has had some peculiar hardship imposed upon him.

Courts of law, have long since determined, that they will not afford relief where there is fraud in the consideration of contract but in those instances only where there is fraud practiced on their execution. There is a species of fraudulent contracts whose tendency is to cheat third persons, which also are many times malicious.

In most of these cases relief must be obtained in the Court of Chancery, and the principles, which they adopt are, that they never destroy a contract, but place the parties in what they were previously to their entering into the contract. They have nothing to do with punishments, it they therefore place the parties in as good a situation as they were in before. So to escusious costs, or the unlawful taking of interest, or every as it is frequently call ed on the Books, are void at law; but in Chancery they will decree payment of what has actually been received, regulate the rest of the contract merely. e.g. A lends B £100, B takes a note for £100 in this
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courts of law would vitiate the whole contract, whereas in this case the courts of equity, B. would be compelled to pay, if B. made void the remaining contracts.

After having considered the nature of different kinds of contracts, I shall advert to the several kinds of actions for the enforcement of such contracts, viz. action at law, debt, covenant, account; then treat of actions which may be made to, their actions, as payment, performance, tender, account, satisfaction, accord & release.

Since we now consider the various characters, these contracts are void or voidable; then are either made at law, or an action so in equity, which I shall notice as I proceed.

The contracts of Idiots, lunatics, & persons of unsound memory, are strictly void, so it is contended by some that they are voidable only. Justice Blackstone is of this opinion; I think however that the current of opinion is, that they are void. See 40. Ed. 6. 123 b. Rolle, 243 b. 3 McAd. 246. 201. Ed. Law 316. Camp. 113. 3 Lec. 296. Court 19. 25th. 1st. 256. 297.

Though the courts of such persons are void, yet it is held that they can not avoid them themselves, & that no person can do this, except the donee in execution of such non sane person; & the reason assigned is, that no person shall be allowed to come into court to testify himself. But if no reason, says Blackstone, why he cannot. By the ancient common law, he certainly could do it, for the rule absolute, his proceeding was not adopted until the reign of Edward III. Again, Blackstone, is of opinion that he might avoid his contracts. 1B. treats the rule to the contrary, as the more expeditious or wisdom of the judge. Powell has given a reason in favor of the rule as it now stands, but in my opinion, a very fallacious one. I shall notice it by the by. We will therefore, take the rule as it now stands for granted, viz. that subjects, non compos, & cannot avoid their contracts, either in a court of law, or in a court of Equity.
the reason in both cases is the same. It is undoubtedly important that these contracts should be many instances during the lifetime of the person be avoided; how then is this to be done? According to the rule we have laid down the contracting parties cannot do it, neither can the heir or Executor, for there are none. It is done in these cases by a commission of lunacy to be issued from the Crown, appointing two or three persons to enquire who the person whose contract is attempted to be avoided is, in fact, a lunatic. If they find that he is, his property from that time is in the custody of the King, and this decision of the Commissioners lays foundation for a suit, passing to issues against the person, with whom the lunatic, non-compos, has contracted, to show cause why the contract should not be set aside. This suit passes issues in the name of the King’s attorney; in this way, the contracts of infants, idiots, non-compos, may be avoided, without their coming into Court itself  satisfying themselves. This proceeding lays a foundation for a suit in Chancery, if the person be found of non-sane memory. Chancery will decrees the contract void.

There is one case directly in the teeth of the doctrine, that a person cannot justify himself (and it is a modern case). It was this; an action of debt was brought for certain articles. The Defendant came into Court, pleaded lunacy; the plaintiff would not admit the plea, but suffered to plead non est factum under the general issue. 2 Strange 1654 or 1655.

Powell reasons why a person thus situated ought not to justify himself; that it would have a tendency to make people feign themselves non-compos, lunatics, the like to open a door to great fraud. I think this, says the Judge, is a very falacious reason, for it is easily obviated by the commission of commission.
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examination, the result of which would determine the validity of the contract. This point is settled in both. Have a person insane into court, swell his head, or avoid his contract thereby. The authorities which are found to favor the doctrine, that a person cannot swell his head, and men are Cor. 398, 612. 12. Co. 123. The first case of this kind is in the year books, in 54 of Edward III. Act proceeding by true facias see 3. Alb. 1700. 16. Tom. 105. 111. 15. Doug. 118. 15. 1410. 1441. Ex. 37. 47.

It has always been settled law, that a lunatic or idiot must be joined in a suit brought in his behalf, for any act previous to his becoming such. Chancery cases 153.

In Eng. a lunatic makes a conveyance by fraud or common recovery, neither he nor his heir can avoid it, on the reason of there is such presumption that the person conveying was in his right mind, at the time of conveyance as cannot be rebutted, for the court will not suffer a person to come into court to convey when he is not in his right mind. 12. Co. 124, 125. 126.

It may be asked, if there is any relief in such case. I answer, upon principle there is none, for a court of Equity, is governed by the same principles as a Court of Law, but the fact is they will sit it aside, if the person is found a lunatic, then go upon this ground, to wit, that of rendering the principle farther than a court of law would. 2. Den. 673, 412.

Upon a view of the whole, there is come to this determina-
tion, that the contracts by lunatics, persons of unsane mem-
ory, may be assented to in the lifetime of such persons, by a commis-
sion of lunacy or a series of facias, i. e. after he is dead, by the Primi-
tor or heirs. There is one case, in which a difficulty of a technical
nature arose. It is this, A man entered into an agreement to sell
whether a piece of land, the vendor afterwards became a lunatic
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...the question was whether the vendor could compel the vendee to convey. The case came on before Lord Hardwicke, who said there was no doubt but that the land ought to be conveyed, but the difficulty was in what manner to do it, as no person could do it for him. He said there was no way in which it could be done; so that a specific performance could not be decreed in this case; the damages might be recovered in a court of law. Vois. 32.

But there is a case in desert Juris, in which the master of the Rolls said, that the vendor could not be compelled to convey, but that a decree might be made enjoining him to deliver property to the vendee, without any title, i.e., if the vendee is willing to take the land without a title, he may take it. 1st of June, 1683.

There are some cases where a court of equity will interfere to set aside contracts, when a court of law will not, by you now the principle of extending the case further than 38. of law will go, as in case of Drunkenness. A person who has been drunk is often insane; if unfit to make a bargain, he makes one to his disadvantage; but he will get no relief in a Ct. of law. In this case Equity would, before, upon examination, finding great impropriety, and no injury done, will set the contract aside. But, if the contract appear equal, or nearly so on both sides, they will not set it aside. But if a person procures another to get drunk, with intent to get a bargain out of him, such bargain may be set aside, in a court of Chancery. 23rd of Nov. 1793. So if he takes undue advantage of him when he is drunk. Chancery cases 202.

Persons of weak understandings perhaps cannot avoid their contracts in a court of law, but in Chancy relief has been afforded in a variety of cases. Chancy, in these cases, it is said proceed upon the ground of fraud (but Judge R. thinks it is in the ground of a weak understanding).
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There are instances where persons understanding have been impaired by old age, or paralytic stroke, the their understandings were originally good, in such cases when their contracts have operated strongly against them, etc. of Chanc, have given relief. 13 T. R. 403. 206. 322.

There is a case of this kind, a man in the possession of his right mind, made a contract which operated age, him it was set aside. In the fact was when he made the cont, he was agitated with most disturbing pains it dies soon after. 6 Ten. R. 137. Chancry provides a for the goods that there was not a clean perfect agent in all these cases.

contracts of Infants.

These properly belong to parent children, where it is treated of at full length. I shall only note some of the general principles here. Reference to the head of parent children for a more particular account of the subject.

The general rule is that minors are not bound by their contracts, either in law or equity, but in this rule there are some exceptions. Infants are bound by contracts for necessaries, the maintenance or necessaries are food, lodging, clothing, physic, they must be necessary for him, i.e. equal to his standing in society.

By what written securities are infants bound? The general rule is, that he can bind himself by such securities, as are the evidence to by law, i.e. such only. Bills of Exchange, negotiable notes, Medal bonds will not bind infants.

Infants are bound by such acts as by law they are capable to perform, thus if infants make partitions, if it is fairly and equally done, it is binding. No decree.

Minors are of age for certain purposes. If an infant conveys a release it will bind him if he has received the money, unless if he has not; the an adult would be bound by his release whether he received the money or not. They are capable of

making
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Making contracts of marriage. But minority is frequently pleaded to void these contracts. But, I think, says the Judge, they ought to be bound by such contracts; the law allowing them, ought to enforce them.

Chancery have in many cases established marriage-suitability made by infants; but there is no rule upon this subject, references must be had to the cases themselves, vide Parent Child.

If a female infant takes a jousture instead of Power it will bind her. If money is lent to an infant to purchase 2000 pounds, it cannot be recovered back in a court of law. But in Chancery it can, in the same manner and the binder had sued the application for necessaries.

The contracts of infants are either void or voidable. There is great confusion in the books upon this subject. I believe however says the Judge, there are very few which are strictly void.

A contract made by an infant, which gives a law authority is void, seems to coupled with an interest. So a power of attorney given by an infant is coupled with an interest is void.

So in some cases the costs of infants are considered as void, in order to preserve entire the privileges annexed to them. Thus where a girl sold her hair to a Banker for a mere trifle, the Banker this contract voids. In this way she recovers ample damages; whereas had it been voidable only, she would have recovered the hire price of her hair in an action of trover.

To understand our law, if an infant sell a horse it take the person obligation for it, he finds the person in failing circumstances, he may go to take the horse & consider the contract a nullity. This is done by his privilege of infancy, i.e. to preserve that privilege. I have thus briefly considered the general nature of the costs of infants. They are like weaker favorites of the law.
Contracts of Some Covers, with Particulars.

I shall only mention, in this place, two or three general rules, before you to the title of Baron Coke, where this subject is treated at large. The general rule is, that the contract of a woman is not binding upon her. There are two reasons for this, which these reasons do not exist. I think, says the Judge, she is bound.

1. When her contracts affect any material right of the husband, they do not bind her. 11. If the wife is under the coercion of her husband, her contracts do not bind her. Now, when neither of these reasons exist, I take the principles to be that she is bound.

It is an established rule that a wife may hold property both real and personal to her separate use; but it is also settled that the separate property of the wife is liable to be taken for debt of her own contracting, i.e., she is liable for her contract to the extent of her separate property. Executive cannot be taken out in the common form, but a bill must be filed in Chancery, and they will issue an execution against the separate property of hers as can be found. Equity will subject her separate property. 2 T. 579 & 2 Ves. Sir. 162. Bro. Ch. 216. P. Ch. 318.

The husband may convey lands to the wife in Eng. this is done by conveying to a third person, to the use of his wife, the flat, does often executes the use, which puts the wife into possession. As we know that, de ses or Bons, it is done by the circuitous method of conveying first to a third person the conveys it to the wife. In equity, a transfer of personal property from the husband to the wife for her separate use, is good, and binds the husband.

Contracts of Aliens.

I shall mention the law of Eng. upon this subject. It is somewhat difficult to know what our law is upon this subject.
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It is said that an alien cannot contract. But this is not strictly true, for their contracts may pass the property from the vendor.

An alien cannot hold real property, nor possess it, in one place, unless for years. If an alien does purchase real property, it is forfeited to the public. A commission commonly is held to inquire whether an alien has purchased real property. It is more lawful for an alien friend to hire a house, garden, &c. for the purpose of carrying on merchandize, than State has also been extended or practiced to mechanics. If an alien purchase real property, it is not in the power of any person to commit trespass upon it, or claim that he is the owner, until process is taken to ascertain the fact. The heir of an alien cannot inherit an estate which he has purchased.

An alien friend may make any contract respecting personal property, so may an alien enemy, but the latter cannot enforce his contracts during the war, i.e. not till hostilities have ceased. Formerly a contract of insurance could be enforced by an alien enemy, during a time of hostility, but the law is now altered. See sect. 2. Tit. 3.3. 3.3 Sec. 3. 3. 33.

In Eng. a clauses, and persons or communicative, refers to the laws, cannot enforce a contract on a court of justice, while they may be sued, they cannot sue. See sect. 2. 3. 3. 33. Section 2 of this kind, in consideration of the laws having not been in the contracting parties. I shall now consider the doctrine of consent.

Consent is said to be either express or implied, i.e. tacit. Express consent sufficiently defines itself, as to imply. A precept is said to exist, that is, cases where there is no express precept, the law assumes an implied one. This may be true in many cases, for many it is false, so far, times a man is compelled by law to do a thing, to which he expressly
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dissent. It is the true ground, says the judge, to be this: that the
wrong does not really go on the ground of any agent, but on the
ground that it is a manifest duty to be made liable. For what a man
submits to is no law, to make him promise, I also make him liable to
other he agents or not. So when a man turns his wife out of doing
the inventory of his wife, he makes him liable, upon the he tolerate
many one from trusting her on his account.

Suppose A. mortgages a piece of land to B. again in the pre-
ence of D. B. mortgages it to C. A court of equity would decree C.
to be the first mortgagee, because B. being present, knowing the con-
tract, but says nothing, by his silence, affords a presumption that he did
in fact assent to it. But this is not certain. 2 Cr. 137. 2 Lea. 393.

Again, A leases D. a piece of ground, again leases it to B.
in the presence of D. who tells B. it is a good lease; says nothing about
his own prior lease. Equity will decree that B. shall hold it on the
ground of D.'s assent. Powel. 121. 2 Co. 239.

There should be a certain knowledge in these cases, the mere
fact of being a witness is not sufficient. 2 Co. 6. Race. 347.

Again, suppose money is exerted by another, you may recover
it back by action of assumpsit, now here is no promise of repayment,
but it is the duty of the person to pay it back, the law raises an in-
fringement promise so to do.

Again, it is said that in all cases of grants, there is an
agent - true indeed in all cases of express contracts. But in many
cases there is not the semblance of it. E.g., suppose a grant made
to an infant three hours ago, will any pretend that he assents?
The truth is it rests without any agent it will remain, unless
some act of dissent is manifested.
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It is said that there are contracts, out of which others from the necessity of the thing must arise; thus suppose you hire a chamber, make a contract for a chamber; it is said that the person hiring the chamber also contracted for the use of the stairway, which is necessary for the enjoyment of the room. I say, it is a part of the same contract, it is not two distinct ones.

And with respect to ignorance, or error in valuations, the asset. We now come to consider cases, which are strict laws for fraud or error. In some of these cases, equity will rectify the contract, in others, the party may have damages in a court of law, notwithstanding the contract is enforced. In all these cases where there is a doubtful or uncertain right as to both parties, this secures the contract is good, it is a bargain of hazard... See Ch. 326. An. 38. b. 10. g. 3.

Relief may be had in equity where a party has been governed by a misrepresentation of one's right. Thus, where a person gave his daughter $40,000 legacy, telling her she might take this sum out of the orphanage share after adjustment of his accounts. She supposed she was obliged to make an election, consequently chose the legacy. But it proved her orphanage share was $40,000. She petitioned Chancery for relief, they decreed she gave her the $40,000, proceeding upon the ground that she gave her estate, through a mistake of her right. 3 B. & C. 316.

So again a person may have relief when he enters into a contract, not understanding his own legal rights. The schoolmaster's case, so-called, is a good illustration of this principle. A. B. C. three brothers; D. and E. and A. the oldest. The youngest came at a loss, to inherit their father's estate. Not coming to any determination themselves, they applied to a schoolmaster, who is the neighborhood, who was supposed to know everything, he said it all went to...
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the youngest. Afterwards the eldest discovered that the whole estate belonged to him according to law. The petitioners thought they gave relief. It is to be remembered in this case that the brothers made an equal division.

In general, when a person mistakes the law, he can have no relief, for every person is bound to know the law. But this is not true in all cases, which Justice point out as precedents.

The general rule upon this subject is, that when there is a mistake on both sides, the contract will be wholly inoperative or not at all. i.e. if the contract is such an one as would not have been made by the parties, if certain circumstances had been known to them; it turns out contrary to what they then supposed at the time of contracting. The case of the salt spring will well illustrate this rule. i.e. A purchases a piece of land of B. Both supposing it to be a salt spring upon it; this was the great inducement to the purchase. It turned out that there was no salt spring, but both were mistaken, the contract, accordingly to the rule we have now laid down was set aside.

Again, when a man bought land under the supposition that it was fertileable when in fact it was. Ponder's case, Chap. 2nd.

If a person sells an article & represents it to be sound, when in fact it is not, an action will lie for the fraud. The soundness of the price is frequently evidence of the soundness of the article, i.e. where a sound price is given for an article, it is evidence that the article also was considered sound.

But we will consider a case, in which there is no fraud. John Stiles sells to Tom. Stiles a horse; Stiles pays a sound price for the horse; The horse is in the hands of Stiles proves prove to be sound, but this was not known to Stiles when he sold the horse.
quere, can an action of fraud be maintained against it? For if, ... not, it has been doubted by many whether any action at all can be supported by it Heay. But, says the Judge, if you adopt the rule that has been laid down, it would seem clear that it must have been maintained that relief might be had by an action on the case for damages. You can not go to Chancery in cases of this kind, for this is a contract executory. Horse is delivered, the money paid received. Chancery interposes only in executory contracts where the contract is about personal property, or contracts both executory and executory when about real property. Also, if we reason from analogy, we shall find that an action in such case ought to be supported, for we know that when money has been paid, the consideration fails upon which it was paid, it can be recovered back in an action of debt assumed form money had and received. There is no reason why an action on the case should not lie in the former instance for damages. The reason is stronger, in that as in the latter case. A man ought not part with that which is valuable in exchange for that which is not valuable. Powell lays down the rule in this way without any qualification, but cites no authority. P. 168. 

As to contracts which are defective in themselves. We suppose in these contracts, that there is no defect in the parties to the contract, no want of assent to no error. 

Under this head will be considered impossible or illegal contracts. These contracts are not binding upon the parties, carrying them out of question along with them. By impossible here, is meant any thing impossible to be done, reason nature, or physically impossible, and is frequently called, not that kind of impossibility, which we ascribe to those persons who are unable to pay their debts. This is saying a bankrupt can
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Say his debts, as if something different from this: as if a man should contract to go to Rome in 30 days; it is all such casual money, has been paid, it can be recovered back again.

Suppose S. L. covenants with T. N. that he will convey him a piece of land by such a day; the time arrives, he is unable to convey because Richard Roe, the man of whom he expected to buy, refuses to sell this land. Now this is a good contract in law T. N. may maintain an action to recover damages out of S. L. for breach of covenant. Chancery cannot enforce a specific performance in this case; but if S. L. himself had been the reason why the contract could not have been carried into execution, they would have laid him under a penalty, this penalty exceeds the damages which might have been recovered at law. 3 Bro. P.C. 147.

There are two cases to this point, one called the rape case, and the other, the breach of contract case. But this the judge thinks was a species of fraud instead of impossible contract. 2 B. & Ad. 139; 4 Bing. 116.

The other is the one commonly called the barly case: it was this, a person agreed to sell his horse & the purchase was to give him a barly crop for the first mall in the year, too on dabling it for every stalk. The court in deciding this case, introduced a novel principle, for they directed the jury to give the Jeff $30.00 on that contract, this being found to be the value of the horse. Now there is no case previous that where the court gave any thing, they did not give to the amount of the contract. In this case they made the owner take the $30.00 the buyer gave the same sum, when there was no contract between them either to take or give it. There was no subject of this case at the 88; for this was not contemplated in the contract & whether this was an impossible contract was not agitated. 2 B. & Ad. 140.
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This is a rule as respects bonds with conditions; viz. if a condition becomes impossible to be performed, either by the act of God, or of law, or by the act of the party himself on whose favor it was made, it does not vitiate the contract. If it is still good if the contract is executed; but if the condition is annexed to an executory contract, the party contracting is not bound. Examples:

A conveys a piece of land to B to condition determine in the deed, to this effect, viz. that if A goes to London to transact certain business matters by such a time this conveyance is to be void. S. dies in London, now the question is, whether the contract is destroyed? Agreeably to the rule we have laid down, certainly not, it was the act of God which prevented a performance of the condition; the contract was executory, the land vested in B absolutely.

But if the contract had remained executory, if the deed had not been actually given, the contract would not have been good, i.e. the party would not have been bound. This will appear from the very definition of an executory contract.

Again, A arrests the body of B. B gives a bond conditioned for his appearance at the next court. B dies before the说到这里 the bond. In such case B is discharged from his bond.

So if B gives a bond to A that he will marry C by such a time, if A marries C himself, now B is discharged, for by the act of A, he is prevented from performing the condition, col. 266.

I will now advert to a branch of this subject, the principle of which, this is the law I am inclined to doubt. It is this— if a bond be given with a condition impossible to be performed at the time of entering into the contract, the bond shall be good if the condition only exist. E.g. suppose the condition of a bond was this: B should travel 100 miles in an hour, is this case the court would say that
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that the condition was void, but the contract good. I cannot this principle, says the Judge, for it was on his part covenanted to do this, so it is settled that such covenant is void, if I consider the bond or this case, only a mode of covenanting it that it ought to be void, then the law is, as I have stated. The principle is not applied to contracts which are unlawful. In such case, the bond or condition are both void. Thus a bond conditioned to murder a third person is void as well as the condition. Ob. 32.

But there is a case decided by Lord Coke, in which a distinction is made; it is this, if the consideration of the bond is mentioned in the bond itself, then it seems that the rule we have before laid down is applicable to those cases only, where the condition is a separate thing; it can be saved from the bond at the bond remains good. Co. 172.


Contrary to do unlawful acts.

If a man contracts to do an unlawful act, the contract is void. But it will be asked, can you enquire into the consideration of such instruments? Sir, says the Judge, you always may enquire into the illegality. The temptation may be pleaded both in law and equity.

A contract to pay for committing an unlawful act is void, it can never bind the party. No difference as to this point, whether it is matter of public prohibition or matter of sect.

So contracts against sound policy, a contrivance more than a void, the this opens a wide door to Courts to determine what things are and what not against sound policy.

A contract that a man will not a particular trade is void as being against sound policy. But if a man contracts that if he does not pay money by a certain day he will go to jail, this is void also; so a contract which has a tendency to promote a
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breach of the law, or a tendency to prevent that from being done, which the law requires should be done, is void. So a contract to
be void, for this tends to a breach of the peace.

usurious contracts.

The taking any premium for the loan of money was formerly
considered as usurious; thus it appears in a number of statutes.
But now it means the taking more for the loan of money than
the law allows. The English Stat. of Ann. the subject of usury
has been enquired in most of the States.

Anciently the taking hire for the loan of money was consid-
ered as a crime cognizable in the spiritual courts. Jews be-
ing the only usurers contributed not a little to its obsolescence.

The Stat. of Hen. VIII. allowed two per centum. The Stat. of
Sae., allowed but eight. the Stat. 55 Geo. III. but five. the Stat. of
Ann. 6 only, which is now the lawful interest in Eng. But it is low.

The statutes point out two kinds of usury. First, where too
much is reserved in the bond or note, secondly, where too much
is received by the person.

Now these kinds of usury have different effects. In the
former case, the note or bond is completely void; in the latter the
obligation remains good, but the state inflict a penalty also on the
lender, i.e., on him who takes too much.

In Eng. the penalty is triple the sum, but in low it is just
the value of the sum lent. The penalty goes, first to the infonna
lent to the State; it is a qui tam action.

The principle then is this, viz., that receiving too much.
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A contract destroys that contract, the receiving too much subjects the party to a penalty.

If a person borrows more than twice as much legal interest, the contract is void, he is subject to the statute, the statute.

Thus, a man lends $90. Takes a note for $100, he is too much reserved, consequently the bond or note is void. But he goes farther, he receives interest when the note becomes due, as interest on money in this case, there is an unlawful receiving of interest, he thus subjects himself to the penalties of the statute.

It means taking unlawful interest, when a person composes pays it to him, is not conclusive evidence that there was an original contract to receive more than the legal interest, it has now become an established rule, that a person receiving unlawful interest, furnishes no evidence that there was an original usurious contract. No subsequent corrupt contract can affect an original good one.

There has been a dispute whether the taking a premium for the loan of money is receiving or receiving too much. The judge thinks it is the former, consequently annuls the contract. In this case he gives it his, that there is no distinction between receiving the premium first, or receiving it on the contract.

This taking the premium may also subject the person to the penalties of the statute for it may be the means of receiving too much. Eventually, by taking full interest at the settlement.

Case of this kind is this: A went to B, to borrow a sum of $90, B will lend it, but says he must have 10 per cent. Add the money and the question was, was this this fraud agreement for unlawful int., there being no written security in the case, made it an usurious contract. The court decided that it was. -- Swes --
contracts.

counsel in the case; I wrote to Justice Buller, saying it as his opinion that the contract was usurious.

No matter how many deceits are given, if they relate to an original usurious contract, authorities however say that usurious money may be recovered back, when the original contract was good, but the usury taken as a part of the agreement.

If a fair loan of money, there is an agreement to pay yearly interest, this is not an usurious contract apparently or in fact. But if you cannot in such case recover more than the principal interest, the if the interest had been paid, it can not be recovered back again. This is founded upon policy in order to guard men against their own carelessness and indiscretion.

So again: if the contract was originally fair, the compound interest reserved, it runs on for years, if then the borrower pays compound interest, the lender is not guilty of usury, because he takes no more than he would have gotten, provided he had received his interest annually, as he ought to have done; even if a note has been given at the end of 10 years for the first sum of the compound interest till then, there is no usury on this. But you cannot compel the borrower to pay more than the legal rate of interest.

When a man lends a note to be paid at the end of one year, the holder gets only lawful interest. But if the note is to be paid in six months, if then the interest be paid in six months, the holder gets more than lawful interest. He gets the interest for six months on the first interest, but the law allows of this, it is not usury.

The obliging a man to pay interest monthly, or promise to make him pay more than lawful interest is usurious, i.e. will be deemed usurious by the law, In times however it became a rule which commenced in relation that it was immaterial to usury;
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That careful interest may be taken any time in the year is now well established.

This interest too much may be done in a variety of ways, it may be by requiring interest when the note is given, taking it again when the note is paid, or it may be done by taking properly of the borrower at a less price than its real value, when the article bought or sold is connected or communicated with the loan in this case there is usury.

Contracts where there are hazards run are entitled to more than usual interest. The hazards must be of legal value, not coloured trades to evade the Stat. Any contract where the hazard extends to both principal and interest is not an usurious one on law. —— Annuities. ——

When a man loans a sum of money to receive upon it more than legal interest, while he being, but upon the termination of his life to lose the principal, it is usurious. No interest is paid at the expiration of one year or a contract of this kind, the it may be very evolvent it is not usurious. ——

Bottamary bonds.

When a person loans another have money, who is going a voyage a condition that if the ship does not return at all, this nothing to pass, but if she does return, then an evolvent interest as well as be paid this bond is called a bottamary bond is not usurious. —— bail to be looked to. The loan of cattle as to double once in three or four years, as the case may be is frequent practice in Eor. This contract is good as the cattle die. Now all the che premium taken in this way is evolvent, but it is not considered as usurious.

Where there is a real hazard run the contract is not usurious.
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But how shall we determine when real hazard exists? Unless 2100L is to receive 21 percent provided he does not die in a week, but if he dies then he receiving no interest. Now provided 18 was in apparent good health at the time of the contract or loan, it will become a colourable hazard merely. Again, Hills of 10L 100L at 20 percent, to receive so much interest provided 8 of 10's children don't die in the space of four years, it is ruinous. There is no hazard real, at least a very improbable one. Yet, if the provision had extended to but one of 10's children, the hazard in that case might have been considerable.

Suppose a man should borrow 100L and give a bond for 200L, the bond paid provided he does not discharge the 100L by a particular time, this is not every form he can discharge it at the time.

Whenever there is an opportunity to free oneself from credit and interest, there is no excuse, unless there is a private corrupt agreement to let that opportunity pass by. Perpetual evidence may be introduced to prove these things, but if by mistake not intention the contract is ruinous, or an exiguous premium is taken, it is not criminal if the mistake can be proved.

The mode of casting interest is different in different places, often different in the same place. There has been a rule established by the Superior Court of London, since adopted by the Superior Court of the United States. For that rule, see Swift System.

Suppose you cast interest according to custom, eg, the custom of some merchants in the City of New York. Given if more than legal interest is taken is it ruinous? It is said not, for there is no corrupt agreement between them. There has been no rule laid down in the books for casting interest. It has been said that no proof is admissible to prove usury.
Usurious contracts may be purged. Where a man goes a note and
then gives a new one afterwards (the first note having been transferred
to a third person to the third person. Now it is purged of its usury, and
this does not go upon the ground that a new note is given merely,
but on the ground of usury. B gives a new note from the third person. B
then executes an usurious note to C. C sells the note to B, now if
A executes a new note to C, the contract is good as between C
and B, but the original note as between A and B is still usurious.

If two notes, entirely distinct from each other, were taken,
one of which was usurious, afterwards a new security is given
for the whole, it is good for nothing. But the original contracts
will remain, since you, according to a manuscript can, ac-
cording to the Judges opinion,

It was long believed that usurious money could not be
recovered back. This idea prevailed until Lord Talbot's time.
The reason given why it should not be recovered back was that
the loss & Disadvantage were pari delictis. Where the parties are equal-
ly culpable no relief ought to be given. But in gaining for
instance they will let the bower recover back his money, because
they suppose him to have been in circumstances therefore not in pari
delicti. -- So in using the person lending breaks the law, yet
both are not equally guilty on law. -- The bower is many
times necessitated to borrow or suffer distress, therefore not so
culpable. But notwithstanding the inequality of guilt in
borrows & lender, notwithstanding this are in pari delicti, it is an established rule that usurious money may be recov-
ered back in all cases.

When an old contract was usurious on a new one was made,
sweeping out all the usury, the Scribe, the last, not usurious cont.
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This has been decided both ways, on the principle that where there is an usurious contract a collateral security would be void.

Powers of Chancery over Usurious Contracts.

Courts of Chancery possess no power on the ground of usury, or usurious contract, because Courts of Law have fullest jurisdiction as to that, but if equity moves the parties of an usurious contract, but the surplus; they only interfere in cases of hardship, their interest, which is more than legal, they relieve against...

Why then do you go to Chancery at all? Because in law, you cannot make proof. But in Chancery, you can compel the usurer himself to give evidence, i.e. by being himself put under oath, the bill filed against him or his non-appearance, will be taken for proof. So, they will proceed to set aside the surplus interest, as the offensive part of the contract.

We have a Statute, which strikes out all the interest where there is usury; the principal alone is received; but a bill must be filed immediately for this purpose, or failure of proof at law, Chancery will strike out all the interest both legal and illegal, where a recovery of the principal only.

In pleading you must set forth the usury, specially, and common law; the where there is a general Statute as that of usury, you need not, plead it specially, for Courts are bound to take notice of general Statutes.

If a surplus may be given in evidence under the same law, therefore when you would avoid an usurious contract under hand, you must plead it upon the record, plead it specifically. The same method is of course pursued in assumpsit.

So a plea the word comes as a particular must be declared, the plea is good if stated larger than appears in proof.
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Suppose a contract with 12% is guilty of usury, while 8% is not. Suppose the agreement was not consent. The 8% would say, here is no usury in the 12% according to the law. It takes two to make a bargain, it takes two to make it corrupt.

Sure, can a new trial be granted if a person fails of making proof of usury at the first trial? Of course, it finds more evidence. So, for the law says where a man has been in danger of a penalty at trial, he was charged, he shall not be put in jeopardy again except the most conclusive evidence of his guilt be offered only if the proof was kept by the offender. The penalty of usury is intended as a punishment upon the usurer.

All illegal instruments not negotiable when the pays, pays with all their turpitude or illegality.

Expectation of a large interest, voluntarily given, does not make the contract usurious.

A contract made in a place, where 7% per cent is the lawful rate of interest, it will carry 7% per cent interest. If a bond is given to secure that contract, where 6% per cent is the legal rate of interest, this bond is good of 7% per cent if received upon it, the bond being given to secure a good of bona fide contract.

A merchant in New York makes a contract in New York with a certain man from St. Louis. He agrees to give him 7% per cent on the payment to be made in St. Louis, on the same principle, this is not usurious. If the bond or goods were to be paid for here, any deception has been discovered it would be other wise.

The Law here where the intention of usurpation of 7% it will be performed will not be given as a general rule. A contract, whose performance is lawful in one country, but malicious or contrary to good morals in another will not be enforced in the
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latter. But if it militates merely against a positive regulation of the latter country they would enforce it. The law of every state upon this ground, it being a positive institution or law here, therefore if more than 6 per cent is taken the law is broken. But if the contract is to be performed bona fide in N.Y., where 7 per cent may be taken, the law will suffer you to recover 7 per cent. Since now cite authorities in support of the above principles: First to elucidate the points of reserving receiving too much interest, the former making the contract void, the latter subjecting to a fine only. See 5 Doug, 223. 156. 2 Hinn. 203. 215. 216. 294. 2 Kel. 294. 51. 2 Kel. 397.

Whether the loan was partial or in lots gives no weight, as the goods connected to conceal the usury, see 5 Kel. 398.

All securities, whether of a real or personal nature, are void when relating to an usurious contract. 5 Kel. 398. 399.

Payment of interest made any time in the year is not usurious now, tho' formerly was if made before end of the year. 5 Kel. 398. 399.

To see the difference between a bargain & loan, see 5 Kel. 398. 399.

The principle of interest are in real hazard it not colourably so, there is no usury in taking more than legal int. 5 Kel. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399. 398. 399.

That there must be a corrupt agreement & that a mistake does not create usury, see 5 Kel. 398. 399. 398. 399.

When a corrupt security is sold & the buyer is ignorant of the corruption it is still void in his hands until it be a negotiable instrument. 5 Kel. 398. 399. 398. 399. 398. 399.

So finally which a man inflicts upon himself for the nonpayment of money at the time is usurious at ease. 5 Kel. 398. 399. 398. 399.
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But if the contract is contrary to this principle, it is a nullity; and all the conditions of it are invalid. Gaming contracts are void, and all consideration is void, unless the consideration is for the purpose of gaming. If money is lost for the purpose of gaming, it may be recovered. The security is void, but the contract is good. But if money is lost for the purpose of gaming, it cannot be recovered, and the Judge thinks this to be the law in most of the States.

All contracts for the sale of such contracts are void, and all consideration is void. If money is lost for the purpose of gaming, it may be recovered. The security is void, but the contract is good. But if money is lost for the purpose of gaming, it cannot be recovered, and the Judge thinks this to be the law in most of the States.

Contracts to pay gambling debts are void by the common law. The security of the contract is a conditional thing, and it is a general rule that where the security is void, the contract is void. Hence, if a man, in England, when the security is void, may
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may bring an action on the original contract. Analogously this is the law for an annuity, which must be in money or it is void; hence, if any part of the face of property goods, I cannot recover the money because that is void according to law. But I can recover quantum relict. The old contract is revived. 212, 182. Deo 68.

A question may arise, where there are no statutes, gambling, whether gambling debts are not void at law, as being against sound policy, being a mere waste of time. Money found on a shaggy coat or shaggy coat in law is recovered back again, but if there is evidence the Judge thinks it can state that costs of recovery are void at law.

Fraud will destroy a cost, or any other, a false substantiated title is also void, such titles are those of land generally.

So if one man is out of possession claiming title, one is in also claiming title, the one out of possession can't sell the land unless he has the real title, or not; for if he has the real title, at least eject the one in possession before he conveys. This is void at law, the the penalty is added by Stat. No. 68. The covenant title would be void for the same is void to all extents thereto.

Page 68. The States in general have a similar Stat.

Where a contract lawful to be performed at the time entered into, but becomes unlawful by an act of the Legislature, the performance is discharged, if money has been paid, it can be recovered back.

Contracts not to follow a particular profession or trade are void as against good policy; but contracts not to exercise one particular trade or professions in a particular place are good. Canit. 206. Poole. 166. Brook. 346. Palm. 172.

If this contract is kept in writing (valid), to wit not to exercise a trade in a particular place, the presumption is that
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It was made without consideration I vote, do here you may not go to try the consideration given, contrary to the general rule on this subject, to wit. That written securities under seal cannot be required into. 4 Plem. 39. (1st ed.) 183, 192. c. 1. 1152: 262.

And such contracts are not unlawful when entered into with a penalty. The great rule is that Chancery will relieve against the penalty. But if the penalty is in the nature of a surety to make good the lots. Of Chancery will not afford relief, otherwise they will relieve against it, demonstrating it to the real damages sustained.

In Con. 158, the courts will Chancery down a bond given for a direct act, in bond, where given as a surety for a collateral act, or a court of law will here relieve as will as legally. the not in all cases when Chancery will. 25, 53, Martin. Huntington 161. 163. 8t. Stanley. Brown 8th.

Again, where a person contracts to all who another is a law suit, i.e. lending it on, it is void as being to the good of the commonwealth, exception in the case of Parent, to Chace. So in a circumstance, an officer takes his obligation for his part it is void; it is not to be taken. Uncertain how the law is, as to this. 10, 197. 159. 160. 195.

So also a bond entered into by a prisoner to pay his bond while in prison is void. So also if he binds himself to remain in prison after the debt is discharged, this obligation is void. A law is so decided in Crumm. 10, 165. 106.

Contracts entered into with an alien enemy are void as against sound policy.

There are some courts, in which lots of law have not of

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Marriage by contract. These are void in Chancery, the law will not relieve against them. They are contracts given by persons desirous of bringing about a match; to pay so much provided they will exert their influence, the party succeeds; i.e. if the marriage is accomplished. Such contract is void, not being detrimental to the public. And any contract to effect such purpose is considered in the same light as a Bond (Ch. 18, P. 38. Thor. P. 145.) when money has actually been paid, no recovery of the same has been decreed. Eq. Cas. 87, 2 Cor. 583. 154, 451.

Again, there is another class of cases, which are decided on the same ground of policy; it is that of contracts with young heirs for their expectancies. Such contracts are void. They are not set aside on the ground of infancy, but that of policy; but Courts of Law refuse to declare these contracts void. 2 J. 85, 314. 3 P. 310.

If these contracts have been executed Chancery will decree a suit to state them, or their expectancies on the usual ground, i.e. if the person supposed to have been obliged to convey his expectancy, set it aside, while Chancery believes that a person is ignorant of his legal rights, at the it is said that ignorance of the law must excusat. 3 P. 314 note 292. note 394.

So where a person paid the expectancy voluntarily, it was not contracted with a suit, still Chancery will grant relief, because he was ignorant of his rights.

But if the contract is paid it is carried into effect with full assent on both sides, Chancery will not set it aside, the thing will have destroyed it before its execution. 2 Th. 159.

A promise to indemnify a person on the commission of an unlawful act is not binding. 2 De. 208, 263.
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But if a person does an unlawful act, not knowing it to be such at the time of its commission, he may recover on the bond of indemnity, for he is liable to damages.-

So where a person arrested another without legal process, to deliver him to an Inn Keeper for safe custody, with a promise to indemnify him against all loss, the Inn Keeper turned the key upon him; it was afterwards sued for false imprisonment, as it clearly was a suffered damage. The Ct. allowed him to recover upon the bond of indemnity, because he was ignorant of the unlawful process, by which he was arrested. Nov. 53.

So if the Plff give an offer, a bond of indemnity, who is about to attack the goods of Deft. but is deceitful, other than belong to the debtor or not, such bond is good. So a promise to indemnify the offeror is good. Co. 252. Plow. 69.

Again, all contracts to evade the law are void. So a wager with a judge of Ct. by Plff on Deft. that he will lose his case is void. Lom. 89.

So again all contracts, which have a fraudulent pretense of new are void as when an Auctioneer employ'd a person to bid for him, in order to take the goods from the bona fide bidder. Miles vs. Baldwin in Day.

So all contracts, which have a tendency to make a person do that, or induce him to do that, which the law says he is not his duty to perform, are void. Thus where a Def. Plff was contracted with a High Sheriff not to serve writs above the value of $120, this was void, for it was his duty as D. Plff to serve all writs, which came to him. Moore 856.

So again contracts, which induce a man to build the law are void.

But
But a bond taken by a Stat. to let a prisoner have the liberty of the prison yard, is good; tho' it is taken to prevent a negligent escape and it is lawful, but actually is not, for the person may escape, whom there is no negligence on the part of the Stat.

A contract which contains no defects the fulness of this proviso is void, both in law and equity. Cowp. 129. 135.

A contract is made, which afterwards becomes unlawful by a Stat. all obligation is discharged: if the consideration has been paid it must be refunded.

But Chanc. says if the contract is of such a nature that part of it may be performed, if the party on whose favor it is to be performed is willing to accept partial performance, Chancery's contract for decree it to be done. So when a lease was made for 50 years afterwards a Stat was made for holding lease to be made for more than 50 years, in this case, if A. was willing to accept a lease for 100 years, Chancery accordingly decreed it. Dig. 37. 22. 19, but the case was reversed in the House of Lords. Pro Chanc.

Thus are other cases in which Courts of Chanc. have afforded relief, some which are void at law, some of this kind, A. gives his bond to B., in consideration of which B. was to use his influence to get C. to convey his estate to A. B. did use his influence & actually conveyed his property to C. B. sent A. a letter, & A. accepted his petition of Chancery. Then it sat aside, & it was set aside, & upon the same ground as marriage brokerage, bust. 37. 276.

Contracts or restraint of marriage are void. They can void in Law, some in Equity only.

A contract not to marry at all is void both in Law & Equity, for it is a general stun proper restraining contract to marry.
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A contract not to marry any except a particular person is void. If A enters into a contract with B that he will marry no other person except himself if she does he will give her such damages. It is for B to pay the damages. In fact the marriage of any person with another person. But if B does not wish to marry it will decree it void if it is also void in law. 1 Pet. 255, 195.

Again, a contract which obliges one to marry someone and a contract that is void in Equity but not in law, it is void for want of reciprocality between the parties. N. York 25, 195, 105.

There is a case in Chancery which is said to be opposed to the idea, but in here we find a reciprocal obligation on the other party, it is also reported in 2 East case 45. But the doctrine I have laid down is supported by Lord Blackburn in 2 All. 408, 409, 410, 415, which sets the point beyond dispute.

The reason why such contracts are binding in law is that they bind to marry under seal carries consideration with it, but the notwithstanding the solemnity of the instrument will expire into the consideration. But a promise merely in this case will not bind at law any more than in Equity, because the consideration may be regarded into.

Contracts to procure offices for others are void, if the money is paid it may be recovered back again, 1 Tho. 169, 170, 391.

There is one exception to this, namely that of officers in the army, many of England, i.e. that it is lawful for one to procure an office for another, the reason why it is allowed it is said is because it is matter of convenience. 1 Tho. 169, 393, 404, 169, 393.

But one officer will be permitted to take the place of another officer. 2 Tho. 303, 403, 404, 323. As where a Captain sold his commission.
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commission of an East Indian man to his Lieutenant, that was void. 5 T. R. 294.

Lord Thurlow says those contracts are void in law as well as equity. 3 T. R. 479.

Contracts entered into with their mistresses.

If these contracts are entered into for future cohabitation they are void. 3 T. R. 480. 9 Ves. 294.

Dunne, whether a bond or other contract entered into to pay for past cohabitation is good? The distinction taken is this: if of the bond was given to a prostitute it is good for nothing. But if to one, whom the obligor has induced, it is considered as the price of her modesty and kindness, this is the old doctrine, 2 N. 63, 318. 183. 484.

This bond, however in modern times, are considered as voluntary bonds, it makes no difference whether they are given to a prostitute or to a virtuous woman, if one who was virtuous before being induced. Lord Camden was the first who advocated this opinion; modern cases have adopted the same idea. 10 M. 348. 227. 318. 183. 484. Rec. in Hoy, 119. Bowr. 742.

There is a question has been made whether past cohabitation was a consideration. The fact is it is no consideration at all: a past cohabitation being induced or the bond does not destroy.

2 C. L. 839. 2 Bowr. 262.

There are cases, in which such a bond might be set aside, but they proceed upon other grounds. Thus a young woman lived in the family of a married man, he induced her afterwards gave her a bond. Now this bond was set aside, though good. This is a case, in which the woman knew she could not marry the man, if this makes a difference from the other cases. 3 T. R. 294.

Another case was where a woman married a man, she had
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had another wife, but she was ignorant of the fact; she afterwards discovered the fact but continued to live with him; he gave her a bond, the question was, whether she could enforce the payment. The court said that she could not. But also said if she had left the man as soon as she discovered he had another wife, she might have enforced it. 3 P. W. 339.

The Chancellors in Eng. have lately been reluctant to inviding with many of these contracts, such as marriage, because the courts for they think they may be avoided at law. 3 P. W. 339. 3 P. W. 339.

Idle Contracts.

A contract may be so idle that no action can be maintain ed upon it — e.g. a contract to give a man £1 if he will wash himself or idle or void.

Consideration of a Contract.

A contract may be defective for want of a consideration.

The general rule is, that a consideration is absolutely necessary to every executory contract. The quantum of the consideration is not considered, but there must be some, if it is not a sufficient cause, no action can be maintained. 3 P. W. 339.

As to Executed Contracts the general rule is, that they are good between the parties, though there can be no releasing them.

212 Reg. 20. 277. 3 P. W. 339.

But there is a rule, that if the grantor makes a deed of real property without consideration it cd not be enforced in the use of the grantor only; as if a man for the consideration of love an affection should convey a piece of land to a person no way related to him, now here is no consideration, if this is said to come to the grantor only. Now I am sure no reason in this says the judge is why a distinction should be made between real and personal property.
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property, for suppose a bill of sale of a horse was given, in this case, the
quarter would have the horse.

The rule I apprehend was introduced into Eq. during the
civil wars. I think it has no application at this county. At the
time of those wars, it was custom for persons to convey their
land to their use, this being a common thing, it began to be presumed
that where a person conveyed property, without consideration, he
conveyed it to his own use, or this was the origin of the rule, and
afterwards the idea of use, vested the legal title in the accounting
use, so that a man could not convey away his land, which he
conveyed it to his own use. Now I believe the true rule to be, that
execute the contract whether of real or personal property
vests the title in the promise. It is the rule adopted in this county.

An Executory Contract there must be a consideration, on
1st Rev. 909. P. 326. 57, 6, 163. If a contract is parcel taken of
no consideration, amount to it.

Suppose the contract is on writing and the promise acknowledges a consideration, this is a good contract.

Suppose the written contract itself mentions the consideration, this is good so no proof will be admitted to contradict it, even tho it could be proved in fact that there was no consideration, for the instrument speaks for itself.

But suppose the consideration in such case in the written contract, is in point of law no consideration, in such case the con-
tract is not binding.

Suppose a man promises to do a thing, if no consideration
mentioned in it; now this is not good upon the face of it, but in such
case you may aver one or your declaration, further might have been
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but a consideration, which was omitted in the writing, being one in the declaration does not contradict the writing, otherwise it was not subject to the foregoing rule; but it is also a general rule that you may always make an averment of a fact, which will state in the instrument; the you may not aver one, which will destroy.

But suppose the written cont, is a stock of instrument, and no consideration is expressed in it, is such contract good? Yet, an expression of consideration is necessary, for the sealing or signing a consideration, it affords a presumption that there was a consideration, as no man would be likely to perform his obliges unless constraining sealing without a consideration.

There is a difference between a right of recovery. An agreement is to do some collateral act, or when it is to pay some money.

Whenever your action is such as sounds in damages, the quantum of consideration may be ascertained, but you cannot pay the consideration, without leaving it to your concern how much damage was a fact done.

But if a bond or covenant was given to pay a sum of money, or there is no other consideration from the bond or covenant mentioned in the bond or covenant it will be recovered as damages. This distinction is owing to the form of action; for the action to recover the sum of money is the action of debt, in which damages are not uncertain; it also on the action of debt you must recover the whole and, states in the declaration or nothing.

Suppose a little bond or covenant, a consideration has been stated in the bond, is the consideration a fact of law? Is no consideration a fact of law? Is no consideration a fact of law? — can there be a recovery? It depends upon this, if the sealing money or a consideration, then...
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... can be a recovery, but if the sealing is mere evidence of a consideration, no recovery cannot be had.

But the seal does not presume any consideration, but what is expressed on the instrument. This proves that the one who assigned, in point of law, is good for nothing; therefore the sealing good for nothing is no consideration, there can be no recovery in such case.

A consideration may be either valuable or good. A good consideration is not good against equity. A conveyance for a good consideration does not stand upon the same ground as a voluntary conveyance; for though it will not defeat an execution of a voluntary conveyance, but they will in many cases, where the conveyance is for a good consideration, as when it is to provide for children or relations.

Under the English law, written agreements without seal, are of no higher authority than verbal agreements, except in the cases of negotiable instruments. The words for value received in an instrument are sufficient evidence of a consideration, upon which to ground an action.

What is a Consideration?

This is no perfect definition of this, the following perhaps is good or one as you will judge, viz. If there is an advantage to the promisee, this is a consideration, also if there is a disadvantage or inconvenience to the promisor, this also is a consideration.

If the consideration is one not to be an advantage in fact it proves not to be so in point of law, although may be a disadvantage to the other party, yet it does not follow that the contract is good. Suppose one in consideration that
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another will beg his pardon, should engage to release a note or obligation, which he held a.g.t. him, nor this will not bind that no action can be maintained upon it, for it is no consideration in point of law to buy a man's pardon is more void, it is not valuable at all he it may be considerable disadvantage for one to buy another's pardon. And it is on this ground that an award to buy a man's pardon, by arbitrators, is not good in law and no action can be maintained upon such an award. For, 6 P. 350. 232.

Past considerations are not binding. This when one has done anything in consideration thereof, another promises to pay him something for it. Suppose B. promises to repay A. in part of money for him; afterwards B. meets A. and tells him what he has done, and promises B. that he will reward him for it, and another man act, any consequence, which may flow from it; now this is a past or executed consideration, corresponds to the old decision is not binding.

Again B. tells A. that C. was about bringing a suit a.g.t. him, and B. had the suit, in order to prevent it, wounded. B. promises B. to repay him, according to old decisions, he cannot maintain an action of debt. Upon a.g.t. A. for the consideration of this promise of repayment is past, and the rule that a past consideration was not binding was universal.

A man cannot support an action a.g.t. another, for a mere voluntary act, or he done him, even the afterwards he promises to pay for it.

But of late some doubt has arisen upon this subject, some alteration of opinions has taken place. it is said that in a case of voluntary act, if a benefit accrues to the person for whom it was performed, an action after an execution or of repayment may be maintained. 320. 305. 306.
decide, viz. a farmer employed a number of men to work his field for him, while they were at work a person came along and wanted to be hired, but the owner was not in the field, he went into the field and worked all day, at night informed the owner what he had done, who promised to pay him for his day's work; he however afterwards refused to pay it, saying the consideration of the promise was past; when this he lost his action recovered upon the promise.

There has been a decision in Crown against, with the foregoing case, the modern rule; it was the case of the town of Plymouth, which noted to give soldiers $400 for enlisting after they had enlisted, after they had given them a proviso for that purpose, authorities to the 2d rule, Byr. 272, 610, 667, Ep. 85, 95, 610, 649, 3 Salk. 96.

I have no authority for the new rule. There are none no doubt, in the late reporters.

There are cases, which show nothing more than voluntary donations, still they lay the foundation for an action; what are they? They are those cases where a man is bound to perform an act, and then performs it in such circumstances that humanity renders it a moral duty for him to perform it; the more circumstances of duty in such case is not sufficient; you must to be in the idea of humanity, which renders it a duty on your conscience. Thus J. A. turns his wife out of doors, J. A. furnishes her with means, he can recover from J. A. for it is not merely a duty for J. A. to maintain his wife in this case, but humanity requires of J. A. that he should do so, 2 Pet. 83, 80, 84.

After the consideration be past, yet if it is done at the request of another, i.e. in consequence of a previous request, it may
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Thus if A. request B. to give back for B.'s doing it, afterwards A. promises to pay B., this is binding. Pemb. 33. Kent 263. 3 T. 96. Co. 24. 169. 2 Ch. 95.

Another proposition is, that a prior moral obligation, or a man to do a thing is always sufficient to raise a promise of such consideration as will bind. Thus a promise to pay a debt, which is barred by the statute of limitations, or contracts during minority,

But if there was no moral obligation, the promise to pay the debt of another, being under no obligation to pay it, is not binding. So when a woman promised to pay the debt of her son, this promise was not binding, she was under no obligation to make the promise, i.e. no moral obligation.

Suppose a married woman should give a bond, after her husband's death, should promise to pay, stile she is not bound by this promise. But suppose an infant had given his bond in the manner of after his came of age, promised to pay, he would be obliged. The reason of this distinction is, that a bond of a minor court is absolutely void, whereas that of an infant is not, but voidable only; no promise can revive contracts void ab initio, but it can a voidable one.

But it does not follow from this, that there can be no moral obligation to pay this bond, in this case the married woman at the time original contract was void, still if promise afterwards is made & there was a prior moral obligation to pay, it being says the judge, this would be good for recovery.

I am well aware that the old void contract cannot be revived in this case, still I do think, that when there was a prior moral obligation to a subsequent promise, this promise will
will support an action; so I therefore think that the proposition laid down in the case of the married woman, is incorrect. 

Now any person under any circumstances have the benefit of a promise made between two other persons. Thus suppose A. should promise T. A. that he would give his son Samuel 100l. when he became of age, how can T. or Samuel sue A. for that promise? He suppose that there is a consideration in this case; there are cases in the Books, where persons for their benefit, promises have been made, have been allowed to maintain their action. He is said there must be a relationship in order to maintain, that this the relationship is the ground. But I think, says the Judge, it is on the ground of absolute necessity, that it can be done in such cases only when there is not a person who can sue; if we examine those cases, which have been decided upon this subject, we shall find that necessity, absolute necessity governs. 

The first case was this, a man having a son and daughter, wishing to give his land to his son, and also to make provision for his daughter, he devised his land to his son, at the same time devised timber then growing on the land, to the extent of £1000 to his daughter. But the son dissenting to have the timber cut of the promises, promises the Father of subsequently, he will alter his devise, I give him the timber, he will say his sister £1000, and she sued him in her own name on the promise to her Father to recover. This was from the necessity of the thing.

We are told in the Books, that this action of maintainable at all or confined to the promise merely, so that it cannot be tried on a bond. But if I have stated the true principle, it
it makes no difference whether it is a promise or a bond; there is no case in the books where a bond has been given.

There was a case decided in the national lot. of the case of a bond - the lot. decided on the ground of necessity. It was this: Mr. Allen gave a bond to Warner Allen, that he would convey certain lands in Termore to his two daughters, when the come of age. The lands were conveyed to the son, that it would for his daughter, the fact was that Warner said it was his executor, it thereby came into her hands of the land: he then refused to convey to the daughter. She having an exact copy of the bond brought her action on her own name recovered against him.

I was once employed as Counsel, says the Judge, in a case of this kind, the it never came before the court. A man made a promise to the Father of a boy, that if he would let his son live with him, he would give the boy a villa of land. The boy went to live, but time out, his: Father refused to give for the boy. Do you, could the boy sue? [Case 6:96, 32, 372, 117, 3:8, 83, 2680, 87, 97, 579, 15, 363, 35, -

Consideration of forbearance to sue.

There have been many actions brought on considerations of forbearance to sue. Suppose J. I. has a bond for 10 years, and J. I. promises an consideration that I. I. will forbear suing him for 10 months. He will pay the debt. Now the bond is not affected by this promise, but remains good. Suppose that he should promise that if J. I. would forbear to sue a bond for 6 months, within that time it happens to be barred by the Stat. of Limitations. Now in such a case J. I. would recover the whole debt on such promise, it is all cases whether it be a man. J. I. sustains by act saving, that damage he will recover.
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This forbearance must either be forever or for some limited time, for a promise to forbear merely without specifying any time is no consideration, whatsoever. It is no doubt, in case of this kind, 17 had a court to he a void, because A gave to B, promising him if he will let go he (A) will pay him. Here, is it bound by this promise? No, he is not, but he would have been had it been good. Code, 205, Section 108, Code, 129, 135, Eq., sec. 79.

A promise by one to do a thing, if a sufficient consideration, for another to do a thing, such as A should promise to B, that he would pay him $50, if he would promise to deliver him a horse, would not affect the performance, it may sue A for the $50, but if he delivers the horse, A, unless, if he was to deliver the cow first in those cases, when one promise is the consideration of another promise both parties must be bound on neither. Since the principle is not too broad, says the Judge; a voidable promise is a good consideration plainly; but if it is void on one side, it is on the other.

Again, suppose A should promise to pay $50, or deliver 50 bushels of wheat; now he is under no kind of obligation, till he delivers the wheat; A can sue B, for the wheat; the 18 that undertakes the first act, must perform it or he is liable, if the other party is not liable till the act is performed. There for in the case just of the wheat, B must aver that he has delivered the wheat: if A need only aver that the wheat was not delivered.

But if anything is stated in the contract, whereby it appears that the money was to be paid first, it must be done. Suppose a man agrees to give $50 for 50 bushels of wheat; it has been pleaded that in such case the wheat must be delivered first; if you can learn by the agreement, that one was
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to act first, that must be done before the other party is liable.

But if there is a promise in consideration of another promise, or a promise in consideration of an act to be performed, if you cannot determine which was to be done first, both being concurrent, the contract is of no validity, till one of the parties perform his act, if there is a mutual covenant, between A & B. As saying that in consideration that B has agreed to convey him a piece of land not done, I agree to give him $300 & B covenants to the same effect in his will; now in this case, you cannot determine which act was to be done first, both are concurrent, & this contract is of no validity at all, it binds neither party, till the other has performed his part.

Thus it appears there are three classes of cases as respects the right of action & the performance of contract. 1st. Where the promise of one is the consideration of a promise, or an act to be performed, either party may sue for the performance. 2nd. Where an act is to be done first, this act must be performed or action to entitle the person to an action. 3rd. Where the act is concurrent, upon the case of mutual covenants, for example, and you cannot determine which is to be performed first, yet there can be no recovery until performance by one, i.e. till one has performed his act & avers it. C and D in 27th. 214. H. 88. 80. 102. Saltby 367. - And in the case last mentioned, equity will not assist either party until he has performed what he stipulated.

A promise of a doubtful right, is always considered sufficient to bind the party. 2 Cor. 234. Acts 1372.

It is not necessary that the consideration be expressed in direct terms in the contract. Prov. 6:36.

In expiring contracts no consideration can be implied by the one, which is expressed. 7 Ecc. 40. 70. 79.
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For fact there has been no consideration at all for money paid, as a general rule, an action of ejectment will be to recover it back again.

Again, if the consideration intended by the party paying if that consideration was the same than now of the contract, the contract may be set aside in Chancery; but if it is not the same, even now the contract stands, if the consideration of any there be well sound or damages.

If the consideration is a promise incapable to be done, no obligation arises on the party to perform it. If the contract is illegal, no right of action can accrue.

But if money has been paid for the performance of an illegal contract it is different; for in some cases it can be recovered back, in others it cannot. When the parties are pari delicto, money is paid cannot be recovered back, but if they are not pari delicto it can. E.g. Suppose two persons are engaged in smuggling goods; money has been paid; here it cannot be recovered back; for both are in pari delicto, but suppose money has been taken; in this case it may, for the borrower ipso facto guilty, with the lender.

There is a strange proposition, which has been handed down to us, but which is now overthrown, viz., that so long as an illegal contract remains executory, if money has been paid it may be recovered back again. This has been law for some time past; but according to the last Reports of Blackstone, it is decided that money paid in such case cannot be recovered back again, any more than if the contract had been executed. [13 Burr. 1012. Corr. L. 990.]

A new question came up on this subject. Acts, 1838, sec. 

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In company enter into an illegal contract with C. to perform his part of the agreement, I must sue the whole sum for the performance of this unlawful contract; the question was, could I recover half the sum which he had paid to from B his brother? The court have made a rule upon this subject, say that I cannot recover from B, unless he was privy to the payment by B or was not dissent to it. 3 Cr. 1291.

A want of consideration of you can get at it will destroy a contract. Of a quitclaim deeds is given; this is a bargain of hazard, no money can be recovered back again.

I suppose there is fraud in the consideration, it is a
make it believe that he has gotten a consideration, when in fact he has none: now in such case you can only recover damages at law, if the contract will remain, but if the contract is impeaching and the court will set it aside.

But if there is fraud in the execution of a contract, it is void, upon est factum; thus suppose a contract made with a blind man, if it turns out different from what was stipulated it is void. E.g. a note of hand is drawn for him to sign, if the same read to him is $50. Whereas the note of hand is for 810, it is void, there is fraud in the execution.

There is a famous case in D. Wilson, & others v. Blanchard, which shows that you may plead the illegality of a contract to avoid it upon the record.

There is one case, where it seems that the court treats the contract as void, tho' the fraud was in the consideration. In Corn, fraud in the consideration may be pleaded law and in other cases, if you may also go to Obly if no fraud has been committed at law. It must all be sheer fraud, that
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Fraud will not be permitted to be pleaded at law, or found.

There are contracts which ought not to have the full effect, by reason of some thing external, and this is when fraud is practiced by either party. Some of these contracts remain dormant; others only are recoverable, while others may be set aside in equity. I shall notice this as I proceed.

By force I mean not only, illegally, properly so called, but all cases where a person labors under some imposed headship, or under fraud. I shall consider a great variety of cases, where an advantage is taken of a man's situation.

There are four classes of frauds.

1. Actual imposition. 2. When fraud is apparent from the intrinsic nature of the contract. 3. When an undue advantage is taken of the circumstances of situation of the contracting party. 4. Fraud practiced upon third persons.

1. Actual imposition. What this is will be considered hereafter. I shall here consider the remedy that is to be had, when this kind of fraud is practiced.

The remedy is sometimes in Law, and sometimes in Equity. In some cases the remedy is in Law only. When there is actual fraud in the execution of a contract, the remedy is complete at law; the contract is absolutely void. E.g. where a man executes a contract at subjoined in fact he is executing one of a different nature. So where a man signs a note of $500 when he supposed he had signed one of but $250. This is void, defined, the fraud may be plead, but suppose it is not paid in suit, the obligation may go to a court of Chancery to have it set aside, so the $t. will decree that such bond or note be declared void or cancelled.

Parol testimony may always be introduced to prove fraud.
In a contract, if the rule that verbal testimony shall never be introduced to destroy a written contract does not apply, suppose introduced here to show that no such contract was ever made for or point of law it never was.

The legal idea of fraud is to destroy it and get it out of existence. Thus when a person with fraudulent intent procures a quantity of silk stockings to be brought to him, he took them, he the price destroyed the consideration & lost all the delivery of them.

Where there is a direct fraud in the consideration of a contract, if it is a personal one it is not void. By the common law of Eng. the remedy is a compensation or damages. Thus if A sells B a horse it represents him to be sound, he proceeds otherwise, B cannot compel A to take back the horse again & give him his money, but he must sue for damages. And if the suit is the name in Eng., if it is a total fraud, B's pays a counter it bill for a horse.

But in cases notwithstanding it is a personal contract if there is a total fraud in the consideration it is void & the general issue may be pleaded & the fraud given in evidence under it.

But a partial fraud respecting personal property is considered here as in Eng. if the remedy is in damages. But I think however, says the judge, that contracts respecting personal property ought to be void, as well as those which refer real property. The experiment has been made but it failed... the case was this: A exchanged horses with B. gave P20 for his tallow; B gave afterwards in the hands of A, fraud thereon, the court declared him to be the best, an action of injury for his former horse, an action for money had and
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received for his money. But both actions failed. Without knowing or pretending

If this fraud is in real contracts you may either recover damages at law, or you may apply to the courts.

Therefore if there is fraud in the execution of a contract it will void; but if it is in the consideration, it is not void at law, but personal to the contract. If it is total or partial fraud in personal costs you recover damages, if in real costs, you must have it ascended equity. In rescinding a real contract, the parties are placed in the same situation as before contracting.

What is this fraud? There have been a revolution of opinions upon this subject; what was in former times considered as fraud, is now considered as such. Notwithstanding other moral writers insisted that the vendor of an article ought to acquaint the vendor, with all the defects of the thing sold, and that if he did not it was fraud. Now there are some authorities, which are contrary to this doctrine. But most other authorities agree with these writers, I say that the vendor ought to disclosure all defects, and that a suppression of the truth was great a fraud, as a direct falsehood.

But if the vendor knew of no defect, there is no fraud, then suppose, says the Judge, that an action would lie against the vendor on the ground of mistake. To maintain an action of fraud you must state a scienter. Prove it, prove it; for if you cannot prove that the vendor knew of the defects, you cannot maintain this action.

Suppose the defects are visible, there is nothing said of it. How, at the time of purchase? In this case there is fraud for the vendor is supposed to have noticed them. But if there is any

end, to conceal these open defects, an action lies, and if it is real property, that is the subject of the contract, it may be
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be rescinded. As to patent or upon defects, see 15 H. 8. Ch. 466.

Expulsion of opinion, namely, even the made with an inten-

tion of fraud, are not such as will support an action. But a
false affirmation as to some facts is fraud sufficient to support
an action. Thus suppose A. says to B., he stole a horse. If
he asked for how much he rented his house, A. says for £40
in fact he got only £20. This is fraud. But if he had said the
horse was worth £30, it would not have been fraud, for it amounts
to mere matter of opinion. 3 Salk. 76. 146 32. 363 363.

A question of this kind has arisen. A. sells B. a house he had
rented for £30 per year, and in fact he had rented it for
£40. If it makes some inquiry, he is concluded to give £30. If B. says
that an action of fraud would not lie in such case. But it has
since been determined that it makes no difference whether
A. made any inquiry or not, so that an action would lie
for the fraud. Lord Elphinstone. 11 N. B. 211. 211.

It has been made a question whether a person in whose
interest it could be made liable for a false affirmation, which
was the procuring cause of the contract, by which A. was sustai-
med an injury. But it is now settled, that such person is liable
for such false affirmation. Thus if A. was about to make a
bargain with B., it should inquire of B. as to the char-
acter of A. He should affirm that B. was responsible
and in fact he was not, in this case. If B. would be liable if
A. should sustain an injury in consequence of what A. had
said. 3 Salk. 76. 363. So also if he affirms a thing of which he is
implicitly ignorant the rule is the same. 363. 363. 10 Salk. 109.

So also, says the Judge, I conceive it to be settled that no
person can make a false affirmation respecting any fact without.
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being liable, in case any part is injured by such affirmation.

But the law will not take notice of a false affirmation of
the fact, if the fact is such as can be known by both parties with
out any difficulty; as if a man should affirm that his horse
or another's had four legs, when he had former but three, or
he was present before the purchase, so that he could not be

But Equity will not enforce any contract, where the
least industry has been employed to conceal defects. E.g. suppos
one should sell another an article, at a distance, which sh
had now he would not have purchased on account of some de
now an action will lie, in such case for any fraud practised, to
all these cases proceed on the ground of inducements conceal
As to latent defects. The rule is, they must be discomfited and
if they are known to the party he does not disclose them, an action
will lie against him. It is sufficient here. Perhaps there may
be cases when latent defects may be concealed, i.e. not nece
lie in such case, as when the purchaser had as good nece
information as the vendor himself. Pothol. 1 Ch. 549. 398.

In the above case it is necessary you state, that the part
ty, who concealed the defect, knew of its existence.

A question has been made in modern times, whether a
latent benefit is an article sold, ought to be made known by
the purchaser to the vendor, supposing the latter ignorant of
it, while the former knows it. Dunn. Is the purchaser liable
for not disclosing this benefit? It has been decided that he is
not bound to disclose it. 2 Tor. O. L. 1020.

There is a case decided in the Books, previous to the one
above, the in some respect different. It was this - A person hav
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Having discovered a mine upon another land, communicated the knowledge to a third person; this person dissuaded the discoverer from purchasing, particularly with the owner, for the purchase himself. But the owner afterwards became acquainted with the circumstances, refused to convey; upon this he made an application to Chy to have the conveyance enforced, but Chy refused upon the ground that the discoverer of the mine might have given more for it. [Vol. 371, p. 371.

The rule as to discovering defects has been narrowed when applied to the sale of real property, the reason assigned is, that from the very nature of the property, description can be practised. The Court of Error in Brown, hanging so far as to say there can be no fraud in the sale of land by applying the rule Current Emperor. This may, says the book, may be carried too far.

If the purchaser has the means of knowing, or being acquainted with the situation of the property, it is denied, that an action will not lie. But not so with respect to personal property, for the vendor owed to disclose defects, notwithstanding the purchaser is pursued with an opportunity of knowing, if the distinction is this, that it is the duty of the purchaser to be more particular in the purchase of real property, that he should exert himself more to acquire the truth, than in the case of personal property. [Vol. 39, p. 678, 678, 170, 170, 170.

Suppose a man sells a farm for 500 acres, when a few acres

without much effort, but 1400 acres or this same vendor will the other vendor, for the vendor might have ascertained the full
by measuring, it was his duty so to have done before he bought it.
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So if the lessee there is so much woodland or meadow, who in fact there is not as much, the action lies for the purchaser might have ascertained these facts without purchasing.

There is a case in the Books, which seems to oppose this doctrine, but in fact does not. The case was this: a man willing to purchase a farm, the vendor gave him a description of one, which was false, the vendee bought the land, and sued for his relief. Why? Agreeably to the rule we have laid down, he should have gone to an inquest on the land; this is true. But in this case the unfairness of the vendor renders it impossible for him to form a correct opinion about it, that was the ground on which the Court decided, that was required in ordinary cases, was in this instance dispensed with. 5 Co. 587.

There is a manuscript case of this kind, a farm lot a house of another. The vendor said the house was sound. But it appeared that some timbers, which were not visible, were rotten; the vendee bought the land, and sued. The purchaser brought an action; here, the Court said the action would not lie, upon the ground however that the damage was small of a trifling nature. But it is said, says the Judge, they would have sustained an action, provided the damage had been great, i.e. if the purchaser had suffered material injury; for in this case he could not ascertain whether the timber was sound or not, as he had pulled down the house. Another case, in 2 Cr. 486.

There has been a great question agitated in former times in the neighboring States, whether this rule applies to the city lands in the western country, which are usually sold without having ever been seen. The question is, whether the vendor is
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liable of falsely representing the quality or quantity of the land? Our courts have always decided that he was, that causation for does not apply in this case. But the former court of Error reversed the judge, in every instance. I am clearly of the opinion says the Judge, that they ought to be liable, the reason I give is, that the lands are at such a distance, the person cannot without much expense, go to view the land; and in most of the States the rule in such cases is, that an action will lie.

There may be fraud in other things. A man is always liable to an action of fraud for a breach of trust. When a man is bound to perform, if there is no express contract the law will in all cases, thus a man employs an attorney to manage his case, and when it is to be tried the attorney is absent, whereby the party is not notified, now the attorney is liable. Bell v. G. 116, 99, 950. 2319. Bro. 1,469.

It would seem from the current of authorities that money are not liable for their friends, but it is opposed to all principle. says the Judge. I conceive that they ought to be liable for their friends, as well as their debts, but the law is otherwise enacted 52, 183.

Actions of fraud may be maintained when there has not been a word spoken, but the fraud was accomplished by actions. Thus where a man blackballed the head of his negro, showing grey, I made him acquire some straightly airs, for the purpose of making him appear like a young man an action was sustained.

In cases where there is a warranty, actions of fraud will lie notwithstanding the warranty. So this seems somewhat strange, yet it may be done. So it is an established rule that where there was a design to dispose of the article by warranty, actions of fraud in such cases is concurrent with an action on the warranty. Bell at 96, 95, 114, 6.
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Warranty. Warranty must be made at the time the contract is made; and, if it is not made, it is of no effect; for if it is made afterwards, there is no consideration. Thus, if a person warranted that the cloth of a second, which he offered for sale, was silver, the person to whom the offer was made did not see it to purchase at that time; and afterwards offered it, but without warranty, the person bought it, it proving not to be silver, he lost an action on the first warranty, but it was held not to be. But an action of fraud in such case would lie. 1 N.S. 134. 1 Eq. 76. 1 LOCK 211.

The next are those cases of fraud where it is apparent from the intrinsic nature of the contract, or from the particular situation or circumstances of the contracting parties, will prevent their contracts from being carried into execution.

Such contracts as these cannot be enforced at law; application must be made to the courts of equity; and even then if those contracts have been executed, they will not be set aside, although something strikingly unjust appears. They will not enjoin any such contract if the least suspicion appears about them. So it requires something more to rescind a contract than to prevent one from being carried into execution.

There are many things which are evidence of fraud or unfairness, which must be learned from the case itself. Biased price is evidence of fraud or unfairness, if it is connected with other circumstances, and is conclusive. A side a contract, so it is said, inadequacy of price alone is not sufficient. But I think it shall be able to show that it is also sufficient to set aside a contract. It is certainly evidence of fraud or taking advantage of a less peculiar situation than this case.
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ground contracts may be set aside in Equity - case of this kind -

Amor takes a mortgage of a piece of land for the security of a debt, on the mortgage there is a covenant that the mortgagee shall pay the interest annually; if he does not, the interest up to the interest shall be allowed. Now this is not easy, but it is considered as an unreasonable contract, as it will alleviate it. So far as they can, i.e. they will suffer only principal interest to be recovered. Ibid. 6:41, 9 Tal. 2:249.

Again, a case of this kind. A young man had a legacy left to him by his creditor, but he was afterwards confined in Newgate for some crime, while there he sold his legacy for a trifling sum; he afterwards obtained his liberty, applied to the creditor for relief, the creditor he might have his legacy upon the ground that undue advantage had been taken of his situation. 3 P. Wm. 290. 1 P. 380 at 310. And I suppose, says the Judge, if he had not been imprisoned he had sold his legacy for some trifling sum, that even in that case they would have rescinded the contract on the ground of inadequacy of price, that offering evidence of some fraud, or undue advantage having been practiced upon him. Wilson 230. 2 D. J. 518.

Another case. A. B. was indebted to C., and the latter received judgment and they were unable to pay the money. Before that time they would give him their farm, he could discharge the debt, i.e. gave them the accompanied promise to which they agreed but afterwards they repudiated the promise to pay for relief, B. rescinded the contract. 96 R. 965.

Again A. was in distress in debt to B., B. pretended to be a great friend to A. B. promises to assist him, which hides by furnishing him with money at different times, at length B.
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proposed to A that he would pay all his debts, provided he would give him all his property, to which A assented; but afterwards repaying of his bargain he applied to Chy. of they rescinded the contract on the ground that B took advantage of A's situation; in this case Lord Thurlowe says inadequacy of price alone is sufficient evidence to sit aside a contract, this opinion has since been followed up by Act 14 & 15 Geo., 3 Chy. 9. 25. 175. 3 Ass. 402.

Contracts in which there has been practised fraud upon third persons.

It is of late years only, that defences could be made to these contracts in Courts of law; relief was obtained in Chy only. But now some of these contracts may be relaxed in a Court of Law. The in most cases Chy is the proper place for redress.

These contracts have in general been necessitating marriage agreements, the fraud may be practiced on third persons in many other cases. Thus, A was about to intermarry with B. C. the Father of B. insisted that D. the Father of A. should give £1000 per year to such D agree. But D the son consents with his Father not to receive but £100. But after the death of A. B. insisted on having the £1000 according to the agreement with his Father, so Chy said that he must pay the £100, so that the covenant between A and his Father was void as it was a fraud upon a third person. 2 Boo. 35. Eq. Cas. 86. 33. 1151.

There is another set of cases usually called composition cases, as when creditors agree to take the debtor's goods, & divide them among themselves; now suppose if the creditors go to the debtor says in will not divide according to stipulation among the other creditors, unless he will give them his note for so much the debtor giving him his note, this note is void because there is
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Fraud practised upon the persons, e. g. under the other consent. 2. Bn. 602. 3 R. 43. 2. 3. 244. 175. Now it is to be observed, that these contracts, which are fraud upon persons that they cannot be enforced. Wherein is Co. 6. in which one of the parties is defrauded in making the contract not withstanding. But in these it cannot be, because it cheats third persons. 3 R. 45. 3. 2. 26. 26. 24. 786. 706.

If these contracts are employed for valuable consideration, they are subject to the same equity as the hands of the assignee as they were in the hands of the assignor; if there was any fraud while in the hands of the assignor, it remains still while in the hands of the assignee, i.e. the assignee does not purge the fraud.

There is another species of fraud upon third persons, to wit, a conveyance of the marital rights of another.

These contracts take place in the instance of Bosom, who, having concluded a marriage treaty, convey away their property without the husband's knowledge, this is fraud upon the husband's voice. But if he is knowing to the fact, he cannot recover it back. 26. 3. 9. 2. 2.

It is admitted, however, that if a widow, who is about to be married to a second husband, conveys away her property to make provision for her children by her former husband, it is a good conveyance. 24. 3. 403. 2. 3. 335. 3. 44. 26. 1. 17. 21. 19.

It has however been determined, that if there has been any misrepresentations by the widow in such cases, as if she had said, she had made no conveyance, nor even could make any, the husband's rights in such cases shall not be destroyed. The conveyance will be void. 1. 2. 1. 7. 4. 24. 2. 2. 1. 32. 62. 3. 2. 24. 675. 2. Brown's Chancery 345.
Contracts.

Fraudulent Conveyances.

This subject is very important. I have devoted much time to it, sayeth Judge. I believe I have sifted the cases so much that I shall be able to state to you the doctrine correctly.

Fraudulent conveyances, in the law, for this subject is derived principally from the construction of the Statute of 25 Edw. II, which regulating fraudulent conveyances, I believe this Statute has been copied in most of the States, the same construction has been given by our Courts, as by the English Courts.

Conveyances might have been fraudulent at common law without any Statute. I shall hereafter mention what the common law was, respecting conveyances of this kind. They all proceed on the ground of degrading creditors or purchasers, against such are void, whether at common law, or by statute.

I will here remark that the conveyances which are of this kind, that I shall most frequently consider, are those of real property, yet the rules are precisely the same as personal property.

I shall first consider those conveyances as they exist at common law, others as they affect purchasers.

As to creditors, fraudulent conveyances arevoid at common law, whether the Statute was declaratory of the common law, or whether it introduced new law. It has been a matter of some question whether it introduces new law, so at common law they were void only as to prior creditors, not as to subsequent ones. The following general rules respecting fraudulent conveyances.

1. The first rule is that a fraudulent conveyance is good between the parties to the conveyance, all claiming under them, that is, creditors, in the contract being both quasi contracts, by which I do not mean that the contract is good of itself, but itself...
Contracts.

II. To prefer one creditor to another when there is not property enough to pay them all is not fraudulent, for it is done with intent to defraud the other creditors. This is the common law principle, the act being void under the Stat. of Bankrupt. It would be considered as fraudulent. The reason of the common law principle is that any man has a right to prefer one creditor to another, and any creditor has a right to prefer himself to other creditors, in other words, a man has a right to pay what of his own debt he chooses.

III. Unless this conveyance is made in satisfaction of a debt, or to secure a debt, it is fraudulent if it is an absolute deed. So also if fraudulent to give an absolute deed of property of large amount to secure or settle a debt of small amount, i.e., it is fraudulent as to other creditors if they may take it; it ought to be conveyed by mortgage in such case, that other creditors may redeem it.

IV. It is not necessary that this conveyance should be made to a person who is not a creditor in order to render it fraudulent. Suppose it is made to a creditor to pay the debt, now this may be fraudulent, it inadequacy of price would furnish evidence of fraud, or that it was given trust for the greater. Suppose the debt, with the value of the property conveyed this will determine whether it is fraudulent or not; other creditors may take this property; if the creditor, to whom the conveyance was made, must lose his debt, for he was conscious in demanding other creditors. To be sure, if he has not given up his evidence of his claim, as a note, for example, he may stand his chance with the rest in attaching the property.

V. A conveyance for a full consideration, if made with a view to avoid civil process, with the priority of the greater, is void.
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for it is an assistance by grantee to cheat grantors creditors; the law
suppose theft not to be done with impunity; since, if the grantor
knew nothing of it, in such case he will not do.

VI. Voluntary conveyances, the not made with a view or intent to
cheat or defraude creditors, still if they do operate fraudulently
against them, it is considered a kind of legal fraud. Thus a man
conveys a piece of land to his son, supposing that he is worth more
than sufficient to liquidate his debts; if, however, he has not
more than sufficient to pay them at the time, his son in
intent to defraude, yet the law will consider a kind of fraud.

The creditor. The judge calls it voluntary fraud; it does not
subject the co-contractor of it to any punishment.

VII. There is a difference between voluntary and other fraudulent
conveyances, i.e. there may be a difference. A fraudulent convey-
ance made with a design to defraude, is void, but as to
forces subsequent creditors. But a voluntary conveyance is not
always void as it respects prior or subsequent creditors; it may
be void only as it respects price; in the conveyance may be made
under such circumstances as to be void as to subsequent creditors.

VIII. This intent must be an intent to defraude; therefore it does
not apply to any particular property, provided there is enough
to satisfy all creditors. So a man who expects his creditors will com-
monly carry away his house, house lot to his neighbor
in trust for him; provided there is propery sufficient to satisfy
his creditors, or they in such case are not allowed to take
that, which he has thus conveyed. But suppose he, to whom he has
made this conveyance, refuses to convey, he may be compelled to do it
or be. But a person cannot convey personal, keep in this way; nor that the
is sufficient left for creditors. Dare does not the last, but an ratio contrare
the first rule, which says such conveyance shall be good between the parties.
Contracts.

I have now given the general rule for this subject; but it may be asked, whether the statute was declaratory of the common law upon this subject, or whether it introduces a new law. Sir W. Mansfield, in 1710, says, that it does not introduce any new law, but that the common law was sufficient to support all cases. There is only one case in support of Lord Mansfield's opinion, which is reported in 2 Salk. 82. - Case was this. A man conveyed away all his property to avoid a penalty; the penalty was not incurred, no judgment had been rendered at the time of conveyance. Now it was contended that this was only void a t j e prior creditors, by the com. law. But it was decided that it was void a t the Queen, who was a subsequent creditor, in this case. No case but this.

It should say, says the Judge, that at com. law, these conveyances were only void a t the prior creditors, notwithstanding Mr. Mansfield's opinion in 2 Salk. 82. But this point is settled in Salk. 105, as I have stated, see 2 Salk. 644, 646.

Voluntary Grants.

These grants, when there is no fraud, are sometimes good, sometimes not good. Few cases where they are good a t the subsequent creditors, if there was no intent to defraud at the time of conveyance, they are void, as prior to subsequent creditors, even if made for a good consideration, as to the subsequent creditors.

But a voluntary grant to a stranger is void, both as to prior or subsequent creditors, even if there was no intent to defraud at the time of the grant.

But suppose the conveyance is made to make provision for some of the grantor's family, is this good? This depends upon the fact whether he was indebted at the time, i.e. consider whether he was the conveyance is void, both as to prior and subsequent creditors.
contracts.

Again, suppose it was made for the provision of the family, as before, and there was no indebtedness at the time, but it was made for some person or persons not in the, the role is, it is void as to prior or subsequent creditors.

Again, suppose the conveyance made as before, to make a family settlement, there is no indebtedness at the time, it is made for some person in spite of the time, it goes agt. existing. But still if it was made with an intent to get into debt immediately, it will then be void as to subsequent creditors. [500 490. 27. 491. 1874. 600. 520. 250. 98. 10. 8. 7. 6. 5. 4. 3. 2. 1. 2.

It seems necessary by the words of the Stat. that these conveyances in order that they be fraudulent, must be made with an intent to defraud. It then is necessary to find out what that intent is, by you will remark that it differs from other cases of exceptions, for by the construction of this Stat. the circumstance of the existence of such a debt is sufficient evidence of an intent to defraud, notwithstanding these debt are contracts, after the conveyance was made, 1287. this presumption raised by the Stat. cannot be rebutted. It is a presumption of law not unreasonable. 10. 8. 1. 8. 2. 8. 3. 8. 4.

Thus far we have considered the Stat. of 13. Elizabeth which relates to creditors, we come now to consider the Stat. of 27. Elizabeth, which relates to purchasers. We have used Stat. as the 27. Eliz. in books. As there is a sin it is one in most of the States.

This Stat. 27. Eliz. makes all voluntary conveyances from a person void agt. purchasers for a valuable consideration. It is made to protect such purchasers.

Thus if I. S. makes a voluntary conveyance of his farm
Contracts.

to his son John Stiles, and conveys the same farm to Stephen White for a valuable consideration. Stephen White will hold the land for ten years, a fraud but intent. I meant to get the money of Stephen White but the same time have his son Tom into the farm, it makes no difference, whether Tom White was one of the voluntary conveyance or not, for he will hold the land in both cases.


Now all this applies when the consideration is really good as well as when there is no consideration at all. In a good consideration, the idea of family settlements must be excluded, for that stands on different grounds from good considerations, i.e. money property. The conveyance can never be fraud what exists in such cases as I have mentioned, namely, when one man gives another to cheat his creditors.

Conveyance in consideration of marriage is absolutely in such ease, for it stands on a different ground, that it is consideration of other cases as a valuable consideration. Now these marriage settlements may be made for Children, or Children not in age. But the question is are they good as age. crediting Hundreds?-

they are good if they are reasonable; but if a man, should settle his whole estate upon his Children in order to discharge his creditors, it is not good, for there is not actual intent to defraud.

But if a husband makes a settlement upon his wife's side, with a ten taxation over to some other person, such settlement is good only in the hands of the wife's share, the husband's creditors may take it off, after they have done with it, for it cannot go to the remainder man in prejudice of creditors or purchasers.

But suppose the father of J. S. should make a settlement upon the wife's side of J. S. with remainder over to some other. 
Contracts.

Presumably in this case the limitation is good, the curators of the cannot meddle with it. They can't take it at any time. See Ruff, 170 P. 434; 246 P. 243, 2552.

Suppose the settlement is made after the marriage, is it good against creditors? Yes, provided the person who makes it is not encumbered or indebted at the time, it is valid for the wife to receive it.

But such settlements are not good against a purchaser, unless he was not encumbered at the time. But a settlement made before marriage is good. Lord Cromer v. Purchasers, 2 H. 158; 2 Shaw, 146; 20 New. 32, 372; 2 H. 158; 2 Shaw, 272; 146, 3 Shaw, 687.

This proposition as to settlement made after marriage as to purchasers requires qualification, for if it is ground on a prior act to settle it is good against purchasers, 2 Shaw, 357, 362, 367.

Suppose this case was a parcel act. This is within the statute of frauds. Since it neither the wife or spouse can compel a settlement to be made. But suppose the husband makes the conveyance in pursuance of the parcel act, now it is contended that it is not good, for there was no legal process to compel him to do it. But it is now settled that if he voluntarily makes the settlement in pursuance of the parcel act, it is good, the same as the act had been in writing, Broe 434; 246, 384.

Suppose the hus. after marriage complies with the parcel act, but does not perfect it, i.e. puts the parcel into the articles of act. Now Equity has refused to put this act into execution when there has been a purchaser, but after what principle they refuse, says the Judge, I know not.

But in this case if the purchaser knows that articles of act had been entered into, he gets no title, which equity will enforce.
Contracts.

Equity will cause the husband to revoke such act in favor of the wife. 7th Ann. 204. 1st N. 7th 127. 107.

Remember that the settlement must conform to the prior articles, if it does not it operates as a settlement after marriage.

Settlements made in consideration of marriage, whether has been no prior act, may be good, provided certain circumstances take place. So after marriage of the wife receiving a portion from any person, the husband in such case may make a settlement upon his wife, out of property so received, this will not be fraudulent. So if this estate should be given in trust for the wife, not directly to her it is not fraudulent, provided it is a reasonable transaction. 264. 18. 18th 121. 10th 185. 25th 477.

There is a species of settlement made after marriage, viz: a settlement made on the wife to live separately, now such settlements are of no validity, as agt. creditors, they are void as to them, but as between the parties they are good.

Although the word voluntary is not used in the statute, it shall be observed that all voluntary conveyances are void agt. creditors, except family settlements; it even here if there was an intent to run into debt afterwards. Com. 493. 2nd 132. Ann. 1596.

The doctrine of fraudulent conveyances extends as well to personal as real property; except in one instance, viz: money, when a man gives away his money to defraud creditors, say the Judge, I know of no way to recover it back, for money is not the subject of an execution, it cannot be levied upon.

In some however, to levy upon money, so it would save there was no difficulty as to the remedy here. But there also seems to be absolute absurdity about it, for money like all other things, subject to escheat, must be disposed of at the last. Eq. Cas. 149. 1st 490.
Cases which frequently happen. Suppose A, finding himself in failing circumstances, it being willing to accept what is right through with his creditors, makes a legal assignment of all his property to trustees for his creditors. Now this will not bind his creditors unless all of them agree. You must first make a compromise with the whole of them, or they all consent it is good. But suppose he should appropriate his property to certain creditors, if these certain creditors take possession, now this is not fraudulent, for a man has a right to give for his creditors. Sec. 17. 420—

But there may be badges of fraud even in this case; the fact of part payment is in possession is evidence of fraud. So also in the previous case, the property being promised to remain in quarters hands after it was appropriated for the payment of debts, was evidence of fraud or trust between them.

Suppose a man makes a conveyance of his estate to creditors, whose claims are barred by the Stat. of Limitations, i.e. are barred at the time of the conveyance, is this good? There is a diversity of opinion respecting this, I have found no actual decision on the subject. But he says, it appears to me it is good, if we only consider the nature of the Stat. of Limitations. If the idea is that a debt barred by the Stat. of Limitations is not debt at all, then such conveyance is fraudulent. But this is not the correct idea, for it is clear that a promise made afterwards would create the debt. So also of a man promise to pay half the debt, which is barred, this half may be recovered, so the idea of a trust is that until the man means to pay the debt the debt may be recovered. In other words, the debt barred by the Stat. of Limitations must be paid. The case therefore does not go upon the ground that there is no debt,
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I am clearly of the opinion, says the Judge, that the conveyance mentioned before is a complete evasion of all reliance on the State limitations, not from deceit. If a conveyance is made in trust for creditors, if they all agree to it, such creditors may compel a performance by trustee, but purchasers from trustee cannot hold it if he has had notice of the trust. *Op. 1235.*

(Attention to *Donations.*

It is difficult to know how far the law in this subject has application to our own country. In Eng., these donations were considered an estate, that the Stat. of Mortmain was enacted to prevent them. But afterwards a Stat. 43 Eliz. was enacted, which allowed them in most cases, except for superstitions purposes. We have no such Stat. as the 43 Eliz. a here. There has been a question in Eng., when a Stat. or this Stat. altered the Con. Law as it stood before its enactment for by Con. Law these donations were good for crediting. But it is now settled that they are void a.g.t. prior creditors. But good a.g.t. subsequent purchasers, provided he had no notice. *Op. 236.*

*Donate causa mortis - this is good a.g.t. creditors. P. 170.*

Now in what manner is the creditor to get hold of this property. For the Executive has no right to it. So can they buy it? The mode is this. The Donee is considered as Executor de son tort, if the creditor may take it from him. Now, however, we have adopted a different mode, for under our annexed law there can be no Executor of his own wrong, we consider it - like any other debt, the donee can not have the benefit until there are assets enough to pay all the debt. The Executor may inventory it, if provided there are not assets enough to pay the debt, the Executor is acting for the creditors. This is also the mode in *Penn. Tit. 173,* p. 120, l. 112.
Contracts.

Suppose a man makes a conveyance generally to some of his creditors, now perhaps he appropriates this for the payment of his debts, it is not gone, it is void to the rest.

Suppose I, T. has slandered T. K. the debts not yet matured, they prosecute him, to avoid this he conveys all his estate to his creditors. Now I, T. can only have the surplus after the debts are paid. C.P. 149.

Suppose I, T. wishing to defend his creditors, should purchase land with his money, it take the conveyance of the land. The question is, whether this is a fraudulent conveyance. Courts of Law have decided that it is not fraudulent. But relief may be had in Equity when equitable principles. Equity says, so far as it respects creditors, their children hold the estate in trust for their father. (Code 550. 259, 490, 260, 231. 259. 111, 60.)

But suppose I, T. should, in this case, take the conveyance to himself's son, now on the death of one of them, then would the survivor hold as in other cases of joint tenancy, hearing equitable relief. 2 Hale, 484, 108, 335.

Suppose a woman who is executrix, marries, the husband voluntarily conveys away the free, of which she is exec. to his creditors, is this fraudulent? I.e. can any creditor of the husband take this property? Is it settled that creditors cannot, for the husband had any part in this estate? But this may be a devolution as to the testator's creditors. C.P. 29.

Voluntary Bonds.

These may be fraudulent inpt. creditors. Thus suppose A, T. knowing if he conveys the land voluntary to his son, it will be void, to creditors, takes this method to avoid the State. viz., he makes his son a creditor by executing to him a bond. Now this is fraudulent.
Contracts.

fraudulent transaction, but it is difficult to prove it, especially in the case of the obligor. If it can be proved it, it has paid this bond in money, application may be made to the court to order the bond to be refunded. For this bond must be paid upon to creditors. Suppose it does not pay the money, but his son pays him on the bond and execution is levied on his real estate. How any creditor may go to law upon it, the same as if the bond was in the hands of this man. Suppose a man dies without paying the bond—his son calls upon the Executor of his father. If the executor of the creditor endorses to the Executor of his father, it is the duty of the Executor to file a bill in Chancery compelling the Auditor to come and contest the debt or claim, and this way prove the bond was fraudulent. All other creditors, it being voluntary. You will remark that creditors may in all cases enquire into the consideration of the bond.

There is one case in which this bond may be proven fraudulent in a court of law. Suppose the Executor has been sued by the son for the payment of the bond; the Executor, has also sued the Executor to the Executor's part the Executor. He asks he has assets sufficient only to pay the son's bond, now it may apply, that bond was voluntary. Pet. 307.

This bond after all the creditors are paid is good, it is subject to the claims of legatees. Pet. 625.

If a man gives a bond to his wife, that he will settle a jointure upon her; he does so, it turns out that he has no title to the lands or she is ejected, or application to a lot of other bonds. They will decree, that she be made out of the personal property previously to any other voluntary bonds. Pet. 425.
Contracts.

Suppose a man were to convey from a voluntary contract. It would be void, and creditors, it would be of no avail. Suppose A makes to B a fraudulent conveyance, and B, bona fide, purchases. Question whether the creditors of A can take this land from B and hold it. This question does not appear to be well settled, but, says the Judge, I am clearly of the opinion that the creditors of A can take it, for I suppose nothing can give effect to such conveyance. Consider this other principle. If the construction of this Stat. in this way will defeat the objects of that Stat., which is strong proof that this is not the true construction. Now the object of this Stat. was to prevent the grantor from conveying his property out of the reach of his creditors without any consideration, and another object of the Stat. was to discourage such practice. Therefore, once admitted that B can hold against the creditors of A, the Stat. is nugatory, for A & B may at any time, or in any case, take their heads together & cheat all the creditors.

Again, the obvious construction of the words of the Stat. is that which I contend for. For as it has not the effect the creditors of A, it is evidence he cannot convey any.

But it is said there is an analogous case, in which the bona fide purchaser holds. But I know of no case, except where the grant was in consequence of some prohibited law, these cases are not analogous to this present. So when the property is sold to market over the purchaser is protected. So if sold by any public vendor, or property sold at this time, the purchaser is protected. But there are public transactions, there is no such private about them as in the former case.

Again it is said that the equity of B is great as that of the creditors of A. Then they introduce this reason, Potter's case, 26 R. 39.
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properly, which they say decides in favor of A. But this is misapplied to the maxim, i.e. it must always yield to the following maxim, "priora in fortiori jure in juure." Thus suppose A steals a horse from B, sells it to C. B sues the horse on the proposition of C claiming B. C says I paid a bona fide price for him, i.e. in proposition, therefore I ought to hold him, but B says my right to the horse existed previous to yours, I quotes the latter maxim, prior in fortiori. As this answer of B is conclusive, he must have the horse. In all cases of equal justice, only let one have the prior right, the question is determinate. But if A has purchased this horse from B, sold it to C, B cannot introduce this maxim to contravene his right, for I paid a bona fide price, even the State cannot help acquiesce.

Again, it is contended that B may sell this horse also as well as A, for it is not contended but that A may sell for a bona fide price. Now let me agree to this, says the Judge, provided the purchase money goes into the hands of A, but this fact is otherwise, for B receives the money. If it is an absolute obligation to pay it over to A. But say my opponents let the creditor get B, for their money, it is not decided, says the Judge. I answer that no man is obliged to charge his debt in any case, except our, i.e. that is when a person sells before he pays rest, in this case, when the true marriage with the Baron, is discharged from the payment of rest, which accrues due upon the co-venture. I this defense upon the particular relation between Baron and some - if the debtor cannot be charged in any other case, i.e. creditor is not obliged to do it.

We will next consider this question on the ground of authority. There can be no doubt, but there are authorities that the State or the greater can convey to B, under the State of
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27. Eliz. for this Stat was made to protect bona fide purchasers—now the decisions concern this Stat. must not apply to cases where Eliz. for this respects the takers. This is frequently done, but the reason in one case do not apply in the other; there is an express provision in the Stat. 27 Eliz. To protect purchasers, but there is no such provision in the 13. Eliz. which relates to creditors—now there is no such provision in the books opposite to my opinion, I only see a case of a purs. in Bankhead v. U. S. For the true construction of the Stat. of 27 Eliz. see Sec. 133. St. 243. 2 Sh. 422. 3 Lec. 387. Cockb. 160. Upon the 11th Section of the Stat. 27 Eliz. one Elmer v. Cook with these remarks—that wherever this valuable consideration arising the fraud is obliterated—

A question of this kind has arisen, it made a voluntary grant to B. & grants to C. for a valuable consideration—bears a voluntary grant to D. the question is, can D hold? It is settled that he can. 2 M. C. 1619.

This fraudulent conveyance may be so as that it is difficult to detect the fraud. But there are various kind of fraud, which often times amount to sufficient proof. Thus suppose A. conveys an Est. to B. B. to secure a debt. Now if there is a great difference between the debt secured & the value of the land, it is evidence of fraud. This conveyance ought to have been a Mortgage. So also is the greater the property of the property this is evidence of fraud, the it is conveys absolutely or discharge of a debt. It is true remaining in possession of land is property, is not as conclusive evidence of fraud as remaining in possession of personal property, but here if not bad, the evidence is sufficient. 2 M. 365.

Such real property is fraudulently conveyed, and the
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Contracts void on avoidance through force or fear. If this force amount to illegal duress, the contract is void at law. It may be pleaded to avoid it. There are many cases, which do not amount to duress, in which they will grant relief. As an instance, one it has been complained of, yet I think that the existence of the fear was just and proper. An old lady had a daughter in the possession of a large fortune; a young man paid his addresses to her to obtain her hand. The father told the young man he would use his influence with his daughter not to marry him, unless he would enter into a contract not to call his mother or account for the rents and profits of her daughter's land to the young man, rather than lose the girl. He gave a discharge to the old woman; but he afterwards applied to the judge, who set aside the discharge as having been extorted from him over an unfair manner. 

Contracts are of two kinds: 1st. Duress of conscience on the part of the parties; or, duress of fraud, as: 1. Where a man is falsely imprisoned, in order to regain his liberty he executes a note or other obligation, such note or security is void at law. But if a stranger should give such security to obtain the liberty of another, this security would be good. It is not material whether there is a debt really due or not, for even if there was, still there may be duress in obtaining the security. Thus suppose A. owes B. £20. A is taken by the throat, he will not let him go until he gives him a note for the £20. Now this is obtained by duress to void.
Contracts.

But suppose a man is imprisoned legally by some security, as if this is good, it not obeyed if it is fairly done. But if there is any unfairness, it will be void in this case. This support I have here at this in Hall, I don't wish he gave a new security to be at liberty, it says he will not take one, unless he will make a new contract with him. Now if he gives a new security, it is void, it is duns. So also has usage may amount to it. See B. 253. 2 East 482. 3 L. P. 239.

If a man is attached to a court in Hall, as it is for a most unjust, unreason able claim, still it is not duns, but if the creditor compels his debtor, who is in jail, to give new security for some other debt, this is duns. Ross 687.

If a person is arrested in prisoned by a process issuing out of a lot, not having jurisdiction, if a security is given by him, in order to secure his liberty, this is duns. Ross 686. Hall 687.

So also if a man should falsely charge another with the commission of felony, have him arrested, then agree to discharge him if he would give him a note, now this note is void for duns. Allyn 92. 0 32.

But if the process is a legal one, nothing, that untrue will avoid the security in a lot. of law. So when a tenant judgment age, as upon which the law was unjust to unfound a suit age. As then agree to withdraw his suit, if he would discharge his judgment. If I say so, but a court of law would not here take place by St. Lex 69.

If this security is given by a stranger to obtain the liberty of his friend, it is not duns, if the security is good. Ross 687. Brown 686. 62 8. 187. But if it should be by way of his own 6, by duns, it would be duns, in St. Lex 687.
Contracts.

A man may avoid his contract for duresp to his father or wife, and the hus. for duresp to the wife. But the servant cannot avoid the contract for duresp to his master, nor wife curte.

To seize upon a chattel a man's property, in order to make him give a bond, note or other security is not duresp at law. 2 Bdl. 324.

II. Duresp per iniquas. This happens where a man is cheated with life of life, limb or with great bodily hurt, to avoid which, he gives a security; now this security is void, it is void also if given to avoid being falsely imprisoned. But to threaten to tangle a man usually he will execute a note to them, now this is not duresp at law; as I think it would void the security. 2 Bdl. 327. 1283.

But these securities obtained by either kind of duresp if ratified after the duresp is agreed are good; thus it seems they are voidable only. 16 Bdl. 862. 2 Dog. 148.

In case of wills something for short of duresp sufficient to set them aside. Continued importance will be sufficient in this case. Duresp must be pleaded specially. 503.

Now for 3 Bdl. will interfere in contracts obtained by something short of duresp, see 2 Birn. 297. 1284. 3 Bdl. 275. 293.

P. Ch. 268. 3 Bdl. 294. 1284.

contracts, within the Statute of Frauds and perjuries.

I shall first make some general observations upon this subject. There is a rule as to executory contracts, viz. that no man can grant away that, which he has not, if he does it is a void grant. So if a man should grant away all the wood, of which he otherwise can be destitute, now this is void, for he has the wood without actually nor potentially. But if a man should grant all the wood he shall have this year it is good. Altho' he has not the wood actu-
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actually, he has it potentially, for he has got the sheep, which will in time produce the wool. Debat 132.

Suppose A, leases land to B, which he does not own. B agrees to pay rent, and let him have it; now is B obliged to pay it? No, for the lease is void, therefore B was under no obligation to pay, ibid. 128.

But if B in this case procure a good title before the suit is brought, then B must pay rent. A's title claim is good. This rule applies to the sale of all lands, where there is no title, for if the consideration fails it may be recovered back again; but if title is obtained afterwards, it is then good.

Case in the books of this kind. A sells a horse to B on the 5th day of August, to take the horse till the 1st day of Dec. Then B is to take him. Before Dec. arrives A sells him to C. B does not come after the horse at the appointed time. upon which B goes to C and demands the horse back, telling him he has no right to sell the horse, at the time he did, for B was the owner, so B did not come after the horse at the time appointed. The horse now became his, i.e. A's. The court said that it could not be done. Though inconceivable, says the Judge, they decide not according to law, yet it has never since been contradicted, much of the kind having risen since. Pane. 133.

Contracts have a different construction in a court of law from what they have in a court of equity. There is a difference, but no opposition; i.e. contradiction. Thus suppose a man should covenant to convey lands afterwards, for, now at law you can only recover damages for this breach in non-performance, but equity will enforce a performance, and oblige him to carry out his covenant.

Thus again, suppose a man enter into a bond, the condition of which
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of which is, that provided he convey land by such a time the bond to be void of effect, now if he refuse to convey a court of law would say that the bond is forfeited, but a lot of Qy. will consider this bond as a conveyance to convey, i.e. they give it this construction it will compel a conveyance. 26 Va. 3-13. 20 Va. 37. 9 Va. 210.

Case of this kind, A man before marriage gave a bond to his intended wife, that he would make a settlement upon her after marriage, after which the bond was to be void. Now a bond thus given from hus. to wife, when the hus. is at an end for it then rests in the hus. by virtue of the law. But an agreement newly entered into by the parties before marriage is good this year. Qy. in this case consider the bond merely as an agreement or bargain it will enforce a performance 26 Va. 230.

So where a man consents Qy. go another to give security in land, I gave a covenant to his agent to convey, judgment of ejectment to the man who made it. This done by which the bond also was to lose his security, but Qy. said it should hold 26 Va. 261.

Again, suppose two persons gave their joint bond for joint debt, now it is the duty of each to pay the one half of this debt, but either of them is liable alone. Suppose of them pays the whole, he may recover the one half out of the other in a suit of Qy. for they consider this as an act. between them, that if one pays the whole, the other will pay his share. But in some we bring an action on the case to recover this half 26 Va. 37-12.

Suppose a woman gives her bond to her hus. elect, that she will convey her lands to him after marriage, he having made a marriage settlement upon her, now he can sue his wife in this case, but Qy. will consider this as a man's act. Qy. will decree her to convey to him. 26 Va. 4 Campbell. 2 P. 174.
This rule is laid down, viz. that b'y will protect the assignment of bonds, at the same time, that they are not assignable instruments. Thus suppose A gives a note on bonds to B. A sells it to C. Now A must pay the note to B, if he has notice of the assignment. But suppose A, B discharge the assignment. In such case A b'y will compel C to pay the note on bonds if he first signs upon it, for A b'y may write a covenant or an act over it. But suppose C is a Bankrupt, if A has paid X, in such case, A b'y will compel C to pay it over again, for they consider him as having practised fraud. See Roy. 633, 2 Taun. 340, 2 Pau 608.

It has been questioned in this case, whether A b'y might not go to C in the first instance, without going to B at all. I should think, says the Judge, that it was not safe to go to him without making an agreement, in the petition that it was a Bankrupt. A b'y will admit proper testimony to prove agreements, provided they are not within the Statute of Frauds. If necessary, A b'y may be questioned as to the facts or agreements, and the circumstances will take them out. It sometimes happens that you have no direct proof, either in writing or by parole, or such cases, circumstances, which attending the facts as natural by result or follow from a transaction, may be introduced from the first or agreements, or these circumstances may be properly parole. It is a rule that parole proof cannot be admitted from the terms of a contract in many instances, but you may have circumstances by which you can infer the terms of the contract.

Terms used in [Contract]. The general rule is that you must affix the same meaning to the terms as technical or as affixed when the contract is made, to which the parties were supposed to intend.
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A technical term must be construed legally, and if you can
gather another meaning from the instrument, "Pray God."

At common law twelve months mean lunar months, 60
undated. In Eng. the 12 month there means a year, 12
months = 12 months = 12 solar months. 2 Bkt. 144, 1. 66, 64.

In construing terms you have a right to take in all the
circumstances, the nature of the transaction, the law, the common u
servages defining on the subject under discussion.

In a warranty of lands, all molestations &c. now this
is not a warranty, a trespass, but only a claim on an
another title. 6 Co. 325. 6 Co. 521. 4 66. 66.

Construction of terms. If by adopting the grammatical rule
the intention of the parties will be defeated you can at liberty take
viable from it.

Formerly there was a difference between the date of
from the day of the date, the former excluding the latter inclu-
day the day of the date.

A fault cannot commence in future, but in carry-
ing one, it is to arrive a commence from the day of the date, 6.
in law means the next day it is void. But we will not defeat
the intention of the parties by adhering to the technical sense of
we will consider the fault as commencing on the day of the date.

Other examples might be adduced, but it is sufficient to observe
they all prove, the design or intention of the parties should be con-
 commanded when not illegal. When an estate is given to A to live in, the es-
tate is always considered as given to A in fee. "For life only" does not the
quantity of estate, not the persons, who shall inherit to A. When
given to A for life of the heirs of his body, etc. Of law throwing
the words "for life," 6 it is a fee tail. But Cht. will no editing but
inform the intention of the testator. Lewis 217.
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You are to be governed by written contracts, and the circumstances may be introduced to elucidate or explain. 3 Sw. 275.

You are to take into consideration the particular matter about which the parties were the communicant, in order to elucidate the meaning or design of the instrument, and also its intent and nature. Cq. 470. 19c. 1091.

When speaking of living creatures of any kind, it is due to extend to all of that kind. Where a statute says "all men," it means both. 1 Foss. 125.

In the books it is laid down that a contract to pay so many pounds, that the pounds shall be valued according to the estimation of those pounds, when the money is to be paid. See all other general expressions about money. The Judge thinks they would often defeat the intention of the parties, so he thinks that circumstances ought to be introduced to explain. 3 Sw. 278. 1 Pitt. 135.

When an instrument must be paid by such a time, nothing is said about interest; interest must be paid in the nature of damages, the not exceeding lawful interest, let the damages be ever so great or small. 3 Sw. 278. Pitt. 135.

The interest must be such, as it is when the money is to be paid, if nothing is specified to the contrary.

When a contract is made to pay 10 bushels of wheat, by such a time, if the wheat is not delivered, in this case the party can recover the value of the wheat, at the time it was to be delivered with interest. 3 Sw. 278. 1 Pitt. 135. Suppose he should pay part within the time, can you compel him to pay the residue?

Rescinding contracts. As if make a contract to the wish to rescind it. If the time of performance has not arrived, they may rescind it by partial if the contract was by parole if the contract was
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is writing by giving up the paper. If the time of performance is past if the contract has not been fulfilled, the may be expressed in writing a written release shall be, but is born without seal, specifying a consideration received. Without such writing their agreements will not bind him the obligee from bringing his action, because he has received consideration. 23. 4th.

One of the parties may rescind when the terms of the contract are such as will from it him. 3. 7. 21. 33.

When a person benefited by a contract shall want it amounts to a discharge. 5. 22. 20. 20. 2.

Length of time will frequently rescind a contract, if not attempted to be enforced within that time. 3. 7. 37. 31.

The party who was to perform, on rescinding shall put in state quo as if the contract had been performed.

When the contract is rescinded or prevented from being executed by one who was to be benefited thereby, the other shall be put in the same state as if it had been performed. 5. 20. 21.

In some cases, damages are given him, instead of the whole benefit of the contract as the performed. The Judge thinks this is the best way.

Mere. A security of a higher nature swallows up one of a lesser. A collateral bond or security does not prevent the holder from bringing an action upon the latter direct security, if he pleases. 5. 20. 24. Contracts of the same nature do not merge each other, unless the same is quantity & quality. 3. 87. 8. 1.

If you have a bond with: But a sealed instrument at common law would discharge it, i.e. the proof must be of as high a nature, as the instrument. This is an old maxim, but not adopted in Court in Eng. it is now contradicted by Statutes.
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Statute of Frauds & Perjuries by Mr. Coke.

There is a material difference at common law between written and unwritten contracts. Contracts at common law are either simple or special. A contract under seal is a special, and not under seal is a simple contract. The former is always in writing, the latter may be or not.

The distinction introduced by the Statute of 30 Geo. II. which is the Statute of Frauds & Perjuries, is different from the common law distinction. For the distinction by the Statute relates to written and unwritten; common law distinction was special & simple.

Statute of Frauds & Perjuries in force was enacted P. 1723.

So far as it relates to the same objects is a transcript of the English Statute. P. 27. Stat. 2. 1723. 183. P. 26. 269.

Under this Statute there are certain contracts that cannot be enforced either in Law or Equity, only reduced to writing, or then is some note or memorandum of it signed by the party or his agent, thereof to lawfully required.

These contracts are of five heads under our Statute, viz.

1. Promises made by executors or administrators to answer the debts or duties of their testator, or intestate are not bindingly reduced to writing, according to the provisions of the Statute.

2. Promises made by one to answer the debt, default or miscarriage of another, must be in writing, else they are good for nothing.

3. Agreements in consideration of marriage, must be reduced to writing, or they are good for nothing.

4. The fourth head consists of contracts of sale of lands, tenements, and hereditaments of personal estate.
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Lacking in the statute, or any interest in a concerning thing, it should be executory contracts for the sale of lands &c. instead of contracts for the sale of lands. The construction has been given to the Statute. These to be binding must also be in writing.

Viz. contracts not to be performed within one year from the time of making them, do not bind, unless reduced to writing, signed as genuine according to the Statute.

By an English Stat. all parcel leases of lands, tenements and hereditaments operate as leases at will, with the exception of parcel leases for terms not exceeding three years. This is a third of the improved rent. The Judges have of late considered these leases, as leases from year to year, i.e. not at will, so that they cannot be determined except at the expiration of the year.


Again, all sales of things of merchantable value, part of the consideration as paid when they are of the value of 100 or upwards, or until the goods are delivered, i.e. sent or shipped, or until the earnest money has been paid, when none of these conditions have been observed & the bargain is not in writing, you cannot recover in law or equity under the English Statute.

Our Stat. in Comp. contains no such exceptions as leases of land &c., for it makes no difference whether it is for three years or more. All parcel leases are void here, i.e. they are not binding, the they may be good as a license.

The object of the Stat. of Francis I. was to prevent persons from proving agreements under the Stat. by oral testimony on account of the importance of some, the facility of practicing fraud on others. Let us examine the five different kinds of contracts, within the Stat., in the order before laid down.
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1. As to promises made by executors or administrators to answer of their own funds or estates for the debt of their testator or intestate, such promise will not bind either in law or equity unless it is reduced to writing signed by the part or his agent.

It has been supposed that if the executor or administrator has a joint tenancy for the debts of his testator or intestate, that a legal promise is sufficient to bind them. But Mr. S. says there is no sufficient authority for this rule, neither is there any reason in it; for even this case the testator would be no more than the common law. So Mr. T. thinks this opinion not founded on the principles of law. 31 R. 385. 32 R. 526. 126. 57 R. 3, 8. 56 R. 365.

It was once held by Lord King that proof of goods in the hands of the executor or administrator would imply a promise on their part to pay the debts of the testator or intestate out of their own estates, but this was when it was expressly admitted and not law. 32 R. 690. 34 R. 288. 70 R. 850.

It is also said that if an executor submits a claim agt. him to the arbitrators, that was proof of admission of debts on his part to answer the claim or debt but this is not law. 32 R. 690. 34 R. 288. 70 R. 850. But if on submission the arbitrators award that he shall pay a certain sum, he cannot afterwards deny debts to that amount for this is equivalent to a finding by the jury, that debts exist over 70 R. 455. But finding that the testator owes merely, does not preclude the executor from denying debts. See now considering the award irregularly made.

Again, it was held that payment of interest by the executor is an admission of debts to the amount of the principal, but this is more clearly not law. 32 R. 8.

But the acceptance of a bill of Exchange by the executor of the testator is an admission on his part, that he has a right to receive the bill. But on his drawer's acceptance of the
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of exchange, may be either in writing or by parcel, by money his use
century. 52 U.S. 176. 182. 3. 14 Eliz. 11 Sta. 1260. 11 Eliz. 1225 Eliz. 7 Eliz. 83.

The rule is the same as to the holder of a bill of exchange.
for of his transfer or endorses it he is bound with his doing the same way as if the holder had endorsed it himself. 52 U.S. 176. 3. 14 Eliz. 11 Sta. 1260. 11 Eliz. 1225 Eliz. 7 Eliz. 83.

But the a promise by the Erecse to pay the debt of his testator, must be in writing, yet he is not bound of there is a want
of consideration, i.e. if there is not a sufficient cause. On the
objects of the Statute are only to subject him to those cases to those
only, in which he would have been subjected at common law. 52 U.S. 176. 3. 14 Eliz. 11 Sta. 1260. 11 Eliz. 1225 Eliz. 7 Eliz. 83.

I doubt whether this rule is law or custom, for there
may be written contracts is a speciality, whether seisin or not. I have
been a recent case where it held that the cause of a prom-
iser must appear in writing, if that part evidence is not suffi-
cyent to admissible to show that there is a consideration.

I have already observed, that the the promise of the Erec-
to pay the debt of his testator, is in writing, he is not bound un-
der consideration is shown. Now this consideration must be a
promise of testator, there must have been an existing debt, by which
the Erecse, in the, was bound as such, otherwise there can be no
consideration for the promise. If a promise does not bind the
promisor, if there was no debt due from the test. the ob-
promise is in writing. 2 Sta. 136. 380. 380. 380. 380. 380.

But it is not necessary in your declaration to. Even a
promise to pay the debt of his testator, to earn be sure.

The
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It is necessary that there be a consideration; yet it is not necessary that there should be a suit to subject him, for he is contemplated by the Stat. as coming out of his own estate.

Suppose an Exc. make a written contract, that as consideration 1. he will pay the debt. Suppose the Stat. is complied with, this written contract will bind him all the he has no agent for him as a consideration. It is in writing, that is sufficient. This is important, that ought to be well attended to. As if an Exc. gives a note, being at Exc. still has to be sued in his own name, if proper. See a long property. Roberts 205.

Now in order to take advantage of this clause of the Stat., it is necessary that the Exc. or agent should have been Exc. at the time he made the promise, otherwise he is not within the Stat. So if the death of the Exc, it should from in to pay the debt, provide they would give him a letter of administration, now if they should form a Stat., to administer, he would not be bound by his promise, the reason is he was not admin. at the time he made the promise. R. 330. Roberts 205.

II. Now we come to consider the second class of contracts, with in the Stat. which are to be in writing, these promises are made by one to answer the debt, default or miscarriage of another.

Under this clause of the Stat., the great inquiry is, what is the promise to answer the debt of another. In the construction of this Stat., the criterion adopted is the distinction between what is called an original and a collateral promise. An original promise will bind the it is by person, but a collateral promise is in order to bind must be in writing. R. 117, 118, 119. 118, 119, 118. 119, 118.

So now promises made for the benefit of third persons are said.
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said to be original - i.e. when the third person for whose benefit the promise is made is not liable at all to the promisee for the
is not liable at all, there is no debt or default to on his part for
not performing or discharging it. 2nd. A promise made by a
party to pay the debt of another is original when the liability of the
latter is in question or the promise being made, this will make
a promise for the benefit of the former, but it is implied in the
contract when it is made that the latter will be discharged, this
is an original promise, and the rule has been questioned as to its
consideration as not now well established. 3rd. A promise made
by one for the benefit of another is original, where there is a new con-
consideration arising out of a new distinct transaction, moving to
the promisee, i.e. offering to his own. This is the character of original from what will bind the party of promise by words as much as if they were in writing.

But contra, where a promise is made for the benefit of a
third person in aid or in addition to an existing liability on the
part of the third person, or made in order to procure credit for him, such
promise is collateral; it must be in writing. So also a promise
is collateral when made to furnish additional security to the
promisee. 3d. May 1835. 3d. April. 205. 2d. March. 229. 3d. October. 1856. 2d. May. 455.

Let us illustrate the foregoing distinctions. We will
illustrate the first class of original promises. Thus suppose A
sells to B a rough and delivers goods to B, if I will pay you gold
this is an original promise; it will bind A all the same, and
again suppose he had said, deliver goods to B on my account, and
deliver goods to C; change this to B, this is an original promise.

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But suppose, contra, I say to a Merchant deliver goods to B of the value of $5,000 if he does not pay you I will. This promise in order to be binding should be reduced to writing; for it is merely by the way of additional security; but in the former case, the person for whose benefit the promise was made was not liable at all. 22 El. 23, 28. 19 El. 128. 19 El. 128. 18 El. 128.

Again, one said to a Baker, supply my mother in law with bread. I will pay you for it. This was held to be a collateral promise. The court said that it was evident that there was no intention was that the mother should be debtor on the part of the baker.

In a late case it was left to the Jury to infer what the intention of the parties was, taking into consideration all the circumstances of the case. The promissor in this case was the same firm as in the preceding one. The Jury found for the defendant, a new trial was granted, not on the ground that it was illegitimate for the Jury to infer the intention of the parties, but on a different one. So it would be in this last case that the rule was somewhat modified, the promissor like the one in the last case is only to infer a collateral promise.

16 El. 212. 223. 18 El. 128.

Again, in a case of this kind. I wished to purchase goods of A. I owed him $5,000. He therefore procured his friend B to apply to the Merchant for goods for him. B says to the Merchant: I am acquainted with A. Will you sell 15,000 if you do not know A, you know me. I will say, yes, you said. Suppose now says Mr. T. that it was then decided to be a collateral promise that it would be under the same qualification asthe case in B. & C. I.e. according to that decision to only prove
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So if I promise that in consideration you will let me have a horse, I shall pay you 10 L for him. If he does not I will pay you the 10 L. This is an original promise. I do not having been privy to it. But in the former case, if you should let me have a horse, I promise I will pay the horse; this is a collateral promise, for here is a contract for bailment & I was liable on that contract; for the law will raise a promise on his part, that there was no existing contract. 1 P.C. 223. 2 F. & F. 632.

Again to make a collateral promise in bailing, it is necessary the person for whose benefit the promise was made, shall be liable at the time the promise is made. This suppose the last case, where I promise if you will let me have a horse, I shall pay you the 10 L, or if he does not, I will pay the 10 L. This is original. I do not being privy to it; I was not therefor liable at the time I made the promise. My promise therefore will bind me, even if I shall afterwards promise to pay the 10 L or should give his note for it; for my promise relates back to the time it was made, at which time I was not liable; there for it is not a collateral, but an original promise. So it must.
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should be this case, you a bond or higher security, this would merge the simple contract and discharge me. Lord May 1833, 16 Ed. 4, 359.

If a promise is made by one of several persons all of whom are liable already, this is not within the Stat., but is an original promise. Thus suppose two Defs to an suit to have accured with both are liable to pay, one of the Defs promises the plaintiff withdraws the suit, he will pay him the costs. Now this is a good promise, I will bind him the by part. This is not a promise to pay the debt of another of.

Again, suppose two or more are liable to pay a bill of exchange, now if any of the persons promises to pay the bill it will bind him, the promise is original, 5 Mox. 1833, 6 Ed. 362; 2 East. 325; 5 Mox. 1833, 25 P. C. 35.

I have observed that there are three classes of cases where a promise made for the benefit of third persons was original, the first of these we have considered. We now turn to consider the 2d. class of original promises, & which is 2nd. The liability of the 3rd. person is extinguished, unless the promise is made, i.e., the promise extinguishes the responsibility of such 3rd. person. This is an original promise, not within the statute.

Thus a promise made by one person in consideration that the promisee will discharge a debt against another, is an original promise, because it is not in aid of a collateral or subsisting liability, nor of it to procure credit for him. Thus if A holds a bond of B, on which 100 is due, & B says to A, if you will destroy the bond I will pay you, the oblige does destroy the bond, now this is an original promise, 3 Mox. 1833, 1 New 56, 130, 2 East. 325.

I have observed that this rule was questioned, it might be considered was not will settle. Against the rule it is said that the words original & collateral are not used in the Stat.
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And if they be not. But says Mr. G. I think the rule as it now stands is covered, for I can see no difference between this and another case, which is settled. Law, it is this, suppose the last case. Black saies to A. I will give you a pair of horses if you will destroy the bond you hold at. A. now it is settled that this case is not with the Stat. But there is no difference between this and the case just mentioned, when he promised to buy the bond in money, there can be none. Rot. on the Stat. 323. 2 East. 325.

But there is one case coming under this distinction, which is entirely an original promise, when the promisor is the heir or son of a debt or a third person, promises to pay the debt to the original holder. This is clearly an original promise. This suppose A holds a bond for 100l. B. says I will give you 100l. for that bond, or I will pay you the amount of it. If you will deliver it to me, now this is original, it is not a promise to pay the debt of another. St. R. 193. 2 East. 325. Per. 226.

Sed. — The third class of original promises is, where a promise is made on a new consideration arising out of a new and distinct transaction. This is an original promise not within the Stat. — The leading case on this head is that of Leper v. Williams, 3 Burr. — Leper was the lessee of A. and S. had assigned his goods to Bift, but the goods remained under the lease from issue. Before having a right to go on the lessee's hand to distrain for rent at all, he was accordingly to Bift, promised him if he would not distrain the goods he would pay him the rent in advance, which S. paid. Now this was a new promise out of the Stat. — The Jift had judgment. The true ground upon which the Law decided was, that the Jift had a special interest in the goods, i.e. he had a lien when there was a lien which the Jift had a special interest in the goods; e.g. he had a lien when there was a lien which the Jift had a special interest in the goods.
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original party remains liable to pay this debt notwithstanding what has been done. 3 Howr. 1886. 2 East 326. Halk 258. 9 Bay & Day 704. 11 R. 26.

A promise to pay a certain sum on consideration that the promisor will withdraw a suit agst. a stranger for assault & battery on for any fault, & while the suit was pending. (promise a mistake) this is an original promise, not within the Stat. thus in the case of Nash v. Read, A brought an action ag. B for assault & battery & while the suit was pending. B promised A he would withdraw the suit he would pay him $20. If the suit was withdrawn the suit. Now this was an original promise, it was not to pay the debt of another, for no debt or duty was due agst. for damages only an promise in or actions sounding on tort. id. 385. 10 S. 706. 2 Edw. 257.

I take it to be a rule says id. that there must be a debt or duty agst. a third person within ascertained a capable of being ascertained at the time. the promise is made. I think this is a good criterion to determine in whether the promise is original or collateral for if the debt duty is not ascertained, or capable of being ascertained at the time the promise is made, it is an original not collateral promise. id. 1 Pet. 7. 208. 233.

But a promise to pay a debt of another is within to consider on that we will stay the suit agst. A. for the recovery of the debt, as a collateral promise it must be in writing. This differs from the case of Super fer. Hows. for Spon in that case. It was with his special interest, but in this case there is no covenant or debt agst. any one, it is merely the case of one person promising to pay the debt of another. Again it is different from the case of Nash v. Read, for in that case there was no debt
or duty ascertained or capable of being ascertained. But in this case the debt is ascertained or capable of being ascertained. 2 Tindal 244. 7 T. N. C. 204. 2 J. B. 1837. 2 K. B. 317. 2 King 430.

But suppose the promise had been in the last case, that is consideration of itself, without the suit, i.e., entering a retracravit. Now this is a promise, an original promise, it's said no such case. For the retracravit discharges the promise. If in Eng. there being another suit for the same cause of action, it is the same as the he had said, if you will destroy the bond I will pay you. But that is an original promise, see this 3 B. C. 246.

But in law it is clear this is a collateral promise, for here a retracravit is no bar to a subsequent action.

I will now mention several cases which I suppose to be law, and you will find there in the books.

If those one promise to pay a debt due from A. of the......
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Some have supposed that when there arises a new consideration of anything, if a formal promise is made it is good out of the Stat. Whether it goes to the promissee or promisor to which the original debt is extinguished or not. But most clearly this is not law, says Wh. for the promise is collateral. If the debt or duty is not extinguished. Original promissory must conform to the rules already laid down. (See 253, 318, 632, 697, 728, 832.)

It has often been supposed that if there is a consideration the promise is made it takes it out of the Stat. but clearly this is not law, says Wh. for the promise is collateral. It would be repealing the Stat. As Comp. law being to before the Stat was enacted. A new consideration will not take a promise out of the terms of the Stat. if it would afterwards come within it, but the Stat never supplies the want of a consideration. (See 253, 318, 632, 697, 728, 832.)

It has been decided as before, that a written promise to pay the debt of another if the Debtor does not pay, is discharge of the promissor, by granting for bareness to the Debtor. This is a promise by way of additional security. (See 253.)

It would here observe that when the promise is original a common action in general would appear to be the proper one to be brought. But where the promise is collateral it is writing the promise action to be lost, is void, and a new for stating the whole case. Endible action is not proper in this case for the promise is merely a security or an assurance of the debt not bound to the Debtor. (See 253, 318, 632, 697, 728, 832.)

And it seems to be a general rule, that when an action is lost on a formal promise, which is within the Stat. a judicial confession is made by the Debtor, suppressing all reality of other proof. This will take it out of the Statute. (See 253, 318, 632, 697, 728, 832.)
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When according to the distinctions already taken the contract must be in writing, still it is not necessary to show in your declar. that it is written. The statute has introduced a new rule of evidence, but has not altered the common law rule of pleading. It is sufficient then that the party making the written promise in evidence, at the time of ascertaining before the Stat. is good still. Suppose a collateral promise made before the Stat. this was good by Parol, if there was a consideration. "Reg. 450. B. A. 259. 31. B. 1390. Rev. 15252627.

This rule holds good in all cases contemplated by the statute. 12. Met. 640. 389. 21. Met. 14. 11. 140.

If there be no collateral promise, it does not allude it to be in writing, but good on communication, for this amounts to an acknowledgment that the promise is written. 7. T. R. 350. Not. 12. Met. 540. 413. 325. 280. 5. Met. 146.

It is difficult to ascertain in what way the law for the foregoing rule will apply in cases. Often consider our sessions as confining a written promise it would at the same time prevent any inquiry into the consideration; for all our written agreements are substantially. Our court ought to adopt one of the one sides, they ought to say, in such cases as this, that written instruments shall be treated as simple contracts, which is the English mode, or they ought to say, that it should be averred in the declaration, that the instrument is in writing and that such error does not confute the written promise. Our Court of Errors, in one case, seems to ordains to the English mode, but there is no settled rule upon this subject.

But all this when the self declares upon a promise, which is within the Stat. it is written, it is not necessary to
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allege that it is in writing; yet when Def. pleads such contract in bar to another action, he must allege that it is writing; the reason is that more certainty is required in a plea in bar than in a declaration. Thus suppose A brings an action ag. B. and B. pleads in bar that C. is a sufficient consideration; and extract of all parties undertook to pay this debt to B. A now this is a collateral promise, the plea in bar is insufficient if not good according to the rule, for Def. should have pleaded that C. promised was in writing. 1 C. & R. 214. 2 S. & S. 61, 69.

But as it is not necessary to aver that the promise was writing, yet it is necessary in all cases within the State, that the declaration should show it alleged a good & sufficient consideration.

If one part of an entire promise is within the Stat. of Frauds, the whole promise is vitiated, it void. A penal contract whereby A promises to pay the debt of B. to do something else void in toto, if part is vicious. 12 S. 62. 12 C. 280. 4 R. 180. 5080. 11 R. 180. 112. 113. 114. Notwithstanding, the rule is established on the ground that an entire contract cannot be apportioned. 5090. 124. 127. 129. 130. 131.

II. — The third class of contracts required to be written by the Stat. of Frauds, are agreements in consideration of marriage. These must be in writing signed by the party or his agent. Now the case of the Stat. does not relate to a promise of marriage, but it relates to family settlements or family provisions. 2 L. 55. 32. 3 W. 24. 12 R. 280. 3 W. 615. 12 Ch. 326. 5090. 2 D. 217. 5090. 311. 5090. 5090. 5090. 5090. 5090.

It was formerly held, that a penal act, that the contract of marriage settlement should be reduced to writing was sufficient to take it out of the Stat. But it is now settled otherwise that it must be reduced to writing in the first place. It relating to it is not sufficient. 5090. 2 D. 217. 326. 5090. 5090. 5090.
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By however it is shaped also that the parties agt. shall be bound to writing, it is not prevented by fraud from being done, a lot. of the parties in such case enforce the agt. R. 294, &c. 295, Rob't. 136. 198.

But a verbal agt. by way of marriage settlement does not bind, still there is a sufficient consid. to support a settlement made afterwards, it is the same as it existed before man. using a verbal promise by way of settlement before man, is a sufficient consid. to support a written promise made after man. the verbal promise is supported by the verbal one made before man. and only will become a settlement, last, want to the written promise.


As to what amounts to an agt. in writing, it is held that a letter signed by the party to be bound, is a writing under the Stat. i.e. the face of the writing will not be objected to, for it may be objection in other particulars. P. 245. 246. 247. *Rob't. 318. 219.

But when one has received a letter, on which he relies on defense, it must appear that the party accepted the terms of the letter, or acted in content in the terms of the letter, in solemnising the marriage, otherwise it is not binding. Thus, where the Father of the intended wife wrote a letter to her, saying he intended to make a settlement on her husband, but this letter was not shown to her till after the marriage, before the husband being disposed to marry, the husband refused to marry on account of the terms of the letter, being ignorant of them at the time. 2 Pet. 3. 19. 20. ibid. 21. 22. ibid. 23. 22. ibid. 24.

It is also necessary that the letter furnish distinctly the terms of the agreement, this is true of all agreements in general, as covenant 240. P. 245. 246. 247. *Rob't. 318. 219. *Rob't. 500. *Rob't. 501.

IV. The fourth stage of contracts consists chiefly by the Statute of
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Fradulents agreements are those contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them. Such contracts must also be in writing & signed by the party or his agent. How far things annexed to the property, as timber, grapes, or corn, etc., are to be considered as parts of the estate, shall all notice hereafter.

Under this class of the statute it has been supposed that a parcel agt. would bind, if it was part of the contract that it should be reduced to writing; but this is not true, it must be reduced to writing in the first place. (Citing a case.)

A question has arisen in Conn. Whether a parcel promise to pay for the land sold was within the statute. It has been decided by the Supreme Court that an action of ejectment would lie for the recovery of the consideration of lands sold by 1835. But the court of errors afterwards decided that an action of ejectment would not lie in such case. But they did not say that an ejectment from the wont would not bind.

It all appears to me, says Mr. C. that this question has nothing to do with the statute of frauds. I, that this parcel promise to pay the price of land will bind as much as a parcel promise to pay for one yard of cloth; for this promise does not affect the title of the land, nor evidence ought to be introduced to contradict the deed.

Parcel agt. made at the time of the deed shall never afterwards be introduced to contradict the deed. So a parcel promise to refund if the land fails short or to pay more if it exceeds such a quantity, is this on the principles of the law, even this parcel evidence shall never be introduced to contradict said. This has nothing to do with the statute of frauds. I, therefore, says Mr. C. that the court's counter is considered as within the statute of frauds.
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their decision was correct. The their reasoning was incorrect. It is to the case. 1 Ross's Cases 23, 264, 27, 8, 25, 18th 22.

I have laid down the general rule that contracts for the sale of lands, ought to be in writing signed by the party or his agent. But there are some exceptions to this rule under the Stat. for there are some parcel acts respecting the sale of lands, or for the sale of lands. Which are good in some cases. the Statute not withstanding. A parcel act respecting the sale of lands, being on the party of prove able consistent with the Spirit of the Stat. and the rule of Evidence. For there is no inherent unfitness in a parcel contract for the sale of lands, it is as good as written on one or in itself, as the only difficulty lies in the proof. and difficulty is introduced by the Stat. The Stat. has introduced a new rule of evidence merely, for the purpose of preventing fraud in the medium of perjury. Therefore it is said that when there is no danger of perjury or fraud in proving a parcel contract concerning lands. The contract is not within the Stat. binding of course. Because it is said in a bill for a specific performance of a parcel contract respecting land, e of the Dift. in his answer confused the parcel act. He is bound by it, as he pleads the Statute.

The foregoing doctrine of rule has been much controv- erce I shall show hereafter. But whatever dispute there may be as to that of the Dift. Charge of the bill confuses his answer that a parcel contract was made, on its to the Statute the parcel promise will bind him. This is settled 2 Bro. Ch. 508 & 252, 23, 266, 17, 18, 16, 26, 8, 27, 18th 22.

So also of the Dift. expressly submits its to the decree of jurist-
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performance, he is bound by it as much as if the contract had been reduced to writing; for he concedes the contract does not exist upon the statute. This is also well stated in P. 136.

Now these two cases, which I have mentioned, go to establish the contract, case above mentioned. Those cases prove that a verbal contract respecting land, are not void, but only that the statute prevents the introduction of verbal proof to guard against perjury, so that the difficulty made by the statute is only in the mode of proof. If the plaintiff in the bill alleges that the contract is in writing, the defendant does not plead the statute in his answer, the plaintiff's bill will not be sustained by verbal evidence. It is clear therefore from this case that if the statute does not throw any obstacle in the way of the verbal agreement, it is good. Roberts 136.

The question still remains as to the correctness of the general practice, just advanced; viz., whether a verbal contract is good binding where there is no danger of fraud or perjury on the statute, notwithstanding. Thus suppose, West in his answer admits the verbal agreement of the plaintiff, the statute also. Now can the plaintiff be sustained in such a case? this seems to be an unsettled question in England, as there are respectable authorities on both sides.

Lord Hardwicke said he would do no a performance in the West pleaded the statute, provided he confesses the parol up in his answer. Now this decision went upon the ground, that if it could be satisfactorily shown to the court that there was no fraud or perjury in the verbal contract, it was that it was no danger in the mode of proof of an admission of perjury; such an agreement ought to be enforced. 1 M. 138, 155, 2 Beav. Ch. 51.

Lord Mansfield was of the same opinion, viz., that if the defendant pleads the verbal contract, it is out of the statute. 12 Ten. 600.
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Against this doctrine, there has been a decision, in the Court of Common Pleas, where it was said by Lord Loughborough, that a confession by the Deft of a parcel agt. does not bind him, that he may plead the Stat. to avoid such conf. 2 T. B. 62. 6 H. 4. 35. 39. 25. Dec. 1083. 14.

Lord Loughborough, Lord Rosly, 4 Lord G. C. C. are of the opinion, that this admission, by the Deft. of a parcel agt. does not take it out of the Statute.

Again is another case the Deft. did not pay nor conf. the parcel agt. but plead the Stat. Lord Thurlow said that he was not bound by the agreement, that it was within the Stat... but he gave this opinion on the particular circumstances of the case, the same consideration for them did not appear to have been any different agreement. 2 Bro. Ch. 339. 67. 87. 313. 2nd. Case. 65.

Roberts is inclined to the opinion that the Deft. is not bound by the confession of the parcel agt. S. 2nd. Case. 61. 66. 3rd. Case. 67.

I think says Mr. G. that the best ought to establish one of the two opinions, viz., whether the confession of the Deft. amounts to nothing at all, or else that the confession binds him notwithstanding he pleads the Stat. For unless one of these rules be established, the Deft. can avoid these parcel agreements at will, as he pleases, which amounts to this, that Equity will compel him to do an act, if he pleases, most otherwise, as this is absurd, in the extreme. 4th. Case. 69.

There is another question, viz., whether the Deft. is bound to confess or deny such parcel agt. It has been decided by Sir Mansfield, 4 Lord Thurlow that he was bound to confess or the other, as there are decisions the other way also. 5th. Case. 66. 5th. Case. 67. 2nd. Case. 68. 5th. Case. 69.

Upon examination of the Authorities, say Mr. G. there is form of the doctrine, that a parcel can be what it is pleads. Bennet says, Mansfield, Thurlow, Lord G. C. C. Mansfield, he who is of opinion, that the Deft. is obliged, rather to confess or deny the parcel agt. in his case.
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answer. I am clearly of the same opinion, says Mr. Gould.

Opposed to both of these doctrines, stands Lord Loughborough, &c.
yes & Co. One of these Judges, opposed to the doctrine, gives a reason
why the Def. ought not to be bound, this he supposes the moral argument
that the Def. is liable to commit perjury. Now Sansum, says Mr. Gould
that this is no reason at all, for it would apply as a reason with equal
force, in any case where the Def. is put upon his oath by the Court: further
more the object of the Stat. was to prevent the Def. from proving a
contract by Perjury, it not to prevent the Def. from avoiding a contract.
This is the only argument I have ever seen on this side of the question;
this is of no weight at all in my opinion says Mr. Gould—q. v.

A solution of this latter question will determine the former,
for it is clear if he is bound to confess or deny the parcel, an
that in such
case a subsequent plea of the Stat. would not avail him. Rolle 165. 1no: 177.

There are one or two cases, in which the Court have been
able to take cases out of the Stat. which are not law; it has been
decided that the Def. was bound by his act. if he had confessed a parcel
agreed not be made out of Court, i.e. if he made the confession out of
Court he that this would bind him. Now this clearly is not law. 3 Tho. 5. 3, 733.

A contract for the purchase of lands at a public trustee, before a mas-
ter in chancery, or on an order from the Court, may be enforced. Because the
master acting under his oath of office, it is supposed there will be no avenue
of fraud or imposition. This is another example in proof of the doctrine before
mentioned, that the difficulty is merely in the proof. 1 Bl. 46, 2 Bl. 30. 1 Bl. 1158.

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mentioned, that the difficulty is merely in the proof. 1 Bl. 46, 2 Bl. 30. 1 Bl. 1158.

There is a strong analogy between this the case before con-
ferred, where the Def. confesses the bill. In the judge of the Court this is
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In many cases of proving these contracts by parol, because or on the spot,
by voluntary confession supercedes the necessity of proving the contract
at all, in the latter none, for they are proved by officers of the be acting
under oath.

Parol contracts respecting the title of land or the sale of land are
many times imputable from circumstantial facts, is there is no
danger of fraud or perjury in proving these facts, such land contracts
will be. I know of no judicial decision to this point, but authorities
are numerous. This you will discern is not proving the terms of the
contract, but an independent, collateral fact.

So when an absolute aver is given circunstanly may be admit
less (as e.g. where the vendor remains in possession, payment, &c.) to
due that the intention of the party was, that it was to be a mortgage
and receivable at some future time. 3 Mees. 527. Fall. 59. P. 3. 466.
with 2. 370. 1. Rex. 525. 2. 463. 36. 158. 426. 3. 42.

This princ case of a Mortgage, came before our Lord the Supreme
And adopted the rule of circumstantial facts. But the C. E. of Eng.
renown the decision. He says C. E. that construction of our Statute
is to follow the English construction, of the decision of the C. E. of English
law: Again, this is another exception, on the ground that a Statute made
be prevent fraud, ought not to receive such construction as to promote it.
And it has been our usage to consult the Spirit of the Statute.

When therefore a party by not performing a verbal act, would
produce a greater fraud upon one other party than would result from
a fulfillment of the agreement, such being is justly held to by such act
as a Court of Equity. 4. Fa. 296. 296. 2. 296. 2. 296. 2. 296. 2. 296. 2. 296. 2. 296. 2. 296. 2. 296.

When therefore a verbal act for the purchase of land or service on
party perform no or one side, at the request or with the consent
of the other party, this other party is bound. Thus if A leases land to B, for

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exact execution of a contract can be proved by parole? This appears to me to be no question at all. It certainly can be proved by parole, for even in writing it would then be a note or memorandum, consequently the statute would be complied with. Again, the payment of money is a collateral act, it is never required to be proved in any way except by parole, if further the statute only requires that the contract should be written, it says nothing about proof of this kind by parole.

When one party becomes deceased, by part performance of a contract his representative after his death can also bring a suit, Prov. C. 306. 307. 308.

The act done in part execution must be such as one as a matter of advice the party claiming an execution of the agreement, unless it were entirely enforceable. So, In re manor of a parcel with B. to purchase land of him, to should pay part of the consideration money it should afterwards refuse to pay the rest, now B. cannot compel A. to pay the residual it takes the land. 7 Ch. L. 301. 6 Bro. Ch. 405. Roberts 180. 160.

It is also necessary that the act claimed as done in part performance must in such an one as in the opinion of the bc. would not have been done, but with a view of part performance. 1 Knt. 405. 412. 2 D. 561. 6 Coke. 586. 7 Coke. 307.

With regard to the nature of kind of acts which amount to part performance the two foregoing rules are the criterion, it is a general rule that any act merely introductory to a final execution of the agreement is never considered as performance within the rule, thus, to go into the land, to suffer it, to build a house upon the subject, were acts of performance, until put to strictly in performance of some part of the agreement. 9 Coke. 361. 362. 7 Coke. 42. 362. 48. 379. 48. 57. 98. 126. 48. 126.

It is to be observed that marriage of one of the parties without the marriage ceremony as agreement out the statute, Prov. C. 361.
Contrasts.

First, contra, it is said that a fraud contract, between three persons in consideration of man. A.B. is taken out of the Stat. by the man. if the it is with the consent of the third person. Thus if the begetter of the intent to has made a fraud a't. with his son, that he will make a settlemet of an estate in conc. of the man. he will be bound to the contract if the man takes place. because if he were not obliged to perform, there would be found no difference from this. Whenever a non-performance of a contract between A.B. will work a fraud upon a third person it will be enforced: whenever the execution of a contract between A.B. will work a fraud upon a third person it is absolutely void.

The cutting down of timber upon land that was to be settled. on the man. has not to be considered in full performance, i.e., in due performance of the agreement. 2 Eq. 154. 167. 304.

Our Court of errors have decided both ways as to part performance taking contracts out of the Stat. But our supreme court have always held, that part performance does take a contract out of the St. as in England. 2 Doug. 522. 43 Mass. 393. 390.

I have now considered two classes of cases which are taken out of the Stat. 1st Where there is no danger of fraud to injure the part performance.

Again, a written a't., respecting land, may be contractually provable the parcel a't. if there was fraud in the execution of the writ. ten instrument. Thus suppose A agrees to convey to B, black acre 13 by fraud gets A to sign a deed conveying white acre parcel proving admissible to show the fraud. 3 H. 324. 7 Pleas, 628. 10 H. 209. 3 Pet. 156. 302.

A parcel contract for the sale of land is to may always be proved when the contract is only inducement to an action of fraud, because you cannot so fill in the fraud to the jury unless you show how it originates. 3 Wilt. 799. 2 Doug. 324.
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So also a verbal act, the within the act, may be proved for the purpose of obtaining relief, e.g., an instrument, when there is a mistake in the execution of the instrument. It must be a mistake in the execution of it strictly, for a man cannot take advantage of a mistake in law unless there was fraud practised. A mistake in the execution, is a mistake with regard to the contents of the instrument. As if A, an intending to convey to B 100 acres of land, signed an instrument binding himself to convey a lease for 100 £, he may show the verbal act to relieve himself. The Schoolmaster's mistake, Mr. J. thinks was a mistake in law. 3 Deo. 369. b. 12 Vo. 370. 386. b. 12. 67. 107. 111. 127. 162. 386. 170, 29, 188. 493.

So also a written act, concerning land I. may be controlled by verbal agreements for the purpose of rebutting an Equity. As if A agrees to sell land to B for so much that this is in writing and order of a previous agreement by parcel to take less than what is specified in the instrument, now this act may be proved by parcel. 2. 20. 399. 160. 12. 240. This rule applies only in favor of a 15. It is a bill of Equity. This rule goes when this occurs that is the interpretation of a bill of Eq. is to make performance specific. B they will make use of the parcel and upon the grounds that it is dishonest to have a written act enforced contrary to a subsequent oral parcel. The bill will not nor can they set aside the written act, but they will leave the parties where they found them. 20. 299. 180. 1240. 1 Rom. 279.

By Stat. 11. 12. 23. The action of ejectment arises where lie for use or occupation upon a parcel lease. Whether the lease be longer or shorter will make no difference, it will lie upon a quantum solutum. This Act tells you may enter upon it and occupy it for 3 years paying 100 £ per year. B agree to it, on the trial the jury is allowed to give in evidence the parcel agreed in order to get the real value of the land, the action is not founded on the parcel act. This action lies in some cases. Coun. we have no Stat. to this effect. 21. 28. 16. 12. 69. 171. 377. 1410. 314. 170. 17. 325. 295. 295. 295. 397.
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Art. 27. All possession of the land must be with the consent of the owner in such cases, there must be a contract either express or implied. Ib. 327.

At common law a purchase will not lie to recover the use of land, but debt will lie upon a verbal lease at common law, for it is debt is a higher remedy. Rutter v. Cowper, 234, 249, 250, 260.

In cases a verbal lease does not create a tenancy at will, nor a tenancy from year to year, it creates no tenancy at all; it is a mere license, it will excuse a trespass, but it does not excuse a contract from being carried into effect, i.e., a found, if there is no change of possession.

V. Contracts of the nature to be done within a year or before a year, unless performed within one year from the time of making them, such contracts must be in writing; thus, if A promises to pay him a sum of money 2 years hence, this contract to be binding must be reduced to writing. The object of this is to prevent perjury or mistake.

This clause of the Stat. operates something like a Stat. of Limitation, as it is not strictly such, because it does not limit the time, in which an action may be brought.

It has been thought that this clause does not extend to any contract respecting lands, tenements &c. and the reason is that the preceding clause has made all necessary provisions. So that if A & B have entered into a contract respecting lands, &c. which was not to be fulfilled within a year or 2 years hence, now if there is a part performance in this case, it is out of the Stat. This clause now under consideration does not affect it. 1 Sim. 156. 1 Blinn. 256. 2 Sim. 327. 1 Bell 324. 1 Bent 20. 1 Bent 61. 276. There are no many authorities to this point, which I think, somewhat questionable. 256.

It is well settled that where in the terms of the contract the performance is to take place when a contingent event, which may or may not happen within the year, it is not within the Stat. 156, 256, of the owner of a ship, promises to pay money upon the return of his ship from India. The contract is good. Salus v. 250. 2 Sim. 210. 3 Sim. 206. Salus v. 9. 12 Del. 346. 723.
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A promise to pay a sum of money on the day of man is not within the Stat. to pay money on the death of promisor's father, for these are contingencies which may happen in the course of the year, see 353. Le Roy, 318. No. to 183. So also a promise by one to leave another a sum of money in his last will, is not within the Stat. 3 Bow. 1278. R.P. 211.

To make the body binding it is not necessary that the contingency should be fixed within the year, for it is general practice, in point of law, to have the state of things at the time the contract was made to be exactly the same as now. 3 Bow. 397. It is has been decided by our Superior Court that contracts of this description are not within the Stat. of limitations containing an accruing consideration, provided it is within a year after the entire consideration became complete.

So a promise to pay for board for 3 years, is not within the Stat., for the consideration is continually increasing as accruing to the rule is the same if it to be paid within one year after the total consideration has accrued. Post 87. But a contract in this case to pay for 3 years board at the end of 3 years is within the Statute.

I shall now mention some rules which apply to the different classes of contracts, contemplate by the Stat. generally.

The rule of construction of these Statutes is the same in law as equity, and this is true of all the Statutes, law and equity. The remedy is different in the different bodies. The intention of the Legislature governs both.

In short this general rule is, no writing which is intended to preserve the terms of the contract is not memorandum to within the Stat. If an agreement is writing.
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mean anything which is made the conclusion of the parties to a formal description of the terms of the contract.

But a note or memorandum is sufficient to bind the parties, although there is no formality about it. Hence, as has been shown above, the writen word or by one of the parties to the other is a sufficient note to prove that the other party acted in conformity to such letter, or a letter sent to him by one of the parties to his agent is a sufficient note to within the statute. 1 Torm. 179, 3. Ath. 502. 2. Bea. 32. 3. Bea. 318. Pa. 261. 2. P. 332. p.

But it is said that the letter must contain distinctly the terms of the contract, this is true; so it is of a writing in any form, the terms of the contract must be stated. Pin. 360. Ath. 13. Stack. 28. Bing. 299. p.

But when upon the face of the note or all the terms of the contract are not certain, yet it is sufficient if they can be made certain by reference to other documents, or its extrinsic facts, which if themselves are certain. A contract to convey land according to the custom of a certain man or by deed, for this custom can be ascertained, also if the agreement was to convey lands for the same sum as he had before given for it, then reference may be had to the former deed. 3 How. 318. 2. Dec. 256. 10. Dec. 330.

But when the writing refers to something extrinsic, if the subject is not made sufficiently clear by the thing referred to, itself, partial writing cannot be admitted to make it more clear. As in a conveyance, reference is had to the quantity of the land, to a former deed, the quantity is there expressed, no partial evidence will be admitted to prove the quantity. 12 Sh. 326. Beale 103.

But in the letter or a gone note it is within the statute, yet it is necessary that the part, claiming by it should show that the other party accepted the land of the age that he acted upon it, more than excepted for there is no part. 2 Plow. 63. Plow. 351. 2 Plow. 74. 2 Plow. 31. 2 Plow. 316. As additional evidence of partial by one of the parties is evidence of the terms of the agreement, is sufficient to within the statute. 135, 12, 599. 3 135. 12, 599.
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It is now well established that the consideration as well as the stipulation of the contract must appear in writing. This was decided upon the particular phraseology of the Stat. That says that the agreement thereof must be in writing, i.e. it must appear for what the thing was sold, else there is no agreement. There is however one exception to this rule, which is where goods are sold to the amount of 10L and upwards. In such an exception under the English Stat. one knows not this exception. Now it is sufficient if the contract is made with one the consid. It may be proved by parole, 5 East 6, 373, 380, 1 Rolle 116, 17.

You will observe that there is no technical form in writing as to satisfy the Stat. Hence an instrument intended as a deed of trust, failing to operate as such, may be enforced in a court of Equity as an agreement or writing. So under our Stat. without a writing or failing to get a deed of trust, an agreement may be enforced as an agreement, as it cannot be made as a deed. Equity will make use of intercuty contracts.

An agreement must import the liberty of both parties as to agree, hence an entry made in the book of the Surveyor of the Manor is no evidence of a lease or copy, between the lord and tenant, 16 Geo. 3, 401, 402, 31 Geo. 3, 315, 316, 32 Geo. 1, 144. 152, 154.

Thus far as to enquiry, what amounts to a note or memorandum within the Statute.

A Net constitutes a signing within the Stat. it has been decided that not only a subscription to the usual form, i.e. at the bottom of the instrument is sufficient, but also the name of the party written by the party himself, or any part of the instrument, if intended to give authority to it, is a sufficient signing. This must be accepted by the other party. Thus, | A. B. agree to sell a tract of land to C. D. | this is sufficient. 20 Geo. 3, 32 Geo. 3, 32 Geo. 2, 33 Geo. 2, 16 Geo. 3, 31 Geo. 3, 401, 402, 31 Geo. 3, 315, 316, 32 Geo. 1, 144, 152, 154.

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...But it is otherwise if the name written in the body of the instrument is not intended to give it authenticity, but only to explain the stipulation to whom. The insertion of the name is not signing as e.g. the instrument with which Act A.B. will convey land is this is not good signing. 1st ed. 1843, p. 265. Reel, 1177.

It was formerly supposed that the parties making an alteration in the draft of the instrument, with his own hand, was sufficient signing. But this is now overruled. 1st ed. 1843, p. 265. Reel, 1177.

Signing the instrument as a subscribing witness, the certificate of the contents of the instrument is a sufficient signing to bind him to the stipulation on his part. E.g. Marriage articles were entered into between A and B, reciting that the Mother of A, to advance 1000 to B on the marriage of the mother signs as witness, the B. not being a sufficient signing, because the same is in the same capacity. 1st ed. 1843, p. 317. Reel, 123. Reel, 284.

Now it is sufficient if the party sign it, even as the other party does not. But it must be shown that this other acquired the contract, or was hereby bound. 1st ed. 1843, p. 317. Reel, 284. 1st ed. 1843, p. 317. Reel, 284. 1st ed. 1843, p. 317. Reel, 284.

Thus if A procures B to sign an instrument and does not sign it himself, B. is bound, as some opinions have gone so far as to hold that if A procures B to sign it himself, and because the signing by the procurer is equivalent to signing by oneself. It is well to discover on what principle this opinion is founded. 1st ed. 1843, p. 257. If however one of two parties, who does not sign, brings a bill for a specific performance, then he is bound, for he virtually takes the agg. as to himself. 1st ed. 1843, p. 257. 1st ed. 1843, p. 257.

An accommodation signing the name of the highest bidder to the printed conditions of sale, has been decided to be a sufficient signing, to bind the owner of the goods, of the bidder.
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There are several opinions, that a counter-offering, signing his name, will bind the parties, whatever property is the subject of the sale, whether lands or personal property. But there are two or three cases that deny this as a general rule. Some modern cases say it helps to all. 1 Ves. 120. 399 Stew. 122. 191. Boll. N. 280. 2 Ves. S. 249. This authority says the rule is general. Contra 2 S. R. 135. 167. R. 197. Boll N. 306. 1068. 306.

It has been doubted whether an auctioneer's sale, whatever be the subject of the same, is contemplated by the Stat. But it is now settled, that they are. 1 Boll N. 280.

A printed name may be valid in many cases as a sufficient signature, as where a trader has his bills or notes printed or engraved, signed out, then the printing is by his procurement, the trader adopts them as his own. 2 Boll N. 238. 56. 120. 121. 34.

And that it is necessary that the agreement be signed by the party or his agent, yet it is not necessary that the agent's authority be shown in the writing. 3 Tred. 4. 2332. 4406. 2331. touch. et. cons. let. N. 45.

It is not necessary that the identical note, statute in the bill of declaration be signed at all; provided the agreement is acknowledged by another instrument, as e.g. a letter, written by one party stating that acknowledging the act. But this is a sufficient note, memorandum. 1 Boll N. 238. 56. 120. 121.

The bare writing of an agreement with one, one hand, does not dispense with the necessity of signing, as was formerly supposed, the Stat. requires that the agreement shall not only be in writing, but also signed. 1 Boll N. 276. 56. 120. 121.

[Signature: "Seth Van Dusen" with date: "Sept. 28, 1810"]
Contracts

Interpretation of Contracts. Sept. 2nd, 1812
Lecture 3rd.

It is to be observed, that the object of construing a contract is to find out the intention of the parties; it however the contract be expressed, they cannot be carried beyond that intention. Prov. 6:27. 27.

As courts of justice are unable to make contracts for the parties, so are they equally unable to make any part of a contract. But 16:23; 22:12, 23.

But on the other hand, contracts are to be carried to the fullest extent of the parties intention, if the words of the contract can be construed thus. As where it is said, a trust out of the profits of his land, for the purpose of raising a certain sum of money, it was held, by construction, that the land might be sold, if the money could not otherwise be raised out of the land. 1 Prov. 6:37. 37.

The words or terms of the contract are to be construed according to the known signification of those words or terms, unless there are some decisive reasons to the contrary. Prov. 16:23; Job 3:5; Jer. 20:13; 1 Pet. 5:9. 9.

It has been held, if A sells B 20 bushels of corn, the interest is in B, unless A agrees not to sell, but the contract only. But if A sells B a cash of vine, he also parts with his interest in the barrel. The rule in such cases is, that the construction must follow the intention of the parties to the usage of sale. Prov. 28:17; Prov. 3:37. 37.

If one makes a lease for twelve months, A holds for twelve lunar months, if for a twelve month, he holds for an entire year. This rule of construction is adopted from the supreme intention of the parties to the custom of law. 2 B. c. 141. 141. 141.

It was in a province of quantity was to be construed, as they are understood at the place where the contract is made. In Eng., the denomination of a bushel is different in different countries, as living in the
of Norfolk, contracts with A- living in the county of Meddlesby to pay
it during his life in the county of Norfolk 100 bushels of wheat, the quan-
tity is to be delivered according to the Norfolk's measure. But Mr. B thinks
had the contract been to have delivered the grain in the Meddlesby
county, the quantity must have, delivered according to the denomina-
tion of a bushel in that county.

But if money is to be paid, it receives its value at the place where
it is payable. Thus if A promises in London to pay B 100£ in Bank-
notes, it must be paid according to the Irish currency.

If the language of the contract is ambiguous, the intention of the
parties may be inferred from the subject of the contract and the effect of
the circumstances. Thus where the grantor covenants with the grantee for
quiet enjoyment of his term generally, all that help his interest is a
covenant against all persons who claim by title, is not subject for the acts of
the encourage or the trustee for a or for any wrongful intervention of the lease.

It has been determined that if A grants to B all the trees growing
upon his land, the fruit trees growing in his garden touch and are not
included, if there are other trees upon the farm. But if the fruit trees are
all the trees upon which the grant will operate they must of

And for the purpose of giving effect, rather than a contract, to
entirely, fact, it is well that an instrument in one form may stand
as an instrument of another form of an entire different species. Thus,
one of a number of joint tenants executes to his co-tenant, a deed of
enfeoffment, it shall be construed as a release. For the joint tenant had
not the fee in himself therefore could not grant it, but all those
trust
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interest the grantor had in the land will pass to the grantee.

So if a creditor covenants with his debtor never to sue him, it is considered as a release of the particular debt only, Resp. 153; 2 Saun. 46. Brod. 352. Dalh. 374. 17. T. 426.

It is a general rule, that if in constructing a contract according to the ordinary meaning of the words, will under the context indicate evil or frivolous, a different construction may be put upon them. Thus words of condition are construed as words of limitation frequent (2 T. 66. 135. Brod. 8. 205. 3. Leon. 211. 1. Leon. 2. 62.

If an Annuity is granted in consideration of service to be done by the unilinear or grantee, the grant is construed to be conditional. As if A grants an annuity to B for 10 years, upon consideration that B will serve him that time, the annuity is construed to be conditional, depending upon B’s service, all the same, there are no words of conditionality used in the grant. Resp. 14. 1st. 383. 617.

If B grants an annuity to B, it is considered defense for giving counsel, as the terms of the grant are that general, yet the construction put upon it is professional counsel. As if A grants an annuity to a lawyer, it means counsel to the end of his profession; if to a physician it means professional counsel, i.e. medical. But the intention of the grantor is considered. 1st. 385.

It has been determined that if one has goods in his own right, and goods in his right as executor, he grants all his goods, then he possesses in his own right merely, with 2. 5. 17. 15. 386. 3. Mood. 278.

When there are particular words, or a release, general words follow, these general words will be qualified or restrained by the particular words. As John A had a judgment against B, in 1000 £. 18, on his death, he granted A a legacy of £100 on the receipt
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of the legacy, and to a receipt for the same, and closed in those general words in full of all demands, this was construed to extend to the discharge of the legacy, only. 6 Co. 65. 170 brid. 2 lew. 269, birth. 119 3. 606 277.

As used in

But where the release is expressed a particular sum, but does not

create a particular claim, the general words are not thus restrai-

ned... As if it owes £100 to B. B. requires to him a receipt for £500

in full of all demands: such receipt was held to discharge the whole

debt, as in cases decided by (Jew. de Wotton) in the case of Deacon & others,

Ca. 119, 13 How. 55. 3. 160 277. Cent. 2 Pott. 465. This case is beyond law.

If after the application of these particular rules, the contract

still remains doubtful, it is to be construed most strongly aga

inst the party bound. The reason is, the words are not his, it is his own fault

that the contract was not more clearly expressed. 2 Co. 6, Plow. 106. 161,

171. 259. 60. 107. 17. a 167 6.

An exception to this rule, where there is an as big an

condition of a penal bond: in this case the construction is not

favorable to the obligor. The reason is, the law wishes to discharge

him from a penalty which it abhors. 2 Co. 6, 161. 171. 259.

When the same principle of one binds himself for a penal bond

conditioned for the payment of a sum of money at a certain date

as Michael owes £100 to A. A. he has paid two of the same dates in the

same year, he shall not be obliged to pay till the last. 2 Co. 6, 161.

171. 259. 60. 107. 17. a 27 6.

Suppose it to be a penal bond to create an estate to another

according to the notice of prescription of W. and it prescribes an in

efficient mode, which is complied with by the obligor, the penalty

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On this rule there is an exception, where the application of the rule will work an injury to a third person: thus when tenant in tail makes a lease for life, without naming whose, it shall be construed to mean his own life, otherwise it might work an injury to another. 1 Inst. 42. 2.

Subject to these rules, the words used are to be construed in the most comprehensive sense, in which they are generally understood; thus a warranty, age, all men, shall be construed to mean all persons, whether men, women or children, or man woman or child. New 40.

An indefinite expression is construed as an universal one, except when there is some manifest reason for restraining it. Thus if party be owner of horses & makes a grant of, another horses, all the beasts in the stable, the horse will pass, all the 2 horses. See 2 B. 35. 400 1.

The legal terms are useful in a contract, they are to be understood according to their legal acceptance. Thus a limitation to the heir of A., so long as he shall pay a certain sum of money, has been held to extend to all the heirs of A. to the latest generation. 1 N. 62 doubtful the propriety of this rule. The word heir is used merely to define the quantity of interest. A takes in the estate; the says, if it is man, if it is itself a word of description, describes person. 2 Rent 18. 116 6.

Where one agrees to satisfy all employing entering committed by an apprentice, upon request & due proof made, it was determined the due proof must be legal & judicial proof. 1 D. 17.

Contracts are to be construed according to the general intention appearing in the whole context, although this should be opposed to particular words in the contract. Thus after contract, unless before that he had made no lease to any person by which he should be definded, even a stranger could not arise, to 1st, it was held upon you were not liable. 4 B. 30. 6 43 5.
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It is a rule, if the thing stipulated for is not done or delivered according to contract, the price the thing bore at the time specified for the performance or delivery shall be the rule of damages.

Exceptio. Where the article has arisen in value after the time of performance, its increased value at the time of trial shall be the rule of damages. The following are authorities for the general rule:


2. Cas. 211. 2. Bovm. 354.

But if the article falls in value after the time specified for performance the purchaser will recover the amount at the time price for performance, for he might have avoided himself at that time it had a lower.

If several deeds or other instruments are made at the same time, between the parties for the same object, they are to be considered as part of parcel of the same contract, they are all to be construed with one construction is to be given them. 2. Bovm. 318. 7. Bovm. 6. 10. 2. 18.
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Of the annuling, discharging or waiving of contracts.

Oct. 20, 1873. pocket vth.

Until the terms of a contract to contract are accepted by both sides, it is not consummated; either party may retract his offer. 2 Trench 165. 2 Co. 264.

But an offer or price, accepted by the other, becomes a cash so that either by tendering performance according to the terms of the agreement will bind the other. Here is the aspect of both to one of the same thing. 20 N. 213. 2 C. 442. Thus if A offers 20l. for his horse, B accepts it for so much. It by tendering the money, or if the horse is tied to the other. But upon A's offering 20l. for the horse, before the acceptance by B. A may withdraw his offer. 2 Trench 165. 2 Co. 244. 7 Holt 41.

So if upon an offer accepted, earnest is paid, or a future time is fixed for performance: the contract is complete; the property is bound. 3 Eq. 136. 333. 2 Trench 64. 3 Doug. 42. 2 Trench 34.

But if upon the offers being made, nothing more or else is done, i.e., no payment, no tender, no earnest, no delivery or no future time for performance is fixed, the parties separate, the contract is at an end, neither party is bound. As if A offers a man 20l. for his horse, in the street, B accepts it, the understanding that I am to pay him the money down, & be there to deliver the horse, but if we separate under the circumstances, neither party is bound. 3 Doug. 231. 2 Trench 34. 7th Pay. 302. 2 Trench 313. 4 Eq. 136. 333.

Suppose on the acceptance of the offer, the purchaser pays the money, or tenders it. The owner is bound. Suppose the owner of the horse tenders it, the purchaser is bound. Suppose upon the acceptance a future time is fixed for performance of the contract, both will be deemed if either party performs or tenders performance at that time. If earnest is paid, both are bound to the property of change.

The question may occur, how is the property bound at a future time?
contracts.

Signs for Performance. The reason is, the time of performance is one of the terms of the contract, which has not yet arrived.

But if A agrees to sell goods to B at a certain price, provided B within a limited time gives notice to A of his willingness to take the goods, here is this case, time is not bound at the 12th; gives the notice within the prescribed time. The reason why time is not bound is because A is not. The contract is reciprocally obligatory or not at all. So this is a very important rule in the law of contracts, that is not general.

It understood, this, among our Mercantile class of citizens. The case in which this principle is judicially decided is 24 Ed. 4th, 28th. 1 St. 6th, 1765.

So that it may be, promptly this much before I enter upon the particular inquiry of this lecture, one how costs may be annulled.

It is a rule, that before a right of action has accrued to either party upon a simple contract, the parties may rescind it, by expiring time mutual dissent, is this may be by parallel. The right having occurred, by this mutual dissent, the right is destroyed. The continuance of a right must be until one has a right of action. As if A offers to B to pay him 1008 for his horse, a week hence, and before that time, the parties must mutually agree to rescind the contract, the agreement does rescind it.

1. Mood. 259, 12; Mood. 388 (1 De G. 412).

But on the other hand, after the time specified for the performance of the contract has arrived, a right of action has accrued to either party, this right a cause of action can't be discharged but by suit, i.e., a writ of habeas corpus. So after the right has accrued the right of the parties is past the question. 12 Mood. 333, 15th. 1853.

Cum 8, 387, 2 Mood. 624, 1857. Now it is very true that such right of action may be discharged by a partial contract executed as accord and satisfaction, but with this subject I have more matter to do, it is sufficiently treated of under its own head, in accord and satisfaction.
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There is an exception to this rule, as in the case of a lease for a long
accepted, for here the acceptor may be discharged by proof as well as
of as before the right of action accrued. But this is a positive rule, of
conformity to the law merchant, and for this reason, it will not
mitigate the

But the general rule is, that as a contract can be sub-joined
by party after the right of action has accrued, yet a contract may be
waived, in Equity, by a long omisison to claim, under it. Thus, in
a landlord, tenant, made an agreement, which lay dormant for
twenty years, the Ct. of Equity decided that neither side was
This rule
proceeds upon the ground of natural waiver. 2 P. & E. 292. 4 Mcle. 343.
2 B. R. 266. 1 B. L. J. 116. 3 Dou. 143. 105. 20. 21. It also shows there was an act
between intended husband and wife, that she should have no separate
property to or separate use, during coverture, to the husband received the whole
profits while the coverture lasted, Equity refused the relief of the
representatives upon the ground of waiver; and it was said, that if
it had appeared she was dissatisfied with her husband taking
the profits, the presumption of waiver would have been rebutted
she entitled to relief. 2 P. & E. 26. 1 B. L. J. 909. 1 Ab. 249.

And a contract contained in a deed, executed may be
ascended, by the one of the parties, if there was a provision in
the original contract to the effect. Thus, where A sold B a house,
with a provision, that upon the happening of a certain event, say,
henceforth, B might return the house, if the event takes place; and,
accordingly, returned him, it was held, that B might recover
back the money. For this is part of the contract. It is not a passa-
ble agreement, which may be always rendered null upon the hap-
tening of the contingency. 10 T. R. 159. 1 B. & D. 173. 2 Dou. 163. 2014 Per,
Per 151. 2 B. & D. 145. 3 Ab. 1732.
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But, according to Powell, if A contracts with B for property, the price to be given and by a third person, the parties cannot annul it, because they have put the perfection of the contract into the hands of a third person. But says Mr. S. I cannot conceive that in law upon any principle whatsoever, for all they have done is at point A. S. to arbitrate for them, it would be very singular if they were unable mutually to revoke the powers mutually given. But Powell seems to suppose they have parted with all their free agency to this 3d person. P. 412. 416. The city Bacon May 22. 194.

And in this case, after a right of action has accrued, it can be discharged by a release under a free act, yet it may be discharged by what the law terms a tacit release. This is by cancelling, burning, or otherwise destroying the contract. P. 416.

Again, if he for whose benefit the contract is to be performed prevents the performance of the party bound, he is discharged. Thus suppose A in consideration of $1,000 agrees with B to build him a house, but at the time of performance B will not suffer A to come upon the land, or in any other way hinder it from performing. It is discharged, because it is not the fault of the party bound that he does not perform. 2 Com. p. 372. 3 Co. Litt. 206. 2 Com. 837. 1 Com. 265. 416. 420.

In the above case the party is in the same condition, as the party who is prevented from performing, as to his own right, as if he had actually performed, he may recover the consideration, 1000.

So also if A makes a conveyance to B, upon the condition that if A pays a certain sum of money to B or C before such time, it shall be void. It the way stated B is out of the case, so that A is unable to pay on tender, yet his title shall be voided. Vest. 256. Thus in this case it is not to be understood that Mortgage is to lose his money.
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A contract may also be annulled by a new contract of higher nature, for the same thing; because in such case the lower is merged in the higher contract. As if it is indebted to B or book which debt is reduced to a bond; I can never sue in assumpsit, but the law compels him to resort to his higher security. So also if B is indebted to A or bond which is sued 4 1/2 to 7%, recovers in favor of A. B can never resort to his bond for he has now adult securities 6 Co. 25. Exch. 21. b. On 2. ci. 164. 115. man. 9. 3 East 251.

The reason of this rule is two fold: one is, the party ought not to have but one remedy; the other, the salutation of the parties; in such case is not the former a two fold remedy, but merely to substitute a higher for a lower security. But if B owes A as adult he gives a bond to secure the payment; the Creditor may still sue the simple contract, i.e. he may still have his remedy against the original debtor. The bond is executed merely to increase the responsibility; this is manifestly the only intention. Exch. 230. b. v. Bow. 423.

"But this a contract of a given degree may be merged in one of a higher, yet it cannot be distinguished by one of the same degree. The only effect of this is to give the creditor his choice, on which to bring his action. Thus if I buy a horse to pay with a promissory note hereafter to pay, to be with interest, that promise, the former promissory not is not merged in the latter. 1 Beav. 9. Co. 3. 579. Co. 8 Esp. Chit. 13. 8. 62. And when this principle if one is indebted to one then for 100L by parcel; afterwards gives a promissory note for the same; by the bond, law the bond from in is not merged. It is otherwise in bond. But if one executes a promissory note to another to afterwards gives a new one in full satisfaction of the former, it is merged 2 Co. 117. Stear. 626. 3 East 25. 1 Ed. 5. 67. P. 136."
Contracts.

October 1st. Lecture 10th.

I observed yesterday that a contract of a higher nature might be
merged in one of a lower, but when a contract of a lower nature is issued
on one of a higher by way of receipt, or to corroborate it, or to ex-
large the remedy, the form is not merged. Here the higher is not
substituted for the lower. Thus if one makes a bailment by duc, an
action of detinue will lie; or in this case, if I acknowledge the re-
cipt of money by duc of $5, to account for, this receipt does not de-
prove $5 of his action of account. The intention of the parties in
both these cases is not to turn a simple contract into a specially.

(Ree. 100. 1272. 113. 2 Bulst. 256. Bibs. 64.)

A contract by duc cannot be discharged or cancelled by parol, but
being a major of law that a contract must be discharged with the same
solemnity, with which it is made. Rather, will parol evidence be
admitted to contradict a duc. By duc is meant a writing un-
der hand & seal. 6 Co. 114. (Ree. 102. Ree. 239. 2 Ib. 86. 376. 1 San. 297 n.1.)

And it is said that a contract by duc is not cancelled or annul-
ved, by being delivered up to the party bound, provided that the party
can recover possession of it. But I cannot know, says Bowd. how far this rule
extends. If the duc is delivered up to be cancelled I think it is forgiven.
But if this is not the intention of the parties, it is still good. This
contract may make oblige the bearer of the bond. (Ree. 199. 127. Bibs. 320.)

According to the strict rules of the comm. law, every payment out-
side of satisfaction does not discharge the bond. But this rule does not
amount to much, for the party does not discharge the bond, yet it is
good discharge of the money due upon it. It seems to be merely a
nicety which any to be observed in pleading. For all he can tie this
payment or discharge of the bond, you may or discharge of the money there-
on specific. (Ree. 234. 127. 192. Bibs. 144.)

(Ree. 100. 1272. 113. 2 Bulst. 256. Bibs. 64.)

(Ree. 100. 1272. 113. 2 Bulst. 256. Bibs. 64.)
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Upon the same distinction a plea of accrue satisfaction or dis-
charge of a covenant is not good, but a plea of just satisfaction of
the damage is good. 6 Bowd. 63. 6 Bowd. 46. 5 Co. L. 19. 699. Y. 1235.

When the right of the obligation of a contract exists in the same
person, the contract is discharged at law; the party entitled with
remedy at equity, thus of obligor to a bond becomes creditor to obligee
estate, by this means comes into possession of his bond; at law there is
remedy, for it was sued, the action would by bond by the obligee act
himself. But those claims in equity, the estate may file a bill in Eq;
they will decree payment. 6 Bowd. 136. 6 Bowd. 250. 3 Bowd. 62. 19
Nov. 365. This has been a contrary decision in one lot of terror.
which case is reported. 1254. 256. But since that time, there has
been a trial in the Supreme Lat. & they decided according to the English
principle.

The rule is in effect the same, as the case of the intermarriage
of the Obligator & obligee. Here no rule can pass the other on account of
the unity of persons; the right of duty are in the same persons. 3 Bowd.
438. 944. But this rule is not universal as between debtor & credi-
tor intermarrying. As if a bond or other contract is made in contempla-
tion of marriage to be determined after the coverture is at an end;
this obligation is good at law or Equity. So not how such of con-
tracts, which are to be executed during coverture. Thus if intermarries,
gives extended with a bond that he will have her certain prof. at his death, when the right of actions accrues it may be adjus-
tice act, his representatives or either Court. 3 Bowd. 326. contra.
200. 216 Bowd. 371. 3 Bowd. 235. 1 Peck 515. 62. 351. 381.

A contract may be discharged by an act of the legislature. I
mean not here mean a special act of dissolution, but a general law
which renders the performance unlawful. This principle does not
contracts.

Upon that clause of the Constitution of the United States, which says no law shall be made impairing contracts. Thus if A, one year in
had entered into a contract with B, to export Arms to Great Britain,

the declaration of war discharges A from the contract. 3 Edw. 195.
3 Mores, 2 Dillon's 218.

A contract may be discharged by the act of God or any inevitable accident, which renders performance impossible. Thus if the coven-

ants with B, pay to leave all the timber growing upon the land,

he is not liable for such as are blown down by a tempest. 10 Mores 1602.
1805. As also if A, binds a horse to B, which is to be returned in a

limited time, it before that time the horse dies, B is discharged. Poth.
545, 1 Poth. 467, 8.

Again if A, commits a surety for one year for a certain sum, which
sum is to be paid by half yearly installments. A, on account of the
expiration of the 2d half installment, 1536, weeked, is not liable
for the second installment, for the contract is entire. I cannot be ap-
portioned, i.e., the inst. can't be divided. 1 Poth. 465.

I will now mention a case, which may appear inconsistent
with the foregoing principles. It was also a test of, undeli-
tate of covenant breach. The case is this. A, committed with B, to sail
his Trip from Eng. to South Carolina, by a certain time; but in con-

sequence of a storm of weather, he was unable to make the port by the time,

on action for breach of the covenant, it was decided (in the

law of Kings Bench) that he was liable. But, say you, how is this case to
be distinguished from the one I have above cited of the trees being
blown down? Both the obligations in these cases failed in perform-
ance by the act of God. The distinction is this, A in this case ap-

plied the whole of the voyage after himself, the like stepping for his

own not merely, so also in the case of the cashier of the house, on the 2d of

March, this case is reported in 3 Town, 1500 foott.
Contracts.

But a contract becoming partially impossible must still be performed as far as possible. This rule was laid down by municipal law. As if a lease is made for a longer time than the law allows, it is good for so long a time as the law admits. So also where I convey to B. to convey to him a certain farm by a certain time, before the judge arrived part of the land was engulfed by an earthquake— the lot of B. was bound to convey the residue according to his covenant. Plowd. 284. Pem. 3, 443.

If one binds himself by bond to convey lands by a certain day, before the arrival of the day is due, the penalty is void, because performance is rendered impossible by the act of God. Yet a bond of Equity will compel the heir to convey. (Op. 6, ch. 18.)

But the act of a stranger cannot annul a warranty in a contract. Thus if August, a bond, conditioned that B. shall appear in an action on 8 days notice, 1 if he does not thus appear he will pay the bond; now if B. voluntarily appears on so many days notice August is not bound by this, this is not according to the terms of the contract. 1 Pem. 493.

Where however the contract is by the terms of it to be void or unenforced by the act of a third person, here the act will have its effect. Thus if August is to purchase goods of B. 4 to pay him as much as A. shall determine, here A. is bound to pay the price. 5 L. & P. 736. The if in this case A. refuses to sell the contract is as

null. 1 Pem. 418, 16.
Contracts.

There is a very important question upon which eminent lawyers differ; it is this:

When one makes a conveyance to another, with an intent to defraud his creditors, is the conveyance void against a bona fide purchaser? This question has been decided in favor of the purchaser at the last Court, by Judges against them. Judge Webster's opinion is to these words: "I would observe before I consider a point of controversy directly, that any may purchase of another without any intention to aid him in any fraudulent purpose. Yet the seller, when he conveys intends thereby to defraud his creditors, yet in this case the conveyance is not void in the hands of the purchaser, for there was no such intent that can be presumed between the grantor and the grantee. The question is, when there is a fraudulent design in the grantor to dispose of his property to defraud his creditors, does the grantee receive it with a view to aid in the design, is such conveyance void against creditors in the hands of a bona fide grantee of the fraudulent grantor? The obvious meaning of the words of the Statute, which declares all such conveyances to be utterly void against creditors, is, that as to creditors the grantor has no title, but the estate remains on the grantor, liable to his debts; such has ever been the understanding of all men. If the grantee has no title against creditors, it would be natural to conclude that he could convey none against creditors. It must be admitted, that in all many cases it is so, that is, that a person having no title cannot convey any, the maxim "nemo quaerit qui necavit" is a maxim of general applicability. I am fully aware that
there are cases where a title may be conveyed by one who has
more, which I will presently notice; but they are at the same time
distinct from this question, and the reason of those cases bore
no analogy to this. When we give a construction to a statute,
if we find that such construction will probably defeat
the object which the legislature had in view, we ought to
be very jealous of it; say I lay it down as a sound rule, that
it is not the true construction, no facility to evade the object
which the legislature had in view to accomplish, ought ever to be
admitted. The object which the law had in view cannot be
mistaken; it doubtless was to prevent persons conveying their
property into the hands of another, either when the grantor
to whom was a secret trust, that the grantor should have the
benefit of it at the expense of creditors, by which means it was
disguised from being a fund to satisfy creditors,
converted into a fund to support the debtors; according
to the rule laid down, the construction, that the fraudulent
grantee can convey a good title to the bona fide purchaser, is to
defeat this object of the law. Such conveyance will not be
good, that it will I think is clear when the grantor is the grantee
are combining to defeat the creditors of the grantor, knowing
that while the property remains in the hands of the grantee,
that their dishonest purposes will be frustrated if the fund
is discovered; there will be in many cases no difficulty in find-
ing a real bona fide purchaser, in many others one offers
with it, and all this is part of the plan entered into to accom-
plish the fraud. To defeat the law, the law it seems to me is
made in vain, if such an evasion of it is to be sanctioned by the
judicatures of courts. Again, Supposing it will not be
found, that when the words "utterly void" or "void to all intents and purposes" are used in a statute that con such a construction has been given as to validate grants, conveyances, or sales to, in the hands of a bona fide purchaser, provides there exists a claim of any person against such grantee or sale, in the hands of the first grantee, obligee or promissary. Hence it is that in promissory notes are infected with every or gambling, albeit negotiable in the hands of a bona fide holder, are no avail against the claims of the maker. It is impossible to conceive a stronger case than this, for here is not interposed the claim of a third person, who has in no way contributed to the conveyance, but the maker himself, who was party to the wrong act. The hand put the note into market, it had contributed to its negotiability. This was a determination in a commercial country, where every move is strained to give effect to a note in the hands of a bona fide holder. Why then was not such a note hold good against the maker? Surely it would have been, if it had been possible; for the claims of equity, debt, and superior claims of Policy seemed to require that it should have been here good against the maker. But the truth is, as it appears from the declaration of Lord Mansfield, it was impossible. The words of the Statute were to this effect: it was made void "to all intents and purposes," by policy, that the opposing policy of commercial regulations, require that no such construction should be given as to defeat the object of the Law; for in this case, as in those before the Court, if the maker of the note or the promissary continue to evade the law of usury, it is but for the maker to execute a negotiable note to the promissary, and the
promised to negotiate the note. If this note becomes valuable, the
promises, by the Statute, ceases to have the least effect. The
policy of the Law, which was to prevent such a transaction
from being a valid transaction, will now suffer such an
evasion to defeat its provisions; this cannot therefore be
an equity on the part of the maker to grant equity on the part
of the holder, must all yield to the superior equity of gen-
eral Justice, which declares such transactions to be void.
It is a much stronger case to induce the Court, than the
one now before them, to give effect to the transaction; for
this case, at least it resembles the other in this, that it is declar-
ed to be "utterly void" as against creditors, which is surely as strong
by imported as in the Statute of Uses, which is "void as to in-
valids of purposes," and nothing can be more void than ub "utter-
ly" so. For in that case it is void to all intents of purposes, to
give effect thus to the grant of the fraudulent grantees in
hands of the bona fide Purchaser would have the same ef-
fact to defeat the provisions of this Statute, as it would be to
defeat the provisions of the Statute of uses, to give effect to
an ulterior note, in the hands of a bona fide holder. By
Mansfield, found it impossible to give effect to such by rea-
on of the same Statute; for the same reason he would have
found it impossible to have given effect to a conveyance
from a fraudulent grantee to a bona fide Purchaser, but
there is in point of equity, and marks difference in favor
of the present decision that the person attempted to be inju-
red by the fraudulent grantee had in no measure contribu-
ted to the fraud; it had no hand in promoting the conveyance. In
either case the equity of the bona fide Purchaser is equal.
But in that of the Promissory Note, the maker has no equity, whereas in the case of the fraudulent conveyance, the equity of the Creditor is equal at least to that of the purchaser for he had trusted the Trustee on the credit of his Estate which is by the conveyance attempted to be withdrawn out of his reach; and this was the equity which the Trustee must respect if there's in a case governed by similar principles, I show the claims of the party that the bona fide holder or should not be protected against his claim, as the equity is not so great as the claimant on the present case, we find the law distinctly laid down that the bona fide holder must yield to the superior force of the positive declaration of the Statute, surely then is this case a fortiori it must be a successful analogous argument that the claims of the bona fide Trustee of the fraudulent Trustee must yield to the superior force of the regulations of the Statute against fraudulent conveyances.

I have heard it said that on every principle, the equity of the bona fide purchaser is as great as the equity of the Creditor, so that even upon the hypothesis that such further act has no title, neither has the Creditor any, and being in equal equity of the purchaser being in possession, such possession shall not be disturbed. The answer to this is, admitting the equity to be equal to one in possession, yet possession against the claims of another avails nothing of the others claim is elder in point of time, no matter of this charge on former grounds than this "qui prior est in tempore, potest est in jure" and this means always without any exception from its universal influence, settle at once.
Contracts.

the opposing claims of all, who without legal title have equal equity. The claim of the purchaser was unknown long after that of the creditor existed; by claim I do not mean any specific lien created on the thing conveyed, but only that equitable right which every creditor has to the property of his debtor, that it shall not be taken from him by a fraudulent conveyance between the grantor and the grantee; which the law considered to be a right of sufficient magnitude to protect against a fraudulent conveyance, and this right must have existed prior to the purchasers claim, for if it has not, there could not have been a fraudulent conveyance. The advocates of the purchasers claim contend, that the creditor has no specific lien on the property conveyed, so that the Debtor might convey the whole to a bona fide purchaser, so such conveyance (it is not pretended) can be impugned, that the fraudulent transferee stands in the place of the grantor, i.e. that whatever the transferor might do, the transferor having all the rights of the transferor, for the conveyance is good against the grantor, may also do, as the transferor may convey to a bona fide purchaser the conveyance is valid, albeit the property conveyed is withdrawn from the reach of the creditor, so the transferor may convey to a bona fide purchaser, it will be valid, albeit the property is withdrawn from the reach of creditors, and by this means no greater injury is done to the creditors than when the Debtor himself conveys. Suppose, then, that a fallacy lurks in both this reasoning. When a Debtor conveys his property to a bona fide purchaser, he is not by this means disabled from
paying his debts it probably will be the means of enabling him to pay his debts with greater facility; there is no presumption that he has the least intention of fraud or that his creditors will be injured thereby; and as the creditors have not secured any lien on the property, the law never intended to prevent the debtor from selling his property, always presuming that he meant to deal fairly with them. No chance can be said in the case is that it is possible for the debtor, with more ease, to defraud his creditors than if the property is sold and converted into cash, than when exposed to view; but the Law does not calculate upon any such possible case of fraudulent intention, but always presumes the contrary. Upon this position that the debtor is unwilling to pay his honest debts after having conveyed away his property for a valuable consideration, it is not on that account the less able to pay it the Law is always open to the creditor to enforce his claims, and the remedies provided by Law must be presumed to be absolutely sufficient to enforce them, if the property is not liable to be taken being fora; the body is liable to be taken on a creditor's holding until payment is made, which the Law presumes will be made to procure the release of the body. Now different is the case when the fraudulent grantor conveys to the bona fide purchaser. The debt is by this fraudulent conveyance utterly insolvable, for he can have no demand on his transferor for the purchase-money, no fund is created to enable him to pay his debts, for he can have no demand on his transferor for the purchase-money, no fund is created to enable him to pay his debts, the fund of the fraudulent grantor is insufficient, he has all this at the expense of the creditors without their having any possible chance of realizing anything on their
Contracts.

The object of the Statute was to prevent the property of the debtor from being conveyed away fraudulently out of the reach of the creditors, of this there is no danger when it is an honest conveyance by the debtor himself. The Statute was not calculated against this, but when the property is fraudulently conveyed away by the debtor to another, anything which the Law meant to prevent is accomplished. The creditor is defeated of any effectual remedy, therefore the Law is calculated against such an event; hence such conveyance is invalid. The two cases are so far from resembling each other, they are in direct opposition. In the one case no right of the creditor is affected or endangered, there was no presumption of fraud, no fraudulent intention to defeat credit of their claims, but an honest intention to satisfy them. In the other the object was to defeat the creditors claims, by the conveyance of the fraudulent grantee to a bona fide purchaser, this object is accomplished, the very thing which the Statute intended to prevent taking place, if a conveyance to a bona fide purchaser by the fraudulent grantee is not invalid.

I have heard an argument suggested to avoid the force of this reasoning, which appears to me so wholly unpersuasive in principle that I should not have noticed it, as it was not urged by the Counsel in the argument of the case, was it not that at seeming equity attending it may possibly induce some to believe it worthy of consideration, it is that to secure the rights of the creditors, if also of the bona fide purchaser, the sale ought to be deemed valid of the purchase money in the hands of the fraudulent grantee.
Contracts

...that the same may be recovered by the creditors out of this fund, that at first be has become debtor to the creditors for so much money received from their care. It is impossible to conceive how a creditor is to obtain his debt from the grantee, in the event of the avails being insufficient to pay all debts. So he liable to the creditor the first pays for his whole debt, or is the Court to go into a settlement of the claims of the creditors? Is it, on an average, to render judgment for this average sum? But it is decisive that the receiver &c. can never compel a creditor to change his debtor by any thing which they can do. It is contended it is analogous to other well known cases to judge. The bona fide purchaser is, it is contended, a sale in acheteret not. Satisfied with the value of the thing, by the Tally, the currency obtained by which was passed to others, for in none of these cases has the seller's title to the article sold, or the purchaser's it profits. All these cases - every other which is governed by the same principles are exceptions to the rule. Good men habit, nor debt, but is an attention observer they will not appear to have any analogy to the case before the Court. Then in all cases in which the purchaser is protected, not on account of his superior equity, for the man who purchases a stolen horse in market overt, has no such equity against the original proprietor of the horse, than the man who innocently purchases of a thief at private sale, the purchaser has paid his money in both cases, & of the horse is reclaimed by the original proprietor, he must lose his money in the latter case in the former he will not. We must then look to some other principle which governs in the exceptive cases than appears to...
to the equity of the purchaser's case, for that is as strong in the one as in the other case. In one it is wholly insuperable; the truth is these cases are governed wholly by principles of policy; they are so determined not from a regard to any private right, but from a regard to public good. The laws of the State, which are always deemed salutary will be defeated of their intended operation, if the decisions were against the purchaser. Woman would venture to purchase of strangers at a sale, or at a Sheriff's sale, she were liable to lose the property purchased. It would discourage all dealings among men of a man right to currency was called in question, after having fairly received it. To prevent this, for the salutary laws of society from being frustrated in their operation, the superior equity of him who is prior in time, or yields to an inferior claim. But when no such reason of policy exists, I trust no case will be found, where a purchaser from one, who has no title, has too first it from the claims of others, yields to be the case: the article, gold passes through a variety of hands. This furnishes an argument in the mouth of the last purchaser against the claims of others if he has title, if he had none. However convenient it may be to disturb the possession of the last purchaser, at all intermediate sales, I am in point of policy, there is as much reason to protect the last purchaser in the case before the court. What law will be defeated for operations of the law, a free purchaser of a fraudulent grantee cannot hold his land against a creditor when the title of the Deeds, was utterly void, against such creditor? Indeed none, but on the other hand the intention of the Deeds.
Contracts.

Against fraudulent conveyances would be often defeated, being great facility for the party to create it if such conveyance should be held valid. This view of the subject appears more convincing, as every person that has a cause against the vendor should also have a cause against the person who is one of the vendors.

But it is said there are cases where a conveyance fraudulent in its creation may become valid by matter of post fact. As where A conveys to B without valuable consideration, and B conveys to C for valuable consideration, or where A conveys to D, without consideration, to E, and E, for one, it then A conveys to D, for a valuable consideration, in such case it is held that C will hold against D, but this are cases under the Statute 27 & 28, rendering conveyances fraudulent, as to purchasers, void. But these cases are founded on totally different principles from those under the Statute 18. Page 1 these are the cases. Where it is said that what the grantor A can do, the grantee B can do, so that if A had conveyed to B, for a valuable consideration, that to D, B would hold against D. So if B had done the same by conveying to C, it would be good if it would hold against D, as much as if A had conveyed to C, that to D. In such case none right of any person is affected for B had when he conveyed the whole title, it was void as to no person the same being for three were no creditors. If there had been it would have been void as against them whilst in the hands of D, but it is manifestly a case where there was
are no creditors. viz. 18½ till at the time he conveyed to B. for a valuable consideration was good against all the world, nothing can be reasonable than thus to say "what A. could have done B. might do." for no person's right could be affected by his conveyance, when B. has obtained it with a valuable consideration he ought to hold it against D., and here the maxim applies qui prior est in temporis potestas est in iure.

But it is said that A. Statute makes its conveyance to B. void as against a future purchaser of A. with a valuable consideration. Here it will be observed that it was not void when until B. purchased, for until a purchaser appears its good; but then there can be no interest in its creation against them. If this conveyance once became void, it was when B. purchased, but before that time. So had purchased of A., for a valuable consideration. So may well be considered as standing in A.'s place, what was done by B. was done by A. But where there are creditors than B. is a fraudulent grantor that he never has power to convey to B. so as to affect creditors, but where the 2. viz. B. is a fraudulent grantor who is capable of conveying to B. for a valuable consideration. The cases have no analogy to each other. But what is decisive of the question is, that in the Stat. by its proviso has provided that the conveyance of B. the voluntary grantor of A. for a valuable consideration shall be void, as in the Stat. 13 & 14. this provision is made if the grantor convey for a valuable consideration to a bona fide purchaser. So the conveyance is good. No matter of this nature were.

(Continued...
that he might clearly withdraw his property from the view of his creditors. Yet the grantee not being fraudulent, he shall hold the property. So to the Stat. 27 Edw., after enacting that a conveyance without a valuable consideration shall be void as to a purchaser with a valuable consideration, provides, that no conveyance made there has been a valuable consideration paid by a bona fide purchaser that notwithstanding the act, be impeached... This provision relates to no conveyance but one made by the voluntary grantee, it cannot relate to the conveyance made to the voluntary grantee, for that is not made with consideration... it cannot relate to a second conveyance with consideration by the grantor, for in the body of the act it is provided that such conveyance shall be good against the voluntary grantee, and it would be perfectly ridiculous to provide in the proviso that such conveyance shall not be impeached, any thing in the act notwithstanding, since the whole object of the act was to validate it. It cannot thus relate to any thing but the conveyance by the voluntary grantee, providing that in such case, if the conveyance for a valuable consideration, that conveyance should not be impeached, notwithstanding the conveyance to whom was voluntary. The obvious language of the Statute, if the proviso was this, of a grantor conveying to a grantee without consideration, then conveying to a grantee with the first shall be void in that event the last prevails. But in case the first grantee conveying to another for a valuable consideration, it shall never be impeached by any subsequent grant conveyance by the first grantor, or any nothing can be
more reasonable than this, for the clear intention was that a bona fide purchaser who has paid a valuable consideration should be preferred to a voluntary grantee. The intention is as completely fulfilled when the voluntary grantee conveys for a valuable consideration as when the original grantor does; it may well be said that what the grantor could do, this the grantee can also do. In both cases the purchaser for a valuable consideration holds as where the voluntary grantee conveys, the right of no person excepted by it. There is thus no analogy between the cases of conveyance by the grantor under the 10. Eliz. 27 Eliz. for under the 10. Eliz. the conveyance by the grantor in its creation void as to creditors, under the 27. Eliz. it is not void in its creation as to any person. Under the 10. Eliz. when the grantee conveys he had no title against creditors, and therefore conveys none. Under the 27. Eliz. the grantee's title when he conveys was good against every person, therefore he could not convey a title to the State, expressly providing that such title should not be impaired. Under the 10. Eliz. the object of the State was to prevent the property of the debtor being with drawn from the creditor by collusion. To sanction such conveyance would afford a facility to defeat that object. The object of the 27. Eliz. was that the grantee who paid a valuable consideration should hold the land. To sanction the conveyance by the grantee for a valuable consideration would defeat the object."

Judge Tristram holds that there has been a mistake in applying the Acts, neglecting the conveyance as they refer to cases under Stat. 27 Eliz. as has demonstrated by proof that the cases under the two statutes are not congruous. The Act 27 Eliz. very much as 12 Hen. 8, 34 Geo. ii, 160 Conf. 434, 438, 6 Geo. 2, 228, 232, 240, 248.
Bailment... by fault

Bailment is defined to be a delivery of goods to a person on a condition, express or implied, that they shall be restored by the bailee to bailer, or according to his order or direction, for the purpose for which they were delivered. 2 Bl. 645. 1 Tamer 153; 4 G. & J. 251.

Every bailment vests a qualitied property in the bailee, is a right superior to all others except the owner. Lord Coke made distinction between bailor, bailee, owner. He said that property is the thing possessed, but that bailer has a moral property. Now this is not true, says Coke, for every bailee has a special property, who, perhaps in some instances, possesseth his utmost interest. It is well settled that a common carrier has a lien on the goods of bailor, to get his pay for the carriage. To be sure, where the bailment is such that it may be countermanded at pleasure, the bailor has no property as it relates to the bailor, but he certainly has it as to all the rest of the world. For it is settled that the person of goods may maintain cause of action against any person, who takes them away, other than the owner, it yet property is essential to bailee. So I think, says Coke, there is no foundation for let looks property. It is a qualified property which the finder has. 1 Bl. 83; 1539. 240. 5 Co., 1242; 1972, 595. 7 Tamer 392.

From the bailee's obligation to restore the thing baileed, it follows that he is not only bound to keep the goods, but he must keep them safely for the specified time, i.e., that he is liable for any loss or damage which happens during the bailment, to them. But he is not liable at all events, for this would oftentimes occasion great injustice. It is a general rule that he is not liable for loss or damage, occasioned without any fault of his own. 1 Tamer 236. 50 Co. 3.
Now, to ascertain the requisite degree of diligence to be done from the bailee constitutes the principal difficulty, which occurs in this title.

The most general rule is that the bailee is bound to keep and deliver to use or use the goods bailed with a degree of care proportional to the bailment.

In some cases a much greater degree of care is requisite than in others. In some cases ordinary care is sufficient, in others less than ordinary will suffice, in others more than ordinary is requisite, and in some cases, bailee is liable for loss or damage at all events.

As to the different degrees of ordinary care or diligence, observe that ordinary diligence is that which rational men use in the care of their own goods of the same nature. Song 9:10.

The different degrees of each part of this plan are as follows.

Unreasonably care. Where the care is greater than ordinary, i.e., above it, it is called more than ordinary care. Where it does not amount to ordinary care, i.e., below it, it is called less than ordinary care. Of course much is left to the sound judgment of the Judge.

To every degree of ordinary care there is a corresponding degree of ordinary negligence, or default. Thus the omission of ordinary care is ordinary negligence, the omission of less than ordinary care is more than ordinary negligence, the omission of more than ordinary care is less than ordinary negligence. Song 15:12, 30, 31.

Negligence is generally regarded as evidence of fraud in the bailee. But this is not universally true. As if the bailee of a few should leave it exposed in the open field of his house, would be evidence of fraud, unless his own money was left thus exposed. For if the bailee keeps his own goods in the same gross neglect, it is not evidence of fraud. Ed. Rup. 915. Song 30:64, 5.
In order to apply these general observations to particular cases it is necessary to observe the three following more specific rules.

1st. When the bailment is intended for the benefit of the bailee, or only, nothing more than good faith is required of the bailee; i.e., he is liable for nothing less than his neglect. The degree of care depends, in this case, upon the consideration that bailor during no benefit from the bailment. The major of law is, he who derives the benefit of the contract ought to bear greater risk. As if I put my goods into the hands of another, without compensation, he is liable for nothing less than gross neglect. 35 Reg. 91. 13 J. & S. 16, 21, 22, 32. (2 Co. 85, 119. 16. 18.)

2nd. When the bailor only is benefitted, he is liable for slight neglect, i.e., he is bound to use more than ordinary care. The same in this case is the same as above. As if I lent my horse without care, the bailee is bound to use more than ordinary care. 35 Reg. 90.

3rd. When the bailment is for the equal benefit of both parties, the burden of the risk, being reciprocal, must be equally borne. 35 Reg. 90. 106, 107. 11. 20th to 22nd, before cited.

All these rules in those cases only, in which there was no special agreement to insure. In such case if one inures art, or is liable by fire, lightnings, &c., he is at all events liable for damage. But they hold in those cases only, in which the bailor implies, from the nature of the bailment, the degree of risk to be borne by one party or the other, or where there is no special agreement of insurance.

October 22d, Lecture 22.

Of the different kinds of bailment. According to the common law there are 6 kinds of bailments. Some infinite more, but 3 others are divisions. Which of the 6 kinds of divisions, because the rules of law are frames according to this division?
1st. The first species of bailment is called depositum orposing. This is a delivery of goods to be kept by bailee for bailee without any compensation. This species is often called making bailment, i.e., the bailee makes a free deposit or volsary, or vulgare, the made bailee.

2nd. Bailment of the second species is called in Latin, commodation. This is a gratuitous loan of goods to be used by the bailee. The bailee is here called the lender, i.e., the bailee, the borrower. It is necessary to distinguish this species of bailment from a malum. Malum is a loan for consumption, not for use. It is to be paid in property of the same species, i.e., the identical, is not to be restored. This where one lends money to another, they are called borrower and lender, but the identical pieces are not to be restored, but its equivalent in value, or any other pieces of money will suffice. It is the same in the case of provisions, even in all these cases of malum, the absolute property of the bailment is in the borrower. And in all cases of loan, the borrower is the only sufferer.

3rd. The third species of bailment is called in Latin, locatio or contract. This is a delivery of goods to be used by bailee for bailee and to be paid to the bailee. The bailee of this case is called the locato or the bailee, the borrower. This kind of bailment is advantageous to both parties.

4th. This species of bailment is called in Latin, pariam, or pawn, it is a delivery of goods in security for a debt due from bailor to bailee. The bailor is here called a pawnor or bailee pawnor.

5th. The first species of bailment, is a delivery of goods to be conveyed or some other act to be done about or with them, by the bailee, for a reward to be paid him by the bailee. Under this head is ranked the delivery of goods for transportation, so also the delivery of goods for a bailee, or materials to a mechanic, or which some labor is to be
Bailments

be performed or exercised. Common carriers, private carriers, brokers, factors, agents to come under this head.

66. [Redacted text]

This species of bailment is a delivery of goods to be carried to
as in 8 of the species, but it is gratuitous, and the carrier is not rewarded.

with. See Jones 30. 189. 60. 104.

I shall now proceed to treat of these different species of the
order I have distributed them. And

1. This a deposit, the bailment is advantageous to the bailer only. I have already observed that the principal difficulty to be
met with in this title is to ascertain the requisite care and diligence on
the bailer's. The general rule applicable here is, that bailer
is bound for good faith; it is therefore liable for gross neglect or
by 8 Reg. 959. 13. Dow 366. 126. 126. 166. 188. Jones
with. See Jones 32. 655. 101. 2. See 12 Med 87. when it is the depositary is bound by ordinary diligence.

Gross neglect is in general (no provisionally true) presumed
from evidence of fraud. The rule in this case is now well settled
that depositary is liable only for gross neglect. But the depositary
is not liable in all cases for gross neglect, he is not liable at all
for neglect as such, i.e. neglect in the abstract; but liable at
all in the account of a presumption of fraud which the law
raises in the case of gross neglect, or he is liable on the ground of
violation of good faith. Thus if depositary treats his own goods
of the same kind in a similar way, as he does those bailed to him,
he is not liable for gross neglect. For if he was, it would be on the
supposition that he practiced fraud or himself, which would be all
true. 8 Reg. 655. 79. 109. 4. Brown 2300. Jones 166. 166. 166. 5. This rule
does not apply in those cases where there is an express agreement to
insure, but only where the acceptance is general.
Duties.

Duties says there is another exception to this rule. He says if the
shipowner takes place by the officer, he ought to be liable for ordinary negligence, for by showing the officer, he may have prevented the loss from giving his delivery to a more careful man. But this distinction says I, is rather too refined and not recognized by any authority.

The old opinion as to the rule now came down. So in Soule's case (see R. 83, 866 881, 815) it was held that the depositary was liable if he did not keep the deposit safely. The decision however in Soule to be correct, this is still for I think there is not one correct principle of law laid down in the whole case. But it is now settled that the rule in this case is not law.

There was formerly supposed to be a distinction between a special agreement by the depositary to keep the goods safely, when there was a valuable consideration, where there was none. That is the former case, depositary was bound for gross neglect, the latter not. But this decision is now exploded. And it is now settled that the delivery of the goods is a safe possession. There is a solicitation involved in the very supposition of such a distinction. So in the latter case, he seems to be depositary, the moment he receives a reward, becomes a bailee of a different kind. In R. 913, Oct. 10th, 129, 114, 117, 120; 3 Examin. 6, 394, 401; 1 Examin. 11.

It is also held in Soule's case, that if the goods are put into a locked chest, the bailee keeps the key, the depositary is liable only for the chest and not its contents. R. 804, 805; 83 9, 794, 815. But this is decided. In the case of Bagg v. Thompson, the defendant is liable. The case that deposit is liable, in such case, as well for the goods in the chest, for the bailee has as much power over the goods in the chest as the chest itself which contains them. Now it appears to
Bailment.

to me says Guider, that neither of these rules is generally ex
 pressed are correct. Neither of these Judges takes any notice at all
 in the bailor is ignorant of the contents of the chest, or not, but
 this, I think he is the true only criterion for judging of depositary
 liability. If the depositary knows the contents, he ought to be li
 able for the contents, if the bailor does keep the key, it certainly
 by makes no difference, whether he or bailor is in possession of the
 key, i.e. if he knows the contents! But contra, if he does not know the
 contents he ought to be liable for the chest. For being ignorant of
 what its contents are, he is unable to determine what kind or de
 gree of care, diligence is requisite for the safe keeping it... this
 not this the true principle, might constitute a new baili
 ce without his knowledge or consent, which can never be done.

Saus 38, 39, 40 Reg. 114.

A baillee is considerate as the insurer of goods, when no loss
 so far as the law makes him liable. Thus suppose a man obtain
 a policy of insurance for his ship, cargo, &c., aboard of which
 there are articles peculiar to of the ship is lost, the insurers are not
 liable for the insured property.

But a special agreement act in these words "to keep the goods safe
 by" does not subject baillee at all events. It is true he is liable
 for his care, or negligence. But he is not liable when the
 losses occasioned by the act of God, as lightning, tempest, or oth
 er inevitable accident, or that is to say, for losses occasioned by
 open violence or other tortious acts, which he cannot avoid. So
 he stipulates only for his own faultful conduct. As where one en
 vents with loss, for the quiet enjoyment of his tenancy, he is not liable
 for the tortious acts of the lessor. But if he lessor acts, these acts he is
 liable at all events. Saus 40, 41, 55, R.2. 74, 25th, 30th, 136, 20th, 34, 1st 245.
BAILMENT.

If the depositary retains the goods on violation of the bailment, as a refusal to deliver them on demand, or in any way converts them to his own use, he is liable to assumpsit on his contract to deliver, to the old common law action of detinue, or to the modern action of trover. These actions are concurrent remedies. In unlawful detainer is a conversion. See C. 631. Title 93. Section 28.

II. The second kind of bailment is called commodatation. This is a gratuitous loan of goods to be used by the bailee to be specifically required. This species of bailment is advantageous to the bailee only if it is the reverse of the former kind. Therefore the bailee in this case is bound for more than ordinary care; it is liable for slight neglect. Thus suppose A lends his horse to B. to use it he is stolen from his stable, here bailee is liable; but if it is said if his stable door was locked he is not. 1 Bow. 6. 249. 1 Bul. 46. 264. 2 Bow. 344. Jones 95. 1 R. Ch. 916.

It seems to be a general rule, that if a loss happen by mere theft, the bailee is liable, unless he proves extraordinary care. By mere theft, I mean theft as contradistinguished from open robbery. Thus if he trusts the thing bailee to his servant, if the servant poisons it, he is liable. The one hardship lies upon the bailee, i.e. it belongs to bailee to shew that the goods were taken with such violence as he was unable to withstand, else he will be made liable. Jones 92.

But the bailee may be liable, in some cases, if the loss was occasioned by such violence as he was wholly unable to resist. As if the owner of my horse, should ride him, on the night this a part of the country, which he well knew was frequented with thieves, and by thus wantonly, loosely, exposing himself to be robbed, he is made liable. But it is generally true that his not liable.
liable for any acts of violence, as not being for him, the utmost care of diligence is no guard against loss. 2 Pugh 94. 1 P. 253. 1106. 95.

Again, A bailee of this kind is not generally liable for inevitable accidents, as lightning, tempests, etc. He may make himself safe. As if I had my horse to A, to ride to New haven & he rides him to his sence, where he is killed by lightning, A is liable. For from the moment I deviate from the terms of the bailment, I cease to be a bailee strictly. It is a breach of trust & I am a wrong done. Thus is the case. I came into possession of my horse by his own wrong as much as if he had given it taken him from my stable without liberty. Suppose in this case the horse had died of a disease at Hartford, this would unquestionably go in extinguishment of damages, the bailee is liable in an action of borrow, for he became liable the moment he set out for Hartford.

Again, Suppose I borrow a boat to go to a certain point, & I am back at a time, when on all human probability the boat must be lost, I am here liable at the least happened that inevitable accident, & although the terms of the contract are not in the least expected. 2 P. 95. 17. 1 P. 253. 1106. 95.

III. The third kind of bailment is the delivery of goods to bailee to be used by him for hire & reward paid to the bailee. By this bailment, the bailee acquires a qualified property in the thing bailied, & the bailee acquires an absolute right to a reward or price for its use. 1106. 95. 2 P. 253.

You may remember that in every kind of bailment, the bailee acquires a qualified property in the thing bailied. In this case, the bailment being advantageous to both parties, nothing more is required of the bailee than ordinary care, he therefore liable only for ordinary neglect. It is however said by Lord Cotes, that
case of Long v. Turner and that the bailee in this case is bound for
the utmost diligence, so that therefore he is liable for slight neg-
ligent. This observation however is but a dictum in Lord Brough's
opinion is now obiter. More clearly this opinion is incorrect,
for if it is correct, there is no difference between the liability of a
conversor or hiree.

Again, as the parties in this case are equally benefited by the
bailement, the risk ought to be in equilibrio.

This same rule as laid down by Scott, is also laid down by
Buller & Powell. 8th Ed. Vol. I. p. 287. Pem. L. c. 231. This dictum of Scott is
the foundation of Buller & Powell's rule. But Scott & Powell do not
make any distinction between hiree or conversor. 2 May 7th.

Jones has traced this doctrine of Scott to Beaton & from
Beaton to a Roman Jurist. 2 May Jones expressly denies that doctrine of Scott, so that it appears to be settled, that nothing more
is required of a hiree than ordinary diligence, so that he is on
ly liable for ordinary neglect. Hence, in such case, the hiree must
use the thing hired with ordinary care, i.e. with such care as a
prudent man in general can such things. Hence a hiree is generally
excused for his occasions by ordinary, and he would not
him. So also if a hirer puts a hirer against a locked stable, he is
not liable if he is stolen. But he is liable, if the stable door is
not locked. However in Jones I think, p. 57, that the sta-
ble door's being unlocked would not make her liable, because
one of common prudence do not lock such stable doors, if this is the
standards for bailee liability. June 12th.

There has been a question, whether a bailee who lets a chattell for hire
to be used by bailee, is bound to keep it in repair during the bail?
It is now well settled, that he is not bound, but that it is bailee duty. Scott 20th June 1831.
IV. The fourth kind of bailment is called a pawns or pledge. It is a security founded upon pawns or pledges, i.e., it is a security by delivery of goods to him. This contract of bailment is advantageous to both parties. It is advantageous to pawnor because it gives him a credit; to pawner because it secures a debt. The general rule is, that pawner is bound to ordinary care; he is liable only for ordinary negligence. See Napier 2 Term 29; Inst. 14; 1 De G. & J. 332.

There remains now, that in Southcott's case, it is laid down by Lord Coke, that pawner is bound to keep the pawns, only with the same care as he keeps his own goods. But this is not law, for it is putting the pawner to depositary upon the footings. See Sir W. 89, 4, 836.

Pawner is not liable for losses occasioned by robbery. When this rule is laid down, you are to understand that bailee is prima facie not liable. Yet, if by his own rashness or want of ordinary care he exposes the goods to robbery, he is liable, as he does not the pawn. It is also held, that in Southcott's case of the pawn is stolen, he is not liable. With due deference to the opinion of the learned judge, I think, says Coke, this is a very extraordinary principle, for its truth would hardly hold in the case of a depositary, much less so in this. Coke's reason was, because pawner had a property in the pawn, therefore, if he kept it, as he did his own goods of the same nature, he was not liable. But Sir W. says, it is unconditional, that pawner is liable for mere theft in all cases. This reason is, that pawner can't be considered using due diligence if he suffers the goods to be stolen. Now, that says No. 5, that Jones is as far from the true principle as Coke. The law never settles the point, whether bailee is liable for mere theft, i.e., whether he has used ordinary care or not; it is a greater effort to be tried by the Jury. But the law is fully settled, that
of possession can show he has used ordinary care, he is not liable for theft. But, Sums in laying down this principle, thus unconditionally, positively contradicts himself. For in another case he says a bailee is liable, in case of theft unless he use extra ordinary care. So you perceive he admits that theft may take place, and the extra ordinary care is used, but this he supposes that theft can't take place if ordinary care is used.... I am therefore clearly of the opinion, that in the case of theft, it is a mere matter of fact, that if the bailee can prove care he is not liable. For Sums doctrine, see Jones 16. 13. 92, in case of Coop. 18. 2. 41. 2. The following Authorities bear the question as to the point of Fact.

Salk. 522. 1 Rev. L. 252.

Bailee, like every other bailee, acquires a qualified possession in the thing bailees, but his interest is determined by payment, or tender of payment, of the rent due, or the day appointed, and the property in the bailee is immediately vested in the bailee. 3 Salk. 268. 4 Coit 528. 2 Salk. 522. Jones 112. 2 Rev. 91.

If therefore upon payment, or tender of payment, the bailee retains the bailee, he is a wrong doer, guilty of a conversion, liable for any loss or damage, which may happen, even this accidental accident. 5. 41. 91. 91. 523. 1 Coit 53. 6 Coit 625. 19. 2. 253.

But payment or tender of payment is necessary at the day appointed, for the purpose of vesting the property in the bailee, or, if he does not make payment or tender of payment on the day specified, his legal title is forever gone.

And on refusal of bailee to reduce, after payment or tender of payment, the bailee may maintain the action of assumpsit on the bond of reducement, sustenance for the retaining, or to use for the unlawful conversion. 2 Coit. 246. 17. 4. 11. 40. 2 Salk. 40.
Bailment.

The rule is the same as the refusal to redeliver, after part, or ten- 
die of harm, or made by paunee's servent acting regularly in paunee's business, as e.g., a Merchants Clerk. This must be such a servent, as in the regular course of his Master's business, would have a right to receive the payment. Such servent by refusal to redeliver would subject his Master. Salk. 217.

And a refusal by paunee to redeliver as aforesaid, is, at common law an indictable offence. The reason assigned is because the delivery of the property may have been secret. But the mere fact of secrecy does not seem to furnish a good reason. Nor thinks the true reasoning; the paunee is supposed to be an embarrassed man, in necessitous circumstances; paunee being the lender of the money, there is great opportuni- ty offered him to defraude the paunee, to take undue advantage of his circumstances; the con. law will indit him if he should be so hard hearted as to refuse a redelivery of the paunee, after he has an opportunity to receive his money. Dal. 406. Salk. 528. Salk. 522. Dal. 1 Rob. 72. 1 B. & C. 240. (Salk. 339. not law.)

In some cases, paunee has a right to use the paunee, or in other cases he has not. This right is said to be founded on paunee's con- sent, or a presumption of it. Salk. 121. 13.

This rule of paunee's presumption of consent is said to exist, as the paunee is likely to be made better or worse, or not at all affected by the use. There are few things that improve by using. Songong, or Example. Such a setting dog is paunee, he is made better by using, as it prevents him from losing his one or stake.

So where the paunee will not be engaged with using, there is an implied consent by paunee that paunee may use it. As if the pledge consists of Sowells, rings, trinkets. The paunee may use them, upon the supposition that they are not likely to be hired. It
Taiment.

he was then at his peril it is liable for all losses as robbery. 5. Reg. 9 17. 16. P. 27. 1, 3, 5, 22. 1. Inst. 82.

The reason that paurre is liable for the loss of the pledge. It is occasioned even by palling (i.e. while he using it) may not readily be observed by you. I suppose it is this, that the implied permission that goods may be used that are palled, as found a certain indulgence of paurre. And while he is using the pledge, he is the only person benefited, it therefore ought to incur the principal risk.

If the paurre is at expense in keeping the paurn, it is a rule that he may use it for the purpose of indemnifying himself of it, so if losses or other paims may be used. This rule is founded on justice. 5. Reg. 9 17. 1, 3, 5, 22. 1. Inst. 82. The rule is laid down by St. Paul, the St. see me where else, that the depository may use the goods, bailed, where he is at any expense in keeping them. No Authority for this rule, but M. F. thinks it a just reason all the same.

But contra. Where the paurn is likely to be injured by use, there is an expense in keeping it, the paurne must not use it, as if wearing apparel are paurne. 5. Reg. 9 17. 1, 3, 5, 22.

In remark generally, if the paurne does use the pledge, in a case, in which he is not permitted, he is immediately liable in an action of trover, if the paurne will recover the whole value of the paurne. Conversion is the gist of the action of trover, it this occurs three ways viz, unlawful taking, unlawful using, unlawful detaining. No authority to this point. But see 5. Sac. 227.

It is said by Sir Bolt, that the distinction in relation to goods found, will apply in the case of goods found, i.e. that the finder of the value is bound to keep them with as much care as paurne. Upon the first impression it would seem that the finder ought to be liable.
Praemunition.

liable to no more care than a depository, because the keeping of the goods is for the sole benefit of the owner. But in strict truth, the finder is not a bailee. He takes the goods without the permission of the owner; whereas in the case of a depository, the bailee selects this particular man as his bailee. But the rule is well settled that the finder is bound to keep the goods with the same care as a bailee, if this not because, at common law, he has assumed upon the goods for his care, troubles, or expense, helping them... — L. Page 417. P. (e.) 237.

It is said, in a case reported in Bro. 219, that the finder is not bailee for negligent keeping. The case was this. Man loses 20 tubs of butter, & by negligence suffered it to spoilt, the bit held that the finder was not bailee. The decision of the bit was correct. The reasoning of the Judge was not law, which was that the finder was not bailee for gross neglect. 2 Bro. 399. 2 Bro. 219. 1 U. & B. 243. The doctrine, I say in this case was not law, but
the decision is. For an action of trover was lost, & the question was, that the butter became covert by the negligence of the finder. The action was plainly misconceived. Therefore the decision was correct. 3 & 4 W & B. 282; 6 & 7 & 8 & 14 G. 41 & 399.

I observed that the finder of goods has no lien when they sit. Common law for his trouble or expense in finding and keeping the goods. And he is liable to trover if he refuses to deliver them to the real owner, if he is not in bad faith. 2 & 3 & 4 Geo. 23 & 21 & 21. 66 & 74. The reason of this rule is, that there is no privity between the owner & the finder. A lien is the fruit of a contract. The question then arises, can the finder recover of the owner for his expenses or trouble? This question has never been judicially determined in England. Sir S. Ege says, a bailee would go as far as possible,
Bailment.

to reimburse the finder. But says Mr. G. I do not see how they can go at all, for it is a mere voluntary covenant, it is my self says that an action cannot be supported unless the les. are willing to prosecute, there was an implied contract between the parties to find and one side to pay the trouble expenses of finding & keeping the goods on the other side. 2 B. & C. 255. &

Mr. T. thinks there can be no recovery. 7 B. & C. 257. 3 B. & C. 258.

In cases under our Stat. there prevails a different rule. Here it is made the duty of the finder of goods of the value of 2/- to advertise the same, & the finder has a lien upon the goods for his trouble & expense in saving the goods, & therefore it is advantageous to both parties to according to the general rule, he is liable for ordinary neglect. Stat. Com. 635.

But a refusal by finder to deliver the goods to the true owner, is not a conversion for he, but only prove a face evidence of a conversion & will be conclusive unless rebutted. It is necessary for the true owner to give satisfactory evidence that he is the true owner, & the finder ought not to be subjected in an action of trover, unless this sufficient evidence is adduced. And the Jury are to determine what is sufficient evidence.

2 Buck. 312. 2 B. & C. 596.

There has occurred a peculiar case in York. A four horse body which belonged to B. & a stranger lost amid the goods, but B. refused to deliver them. B. brought an action & in a decree the les. by false testimony, to believe the goods were his & he gave judgment in his favor. A. afterwards B. the real owner lost his action of trover ag. A. & afterwards B. the real owner lost his action of trover ag. A. He pleaded the former recovery of les. but the les. held this plea insufficient & gave judgment on les. favor ag. A. & he was obliged to pay for the goods & loss.
Dailment.

No court thinks this principle to be incorrect, nor just, for it has never done more than by law be compelled to do. That the voluntary is delivering the goods to be bought, no doubt, is justice, but liable to the true owner. Of this is a true principle, the lender may by law be compelled to pay for the goods to the 232s to every letter in the Alphabet.

Again, it is settled that if a person will not, or cannot, or will not pay their debts, no court, or the right has he can compel them, who have once paid, to pay their debts over again. But the only resort the right has, is to the false Ev. hir, to show the debts were paid. And this rule is the same, if we take out letters of Administration, as before, and a suit appears. The above cases are analogous to the one I have before cited, i.e., the case of the false Ev. twice, twice, and twice, twice.

The rule seems to be this, that where the law has compelled one to pay to a wrong person, it will never oblige him to pay it over again, even to the right owner. 5.3 Rep. 125. 12 Ed. 669. 683. 15 Eng. Rep. 112. 241. 128. 139. 116. 116. 142.

Lecture 14b.

If the pawnor, after tendering the money, brings his action to recover in the refusal to deliver, still the pawnor may recover his debt, but he must first make a demand of the money due. For pawn or is not obliged to carry him the money, but only 191st 29. 30. 18. 133. 33.

If the goods pawned are perishable, decay stale, false, or may recover his debt, for the pawn is not a payment but only a security for the payment, the debt in duty, stale or duty, stale continues. 40. 179. 40. 205. 186. 313.

The rule is the same under the maritime law, in case of a hostage. When both are many years but by subjects of different states. A hostage is usually life to secure the payment of the debt.
Partialment.

Although the mortgage dies, as is before stated, the power of the mortgagee to recover the debt may be recovered. 3. Brev. 1734. 1653. R. 866. Doug. 61. And while the pledge remains uninfected in the hands of the pawnee, he may sue to recover his debt, unless there was an express agreement to the contrary. 3. Ash. 179. 2. Dea. 214. 2. Dea. 17. 4. Dea. 68.

As in the case of a Mortgage, so also in that of a Pawning. If the debt be not paid at the day appointed, the property of the pledge becomes absolute, at least, in the pawnee. But, pawnor, like mortor, has still an Equity of redemptions. 3. Ash. 179. 2. Dea. 214. 2. Dea. 17. 4. Dea. 68.

Analogous to the mortgage, "once a mortgage always a mortgage," so also "once a Pawning always a Pawning." The meaning of this maxim is, that if the goods were really delivered to secure the payment of a debt, yet they shall be receivable in Equity, unless there was an express agreement to the contrary. So where one delivers an absolute bill of sale of goods to another, if the pawnor gave a writing in which it appears that the goods were delivered in security for a debt, or that the writing stated that if the debt was not paid on such a day, the goods might be sold, this was decided to be a pledge. 3. Brev. 1734. 1653. 1734. 3. Dea. 662. 2. Dea. 698. 1. Dea. 285.

A factor, the he has a right to buy them for his principal, yet he cannot pawn, principal's goods, so as to give the pawnor a lien upon the principal. At this, the factor has a lien upon the goods of his principal, yet he cannot transfer it, for it is a personal right. So here, that if the factor of A's goods to be, now it, tenders to the amount of the lien which he (78) has upon the goods, he may then bring his action of trover, as 5.3. Dea. 662. 1653. 1653. 4. Dea. 1734. 1734.

After the day appointed for payment has expired, the debt not being paid, the pawnor may sell the pledge. So the title, at law is absolute. Parnor cannot redeem from factor, where a Mortgage.
Nailment.

It has been once held, that a pawnee may sell the pledge before the day of payment arrives. But this doctrine is manifestly incorrect. For till after the day of payment, the property is not absolutely the pawnee's; he has only a lien upon it. I think, says Mr. T. that the true rule is, that the pawnee cannot assign or sell. For the rule that he may assign see 1 Bac. 239. Cur. 24, § 6. For the rule the he cannot see Bac. 245. Telden 323. 166, p. 66.

Again, I have before said, that a pawnee's lien upon the pawn is a personal right and cannot be transferred; but it has long been settled that a pawn cannot be foreclosed by the assignee of the pawn. J. P. A. 1. 5. 1. 1762. 112. 12. 2. 13 Bac. 376. R. 2. 24. 3. 1651. 1656. 66.

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Again, it is a settled rule of law, that the pawn cannot be taken in execution for a pawnor's debt; because he has only a lien, and the property is in the pawn. 12 Bac. 238. 253. 4 Cor. 253. 254. 67.

Contra, alio, the pawnor cannot perfect his interest, yet the lien may be sold, or perfected. The King can, by a warrant, take upon himself the property of the pawnor's lien. 18 Bac. 29. 4 Cor. 253. 4. 79. 129.
Bailment.

There may be an urgency arise from the reason of this rule, i.e. that præmune cannot refuse before stay of payment. In deo, says it, that this bailment is in the nature of a fiduciary contract. The owner of the goods may be very willing that this particular person should hold his property in præmune; but he may have many weighty well-founded reasons against the assignee who the præmune may see fit to select; for the assignee may become a beggar, the præmune therefore lose his goods. The case of a Mortgage is very different. There is no doubt but the interest in a mort. may be assigned, the reason is, there is no danger, whatever may be the situation of the assignee, the heir will ever remain. This view, however, can never be run away with.

It was as a matter of course essential, that the præmune should be delivered at the time the debt is contracted, but this is overlooked, as any time subsequent is equally well. 2 T. 36; 16; 10; 350, 59.

There was once a question, whether præmune can be committed to restore to prænue the surplus of the pledge after it has been sold. No authority to this point - but 36. 2 T. 36. says it, that a claim of this kind could not be supported, i.e. that præmune is not obliged to restore the surplus.

If A delivers goods to B as a security for a debt due from A to B, B becomes præmune - A has no right to demand the delivery - but says it, G. it would seem to me, that B would not be considered as præmune unless there was some agreement between.

C. T. 36; 10; 16; 49; 36. 49. Contra, 36. 36.

If A delivers goods to B as a naked donation to B, he may convey and the delivery at any time for that is no consideration. A naked gift, without delivery transfers no right to do so.

C. T. 36; 49; 36.
Bailment

It was formerly doubted, that if there was no day fixed by the parties, whether the pawner's right of redemption continued after their joint living. But it is now settled, that the pawner has a right to redeem at any time during his own life, or after his death, the right of redemption ceased at law. 1 Sa. 249. 14. Co. 153. 29. 2 Co. 138. 7 14.

There being no day appointed, the pawner must be redeemed by payment or tender of pay. But if pawner's exec. cannot redeem. Bacon thinks however, that pawner's exec. may have a right of redemption. 16 Bac. 239. 11 Boll. 29.

When a day is appointed, the death of pawner does not, stop the right of redemption, if it was before the day; for pawner's exec. has the right. 1 Bac. 239. 11 Boll. 29. And if the executor does not pay at the day, he has the same right of redemption, that the pawner would have if he were living.

In case of the death of the pawner, the pawner delivered his pledge to a stranger without consideration. Still pawner must make pay, or tender of pay, to pawner's executor. If the stranger refuses to deliver the goods to pawner, he is liable to recover. 1 Sa. 241. 14. Co. 138.

But suppose, in the last case, pawner delivered the goods to the stranger for a valuable consideration. Now whether pawner must make a tender to the exec. or to the stranger, depends upon the question, whether the pawner has a right to file, before the day of pay. Which question we have considered before. 172. Co. 138. 2 Co. 153.

V. The fifth species of bailment is a delivery of goods to be carried over some other act to be done, about or with them, by the bailor, for a reward paid by the bailor. This kind of bailment excludes a delivery to a
Praelimun,

private person to a common carrier or one who executes a public
character or employment.

And 1st. of a delivery to a private person. A bailment
of this kind is one made to a person not executing a public em-
ployment. As a delivery of cloth to a tailor, to be made into
a garment.

Bailment of this species is advantageous to both parties; it
is advantageous to bailee, because he procures some act done with
or about his goods, to the bailee, because he acquires a profit by
doing this act. Agents, Attorneys, agistors, Farmers, factors, curragers
and many others, are included in the class of private persons. Both baill
ment is equally advantageous to both parties, bailee is bound
only to ordinary care, baile is only for ordinary neglect. 1 Bay.

If goods are delivered to a private person, it may be occasion-
ated by not baile he is prima facie accused. But yet it must be
not baile accompanied with irresistible force. 1 Bay. 18. 12. 16.

If baile is occasioned by care theft, bailee is liable as he shou
ordinary care. Then prima facie he is liable, because it is frequent
ordinary would save the bailment from theft, but this presen-

Jones says, if the thing delivered bailee, is distrainable by both,
Lands, and titles, the bailee is liable, for it is ordinary neglect.
If you will remember by the English law, the Landlord has right

Under this class of bailments (as one of that of commodation)
there must be a diversity taken between it. It is a mortem.

If a certain good is delivered to a smith to work into an
extensit, this is not a bailment, but a mortem. The property
is not at the end of the 4th sentence on the next page. 77.
Bailment.

...exists absolutely in the Smith, he is alone liable for all losses which may happen. The Smith has a right to use the (Bailment) property for any other purpose, or for any other Customer. The reason is, that to accomplish the intention of parties, the property is to be so altered by friction that the property cannot be identified, it is not expected to be specifically restored. This rule I find laid down by no writer except Jones, there are some analogous cases in the books. Jones 52, 1 B.C. 640, 2 B.C. 654, Digbey 35.

This rule is certainly true, M'C. thinks, in all those cases except where the nature of the property is not altered by friction. Where the kiss happened, the reason why the property is supposed to be absolutely in the Smith, is because it is not to be specifically restored. (M'C.) It is not to be so much while lecturing upon this principle, i.e. respecting the Smith, that I find it impossible either to gather his own opinion or find out correctly what the doctrine is. See note at the end of the title. 2 B.C. 400, Mon. 26, Digbey 35.

When the bailment is to a person to do some act of skill or profession, in the goods for hire, the law implies a two-fold obligation on the bailee's part. 1st is, an obligation to restore the property after the labor is performed, 2nd that the labor so bestowed be skillfully performed. So a tailor engages not only to restore the garment, but also restore it skillfully made if the fault is either of these obligations he is liable.

But if the act to be done is not in the professional business of the bailee, the law implies no contract that the work shall be skillfully done, but it does that in that use ordinary care. If, a robe is delivered to a tailor to be short, or cloth is delivered to a blacksmith to be made into a garment. But if there is an express contract to do the work with skill, he is held liable. 2 B.C. 184, 1 B.C. 166, 1 Digbey 61, Mon. 109, 20, also 1160 14; Lec. 329.
Bailment.

Jones lays down another rule, viz., that ordinary care does not imply that private bailee, that is, one who is not sure to be found against fire, is that if the goods are lost by fire, the bailee is not liable. Now says Mr. C, I think this rule should depend on usage, that if he would be bound to insure in those places where it is usually done, it charge the premium to the bailee. And in those places where it is not customary to insure property of the description of this bailment, he ought not to be bound. Jones 142.

If the goods, which are delivered to this private bailee, are lost or destroyed, while the work to be done is done, then is the risk of the loss completely upon the bailee. If this happens by want of ordinary care, in the bail re, it means that the bailee is entitled to no wages for the labor he has done. The reason is, the bailee receives no benefit from his labor. I say it seems to be a rule. But I can see no reason why the rule is. The reason is, that the rule should not apply with equal force, when the work is finished, but is not delivered over to the bailee when the work is finished. It should be done so, that the bailee is entitled to no wages, whether the work be finished or not. 4 P. C. 383; Burr 1392; 95.

October 6th, 1857. Schraul's 5th.

Every goods bailed to a public character, or to a person executing a public employment. As e.g., a common carrier.

A common carrier is any person in general who makes his business to carry goods of another person for hire, but merely going a journey for a merchant occasionally will not make a common carrier. A com. waggoner, a com. hey man, a com. porter, a com. man, nay, if they receive hire for the goods they carry, fall within the denomination of common carriers, or in fact every person whose regular employment is to carry for hire. 1 Ch. 918; 1 Rob. 13, Ray 220.

Treatise.

It seems formerly doubted whether any other person than a carrier by land fell within the distinction, but by statute of 1749 it was extended to common carriers, and by Stat. Car. II. to ship masters, which extends the distinction to carriers by water as well as by land. Lord 1749, 10 C. & 11. 232. 10 C. & 11. 335. 2 Lev. 64. 122. Since the rule of law have been extended to carriers by water, it follows that ship owners, if their ship is regularly employed in the transportation of goods, also fall within the denomination of common carriers. And whenever the owner of goods has a right of action against such carriers by water he may maintain it, or may maintain it, either against the master or owners of the vessel.

But by Stat. 1724, the owners of the vessel are liable only to the amount of the value of the goods, freight of the loss was occasioned, and to the negligence of fraud of the master or owners. So it seems that the owners are not liable for so much of such loss as exceeds the value of the ship's charge. But still if the action is brought vs. the master for his negligence, or for the loss, he may be made accountable to the owner of the goods, to their full value. 10 C. & 11. 232. 122. 1 Lev. 64. 122. 1D. 29. 101

A common carrier, having conveniences to carry goods such as are offered, is bound to the best of his skill and care to carry, he is liable to the owner of the goods in an action on the case, he is liable to the owner of the goods in an action on the case, because he makes an implicit contract with the public that he will carry goods for any person who may apply to him, provided he has conveniences for that purpose. But if his waggon or boat is already full, or any accident haps his terms of carriage so that he can carry no more than a given weight, he is not liable in such cases, if he refuses to receive the goods. This rule is the same as to an innkeeper if he has conveniences to receive the goods, but he refuses to entertain Travellers. But 10 C. & 11. 232. 1D. 29. 101.
Bailment.

Notwithstanding this rule, a common carrier has a right to make a special or a conditional acceptance; that is, he has a right to say he will not be answerable for the loss of valuable goods, until he is made acquainted with their value, and his payment accordingly. 1 Burr 2295. 1 B&d 622.

A bailment of this kind being mutually advantageous to both parties, the bailee would, if there was nothing to interfere with the application of the general rule, be liable for nothing less than ordinary neglect; but this was the rule in the reign of King III. when it was held that a common carrier was not liable for losses occasioned by robbery; but in a later period, the reign of Elizabeth, it was held that the carrier was liable for all losses occasioned by robbery. 10 Eliz 5 pl. Moon 462.

Note 2, ib. 89 a. 173 bec 375. pum 146.

Since this time, i.e., the reign of Queen Elizabeth, it has been well established that common carriers are liable for all losses occasioned in any way, except by act of God, or the King, or public enemies. 2 Camp. 8; 3 Burr 1593. 1 Str 128. 10 Eliz 193. 120 unknown. 1 Self 18. 17 Eliz 3. 1 East 599.

Lod. Coke, assigns as the reason of this rule, that he is made liable because he receives a reward for carrying. But says, No. It will be once known that, were this the reason of the rule, it would apply with equal propriety to a private carrier, as to one, who bestows labor upon the bailment. The true foundation of the rule is public policy. A com. carrier is one who makes this his business; he is necessarily trusted by the public at large; and are obliged occasionally, to commit the safe keeping of the transportation of other property to such persons, he then can have no right, opportunity, to defraud his customers; it is also for this reason, which his liability is retained. 1 108-418. 1 Self 145. 1 Self 143.
The receipt of a reward is not the true reason of common carriers' liability, since it is true if he receives no reward he is not liable to this extent. The receipt of a reward is necessary to his character as a common carrier. No one acts as such unless he does receive a reward. If he does not receive a reward he is a mandatory, a bailee of the 6th slate kind, in such case if the goods are lost, he is liable only as a mandatory.

In every bailee stands in the nature of an insurer against risks for which they are liable. So a common carrier is an insurer as all losses which may happen except those inevitable accidents, acts of God, and unavoidable accidents are used in the law as synonymous terms, according to Ed. Mansfield. They mean such accidents as could not happen by the intervention of man; as lightning, tempests, earth quakes, etc.

17 R. 33. Ston. 126. Hence fire occasions other than by lightning is not considered as the act of God. And when goods were lost in a ship by means of a rat knowing a hole in the side of the vessel, the carrier was held liable. 12 R. 39. 2 L. Bl. 113. Syn. 16. 1 Wirt. 251. 13 B. R. 70. Stone 126.

It is determined that common carriers are liable for losses occasioned by mobs, insurgents, & robbers, for they are not considered public enemies within the rule. It is not necessary, however, to constitute an enemy, that they are declared by the acts of a sovereign State, for Pirates upon the high seas are declared public enemies. But what wiser pirates as they are called, i.e., such as in past the courts & harbors, are not within the rule. They are robbers merely. But 16th. 239. 12 R. 35. Syn. 16. 1557. 1572, 1578.

This observe that the acts of God of public coincidences will discharge the common carrier of his liability. But it is not.
necessary that the immediate loss is occasioned by the act of God, it is sufficient if it is the procuring cause. Thus, if it is necessary, by a tempest, to throw the goods overboard, the carrier is as much excused as if the goods in the ship had all been lost, because the tempest, which is the act of God, is the procuring cause. Duns 551, 2 Hals. 250, 2 Robt. 367, 12 lev. 63, 17 Bac. 545.

There is a case in Aliquapt. P. Q. where an action is brought in a com. car. for the loss of a box of lard, and he pleaded that in a violent tempest he was obliged to throw the box overboard. The bet. held the master liable. The bet. says, Mr. E. must have proceeded on the ground that it was necessary for the safety of the ship, its weight being of trifling consequence. I would here observe, says Mr. E., that whenever it becomes necessary for the safety of the ship, that the goods be thrown overboard, the owners, the freights, the master and the passengers are to arrange the loss among themselves according to their respective interests in the ship. This is a rule introduced by the maritime law and is different from the com. law principle. Beaus. 2, Mar. 148, 2, 12 Robt. 407, 3 East. 320, 11 Robt. 262, 228.

In this as in analogous cases, I observe that if a com. car. voluntarily exposes the goods to danger, from the act of God, he has no excuse, for his own rashness is the cause causans. If a common hoggman rashly puts to sea in tempestuous weather, he shall be liable for the loss. Sta. 128, 105, 620.

The com. car. is also excused if the loss happens that the act is defect of the bailer. Thus, if a ship of war should be driven to a com. car. in a state of fermentation, or in any situation in danger for transportation, the ship being burnt, the carraia is not liable. For it is the owners fault or folly that the loss happens. Bur. at. D. 14, 1 P. C. 628.
So also if the carrier suppose is full, the owner sends his goods upon him, he is not liable, i.e. to the extent he is not liable as a common carrier, but he is liable if he happens that waste of ordinary care. See 2 Thoma, 154, 346. Suppose the goods are liable to damage from rain, insist that they shall be carried upon the deck of the ship, the carrier is not liable for any loss or damage which may befall them for it happened that the fault of the owner, but if he puts his goods on board, the master had not secured them under hatches, if they had been damaged by rain, here the master is liable, as the loss is occasioned by the act of God.

In order to subject the carrier within these rules, the goods must have been lost while in his possession and under his immediate control. Hence it has been determined that if the owner of the goods should, his servant, in the vessel or hoy to take care of them, the master is not liable. That is, he is not liable to the extent a common carrier is, but he would be for ordinary neglect. The reason he is not liable as a common carrier is because the goods are not considered in his immediate possession. So if the goods are stolen or they are damaged by the passengers he is not liable for the same reason. But if the goods are delivered to the carrier, he should request a passenger or other person "to keep an eye upon them" this would not excuse the carrier. So that the rule seems to be this viz., if the carrier has not a control over the goods he is not liable as common carrier. So if a passenger carries baggage in the stage, as he has the control of it, it

It is also determined that a common carrier, the ignorant of
The contents of the box or chest is liable for the contents, unless the box is occasioned by the act of God, provided he does not discharge himself by a special acceptance. Bull. 2 D. & J. 141. 1st Ed. 12, 22. S. Supp., says, Mr. J. of the carrier knew the box contained goods, but does not know what the specific articles are, then he has no fraud practised upon him, this rule is correct. But there are two cases in the books, when the carrier was held liable, although the owners of the box: misinformed him of the contents. Alby q. d. Bull. 2 D. & J. 141. 1st Ed. 12, 22. Thus in one of the cases, when the owner told the carrier his box contained nothing but some cheap silk, when in fact it contained a large sum of money, he was robbed, ibid., 238. In the other case he was told the package contained nothing but a book of some tobacco, when $10,000 in specie & bills were the contents; in both these cases the box held the carrier liable to the amount of the actual contents. Alby q. d. 3 M. & R. 135. Bo. Sta. 1307.

These two decisions were sensibly shaken by Lord King, more so by Lord Mansfield. It is evidently a most unjust principle. For had he known the actual contents, most likely the robbery would not have happened. He would have so augmented his guard as to be able to resist any force. I think these cases may be considered as overruled, as they were shaken by Lords King & Mansfield. 4 Burr. 2300. 1st Ed. 12, 22. 612.

By a "special acceptance" is meant an express agreement made between the bailor & bailee stipulating how far bail or ce shall be liable. And—

For the purpose of making this special acceptance it is not necessary there should be a personal communication between the bailor & bailee. It has been determined that an advertisement in a public newspaper, stating on what condition
What only he will be responsible for loss may be considered as a special acceptance. Such an advertisement, that it is not for sale a special acceptance, may be given as evidence to the jury that the owner of the goods had knowledge of the condition of the acceptance. _Bull. N. P. 71, 4 Barr. 2248_.

_Cent. 485, Epsi. 622_. This however is not, universal rule, for it may be proved that the bailor never saw the advertisement, nor knew its contents, then he could not assert it to its conditions.

Under a general acceptance a common carrier is liable for what he receives supposing there was no fraud or concealment by the owner of the goods, but if he accepts especially he is liable for so much only as he engages to carry. The reason is this reward extends to no more than he engages to carry, therefore he ought to be liable for no more than his compensation extends to. Suppose e.g. that a carrier has 10 per cent for the carriage of money, the owner tells him his bag contains 40000 guineas in gold notes. But he later finds that his bag contains only 1000000 guineas in notes. The law holds the compensation extends to the 1000000 guineas in notes if the compensation is for money. To the receiver in the bag he is not a common carrier and nothing less than gross negligence or a violation of good faith will subject him to liability.

_In 1362, 13 Ch. 3_ is a case, where an action was tried against common carriers for a loss of goods. The carriers had published the terms on which they received cash or other valuable articles which were to be accounted for, and if the owner was known by them to an insurance paid for the goods according to their value. The owner deceived them by leaving the parcel to pay only the customary carriage of valuable articles at the he knew the terms. He held the carriers would not be liable to any amount, not even what was paid for transportation._R. 158._

238.
The master of a Stage Coach, who receives hire for passengers only, not for baggage, is not liable as a common carrier for the loss of the latter, but if it is his business to receive hire for the carriage of baggage also, he is subject to the rules before laid down. Com. 1 Ch. 300. 1 Ch. 292. 1 Ch. 128. 1 11 Ch. 383. 4 W. 185. 4 622. 62.

But as he is liable only for that, to which his reversion tends, yet it is not necessary, in order to subject the common carrier, that he was actually paid his reward at the time he received the goods, or that there was an express contract that he should have after the goods were paid. In such case the law implies a contract, the carrier would be liable to him in a quantum meruit. 1 11 Ch. 325.

Another is it necessary for the purpose of subjecting the carrier, that the goods should be lost in transit, if they are lost before the delivery according to the terms of the bailment, it seems he is in general liable. Thus if he stops at an Inn, it is no excuse for him, that he put the goods under the care of the Innkeeper. It is his duty to deliver the goods to the consignee, unless there is an established custom to deposit them. 2 11 Ch. 1291.

E. 42. 4 622. 62. 4 622. 62. 4 622. 62. 641.

If it is the established custom, after the goods arrive at the place of destination, for the carrier to deposit them in a warehouse of his own, he is liable as common carrier for loss, which happens at the warehouse; but in this case he is liable to the same extent any other ware-house-keeper would be, i.e. he is bound to ordinary care a liable for ordinary negligence. 4 11 Ch. 12585.

It is a general rule, that if the consignee directs by what carrier the goods are to be transported, the action is to be brought by him, not the consignor. If contrary, the consignor selects his carrier, he must bring the action against the carrier. If the consignee makes
himself liable for the risk, when the consignee sells the carrying ship may bring the action to reverse, because in such case the consignee and consignor are both parties to the contract. 21 T. R. 330, Bulkt. 330.

When an action is to be brought by the owners of a ship, or the owners of a Stage coach, they must all be joined, because the contract is not, and they are liable quasi contractu not ex delicto as in torts. The master may be guilty of a tort, yet the owners being absent are not. Sallo 49. 1 T. R. 623. But if all the owners are not joined, the nonjoinder is pleaded only in abatement. This has been the established rule ever since the time of Lord Mansfield. In Lord Colton's time it was otherwise. It was then held that advantage of such nonjoinder could be taken under the general issue. 5th Ed. 2611. 5th Ed. 656. 6th Ed. 638. Perk. 1140.

At common law, a Post Master, as he was not an officer appointed by law, was liable for losses as a common carrier. But the Statutes 12 Geo. III suppressed all private posts. Those offices, it established a general one; since which time Post Masters are not liable as common carriers. He is now an officer appointed by the government. He makes no contract with those who send letters, neither do they pay him any reward or hire; there is no privity of contract, all his hire, i.e., his commission is allowed him by the government. Besides, the Post Masters nonliability seems to be found in public policy. For even they liable, no man or earth would venture to take upon him the office of Post Master General. Sallo 7. 1 P. R. 655. Cons. 165.

Upon these principles the Post Master is not liable for the defects of his Sub-officers, for by law he is bound to appoint them, or doing which he acts officially. But a post Master is liable for his own defaults, as any person would be, who is entrusted with business. 1 T. R. 813. 2 Wh. 666. 3 Term 765.
A common carrier's liability is said to be founded upon the
custom of the realm, but this custom was to be counted upon accord-
ing to the custom of the old practitioners. But it is extraordinary
and unnecessary, as this custom is no more than a branch of the
Common law. [Per 245 1 Bae 369, Rob 12 33 Jones 1033 M 287 p27]

The remedy at law, common, where the loss is occasioned not
by any misfeasance of the carrier is a special action in the
cases. Proof will not lie, unless there is a conversion, there can
be no conversion unless there is a misfeasance. This special action
on the case may sound as a delicto or ex contractu. Whether he was
guilty of a misfeasance or not; proof will not lie for a non
feasance, yet it will lie for a misfeasance, as destroying the goods,
bearing upon the trunk to. Ta 18 653 v 760 884 14 6 5 84 282.

Under this class of bailors of this 5th kind I have formerly
been of the duties of Shipkeepers, but there being some rules which
apply to this class of bailors alone, I now to them next I propose consid-
er I have chosen to consider them, under a distinct head of title.

I would here observe generally as to all bailors of the 5th
kind, that if the loss or damage is not occasioned by the mis-
feasance of the bailors, the owner may declare a special account
suit, ordinarily on the case sounda in neglect, East 3 12 282 34 43 19.

VI. . . . Ballet of this kind is called mandatum, it is a delivery
of goods to be carried, or some other act to be done about or with them,
by the bailor without any hire or reward from the bailor. The
difference between this and the 5th kind of ballet is, herein the act is
productive. But there is a very close affinity between this 6th kind
of ballet, i.e. a depository. The difference is, the duty of the depository
lies in custody; that of a mandatory lies in feasance; that is, doing
some act. . . . This kind of ballet is advantageous to bail
bailee only, and therefore the bailee is liable only for gross neglect, or a violation of good faith. This is the kind of bailment in the case of Savory v. Runnard. 3 De g. & J. 609. 174. 175. 205. 26. 25.

I think it is a case that this rule, as to the extent of balee liability, holds only in those cases, where there is no express agreement between the parties, for bailee's faultless bailment. In other cases there is an implication, in the nature of the bailment, that the bailor shall use all necessary skill to. But this engagement is implied only in those cases, where the act to be done is in the regular line of the mandator's professional business. 3 T. & C. 165. 166. 176. 183.

A question has arisen, whether an express promise by a mandatory is binding upon him, as a contract, for gross neglect. For C.J. Loughborough in the case above cited from 176. 177. 178. delivering the opinion of the House, observes, that when there is an express agreement by the bailor to use a given degree of care or skill, the omission of that care or skill is gross neglect. This is the rule of Loughborough's. Mr. F. thinks it is incorrect; for gross neglect is equally in every kind of bailment. If it is ever no more nor no less than the omission of the care which every man of common sense, house or inattentive, takes of his own goods. If the bailee should stipulate in all cases by inevitable accident, if the goods should be destroyed by tempest or earthquake, it would be said, were this a true rule, that it was gross neglect in the mandatory, this for no other reason than because he has made himself liable for such accidents. The mandatory, therefore, says, it is liable on the contract, not on the ground of gross neglect. The difficulty which occurs here, i.e. making mand. liable on his contract, is want of considerations. But Lord Coke says that the delivery of the goods is a sufficient consideration in common law, for the delivery lacked
mandatory is an act that will be disadvantageous to the bailor, if in the event the object of the bailment is not performed according to the terms of it, or to his expectations. This is abundant consideration not only in this but in every species of bailment. 176. 156. 158. 162. 1 Ray 90. 91. 92. 96. 98. 100. 102. 106.

Tomes makes a distinction which is too refined to be practicable. He says that the duty of mandatory is greater in the case of preservation, or when there is some act to be done, than in the case of custody, because the nature of the thing implies it, because more care is requisite for the safe keeping of the goods, from one place to another, than simply in keeping them. He says that the liability of a mand. is greater than that of a depositary. He cites no authority but you may see his doctrine in Sos. 73. 74.

This rule of Tomes is also contrary to the doctrine laid down in 176. 186. as before cited. Therefore I reject the rule, for 3 reasons: 1st. it is too refined. 2d. it is arbitrary i.e. unsupported by authority, and 3d. it is not consonant with other rules of bailment.

When the act to be done is in the line of the bailee's business, he is liable for the event of all necessary care, but this means all necessary care in the preservation, or the act which the bailee has stipulated to perform, or does not extend to any external duties, the comprehension of which would be by them gross neglect, as carefully watching the goods, as the wrong acts of others. A bailee, who receives my cloth to make into a garment as a mandatory, is bound to make it skillfully, because it is in his line of business, but his liability does not extend to acts of the rigorous, who burns or steals the cloth, unless it was occasioned by his gross neglect. 176. 186. 190. 1 Ray 90. 91. 92. 96. 98. 100. 102. 106. I have now enumerated the particular kinds of bailments, and the rules which apply to the different classes; there are however some General rules remaining, which I will now give you.
General rules as to Bailment — The 1st as to the lawful right of lien upon the goods bailed. A lien, properly so called, is only a favor of the 16th & 5th claus of bailiers. By the term “lien” used in the law is meant a direct claim to, or incumbrance upon some specific property for the payment of a debt or duty of bailor favor. This right does not exist in favor of all the bailors of the 16th kind, but it does exist to all of the 5th, because the very object of giving a pledge, is to give the bailor a lien upon the security for the money due. Yel. 17, 19. 10th, 522, 1st 211, 21, 22, 515, 21, 583.

Most bailors of the 5th kind have this lien upon the property, but the right is not founded upon any express contract of that effect, as in the 16th kind, but upon an implied condition annexed to law to the bailment. The rule is not universal. Scott, 3, 383, 383, 183.

Whenever this right of lien exists in favor of the bailor to a third person wrongfully obtains possession of the goods, such 3rd person cannot avail himself of this right, if the same may maintain trespass a quo, such wrong done, without tending to the bailor his due. As if A pledges goods to B, to secure a debt, which is to be paid in 60 months, and within three months C wrongfully obtains possession of the goods. A may maintain his action as trespass immediately, without tending to B, the amount of his lien. For this right of lien is strictly a personal right. But if the bailor wrongfully delivers the goods to such 3rd person, the owner cannot recover the goods till he has tendered the bailor his due. Scott, 3, 383, 383.

And a common carrier has this lien; if he has a right to detain the goods until he is paid. 2, 252, 253, 513, 26, 253, 253, 253. Contra, 52, 253. And if goods are stolen & delivered by the thief to a common carrier, he may detain them. As the true owner himself till he is paid for the transportation, 6, 253.
The laws obliges him to receive & carry the goods. L. 4th. 1. 5. 20. 23.

So also a tailor has a lien upon the cloth delivered to be made into a garment. 1. 1. 1. 5. 2. 1. 22. The tailor can take the cloth as the common carrier of the goods, but when the condition on this case is arrested by law in favor of tailor.

S Proc. 4th. 54. 7. 9. that where the tailor has been in the habit of trusting to his personal credit for his pay, he has not this lien unless he informs me that he shall depart from his customary rule & must pay in down when the work is finished. 1. 1. 1. 5. 2. 1. 22. 25. 29.

But an agency carrier has not a lien upon the cloth, for he is trust for their helping. For in this case, neither of the above reasons will apply, he is not obliged to receive them, neither is it for the furtherance of trade & commerce that he should. Ep. 1. 5. 2. 3. 1. But M. 1. 4. 5. has C. 1. 1. 1. 5. 2. 1. 22. 25.

The master of a ship has no lien upon the ship herself for his services or for repairs or stores he furnished. For he can't like the ship in the court of admiralty for his wages. The reason is, his contract is with the owner, & he depends upon thir personal responsibility for his pay. But the master officers may have this lien it may be bit here. As an of Westmorland 1. 1. 1. 5. 2. 1. 22. 25.

But the right of lien in every case is founded, by the delivery of the actual possession of the goods to the owner. Ep. 1. 5. 2. 3. 1. 22. 25. 7. Now this is not an arbitrary notion of the law, for a lien arises in the actual possession of the property. It would be absurd for me to say I am the mower of property not any
Bailment.

The right of a bailee in the very nature of the thing, is a right of continuing possession. 1 Broom 293. 2 K. East 4.

Contrariwise, there is a special agreement in which the bailee, relying for his reward, cannot have a lien upon the goods, for it has been held that a special agreement between bailor and bailee to pay a certain sum of money is an abandonment of this right of lien, for when the parties themselves make a special agreement, the law will imply none. 6 Sp. 636, 5 B. & C. 274, 2 M. & W. 92. - 36 Geo. 3.

A factor also has a lien, implied by law, upon the goods of his principal, not only for a special, but for a general balance. 1 El. 44, 2 El. 1154, 1 Cr. 119, 1 Ackl. 254. But he cannot transfer this lien to another, nor create a new one, unless in favor of the goods of his principal. 5 G. & C. 634, 11 El. 362, 31 Geo. 3. I observe that bailors of the 20th & 21st aide undoubtedly have a right to detain the thing borrowed, if hired for the time stipulated, e.g. the bailor himself, e.g. If I borrow or hire a horse for a particular journey, or for a specific time, the bailor or lessor, can hold the horse, till the journey is performed or the time is past. But this by no means can be called a lien, for it is not an incumbrance upon the property for the payment of a debt to, but it is merely a right to hold the property according to the terms of the bailment. 16 El. 172, 18 B. & C. 240. The bailee of the 1st aide has no lien, for bailee, no computation, t he bailee is generally house to deliver at the side on demand. So a mandator has no lien, for he is a mere volunteer. 16 El. 172, 18 B. & C. 240.

So much for bailee's right of lien.

October 10th, 1812.
I am now to consider how the rights of third persons are affected by a contract of bailment.

If one bails the property of another, it is said by some that the bailee must redeliver the property to the bailor according to the terms of the bailment, not to the true owner. (Note 607, 11 Bac. 232, 242.) But, says Mr. E., I think there is nothing more meant by this rule than that the bailee will be justified in delivering the goods back to the bailor, because he is unable to act judicially between the parties to determine whose the property is. Nor says, if the bailee redelivers the bailment to the bailor before or pending the suit of the owner against him, this redelivery will bar the owner's action. (Note 607.)

Observe here, that if the true owner does not exhibit sufficient evidence of ownership, the bailee is not bound to deliver the goods to him. But if he does exhibit such sufficient evidence of ownership, the bailee may be liable to the owner, and if he discharges himself by a redelivery to the bailor.

But it is said that if bailee, in such case, dies, the ecc. comes into possession of the bailment, he the ecc. is bound, by his will, to deliver the goods to the true owner, or to the bailor. The reason assigned is that he comes into possession of the goods by the act of law, and it is not privacy to the personal trust of his testator. But says Mr. E., this reason to me is unsatisfactory, and I believe our Law would hold a redelivery by the ecc., to the bailor, or according to the terms of the bailment, would bar any action on the owner's part. (Note 607, 11 Bac. 232.)

Rights of Bailors Creditors to the rights of those who furnish the property of the bailor, supposing it to be his.

To determine questions under this kind, we must resort to the
the State respecting fraudulent conveyances. The Stat. 13 Eliz. relates to creditors. And it is a general rule that if the purchaser leaves the goods purchased in the vendors possession under a bill of sale, or absolute contract, a creditor of vendors may take an execution against them as vendors property, and purchaser cannot hold them. The reason is that such sales, i.e. when the property is in the vendors possession, display false colours, in sense of misleading senses or other persons. 3 Coa. 263, 603. 242, 463, 586. 21. 12. 387, 12. 27.

But this rule is confined to an absolute sale. For if it was of immediate possession by the vendor is inconsistent with the deed of sale it is not of course a fraudulent sale, if the property is subsequently returned to remain in the vendor's possession. So if there is a condition to be complied with before the vendor has the right of possession till it is performed, &c. Mr. C. says. Supposing the rule is the same even tho' it is condition subsequent. 3 T. R. 597. 432. 727. 3 R. 462. 21. 10. Now a sale of goods within the rule arises from the nature of the property immediate possession cannot be given. 21. 597. 62. 584.

The Stat. 13. Eliz. relates to creditors, it is an assurance of the common law. Lord Coke says, it is an assurance only as to prior creditors, but Lord Mansfield says it is a both prior and subsequent ones. Comp. 4. 34. 3. 603.

Grant of immediate possession by vendor when there is an absolute sale, is by some authorities, to be fraudulent. 21. 597. 796. 197. 5. This rule is however very questionable. I find but one case where it was held, viz. Edwards v. Hare. in 3 R. C. P. It is I think only a badge of fraud. I have seen an opinion of Lord Ellenborough, Lord Eldon in C. B. Wherein he questions the authority of Edwards v. Hare. Our Sup. Ct. have always decided that it was only a badge.
Statement.

In fraud, like a late case when three of the Judges gave it as their opinion, that it was free to a fraud. This case was carried to the C.C. of Errors & their decision was that.

Another Eng. Stat. 21. Inst. provides, that if the bankrupt has the goods of another in his possession, order & disposition with the consent of the owner, they shall be considered as the property of the bankrupt it may be taken to satisfy his debts. We have no such Stat. in Conn. Acts 166, 1692, 1787, 1797, 1811, 1854 & 21, 24 Rile. 1857.

This Stat. relates to no others than Bankrupt Baillees. If the Bailer is insolvent, the Creditor may take his remedy against the baillees estate. I observe, the creditors of bankrupt baillees are to take the goods in his possession, not by reason of any fraud supposed to exist between the bailer & bailer, but by reason of the false credit given to the bailer by having the goods in his possession. This is founded on the common law principle, which is, if one by putting property into the hands of another enables him to defraud an innocent person, the person thus defrauded shall suffer rather than the 3. person. 1 Rob. 364 to 372.

This Stat. does not extend to goods found in the Bankrupt's possession, which he holds in right of another. As if he is possessed of goods as Cee. or 42d. Here if the Executor becomes bankrupt, the Creditors can't take these goods to satisfy their debts, for this would work a manifest injury to the testators represented. The rule is the same, where the husband is in possession of property which the wife holds to her own separate use. At the time this possession may give the husband a false credit, yet they are not allowed to deprive upon the wives property, then this is the case, it would be to remedy the injury by creating a much greater one. The rule
holds good as to a Factor; for if he becomes a bankrupt, his creditors cannot receive the goods of his principal to satisfy their debts. 1 Atk. 163. 3 P. 171. 3 T. 54. 618. 1 Sel. 11. 1427. 202.

But the Statute does extend to cases where goods are sold or mortgaged; if the possession is suffered to remain with the vendor. The vendor, in such case, is the bailee of the vendee, and if the goods are thus found in his possession, they are liable for his bankruptcy. 1 Atk. 155. 160. 163. 3 S. 397. 860. 1 Sel. 47. 1 P. 389. 90.

But if a man sells a Ship, which is then at sea, and afterwards becomes bankrupt, the Ship will not go to satisfy his creditors; for here it is impossible to transfer the possession to the vendee, and also, it cannot give the bankrupt a false credit. But if the Ship, returns the purchaser suffers him to remain in the possession of the vendee; for no particular purpose, the vendor afterwards becomes bankrupt, he would be registered for the benefit of his creditors. 3 D. 462. 559. 1 Atk. 160. 163. 560. 1 R. 352. 612. 6.

And in many other cases, the want of actual delivery does not bring the case within the Statute; for sometimes the non-delivery can be satisfactorily explained. Thus, for example, a merchant sells a Store of Goods at one place to a person; it is reciprocal by convenience that the possession of the goods should that merchant so that way, or that would, take place by the vendor; but a symbolic delivery would be sufficient. As if the vendor delivers to the vendee the key to the Store. This is a virtual delivery of the goods. 3 C. R. 71.

The great discriminating rule is, that the bankrupt at the time of becoming such must bid in the possession have the order or disposal of the goods. The possession must be such as will make him appear to be the owner of them. Hence they are not within the Statute.
Treatise.

As if it should import an agreement of goods to put them into the store of R., & suffer him to deal them out from time to time; any
will be considered as the times owner only. A exercise some
public act of ownership; if those goods will be subject to his debts
whenever he becomes bankrupt. The reason here is, the actual
possession of the goods, gives him a credit. The only difficulty,
which occurs in this part of the subject, is to ascertain when the
goods are in the possession & not disposal of the bankrupt,
the example above will be sufficient to illustrate my meaning.

Comp. 233. 1. 188. 1. 7; 179. 207.

A temporary possession for a particular necessary purp
one does not bring the case within the Stat. e.g. deliver a march
from borne. Should go to A. Rock & then purchase an apartment of
goods, & the ship or waggon destined for their conveyance does
not start for a week from the time of purchase; the merchant
should leave the goods in possession of the person of whom he bought
& before the week elapses, the vendor became bankrupt, this good
would not be liable for his debts.

Again, in other words; the bankrupt must appear to him
to all respects the owner of the goods to bring the case within the Stat.
Hence of from the nature of the bailors business, all presumption
of ownership is excluded, the creditors cannot have the goods. The
situation of a factor will illustrate this. He is in view of the propos
that he has the whole or part disposal of the property, yet by the
very nature of a factors business it is well understood he is not
the owner. 5 & 6 & 7. 185. 176. 185. 176. (Pet. 5).

Thus far as to the creditors of the bailors. For the purpose
of giving construction to a Stat. entry in a deed, & the general rules in
can be applied that should multiply cases. Now for the purchasers to
In common cases of bailment, where the bailee has not the possession or control of the goods, or if he has the possession or control of the goods against any person who purchases or obtains possession of them by fair and honest means, or by sub-purchase or by any creditor of bailor's, except in such case the bona fide sale of such goods was made on market overt. As if A. let a horse to B. (a bankrupt) to perform a particular journey. Then B. is in possession of the horse but this is not sufficient evidence of ownership. Suppose a stranger purchased the horse of B.; the owner may have trover at him; or if the creditor of B. living an execution upon him, the owner may have his action in the office of creditor, if the officer sells him at the post he afterwards has found this half a dozen times the same principle holds. The now in some is, Caveat emptor. 1 Sheel 1183, 8 Edw 2 1187, Scot 33 3 Att 44.

The celebrated case of Barbour v. Bourne explains in great at all the great principles, which regulate this branch of the law. 2 Edw 3 376 4 D. and R. It was, in brief, this: A. owed the 6s. 8d. of money to ensure the payment of which he pawned a box of jewels to A. From the time he received the box he dealt upon the box. The box was broken. The action was brought against the purchaser who sold it to a person who appeared to be the true owner. But the latter gave judgment for A. as the purchaser. The ground of their decision was that the apparent as the owner was in consequence of his breach of trust. et al.

Our Sct is Com. to fraudulent conveyances as the same as the English statute. But we have no Stat. like Stat. 37 Geo. I. the principles adopted here in Relation to Bailment to insolvent persons, are similar to those adopted in the construction of that statute in England. 2 Titr. 42. Sir. Wilmot's opinion.

As our Cts. have determined, that where there is no actual fraud, the creditors of the insolvent bailor can't take the goods, how ever decisive the appearance of ownership may be. It is the same in the case of a purchaser. But if the bailor is insolvent, the Eng. principle, in its full extent, is adopted. 1 Bos. & Pek. 59. Doug. 206. 7 Gr. & 1 R. 14. 107. 237. 111. 1. 126. 268.

Hence when the bailor is insolvent, a creditor or purchaser can't hold, unless there is clear evidence of ownership, or unless there is consent of possession given by bailor. E.g. Suppose owner hire his horse to an insolvent person, to perform a journey. He can never take him; suppose the person should sell him, purchaser would not hold him.

A question has occurred in this, whether the lessor of a cow can recover ag. the creditor of the lessee who had taken the cow in Execution. The Cts. have decided that the lease is not sufficient evidence of ownership, t. that the lessee may recover. It is an leading case, but I desire to long ago that it is not affected.

It was this. A man purchased a drove of cattle in the north part of this county, & employed another person to drive them to Stock market the nearest way. Instead of doing so, the servant left the nearest road, & drove his cattle to Litchfield & sold them there. The owner of the cattle, lost his action ag. the purchasers, t. the Ct. determines, that a man driving cattle was not sufficient evidence of ownership, t. the bailor must recover.
Bailment.

If goods are bailed for hire to be used by the bailee, the creditor of the bailee cannot take the use of them in execution. This is a doctrine of Lord King's, in which he seems to infer a different doctrine in the case of London & Bowpen, 7 P. 11, 12. The question is, suppose I hire a horse to B. for six months, can his creditor attach the use of the horse if I have it set off in the execution? Mr. C. thinks he cannot, for every bailment is a personal trust. I may be very willing that my friend B. should use my horse for six months, but have the most urgent objections against the creditor of B. taking the use of him, for before the times expires he may become a bankrupt or beggar and I lose the horse. This danger arises in its natural estate, then the rule is different.

So what actions or remedies the bailee and bailee are respectively entitled to? Strangers v. vy each other...

It is a general rule that bailee, he having the general property, may maintain an action against a stranger for taking away or injuring the goods, while in the possession of the bailee. General property means all the interest, except the bailee's special interest in the bailment. Note 2. Bul. 1263; Latch 214; 8 Bap. 169.

And this rule holds, as the case may be, even tho' the bailee never had the actual possession of the goods. As if the goods of the bailor to B. t. A. make a bill of sale of the bailment a bill of sale of S. P. Should injure or take away the goods before B. had gotten possession of them, still he may have an action at T. P. In things personal, property comes after it a constructive possession a right of possession is the constructive possession. Latch 214; 14; 18; 21, 33.

For the purpose of maintaining this right in troops, the latter must have either an actual or constructive possession of the goods. Thus if B. back goods to B. for hire for sixty months, and
During this time it is wrongfully obtains possession of the goods, here he cannot maintain an action against a by B the bailee for the injury of taking from him. The reason in this case is why the bailee cannot maintain an action because at the time the injury was committed he had not a right of possession. The bailee has both the right of possession for the time it was committed. A constructive possession is a right of present possession 4 T. 489. 122 A. 387. 2579.

It would appear that after the time of the bailment has expired in this case the bailee after making a demand of the goods of B a refusal of redelivery by him the may then maintain an action for the right of possession now exerts his refusal to redeliver is a conversion after his right of possession commences.

If the goods of one while they are in the possession of another, given by the owner to another person, is afterwards injurious to him or taken away before the owner obtains the possession of the goods, the one cannot maintain an action against A for he has no actual or constructive possession for a transfer of goods without delivery does not vest the title. 1 Br. 956. 12 A. 377. 5 B. 2 W. 184.

But on the gift of goods slight acts will amount to delivery. As giving the key to the store, which contains the goods while was delivered. So if the gift is delivered to the donee without delivery. But without either an actual or constructive delivery the donee cannot maintain an action. Comp. 294. 4296. 3 Dan. 954.

If the bailee delivers the goods over to a stranger, the bailment maintain the action as the first instance it is the stranger so he cannot lose the possession lawfully as the goods were delivered to him by one who had the right of possession. But if a demand is made by the
bailor, he must produce sufficient evidence of ownership, but a refusal of the bailor will subject the stranger, because it is a conversion. Will. 607. 13 R. 242. 15 T. R. 406. 1 R. 153.

Is there any general rule to determine when the bailor has the right of possession? If he has not? Yes, the rule is this—When the owner the bailor has a right to countermand the bailment, then he has a right of possession, and may maintain an action. In the case of a bonner, the bailor has no right to countermand, till the purpose of their delivery is accomplished. In case of a depositary he may countermand at any time. In case of goods bailed for hire he has not the right of countermanding, until the agreement of the parties has been fulfilled. In case of a pawn he has no right to countermand, till the debt is paid.

The right of countermanding always exists as to bailors of the 1st and 9th kinds, for these bailors are acting as servants. I have a right to control my property at any time, in their possession. Suppose I deliver my cloth to a tailor to be made into a garment. I may take my cloth at any time, if the garment is half made. But the tailor in such case has a right to his full wages. After countermand the right of possession is on the bailor. Thus far if the bailors right to maintain actions against bailors strangers—

It is clear that most bailors may maintain an action against one who injures or takes a bailment out of his possession wrongfully. And thus Mr. E. Sacred all bailors have this right. As common hire, special carriers, as agisting farmers, horn contractors, factors agents to maintain actions. 1 May 21. 5 But 3 D 33. 1 Stra. 305. 10 Bal. 143. 5 R. 165.

I have said that any bailor might maintain an action of
the case supposed. But it is said that the grounds of this right is in the bailor's liability over to the balee, hence it has been contended whether a depositor can have this action, because he is not liable over to the balee. (Bam. 158; 4, 5, 6, 2, 43, 262; 23, 3, 82, 116, 56, 83, 116, 89, 87, 113, 89, 47.)

Now, says McF. Supposing the reason assigned in the above case is incorrect, if not, the inference drawn from it is illegitimate. But it is not true that the bailor's liability to balee is the ground of the right to maintain an action aq. a wrong done. But I apprehend the ground of this right is the qualified property every balee has in the bailment. Now if this liability is not the sole ground, then the inference is incorrect; it was allowing it to be the sole ground that a possible liability may exist in every case, of course the right be co-extensive. — A personal property is a legal right, but a legal right in one is utterly inconsistent with the same right in another. It is absurd to say there is a legal right without a reason; then by the supposition, there is a right, i.e. of possession in the balee. Now in the case of a feoffor, justice Sir, upholds himself thus: a feoffor may well maintain the action, because he has such a property as will enable him to keep the thing against all but the true owner, hence he may maintain trover. So question but a depositor has the same degree of property in the feoffor. (Saw. 159, 87.)

It is well settled that if a servant is robbed, he may maintain an action aq. the landlord for the goods. Now how can the servant have an interest, the he has a right of possession aq. all but the owner. He is not liable over to the owner; hence his right of possession is the ground of his right of action. (Com. 253, 4, 26, 62, 158.)

It is also laid down that the servant may have an effect of robbery against the robbor; the reason governing him, and in account of his liability, even to his master, for he is not liable over. (13, 62, 9.)
Bailment.

Again, Butler lays down the rule, without any qualification, that a special property is sufficient to maintain his \textit{John P. 33} v. \textit{John P. 39}.

It is also determined, that if a house is blown down the 
keeper may maintain an action ag. any one, who takes away the tim- 
ber or materials of the house, because of his special property or his 
righ of possession, let the expiration of this word. \textit{John P. 39}.

It is also decided, that an unsecured bankrupt may main- 
tain an action, after the act of bankruptcy committed, against any 
wrong done to property he acquires after becoming a bankrupt. For 
he has none but a special property, it may be taken from him. 
by his creditors, at any moment. The certainty has no more proper 
by than a depository \textit{P. 18891 391 18891 44}.---

I have gone this far to show that the reason why a bailee, in 
y any case, may maintain an action is not on account of his liabilities 
over to the bailor. \textit{But read on}.

But if the possible liability of this right, the bailee is the 
founder of this right, still, this is a matter of uncertainty. How 
is to be divided, between the bailee & wrong-doer? And if the 
wrong doer is excused, because the law says that the bailee is not lia- le to the owner, why then if the bailor does the bailee he may be 
found liable to the bailor, because the record in the former can 
can not be given in evidence in the present.

A depository may be liable over to bailee for the wrongful 
act of another, or he may not, so of a common carrier. So that 
the liability of common carriers over to bailor, is not the ground 
why he may have an action ag. a wrong-doer. For when the bailor 
uses a wrong doer, you can not go into the inquiry of his liability to 
to the bailor. It is a consideration, which can not be used by them, 
wrong doer to his own advantage. Further
Further, policy requires that bailor should have a right of action. Suppose I should deposit goods with a person in Eng. or New York. Now I am at a distance, a speedy remedy is required, if the depository can't maintain an action a wrong done I may lose my goods. Sam. therefore fully convinced, says, etc. that a lawful possession will give a right of action when case, if that the person, in whom the special property is, is the owner of it and against all persons, but him who has the general property. It is also settled if bailor deliver the goods to a stranger, the latter may maintain an action for wrong due to the goods. This is a distinct rule, but it directly compares with the doctrine I have been endeavoring to establish. Pull 607 (Bac. 267, 6, 175, 260).

An auctioneer may maintain an action for goods sold by him on a contract, as auctioneer; even the the purchaser does not know that the goods sold belong to another. 1Bac. 315, 539, 644, 656. So also of a Factor.

Now it is clear that a common servant can't maintain an action on a contract he makes for his master. The case of agents, factors, stands on a distinct ground. Here the principal is generally unknown, if they sell in their own name.

In most cases, bailor or bailee may maintain these actions. Bailor is sometimes preferred. As I have before stated, for want of possession either actual or constructive, as when I has hired or bailed a thing, for a certain time limited. It is a rule, when either of them has the right to sue, a recovery by one bars the others action, for there can be but one recovery for the same wrong. 25 Co. 69, 1 B. R. 165, 260, 2 B. R. 369.

And as to the question, the shall have priority, who lost sue. Well, says he who first recovers shall own the other. But, says
Mr. G. I doubt the correctness of this rule in Rolt. But I conceive the who first commences the action, shall have a paramount right of recovery. By first commencing, he attaches to himself a right, of which he cannot be divested by another. I conceive then for he who first commences the suit, contests the other of his right of action. 3 Rolt 367. 2 Taur 373. 3 Co 44. 52. Tr. 61. Tal. 123. 3 Brec. 539. note.

If the bailor has recovered of the wrong done, he clearly can't recover of the bailee, for he can have but one satisfaction. Co. 624. 35. Tulk 14. 3 Lev. 124. 2 May 124. 4 Ves. 68. 5 Brec. 285. Co. 626. 1 Brec. 637. 1 Brec. 45.

And I conceive, says Mr. G. that if the bailor commences his action ag. the wrong done, he waives his right of action ag. the bailor, the I find no authority to this point, yet I think it follows that if the bailor is ousted of his right, the wrong done, by the bailor's first commencing against him, he shall not afterwards be subjected. If the former rule is true, this is so in justice. There is an analogy between this & the case of rescuers. Thus suppose a person is committed to prison & is rescued. Now the P. or Sheriff may sue the rescuers, & the P. may sue the Sheriff or the rescuer, if he commences an action ag. the rescuers it bars an action ag. the Sheriff. Ex. 616. 12. 616. 12. 616. 12. 616. 12. 616. 12. 616. 12. 616. 12.

But on the other hand of the bailor first commencing his action ag. the wrong done, he makes himself liable even to the bailor, at all events. For I go upon the ground that the commencement of an action by one outs the other of his right, if that rule is reason a strict law, this certainly is: if I was incorrect then I am now.

I said that there could be but one recovery for the same thing or wrong, still the bailor may have a special action, & that case for the injury done to him, the the bailor has recovered full.
value. Thus A lends a horse to B, wrongfully takes him, and B recovers the full value, still B may have his action ag. A for the special damage done him. Wherever there is a damnum emergens, an action will lie, it is so in this case.

If the bailor himself takes the property from the bailee, before he has a right to it, the bailee may have a special action on the case ag. him. It is my opinion, says Wood, that he cannot have trespass or trover ag. the bailor. 18 Be 69. In this authority it is said that he may have trespass or trover. I think it is not correct.

If the bailee delivers the goods over to another, contrary to the orders of the bailor, he is ipso facto guilty of a conversion, and trespass will lie ag. him, tho' the time for which they were bailed.

has not expired. 4 T.R. 280. 6th. 2686.

Bailor can generally maintain no other action ag. the bailor, but trespass on the case; but this may be in three forms, 1st, for negligence, 2nd for detaining, 3rd for assumpsit, trespass, or implied trespass will not in general lie, because the original possessor was lawful. 12 W. & M. 282. 13 T.R. 13ac. 237. 244. 244. 257. 257. 269. 319. 3 East 62. 5 6146.

If however the bailee wantonly destroys the goods, the bailor may have trespass. As if the bailee purposely kills the horse bailed to him. Here the bailor by his misconduct has divested himself of the character & rights of a bailee, the contract of bailment is destroyed. 1 Inst 576. 36 Ed 13. 6. 22 T.R. 463. 3. 10th. 100. 6. 2 Thor. 535.


Oct 7, 1812.
Innkeepers. October 10, 1812.

Arms are public houses of entertainment for travellers; the keeper of the house is called the host, i.e., the person entertains the guests.

At common law, any person may lawfully exercise the employment of an innkeeper, unless it gives inconvenience to the public. At common law they may be established, without license from any public authority, by the mere voluntary act of the party. But he who assumes the character of an innkeeper, by hanging out a sign, as was once made himself liable to all the duties of an innkeeper. 1 Bl. 34, 2 H. 739.

But from the inconvenient increase of the number of inns, they may become nuisances to the public; then who set up inns, so as to render the increase inconvenient, may be indicted for a common nuisance. 3 Bl. 165, 2 H. 739, P. 134.

A disorderly inn is also a nuisance at common law, and may therefore be a ground of indictment against the host. 2 Bl. 165, 2 H. 739, P. 134. 225.

What in England, are called ale houses cannot be established except by license, according to the Stat. 5 & 6 Will. 499, Stat. 4 & 5.

In some, all inns or taverns are established by law, and no one there can set up an inn, unless he has a license to do so. This license is obtained for one year only. It is granted by the Court of Common Pleas, at the recommendation of the civil authority, constables, select men, grand jurors of the town where the applicant resides. And it is penal for one in this state to establish an inn without license first obtained. Stat. Cap. 64 & 65.

If an innkeeper is guilty of disobeying the laws relating to inn, his license may be suspended by the civil authority.
Innskeepers.

select one of the town into the next depred of the lot. of common
pleas, they can then deprive the host of his liquor on continue
it to him, at their discretion. Stat. Law 64. notwithstanding a
power like this in the civic authority to the common lawmen,
city still remains.

The chief duties of innskeepers extend only to the entertainment
of travellers of the keeping their effects. 9 B. & C. 3 B. C. 180. 1.

If an innskeeper refuses to entertain a traveller without
sufficient cause, upon a reasonable price tendered, he is liable
not only to an action on the case in favor of the traveller, but he
may also be indicted. An innskeeper makes an implied contract
with the public that he will entertain all; his refusal is then
wont made a public offense. But upon sufficient cause he may
refuse, for the law will not compel him to do that, which it
is impossible for him to do. As if house is already full, his fam-
ily sick? The law is very willing to act will excuses, but they
must be reasonable ones, not grounded in the caprice or hu-
mor of the host. 4 B. C. 168. 18th 1180.

The innskeepers care of oversight does not extend to the per-
son of the guest, but only to his effects. Thus if the guest is beat-
on the host incurs no responsibility. 8 B. 32.

But the the host care does not extend to the person of the
guest, still if he furnishes him with corrupt wine or unhealth-
ful food, he is liable both to an action in favor of the guest it
also to an indictment. 1 B. C. 95.

The duty of a host, with respect to the effects of his guest, is as
a bailee; a bailee of the 5th kind. Especky in his digest, consid-
ers an innskeeper as a bailee of the 2nd. class. 1 B. C. 625. b.
But such classification is manifestly incorrect. Better classes ha-
Innkeeper.

render the fruits of man's culture. This Mr. T. thinks is also incorrect for a man to receive the goods bailed to him gratuitously. Such bailment is always to a private person, not to one in a public employment. Again, in some cases, as in the case of horses or cattle, the innkeeper does not bestow his care to trouble grates. Neither, I think, can his care own his guests inanimate effects, to consider as gratuitously bestowed, for he obtains his pay out of another part of the contract.

This bailment being reciprocally advantageous, according to the general rule, he would be liable only for ordinary neglect, but by the policy of the law, the innkeeper's liability is farther extended. The same reasons apply here, in regard to the extension of his liability, as were given in the case of common carriers.

The host is clearly liable for any loss occasioned by the act of his servant in any way. For he is bound at his peril to procure honest and careful servants. Bo. 32, 313, 31; P. 113, 36, 431.

So also, if the goods are stolen by a stranger, the innkeeper is liable, if it is not material how much care he uses, for his liability at all events, for theft. Co. 118, 224, 86, 332, Jones 129.

There is an Exception to this rule, as if the goods are stolen by the guest's own servant or traveling companion; for in such case, he brings his own blame along with him; or if they stolen by one, who he desires to lodge with him. Where the theft is committed by his own fault, Co. 285, Ky. 62, 86, 332.

It seems that innkeepers are also liable for all committals of robbery, as the law will make no allowance for the fact that the force was irresistible. If this rule is reasonable in common carriers, it is doubly so, applicable to innkeepers, for they may bring in the collective force. The rule in both cases is founded on policy. Co. 32, 216, 9, Jones 135.
Innkeepers.

On examination of this subject, I expect to find the rule distinctly laid down that innkeepers' liability was co-extensive with that of a common carrier, i.e., making over excess harm, except the loss was occasioned by the act of God or the king's enemies. This is, of course, now questioned by Sir W. P. Coke says, that the innkeeper is not liable, unless there is a default on his or his servants' part. This doctrine is first distinctly enunciated by Bullen. It is not necessary there that you prove any actual default of his or his servants. Coke rule is clearly not lawn 16032. destruit in 51. P. 270 10 p. 621.

The innkeeper is liable for those goods, which are in a hospitium, within the house. But this in-hospitium is construed to extend to his stables and out houses, where the goods of his guest are kept. 3 Co. 32 b.

It follows, then, that if the property of the guest is moved by his own direction from the hospitium, the innkeeper is not liable for loss. But if the guest removes the goods of his own motion he is liable. If the guest's horse is stolen from the stable, the innkeeper is liable, or if he puts him to pasture without the direction of the guest he is liable if he is stolen. But if he is put to pasture by the direction of the guest, the innkeeper is discharged from his liability, in the same state. 3 Co. 32 b. H. 608 4. 129 5. 133.

When the horse is put to the pasture by the direction of the guest, the loss is not liable as innkeeper. But if the loss happen by his own or his servants' actual neglect, he is liable. As if either case he should have opened the gate or fence to which we call the loss happened, he would be liable on the grounds of neglect, not as that of Innkeeper. 11 Wall. 4. 152 1. 133.
innkeepers.

And the law is so cautious of admitting exceptions to his liability, that the innkeeper is not discharged from this liability by his absence from home, his sickness, or even his insanity. If he is sick or insane, this reason would be sufficient to authorize him to refuse the guest, but if under these circumstances the guest is received, he becomes liable to all losses in the degree as if he was at home and in good health. It has by some been thought unjust that an insane host, should be made liable as innkeeper. But say, Mr. T., insanity is a game that is easily played. The law has thus for thought it dangerous to admit it as an excuse. Furthermore, it is the duty of the family to provide for one, who, in sound mind, to take care of the inn, else have the employment.

26o Eliz. 622.

A child cannot be made liable as innkeeper; neither can he be charged in any contract of bailment. His privileges are to be preferred to custom. [Will. 2, 5 Eliz. 169]

And if the key of the apartments occupied by the guest, in which are his effects, is delivered to him, the leaves the door open; the goods are stolen, still the innkeeper is liable. But if the host requests the guest to keep the door locked, then, if it is a question in the books, whether the innkeeper is liable or not. But Mr. T. thinks he would not be liable, for the request is as much as informing him that there is danger. Of the trouble of locking the door when the guest comes out of his room is not trifling, that he is bound to do it. So says Mr. Gould.

2 Co. 33 Eliz. 3 Bac. 153. 2 De 266. Mov. 38, 158.

The innkeeper is liable for help, tho' he be ignorant of the kind or value of the goods entrusted to his care. This premise I believe to be correct, as you remember I questioned it.
Innkeepers.

when treating of a depositary. But the situation of these two
vuluses are entirely different. A depositary is a selected person
in whom the balse can put implicit confidence, and obliged
to receive goods. Not so with the innkeeper. He is a
stranger to the guest, to whom no one would travel were he obliged
to inform every innkeeper of the precise contents of his portmanteau

Now as to the question, whether the innkeeper would be lia-
bile in case the guest voluntarily delivered him of the
contents of his trunk. I think the same reasons would apply
to discharge him as in the case of common carriers. If the guest
voluntarily lies, let him suffer for it. For the host might doubtably
come to have taken care of the property had he known its value,
or had he been really ignorant of it.

The innkeeper's liability exists only in favor of travelers,
is board at his own at the usual price charged to tra-
vellers. It does not extend to neighbors, or to boarders at the
common price of boarding in private families. Neither
is bound to receive his neighbors, or to furnish them with victual
drink or lodging. § 60 32 6 (Note 3. Stu. 275.

Neither is the innkeeper regularly chargeable, on the
owner's absence, for the loss of goods for the keeping of which he
receiv no profit, for in his absence he is not a guest; yet he absence
must be of such a nature as to take from him the character
of a guest. As if a man should leave with an innkeeper, his trunk
to be forwarded to him to New York, or to help his interest;
the loss is occasioned by theft, not withstanding, the innkeeper
is not liable, as he is, but he is liable as a depositary.

(Notes 3 338. 404 388. 5 7 18 273. 8 P. 179.)
But if the innkeeper does receive a profit for keeping the goods he is liable, at the same time that the innkeeper is entitled to the profit, unless he is in the same manner as not to be considered as a guest. As if a traveller should leave his horse to be kept for a certain time or for a certain purpose, the innkeeper would be liable for loss. Lord 138. 3 shall. 388. 3. 18 Bac. 184.

The innkeeper has a two-fold remedy to recover for his entertainment. He may in the first place detain the person of his guest for the whole bill, or he may detain that property, the keeping of which has afforded him a profit. But he can detain the property for no more than to satisfy for the keeping of that very property. As if a man seizes the guest's horse, he can detain him for the expense he has incurred in keeping the horse. But he cannot for the expense the guest himself has made him, as for victuals. 2 Rot. 85. 1 Bac. 388. 3 shall. 388. And as the guest departs without paying his bill, he may pursue & take him, & keep him as a pauper, till he does pay. The innkeeper is entitled of the 5th kind, who has a lien. 3. 18 Bac. 388, 2 Rot. 288.

But where the innkeeper detains the horse of his guest, he must not use him. In this respect he is not like a pauper, who is allowed to use the pauper to satisfy the expense of keeping. For the pauper has the pauper by the voluntary delivery of the pauper, but here the detainer is by the operation of law, i.e., the will of the owner. So, in the nature of a distress, if the law will never permit the distressor to use the distress if he does he is a trespasser, & liable, so in this case. Lord 137. 3 shall. 386. 1. But if the innkeeper voluntarily permits the detachment of his guest, or the guest's property, he has lost his right of lien & can never afterwards reclaim either his person or property.

Fins. — Pittsfield Oct 10, 1812.
The Action of [October 12, 1812

Lecture 4.1]

Covenant

By Mr. Gould.

5. Of the general nature of courts & how they may be created.

This is an action founded upon a covenant, claiming a recovery for some breach of it; for this reason it is, that we give it the name of covenant.

Covenant contracts & agreements are sometimes made by

words or promises; but they are not strictly so, for that every covenant is a contract or an agreement, yet every contract or agreement is not a covenant. A covenant is a contract or an agreement written or sealed. A covenant may be by indenture or deed poll.


But tho' the covenant is made by indenture, an action may

be maintained upon it, if it was sealed by the covenantor in the presence bound, but not by the covenantor. See Ex 3:12.

The usual remedy for a breach of covenant, is an action at

law, for the recovery of damages. Still the action of debt will

lie upon a covenant, where it is not a specific sum, or where it

may be reduced to certainty by an agreement. Thus if A covenant

with B to pay him 100£. Debt will lie upon such covenant. Or if A covenant with B to pay him 28 for every bushel of wheat he

will deliver him, here by an agreement as to the quantity deli-

vered by B, the amount due may be reduced to a certainty. The


But tho' the most usual remedy for the breach of a cove-

nant, is an action at law, to recover damages, yet where the cove-

nant is to do some collateral specific act, as to convey land, to

carry a deed, or the most common of preferring remedy for a breach.
of such covenant, is by a bill in Chancery for a specific performance. 1 Bl. 626; 1 Ton. 39, 159, 156. I do not mean by this that an action at law will not lie in such cases; for it is a rule that you cannot obtain relief in Chy, unless you can recover damages at law.

But when a covenant entitles the covenantor to damages by a bill in Equity founded upon such covenant cannot ordinarily be maintained, for a court of law could do this; of further damages are not to be ascertained by a Chancellor, it is the province of a King to do this. 2 Bac. 34; 1 Pleyd. 574; 1 Bl. 525; 1 Ton. 213. Thus suppose one covenants to pay a sum of money, or to deliver a certain quantity of personal chattels as wood, grain, &c. a bill in Chy. cannot regularly be maintained upon such covenants, for the covenantor has an adequate remedy in a court of law. Equity intepret for no other purpose than to give the party an adequate remedy, than a court of law can afford.

Even in these cases however where the remedy lies in damages only, if the relief prayed is consequential or collateral to a ground of relief properly cognizable in a court of Chy, the bill will be sustained. Thus suppose A owes B at law for a breach of covenant, B files a bill in Chy. for an injunction against this suit, or the ground of fraud. A may file his cross bill in Equity for a breach of the covenant, if no fraud is discovered they will give damages to the covenantor for the breach. 7 Eq. Pek. 1 Bl. 69, 326; 2 Pek. 216. The above rule is sometimes couched in the following terms, "When a remedy lies at law, a bill of Equity will lie if a matter of fraud is mixed with the damages." I have chosen the words in which I have conveyed this rule, because I think they convey the meaning with more distinctness. I have further observed that when the perfect at law is this bill unto a bill of Chy to answer to a fraud, the motabilit.
the English Chancellors adopt to decide the damage of a违约 does at law to ascertain the Damage. To come to practice is to refer the inquiry to a committee or commissioners, and the like.

All covenants are divisible, into two kinds:

1st. Covenants of deed. 2nd. Covenants in law.

Mr. T. thinks the following would be the better phraseology:

Covenants express and covenants implied by law.

By a covenant of deed is meant an express covenant, that is a covenant expressed in words. Mr. T. states a house to be for rent for a year of 18 covenants to pay 25, and his tenancy expires Nov. 26th.

A covenant in law is a covenant raised or implied by law when an implied covenant. Thus, if A, demises land to B for a certain time, the law raises a covenant that the lessee shall quietly enjoy the land during the term, it also that the lessee have the right to make this lease, so that if the lease be evicted by an other title it is a breach of the covenant. Inst. 389, 4th ed. 266.

This division of covenants arises from the nature of form of the agreement. There is however another arising in a different way. All covenants, whether in deed or in law may be divided into real and personal. This is not a real, but a co-division.

A real covenant is one where the covenantor binds himself to pass a certain thing real, as lands, tenements etc. As in the above case of covenant to lease; this is a real covenant. Inst. 139, 1st ed. 343.

A personal covenant is one, which is annexed to the person, in which concerns the personally only. Thus a covenant to serve as an agent, a covenant to pay money, to deliver personal chattels to this are personal covenants. S. Cott. 17, 4th ed. 145.

Now as the former division arose from the nature of
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From the covenant, this latter division arises from the subject of it.

With regard to the creation of covenants, it is a rule that no precise form of words are necessary. Any words introduced to an instrument under seal, which show the concurrence of the minds of the parties in an agreement, are sufficient. Therefore the word covenant or agreement need not be used. Thus if A leased to B, then words annexed "B to pay so much rent," or "reserving so much rent," or if the words are "he (B) paying so much rent," these are all considered as conveying covenants. Therefore it is a safe rule, that any words in a sealed instrument, importing an agreement, will amount to a Covenant. 1353, 211 P.R.I. 518. 1828, 10 B. & C. 274. 200 B. & C. 274. In case of the above words being used it is considered as an express covenant on the part of B, of the acceptance of the lease thus written, if he does not pay the rent as stated, an action will lie ag. him for a breach of the covenant. And it makes no difference whether the rent is paid by intention.

A covenant may be created as to a thing, present, past, or future. It is most generally in future, but not always. As of the grantor covenants that he has seisin, this is present. Then covenants that he perform a certain act, as if the covenant with B, to convey to him lands, which he also covenants he has purchased of A. This clause will bind him whether the title is in him or not, how the covenant is, as to a thing past, but as said, almost all covenants are future, as when the covenant is covenants that he will warrant, in short all conveyancing covenants understood it are future. Plow. 308.

Covenants in law differ from covenants in deed in these covenants in deed are founded on the words used.
the covenant, the only one not the most apt to reflect, as the words, "meaning so much," etc. the covenant in law are not necessarily derived from the phraseology, but from the nature of the covenant, as before said. Thus the words, that have granted a "demise" in fact so fact in law, that the grantor had good title. The law is this much on such cases, if the lease is void the lease may sustain an action upon these words. 4 Co. 30, 3 Blou. 2d. 28, 3 Blou. 30, 30, 3. Peth. 388.

Sconcire says it that an action will lie upon the words before the lease or grantee, has been evicted, if the title to the lease or grantee, prove not good. For the implied covenant is, that the lease or grantee has a good title, then the covenant is fulfilled. But this is the very moment it is entered into; I conceive, the covenant will lie here constant, as well as in these cases where the covenants expressly that he has good title. 38, 2d. 38, 38, 2d. 38, 2d. 38, 2d.

But covenants in law are always unrestrained by an expressly covenant on the deed. This rule follows from the maxim, "expressio unius factum nolo secare tacitum." Thus suppose the lease is made by the words, "授予," still if there follows an expressly covenant that another he by any one under will exist the lease, the lease is not liable nor the words. The evident meaning is, that the lease is not to be liable for an eviction by a third person, having an elder title. It amounts to no more than the provisions releases or quiet claimants. 4 Co. 38, 38, 38, 38, 38.

There is another rule so generally expressed, that it is very apt to mislead one. It is this, in a case of a lease under the words, "granted to have it," that an action will not lie for an eviction by a Stranger. But the rule must certainly mean the tenant's eviction by a Stranger, that his only under an elder title. If this were not the meaning of the rule, it is wholly inconceivable, with
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I say authority upon the subject. bro E. 214. Ep. 268. 4. b. b. 86. the words did it comprise amount to a covenant of quit a

payment.

A special on a covenant of a former agreement, creates an express covenant, on which an action will lie. Thus of a covenant between A & B, it is said, that whereas it has been agreed, or whereas it has been herefore agreed between A & B, that B shall pay a sum of money &c. Now this confirms the partial agreement by relation & makes an express covenant.


But the technical words are not necessary to constitute a covenant, yet there must be some void or words, which do not an agreement to constitute a covenant. It may, when in a lease, the lessee covenanted to repair during the term, provided the lessee will furnish timber. This is a condition precedent to his obligation to repair; it is no covenant on the part of the lessee. If however it had been this “provided it is agreed” to, that lessee shall furnish timber. This is a covenant on the part of the lessee: in the former case the proviso was a qualification of the lessee's covenant to repair; here it is a covenant importing an agent, & an action may be maintained upon it if he neglects or refuses to furnish the timber. 1 Rol. 518. Ep. 12. 267.

But by this it is not meant that a covenant cannot be created in form of a proviso, for it may be created in any form of an intention is manifestly to be found clearly. Thus if lease is made to one for life with a proviso that if the lessee dies within 20 years his Executors shall hold the term till the 20 years have expired. This proviso will be considered a covenant. It cannot be considered a lease for the lease expires in 20 years. 1 Rol. 518. Mon. 478. This Reg. 27.
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It is a usual practice in Eng. for covenanters to execute a bond, conditioned for the performance of covenants in due. These bonds often as well to covenants implied in law as to covenants express. Thus, A leases to B, under the words "...compliment, which partly a twofold covenant, and then recites a bond for the performance of these covenants, this bond extends to both these covenants, and action for breach may be maintained upon the bond itself.

But whenever a stipulation is in the nature of a re- 

For instance, if a lease contains a clause "providing on condition that..." such an act", this clause does not create a covenant on the part of the lessee, but it is merely a disaffirmance, condition to defeat the estate.

It is a general rule, that where the stipulation is a deed is in the nature of a disaffirmance, an action on a covenant of law will not lie upon the condition of the bond, but act of Equity will sometimes compel the obligor to a specific performance. 1 Pint 518; 2 Sic 42. October 13, 1812. 1 Parke 567. Lecture 240.

11. of the construction of covenants.

It is a general rule that covenants are to be construed literally, i.e., the meaning of the parties is to be sought, without strict adherence to positive rules as are necessary to be observed if followed in the construction of deeds, grants, executed by inserting the word "heirs" in the deed. But no rules of this rigorous nature are required in the construction of covenants. The intention of the parties is sought. 212. 699; 6 Blinle 140, 156. 4 14. 6 5 8. 1502 539.
In many instances even a literal performance of the covenant, will not be considered as a legal performance of the covenantor. Thus where the condition of a bond was that the defendant should before a certain day, deliver to the plaintiff a bond, wherein the plijf was bound to the defendant. Before that day the defendant saved the plijf or that bond recovered, it at the day he deliverance it up. This, the bond was delivered up at the day, yet it was not performance of the covenant, for it could not have been the intention of the parties, that it should be just in suit. The covenant was virtually broken, the literally performance. 664. 16. 98. 16. 19. 30.

So, on the other hand, a substantial performance is keeping of the covenant it discharges the covenantor, even that is not a literal performance. Thus when a man bound himself that his son (who was then an infant) should before such a day buy a horse, or (in other words, a lita) should marry a covenantor's daughter before such a day, or before such time the son loses the horse, or marries the daughter, or the time is reversed for error of the son when the comes of age, and to the marriage, yet is the covenant well sufficiently performed. 51. 2. 16. 98. 16. 19. 30.

Covenants being intended for the benefit of covenantor, by no act shall the covenantor be allowed to defeat the effect of his own covenant. As in the covenant to be made the timber which is growing on the lands then to be left at the end of the term, and it down, but leave it there, it is breach of the covenant. 664. 16. 16. 16. 33. Against a covenant in the plant, in beacon with 16. before such a day to deliver to him a piece of cloth, it after the day his injuries injure it, this was
a breach of the covenant. Again, when the Defendant covenant'd that the P's should have all the grains made in the Defendant's bin house, for seven years, if the breach of faith was that Def. had put hogs into the grains, by which they were spoiled, and the corn would not eat them. The action was held well to lie, for the evident intention of the parties was that P's should have the benefit of the grains, which by this means was nullifie.

Thos. Kay. 469. Atkin. 39, 40. 1629, 429, 449. Esp. 1861. 273. And it has been gravely determined that a covenant "to pay £30," meant so much money! (Sec 157.)

When the words of a covenant are uncertain, it usual, that it is to be taken in that sense, which is most strong against the covenantor, it advantageous to covenantee. Therefore where the Def. covenanted with the P's, that she would money his daughter, he would pay him 200 £ provision, without staying for how long, it was held that it should be the life of him (the grantor) not for one year only. For such construction is most beneficial to grantee against grantor. 12 Eq. 295, 102. Esp. 18, 27. 319. 1629, 539.

If one covenant to do an act, as e.g. "to convey a piece of land before a certain day," if before the day he conveys it absolutely to another, the covenant is of no force, but his act will be immediately, i.e. before the day specified for the performance, 1 T. 216, 2 105, &c. Book 313, 323. At the says Mr. Gould, this principle seems to be well supported, still I cannot help doubting its justice, or correctness. Suppose e.g. covenant with H, that or before the 10th day of October, 1813, I will convey Blackacre to him, and tomorrow I convey the farm to X. It is on. Now an action will lie against me in favor of H. On my part, immediately
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but what judge can say, but that before the expiration of the time specified in the covenant, I may not again think of the land I be able to sell for the covenant.

There are some cases in which an exception in a lease a great way amounts to a covenant, so has to which it will not, the rule of discrimination is this: where the lease is of a gross subject, except a certain part of it, this exception does not amount to a covenant on the part of the lessor that he will not, upon the same part to occupy it, e.g. lease to B. blackacre except such a particular enclosure. Now this is not a covenant on the part of the lessee that he will not enter upon such excepted enclosure, but if he does, the lessor will have a remedy against him the same as if a stranger had entered. This is not a thing derivable out the lessor's interest. But contra, where the exception is of a thing or a profit to be derives out of that which is leased, the exception is a covenant that by the lessee will not enter for it. Thus if lease a farm with an exception of a right to fell the trees, or a right of way over it, here the exception is a covenant that by the lessee will not disturb this my right, if he does in any way, as by fencing it up. The covenant will lie against him. Case 697, 699. 1 Bell 431. 9th 392. 10th 191. 10th 191. title waste letter C. Page 2. I am not certain says Mo. Gould that this last case amounts to a covenant unless the lease is by indenture, yet I think, he says, it will hold in the case of duckett. 9th 392. 10th 238. 9th 263.

There is an established difference in point of construction between express and implied covenants. The rule is that express covenants are construed more strictly than implied ones, a man may without consideration enter into an express covenant...
Covenant.

by hand and seal, to the performance of which he is at all events bound. Now in this case, where a master of a ship, by charter party, covenants to be at the port of New York in South Carolina by a certain time, it appeared that it was impossible that he should be there at the time from storms and other inevitable accidents; yet he was held to be liable to the covenant. Starbuck v. Salmon, 3 Burr. 163. 3 Burr. 232. 311. Rep. 259. 2term. 38. 238. So a loss of lexic.

makes an absolute covenant to pay $100 to the heirs of the house burned, he is bound to pay this rent, even though the house burned down at the commencement of the term. 2 term. 163. 13 Rep. 708. 315. 2 term. 163. 315. 2 term. 366. — Decree, an act of equity in this last case, relieve the lessee? There is very little authority to be found upon the subject. You may see however 1 Ey. Cas. 83. 1 Ey. Cas. 371. — My opinion, says Mr. F., is that the lessee is bound to pay all rent.

But contra in the case of implied covenants, such accidents will excuse the covenantor. Thus, every lessee enters into an implied covenant not to commit waste. If the house thus leased be burned with lightning, or the trees burned with a torch, the lessee is excused. 3 Burr. 163. 319. 30 term. 366. Doug. 2272.

It is a general rule, that the performance of an express covenant cannot be discharged by any collateral matter what so ever. The case of the lessee's house burned, as above, will furnish an example here. Esp. 270. — But the following are exceptions to the rule. 1. If a man covenants to do a thing, which, when it is lawful, by a statute, is not declared unlawful, the covenant is annulled by the statute. Here the statute makes the performance unlawful; in such case, the theory of the law is that an impossible. Lat. 102. 242. If a man covenants not to do a thing which it was then lawful for him to do, a statute conversely
comply how to do it, the Statute refunds the covenant. But 3rd. If a man covenants not to do a thing which was then unlawful, an act comes to make it lawful; yet shall the covenant remain suspended.

Another general rule, that covenants are construed in their operation, so far as respects the subject matter, to that which it is in being at the time of making the covenant. Thus, if in a lease the lessee covenants "to pay all taxes," this shall be construed to extend to those taxes only which existed at the time he covenant'd, not to a tax of a new species. 2 Crou. 392, 222, 225. 5 Bla. 1194, 3 T. & R. 377. Now this rule is not founded upon any arbitrary, principle in the law, but upon the very intention of the parties. A covenant contrary to law, is void; this rule is applicable to all contracts. 1 Bla. 635, 64, 64. 114, 176. 122, 341, 37, 42, 17. 2 Bla. 164, 176.

If one leases a personal chattel to another to covenant that the lessee shall have the use of it during the term, it becomes useless for want of repairs; then has been a question whether the lessee has broken the covenant if he does not repair it. The better opinion, says Mr. T. Coxe, is that the lessee is not bound to repair it, therefore not liable. 1 Bla. 635, 1 Bla. 429, 64, 176, 429, 5 Bla. 322.

An assignment of a chose in action by and, amounts to a covenant by the assignor, that the assignee shall have the use of it, & that he, the assignor will not by a discharge or prevent the assignee in recovering upon it. Thus if A holds a bond, e.g. B, by deed assigns it to C. This amount to a covenant on the part of A, that B, shall enjoy the use of it, & that he shall not discharge or release B, from the bond. And if A does discharge or release B, from the bond, he himself is immediately liable in the action. 3 Bla. 362, 369, 109, 125, 127, 129, 129, 129, 129, 129.
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You observe I construe the rule to mean when the assignment is by deed. It must be by deed that covenant will not lie. But if the assignment is by parcel; the assignee will have a remedy if the assignor releases the obligor, or enters into the contract of the bond... 2 T. R. 396.

The usual practice in bond, when the assignee has released or discharged the obligor from this bond, in an action on the assignor sounding in fraud, if the assignee has given notice to the obligor of the assignment, an action of fraud will lie ag. him for accepting such release or discharge. It is the English practice in such cases, to apply to Chancery.

Covenants, like all contracts, are construed, and to be carried into operation according to their legal effect. As a creditor covenant with the debtor, not to sue him, within a limited time, it is no discharge of the debt; if the creditor fails within the time, this covenant cannot be pleaded in bar to the action; but the creditor makes himself, for the covenant, by so doing. 3 T. R. 352. 1 Chit. 263. 1 Bl. 611. 6 T. R. 61. 6 T. R. 63. 1 T. R. 373. 2 T. R. 104. 156. 1 P. C. 353. But contra, if the creditor covenant never to sue his debtor; this is a release of the debt may be pleaded as such. 3 T. R. 170. 2 T. R. 95. 3 R. 352. 6 T. R. 443.

The reason of the diversity in this, in the case of a covenant not to sue within a limited time; if this covenant were construed to mean a release for the time limited, it would be a perfect one; for it is well settled, that a personal right once suspended is forever gone. But contra, if the covenant is never to sue, then the covenant is a release the perpetual one, so it extends to the enfranchisement of the parties that the right of action shall be forever extinguished. To prevent a misuse pleads of suits this covenant & in the 2nd paragraph on the next page...
Covenant.

new to sue, is construed as a release, the in form it is not one. For the law will not be so idle, as to allow in this case, the covenantor to sue before he recover his debt. If the covenantor then about't, the covenantor on the covenant, or rent, just the ant of the debt back again. It may therefore be pleaded in bar by the covenantor to act for the debt.

But if the covenant "not to sue within a limited time," makes a part of the instrument, sued upon, as if it be endors ed upon it, it will prevent a recovery till the expiration of the time. e.g. It makes a promise, note of 13 for 900 payable or 12 months, the note then is endorsed upon the note, that the pres mises will not sue the note till the expiration of 12 months, no recovery can be had upon the note till the time endorsed upon it expires. The endorsement is to be taken as part of the note itself, so it shall be construed to mean the same as if it had been written in the body of the note itself payable in 12 months, 10/13, 1/3, 1/3, 1/3, 1/3.

As the rule that a separate covenant "not to sue within a limited time," applies only to personal actions. Because the temporary suspension of a real right is not an extinguishment of it, of a personal right it is. 2 Trench 304.

And a covenant by a Ouarder not to sue his Debtor in a foreign country is forever a local release, it is a good bar to an action but in that foreign country. This question has been solemnly determined within a few years in Westminster Hall by Lord C. B. of Mansfield. The case was this, the crew of a for eign ship connived with the master of it, they would not sue him for their wages in any foreign country. They are not sailed for England, on her arrival there, the crew co-
Covenant.

commemorated suits ag. the master, contrary to the covenant, it
it was determined that the covenant was a good bar to the
actions. 2 Bl. 183. 605. 97.

I would here observe, says Mr. F. that a man cannot by
any covenant or contract whatever, exclude himself from res-
sorting to the proper courts of Justice. Thus if the creditor, the

covenant with his debtor, that the overseer of the poor, arb-
trator, or any particular persons a person should settle the
claims between them, & that he the creditor would never
so set to a lot. of Justice for this purpose, such covenant would
absolutely void, as against good policy. 2 Bl. 183. 605.-

A covenant not to sue at all, one of two joint obligors
is no bar to an action brought of the other obligor, exp. 525.
I imagine it is no release to either. Such covenant is con-
mean only that the party waives his right as ag. the coven-
tee, the right is clearly not meant to be extinguished, for the co-
venantee reserves to himself the right of suing the other obli-
gor. And he may sue the covenantor to recover, but he could
be liable on his covenant by so doing. This is often done to pre-
vent a multiplicity of suits. ... But if the bond or obligation
is joint of the covenants not to sue one, it is a relevant both
may be pleaded as such. 2 Bl. 183. 605. 97. 602. 11. 603. 32. H. 155.

But contra, a release in form, to one of two or more joint obli-
gors is a good discharge to all. Because it is an extingu-
sment of so much, as the person released is bound to pay. He is
individually bound to pay the whole bond or obligation as
it may all be collected of him. Such release though may well
be pleaded on bar to an action against either of them. 3 Bl. 183.

But if a creditor covenants with his debtor that
Covenant, covenant.

"that he will not sue him for such a day, & if he does that in the debt or may plead the covenant, or release or acquittance. Furthermore, that the debt is that event shall be for: so this instrument is a conditional release it may be plead or bar if the action is but before the day, the debt will be forever discharged. For how there are direct terms of discharge. 1 Pelt 939, Earle 60. 210, Book 123, 1 Shaw 46, 335, 380. 2 Shaw 446.

Covenants ordinarily used in conveyances.

In all kinds of conveyance, except releases or what we usually call quitclaims, there are two covenants, expressly or implied. 1st. that the grantor has a right to make conveyance. If the conveyance is of freehold it is a covenant of seisin, if it be less than freehold it is a covenant that grantor has title. 2nd. a covenant, which is here called covenant of warranty, so as a conveyance of quitclaim, all the words to the premise are implied covenants of title & enjoy ment.

4. 60. 36. 1 Pelt. 519. 20 & 2 North 22. In quitclaim must as such covenants.

On a covenant of seisin, the grantor may maintain an action before his seisin, indeed he may sue as soon as the deed is delivered, for if the grantor was not sure, since the covenant was broken before the moment it was entered into, it will be a sufficient breach of the if the grantee proves that the grantor had no title. Bro. 369. 170. q 606. 300. 140.

But on a covenant of warranty, or quiet enjoyment, the grantee or defier can maintain action till he has bust = victor. Bro. 941.
Covenant

In an action on a covenant of seisin, it is sufficient to state as a breach, that covenantor was not seised. The mere act of stating this is sufficient. If, however, the grantor states in his deed, that he was seised, it then becomes necessary for the plaintiff to show an older or better title in another, or that the covenantor states no title to facts. See 369, 660, 374. 6th ed. 299.

Covenant of seisin is broken by an existing encumbrance upon the land, unless the encumbrance is expressly excepted. If the covenants seisin, and there is an existing mortgage upon the land, this satisfies the covenant at once. Which this rule is true in Eng. as well as here. 3d ed. 491.

Covenant in case of covenant of warranty must state in his declaration the eviction. The eviction must be stated as under a claim of title or by lawful act or under good faith title. If he states merely he has been evicted by one, under lawful title, it is not sufficient, for the evictor may have derived his title from covenantor himself subsequently to the covenantor. The last clause, under good faith title, is indispensably, in assigning a breach upon this covenant on a title act 34, 35, 215, 216, Bl. 26, 1. 11, 249, Sec. 20, 147.

But if it appears from the declaration, that the eviction was under good faith title, and it is not formally stated, it is sufficient. But it must somehow appear. 3d ed. 491, 3d ed. 497.

But it is not necessary for the plaintiff (grantor) to state in what title the eviction was made, i.e., it is not necessary for the plaintiff to state the estate of the evictor; whether of fee or tail, or from whom he obtained. It is sufficient only to state the eviction was under good faith title. 2d ed. 37, 42, 6th ed. 614.

Sec. 7 states, it is unnecessary for the plaintiff to show what
covenant.

This is an assertion that the covenantor claimed. But if anything more is meant in this observation than a necessity of showing an older title, it is abundantly overruled and most clearly is not law. 155, 159.

The reason why the covenant must be shown as under any title at all is, that the covenantor does not extend to the tortious acts of others. The covenantor warrants the title, i.e. the conveyance of the premises against all right title claims.

Alleging that the eviction was by judgment of Court is not sufficient, only for two reasons: (1) The judgment is not conclusive, and (2) the evidence in this action, the greater not having been a party. 25. The judgment upon which he evicted may have been obtained by virtue of a title from the party himself. 164, 402.

These rules apply only to ordinary covenants. For a man may be so accurate as to covenant as to the tortious acts of others expressly, and he does the title of the evictor must not in any manner be mentioned. 156, 203.

But a covenant of warranty against the acts of a particular person extends to a tortious act committed by him, as well as an eviction by claim of title. For when one covenant against all evictions by the act of Sec. 13, or on all of them, such covenant is construed to warrant the title, and preserve against such person, at all events. 162, 93, 94, 202, 760, 110, 111, 41, 43.

But if the covenantee disturbs the covenantor, even by a tortious act, if done under a claim of title, or by such a one as a person to be an ascription of right, he is liable on the covenant. And in this case the covenantor must not allege that the covenantor had any title whatever. This rule holds to the covenant is expressly limited to lawful evictions. 157, 24.
covenants to disturb the covenant. I have before my covenants, it will not avail for me to say that the vendor's claim was not good. 1 Dall. 474. 2 Doug. 215. 1 R. 782. 389.

I will here remind you, as an analogy to the above doctrine, that an eviction by the lessor suspends the rent, but a wrongful eviction by a third person does not. 1 Com. 206.

And the rule (viz. if a covenantor breaks his own covenant to), by a third person does not, as by operation of law are excluded from the covenant, as does the Executor, Administrator of them, either to these, the covenant by the tenant of title, they are liable. 1 Com. 206. 2 Com. 504. 1 R. 782.

A covenant of quiet enjoyment, by Executor or Administrator, is confined to themselves, those claiming under them, if the breach must be occasioned by some act of the Executor, otherwise, if the person claiming under him, Supp., if the Executor makes a claim of a chattel real, 3 covenants, that the lessee shall quietly enjoy it. Now this covenant after the grantee generally expressed, is restrained to the acts of those claiming under him, the lessee liable only in his representative capacity. If then a breach of the lease should be evicted by one having paramount title with that of the lessee, the Executor would not be liable. 1 H. B. 31.

In Eng. when the Pfl. recovers on a covenant of seisin, he recovers the consideration money and interest. When he recovers on a covenant of warranty, he recovers the consideration money, the interest &c., says Mr. Suffolk's, his damages occasioned by the eviction, he finds no rule in any of their authorities to this effect. In Conn. when the Pfl. recovers on a covenant of seisin, he recovers his consideration, money and interest as in Eng. But on the covenant of warranty he recovers the value of the land.
Covenant.

Covenants at the time of the eviction, the damages he has sustained as a consequence of it, as the costs of defending the title to the land. Hence, as you will observe, there is a wide difference in the recovery of the full amount of warranty in England. The reason of the difference is this: in England the value of the land has been stationary for centuries; it is that in case it is just that the plaintiff should recover his money and damage for it. But how it is in all new countries, the value of land is constant by fluctuating. It is therefore now just that the plaintiff should recover the actual loss occasioned by the breach of this warranty estimated by the value of the land at the time of the eviction. 

Thus suppose A sells to B a farm of 100 acres for 5000, with covenant of warranty. Now this land, the real value of which at the time of purchase was worth no more than 5000, but 5 years afterwards, at the time of the grantee eviction, it has risen to be worth 1000, it is just that he should recover so much of the grantee, it this will be the rule of Dam's here. 

On a covenant of seisin, I take the rule to be this: the assignee of grantee cannot maintain an action to the grantor, i.e. that a covenant of seisin does not run with the land. The reason is the covenant was broken (if the grantor had not in the, at the moment it was entered into it is therefore a mere share, or personal right in action on the grantor to recover damages of the grantor, which cannot be assigned. This principle was decided in the case of Tyler v. Tiffany in the Supreme Court in the year 1807. I think, says Mr. E. 

But contrary, the assignee of grantee, may undoubtedly have an action on a covenant of warranty, provided the eviction happened after assignment or while he was in possession, because...
Covenant.

The covenant is not broken till the right of the estate is violated. Thus a grant to B with covenant of warranty, lapses to B, and he evicts by D having a good dealing title. Now covenant will lie upon the warranty in his favor against A. Bal. 1 Pay. 152, 2 So. 295, 5 Cr. 16, 140.

Where an action of ejectment is brought by a stranger to recover the land against the grantee, he ought to give notice of such action to the grantor, that he may have an opportunity of coming in and defending the title. But the grantor is not obliged to appear in such case, if he does not, grantee may defend alone. 3 Bl. C. 300. 310. 1 B. 652. Inst. 101. 365 a. In Eng., there is a writ of voucher used in such cases; in Born., notice is given to the grantor by a hand of summons, which we also call a writ of voucher, served by the court where the action is pending.

I observe, that this notice ought to be given to the grantor for his own security, because it is said in Born., that if the grantee does not give notice, he cannot, on being evicted, recover of the grantor, the special damages which accrued in consequence of the eviction. Again, if grantor is not ejected, he is not concluded by the judgment against the grantee, but if he is ejected, he is concluded.

Quitclaim deeds, or deeds of release, contain neither of the covenants which I have been treating. Yet it has been supposed formally, that covenant must be maintained in the grant of a quitclaim deed, if he departs or composes upon grantor. But, says Touch, I believe this doctrine cannot be maintained on principle, or the common law, nor clearly will not be adopted. And it has been by the Court of Errors, that covenant will not lie for fraud on the sale of land. See Delarey v. Thorowd 2 T. 10 12.
Covenant.

After an action of covenant against two, the plaintiff obtains judgment by default or otherwise; and it is afterwards barred as to the other by a special plea or by general issue, judgment cannot go against either. The rule is different in case of costs, for costs are not joint. Bro. 106, Barth. 261, 172, 328, Buck. 438.

October 15th 1871.

Lecture 4th.

Covenants and Contracts to Pay Money by Installments.

This subject is treated very confusingly in the books. The confusion arises from various causes. One is the books of times made no difference between different forms of contract whether it is bond, bill, or any other, whether the sums to be paid are aggregate or not. I think the law is now well settled upon this subject.

On a penal bond, conditions for the payment of an aggregate sum by instalments, an action of debt lies for the non-payment of the 1st instalment, where it falls due; and common law the plaintiff will recover the whole penalty of the bond, thus if the debitor enter into a penal bond with his creditor, conditioned, that if he the debitor pays one hundred dollars in five months, or one hundred and twenty-one months, the bond shall be void, now at com. law if the first 100$ is not paid at the end of the 5th mo. the bond is forfeited and the plaintiff will recover the whole penalty. Bro. 191, 190, 315, 314, Buck. 558, Buck. 424, 167.

But if a single bill is given for the payment of an aggregate sum of money by instalments, an action will not lie till each instalment is due; if that debt is the action to be lost. But here there is no penalty; there is no condition, either the bill is lapsed in time, or it is divisible, as to its time. If the payor could
Covenant.

But when rent is reserved, payable by installments, the lessor may have an action whenever the installments fall due, though there is no bond or bill in the case; and the stipulation may be by parole or by deed. Now you may ask, upon what ground is this diversity founded, between a single bill, trust reserved, and the case of a single bill the rent is entire, &c. or in any way be performed; the recovery of rent is only by action of debt. If these at all not lie, unless the whole value of the rent is recovered. But contra, where rent is reserved, it is considered as a part of the price or object of the land; each reservation is supposed to accrue on the pay day; therefore, if no debt were that day owing, for that day the reservation would be distinct debt.

As to covenants or promises notes to pay an aggregate sum by installments, the rule is that an action of covenant will lie upon the covenant, or a demand upon the note for damages when the first installment falls due. First, if the tenant will recover as much in this case as is then due, he may not recover the whole rent, or the covenant or note, as in the case of a single bond. Thus if one covenants to pay 1000$ by four yearly installments, an action of covenant will lie at the end of five months; he will recover 500$, but the debt will not
Covenants.

Lie till the last installment falls due, & for the reason, that if more than onceassigns, that the covenant cannot be apportioned. So that on the action of debt the whole covenant must be recovered or no part of it can be. It is the same as to the note, the actions of covenant or a sum of it may be brought upon them for the damages thus actually sustained. See 8.171, 3.21.22. 8. 158. Code 165; 113; 116. 136. 167. 176. 178. 179. 180. 181.

457. A contrary doctrine is 8.118, but it clearly is not law.

If a covenant is made for the payment of several sums of money, when there is no aggregate sum is due, an action of covenant will certainly for the recovery of the first installment; also, the stock debt will also lie. As, if one enters into a covenant, to pay at the end of one year 20£ & the end of two years 20£. So on, now there is no doubt but covenant will lie at the end of the year for the recovery of the 20£ then due, & the reason why I am inclined to think, that debt will also lie at that time is, here is no aggregate sum included, or in other words, the different sums are not aggregate. But the reason why you can't bring debt upon a single bill, where the sums are aggregate, does not apply here. Suppose that it was into two covenant to pay in one 20£ in one year, & in the other 20£ in two years. Now debt will lie upon these covenants the moment the covenants of them become payable, until I suppose says Mr. Ed., that the circumstances of the covenants being written upon one or two pieces of paper will make no difference, if the sums contained in one covenant are not aggregate, that debt will lie, whenever the installments, according to the terms of the covenant, become payable. See 156, 536. Code 161, 580. 163. 621, 618.

As in a covenant for the payment of an aggregate sum by.
covenant.

Installments, there is contained this clause: "That in the nonpayment of any one installment, on the day on which it falls due, the whole shall immediately become due," such clause, having, if any one of the installments are not paid at the time, an action will immediately lie for the recovery of the whole bond or covenant. It is on page 212.

I shall observe, says Mr. G., that in an action of covenant broken, the plff. may asseg any number of breaches he pleases. The covenants may be numerous, if they may all have been broken, he must then allege the breach of them all, else he cannot recover upon them, i.e., he can recover upon these only, which he signs to have been broken. But at common law in an action on a penal bond, the plff. would recover for the breach of all the covenants, that he alleged the breach of but one. The reason that on a penal bond, one breach will work a forfeiture of it as effectually as two or more; the assignment of more than one would be duplicity, then. As in the above case of covenant broken, Suppose money is to be paid by four different installments & the action is not brought till the 2d installment has fallen due, in this case the plff. may assign four breaches.

1 Bac. 134. 5. 2 March 178 (Note 118. Cor. 25). 268 (293. 3) 382. 188.

In bonds in an action upon a penal bond, which is given for the payment of an aggregate done by installments, as for the performance of several conditions, the plff. must allege many breaches of the condition as have happened; for the plff. never recovers the whole penalty, only he has been seen refer to the full amount of it. Our statute provides that a court of law may enhance the penalty of the bond, down to the actual damage, the plff. has sustained. Stat. Cor. 35. 6. And now in Englan.
Covenant.

by Statute 8 & 9 Will. 3, c. 10, the jury may assess as many breach as the parties to the suit are to answer damages for such as have been broken. This Eng. Statute has introduced a new rule of pleading there, which exactly agrees with our practice in bond, 3 Bro. 377, 3 Egg. 126, 2 Bl. 810, 16 & 17 Geo. 2, 820.

It would again observe, that when in conv. law, there was more than one breach alleged upon a special bond, advantage could only be taken of the duplicity by special demurrer; for it is a fault of form only, comb. 247, 4 B. & S. 136.

What persons are bound by covenants.

It is a general rule that the personal representatives of the covenantor, as Executors, Administrators &c., are implied in himself, and bound without being named. Thus, if A covenants to pay a sum of money at the end of one year, t. dies before the time arrives, his Exec or Admin. is bound to pay the obligation. This not named, 2 Pl. 192, 2 Beav. 519, 1 P. W. C., 38.

There is an exception to this rule, viz., when the act covenanted to be done, is to be performed by the testator personally. Here, the covenant is fiduciary. Thus, if I agree to labor with A. for one year t. dies before the expiration of the same, my Exec. or Admin. is not bound to perform this covenant, by laboring themselves, or procuring any one else to labor. Again, in the case of an indenture of apprenticeship, the Admin. is not bound to teach the apprentice on the death of the Master. The instruction was to be given by the Master, t. him only. Cro. 533, 1 Bl. 533, C. 526, C. 542, 2 Bl. 208, &c. 206.

But even in these last cases where the covenant is fiduciary, there is a material difference between the death of the
Covenant

Covenants personal representatives to perform his covenant, if
their liability for his non-performance, for the Ees, or Adm. claims
of a breach of the covenant happens during the life-time of the
cestator, for in such case he dies subject to an action by the coven-
antee, the Damages of the breach may as well be paid by his rep-
resentatives as by himself, ibid. 24 Eq. 213, 3 Eqn 338a.

So also an ancestor seize in fee may bind his heir by
his covenant. Thus if A. tenant in fee simple covenants to con-
vey to B. to die before performance, his heir will be compelled
to convey the land, if the consideration money will generally
go to the Ees. 24 Eq. 213, 3 Eqn 338a.

This is called a covenant real, but it is a general rule that
covenants real bind the heir of the covenancor to descend to the
heir of the covenancor. Now suppose in the above case, A. & B.
had both died; the heir of B. would have compelled the heir
of A. to convey, 7 Eliz. 343, 10 Eliz. 320, 1 But. 4 P158.

The heir of the covenantor may sue upon the covenant
the next named, if the covenant runs with the land, to continue
after the death of the ancestor. Thus suppose the lease covenants to leave the house in repair, 9th
land will fence at the end of his term, if before the expiration the
lessee dies, his heir may maintain an action for the breach of the
covenant, the next named, 2 Eliz. 265, 3 Eliz. 285, 5 Eq. 244. 5

The rule as to the heirs liability, as such, is very different
as known from what it is at common law, see title Heirs & Admins.

At common law, an heir having a free, is bound, as he is,
by his ancestor's covenant of warranty, 15. But he is not li-
able to the extent of them. Suppose that A. covenants with
B. to warrant the estate leaving B. his heir with a free. Upon
a breach of this covenant the heir is liable, and if he knows of its sufficient to answer the whole damage of the breach, he is bound per tanta i.e. to the extent of them. But if the ancestor's property comes by any means except descent he is not bound, no more than the honest purchaser in such case would be. This bill, upon the ground only of having a copy of the covenant or disposition by descent. 

Have been told, says Mr. B. by our Judges, that there formerly was a decision in Conn. that the heir was liable for his ancestor's covenant of seisin. I doubt says he, the correctness of this decision. For in this case, there was a claim upon the person of the ancestor, at the moment the covenant of seisin was entered into, by a provision in our Stat. it is made the duty of the Exec. or Administrator, to answer all claims outstanding debts to the person of their testator. Stat. Conn. 269. 270. 75.

What covenants run with the land? What NOT.

There is a material difference to be observed between these covenants which run with the land those which do not.

All covenants or conveyances do or do not run with the land, those which do not are called collateral covenants.

Out of this distinction there arises certain other distinctions as to the liability of the assignee or grantee.

It is a general rule, that the assignee of a lease, the more remote, is liable for all breaches which happen during his possession, provided the covenant is one which runs with the land. But if the covenant does not, he is not liable. 

(Notes 521-525. 610-615. 620-625. 64-64)
Covenant.

If the thing covenanted to be done, or concerning which something is to be done, was in effect at the time of the covenant it is part in parcel of the demise the covenant is said to run with the land. In other words, when the covenant relates to the doing of a thing on being parcel of the demise, the thing to be done by force of the covenant is quintessentially annexed to the thing demised. It shall go with the land; the assignee is to perform the act named.

Suppose then e.g., the lease covenants that he will keep the house in repair; the assignee is bound by this covenant the not named; he is liable for any breach which happens during his possession. The theory of the law is this: Such covenants are considered as annexed to the land, inseparable from it; therefore following it into the assignee's hands the not named. The assignee is bound in the last case the not named, for the house is parcel of the thing demised and in use at the time of the execution of the covenant: so it runs with the land. Again, suppose the lease covenants to pay rent during the term, before the expiration of it he assigns; the assignee is bound to pay the not named in the lease, for rent runs with the land. The issues, profits of the land, indeed, are not actually in use at the times of the lease, since they are potentially in use.

(1 Poc H 152 3, Bro E 682, Mon 357, Bul P 150 159.)

But contra if the thing covenanted to be done, is not in effect at the time of the demise, or is not parcel of it, the assignee is not bound unless he is named.

As e.g., if the covenant of the lease be to build a wall upon the land demised, this not being in effect at the time of the demise, or that the covenant was made, it shall not extend to the assignee unless he is expressly named on the covenant. See 168 Pennsylvania 3, Bun 127 1, Bro E 552 183 1 584.
Covenant.

So also a covenant is void, as to run with the land, if it goes to the support of the thing demised: Sect. 20. if such covenant shall bind the assignee the act named, if the covenant is to repair the house, or to leave so many acres unimproved, the assignee is bound in such covenants the act named for they are for the support of the demised, or in the at the time of the covenant. 5 Coke 62. 2 Chit. 205. 3 & 4 B. & C. 333. 5 Ray. 303.

Upon a covenant which runs with the land the assignee is bound, whether he is assignee of the whole premises or not. This rule is not universal, however, but in the case where the covenant is for the support of the thing demised, I believe it always holds. Thus if a lease 10 acres to B. the covenants to repair, & afterwards B. assign 5 acres to B. in this case B. is bound to repair the act named it is liable if he does not. 2 East 589. 4 Myl. 232.

When the assignee is named in the covenant, as if the lease covenants for him and his assigns, he is bound to perform all the covenants which I have mentioned, whether they run with the land or not. The difference in effect between a covenant which runs with the land & one which does not, is this: When the covenant runs with the land the thing is so effect, the assignee is bound the act named; when the covenant does not run with the land, he is not bound unless he is expressly named. When he is named therefore he is bound to all covenants, for in such case the covenant is made for him, it by accepting the assignee out the covenants 2 & 4 B. & C. 304.

This rule however is confined to cases in which the covenant is to do some act that concerns the thing demised. For this the assignee does covenant, for him & his assigns, to do some act foreign to the demised, or which is not annexed to it, here the assignee the expressly named is not bound. They
If in the case of a farm, the lessor should covenant for him and his assigns, to build a wall or a house on the land of the lessee, the assignee, the named, would not in such case be bound to perform the covenant. Here the lessor is collateral, unconnected with the lease, i.e., the act to be done is collateral; and the assignee. Because the act to be done does not concern the demise, the assignee cannot be made liable for such covenant.

When according to the rules of distinctions now laid down, the assignee is bound, he is bound only for rents incurred, or covenants broken during his possession. If therefore the lessor has broken the covenant before the assignment, the assignee is not liable for the breach. Suppose e.g., that at the time of the assignment there was one year next due from the lessee, the assignee is not liable for this year. The legal principle here is that the assignee though bound by certain covenants of assignor, yet he is bound upon the ground only of his possession, or priority of estate. Suppose then, that the lessee himself breaks his covenant before the assignment, the assignee is not bound, for when the breach happened there was no priority of estate on his part. The lessee's liability is not upon the ground of priority of estate, but priority of contract. But priority of estate is the only ground of assignee liability.

The right of action, in the assignment last above, against the lessee cannot be transferred; this consideration is an additional reason, why the assignee is not liable for breach happening before the assignment to him.

Upon the same principle, the assignee is not liable for breach.
Covenant

of covenant happening after he has assigned. Thus suppose the first assignee assigns to a second, after which rent is due, the first assignee is not liable for this rent, even though he is in actual possession. This is the rule of privity of estate. That is, if the first assignee assigns his interest in the term to a second assignee, over the very day before the rent became payable, let him to the lessee; he (the first assignee) is not liable for any part of it. Thus suppose the pay day is on the 1st day of May, at which time there is one years rent in arrear, the assignee assigns to a second assignee on the last day of April, the second assignee is bound to pay the rent in arrear. The reason of this is, there is no appurtenance of the rent, nor a right in a tenant; is supposed to be due till the 2nd day of May at the time his interest in the term of estate is gone. 38. 22. 1 Pala. 81. 4 Abb. 271. Doug. 661. Bal. 3 P. 159.

Again, if the assignee on the day before the rent becomes payable according to the terms of the lease, makes a bona fide assignment of his interest to a lessee, with the very intent of defrauding the lessor, the first assignee can be made liable at law for any part of the rent due, because (as before) the rent is an entire debt not due till the very day. But if the lessor is not without remedy, for if the covenant was express, he may have an action against the original lessee, or he may distrain upon the land. 1 Bot. 22. 1 Pala. 81. 4 Abb. 271. Doug. 661. Bal. 3 P. 159. A contrary doctrine is laid down in 12 Vent. 327, 3d. At this time, this is against the current of authorities in the several state's law. The reason of this rule is, the assignee is liable only by virtue
of priority of estate. It is not priority of contract. The liability
successors the subject of the contract or covenant, & attaches
the person who takes the estate. But in the last case of an as-
ignment to a beggar, if the assignment is a mere sham, or
not long after, for the purpose of defrauding the lessee of his
rent, the assignee would be liable; for in such case there would
be a secret trust between the assignee & the beggar, & the as-
signee cannot be said to have parted with the priority of estate.

But in the case of an assignment to a beggar as before a
court of Chancery, it will compel the assignee to account for the
rent while he enjoyed the land. At this is strictness, according
to legal principles. no rent accrues during his time, yet Equity
will compel him to account, in a ratio to the whole time, i.e.
if he enjoyed the premises for six months he will be compelled
to pay half a year's rent, & so on in the same ratio. For then just
ice requires there should be an apportionment, a bit of Egalit-
ian it... 12 T. & R. 465, 1 T. & R. 381, 3.

If the assignee is entitled to part of the premises only, the rent
may be apportioned at law, for acts that part from which he
is not entitled the priority of estate remaining. The law can't ap-
portion rent with reference to the sum to be paid, but it can
with reference to the quantity of estate enjoyed. Suppose has
100 acres assigned he is entitled from 80 of it, he is compelled
to pay rent for the enjoyment of the remaining 20 acres, pro
rata. The rule is the same as to the Coven. 2 East. 523, 60, 22 and

In an action of Debt against the lessee, the rule is the
same. for debt is founded upon the priority of estate... but debts
of covenants is brought this being founded upon priority of estate,
Contract.

or such case the lessee will not be compelled to pay any part.

The question has been raised as to whether the Court of Chancery can restrain the assignee from assigning to a beggar or an insolvent person. There has been no decision upon the question. But say Mr. G. I do not conceive how they can put any such restraint upon the assignee, for the principles of law clearly give him the right of assigning to whom he pleases. In the Speculations upon the subject in 1292, 1242, 1252.

It was formerly doubted, whether an express covenant by

the lessee, “never to assign,” was binding or not. But this doubt is now removed & it is well settled that such covenant is binding. 1 or. 803. 3d. Rep. 806. 5th. 122.

But such covenant is not broken, if the lessee’s interest in

the term is taken in execution by his creditors; for this is not an

assignment by his own act, it is an assignment by operation of law. It is certain it is transferred without his concurrence in

common presumption against his will. 3d. Rep. 3d. 641.

Ab. 102. 15 you ba. 102. If such covenant broken by an 

act of part of the term. Thus suppose a lease is made to A.

for 20 years the covenants never to assign his interest, and

afterwards assign it to B. for 10 years, this is not a breach of 

the covenant, for it is not an assignment. Again, a coven

ant by lessee never to assign is not broken, by his disposing of

the term. Thus suppose a lease is made to A. for 20 years, but at

the end of 10 he dies & Assigns the remainder of the term. This is 

not an assignment, for the intention of the parties was that the

128. 12. 3d. 1285. 3d. 1281. 3d. 1285.

I will once more remind you that the general rule is
Covenant.

The case of an assignee is that he is liable for the breach of the covenant only, which happens during his possession, and thus far of the liability of assignees.

With regard to how far the lease or assignee is chargeable on covenant, there is a considerable difference. For lease has, from his covenant, both a priority of contract and of estate, and though he assigns thereby destroys the priority of estate, yet the priority of contract continues; he is liable on covenant notwithstanding the assignment, but the assignee comes in only as priority of estate, & therefore is liable only while on possession. Doug. 438.

But with regard to the lease it is a rule that he is always liable for breaches after his express covenant, whether they happen before or after assignment. For in such case his liability arises not from priority of estate but from priority of contract, & if he expressly binds himself to covenant to pay next for twenty years, he is bound whether he assigns or not. 2 Co. 22 b. 23 a. 4 T. 93. 380 Doug. 443. Bald. 449. 16 B. & C. 939.

If the lessee has accepted the lessee's assignee, for his tenant, as by accepting rent from him, or giving any other act recognizing him as his tenant, he (the lessee) cannot afterwards maintain the action of Debt against the lessee. The reason is, the action of Debt, at common law, is for trespass on the estate, which is here gone. Thus eg suppose lessee lets for 20 years to the lessee's assignee, the lessee accepts rent from the assignee, or such case the action of debt will not be apt to the lessee. But this rule qualifying the liability of the lessee is confined to the action of debt, for covenant acts lie against him, thus the breach happens after assignment. 3 Co. 334. 17 B. c. 449. 17 B. & C. 359. 2 Co. 23 A. 1st 16 b. 136. 439.
But if the said Court, that if the covenant is express, to pay rent, the lessor may maintain an action against the lessee for any breach, the committed after assignment, for the action of covenant is founded upon the privy of contract, and where the covenant express, this privy remaining. Bell. 4 P. 152. 1 Bl. 444, 453, 454. 1 Chit. 307, 322. (Caw. 223.)

But if the covenant is only implied by law the lessee may maintain an action against the lessee upon the privy of the estate of the assignee for his assignee. The reason is the privy of the estate of the assignee, the original covenant being implied only, the privy of contract is also gone. The lessee here has parted with all his interest, and the lessee has accepted the new tenant. This implied covenants arise from the privy of the estate, not the nature of the conveyance, for in the supposition there is no privy of contract. 1 Chit. 322, 1 Bl. 453, 454, 457, 1 Steph. 247. All the authorities collected.

Where the covenant is express, the lessee is not discharged from his liability, that he has assigned the assignee, or accepted. And where the covenant is express, if such an one as binds the assignee, the lessee may have actions against both the lessee and assignee at the same time. This is the lessee expressly covenants to pay rent. And assign the term, this covenant is binding upon the assignee, and upon the assignee because it runs with the land. But on such case the lessee can have but one satisfaction; thus if he gets execution at the lessee's expense, he must get the full for any more than the costs in his action. Where the assignee may have no security, or the assignee, the assignee, 1 Chit. 323.
By the English Statute, 32 Hen. VIII., the grantee of the
lessee has the same remedy upon the covenants, as is given to the
assignee, as the lessee himself has at common law. No common law
remedy of the lessee was the remedy, which the lessee had,
neither could he have because he has no priority of estate. But
this Statute gives him the same privileges, which lessee were con-
ferred on the lessee of his personal representatives. And by the same
Statute, the lessee has the same remedy against the lessee's gran-
tee as he before had against the grantor himself. (1st Ed., 522, 3 Ed. 22, 4 B.R. c. 274.)

There is a distinction in the law between an assignee or
a derivative lessee, or under-lessee. An assignee or a derivative le-
ssee is one who takes only part of the residue of the term; a lesee who takes
the lessee is one who takes the whole residue of the term, as tenant to the lessee. Thus, if a lease is made for twenty years, it be at the expiration of ten of those years, land for his
whole interest to B., but B. is an assignee. But if at the expiration of the ten years, it lease to B., for any lesser less than the
residue of the term, then B. is a derivative or under-lessee. See
4 B.R. 233; 1 B.R. 12766.

How you proceed that when A. in the above case, con-
tains his interest to the assignee, there is immediately a privi-
lege of estate created between him (the assignee) and the lessee. This is
accepted by the lessee as his tenant. But in the case of a
under-lessee, there is no such priority of estate between him
and the lessee. For to the lessee he is a stranger, the original lessee is
his Landlord. You will keep in mind, that the derivative lessee is
in no case liable to the lessee upon the covenants of the lessee.
So also of the life rent mortgage, the whole residue of the term, the mortgagee is not liable on the covenants in the lease, to the lessor, unless he takes possession under his mortgage. For his interest as to the contract is considered only as an incumbrance. Doug. 438. The specific difference this between an assignee and a derivative lessor is, an assignment is an absolute sale of the lessor's interest, but the latter is the creation of a tenancy upon him. An assignee is a tenant to the original lessor, the derivative lessor is tenant to the original lessor.

To assignees, I further observe, that they are liable according to the covenants, according to the distinction already laid down, whether the assignment is actual, or whether it is by devise or by sale under execution. That as to this liability, it makes no difference in which of these ways they come into possession of the premises. Thus suppose, e.g. a lease for twenty years to A. & B. at the expiration of ten the residue is taken by his creditors to sold under their execution to C. or suppose at the end of ten years A dies, leaving to B. Now in these cases B. is regarded as a kind of an assignee & is liable the same as if he had purchased. Doug. 437.

It is a point unsettled, whether an assignee for part of the premises only, is liable to the lessor, for his or any part of it. It is clear the lessor is liable for the whole, but whether the assignee is liable for the rent of his part. Doug. 633.

It seems there would be some difficulty in apportioning the rent, say Mr. E. § 4 on this ground, it is my individual opinion that the assignee could not be subjected, the I am aware there is a case when the rent is apportioned.

If the life rent covenant for him & his assignee, that he will pay the rent as long as they continue in possession of the premises.
and the assignee continues after the expiration of the time, he is bound to pay the rent according to the covenant in the lease. Sides 80. 20. 81. 82. 36. 37.

There are certain other distinctions, with regard to the duties of the heirs of the personal representatives of the covenantor, so covenantee.

I have already observed, that the heir may be bound by his ancestor's covenant, if he had accepted. I now further observe that in an action on a covenant running with the land against the lessor, heir, his infancy is no bar; it is true, his personal demand, i.e., suspend final judgment till he does arrive at age, but his infancy is no bar to the action, for his obligation here is derivative, he is not sued upon a contract which he has contracted in his infancy, but which is such, would be void, but his liability is divided upon him by the operation of the Law; this however is nothing more than a rule in pleading, necessary to be kept in mind. 40. 762. 763.

A. covenantor with 15. this being assignable, so the covenant is broken in his lifetime, 15. Executor shall have the action, not the heir, the the heir is named of the Executor is not.

For here a right of Damages had accrued to 15. in his lifetime, if he had sued to recover, the Damages would have been paid from his personal fund, which would have gone to his Executor. And this being the case, the Executor shall have the benefit of this right to recover, as he would have had the Damages themselves had his lifetime still on his lifetime.

17. 37. 21. 22. 15. 16. 21. 22. 15. 26. 27.

But on the other hand, if a covenant ran is broken after the covenantor's death, his heir is not the Executor hath action. Thus suppose A makes a covenant of warranty to
18. If after the death of B, there is an eviction. The action in such case, shall go to the heir, for his right is now viola-
contrary. It is a general rule, that the covenanting executor, the not named, is always liable for breaches happen-
ing in covenantor's lifetime. For how the right action accrues to the testator in his lifetime; if it had been begun it would have diminished his personal funds, then the executor shall pay the damages occasioned by such breach. And if the covenantor was expressly the action will lie ag. the executor, the not broken till after the death of the covenantor. The reason that the covenant being express, the executor is joining to the covenant. Thus support 6. actions into an express covenant with B. For quiet enjoyment of the demesne, after the death of A, B is evicted, now the action must be trust in A. His executor is being joined to the covenant, act. 14th 8. 123. 20. 125. 34. 11. 125.

There is an exception to this rule. Mr. Where the covenant is fiduciary, i.e. when the act to be done, is according to the nature of it, to be performed by the testator himself. Thus if cov-

enant with A to labor for him for one year 'dies before the expiration of it, my executor is not bound to fulfill the covenant, by laboring himself or appointing any one else. Cro. 303.

But contrary if the covenant is not express, but must be

place in law the executor is not liable to breaches happening after the testator's death. These rules you will recollect, for applications to covenants real. You recollect that, according to B. in the words, "they conceive," but values into your own covenants of quiet enjoyment, this covenant is broken.
Covenant

After the death of the covenanted, his executor or not liable on this covenant. (c. 15. The words statute created an implied covenant of quiet enjoyment, and have before been of the Executors is not liable, for he has no interest in the possession, the right of action on these implied covenants is found in priority of estate. The remedy then exists only at the

When the Executor or Administrator come into possession of the lease in their representative capacity, i.e. as Executor or Administrator, they may be sued as assignee for any breach which happens during their possession. For proving the debt, Executor or Admin. is proving him to be fact an assignee. This is a rule in pleading only, it does not determine when the Exe. or Admin. is liable, but only that they may be sued in the name of assignee when they are liable. (1630 p. 193) 1 Bl. 307 F. 5. 129

The heir of the covenanted is liable for breaches occurring either before or after the death of his ancestor, provided he is named in the covenant that was affected otherwise he is not bound. You recollect the general rule laid down before, with regard to Executors was, that he is implied regularly, in the person of the covenanted, whether named or not. But this rule is not applicable in such cases. Suppose then a covenants with B for himself, his heir, the heir is bound in such case, if he has a right to breach, happening as well before as after his uncles death, but if he has a right he is not named, or he is named unless a party in either of these cases he is not bound. (Cen. 35) 1 Es. 365

370 3554 2 Bl. 635 315 sec 27.
Covenant.

Covenants and bonds to save harmless.

A covenant or bond to save covenantee harmless, is a covenant or bond of indemnity to save him from some possible liability or loss. Such covenants or bonds are frequently given. Thus if indubitably the creditor procures to sign a note or other obligation, as usually, with him to B, & it is usual in such cases, for A the debtor to give to a bond to save him harmless from any liability he may incur or consequence of his signing the note or other obligation, to B.

With regard to breaches of such covenants or bonds, it is a general rule, that they are not broken by the tortious acts of another. Thus, if the lessee covenants with the lessor to save him harmless, this covenant does not extend to the tortious acts of a third. Again, suppose that the assignee of covenants with the lessor to save him harmless from the payment of future rent, it afterwards the years of the lease unlawfully distanced for rent, the lessor can have no action at the assignee on the covenant of indemnity, for the act is tortious. (See 4 Co. 222. 6 Mod. 125. 3 Lev. 3.)

This kind of indemnity is always taken by a sheriff on his admitting a prisoner to the liberties of the gaol; and, as it is called a bon or the prisoner escapes, the sheriff may maintain an action at the prisoner, on his bond of indemnity, immediately: whether he has been made liable to the creditor or not. And it is no plea for the prisoner to say that the sheriff has never been subject to the creditor. (See 52. 123. 1 Mod. 126. 11. The escape of the prisoner, & the liability that the sheriff, if perfected, is considered as a determination.)
A secretariat, serving in to a box with 13.
to secure a debt due to him from b. payable in 36 months from
the date and if it takes from b. the debtor a certain bond of
indemnity. Now if b. fails to pay the bond on the day spe-
fied, a. the surety may immediately maintain an action on
his counter bond, e.g. b. even if a. he has more men subject
to pay to the creditor one furthering of the original debt.
The reason of this rule is, that these indemnifying bonds are
constructed to save the surety harmless from all liability to
pay the debt, and by the debtors not satisfying the bond
on the day, on which it became payable, the surety is imme-
diately liable to an action on that bond in the creditor's
name. 3. 184. 2. 24. Sal. 198. 5 9 24 a. 2. 11. 165. 640 b. 9. 8. 372 4. 307 14074.
390 307. 70 b. 9. 7. This point has been decided both in an on the
former bond, says 658, but the last case was carried up to the
ct. of Errors, t hen established the doctrine as now laid down: the 390. 307. 70 b. 9. 7.

Then, take you observe, the debtor, if does not pay at the
day, is liable to two actions, one on his bond in the creditor's
favor, also on the bond of indemnity in favor of the surety.
Suppose that the surety sues it recovers upon his bond, after
wards the creditor sues the debtor it recovers all the money
out of him alone? Then you see the debtor has been obliged
to pay his debt twice. The rule in such case is, the debtor
may have a remedy in a ct. of equity; they will compel the
surety to refund to the debtor what he formerly received at
law, upon his indemnifying bond. For it is the province, in
such cases for a Court of Equity, when subsequent events
render it unconscientious for the surety to avail, to compel
him to refund the money. 2, 184. 5.
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It was once held that the action of a surety would lie against the surety in such ease to recover the money back. In the case of Moore v. Bevis, 27inn. 602, and Bevis v. Harvey, this is not true. 11 T. 240.

A surety's liability arises on the part of the surety, and he is liable to an action against the debtor, but there is this material distinction to be observed, that if one having obligated himself as surety it takes a bond of indemnity after his liability to pay the debt accrues, he can maintain an action upon his bond of indemnity, till after he has been made specially liable on the surety bond. Thus suppose A. and B. jointly execute to C. the creditor of A., a promissory note, payable in one year from the date of the same, and after the expiration of the year B. is to take a bond of indemnity from A. He can maintain upon this bond till after he has been actually subjected to liability in consequence of his signing the note. Again, suppose the debtor to B. as security execute to C. a note on demand, at that moment B. takes a bond from A. to save him himself. B. cannot maintain after this act till after he has been actually subjected. For the indemnifying bond in both these last cases is intended to guard the surety against all future liability; then the liability existed before the bond was entered into. 213. 53. 803.

If a surety takes no bond of indemnity, it is subject to pay the debt, he may maintain an action of indemnity as summary against the debtor for so much money paid out and expended for his use. But he cannot maintain this action for more liability; he can recover till he has paid, and
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Then he will recover his actual damages. But you may ask, why the diversity? Because this is the rule that allows the surety to maintain an action as soon as he has been made liable to pay. The answer is, that in the other case the surety is to be saved harm, from all future liability to pay. In this last rule, the surety is the payment. *Simp. 25*, *25. T. Rep. 104*, *1st T. Rep. 343*. *J. 1624.*


There arises another distinction. If the surety has taken a bond of indemnity, it has been obliged to pay the debt, if it cannot maintain indebita a quo it did to the debtor for the money he has paid out; for he has taken a higher security; it is a principle of law, that the law will not imply a contract for the parties, where they have made an express for themselves. *2 T. Rep. 165.*

*October 19, 1812.*

In some cases the covenantor, after assigning a specific performance may release the covenants, in others he cannot. It is a general rule of common applicable to obligations in general, that after the assignment of an obligation, by the obligee or the person who will derive the benefits, may release if the obligation was not assignable. But if it was he cannot. In analogy then to this rule, if the lessee after he has assigned his interest, unless the lessee can maintain an action for breach of the assignee, because the covenantant is made assignable by the Statute. *32. Verc. 88.* By *Stat. Lese* assigns his interest that will not become due, in having
after the assignee released the lessee from his covenants to pay rent. In this case the assignee may recover the rent, notwithstanding the release. 2 Gore. 6. 2 Co. 360. 172 Eng. 345.

But on the other hand, if the lease has been assigned by the lessee, he may, releasing the covenants of the lessee, assert the assignee, of his remedy for breach of them, if the release has been given before the action is commenced. Suppose, e.g., the lessee covenants to make repairs to the amount of 500 guineas. The lessee assigns his interest, before any action is commenced, he releases the lessee from his covenants. In such case the assignee cannot maintain an action against the lessee for not repairing. 2 Gore. 6. 2 Co. 360. 172 Eng. 345. But after the action is commenced, it is said that a right of recovery attaches in the assignee, so that the lessee cannot release him from its effectual.

Suppose, says Blackstone, the reason of the distinction between the effects of an assignment by the lessee and those by the lessee, is that the former are within the Stat. 52. Geo. III. 51. 65. c. 100. c. 360. But after the action is commenced, it is said that a right of recovery attaches in the assignee, so that the lessee cannot release him from its effectual.

It is a general rule that a release by the covenantor to the covenantor of all demands, the release being executed before the covenant is broken, is not a release of the covenant. Thus
A lessee to be the life covenants to pay rent annually. Here this case before the end of the year to release all demands in 13. this is no release of the rent. For at the time of the release of had no demand and pay rent. There is nothing due till the expiration of the year; it is not "quod in praesenti, solvatur in futuro." So a release of all actions, rights of action, no release of a covenant not then broken. But a release of all covenants, before the breach of them will discharge the covenant.

I premise that my purpose is not to give you all the general rules, which are applicable to covenants, because there are many general rules applicable to this action, as to the whole class of contracts. But my purpose is to give all those rules as an appropriate to this action, occasionally introducing general rules where they are necessary to illustrate or explain.

1st. Of the Declaration. The declaration in the action of covenant broken, must always state that the covenant was by deed. This is an indispensable requisite. In whatever in the agreement, it is no covenant unless it be sealed, or in other words unless it be by deed. St. 18, 314, 347, 380, 105, 209.

But if an agreement, in the form of a covenant is signed to writing but not sealed, an action will lie upon it, but not covenants the remedy is trespass on the case.

Any instrument written to seals is a covenant, it matters not what is its form.

The principal rules concerning the declaration of the self, relate chiefly to the mode of laying or alleging the breach. Last to this head.

It is a rule, that when the covenant is general the assigne
assignment of the breach may be general, i.e., that the breach may be generally assigned. As where the grantor covenanted that he was not well seized, an allegation that he was not at all seized is a sufficient assigning of the breach.

If on the other hand, the covenant be particular or specific, the breach assigner must be so likewise. As of a covenant that he was seized of all the estate which J. S. had in certain lands, and that this was an estate in fee simple, the plaintiff must state the description not all the title, or that it was not a fee simple. The Declaration must follow the covenant in assigning the breach. 5 Co 327; 6 Kim 307; 7 Chit 327; 8 Esp 81; 9 Co 298.

The most general assignment of a breach is in the words of the covenant, with a Negative. As where the grantor covenants that he is well seized, the grantee declares he was not well seized. 2 Co 60; 3 Co 1379.

And the breach must always be so assigned as to appear on the face of the Declaration to be within the covenant. As it is not sufficient that it may be proved by extrinsic facts to be within it. Thus if the lessee covenants not to cut down timber more than sufficient for necessary repairs, the breach assigned was, that he cut down timber to the amount of 1000$. This is not a sufficient assignment. For the court can't know that this was more than sufficient, unless it is stated in the declaration. 3 Le En 343; 4 Co 203; 5 Sh 152; 6 Co 292.

And if the plaintiff by subsequent words in the declaration narrows the breach, first assigned, he must confine his proof to the breach charged in the declaration subsequent allegation. As if the lessee covenanted to use the land in a husbandlike manner, and the lessor in his declaration states that he has not, but
on the contrary, that he has committed waste, he must confine the proof to waste alluded to, the will recover for no other breach of the covenant. 3 T. Rep. 307.

When the covenant contains a provision, deeming the covenant on the happening of a certain event, the self is not bound to take any notice of such provision in the declaration. The provision is in the nature of a defeasance. It is like the condition in a personal bond. It is a matter of defense for the lessor. He may pray upon the covenant, &c. whatever it contains for his advantage, may be made use of for himself.

But if there is an exception in the body of the covenant, the self must set it out, & negate it, i.e. he must show that the breach does not come within the exception. The reason is, this is not a defeasance, but it is a component part of the covenant itself; if it is not set out there is a variation between the real covenant, & that declared upon. Thus, suppose the covenant was to repair all the fences or the land but one; if the declaration states that the lessor covenant to repair all the fences, except nothing as to the exception, the variance is fatal. If the lessor assigned the act of repairing 100 acres of fences, the self must, in other words, show that this is no part of the fence excepted. But if the covenant was to repair all the fences, provided that on the happening of a certain event, the covenant was to be void. This is a defeasance; no part of the covenant, & the self must set it out.

The Rex vs. Giff. 300.

The self assigns an inconsistent breach under a defeasance. This will be rejected as surplusage. If the covenant was made on the first day of October 1810, & the self in declaring the words, that afterwards, &c. he is the
day of September there was a breach of the covenant, this
response shall be rejected after verdict, & the declaration
tells that on the 1st day of October 1812 the covenant was
made & a sum of money paid, & that the
"See St. 32."

When the covenant is in the alternative, that is one of
two things are covenanted to be done, the breach must be shown
as to both. For otherwise there does not appear to have been any breach. As if a covenant to pay $1,000 within one
year or convey him a piece of land. Now if it is alleged that
I have not paid, without saying more, this is no breach
alleged. It is necessary for here to state, that I have neither
paid the $1,000 nor conveyed the land. 1 Leon. 360. Cep. 16. 300.

There is a distinction to be observed between covenants that
are substantially in the alternative, & those which in their
phraseology are in the alternative but in their legal effect
are not considered so. With respect to the latter of these, the
last rule does not hold. Thus if one covenant, "to pay or
cause to be paid," now this in its phraseology is clearly an
alternative, but the breach is sufficiently alleged if the deft.
alleges that the deft. had not paid, "without saying or
caused to be paid," for if deft. had caused to be paid, he
had paid. But, if a covenant, "to pay or
cause to be paid," 2 Smith. 229.

But where the covenant is founded on the contingency of two things, & which shall first happen, it is not
meaning for the party who alleged the contingency, to
state that it is the first; & he may declare, on a breach
arising from one of them, without making any mention of
the other. Thus if a covenant to pay $1,000 on the death of mar-
riage of F. & G. it is sufficient in declaring a per such covenant

to state the happening of one of the contingencies, without say
ing, that it was the first, & that if even the other had happen
ed first, the declaration was still good, for the delay was th
plaintiff's own. Lord Raymond, 132, 157; 159, 161, 162.

When the covenant is for an act to be done by the co
ventor or his assigns, & the act is late, or the assigns
the breach must be laid in the disjunctive, i.e. the plaintiff
alleges, that the act has not been performed by the covenant
nor his assigns. Thus, A. lessee covenants that he or his
assigns will repair. Now the breach must state that
the lessee nor his assigns have repaired; for if either of them
did repair, the action would not lie. Prod., 348.

This rule does not hold, where the action is brought
ag. the original covenantor himself. For if the action is
not so done, then does not appear to have ever been an
assignee. Thus suppose A. lessee covenants that he or his as-
signs will do certain repairs; now if the action is brought
ag. the lessee, there is no one of the lessors laying the breach
down to the assignee. For if the lessee has assigned the co-
covenant has been performed by the assignee, he may there-
upon have judgment in his favor. Prod., 328. Salt. 139.

But on a covenant to a man, an assignor that it
was done to the donee is sufficient. If there has been an asig-
ment & the covenant has been performed to the donee, the
Def. may plead it. This rule does not hold, if the
assignee brings the action. For action in this case is lost
by the assignee, because there is that the covenant has not
been performed to the covenantor or himself, & then the action
would be as above. 1 Salt. 139. 3 Salt. 47. 3, 660. 139.
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The last rule is laid down in a very pugnacious manner by Lord Holt. It would seem, between this rule and the former one, there was a real distinction, i.e., that there was a different mode of pleading to be observed, when the covenant was to be performed by or to a man. But says Mr. C. If the cases are the same in point of fact, there can be no difference in principle.

When there is a covenant to pay a sum certain, there can be no apportionment of the demand; the breach must follow the covenant, i.e., it must not be paid for a fractional part of it. As where the offered or a covenant, where the Defendant covenant to pay the plaintiff so much per ton for goods imported, it assigned a breach in not paying for so many tons of one baghead. Here the breach is its assignor, in charging for the baghead, the covenant being only so much per ton. In this case, the plaintiff cannot recover for the ton, which are entire, for he shows no breach. 1 Burr. 124. 3 Edw. 19.

But if the covenant (in the above case) had been to pay 10L per ton and second demands made, the breach would have been assigned well. But where the plaintiff claims more than the contract will support, he may enter a demurrer, for that he has claimed too much, to take judgment for the rent provided the demand is not settled to a certain amount by the covenant, but depends on something of this sort. So if the demand is so settled, as in the above case, if he be a covenant to pay 10L, there can be no demurrer. East 658 1 Bost. 107. But if the Defendant does not enter a demurrer, when he is allowed to the Defendant may defeat him by Demurrer; or after judgment, he may arrest the judgment.
There have been a few instances in England where the Defendant, in the action of covenant broken, has pleaded a generally that he has not broken the covenant. This has been the practice in Coram, in the non suet, that it has never been questioned till within a few years, when at that time a Defendant pleaded thus generally to an action of covenant broken. I think, says Blackstone, 'that the plea was held as no evidence at all. And I conceive that this is never a good plea; for it always throws questions of law to the Jury, which generally does not form an opinion.

Suppose that as a general covenant of seisin, the Plaintiff alleges that the covenant is broken by the Defendant. The Plaintiff pleads in general terms that he has not broken the covenant. On an the plea, if it were good, every principle of law upon the subject might be given in evidence to the Jury. But I say that such plea does not usually form an issue. For, the Defendant in his declaration that the Defendant has broken his covenant. The Defendant pleads that he has not broken it. Now here is not on fact proven to denied. The Defendant in this plea you, could go into the proof that the more respects the same. That the covenant had been all performed, or any other defence that he might choose to make. And from this plea the Court or the juries would never tell on what particular he meant to cast his defence. He introduces his evidence, but he could not be confined to any particular defence. So if he failed in one, he might proceed to another in another. So
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It is laid down in the books as a general rule, that when the covenants in a deed are all in the same form, the Deft. who has sued upon the covenant may plead performance of it in general terms. But says a No. 2. this rule, in the circumstances in which it is laid down, is not law. It requires qualification, i.e. in fact it holds in those cases, where only one of which the thing covenanted to be done, or in some way, indefinite, in kind or number. It is rather an exception to the general rule, which I conceive to be called the reverse.

Thus if a Sheriff covenant to return a faithfully serve suits, processes, laws, etc. directed to him, upon covenant brought upon this, he cannot plead generally that he has performed all the covenants, for such plea embraces every matter in principle of law upon the subject, which must be judged of by the Court and not the jury. For this purpose of avoiding pecuniary, for the plea otherwise he would be obliged to avow the time, mode of serving & returning every process which had been directed to him during the continuance of the covenant, he would as Lord Coke expresses it, “tend to infiniteness.” Again. Suppose an officer enters into a covenant to perform all the duties of his said office, “because assigned is that he has not performed all the duties. Then the acts covenanted to be done are in their kind so numerous, that the law allows allowance to plead a general performance, for the same reason as in the case of cases, because otherwise it would tend to infiniteness.

Comps. 125, 1146c. 91. Tho. Park, 82. 96d. 2302. The cases are much like this, for the rule as laid down above.

But says a No. 2. Make the general rule clear to be this.
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that when the assured has covenanted to do a number of specific acts, he must plead performance specially, i.e., he must plead the performance of each and every specific act, he cannot plead generally that all he covenanted to do he has done. This says Mr. Scobey is the true general rule, and the otherwise an exception to it. Thus suppose an executor executes a covenant to pay all the legacies contained in his testator's will in an action on such covenant, the executor cannot plead generally his payment of all the legacies, but he must plead specially the payment of every particular legacy. Again, suppose he covenants with B. on the 10th day of October 1813, to convey to him (B.) at the expiration of six months all the lands of which he was possessed in fee simple on the 10th of October. Now to an action brought against A. on this covenant, he must plead that he did convey to B. on the day specified, one farm called Blackacre, one farm called Whetcroft, and that these were all the lands of which he was then seized in fee simple, at that time.

It is a general rule, laid down in a modern case, that a plea of performance otherwise than in the words of the covenant is ill. Thus suppose the case. Where A. covenanted to convey all the lands of which he was possessed in fee simple, etc. Here the Doe pleads that he has performed all the covenants in the deed, such plea would be ill for it embraces matter of law to be determined by the Court. 16 Geo. 3,停下来。But says Mr. G. I doubt whether this rule is universal, for there may be exceptions, wherein the Doe may plead more particular or other words than those in or to the covenant. If we, too, a general rule. I have observed that the general mode of pleading in cases
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The affirmative covenants is allowed to avoid prolixity from further authorities to the rule, you may see, Comp. 358. 32 B.R. 135. 1 Ed. 749. 916. 1 Port 1242.

This same mode of general pleading is also allowed in replications, assigning breaches of condition in actions on Fatal lands, where the assignment of each particular breach, would tend to prolixity. Thus where a man enters into a parcel for not to sell a certain article within such a time by such a particular place, p. p. in his replication assigns that it was sold to A. to B. and divers other persons, this was held to be good; for it would be almost infinite to assign every breach of the condition, it appearing that he had been in the constant habit of breaking it. 32 B.R. 459. 2 Dech. 11, 35 B.R. 55. 1 Dech 482. 1 B.R.

But where some of the covenants in a deed are affirmative & some negative, the Def. cannot plead special performance to such as are negative. For one cannot plead special performance to a negative covenant, it being not to do a certain act. But if the Def. does plead special performance to such covenant it is a fault or from merely is added by verdict, the latter opinion seems to be upon general Elizabeth too. The proper plea in such case is, a special plea, that he has not done the act, the covenant not to do. Comp. 32 B.R. 696. Inst. 303. 2 Inst 578 Bart. 82 91.

The following is an exception to this rule. If the negative covenants are good, the affirmative are good, the Def. may plead precisely as if there was no negative covenants in the deed. But it must appear the face of the covenant record, that the negative covenants
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are void. Suppose a Deputy Sheriff, among other covenants, covenant with his Sheriff not to serve any suit on other processes above the sum of 100$. If the Deputy Sheriff is sued upon this deed, he may plead, in form, without notice, this negative covenant at all. For it is upon the face of it void. In creating a Deputy, the Sheriff cannot in any manner abridge him of the powers or enslavement arising from his office of Deputy. 2 P. & D. 1321. 4 Sand. p. 174. notes. 

When the covenants contained in a deed are in the disjunctive, the Defendant must show in his plea of performance which he has performed. Disjunctive covenants are such as bind the covenantor to the performance of one of two things. Thus suppose A. covenants with B. to pay him 100$ in one year from the date or convey 1 acre to him. "Nor to an action on such covenant, A. can plead "that he has paid B. the 100$ or conveyed the land." But he must show in his plea which he has done. And if he pleads payment of the money, he must also show the time, place of the payment, & the acceptance of the money. Or if he pleads the conveyance of the land, he must show the time, place of executing the deed, & the acceptance of the same. 133, 38, 133. 343, 860. 133, 38, 133.

There is a controversy of opinion in the books, whether pleading in a manner disallowed by the above rule is fault in form or substance, i.e., whether such pleading is it a

yourself or your ad

see

conceive
does

That it

is a defect in point of form only. Suppose then, the above case, you plead payment of the money, but do not state the time, place of the payment, or the acceptance of the
mony. Now the payment I think is the substance and the manner of it is from only. But it is necessary in court pleading to show the whole of the circumstances attending the performance. See 2 B. & C. 101; 110. 1 B. & C. 115; 3 D. B. 22. 4.

When one covenants to do an act, which consists of a matter of law, as to execute a deed to suffer a recovery, to buy a freedom, he must not only plead special performance to such covenant, but he must plead quo modo, that is, he must show in what manner he did the act. Thus if a covenant with 15. to execute a deed of bargain & sale of a certain article to an action on such covenant, A. must not only plead that he did make the conveyance, but also that it was made by deed, that all the necessary solemnities in executing the deed of bargain shall were observed. So also if the covenant was to suffer a fine, B. must show in his plea before what court the fine was levied that it may appear whether that Court had competent jurisdiction whether the judgment was correct.

The reason why the plea in this case must plead the manner of his performance is, that the covenants consist of matters of law & must be shown to the Court in the Defendants plea. See 1 B. & C. 101; 2 B. & C. 22. 9; 3 B. & C. 15. 4; 13 B. & C. 99; 1 B. & C. 26.

The rule seems to be universal, says Mr. Goulde, that when the covenant is to do an act, which must appear of fact and must the performance must be specially quo modo be pled, this for two reasons. 1st. He must plead quo modo because the covenant embraces matter of law and fact, because the Court is not the party to judge of the fact, but the opposer must. This is far of the plea of performance. The next is by far the most difficult to be understood and is...
The pleadings of the Defend. to actions on Covenants. Indemnity.

There appears to be many arbitrary distinctions in this kind of pleading, which could, but the distinctions are generally founded in reason. There is no doubt however but it is the most difficult to be understood of any branch of pleading in this action.

As to the Defend. plea of covenant of indemnity, he may sometimes plead non damnumficus. i.e. he may aver that the defe. has not been damnumfictus in consequence of entering into bond of surety by way of performance; and in other cases he must aver that the defect has not been damnumfictus at all, nor how he has discharged him. The chief difficulty seems to distinguish when it prefers to plead non damnumficus by way of performance, and when he must go further, i.e. how the defe. was discharged.

To this, if the covenant is to discharge the covenantor from any particular thing, ascertained in the instrument, non damnumficus is not a good plea. Thus suppose a decree joins a debt or a covenant to pay, if the defe. pays a bond of indemnity, that is damnumfictus, and is sued, non damnumficus is not a good plea to such action. 2 Coxe 3d. 374, 375. 117, 118. 4 East 239. 914. 1006, 926. 639. 632. In this case the covenantor must plead that he has discharged the covenantor from that bond, and must also show how he has done it.

If the covenant is to indemnify the same harm, non damnumficus is a good plea, i.e. a plea that covenantor has not been damnumfictus, is a good and sufficient plea. 3d. 309, 310. 1007, 926. 639, 632. 117, 118. 120. 1, 117. 357, 309, 10.

From the nature of the differences between these two last principles, say Yould, it appears hard to be tied. The first case is the Defend. covenants to discharge a quittance. In this case
by the very terms of the covenant the Def. is bound to some specific act, amounting to a discharge or acquittance. But when the covenant is to save harmless, the covenantant may be saved harmless without any act done by the covenantant. He is of course saved harmless, if he has suffered no harm. But it can't be said, he has been discharged or acquitted, unless the covenantant has done some act amounting to a discharge or acquittance. This says 1st, I take to be the correct foundation of the distinction. I agree it is pretty artificial. But there are others to be observed—this—

If there is a covenant or bond to discharge or acquit, in general terms, from all suits, costs, damages or non damni coreatus, it is a good plea, for how the thing to be done is not ascertained in the instrument. The thing to be done in future contingent it does not appear that there has been a damnification. This too is a distinction very artificial. Cases 216, 246, 374, 153, Phil 639 note. Selous 244.

Further, in this case where the covenant is to acquit & discharge of all future suits, costs, damages, in general terms, if there is a particular act covenanted to do, to acquit & discharge the covenantant in the indemnifying bond, as by paying the bond, non damnification is not a good plea, but the Def. must plead specially, the performance of the particular act. The reason in this case is obvious. The covenantant in the indemnifying covenant with his party, the covenantant, that he will pay the sum by bond by such a day, now here it is manifest that the covenantant in the indemnifying bond can't be performed without doing that act. The performance must be specially pleaded in the.
The rule is the same, if a bond is given for the payment of money at a certain day, non clamorificatus is not a good plea, although it appears that the bond was given as an indemnity to save harmless. That if a debtor gives his security a bond of indemnity (which upon the face of it clearly appears to be an indemnifying bond) in which he covenant, that he will discharge the covenantants from the duty bond, by saying that bond on a certain day, to an action on the covenant non clamorificatus is not good plea, he must plead the payment specially. 1 Boz. & B. 538.

Again, I just observed that where there is a covenant or bond to discharge or acquit, in general terms, non clamorificatus is not a good plea because the thing to be done is not ascertained in the instrument, still if the plea in this case is a plea affirmatively, that he has discharged or acquitted by performing the act, he must plead quo modo. And again, if the covenant is to discharge or acquit from something indefinite, how non clamorificatus is a good plea, but if that is the plea, will plead special performance he must plead quo modo. The reason in both these cases why he must plead quo modo is that the plea of performance, specially pleading quo modo, is a positive act, this act he can certainly shew in his plea. You may note this as a general rule viz., that in those where non clamorificatus is a good plea, if the plea will plead affirmatively, he must plead specially quo modo. The reason of this rule is assigned above 260, 360, 634, 895.

If a covenant is for an act to be done by a stranger, the covenantantor must plead performance specially in those cases in which he would, had he been obliged to have
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performed the act himself. [Recto 55960.

If the Deft. pleads non-damnification where he has a right so to plead, a replication consisting of a general traverse is ill. If the Plea is to the special damnification, eg. the Deft. pleads that the Pltf. has not beenDamnified, the Pltf. replies that he has; this is ill. For the breach no where appears. The Pltf. in his replication must show in what particular he has been Damnified; for if he had suffered any damage, it will admit of specification. Without thus specifying the issue is incomplete. 1 Sav. 83. 1 Eq. 444. etc.

A covenant is one deed can be pleaded October 27, 1812. in bar to an action on a covenant in another. 5th. Ab. 31. ed. 9th. and unless the former covenant is in the nature of a defeasance or release to the latter. But contra a defeasance in a separate deed may be pleaded in bar of an earlier deed, and unless the later deed is intended to operate as a defeasance or release. That is proper words must be used in the 2nd deed to denote that the intention of the parties was, that the 1st deed should be defeated. Thus if the 1st deed recites the first declares it void, or if there is a clause in the 1st deed, by which the covenant is first, binding himself never to see (which you recollect is total discharge of the obligation) such words plainly denote that the intention of the parties was the right of action in the first deed should be totally destroyed, etc. this 2nd deed may be pleaded in bar to any action but upon the first deed a covenant. 20th. 21. 2d. Eq. 525. 608. 628. 629. 426. 39. 26. 205.
The contract to illustrate the general rule, that a covenant in one deed cannot be pleaded in bar to an action on a covenant in another. Suppose the lessee covenants with the lessor to pay him 100 $ per annum for rent, & the lessee in a distinct instrument, covenants that the lessee may retain 100 $ per annum for repairs, now the lessee cannot plead this latter covenant in bar to an action but by the lessor upon the covenant promising to pay rent. The two covenants are distinct. The lessee does not say in his covenant to the lessor that the former covenant is void, nor does he covenant that he will never sue him, neither in any way be said that there are words amounting to a release. It is a distinct right of action in the lessor, if the lessee should compel him to pay the rent. They both have separate rights of action upon their individual covenants, but one can never be pleaded in bar to the other.

But contra one covenant may be pleaded in bar to another covenant in the same deed or instrument, as the phraseology of the latter are no words amounting to a discharge or release. In this case the instrument is entire, & all its parts must be taken into consideration in giving it a construction. Thus if the lessee covenants with his lessee to pay him one hundred Dollars per annum rent, & the lessee covenants in the same instrument that the lessee may retain Fifty Dollars per annum for repairs. Now in such covenant, the intention of the parties manifestly is, that the lessee is to pay the lessee the 50 $ per annum rent. The Court will give the covenant such construction. 62 743 78 483 152 46 32.
There is a class of covenants which require a distinct consideration
and severally and severally and several covenants.

If two persons covenant "jointly and severally," the covenant may maintain a distinct action against one, a separate action against either, or a joint action against both.

Also if three persons covenant "jointly and severally," the covenant may maintain a distinct action against one, a separate action against either, or a joint action against all of them. But an action against two without joining the third cannot be maintained. The reason is the covenant must be treated as altogether joint or altogether several. When therefore the covenantor brings his action against all he treats the covenant as altogether joint, when against one as altogether several, but when he brings his action against two he leaves out all the third. He treats it as partly joint and partly several, which the law will never allow. 2 B. & C. 222; 3 B. & C. 698.

But if two or more persons covenant "jointly" to perform an act, they must all be joined in a suit upon the covenant, i.e. if the covenantors are all living at the time of the action brought. 2 B. & C. 99, 13th Ed. 392.

If there are two or more joint covenants, they must all join in an action as jeffs, otherwise the covenantor may be doubly charged. When one covenant is two jointly, there is no right in favor of either of the covenants severally, the right is joint. The rule is that the person whose right has been violated shall have a remedy, but how the right is joint of the remedy must be joint of course. If the action is brought by one of the covenantors, the B. & C. after app of the Court may determine. E. C. & B. 271; 282; 2 B. & C. 1168.
When the right of the covenantors is joint, the rule is, if one of them dies, the sole remedy is in the surviving covenantor. The representative of the deceased cannot bring the action, neither can he join with the survivor. I am not sure to be understood that the ultimate right of property in the obligation survives to the surviving obligee, but only that the remedy upon this obligation is now his; his alone.

Bro. 729. 118. 6 Titul. 445. 7 East 497.

In some cases, where one covenantor holds by, or upon, non joint 
several, i.e. when the covenant is to the covenantor jointly 
& to each of them, the covenant is construed to be joint in oth 
er. Several. That is, in some cases all must join in the suit, 
notwithstanding the words of severally. In other cases each 
deny one may have a separate action upon the covenant.

The rule is this, if upon inspection of the covenant it appears 
that the intention of the parties was to convey a several int 
rest to the covenantors, each of them may have a several act 
don; or if on the other hand, it appears that the interest to 
be conveyed was intended to be joint, they must all join in 
the action; he joint or several form of the phraseology not 
withstanding. Here the interest conveyed is the criterion. This 
of one farm in the same instrument Black acre to A. and 
White acre to B, + covenants with both & each of them, is to his 
interest in both these farms, yet the interest being several 
either may maintain a several action upon the covenant.

Here the covenant as to Black acre is to A & B. but B. has not 
the least interest in that farm, so it is demised absolutely 
to A. So also if of White acre A. has nothing to do with it. & Co.

3. 18. 19. 68. 77. 78. 78. 10 1698. 1. 22. 63. 3. 2. 4. 3. 116. 24. 6.
covenant.

Do also if one covenants with A. & B. to pay them 1000£, which sum is to be equally divided between them, this amounts to nothing more in its legal effect than a covenant to pay 500£ to each of them; they will therefore have a separate action to recover so much. See 12 T. & C. 225. And in this case each one may declare as if the covenant had been made himself alone, he need not state the other covenant or at all authorities above.

I have observed that if it appears upon the inspection of the covenant, that the interest is several each of the covenants may have a several action, if it appears the interest was to be joint the action must be by them joint by. Thus suppose A. & B. covenants Black acre to 100£. 4 covenants "with them each of them" done, it is manifest the interest that the interest is joint, both must join in the action, at the same place, the joint interest as to the covenants. Here again the right is determined by the interest. Scott 18.


It follows then as an inference or corollary, that all the two or more co-obligors may bind themselves severally to the performance of the same thing or duty, yet two or more co-obligors cannot have distinct rights to enforce the performance of that thing or duty. For if two or more co-obligors could have distinct several rights of recovery, it would follow that the co-covenantor would be subjected to as many actions for the performance of one thing as there were covenants in the covenant. For a recovery by one in his own right is no bar to a recovery by another in his right.

Upon a joint or several covenant by two or more, either
Covenant.

may be sued alone for the neglect of the other, it alle the
one done is in no fault. As if A and B covenant that B shall
perform a certain act; now how it is nothing more than a
safety for the performance of B, still he may be sued upon a
breach of such covenant. *Sta 353.

When two or more are jointly & severally bound, a recovery
against one of the obligors is no bar to an action against the
other. Further is the taking the body of one in Execution a
bar to an action against the other. But the recovery of actual
satisfaction of one (as all the money due upon the covenant)
is a good bar to any action brought to the other covenantors.
*66a. 66. *Proc 73. 6 East 267 & 6286.

If one of two joint covenantors dies, his Executor is not li-
able to the covenantor on the covenant. But if one of two joint
or several covenantors dies, the covenantor has a right of ac-
tion against the survivor & the Executor of the deceased. In
the first case the covenant being joint, the deceased had
no sole liability, he could not therefore transfer any to his
Executors; but in the latter case, the covenant being sever-
ally, the covenantor had a right to have his remedy against
the Testator alone, the liability will then fall on surviving
his representatives. East 2100.

If two or more covenant "jointly or severally" the
word "or" is construed as having the same meaning as the
word and, it such covenant is in effect the same as cove-
nanting "jointly or severally." For him the covenantors put
it into the election of the covenantor, whether he will
subject them jointly or severally. Then the whole covenant for
each other, bind covenant for the other. *Proc 382. *Lyde 18. 6 East 186.
*Sta 76.
covenant.

If two or more jointly severally, one is made Execu-
tor to the covenant, the whole obligation is discharge-
at law, This is to be the covenants to be the covenan-
tee becomes Executor to b. Now if the action was to be bebot, it must be brought by A in his own name, this is one of the obligors to the bond, so upon the records it will appear that A is Left, the might be made Left too. Now the right

t any authority. Salk 360, 366, 355, 66, 516, 206

The rule is the same in Chancery as between the origin-
al covenantors, the covenantors representations. The if
is such case there is not able to pay, the debt unless
this covenant is paid Chancery will compel payment.

Taft 2 cas. 240, 2 Pow 2, 254, 2 Bac 311, 2 Ch 72, 10 572, 519,

In the last case a bit of b to compel part of the bond in
favor of the creditors, upon the ground, that making one of the co-
vanantors an Executor is in fact giving him a Legacy. It is in fact
giving him a legacy of that bond, legataries must be postponed
to creditors according to the major that a man must be
just before he is bountiful.

But the Executor in such case can never be com-
pletely to pay the bond in favor of the legataries repre-
sentations. This right is preferable to all mankind in
law, in Chancery to all except the honest creditor.

When the instrument begins with "we covenant"
it is signed by one only it is good as a sole or several
obligation against him. Bac 323, 205, 32.

If two of more bind themselves together in an ob-
ligation, without using the word "joint", the obligation
is joint of course unless words implying a several ob-
obligation or duty are understood. As if A. & B. execute a promise to C. without joint words expressing it. This note will be construed to be joint. L. Ray 1203. Buc 597. No. 130. 236.

But if a covenant begins "Covenant," it is interpreted by two or more it is construed to be joint. Here the word "I" in the singular is to be taken distributively. And when it is promise to pay if A. & Tom cock promise to pay, then such obligation is construed to be joint. General 1204. 

Fines 156. 132. Smith v. B. 176. 35. L. Ray 1544.
The Action of Account.

By Mr. Poulton.

October 28, 1812.

It is unfortunate for this country that this action has been very much discussed in the courts of Westminster Hall in England. The common law action of account is a very common frequent one in Connecticut, and says Mr. P. I believe in most of the States. In England on the other hand the action of Account has given way to a bill in Equity which according to their regulations is much more suitable. Indeed the last account bill in England, was continued from term to term in the Court of Common Pleas, evidently owing to the perplexities under which the Judges laboured, their entire ignorance of the whole science of this action, for the term of fourteen years.

It is on this account that this action has not been materially built up, as most of the common law actions have been. It is for this reason that the English authorities are so entirely barren upon the subject. Sooner does not occupy several pages in his Digest in treating the whole subject, so many principles are still left unvisited, which it would seem ought to have been decided long since.

The action of Account is an action founded upon an express or implied contract, that one who has received the property of another to account for, will render an ac-
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account of it; if he does not this action will lie aga. him.

At common law the action of Account could be
maintained against three descriptions of persons only:

- A Receivers
- A Trustee
- A Bailli or a Bailiff.

It did indeed lie between Joint merchants, but these were sup-
posed to fall under the class of receivers; and in the suit the
Def. at a partner was treated as a receiver. By this it is
not to be supposed that Joint merchants were a distinct class
but only a branch of the third class.

I have observed that the action lay only aga. these
classes of persons. A Receivers in Socage was liable to the ac-
tion in favor of his Ward; a Bailli or a Bailiff receivers in favor of
their respective principals. Com. 3 B. 1. s. 1. sect. 4. 1. 5. 6. 7. 8. 9.

By the English statute 14. 15. 16. and 17. Hen. 8. the action is extended in
favor of Joint tenants & Tenants in Common against three ten-
ants. In this case the co tenante, Defendants, are consid-
ered as Bailiffs to the pef. Before the enactment of this Stat-
ute, if one joint tenant or tenant in common received more
than his proportion of the profits of the land, the co ten-
ant could never call him to any account. 1 St. 12. c. 20. 2. 3.

At common law this action lay only for or against
the original parties themselves, it could not be maintai-
ned for or against their personal representatives. The rea-
son of this was, that the action was founded upon a fic- 
cional privilege of contract which was supposed to exist be-
tween the parties themselves, but which privilege could in
no way be transferred to their personal representatives.
The consequence of this was, that it was submitted to the
representative of each other the disbursements or receipts. 1 Com. Ten. Cod.
1. 1st 59. 60. 113. 14.
There was an exception at common law to this last rule in favor of the personal representatives of joint merchants but not against them. That is, the Executor of the deceased merchant, might bring an action of Account to the surviving merchant, but the surviving merchant could not sue the Executor of the deceased. Thus if A, B were joint merchants and A died, now A's Exec. may sustain account as the survivor vix B, but B could not maintain the action agst. the Executor. (Sure, is it a good rule that will not work both ways?) The reason why the Executor could not be sued was, he was not substituted able to account for the profits received by his Testator; but the survivor may as easily make an account to the Executor of the deceased as to the deceased himself were he living. But this exception was introduced by the law merchant, it was substitutive only to favor trade and commerce. §920 of Law of Torts. §926.

The English Statutes 13 Car I. 25 Car II. and 31 Car III. extended the action generally to the representatives of Guardians, bastardy, receiving on their favor. That is, these Statutes gave the representatives of the party entitled, the same right of action, which before had been given to the representatives of a deceased joint merchant. But these Statutes gave no remedy against such persons. §517 of Stat §526.

And now by the Statute of Anns, the action is extended against the personal representatives of Guardians, bastardy, receiving generally; this statute also extends the action in favor against joint tenants, tenants in common. For observe there was no necessity that this
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Statute should have extended the remedy in favor of the representatives of the creditors in so far as the receivers, for the Statutes of Edwin had done this before. Upon putting all these statutes together, we find that the action of Account now lies generally for and against the personal representatives of the original parties. B. C. 82, 1

1 B. c. 17.

In every case, except that of a guardian or sojage, the Defendant is chargeable in the declaration as bailiff, as receiver or as both.

At common law a joint tenant or a tenant in common was neither a bailiff nor a receiver, because he was liable to no action compelling him to account for the profits over above his proportion, but the statute which gives the other tenant a remedy against it makes him liable to the action of account; whereupon statute creates him a bailiff or a receiver. He is not sued in the character of a joint tenant or a tenant in common, but in the character of a receiver or bailiff to the other. So also in the case of a joint merchant, he is charged as a receiver.

These statutes have not multiplied the classes of persons liable to the action of account, but have only added a description of persons within the classes, which at common law were excluded. Thus the action will not lie now, unless it is brought against a guardian or sojage, a bailiff or a receiver. The pleadings now are precisely the same as they were at common law. Com. 31, tit. acc. 2, c. 3, Pig. natura brev. 116.

When I observed that the joint tenant, or tenant
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In common is not charged in that character. I do not mean that the plff, does not state in his declaration that the deff. is joint tenant or tenant in common, for this does appear, but I mean that the joint tenant is not debarred against the nominee, he is charged as bailiff to the deff. In the case of the declaring the deff. as joint tenant, or tenant in common, as the case may be, he is required to render an account of the profits he has received since he has become bailiff to the deff. on some cause to the contrary. So also in the case of joint merchants, the rule is the same.

I have observed that the deff. is always to charge as Guardian, bailiff or receiver. But note a material distinction between a Bailiff & Receiver.

A bailiff is a servant or agent who has received property of another to improve for the owner, & who is entitled to wages for his trouble. Inst. 172. a.

And a bailiff is bound to account not only for the profits he has actually made, but for those also, which by reasonable industry he might have made. Thus if a tenant in B. with 1000$ of property to employ in traffic & speculation, & B. by his gross negligence suffers the property to be idle, he shall be accountable for as much as the property might have gained upon a reasonable supposition. For this is manifestly a breach of trust.

Inst. 172. a. Com. 3d. 4th acc. 3d. 1 P.R. 2d. note. 13. 2d 19.

A receiver is one who has received money to the use of another, to render an account for it, but who receives no compensation for his trouble. He is not one who receives property to speculate with & make profits out of.
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It is for the owner. Thus if A. be a tenant for rent, he is liable to an action of Account as receiver. Here, although the steward receives wages for his service in his office of stewardship, yet he gets no compensation or wages when the goods of receiving the money to them of the owner. Again, I send my agent to receive a debt for me due from B. As my receiver, he is liable to an action of Account if he does not pay it over. (1 Bost. 172.)

(1Bost. 172.) Com. Di. Ti. Acc. 2. 4.

But to the general rule that receiver has no allowance it is not accountable for profits, there is an exception in the case of Joint-merchants. But this rule or exception is introduced by the leges mercatoriae to favor commerce for the benefit of trade. (1 Com. Di. Ti. Acc. 3. 15. 13. 1 Bost. 172.)

It follows as a consequence from this distinction between a bailiff or receiver, that a bailiff can't be charged in the declaration as a receiver. For if the bailiff is charged as receiver at the full profits in the action, the judgment must follow the declaration; but the defendant would be entitled to no allowance. But in such case the defendant will prevail upon the general issue pleaded; the evidence will not support the declaration. (1 Bost. 172.) 1 Wash. 119. 1 Bost. 172.

We have a statute in Comm. extending the action in favor of and against joint tenants, tenants in common, and co-ownership, also in favor of all their personal representatives. So that an Executor may be sued on any issue. You will observe that the Stat. of Comm. has extended this action to a class of persons, who never had the right.
of bringing the action to England, viz. Cappercum. Then have
now the same privileges in this state as joint tenants. The
Statute also extends the action in favor of one Executor, his
Co Executor, as residuary legatee, against all residuary
legates generally. Stat. l. 10.

It is remarkable, says Tudor, that our Stat. did not ex-
tend the remedy against the personal representatives of the
bailiep, &receiver, in terms. It is silent as to such persons. But
both have, notwithstanding uniformly sustained the action
when brought against such representatives, when the English
Statutes.

And on the other hand, our Statutes does not extend the
action in favor of bailiep, &receiver, but our Courts have
adopted the English principles in their full extent, so that
when this action can be maintained in Eng. it will be sup-
ported in Connecticut.

I have before observed that this action is founded upon
a peculiar privy existing between the parties. This action
will not therefore lie to recover damages in case a Tax is
committed, because no is no privy. Suppose to antici-
pate wrongly, whose land it occupies the profits. B can't have
this action to compel him to account for the profits he has
received. He has another remedy, however.

There is an Exception to this rule, in Eng., in favor of
the King. He may have this action. There is also an other ex-
cption in favor of Infants. For if one enters upon the land
of an infant, wrongly, & takes the profits, the infant may
have this action against him. But the wrong done in such
case is treated as the Guardian of the Infant. But this ne-
of the many privileges given Infants to protect them from the wrongs of the more mature in age. See 19. tit. sec. 7.

It is said in some of the books, that the action of account cannot be maintained for the recovery of a sum certain. But in the unqualified terms in which it is laid, I take the rule to be incorrect. The true rule I believe is that for a sum certain one cannot be charged as bailiff, but he may be as receiver. Thus if one delivers 100$ to B. to trade with for the benefit of the owner, now B. can't be sued for this 100$ alone, as bailiff, but he may be sued for the 100$ as receiver, or he may be sued for the 100$ together with the profit as bailiff. In such case the 100$ is not the exact sum he will recover, i.e. if it is sued as bailiff, but he will recover in addition the profit he has made from the 100$. Com. B. 7.

I am confident, says Lord, that this is all that is meant by the rule. For it is clear that if a Sheriff receives a sum of money upon an Execution, the plaintiff may sue him for that sum as receiver, in an action of account. Act. 206. Again if I send my servant to receive a debt of 100$ for me, I can maintain this action against him, for that sum as receiver.

You may then put it down as a general rule, that who ever receives money for another, is to account for it; this action will lie against him to recover it out of his hands. S. 1. 32 B. 180, 2. Mod. 107, Com. B. 7. sec. 4.

If receiving money of B. to deliver to him on the hand for a certain sum. B. may maintain this action against him as receiver. E. G. I deliver money to B. my agent to be delivered...
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If money has been received of A. to the use of B., this action will lie in favor of B. against the receiver. But he must state in his declaration of whom the money was received, because if he declares against the Def. as a receiver generally, he will appear to be a receiver from B. himself. Inst. 122a. 18CC. 120. Com. to acc. 4.

But if I deliver money to A. to be delivered over to B. for my use, which money is actually delivered over, I cannot maintain this action against B. Thus suppose I deliver money to a merchant in Pittsburgh to be delivered over to a merchant in New York for my use. I cannot maintain account to the merchant, for there was no privity between us. But I may have another remedy, as indubitably as this act, as the law may be. Com. Di. to acc. 9. 18CC. 118.

If bailed goods are delivered, delivering them, the action of account will not lie against him. But bailed, delivered to will. Com. Di. to acc. 9. Inst. 19. 18CC. 116. The reason why he cannot be charged as bailiff is, that he does not receive the goods in property for the bailor, so he cannot be charged as receiver because the property is not money. Receiver is one who receives money to the use of another to account for. If the property bailed is money, he is not accountable as receiver only; there is some agreement between the parties which constitutes him a receiver.

This action does not lie as a defendant, because the action is founded upon a contract. There is more, except in the case of the King than infant, which I have before noticed. Com. Di. to acc. 10. 3 Lion 24.
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If the bailiff or receiver makes a Deputy October 1812. he cannot have the action of account against the Deputy, for belief of the Deputy is not that peculiar privity upon which this action is founded. (Rep. 173, 174.)

The action of account will not lie in any case against an Infant. For all he is liable for his torts, and in some cases for his contracts as for negligence; yet he can never be subjected to this action. There is not only the general objection that the infant is unable to contract, but he is also supposed to want the necessary discretion to enable him to render an account. (Rep. 173, 174.)

If he who receivers the property of another, to account, makes an Express promise that he will account, the owner may maintain this action against him, or he may maintain against upon the Express promise. He may have the account because there is a promise to account, and he may have the action of account, for the special damage he has suffered in consequence of his breach of express promise to account.

It is said by Lord Coke, that the duty of the brings the action of account, upon the Express promise. If the last case, shall not be permitted to go into the particulars of the account, but shall confine himself to the special damage he has sustained in consequence of the failure of the Deft. of not accounting. (Tall 9, Earl 89, E. P. 79, 89; 164, 2.)

Now if the rule laid down by Lord Coke is true, it follows, that a recovery in the action of account will be no bar to an action of account, because the two
actions will not be brought to recover the same thing. The action of Assumpsit, to recover damages occasioned by the breach of promise to account to recover the value of the property deposited the profits. This rule has been questioned by the Editor of the last Edition of Bacon, sect. 119. But says Dr. P., the rule as laid down by Lord Coke, appears to me a reasonable one. I do not say it would be wholly impracticable, but I conceive it would be attended with extreme inconvenience, if the Plaintiff and Def. in an action of Assumpsit were permitted to go particularly into accounting. But says he, I can find no authorities in the English Books to this point, which I attribute to the disuse into which this action has fallen there.

If one, by deed, acknowledges to have received property of another, to be accounted for, the party has his election to bring the action of account to recover it, or an action upon the deed. The requirement of an implicit contract is not merged in the deed; neither is it given as a substitute for the other, but only for the purpose of furnishing an additional remedy. If the deed were given as a substitute, the principle that a man must resort to his higher remedy would operate here; but this is not the case. 1184. 1232. 1234. 1245. 1746. 2747.

If one finds the property of another, the action of account does not lie against the finder to recover it on the ground that the property which is necessary to support this action is wanting here. The proper action in such case, after proof of ownership adduced, on a refusal to deliver, is Brown. 1Sch. 19. sec. 12.
in the action of account, if the self prevails, there are always two accounts. If the self prevails upon the first issue, chosen two, whether the whole issue is in his favor or not. The first is a judgment, upon a compunct, i.e. that the self account. The self does never recover his money upon the first issue, but upon the judgment upon a compunct. Auditors are appointed by the Court of the self accounts before them. [Footnote: qf. 1784.

42. Corr. 15 to acc. 45.]

The auditors being thus appointed, the parties are to meet before them, and the account is to be taken by them. The account being thus taken, the auditors make their award or report to the Court, and upon this award or report for judgment is rendered. The award or report of the auditors, is much in the nature of a verdict by a jury. If the award is in favor of the plaintiff, the judgment of the Court is that he recover the sum thus found due to him by the arbitrators with all his costs. 3 Tn. 6. 1640. 11 Tn. 474. 1 St. 1 P. 39.

Under the Statute of Crown, the parties have a common right to testify for themselves, before the Auditors, and each one may be compelled by the other to disclose, and on being thus required, if he refuses, he may be imprisoned by the Auditors till he will testify and answer. [Footnote: 28.

If the self refuses to appear before the Auditors, or if on his appearing he refuse to produce his account to the Auditors, the Auditors must award that they find the whole demand claimed by the self to be due. In Eng. by the common law this is done by the Court. G. 2805. 3. 20 Stat. 142; 1800, 19. 1642. 11 Tn. 474. 1 St. 1 P. 39.

By our statute it is provided, that if the Auditors find a balance in favor of the self, they must award that
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Balance, which on being returned to the Court, the Defendant will recover the amount the arbitrators have found due him, and his costs. Here in this stage of the proceedings the Defendant is allowed to become a plaintiff. But in a Court of Law in England this can never be the case. If the arbitrators do award a balance due the Defendant, he then can recover no more than his costs; but upon a bill of Equity, which you recollect, has in practice this action in Eng. They can record in their return from the suit a balance. 1 Bl. 160. 2 Term. 156.

I would now observe that these proceedings of the Arbitrators are not before the Court, or under their control. They are out of Court, at a time and place by them appointed: i.e. unless the Court appoint, this is seldom done.

Pleadings. As to what plea the Defendant may plead in bar, there are contradictions in these books. These arise from the different opinions of the authorities upon this subject, there has been a certain abuse of the action in Westminster Hall. There are however some rules which appear well established.

It is a general rule, that it is incumbent on the Defendant to plead in the action, any matter to show that he was not bound to account. The plea in bar must be made before the Court, and before the rendering of the first judgment. The general issue is, upon a direction, another bailiff or another receiver, as the case may be, and in all good pleas, it is proved will bar the action. 1 Bl. 160. 1st Term. 1 Bl. 160. 2 Term. 156.

So also a release of all actions is a good plea in bar. For if the plaintiff has released to the Defendant his right to recover in all actions, it will operate as a discharge to this as well as to all others. 1 Bl. 160. 4 Term. 85.
It is also competent for the Def. to prove an award of arbitration that he should be acquitted of the action. For if the parties have once submitted to arbitration, they have a waiver in favor of the Defendant, it is an extinguishment of the plaintiff's right to recover. See 12., 11. 4th ed. 32. \\

It has also been determined that a plea that the Def. received the money to deliver over to a stranger, is that he did actually deliver it over, to a good bar to the action? For if the Def. received the money to deliver over to him, it never was liable to account. See 12., 11. 4th ed. 32. \\

The plea which I have thus far considered, all conduces to show that the Defendant is not liable to account. You may ask, why is the Defendant, confined to pleas in bar, which to the point only? It is because all pleas in bar, if true, prove that the Defendant ought not to account, and it is a general rule that any plea in bar, which does not show this, is it. Thus if the Defendant pleads payment in bar, it is it. For this admits the fact, that he was once liable to account. Payment is not accounting; although he may have paid the plaintiff all his due, still the plaintiff has a right to his account. 6. (2.) 11. 4th ed. 32. \\

But a plea that the Defendant has once fully accounted, is a good plea in bar. For if he has once accounted fully, it is, he is entitled to send him before an auditor to compel him to account the second time. Such plea is good, though by it the Defendant admits that he was once liable to account. 6. 11. 4th ed.
has once undergone his full account, this is not the proper
way to recover the balance due, it is well stated in
practically that an informed complain which must bring 5128, 114, 32. 112, 40.
But the plea of full account, the defendant can go into
the particulars of the account, as the items which compose it.
If he is allowed to do this, he would be, in fact, ac-
counting before the court, and they have no jurisdiction on
such matter. But he must prove the accounting done oth-
erwise, as by a writing signed by himself or the plaintiff, or
the account stated in the bill. 3 Trench 4235.

It is a general rule that if the Def. once admits his lia-
bility to account, that no special plea in bar is good, except the plea
of full account, a release, or something equivalent thereto, as an
award. All other defences he is not allowed to use before the St.
But if he has any other defence he can make use of it before
the Auditor. 3 Ueba, 72, 113, 114.

All defence, except such as go to show that he was never ac-
countable, must be pleaded specially. Of course a full ac-
counting, and a release must be specially pleaded, because such plea
are inconsistent with the general issue, which you recollect
is, never Guardian, never bailiff, never receiver. They therefore
can't be given in evidence against it. They do not deny that the
Def. was once liable to account but on the contrary, insist
the fact; but they have been released by matter subsequent.
3 Ueba, 113, 14, 2 Swift 142, 32.

If the judgment goes competent to be before the Auditor,
practically may plead to join issue either on matter of law or fact.
It is said that when issue is joined before the auditor, the
cause must be carried back to the Court by them tried.
But by this is only meant, then, when the issue is joined upon some special matter of law or fact. The most usual plea of the Def. before the Auditors is the thing in question; they are bound to determine, when this is the issue. But it is true, if the issue is joined upon a matter of law, it must go back to the Court, for the arbitrators are not competent to determine a controversy. 3 Will. 44, 22. Co. 34, 806. Co. 60, 4, 22. & 24. &c.

The above rule, so far as it relates to a special issue in fact, is not adopted in Conn. Here any issue of fact is tried by them.

Another general rule is, that whatever can be pleaded in bar must be so pleaded, it cannot be pleaded in the trial before the Auditors. The rule is general, that whatever is properly plea-able before the Auditors cannot be pleaded in bar; so also whatever is properly plea-able in bar, cannot plea-ble before the Auditors. For to any given Defense the Def. must plead thereto, the earliest opportunit, he has. So would be contrary to all rules therefore of the Def. could retain his plea in bar to be made use of before the Auditors when it would have been effectual to have prevented the first judgment. If therefore he does not make use of his plea in bar before the Court, at the proper time, he shall be considered as waiving that defense, and noting it up on some other matter. 3 Will. 44, 22. Co. 34, 806. Co. 60, 4, 22, 42. & 24. &c. 23. 24.

It is a general rule that the Def. can never plead any matter before the Auditors, contrary to what has been plea-ble and found in Court. This would be, even if permitted, to contradict the first judgment quasi competent. Hence the Def. can never plead before the Auditors, that he was never bound on certain recitals. For the judgment quasi competent
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necessarily implies that he was. 

Thus if the plea were to be tantamount to a denial of all the facts and defences, the arbitrators would have no jurisdiction over them... 466 82 3 112 1 24 148...

Contra, it is good accounting before the Auditors, first, to show anything which he could not have been held liable for the Court, to the action, but which proved he ought not to be eventually liable. The rule presupposes that the cause is such as could not be pleaded in bar; he must be allowed to make use of it before the auditors them, else he could not from it any where, and it would be a reproach to the law that a man had a defence it is not permitted to make use of. Suppose for example the defence is that the property for which he was accountable was lost at sea by the act of God. This defence could not be pleaded in bar, but it is good pleading before the Auditors. It admits his liability to account, but discharges him from all eventual liability to pay for the property. The rule is the same if the property was lost by public enemies, by robbery, without fault of the Defe...

Thus the proper mode when the Defe pleads any of these things is to make out the account charging himself with the property, it then charges the Defe with loss by the hands of the sea, public enemies, by robbery, &c. as the case may be.
If the whole of the property was thus lost, the Def. may charge him for the whole; if but a part, he may charge him for the part. Com, 6th. acc. 8th. 4th. 9th. 1th. 26th. 27th.

But if a plea that the property was irreparable, and being likely to perish, the Def. sold the same upon a credit, is not good; unless he had special permission or authority from the Mfr. to sell. Pullin 100. 130. 140. Com. 6th. 1th. acc. 8. 12.

A bailiff is allowed all reasonable charges and expenses in his account; the bailiff must have a compensation, else he loose his character as bailiff. This rule does not hold where he makes himself a bailiff on his own. E.g. a man enters wrongfully upon an infant's estate, he is liable to the infant for all the profits he has actually made from the land, also for all he might have made; still he is not entitled to the benefit of a lawful bailiff, can receive not the least compensation. 1st. 89. Com. 3th. acc. 8. 12. 1st. 1st. 21.

And a receiver is entitled to no allowance whatever, for he is one who has the money of another to account for, without using any trouble or expense about it; and if he do use any trouble or expense about it, receiving a compensation therefor, this at once destroys his character as receiver, and makes him, ife fact, a bailiff. 1st. 17. 20. Com. 5th. 1st. acc. 8. 13.

The following are rules which have been established under our statute.

In cases when an action of account is brought before a single Magistrate, as a Justice of the peace, he tries both the issues; that is he determines in the first place whether the Def. shall be compelled or not to account, and if he the subject of the account, himself of fixing the place of a auditor.
It is also provided by our Statutes, that in an action of Account, where the sum exceeds 17s. 6d., the Superior Court, or Court of Common Pleas may appoint Auditors to adjust the accounts of the parties, proceed in the same manner as in an action of Account. This is very convenient, for in the action of Account, nearly resembles that of account.

It is further provided, that when judgment is entered by a Court of Common Pleas upon an avowal of Auditors, there can be no appeal to the Superior Court, whatever be the amount of the demand. In Eng. in the action of Account, the plaintiff is not entitled to a discovery of the Defendant's books, or papers. Neither can he compel him to testify, in order to discover the truth. But in Chancery he is entitled to all these different sources to obtain information; it is for the

same reason more than once observed that a bill in Equity is now universally resorted to in England. 3 Bl. 233. 233. 381. 32. 34. 223. 223. 132. 132.

On the other hand, the Stat. of Comm. has given the auditors virtually all the powers of an English Bill of Exchange.

There have been before that either party may compel the other to testify, and may have access to all the other papers and books relating to the subject, upon produce that the

same action of Account is as extensively resorted to as in Equity in England.

There is however a class of cases where the action of account will not lie in Comm: that is, where an account between three or more partners is to be adjusted, the action will not lie. This point was decided by our High Court in the case of Boardman v. Seymour, but two or three years since.
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The reason of, that it is impossible for the Court to adjust the accounts of all the partners. Suppose both B. B. are partners. A brings an action ag. B. B. 1. If B recovers, he may have his action ag. B. B. 2. if he recovers B. may have his action ag. B. But suppose again, that A brings his action ag. B. B. because B. is an absent co-partner. If he recovers, B. may have his action ag. B. B. 1. But suppose again, that B. B. are entitled to their respective actions ag. each other. It is on the account of the multiplicity of the actions which might otherwise be mainained, that our Courts have decided, they will not adjust the account of more than two partners. They are therefore more competely applied to B. B. for an adjustment.

Neither of the parties are dissatisfied with the award of the Arbitrators. He may apply for relief to the Court. This is the rule in Eng. as well as here. 1 Bear. 98. But for what purpose object the Court will set aside an award of Arbitrators does not appear to be well settled. Some reasons however are well settled to be sufficient. As if the Arbitrators exceed their commission, or they have made a mistake in their computation, or they have allowed or disallowed what they should not. If they make an arithmetical mistake in computation, or they make a mistake on open facts, or if there has been any corruption or partiality, unless by them. For all these reasons it is clear their award will be set aside. 1 Ed. 3. 2 Ed. 2. 7 Co. 115.

The mode of objecting to an award is by a written remonstrance to the Court. The Court will not generally make an enquiry into the facts at large. If however the cause appears upon the face of the award or if they can be learnt from the Arbitrators themselves or Court, then report may be set aside. When the objection is on the ground of merit, however in the Arbitrators it must be proved by any other fact, as by evidence to that particular point.
The Action of Debt

By W. Story

The legal acceptance of the word "Debt" is a "summing up due by contract to expired contract." E.g., By a bond for a determination at sum, not a specific bargain. J.P. 3 H. 152. 311. 327. 172.

So for a sum payable of being ascertained. Doug. 5.

This is generally 2D 176. 135. 550.

The action of debt lies in some cases on contracts explicit (in posta), but not in cases of contracts implied to pay an uncertain sum. E.g., If A sells goods and a quid pro quo for a fixed price, the action of debt lies. But if no price is fixed, debt lies not. 2 B. 12. 12. 2. 94. 91. 176. 165.

2D, in 176. 125. 550 that it does not lie.

The action of debt has been discussed in Eng. by reason


2. Because the whole sum demanded must be recovered, if any, according to the old rule. 2 H. 135. 559. Doug. 219. 136. 559. This rule is not now observed. 4 B. 128. 128. 128.

Dong. 5. 128. 176. 135. 559. I have said that this action of debt or simple contract has long been discussed in Eng. it however has lately been revived in 2D. 176. 135. 559.
Action of Debt.

In some cases debt lies not, on express stipulated contracts, e.g. it does not lie for Exon or Admin. This is no in debt unless on his part. S. 138; Wilm 220, dit 18th. 19.

For the Testator might have paid his debt, but the Exon or Admin. cannot. Esp. 119; G. 689 Cor. 135, 137.

Debt lies on a promissory note. Chitty 221, 10th 1833. Whether or not it would be in favor of the endorsee. If the endorsement is doubtful. Chitty 221, Note 11, 812, 813, 814, 815, 816, 817, 818. Esp. 173.

The debt seems to be in the nature of an instance of debt, esp. 172.

An action of debt will not usually lie on stipulated contracts. The rule is that if one expressly promises to pay a sum certain for property delivered to his own use, or for services rendered to himself, debt lies. Secures generally if the promise is for another, or for services rendered to another, debt lies not. Case of the Attorney. Esp. 173 where a promise was made by A to pay an Attty. if he acted for B. debt is not lies. Promiss or been relinquished by the self-promise to pay another debt. In such case debt lies. 13; Bell 1836; O 1836; G 122, 123, 124, 125, 126, 127, 128, 129, 130, 131.

(Stake the rule to be true in those promises which under the Stat. "presents and performances are called collateral debt at Common Law, will not lies, the action of Assumpsit will. But on those promises which under the Stat. are called original debt will lies.")

Here there must be a special action on the case. Esp. 179, 180, 182, 183, 185. Debt will lies, when the person for whose use it was never liable. Ray 342.

So debt lies not for the acceptance of a Bill of Exchange. Nor is rather on the nature of a faculty, or
Action of Debt.

guarantee, and is therefore a collateral promise. The

The rules of this rule are that the party or debt must
recover the precise sum declared for or nothing. F. T. Peck,
E'y g. 3 Bl. 155. This rule is not now observed in cases of debt
on simple contract. See 2 Bl. 152. Rep. 1221, case of a motion
for a new trial. Doug. 6, 753. 704. 706. 128. 133. 249. 263.

Debt lies on some cases on implicit contracts, e.g., as

William who has collected my money. 12 B. C. 46. 32. 1226,
also sometimes where there is nothing like a bare

gain a contract or other commercial transaction, from

which to imply a contract, e.g., on a bank at sight. Where

the remedy is certain, than bring the specific more of recov-

ering the penalty prescribed, 2 Bl. 154. 702. 597. This is a com-

mon practice in England, and here (court) it is a civil action.

There has been some difference of opinions with re-

spect to the plea in an action of debt to recover the pen-

alty in the above case. "A debt" is a good plea, but, what is

"Not Guilty" if a good plea had been questioned? It seems

that not guilty is a good plea on the idea, that the pleader

thas in sever an action on contract, not in fact arising there-

from, as a plea of not guilty proves not debt by inference

only, 17 T. 460. 177. 133. 267. To an action of debt, generally,

"Not Guilty" is not a good plea. 21 T. 350.

The debt Exempt to receive damages, yet after damages

are recov. debt lies on the judge. In the demand by the judge, it must

certain. 2 Bl. 146. 717. 506. 606. 2 Bl. 465. 766. 706. 236.
Action of Debt.

The action of debt will lie upon the assent of Arbitrators to pay a sum certain. It is in practice of any judgment. 

When the debt is a judgment to the custody of the Court, it is not necessary. But the judgment is a decree of execution. 

Execution is a statute in 112, 22 Edw. 3, 23 Edw. 3. 

 execution is a statute in 112, 22 Edw. 3, 23 Edw. 3. 

As to the proper time for bringing an action judgment, in Eng. Cour.

In Eng. Cour. it is a general rule that an execution cannot issue after 6 months from the time of rending a judgment, and in this case the judgment only renders at 20. This was by the action of debt on the judgment by original writ. The reason was that after such a time, judgment was prescript. 

But the statute of limitations gave the debt a right to sue, calling in the Person to show cause why debt should not issue, and now after 6 months no the debt cannot take Exe. without an action. There is an exception to this rule, where Exe. has been suspended by a court of Equity, or in other cases. In such cases, as may have Exe., without being facets after 6 months, expiration of a year, there is, 23 Edw. 3, 24 Edw. 3, 25 Edw. 3, 26 Edw. 3, 27 Edw. 3, 28 Edw. 3, 29 Edw. 3.

It has been questioned in Eng. whether debt or judgment are not Exe. within a year to day. But the statutes this
Action of Debt.

After a year: Deu. 18:12. 35. It is said on 2 Nov. 14, that debt on judgment is allowed to proceed to execution for not paying, that help may not be put to the expenses of levying by force to compel payment without execution. Therefore, that the action will lie, before a year to a day. In Term 54 1/2, judgment in Hilary term, and debt on that judgment must estat date the 9th of next term, ie., ye next term, within a year of.

For how; no time is limited for taking out execution, therefore there is no necessity from lapse of time to bring debt or judgment after a year, as in Eq. And it seems to be generally agreed that in Court, debt or judgment will not lie, with Court, can be taken, by ye free benefit of ye judgment obtained by it. Here it would be exceptions to see...

But on the other hand, when debt cannot be taken out, debt or judgment will lie, &c. So a justice before whom the original judgment is issued dies or is removed before execution granted or satisfaction of judgment, ye pet may have his action of debt or judgment within ye year, if the debt does not exceed £35 it may be before another just. If it exceeds £35 it must be before the County Court. As ye.

So when great length of time having elapsed, the Court will not grant debt. Debt or judgment on issue, judgment will lie.

So when free benefit of the judgment cannot be obtained by taking execution an action of debt on judgment of the Debtor, in the original action is an absolute debt, not to be put to it. In this case the property cannot be taken on an execution in the hands of his agent or trustees, and Debt on the judgment lies. Tel. 1871, 187.
Action of S & L.

If the judgment was rendered in another State, how
satisfaction cannot be obtained and Def.'s removal
to this State, debt or the judgment into this State.

So where the Jef. wishes to obtain orders of his judge-
ment, it seems to be his. (Park v. Hooper. 255 Cal. E. 3d
charges interest on liquidated demands, according to the law.

Laws. Formerly our 1st. allows no interest in such cases.)

In case in Middlesex County. — Decision in favor of the ac-
tion, (related by Judge Harris).

It is no objection to an action of Writ on judgment
that the judgment on which the action is founded is erroneous.
An erroneous 2d. party, will support this action, for such a
judgment is available to all purposes here revised. 2 B. &
C. 458. 3 Wall. 343; 8 Cal. 24, 142. 1 Co. 196.

The constitution of the United States "Just faith and ac-
dute to be given by each State to the public acts, records, judicial
proceedings of every other State." The question has been made,
whether the validity of a judgment rendered in another
State, can be gone into in this city. or other words. Whether,
a judgment is rendered in another State. then can be no
inquiry in this State, into the original cause of action. Have
have supposed that the constitution extends to, or means
only this — That the records of other States state to be used
as full evidence, that such proceedings have been had,
and not prima facie evidence of their validity, but
not conclusive proof of it. But on this construction the
Constitution has effected nothing more than could be ob-
tained at Common Law. Mr. Tadross thinks that the proof
of a judgment in another State, is conclusive proof of
Action of Debt.

The demand. It is a mere rule of evidence. It has been decided in Sep. 82, in New York, that there may be an inquiry into the original cause of action, contra the Court. 1 Dec. 189, 2d, 325; 3d, 260. Enimos, 492, Dec. 189, Sup. 944.

According to the above decision, they are placed in the same footing as foreign judgments. They are not receivable according to the law, and are only prima facie evidence of a legal demand. It was formerly noted that debt did not lie on a foreign judgment. Sib. 1098.

It is now settled that debt will lie on foreign judgments, but they are treated as simple contracts only. The merits of the demand are examineable; and evidence arising from such a record may be admitted. The judgment itself however, implies a sufficient consideration, viz. the contrary is shown by the. Def. 2d, 736, 410. Doug.

The Sib. in declaring, i.e. in an action on a foreign judgment, and not on the original cause of action. It lies on the Defendant, to show that the claim would not support the judgment. Doug.

The judgment of a foreign court is examineable here only, where he who claims the benefit of it, applies for it in person. For it is thus voluntarily submitted to the jurisdiction of our Courts. Sib. 736, 410. 7 T. 234, 7 May. 470. Skirrow v.

To debt or such a judgment must be recorded as a voice plow. The declaring on the judgment as such does not vitiate the debt. "grain patent for record" is spec. Doug.

The laws of foreign Countries are provable as matter of fact in such cases. 1 Dec. 189, 2d, 325; 3d, 260. Enimos, 492, Dec. 189, Sup. 944.
Action of Debt.

Before the adoption of the present constitution the laws aforesaid allowed a debt to be enforced only in other states, unless that just cases were to be given. Yet they held that the original cause of action must appear in the suit itself.

They treat a judgment thereupon as amounting to a foreign judgment at Common Law, Doug. 1. Shewing the original cause of action was not necessary on principle. A judgment alone is a sufficient cause. (On last page.)

Indebtedness is concurrent with debt on foreign judgments, Doug. 156. Interest is allowed on such judgments, as well as on a judgement here. Const. 1456.

It has been said (Doug.) that when in debt the debt alone is a sufficient cause. It is not so in all cases. E.g., money paid by mistake—obtained by fraud—by breach of trust. A sale of property made by a person not the owner. 2 Barn. 1303.

This rule must be understood in general. I conceive of express promises to pay money, and of those implied from an actual contract, and sale of goods without an express promise. Same results without an express promise, Const. 176. 136. 350. (See note 1 page of this title at top.)

In a piece judgment debt lies not. E.g., a piece judgment obtained by fraud, no action lies, e.g. fraud on the proceedings. It is a nullity. Simms, 13 b. 351. For instance, if the devise is forged by the legatee, the devise having never been noticed. If one personates another it confers a judgment in his name. (Of irregularly obtained.) The question arises, what is irregularity? 

On payment of duty in this State, Doug. 136. 140. 142. 145. 155. 159. 162. 169. 176. 136. 350. (See note 1 page of this title at top.)
Action of Debt.

Not returnable to nisi prius court. So want of jurisdiction on the subject matter. See "false imprisonment."

In case or judgment obtained by foreign attachment, debt is at stake, as not ad. absconditum debtor himself, the object being to draw property out of the hands of the defendant. But debt on a common judgment may be brought by foreign attachment. Stating that satisfaction of the judgment cannot be obtained by execution. Pink 342.

For money secured by a bond or draught, Bill on recognizance, the action of debt is the only common law remedy. The most proper action on our Bill-bills, given for money, so it is on a recognizance—sometimes a debito facias. Op. 235. 13. 93. 17. 608.

A bond, if payable generally, is, at time of payment, being joined, is payable on the day of the date. If, however, the condition of it was, that the bond to void if the debtor did not pay, it was upon condition of payment a breach. It was a clear mistake. Doug. 380.

If a bond is given conditions for the performance of a collateral act, there is sometimes a remedy by Phy. (which will deem a specific performance) (of which parties under the proper title,) it being viewed as evidence of an agreement to do the act. But the common law remedy is the action of debt for the penalty.

In debt on a Bond damages may be given exceeding the penalty, in certain cases, e.g., of principal and interest, which will mount the penalty. 2 Cl. 335. Doug. 69. Pro. 872. P. S. 522. Doug. 382. 35. Law. Mart. 221. 11. 67. 10. 333. 1 East 653. 18 Sel. 15. 1. 99. 496. 2 B. B. 1190. 6 East 604.
Action of Debt.

On Covenant to pay a sum certain debt lies, at issue
with "Covenant" Starr 1689. 12 T. 165.

If the condition of a bond is that the obligor under a
sum due, just account of monies received, must pay for
the same, he is a breach. Doug. 367. 20 T. 6. 382.

If there is a covenant with a penalty, the obligor has
this election: to sue for damages or Covenant broken or in
debt for the penalty, unless it appears that the covenant
was to have this election to do the act, or pay the penalty.
In such a case on non performance of the act, the action
(of debt to support) lies for the penalty only. 2 Sum 106.
313 in 1248. 2 Ath. 3 F. 533. 2 Plass 1792. 1 Vet. 333. 1667. 126 413.

Debt lies for a purchase who has collected money for a deft.
in Exe. on refusal or neglect to pay it over, for carrying
it in lieu of a contract of sale. By the carry, the indebted
may be considered as transferred to the deft. 2 Bac 49. 16 206.
Corne 586. Chitty 226. 2 176. 55 580.

It lies for non resided in a house - it is the usual
appropriate action (the in some Caud., Covenant is concurrent). 10 26. 125. 60 Hill 954 72.

It does not lie vs. Tenant at Sufficient for rent
in arrear, by the Com. Law. This is a wrong form, for the con-
tact was determined. C. 190. 183.

But, Debt will not lie for collateral articles, be-
cause it not sold for want of punctuons. Debt being a
sum of money due. 2 Bac 49. 16 206. 260. 514.

Yet if he should return collateral articles to
him and estimate them in his return at a sum suffi-
cient to pay the debt - and should neglect to sell
Action of Debt.

there, it would seem that debt lies as here. For his own
utility shows that the Defendant or Executrix ought to be ena-
und 1 Rob. 288, 30th Dec.

In Debt on parole, the Stat. of Limita-
actions; no release may be given to evidence under "Writ

The Stat. in Cor. limiting actions of Sheriffs, for
neglect or default to two years, extends not to actions in re-
course from him, what he has received as Exeq. This is not
a neglect or default within the Stat. Stat. Cor. 266.
The Action of Delinque.

The action of Delinque lies for a recovery of a specific chattel, and thus far it is in the nature of a bill in equity, or its effect. It is brought to recover the object of the suit specifically. The judgment is not to recover the value of the chattel as in trover, but the chattel itself, with a clause inserted that if the chattel can't be specifically restored, the Defendant is to pay the value of the same & damages for its detention. The officers who have the execution is to collect the same in cash, unless he can find the identical chattel. 120 East 378, 6, 602, 1081 13, 184, 42.

But as this action is not for specific restitution, it will not lie for the recovery of any personal property which can be identified, or which will not admit of such description that it may be distinguished in the judgment from property of the same kind. Hence it will not lie for the recovery of money or cows, because it would be impossible to describe such property so as to distinguish it from that of the same kind. 91 C. 666 John De in Tid. 31 23 Bac. 46.

But all the this action will not for an aggregate sum of money as 20 $ 500 in it, may be brought for a piece of gold of a given value, for this may be identified. It will also lie for a sum of money contained in a box or bag, for by this means it may be described. 91 C. 666, 423.

This action lies only in those cases, in which the object
Action of Detinue

Detinue is an action to recover possession of property wrongfully held or kept. The reason why Detinue was not the recovery of property, the possession of which was improperly obtained or in order to recover money, the action is founded upon a contract.

It is true that Judge Coke says, Detinue sound in law, but this is not true. Since it is that Detinue may be joined as a third party declaration, but contract that can in no other case be joined in the same declaration, the contract that can in no other case be joined in the same declaration.

Indeed the action of Detinue is in its general nature, the same as an action of Debt. It is an action of Debt for the recovery of a chattel; and the action of Debt is nothing more than an action of Detinue to recover money. Debt lies against him who detains my money; Detinue against him who detains my chattel. 3 Bl. C. 156.

The action of Detinue will not lie to recover money lost; for in this kind of bailment the specific article a cow is not to be restored, but only its value. 2 T. & R. 1166.

The action of trover has now become concurrent with the action of Detinue. Trover will lie in all cases in which Detinue will, but not converso. When the gist of the action is the unlawful detaining those Detinue will lie, but when it is for the unlawful taking or the unlawful using those Detinue will not lie.

The action of Detinue has gone entirely out of use; in fact, it was never in use in this country. It has been disused in Eng. first, because in this action the defendant had a right to take his own, second, on account of the difficulty attending the certainty of recovery, concurs in the debt demanded. There is therefore much more convenient,
For in this action there are neither of these inconveniences.
But, by the way, Trusts is an action unknown to the common law. It first originated from the very liberal construction given to the statute 13 Edw. 1. Neither was the action of Detaince on the case known to nomenclature to the common law, but it derived its origin from the same statute. Since that time these two actions have by degrees ascended the action of Detaince; & derives it from the Courts of Westminister Hall. 360 v.p. 11 Edw. 2 & 3. 45 v. 172 & 1 Bac. 45.
Actions on Contracts.

Of Notice and Request.

It is common law, in an action on contract, to serve a notice to the defendant to the effect that he has not yet paid, and to show the terms of the contract. In many cases, it may be by quiet entry. 5 Co. 2: 48, 12 B. & C. 735, 11 Wms. 317, 10 C. & H. 233, 8 Hold. 357.

The servitor must always and upon notice to the defendant, when action has not been commenced, and when it is impossible to comply with the terms of the contract. To answer the question of whether the servitor is at fault, the servant relies on the terms of the contract. If the master, or owner, or other person, has not paid the servitor for the same, he may be required to pay the same, or to pay at such time and place as he may agree to pay for the same. Sect. 4 of 1459. Hol. 30: 448, 21 B. & C. 179, 11 C. 49, 25, 35, 10 C. 48. First rule of the section 1459, Hold. 30: 448, 21 B. & C. 179, 11 C. 49, 25, 35, 10 C. 48.

So of a promise to pay on the day of the promissory note, unless there is a notice to the defendant to the contrary. 3 C. 48, 21 C. 48, 25, 35, 10 C. 48.

Sec 4 of a promise to pay on the promissory note, that the promissory note is to be made payable at his hands. 3 C. 48, 21 C. 48, 25, 35, 10 C. 48.

To an promise to deliver to the promisee the same, or the promissory note, as the promisee desires, or as the promissory note, as the promisee desires. 3 C. 48, 21 C. 48, 25, 35, 10 C. 48.

To an promise to account to the promisee, or to the person aggrieved, the promissory note, as the promisee desires. 3 C. 48, 21 C. 48, 25, 35, 10 C. 48.

Sec 4 of a promise to pay on the performance of a certain act, to the promisee. E.g., on his return to London, when he returns, he gives notice to the promisee. 3 C. 48, 21 C. 48, 25, 35, 10 C. 48.
So it must appear that it was given to the party, or
promise to pay before & all of such a fair as much as the distin-
side of such cases, & the party there arise notice, given before & one
as another to the Court. Midd. & 8°. Con. 6th. Moore & 7th.
But if the promise, contracts to pay to the performance of an act by
a stranger, or by & not even notice, or the promise, must be act at
his peril, & a promise to pay, & Ch. 12. 77, note 392. 1. 16. 127
So in some cases, it seems, before it leaves to give notice, eg. a
promise by before to deliver is must now than to state notice in 1. 17.
by 21. 16.

In some cases, this must make an extra special request,
eg. the promise, engaged to do a collateral thing to the paying of the
promise. Con. 6th. 12. 69, Con. 7th. 12. 52. 21. 23. 36.
So to pay a collateral sum. i.e. the debt of a stranger, or
request. 3 Tall. 205.
So to pay a request, such sums, as the promise, & act
paid for him, Con. 6th. 12. 69. Con. 7th. 21. 23. 36. 37. 201. 3. Con.
Request. 1st. 12. 52. 21. 23. 36. 37. 201.
Actual request is not in any way that the only a debt
is precedent to, or in independent of the contract, promise to, to
which is the the promise, to do on request, for how the request
is not the a force of the action, eg. a promise to pay on request
the price of a horse being a bought by the promisee. (Note *)
The duty to exist, without the promise, request out of the year
of the action. eg. after requests to the Agent. 3 Tall. 205. 1st. 21. 23. 37.
201. 21. 23. 37. 201.

* This rule must be understood thus, 1st in which the representative
act, contract, every the only a party, applying to the court, requests contract, may be to do
a collateral thing on request to the before, or pay the debt of another person, for.
Actions on contracts.  Notice of Request.

Secur. (lit. ante) of a promise to pay another debt on

request.

But the rule does not hold of a collateral promise, or
promise to do a collateral act. E.g. if the hirer, after his promis-
to deliver a load of wheat, on request, request must be spe-
fified. To a promise to pay a Strangers debt, on request. 58th,
388. Foren v. Peel 270. 4th.

For in the last case the right of action is founded on the
promise & request (the being no contract at all) specific request
must be alleged. 31st.  Pluckley 270. 6th. 6th. 298. 3rd.

Where there is a covenant that ye Defp. shall repay me
the Defp. must demur to the tenor. Cen. 280.
Cor. 3rd. v. 6th.

Where specific request is necessary, time & place must
be alleged. It being traversable, Cen. 183. 4th. v. 280. 3rd.
Cor. 1st. 298. 4th. v. 6th. 298. 2nd. 298. 2nd. v. 6th. 6th.

The 3d. of the 3d. of the 3d. Dqore. Does this rule apply to cases, in which
in General, your involves a denial of request, as the alle-
ration is not the traversable specially. E.g. Indeb. on a Bk. of exch. v. the Indeb. - of which defined has no
notice sufficient.

So upon a promise to pay, on condition that Defp. not pay on request, a special request 2d. 9th. 9th. 9th. 9th. 7th.

But if an avowment of special request, where
a request not avow. by you. 380. 280. 3rd. v. 298. 3rd.
Cor. 183. 4th. v. 248. 1st. 8th. v. 6th. 298. 6th.

In promise to pay the debt of a Strangers debt, request
specific request must be alleged. There is no separate debt & request is
part of the agent. Cen. 6th. v. the agent for action. (vide ante) 280.
Section on Contracts.

When a special request is necessary, the omission is
unenforceable. When not necessary, not enforceable. 1st. 389.
2d. 392.
2d. 393. Sec. 74. 2d. 1. A mischief
includes a doing of it as an Indul. of

General rule. When there is a contract to deliver
thing "on demand" and Def. can not discharge himself, by
tender without request, special request is necessary. E.g., a
merchant engages to deliver such a sum of goods at his
store. So suppose A, a merchant, engages to deliver such a
sum of goods, at a time previous, he cannot reject goods.
3d. 393. Sec. 6. is to be rejected by a stranger, then the
Merchant shall refuse of stranger to choose. 3d. 393. 11. 25.

But when he can discharge himself by tender, spe-
cial demand is not generally necessary. 3d. 393. 11. 20.

(The two last rules do not as they interfere with
the particular cases before laid down, an \textit{Indulgence}.)

If one accepts a \textit{bill of exchange} to be paid by his
banker at the calling store, presents it out of the city (at the
place) for payment, is prima facie necessary to give the holder
an action at \textit{acceptor} in his dishonor. Secs of this accept-
or can be proved to have had no effects in the Bankers hands.
4d. 27. 11. 329. 3d. 11. 139. 276. 11. 329. 3d. 11. 139.
Defences to

Actions on Contracts.

I shall treat of the defences to Actions on Contracts generally.

To every action there is a General Issue. This is denial of the party's allegations. In the action of assumpsit, as in the general issue, denies the allegations of the plea, since it does not always deny the promise. It often confuses it. For you may say, you do evidence render it, that you have performed the contract, that it was executed, that it was obtained by duress, in fact, you may show any thing under the issue, that discharges you from the performance. Like, in an action of Debt, you may give any discharge or evidence.

By this you are not to understand you are obliged to do, for you may prove upon the record, the fact that the contract has been performed, that it was obtained by duress. We have however a State in Law, so acting that if the Defendant is discharged from performance, by a release, he must lay this upon the record. I now proceed to the defences to actions on contracts generally. I shall first treat of the

Doctrine of Tender. To any action whether

be upon a contract, which may be discharged by a tender, there is a gress plenum. By tender is meant an offer to pay a debt or perform a duty, which the tenderer has contract to
Perform. Tender must be made in the way the law directs.

A prominent feature of tender is this. When tender is properly made, made it goes as shall have exactly the same effect, eventuate, as if payment was made, or the duty contracted to be performed, actually performed: it is equivalent in effect to payment, or performance, the tenderer discharges him from all liability on his contract, taking right which he could derive from payment or performance, he shall derive from a legal tender. 

Or proof of tender made bona fide (so it must be bona fide made) at the time, to an sufficient action for the price, or avoid himself of it in defence to an action for non-performance.

A 2d part of the rule is this, that when a tender is hindered by the person to whom it is proper it shall now (as if he is not to be found) the debtor by proving that he was ready to have made it at the time and place, entitles him to all the benefit which he would derived from an actual tender. If the debtor can prove that he went to the proper place, (as to the house of the person to whom the contract was then to be performed) at the time for the purpose of making the tender it is sufficient. The tender was absent, and the debtor is not tender to go stealthily to the house; and he was not obliged to call debts and to see him make a formal tender. If that then he has some effect as an actual tender.

A 3d part of the rule is that this plea of tender is a good defence in those cases only where the condition is uncertain. But where it is certain or ascertainable,
Defences to actions on contracts.  

As where it sounds in damages, which requires the intervention of a jury to ascertain them, it must be no defence. If at first I say, or that B. or an action for damages I cannot plead to it. This is the rule of the Common Law. Where there is a particular statute or rule for ascertaining the damages, then is a good plea to defence.

There are sometimes statutes which say a tender into be a good defence, the damages are uncertain. Thus by a statute in England when a man sets an act of justice of the peace for an involuntary mistake, if the justice tenders what the lessor judge to be sufficient separation, the tender shall stand thereon, it be a good defence. And in some of the States they have statutes on the same principle in case of involuntary trespass.

If a difference arise from or after the transaction, i.e. the parties differ as to something posterior to the contract, it makes no difference as where part or ye amount of a note is tendered, which the lessor pays, the whole proceeds that is due as part has been paid, the lessor items it; how the amount uncertain, yet tender is allowed. We see that tender itself is a good defence to any expenses arising. So a tender of the value of goods in the contract, you will remember that that which can be tendered, certain, consists certain to certain, plentitude of law. The manner of this good for these certain, certain, and hence it is do, do debt. It is a good tender in all actions of debt for the sum is certain. So also in contracts, to conduct where the damages are certain, or can be made certain by some knowledge. But tender is never a defence in law.

If the contract is to pay a sum of money, the tender
Defences to Actions on Contracts

When the tenderer refuses to accept, the tenderor is not obliged to leave it. The court may, if it think fit, have it ready at all times, and when the article is once passed over, to deliver another at the tenderor's risk. The tenderor is not obliged to keep it, but may leave it at the place appointed, and it wholly discharges the tenderer from any claim. In his contract, the property vests in the tenderer. The tenderor may take the article home, with him. When it is refused, and not in a trespass on time of the defendant, and afterwards on demand of the tenderor refuses to deliver it, the tenderor could have his money in return, for he is a mere bailor. 1 W.R. 165. 2 D. & G. 210. 11.

This tender of money calls the tenderor's jurisdiction, and it, of the tenderor is obliged to keep it, is a discharge of all securities, as mortgages, bonds, notes. It places the tenderor upon precisely the same ground as if the money had been accepted by the tenderor.

There is no practice in any State in the U.S. that when a man has not tendered, when sued, he may pay the money into court. This is a rule of court. The effect is, if the plaintiff takes the money out of court to recover his costs, it is the same as if tendered; if it is paid into court to pay costs, it is paid into court. On the other hand, you will remark that bringing too much into court by defendant is an evasiveness that does much to obscure justice, and if the jury find a bill based upon a claim or debt, you are as much as the tenderor.
I have already remarked that the person on whose tender the money is oblige, or who takes it, is subject to the demands of the tenderer; it becomes therefore a very interesting question to determine, whether of the money be lost by inevitable accident, as by the burning down of tenor's house, depreciation of, (as where paper currency is a tender), the tendency to tendance, shall sustain the loss? It has been said that the tenderer must be the loser, as a tenderer is not in the tenor's interest, because he may sue the obligee. I apprehend, says the judge, that some propositions of the elementary writers have given rise to the controversy on this point. They tell you the debt is a duty, remains. As in a sense it does, as the tenderer becomes a Bailee of the money. But it does not follow that the bond or note is not discharged. A tender of money vests the property of it in the tenderer, but money being of light, portage, the law does not consider it a hardship that the debtor shall keep it in his possession as Bailee or Depository for the Creditor. But is the original what. Baes or other security discharged? If the tender was of some became articles according to the contract, is there no prejudice, the value of it entirely discharged. And what good reason can be given why it should not be so with money? Why should the tenderer be subjected to the suspense of the tenor, more in the latter than in the former case? I think, says the judge, he is in the same situation in both cases, the note is discharged. The Law makes the Bailee Bailee of the money, where called upon by the tenderer itself the tenor must be considered as tenderer, he must pay it. How the tenor question is, who is the money? They say,
A. owes B. the money and B. tenders it to A. A. refuses to accept it; afterwards A. sues the Def for the instrument or he receives his money; but this reasoning is not conclusive, the Def does not recover the money by force of the instrument, but recovers it by demanding it from him at Dules, and the money is paid in consequence of a legal demand. B. can demand it of A. at any time after the tender, even refuse the benefit of the tender if lost. Thus being the true light in which a tender of money is to be considered, the only difference between a tender of that it is a collateral article, is that when the tender is of money, the tenderer is obliged to keep the money at Dules for the tenderer on his refusal to accept it, but when it is of a collateral article he is not obliged to leave Dules unless at his own option. But there is another reason of sufficiently given for considering the matter in this light, that after at the Dues after having tender the money, the tenderer has refused to accept it, it then if the def demands it, the Dues refuses to pay, the def will recover the debt from the def on the note. Know then why suppose this if the note is estipulated, it is not, says the judge because the note gives any right to recover, but because the Dues keeps the money, for the def. if after refuses to pay it, he is stopped of pleading tender as his defense, for he can never plead tender, without averring "that he tenders it at the time and place, appointed, it is in all time ready to pay." (Brady's Cr. 458, (Tulk's Cr. 494, 500), 512.)

With all owing this note to be received, there is nothing equivalent in remedy, that which was done, now
Defences to Actions on Contracts

An analogous case. A man is made repetendent a former one, so that the repealing law is itself repetend; this is not
sufficient to reverse the former law.

It would be unreasonable to make the debtor do more than the creditor's tender was call at
one. Suppose, A, an Englishman, is indebted to B, to the value of in the sum of 1000l. A goes to B, and
makes a tender of the money, B refuses to accept it, in returning with the money. A is robbed, and C stabs
him. This left for his additional trouble, whereby
had been a calculating article, it would not have been
obliged to take any care of it.

It is to be remembered, in such a case, that as long
as the tender is kept, good the debt draws no interest
from the time of tender is that of demand. Sir George
Riviere says this survives as sufficient security for the benefit
of the endorser. When the payer of the money has lost
by entitle to the note; thus preventing any danger from
an after action upon it. Third; because it does not

It is no great difficulty for the debtor to take care of
the money when the endorser refuses to receive it; and as
the debt was capricious the law takes care of him, as
days that the debtor must keep the money, subject to the
default, but does not impose upon the creditor of the
cash as robbery, depreciation, 10 after the tender, was con-
tinued for a price made. But in such cases articles it is
difficult for Debtor to take care of them; therefore
is not obliged to.

It is the Law of all Countries that in all discharges
References to Actions on Contracts.

the debtor, and the debtor derives all the advantages (in
lend) which he is from an actual payment. To illustrate
this principle. Suppose A. to have agreed to make a debt
of 400 and paying him 400. B. lends the money which A.
refuses to accept. A may then bring an action and recover
out of B. the value of the debt (or A. to decree a specific
performance) though the money is in his own hands, or
all this seems reasonable when we consider the money
as resting in the tenderer or the lender, 1 that the tenderer
receives it merely as bailee, but that it is liable for it.

If the tenderer is incapable, he has left no
agent, &c. Defendant for tender was ready to tender, though
he did not make an actual tender, the money now car-
ried interest from that time, for no man is obliged to fol-
low his creditor out of the debtor to tender money. He
is to suffer no inconvenience from the incapacity of
the creditor. The defendant must state how the sum of no-
money by him, it always be ready to pay when called upon,
or he might lose the benefit of his tender. This shows
that the money is not his, for even if his own he would
to him liberty to do as he pleased with it. The defendant
day may at any time interest in such case. The
of the peripety the was absent. This principle was fully il-
dicates by the practice pursued in this Country during the
American Revolution. When the debt
men into first arose in this Country there was no authorities
in the way. Books to be joined. And these are but the old
cases relating to it. There are to be found in Davis R. 18. 97. 58.
also 3. 83, &c. "Notes on Actions: 18 Digest of.

Defences to Actions on Contracts

Tender

In the time of June 1787 certain pieces of money were made current in Egy. by Proclamation, and during the continuance of the Proclamation, a person who owed a debt made a tender of those pieces, to the debtor, refused to accept them. After some time when the proclamation was at an end, the money depreciated in value; the tenderer brought his action. The defense answered, tending to show that the loss must fall on the tenderer; therefore the money was holden to be the tenderer's.

The reason why this Debtor became so important was, that it arose out of the situation of our affairs at the close of the Revolutionary War. In the commencement of that year several persons fled from the country, and were the fugitives (not enemies) those many persons were indebted to them. The day of payment having arrived during their absence our Continental money which was made legal tender by Statute it afterwards this money depreciated in value, at a Dejection of some importance arose at the close of the War to determine who should sustain the loss. Whilst it was a legal tender it was good for consideration as a discharge of the debt. It the loss of depreciation fell on the tenderer. After the close of the War a Statute was made vesting the Courts with power to settle this species of claims equitably according to the principles of justice. Out of this Statute grew an important Debtor. In the Treaty between the United States and Egy. there was a stipulation on the part of America that the debt due to English Subjects should not be impaired by any subsequent Law. This Statute was made after the Treaty.
Defences for Actions on Contracts.

and the English claimed that it impairs contracts. Hence, under its construction the Refuges come off with nothing to their dues, in consequence things that it was contrary to the provisions of the treaty. Congress recommended to the several States to pass remedial acts upon the subject. In consequence of this, the Legislature of New York passed a general statute upon the subject, repealing all laws which were contrary to the provisions of the treaty, thus leaving the question open for litigation upon its merits.

The question came up before the Courts, and the argument was that the British treaty had secured to our debtors their debts. This was not denied, but it was claimed that under this treaty had secured to them their debts, which were due. Yet these debts were discharged by a decree, which subjected them to the loss. The question was: what was due? The creditor by leaving the country was in a negociant, if the debtor did not tender the money which was due, then how the inaccessibility it. As soon as it change the interest on the debt for being ready to tend, in this case it equal to an actual tender. Suppose it had tendered what to the creditor have been entitled to? The answer is the principles only, no interest. The treaty does not secure to him only the debt due at the time of its tender, provided the tender was good in law. But the tender was a legal one, however. It was paper money. The current by which the treaty secured no more than was due, at that which values of the money tendered, whether bills or paper. It cannot that this was dishonest—but how can that be? A man could not refuse it when tendered to him,
Defences to Actions on Contracts. (Tender)

for it was a legal tender, and as a man was compelled to receive it he might honestly & conscientiously pay a sum. The law puts on the Tenderer and so it was determined by the Courts. After tender, they decide, the money became the property of the tenderer. He must then you hear the loss of its depreciatio?

These decisions seem to have satisfied the British go
erment of the correctness of the principle, for they allow
inears the claims & has never since been reversed.

It is therefore now settled that in all those cases that
the tenderer must bear the loss - the money is his after
the tender. The Defend must come to the Defend. The house -
demands the money. The Law obliges the Defend after in
this to pay, but it is entitled to the Note, if the suit must
be based upon the Note, that it may be taken of the rest
of the Debtor (ante.) If you tender a dormant article
as a debt of 20s. & the tenderer refuses to accept it, if you
take it home with you, you must deliver it, or demands
or you will liable to Treasure.

Tender may be made either by or to a man. Ed. after
actor a defendant in suit, you must the Defendant.
so, or might be done to him, may be done by or to his Eex.
or Adm. 3 & 13. 684. 5 & 6 Be 4. (389 115 x 60 & 115)

What is the proper mode of making a tender? If
from the debtor goes to this creditor 1 says "Sir I come to pay you
your money" and he sits on a bag under his arm. This was
sufficient to constitute a good tender. He should take it from
under his arm & say I have come to pay you your money
and here it is. But he must not count it; it is the duty.
Defences to Actions on Contracts.

Tender.

The tenderer because it. If the tenderer was not there, he
must not have taken the money from under his arm to
made a formal tender, if he was ready to say it is suffi-
cient. In the case the tenderer had been at home, if when
the creditor began to tell him he had come to pay, the cre-
ditor had said "out of my house, it's not have you here, in
such case he may do no more for the tenderer this crinse a
position not to receive the money, and the'trans is good.

*Deb. 25, 3. E. 115. 3 T. 13. 654.*

It has been made a question whether, if there is more
money than the amount due, is it a good tender? But this
is no doubt, says the judge, but the tender is good, for the tan-
deer may demand the surplus paid by mistake, but we,
usual to refuse, may maintain an action for it. Strength-

"It is made certain that the person tendering may de-
crete the application of the tender. As where, he is indebted on
Book debt on a note, he may direct. the tender to be ap-
plied either to the Book debt or Note. If he does not direct
the tenderer may apply it to either of the demands he ple-
ses. And to make a good tender there must be actual offer-
ing of the thing tendered, when the parties meet." 2 Bampby.

3 S. 104. Co. 5. 115. 80. 15.

It is said of a man engages to deliver one of two things
he must tender both. That this is not so. The rule con-
held only where the contract is to deliver one of two things
at the election of the tenderer, whereas the tender, when it
is, as is generally the case, in the alternative merely a tend-
er of either is sufficient. 1 Doug. 19.
Defences to Actions on Contracts.

What may be tendered?

When the Law prescribes what is to be tendered, that is nothing else, than to a good tender; but where there is no law, the current money of the country is a tender according to the current value of it. The Legislature may always fix what is a good tender. Sec. 114. Tender of money or a Bag is good, as I before remarked. Sec. 115.

The Law makes Copper coin a tender in Eng. by proclamation. And in this Country, our Cents are made tender by Law, but a great quantity of them cannot be tendered. Whence the Law does Copper coin shall be a tender; it merely means by way of Change. This Question was decided many years since in New York, where a man called to several boards of juries, and had them call to his Court house, to make a tender of them, the tenderer refused to accept of them of the lot determined that this was not a legal tender. (A Story by the Judge.) A number of years ago, when I was practising at the Bar, I obtained a trifling judgment vs. a man (as above) in which the costs amounted to about $50. He was much vexed at being thus made to pay, if he could not settle the costs with me. Told him Yes, and he took me out into the Lobby of the Court House, produced a pair of small bags of copper, I tender him. He accepts them; the man was somewhat disappointed and requested me to count them. "Oh no Sir," replied. "I wish to your honesty, I am now over many miles obliged to you as I am about starting a journey to turn out. I can throw them into the bottom of my Bag, they will be the most handy change I could have on the road. The poor Watchman..."
Defences to Actions on contracts

went off quite modified, that his scheme had failed.

If counterfeit money is tendered, it accepts, the tenderer according to the old rules, must bear the loss. But it is not now the rule. The tenderer discharges the obligation, but does not lose the tenderer without a remedy. The must give the tenderer notice, that it is counterfeit, if he refuses to receive it back, it pay the amount in good money, you can sue him, you will recover. It is similar to any other case where counterfeit money is paid. As if

I. gives a Turkey of Debt. I pays him a counterfeit bill for it, when he finds out that it is counterfeit. I must give notice of it to I. and if he then refuses to pay in good money, I can maintain an action agt him for the price of the Turkey. See 268. e 57., 115. 553. (Parr. 573.)

Among which is current according to Law is the only good tender (of this section) but it has been decided both in

Chancery. It is a Court of Law, that Current Bank Notes are a valid tender, when no objection is made to them on that account. They are of themselves no good tender, but when tendered therewith is no objection made the tender is good. There is a case in 5 (6) Tern. Help. from which it may be gathered that the Court were of opinion, that if nothing was said they constitute a legal tender, as that no objections to be afterwards raised on the score of their being Bank Notes. In this Court, Bank Notes have not the same currency in England, and therefore the tender is made in the same, this must be Bank notes current in the place where tendered. 6 608 514, 1852, 1853, 6 Parr. 401 cites the Query cases supra.
Defences to Action on contracts.

Of the place of Tender.

A tender of the debt must be at the place points one in the contract, but where that is not precise, and the debt is of money, the general rule is that the place of tender follows the person of the creditor, he remaining within the realm, at his place of residence: as man is obliged to follow the person of his creditor out of the realm to make a tender, unless the contract was made in England, in Scotland or Ireland, he must do the same, as expounding "actus expensae tamen." But where the contract is made in England, the debtor is not obliged to follow the person of the creditor, or even into Scotland or Ireland which are under the same Government.

This is the rule in England, what rule would be made here I know not. There can be no question but that the Common Law rule applies here in general. So it is until this, and I can say I was no determinate rule upon the subject, but have no doubt that if the creditor were to move from here to New Orleans the debtor would be excused from pursing him there to make the tender, for it is his duty to leave an agent here to receive the money. Neither do I think the rule can be limited to each State. For suppose the contract was made in Con, near the line separating me from York and the creditor should move into N York, a sufficient distance, the debtor I think would be obliged to make the tender to him, or in N York. The rule I think should be established as in a libel growing, for it will be very hard to compel a man to go from Penang to Macao, when the creditor, except he has been

...
Defences to Actions on Contracts.

Tender.

 Unless by his contract so to do. This is merely my opinion, says the Judge, for there is no certain rule.

The general rule is that the tender must be made to the creditor. You are not to understand by this that the tenderer after having gone to the Creditor's house, he is absent, that he is the last day that the tender can be made, is to follow the Creditor. If the Creditor has left no agent, the tenderer has done all he is required to do, by going to the House of the Creditor at the proper time, prepared to pay or tender the debt. But still he must keep the money by him to be ready to pay it, or else called upon. The tenderer cannot by any separate act of his, prevent his tender from having the benefit of his tender.

There is an exception to the rule in Eng. Court. In such cases, the privilege given to Tenants (now debtors) for their own interest or by custom, by tendering on the lands, or at the occupants house, or at the Steward's house, if there is a Steward appointed. No such rule in this Country.

There has been going on the ground that no place is fixed for payment, and the rules apply only to the payment of money. While the contract is to deliver bulky heavy articles no place is fixed, the rule is that they are to be tendered at the tenderor's dwelling house, i.e. where he lives at the time the contract was made. The residence at that time is the place fixed by law where the tender is to be made. He is not obliged to follow the tenderer to make a tender as in the case of money. But there are, as a bulky article, it is to be understood with certain limitations; i.e. if it is no more inconvenient for the debtor.
to deliver the articles at the new residence than in the old to make delivery there at the new residence. See also 1259. And you must observe that the Law does not regard a trifling difference in time as "prima facie" sufficient. If it is reasonable that he should deliver them at the new residence, he must do it, though it might be in a slight degree more inconvenient than to deliver them at the old residence. The Creditor may in some cases change the place of delivery when he moves away, but he cannot do it when it would not be more inconvenient for the debtor to deliver there. Suppose a man in Shelburne had contracted to deliver 100 Barrels of Flour to Washington, the Warden of cities, if after he moved to Charlotte he may direct the delivery of the Flour at Charlotte, the debtor knowing he had to deliver the Flour there, for it would be less inconvenient for him, than to have delivered at Boston, for the distance being nearly the same. B Russel 3 Mass. 642. 2 D. 497.

I have been treating of the mode of tender, to whom it is to be made, and the place where, that we now consider the

**Time of Tender.**

There is a day fixed for payment by the contract, that is the time tnder must be made. This is very plain and simple. Suppose the contract is to pay "on or before a certain day" the legal tender of the last day first. The Creditor did not know when the tenderer would come, and he is not obliged to remain always at home, for fear the debtor will come in his absence and the Law entitles that both parties shall be present, and therefore it had fixed the tender in order to be good must be made on the last day fixed.
Defences to Actions on Contracts.

...it must be made. And the tender must not be made on the last day, but on the 'utmost convenient' part of the last day.' By this is meant, that the tender must be made at such a time of day that the money can readily be counted in day light. Some say, it must be so that the money can be counted before sun set. The judge is the former account.

It depends in a great measure upon what the article is, its quality, for some articles would require much longer time to tender than others, as cattle &c. You cannot understand from this rule that when the contract is to pay "on or before" such a day, that a tender cannot be good unless it is made on the last day. If the parties meet before the last day, the tender is good, it is good. (See C. 14, sec. 202, 206, 524, 624, 777, 826, 108, 150, 174.

I have said that tender must be made on the utmost convenient part of the day fixed for tender either by law or by the contract. You suppose the debtor is to go to the creditors' house before sun rise. He should not be out of bed. This is not a good tender, but if he is out with the creditor, or finds him risen, it tender to him, it would be a good tender. So where the contract is to pay on or before, if they meet with each other the tender is made, then before the last day, it is a good tender.

Sometimes it happens that no obligation is given, or the time of payment is not fixed, the place is. In this case it is the duty of the creditor to give notice to the debtor when he will pay. So it is liable to be paid at any reasonable time. But suppose neither time nor place is fixed? I know of no rule governing a case like this. In
Succession. Delivery may be made without notice at any time at the usual place of abode of the cedidor. There may be a difference between this and the last case, as there it is presumed that he is at home, or has an agent there. 


Since it has become common to assign even instruments, as bonds, notes &c., which are not negotiable, some important questions have arisen upon this subject. To whom in these cases ought the tender to be made? The Debtor or assignee? If the Debtor is in fact the tenderer, the assignee can make the tender. But if the assignee is tendered to by the first obligor? Some say the property vests in the assignee at law and the obligor must pay to him. But it is otherwise with a bond, which is not negotiable, the legal property does not vest in the assignee. It has become common to transfer for them and Chip says that payment must be made to the equitable owner. In Law how is it? I have no hesitation in saying what I think is right in this case. When a man has once acquired rights which can be enforced, it seems strange to say that tender passed conveyance, payment can be made to another who has no right to do so. Here the rights of the owner. Say that in this case the assignee had the rights and tender must be made to him. The Creditor cannot assign the instrument to another to make it more inconvenient to the obligor. When the rights can not pass then can be no question. And here Chip says the assignee had the rights and the obligor must tender to him. But seems where the obligor would be put to inconvenience by tendering to the assignee, as
On Tender & refusal.

Suppose there is no debt but a man has a security, as a gratuitous, as a gratuitous mortgage, binds himself not to discharge the lien nor the land; as suppose, A. lends young goods living with him that he will pay him 2000, gives him a mortgage for that sum, conditions to be void when he shall pay him the 2000; and sometime afterwards he tenders him the money, but he refuses it, says he does not owe it there — thinking himself safe by having a mortgage, here at there was no preceding debt, but it was merely gratuitous, the duty of lien on the land is discharged, by the tender of refusal, and the promissor can have no remedy at all, for he has no longer any right to 2000.

There observed that tender has the same effect as an actual performance. Suppose the case of a mortgage.
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Tender at the day, vests the title on the tenderer. It is how one proceeds to get the Deed back, as the tenderer to the
lender may die after some time— but it is of no use, give
with the title. If he will not give up the Deed, upon appli-
cation to a Ct. of Ch., they will compel him to give it up.
But suppose the time day has past, tender will not take
the title— without word of payment. All that either would
do, to enable the person to apply to Ch., is a rel
relief. In this case tender has the same effect as payment.
So in all other cases tender has exactly the same effect,

There is a rule in the English Law which I think con-
tracts the doctrine of tender to explain. Where a man is bound
to perform a collateral act, if he tenders his service and they
are refused, he is entitled to the same rights as if he had ac-
tually performed. E.g. A agrees with B for $1000 to build him
a barn of such dimensions, but when it comes to his work.
man 80 at the time specified in the contract. B refuses to
him, on the ground he denied him of his land. A tendered his services
but B. refused to accept them. Now at law being an action
to recover the $1000, even to the same as if he had performed. To
carry the rule through, for Ch. to afterwards compel
how to perform. If in a contract to pay money you tender
but is refused, you must keep it. It is not ready; so also
in this case he must perform the work hereafter. But this
is not right, for he may have other jobs on hand. So have
a prefixed the principle. In some cases consider the con-
tract is broken up and the jury are directed to give
simple Damages for his disappointment. There is
Defences to Actions on Contracts.

Here, no claim on the Contractor to do the work afterwards. This is the most reasonable way. 5 Ray. 688.

I shall now give a number of Authorities applying generally to all the foregoing rules. 9 P. C. 79, 2 B. & J. 835, 3 B. & W. 795.


Manner of Filing Tender.

When tenders are filed, the pleadings must square with the rules which constitute a legal tender, i.e., every incident which is necessary to make a valid and effective tender must be set forth in the plea in the right as the court desires to it. It is not sufficient for Defendant to say he tendered according to law. It must be put upon the records for the Court to say whether or not it is according to law. The must plead that he tendered on such a day (being the day given) and actually delivered the money due on the utmost case to the plaintiff.

But in case the creditor was at the place the utmost case, he may plead just tender, i.e., not plead that it was the utmost convenience, but it is necessary to state that the pleff refused to accept. This is the form, viz., to state a refusal and you should not depose from it unless you have a good reason for so doing. Suppose the creditor was absent, then the Defendant must plead that he was ready on the day that pleff was absent from home. You need not state a refusal in such case. After verdict, a tender is good though a refusal is not stated. If the contract was to pay on or before such a day, the Defendant must plead that he tendered on such a day that it was...
Defences to Actions on Contracts. Tender

the last day. But in case he have met the Def. before the last day and has tendered to him it would be good, once the Def. may plead it. If it be en money it will not do merely to say he made a full tender of the amount due on the day figured, for the utmost convenient part of the day, that the J.r. refused to accept, but in addition to all this he must say that he has ever since been ready & able to pay the same as he must produce the money in Court, and in all the places mentioned above, the conclusion must be in those words "that he has always been & able to pay it." And when it is a tender of various articles, he must only state in his plea as tender according to the terms of the agreement; and as for a tender of collateral articles being wholly immaterial, the mere act of tender fully discharges the Def. from any liability. 5th Ray. 587. (Salk. 574. Cor. 3 422). (Salk. 923. Cor. 3 888. 1 Tamm. 458. 17 11. 139. 7 Co. B. 10. 1 Tamm. 37. 1803. 581.

S. 3. Nov. 24, 1812.

From this you see that in a common case of money being tendered it is necessary for Def. to plead that he made full tender on a certain day, which must appear in the day figure for tender, and also that it was on the utmost convenient part of the day, that the J.r. refused to accept the money, and that he (the Def.) has been ever since been ready in Court to pay the same, and then he must produce the money in Court. This supposes that the J.r. was present at the place of payment at the time of tender. But suppose he was absent in such a manner that it was impracticable to
Defences to Actions on Contracts. Tender.

The defendant to his person, the law respects; but in such case as tender may be pleaded, non est pecus of the defendant to accept of tender, but only a reading of the suit at a convenient time of the day, before payment is to be made. If payment is to be made on before such a day, the mode of pleading it not otherwise in a common case. The defendant must plead tender as the case may be. If he did not the before the day he had tendered to him, it would have been a good tender. He may plead it. And where such cases where the tender was not money he must conclude with "that he always has been known as ready to be." If the defendant substantiates his plea in this manner he effectually bars the defendant's action, and the defendant is liable for costs, though he is entitled to the money produced by the defendant. 1 Tint. 109; 3 Ed. 12. 79.

When the defendant to the plea of tender he has a right to traverse any part of it which he thinks is untrue. He may reply not a just tender, or an after tender and sejus, which deems that he was always ready, if he can prove his replication to effectually overthrow the plea. The effect of his replication stating an after demand is, that he will gain his interest if he can substantiate the replication. Unless there has been this statement, the defendant only gets his principal, which is in Court. 15 Ray. 267; 1 Tint. 623. 4; 9 Ed. 10. It is assumed that the controversy is on the money to be paid as an answer to him, it is. I can't take the money out of it. But there is no question. But he is entitled to it. If this is not the case, that claim by tender is destroyed. 13 Ed. 57.
Defences to Actions to Contracts.

If a tender is made on collateral articles the Defendant must plead tender at the time of place according by terms of the contract, but must not plead "always ready" nor a refusal. There is a practice in Eng. for the Defendant to bring the articles into Court Plot they are not bulky, and this also in an action of trover, as you will see. This is regulated by a rule of Court: and our Courts can make such rules as matters of convenience. This practice obtains when the suit is for the restitution of the specific articles, as jewels, family pictures, for which the owner has an affection at regard, and they would be of fleeting value to any other person than the owner. The law gives such damages as will be sufficient to enforce a restitution. The old action of Detinue would lie, but it would not answer the purpose better than any other action. Why would compel a performance and Courts of Law can give damages to answer that purpose. Remember this rule, that what a man brings into Court is an admission that he made no use. This is incident to all Courts, I presume. By thus bringing into Court the Defe is estopped from denying anything, even the execution of the instrument. He is to pay all costs which have arisen before the tender into Court, but none afterwards if the tender is made sufficient.

In Court, we have no rule about bringing into Court. The reason is, because of tender is difficult, and so it is in many of the Writs by usage. The English Law does not admit tender after action brought. But here tender may be made at any time, even while the cause is a quority in the jury. But the suit is commenced, tender must be made of the costs likewise. As this is a rule of Law, it is adopted in many of the States.
Defences to Actions on Contracts.

Insanity is a defence to an Action on Contract, as in other cases; but it may be given in evidence, under the general issue. But when the action is founded on a special fact, Insanity must be specially pleaded in the case, and, as such, be proved upon the record. But is Insanity pleadable in an action for a Tort? The Books say that it is not, and Judge Peck thinks it is correct, that an insane person is liable for his tort, and that Insanity is not considered in an action of Tres-pass in the first instance. The action is brought to recover damages for the injury, and not to punish him. But when malice becomes necessary to maintain the action, as in slander, etc., Insanity is a good defence. And it is a general rule, that in slander or other actions on the case, when it is necessary there should be a malicious and wicked intention proved in order to maintain the action, that insanity is a good defence. But in some cases, it is not.

Covellite is a good defence to an action on Contract. A hose Court may plead est on the Taction to a Bond, for all her Contracts are void, except concerning her real property. If a woman promises to perform, after her covenant is terminated, that she contracted to do while a hose Court, and after this was a prior moral obligation, she is not bound by her promise.

Infancy is a defence to Contracts. When a minor is sued, he pleads that the Defendant was a minor, and it is a good plea, and yet the Defendant may set it up by showing that the contract was for necesaries, and that he was liable for the value of them himself.
Defences to Actions on Contracts.

Minor are in truth not bound to repay contracts entered into, the suit is brought, but on a Declaimum pabellum. The Def only replies on a pecuniaries, and not what the transaction was. The answer to this is not, pecuniaries. When the Defendant has pleaded that the Plaintiff be barred as to the Deft was a minor, the Def. may reply that he promised in part. The suit is brought on the first promise, which is set up by the second promise. I have never seen but one action but on the second promise, but I cannot see why it might not be done, as it is altogether unnecessary. Souvenirs are done to suits except those before the Infant attains the age of 14 years. After that there is no rule saying they cannot be punished for acts, it is doubtful if the man in the malitia sallie station. The ongoing after a year of age is, was he able to pay? If he was he is liable, they may be hung for murder. There is a case which lately happened on the State of New York. An Infant under the age of 15 yrs. was convicted of murder & sentenced to be hung. The Governor, recommends the prisoner to the Dignitary for a mitigation of the sentence on account of his age. 1839. 1842.) After the age of 15, there is no inquiring whether he was able to pay or not; he is at that age liable for his torts as an adult to be. It is said an Infant is not liable for Sluender till 17. But I see no such authority. He is certainly liable at 14. It is said a Boy that an Infant is liable for Sluender at 17, and since the inference is drawn that he is not liable before, but the inference is illegitimate.
Defences to Actions on Contracts

**Impossibility of performance** is a defense, if the defense is positive, by reason or prevents from performing by the act of God or the self himself, then must be may set it up as a defense. Contracts which are illegal are considered to be impossible. **Illegality of Consideration** is a defense, which if a plaintiff must not be pleaded, but may be given in evidence under the general issue. But in an act of a specially, it must be pleaded. So may any thing which shows the illegality of the instrument. **Illegality** may be given in evidence under the general issue in a defense. But it must be specially pleaded if you wish to defeat a security. But this only avoids the security, but does not discharge the debt. So when there is a total **Want of consideration**, it appears on the face of the instrument. It may be denominated to. But when there is a bond, given the law implies a consideration, it this presumption cannot be rebutted. But the presumption lasts no longer than the consideration after five years, and therefore in a covenant of there is a consideration appearing not recoverable by law it may be demurred to as above, for the declaration shows the consideration not to be a good one. In such case the covenant is no better than a pastoral contract. 1697, 1606, 228, Palm, 543, 367, 585.
Defences to Actions on Contracts.

Statutes of Limitations.

The Legislatures of most States have thought proper to limit the time within which actions may be brought for the redress of particular injuries arising out of the non-performance of contracts at law. The time limited is different in different States. In New York it is 7 years. In New York there is a Statute of Limitations.

In the application of these important principles and of the cases in which they are said to be applicable, there is often said to be an intangible or inconceivable principle. I think I can give you the great governing principle on the subject. I collect my opinion from scattered cases; and I find no contradiction as to the principle. I shall give you... A case of considerable importance came up before the United States Court in New York decided on the principle which I think to be the true one, and that principle was stated by Justice Story, in the course of an argument on the Court, that there is no case in which the Statute of Limitations may be pleading due to any action without a Statute of Limitations. In 1840, or 1850, upon a contract within the Statute of Limitations, there is one case of many cases that the Statute of Limitations does not run upon the statute, or that the contract is taken out of the Statute, when the Statute has run upon any contract afterwards made, the promise takes it out of the Statute. If a promise is made one year (not any prior) before the end of the time, it prevents the Statute from running...
Defences to Actions on Contracts. Statute of Limitations.

on the Contract. There are many such cases.

I will mention the three hypotheses insisted on by judges & lawyers. The first is, a plausible appearance, but it is altogether fallacious. The idea that the "ground on which a recovery of a debt is barred by statute," is, that the debt is barred by the Statute, that it has been paid. The presumption of such payment has by some means become lost, therefore whenever this presumption of payment can be rebutted, the debt must be considered out of the statute. It is not on the ground of the debt being old, but on the ground of its being paid, and if it is paid, the man should not be harassed by being drawn into 60 days to pay it again. This appears plausible, but is contradicted by the authorities. They say there is a debt barred by statute, and it is presumed it is paid, but this presumption can be rebutted, as the statute may come to prove that one year ago the Debtor promised to pay, or that six months ago he paid one half of the debt, which was in process to pay the indebtedness; say they, to pay more, if the law raises a promise. But judges have remarks, if we consider the spirit of the statute, to reject only the oldest term of the party, the party's debt is not recoverable. For they are wholly irreconcilable with this doctrine.

When the Debtor acknowledges the debt, says the debt, does not tell the party the debt exists but says the statute bars when it the will not pay, this rebutts the presumption of
Defences to Actions on Contracts. Stat. Limitations.

its being paid, yet the Creditor cannot recover. How can this doctrine agree with the Chancellor's decree where a man in his Will directed all his just debts to be paid? Here this decree that these barred by the Statute should be paid. (Cenin 1839, p. 299, 26th Pror. Nex. 1839. Smith's Statute.)

Now if it had been considered on W. that in legal presumption those debts barred by the Statute were paid, it was very unjust to declare a second payment. If they were paid, they were not debts now, yet they directed to be paid.

If their doctrine is correct, there was no legal presumption that debts barred by the Statute had been paid. If their doctrine is correct, the Will lapses over all laws. If it goes on the ground that the Chancellor's word was taken from the Testator's intention, it is the same thing; for who does he know that it was the Testator's intention? They must be existing debts... again, on that ground must the Statute have proceeded when they determined, when a person who had been a Bankrupt, and had paid his Creditors only 10½ on the pound, afterwards (after regaining sufficient property) for all his Creditors to come on the same principle and pay all his debts, that those debts barred by the Statute should be paid? If they had gone on the ground that in legal presumption those debts barred by the Statute were already paid, they did not have in mind that the person accepting, who he promised to pay "all his debts," from that to pay those which in presumption of law were no debts.

A Second Hypothetical is this (which I think is equally false). It assumes that there was no presumption of the debts being paid, but that they were debts due in conscience; that not considering at law, that the promise to pay was supported by the personal moral obligation; be
The offences to Actions on Contracts. Stat. Limitations.

This is a great in the cases before put an recovery to be due from
there had been a refusal to pay. If this is correct the ac-
tion must be brought on the last promise, but it is not so,
for if this were the case a new promise must always be
shown to have been made either expressly or impliedly.
This however is not the case, the action must be brought
in the old promise, there having been a waiver of the
Stat. Nothing is necessary to be shown but that waiv-
er, eg. as Executor of a Debtor calls on a Debtor whom
debt was barred by the Stat, and he promises to pay
now the first promise was made to the Testator and
on that, the action was brought, and the last prom-
ise was introduced merely to set up the first. So the
principle is fully established by the decision which
made the Debtor liable, he having acknowledged
debtor paying the action, in which case the action must
have been on the old promise, there being no other con-
tecedent to the commencement of the action.

The third hypothesis is the which judge here takes
as the true one, it which is sanctions unanimously by the judg-
es of the National Court. The Statute of Limitation was
not made on the grounds of justice between the parties, but
on that of public policy to prevent persons from neglecting to collect their debts in a reasonable time, the con-
sequence intricate, is parties to litigations which such neg-
lect must give rise to, and it would be in the power of the
Debtor to avoid the payment after such a time. This
stimulates the Debtor to collect his Debtor in a rea-
gonable time, and as a person may, always waive or
Defences to Actions on Contracts. Statute Limitations.

one of Dam in his favor, do in this case by a clause of the Statute, the Debtor subjects himself to the payment of debt, and from any thing to recede of the Debtor the boomer is in, if ever, as remembrance of he has once waives the Statute, by putting payment, he can never afterwards waive himself of it. If the Debtor say 'I will not waive myself of the Statute,' it is a waiver. When a Debtor says to his Sureitor, I acknowledge the debt, but I will take advantage of the Statute to make you do me justice' and with this inducement was admitted, yet it was held that he has never waived the Statute. So where the Debtor says 'the Debtor of 93, you have against me is unjust, since do you justice by paying your 93,' the boiler held that it was not a waiver of the Statute. But in this case, if the Sureitor had brought his action for the debt, it is to have recovered it. And in the case of Statutes above, one where a man in his will directed 'all is just debt to be paid,' where the Sureitor declare do that these bars by the Statute, were included; and the other, where the Debtor, right after having acquire property, advanced for his Sureitor to come in the 93, pay them, the Sureitor determine that those bars by the Statute, be paid, the decree in Chancery of the decision at Dam sure major on this ground. Which is indisputable. The true meaning that the Statute by his name, the adjudication by his advertisement has reserved the benefit of the Statute. And all these cases where the Debtor has been not liable (notwithstanding the Statute) may be reconciled with this principle of waiver. This is a case where the
Defences to Actions on Contracts.

A Debtor became insolvent, a Creditor to a very considerable amount, whose debt was barred by the Statute petitioned at the Debtor's request for a commission of bankruptcy; he obtains it. If the other Creditors were to be satisfied because his debt had been barred by the Statute, it was determined that the Commissioner was to order that if the Debtor had a right to waive the benefit of the Statute, and he had done so.

Every right acknowledgments to the debt of the Statute, and an overt act of a waiver, as where a debtor in a short time before the time his debt was to be barred by the Statute wrote a Letter in a dubious manner intimated to make what use of it he pleased afterwards; it was anything or nothing as the saying is; and the Creditor supposed it amounted to a promise to pay the debt; this was decided to take it out of the Statute, although after the time expires the Debtor refuses to pay, saying the debt was barred. And if a man should voluntarily pay a considerable part of the debt before the expiration of the time, this is absolutely a waiver of the Statute; at the time of payment he admits the debt was due, and the probable intent not to return to take advantage of the Statute. I do not know how the Law would be, but the surest and most efficacious method to pay the first half.

When there is an expostulation declaration of the party that he will avoid himself of the Statute, or can insist an intention of honest intention, it consequentially waives and the fact that there is an acknowledgment a debt, but in such a manner that no waiver can be
Defences to Actions on Contracts. § 1132. Limitations.

inchoate, he will not be liable to pay it, fully establishes the idea that the Statute does not proceed on the presumption that the debt has already been paid. If the debtor makes no objection, but acknowledges that the debt is due, you may fairly infer that he will pay, and he will not take advantage of the Statute. It is not necessary to prove a promise to pay, if such things are proved as amount to a waiver. If the Debtor protests himself of the Statute, he must plead non assumpsi or non assumpsi in factum. The number of years limited by the Statute.

So that it is a rule of the Defense, when this does not plead the Statute in Bar it is a waiver. You cannot sustain to a Declaration which states a debt contract in so long since that the Statute, provides the Statute will run upon it, because we have already seen some debt are not within the Statute. But to have a waiver of the Statute, it must be pleaded. And if this was formerly subject to appeal, it is now settled, says the Judge, at all times were formerly decided in Court. Both ways that the lawyers may still be of different opinions, yet the decision unanimously has in the National Court in the case of Pantarvis. When is a concession of, it must be the Law on the subject. For all the Law on the subject see 2 Binn. 1609. 3 Binn. 356. 4 Binn. 419, 2 Binn. 226. 5 Binn. 293, 9 Binn. 349. 11 Binn. 11. 2 Binn. 226. 5 Binn. 293. 9 Binn. 349. 11 Binn. 11. 2 Binn. 226. 5 Binn. 293. 9 Binn. 349. 11 Binn. 11. 2 Binn. 226. 5 Binn. 293. 9 Binn. 349. 11 Binn. 11. 2 Binn. 226. 5 Binn. 293. 9 Binn. 349. 11 Binn. 11. 2 Binn. 226. 5 Binn. 293. 9 Binn. 349.
Joint Creditors

In a case where one of two joint debtors acknowledges debt, it pays a part of it after the Statute has run upon it, it was held that it was an acknowledgment of both, and it must be so from the nature of the contract. The right of recovering lies on both, and not of one, but as it is recoverable by one the action lies on both. Where one dies, the action of both. 3 T. 584; 4 T. 879; 5 T. 224; 6 T. 820. The cases are attempted to be reconciled in T. 584, but it is under a different Statute.

The Statute of Limitations begins to operate from the time the right of recovery commences, not from the time of the promise. In all these Statutes, there is an Exception, a favor of Persons, as by Infants and Persons under age. When the Statute has commenced running, going beyond three years, marrying, cannot stop it or take the case out of the Statute. In these Joint Creditors have an interest in sea, but one, this will not prevent the running of the Statute in one of life, by whom the action may be brought. In this case, as in no other. Contracts, it has been made a Question, whether it affects a Contract, or which is in a state of things just as it lies. There is no doubt but it affects all Contracts. But if the contract is a Bump, grows out of a wrong, or tort, it does not affect it, so where money is joint, the Statute does not run.

On a running account between the parties, in which arrears are charged on both sides, and the account stops. In a grant, take it at trust. E. B. sells to B. a pair of oxen. Some time after, B. sells them to A. A. sells him his black oxen. Some time after, S. sells them, his balance. E. B. sells E. B. a Shoulder of Beef. S. sells him 3 Pigs. E. B. sells him 4 Sheep. E. B. sells him 8 Sheep. When we say that the
the Statute, read upon it, we do not mean, that there are not many things more than the 2 years old, the time limited, that cannot be affected by the Statute. The rule is to apply the payments made or the remaining account to the oldest debt in the other account, so what it will not absorb is affected by the Statute. This is when the party does not claim, that the payment he has made shall be applied to the old debt.

Thus far I have been treating of the Statute of Limitations as respects Contracts. But there may be Statutes frequently enacted, limiting the time in which a recovery can be had for Debt, as the present Statute. Remember, that nothing (even a confession) can take time out of the Statute when it has once run when there. There is a doctrine growing out of this, which is nowhere decided. Suppose you have been in the habit of trading at some distance from home, and in a secret manner been greatlySandman, if this you were to avail itself of after the expiration of the time, within which the Statute says an action for Sandman must be brought, you were so much damaged by this false representation that you found it impossible to make bargains; suppose you were still ignorant of the cause, can you now (after the expiration of the time) bring an action for the special damages you suffered within the time? The case as here stated, there can be no question but you may recover consequential damages for the loss suffered. In Sandman you must prove the loss, as in present damages. But the statute here is; can you bring an action for the special damages, which occurred within the time limited by the Statute? If that time has expired? I do not know how it would be.
Defences to Actions on Contracts.  

Sui Generis Limitation.

determine. Courts perhaps would say that the action could not be brought, while I think it would be incorrect...

There are also Statutes of Limitation with respect to entry on Lands. If a person does not enter on his land for a certain time fixed by the Statute, he can bring an action of ejectment to recover them. The party who has a suit of right, which is of a higher remedy than an action of ejectment. The mere entry on the Land does not (in Eng.) bar the title, but it does bar the right of entry. The Law, whatever it has an entry bars the title. In many of the States, they have no suit of right, if the party cannot recover in an action of ejectment, he cannot recover in any action, and this is the Law in Rome...

In. Under the Statute, it has been a Question whether one disability may be lapsed upon another? Is it true, a young man, by entering as a minor under age married, and Coverture enters, and that for an additional disability? Does it prevent the title of Land from resting in one person or possession, after the first disability, in account of his minority, is at an end, or may it re-enter? It is the opinion of many eminent Lawyers, that the State have the benefit of his coverture as well as of his infancy, thus lacking two disabilities together. Judge Denio is of a contrary opinion. Such a case happened in London. It was this. A girl under age married, some other person at that time had possession of two Lands. The wife about 50 years under Coverture, on her death the Land descended to a daughter also married while a minor. This being the case above 40 yrs under Coverture. So that the persons have

having the fee of the land were acting under disabilities for more than a century. After the action was brought upon the title, and the court decided that the disabilities having been perpetual, the Stat. did not save. Of the same opinion was Judge Robert R. He gave an argument, that opinion was shaken in a subsequent case, but was satisfied it was erroneous.

A similar case came before the Supreme Court of New York, and where Parsons gave the opinion of the Ct. that the disabilities it could not be taken, 87, the case of Smith v. Rep.

All Courts (says I. T.) have given in pleading to the Stat. They plead it in Bar, as what amounts to the same thing. The English modes is, now after that refusal, I cannot, which amounts to a plea in Bar. This practice has been adopted in most of the States in the Union. I think it is clearly a plea in abatement, it is as plea in Bar in many cases (for a plea in Bar goes to the merits of the action). E.g. As the State of New York they have no Stat. of Similizations, in this town we have a Stat. limiting the time to 7 yrs. Now suppose a Bond made in 1882 is due in 1892, our Stat. will not be pleaded in abatement. If it were pleaded in Bar, it would go to the merits of the case, according to that you will say that there is no recovery, when it may be recovered in 5 yrs. if the Def. fail to found the same. If it is in no defence for Defend. when due in 1892, to plead the State or Con. A plea in Bar in one State is a Bar in another, therefore it will not be pleaded in Bar, but in abatement. The nature, constriction of a contract must be according to the
Defences to Actions on Contracts. Stat. Limitations

...in the place where it was made, but if, from the mode of procedure, it is according to the law there.

It has been a disputed point whether a Stat. limiting the time for bringing a particular action can prevent a recovery in another action for the same cause. For example - A wrongfully took away B's property three years ago. The action of Trespass is barred by the Stat. Can an action of trover be brought? The Crown is not mentioned in the Stat. Which limits Trespass for the same cause? Yes. The Stat. as to bar to an action of trover - alike it is objected that the Stat. was intended to apply to the thing done and not the form of redress. The rule is that you cannot carry the Stat. further than it expressly goes. The Stat. is an infringement of the Common Law, therefore a literal construction is not to be given it.
Defences to Actions or Contracts.

Of Accord & Satisfaction. (By Judge Bacon.)

"When there is a contract for money to be paid, "full payment" is the plea; and when it is to do a collateral act, "performance" is the plea. When an agreement is entered into between the parties to accept something in satisfaction of an injury done by one to the other, or for a debt due from one to the other, the plea is "Accord and Satisfaction." Payment" is only a plea when the contract is to pay money. "Performance" is only a plea where the contract is to do some collateral act. And "Accord & Satisfaction" is the plea where the contract is to receive a collateral thing in satisfaction of an injury done to, or for a debt due. And an Accord with Satisfaction having any necessary qualifications to constitute a valid discharge of the contract, which are the same that are necessary in other contracts, is a good plea in bar to any actions, writs or contracts in any courts, upon the original liability for which the accord was a consideration, except it to Title done otherwise by the parties, which I shall presently notice.

Accord is an agreement to receive something in satisfaction of a contract, besides the thing specified therein. Or in case of a Tort to receive something in lieu of certain damages incurred to be recovered. It always supposes an agreement, and, when satisfaction is made according to the agreement, it is a Bar to any recovery.
Defences to Actions on Contracts—Accord and Satisfaction.

I have said it is a bar to all actions except real to one other suit which is an exception. If the debt of duty arises wholly from or grows out of a Specialty, a partial accord or satisfaction was at first law a bar to a recovery on the Specialty. But when a man owes a Single Bill (not a Bond, with a Condition, for the rule is of a Special instrument without a Condition) and the obligee received some of it or it satisfied part of the same, it was held to be not barred to a recovery on the whole. He must to where the debt grows out of the writing itself; it is from the deed, and the rule does not apply a Bond with Condition. The reason of the rule is this: It is founded on the old maxim of the Common Law, "Unum quadque ligatur eo ligamine quoddam ligatur dis solutus." A contract can only be discharged by another of as high a nature as itself. In this case, the discharge (which is by partial) is of a lower nature than the contract (which is by Specialty).

But this principle, says Judge Rives, I consider to be wholly done away by an English Statute. It Com. Law, payment is not to given or evidence but that statute allowing payment to be given or evidence, are the reason of the rule in case of an accord or satisfaction, etc. supra must cease.

I say even payment at Com. Law is not to given evidence unless there was an instrument in the nature of a discharge or a release, or receipt of the same solemnity as the Bond. But the Statute alters this, that applies in all respects to this rule, accord or satisfaction concerning
Defences to Actions on Contracts. Account and Satisfaction.

A specially when the debt or duty grows out of the instrument itself. It does not apply to a Bond with condition.

In some States payment may be given in evidence. In other States statutes have been made including accord and satisfaction. Suppose A gave a Bond to pay $100 to B provided he did not perform such an act (as e.g., to repair a house). Now accord and satisfaction is a good plea to such a contract, for here the liability does not grow out of the debt but arises from the non-performance of the act, and may be done away by an accord and satisfaction. This exception I have now mentioned, extends only to cases where the consideration does not appear; and you could not question it because the instrument on which it was founded was under seal. 1 Brownl. 136. 2 Co. Law. 143. 9 Beav. 78. 3 Beav. 44. 2 Co. Law. 140. 1 Nove. Law. 266.

When there are two or more Debtors, an accord with one is a good discharge of all, either in contracts or torts. You cannot sue them separately and recover a part from one and a part from another. One is liable for the whole; there fore an accord with one is an accord with all. It proceeds on the ground of a complete satisfaction for injury, if a tort, if the specific condition, if a contract.

With respect to an Accord, being a Sort of a Real action, it is impossible unless something more appears. Woman can obtain a right to real property without a deed. Suppose A and B have a dispute about a piece of land, and agree, in this manner, to settle it. Says A to B. If you will give me $100 in satisfaction of my claim, I will relinquish my right. B accepts the offer and pays the money. In personal
Defences to Actions on Contracts. Accord and Satisfaction.

Defences to Actions on Contracts. Accord and Satisfaction.

Defences to Actions on Contracts. Accord and Satisfaction.

Defences to Actions on Contracts. Accord and Satisfaction.

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Defence to Actions on Contracts. Accord & Satisfaction.

enquiry into the consideration, unless it appears on the face of the instrument, that it is insufficient to be a full satisfaction. Prow. Com. 5.

Another case: Where one took the cattle of another away, the latter sued in this part he pleads that the plff ought to be barred, for the he (the plff) on being allowed to take the same, accepted them in full satisfaction of an wrong. But it is no satisfaction for want of a consideration. 11 Mec. 128.

Another case: Where a man enters into a covenant to repair a house, he neglects it— and after the breach of the covenant it was agreed that he should go on repair, he did so, and when sued for a breach of the covenant he pleaded that the plff ought to be barred, for that they agreed that he (the defendant) should go on repair after the expiration of the same covenant. He had so repaired. But this was held to be no conscience for the breach had been committed. 11 Mec. 128.

The principle you see is that there must be a consideration, else it is no satisfaction. In the case I mentioned above, in 11 Mec. 128, where a man sued another for wrongfully driving away his cattle, the case is decided in that the plff, agreed that if he (the defendant) should drive his cattle to a certain place it should in full satisfaction of the wrong. This agreement was good, the driving the cattle to the place pointed out being a sufficient legal consideration. 11 Mec. 128.

I observe that a consideration, however small, is a sufficient satisfaction unless it appears upon the face of the instrument to be insufficient; as, when a man...
It appears to actions on contracts. Accord and Satisfaction.

Since another for 15S 4 4 6 to 4 4 6. It is said that the plaintiff ought to be barred, for that it was agreed between him and the defendant that the latter should take 5L 5 4 9 ful sat. satisfaction of debt. It was not a composition between debtor & creditor, but by way of accord or satisfaction; it was evident that it was not a sufficient consideration, as it was taking a third of the actual sum due, therefore it was not a good plea.

1 Term 4 4 4 54 17. 1 Leon 19.

Nothing is a satisfaction unless it is something in the nature of property of a pecuniary nature, money's worth. This is a rule, but it is says the judge without sense or reason. But as the rule is, so I give it. If Debit

Sends Notes, & they afterwards agree they will ask the Debit's pardon that it shall be in full satisfaction the injury done, there was a consideration, but it was not an accord or satisfaction which could be pleaded in law for it was worth nothing. But if Debit has treated him to a glass of grog, it would have been a full satisfaction; there is, then, have been a legal consideration.

The accord must also be certain, or else it is void, this is like all other contracts. As two Landlord Tenant difference concerning the ease, & they agree that the Deft. should leave the house (without specifying the time when.) The Court lets this accord not certain enough. I think however, says the judge, that it was sufficiently certain, that it was to be presumed he was to leave the house as soon as he conveniently could. Another case where it was agreed that a man should deliver a quantity of

Shall in satisfaction of a contract, the quantity was
Defences to Actions on Contracts. Accord and Satisfaction.
not specified. This was not certain enough for one could
day whether he was to deliver one Bushel or one hundred. In
other cases, where it was agreed in satisfaction of a contract
that the Deft. 89 employ a person for the 10th for two or three
days, it was held not to be sufficiently certain. But
could it not be made certain by the Deft. saying I will
employ them 3 days? So for the maxim of Law of that
that which is uncertain in its creation can never af-
terwards, by the parties, be made certain. I should say
days the Judge, that an agreement to employ 20 or 3 days
was an accord thus leaving it at the election of the party
to employ 20 or 3 days. But the above maxim cannot be ac-
cepted this. 22 Edw. 4. 4 Edw. 3. 88.

And an Accord to be of any effect must be Exec-
uted—For if it be Executory that the debtor according
agreement make a tender of the articles agreed to be tak-
en in satisfaction, it will be of no avail without an
acceptance. If the creditor refuses to carry an Executory
agreement into execution, it will be of no avail to the Dge.
An Executory agreement is no Bar. And it is said that
no action to lie on this Executory agreement, but I think
days the Judge that an action on many cases will be for
the damages occasioned by the disappointment thereof.
But if the agreement is not carried into execution, it will
not be a bar to the action. 1 Bl. 179. 1 Esp. 193. 305. 1 El. 3169.
9 El. 11, 79. 580 is all of Law. If there is an agreement to do a cer-
tain thing the lives of another to suit is lost before the day on
which the thing is to be done, the agreement is not bar to the
action, because it is not Executed. 9 El. 193.
Defences to Actions on Contracts. Accord & Satisfaction.

The manner of Pleading an Accord.

The old method of pleading an accord of satisfaction was to speak all the contract of accord upon the record, to deliver a signature to that accord, to an acceptance by the party. The modern method is much more concise; the offence of it being a delivery in satisfaction, and a receipt by the party in satisfaction. Satisfaction is the gist of the action. St. 573.
Defences to Actions or Contracts.

Foreign Attachment by Iago Reed.

But little do we gather from the Eng. Authorities, which relate to this branch of our subject. It is recognized by no other Eng. Statute or Common. It is by only a Board of London, and this custom is adopted throughout the different States, in general, in the Union.

It is a remedy calculated to enable a creditor to compel the Debtor of his Debtor, to pay over the debt to him, or can the immediate Debtor lives one of the State, or has absconded so that he cannot by legal process be compelled to pay the debt. The nature of it is this, to explain it by example... A may abscond out of the State, town, town, and B living in the State may owe A. The object of this foreign attachment is that B may get the money due of C. B brings an action, and it leaves a body with C. which attaches the debt due by him to A.

It makes no difference whether the property of A. is the hands of B. or money or goods. Whatever it is this copy attaches it. Now B must restore the Damages suffered in the debt of C. back to the extent of the Debt owed by B. to C. And if C pays this to by judgment of Court, then towards that, it is a bar to its action. to please that C. has paid the debt on a judgment obtained by B. D.

This process is given to enable the creditor of the absconder to recover his debt, of the Debtor of the absconder, in this case is called the Garnishment.

Foreign Attachment is pleaded by stating in their order, the petitioner (A) indebtedness to him (B) who brought the
Defences to Actions or Contracts. Foreign Attachment.

attachment - that the suit was returnable to such a court - that the present Defendant was sued with the process - that default was made by present Defendant, that judgment was recovered vs him - and that the present Defendant paid the original Plaintiff on said judgment.

After this, serves with a foreign attachment the property in his (C) hands, this never been, it attaches and he cannot pay it over voluntarily to his Creditor (the Plaintiff to the suit) (A) but at his price. If he does he will be compelled to pay it over again - he does it in his own wrong.

If B should be in another State and A should sue him there to recover him would not then be compelled to pay it over again. If A the Defendant to the foreign attachment having paid the demand himself, brings his action to his debtor, he pleads the foreign attachment, payment is a good replication in this last suit; however it is incumbent on the Plaintiff to have given notice of his payment to the Defendant. Suppose after B has obtained a judgment at it he takes suit in Execution & demands the payment of it, if B refuses to pay it, claiming that he owns A. Nothing or that he has none of A's property or his possession or care, what is to be done? B must take out a suit of set off, vs him (C) to show cause why he does not pay it. By the Statute, Writs, B has a right to call upon him to come in to prove whether he owns A, the amount of the judgment, or that he does owe him, or what property he has of A's in his hands. And if the B does not call him in for fear he will punish himself & attempts to prove his indebtedness to A by other extrajudicial means he has a right to his judgment.
Defences to Actions on Contracts.  Foreign Mutual

come to it sworn, and if on his story state the circumstances put together it is found that he is a debtor to A, he must pay the amount of the judgment recovered. A, if he can't meet, if not he must pay to the extent of what he did owe, which is found by the jury.

But, shall it not be conclusive - it may from other testimony or circumstances be found he is him, and yet be is not guilty of perjury by swearing? If he will not come in to testify when summoned, judgment will be rendered against him as for his own debt for the whole sum, sub silentio.

The plea in this case is, non agent, ally, trustee, debt out (as the case may be) now has no property of the abscinding debtor; in his possession. And upon this plea the jury finds whether the fact is so or not.

By the Stat. of the abscinding debtor to not in the State, no agent or ally, appears to defend on the suit or the original process, the cause shall be continued to the next Term, if there is necessary by the Term after, an until a special cause alleged and allowed in favor of abatement it shall come to issue. This provision it was found opened the door for a singular kind of fraud, as the abscinding debtor having left the State, be avoid being compelled by the creditors of A to pay the debts at given up the effects in order to his friend (by promising to pay all the costs of the suit to factorize him in a suit made the A was never his (3½) debtor. The Parol itself of course being careful not to appear on the return of of suit, to the abscinding Debtor being out of the State, the cause was continued from term to term, the property held in the
Defences to Actions on Contracts.

Foreign Attachment.

solutions vice, while the real creditors were defrauded of their claims. In order to prevent cases of this kind as a flaw, was made, that in such case the suit should be considered a petition one of the party so be liable to suit for damages.

If the debt from A to B is not due, but becomes due some time hence, say 3 yrs, still this does not prohibit B from suing now, but B cannot have a suit for the expiration of the time.

If two contract was to deliver at a collateral article, as e.g. 100 shy worth of goods, and has a judgment B, he must take out the goods, he is not obliged to pay the money the B requests it, B may bring this Eon on there and see where at the Posts, if the amount the B, he tell you to go towards payment of the debt.

If there has been an Eon in favor of A, B, and C, recovers judgment B. A now of C, is compelled to pay the amount of the debt in the execution in favor of A to the Sheriff, he cannot be compelled to pay it over again in B's execution. Suppose in this case B pays the money into the hands of the Sheriff by Compulsion, can B by leaving a copy with the Sheriff have a law upon the money in the hands of the Sheriff when he (B) has his judgment 100 shy.

I think says the Judge that he can. The reason in this case why C is not liable to pay it over again it B, is because, the payment of A's execution is not a voluntary one, but he was compelled to do so by process of law.

Foreign Attachment relates only to cases of property on debt due. No person can make a claim of this kind for
Defences to Actions on Contracts.  

Foreign Attachment.

A civil suit is at an end. If A beats B. what A does is not in his debt, B. cannot by leaving a copy with B. attach B's debt due by him to satisfy him for the injury he has suffered.

The Parishioner (B) must be a Debtor or have property in his hands, and whatever B. pays to B. (who has obtained a judgment against B.) without putting B. to the trouble of taking out a sequestration or an appearance; he recovers his debt out of B. B. (in the Parishioner's case) will be obliged to pay this additional cost out of his own pocket. This may be done, contention; the property being in the hands of the Parishioner, you B. a creditor, & D. another creditor, may both sue A. the absconding Debtor. D. thus having two suits, if foreign attachment are both obtained judgment, B. the Parishioner will not know what to do. he does not know who obtains judgment first. he cannot pay the amount to it. the absconding debtor, he must pay to the, on D. it is immaterial to him. what one of the judgments may be bad for error. - Our State has made provision for this. We have permitted both suits to be tried at the same time & whichever the C. may say the Parishioner shall pay that person he must pay. By this means the Parishioner is saved of any trouble or expense as the parties must pay the cost themselves.
Defences to Actions on Contracts.

Composition with Creditors. This is different from Accord & Satisfaction. Whether the Creditors have subscribed to it agrees to take when they meet together, they will be bound by it. If proves it is due to any such contract. It differs from Accord and Satisfaction, which concerns only a single transaction, whereas this comprehends all debts.

With respect to Illegal Contracts if the illegality appears on the face of the contract, it being by fraud, you must prove it. If the contract is by specialty, you must prove the illegality specially. In a case of Usury, you must state in your plea, that there was a corrupt agreement between the Defendant, that the interest is given to the first person that according to that corrupt agreement he did give to the Defendant a certain sum more than legal interest. If the plea does not state that there was an agreement, it may be dangerous to the court to be corrupt. Stating an agreement, namely, without saying corrupt is not good. It may be there was an agreement to take more than legal interest, yet not be illegal; as where Haywood & son. The question is that there be a certain sum put in, but I can see no reason for it. If the County have no evidence. If he states that the pleader took a certain sum and pays the other sum and says the player will be good, this is more than legal interest, or if it is proves the plaintiff took any more than legal interest it will be good. The plea states that there was a corrupt agreement; the question arose whether there could be
Defences to Actions on Contracts.  Illegal Contracts

an extinguish contract of which the Defence was ignorant at the time it was made? A man may sign a note for more than legal interest, but is it void on that score? The C. of Errors said it would not be a corrupc agreement & not be usury. They said it took two to make an agreement. I was more satisfied with the decision. The Law with respect to usury does not mean that there should be 2 parties. True, there must be a contract, othis requires 2 persons, but one of them I think may make that contract corrupc. Formerly any thing was usury which grew out of money, but now, usury means taking some thing more than the Law allows for us of mony. And if a man takes more than the Law allows whether the Defence knew it or not, I contend it is corrupc.

3 Day 26? There is very little Law to be found on this subject, because neither the Statutes nor Engligh Law Books contemplate a case of this kind.

Another defence is, former judgment in an Action for the same cause, matter or thing...

If the Pll has once recoverd, cannot sue the Defent for the same thing. If he has lost his case he may take out a Writ of Error, but that is not the Question here. There are different forms of action extending to the same thing, as Action or Tres- pass are concurrent in many cases. Suppose then the Pll has recoverd or there can be bring another suit for the same thing? No, he cannot. The Question then arises
Defenses to Actions on Contracts. Turner Judgment.

What actions are concurrent? The rule to determine this is, will the same proof support the two actions? Where the same evidence must be brought to support the second action, that was tried up of the first when judgment was recovered, the first judgment is a bar to the second action. But there is an exception to this rule. Another exception is the action of ejectment is no bar to another action of ejectment for the same lands. The parties are at the same time. 3 P. & E. 354.

Payment.

Another defense is payment — and it is a plea in bar. Not much is to be paid of this. The debtor pleads that the debt ought to be barred for the note or (i.e., the debt) is discharged by payment. Where there is no statute of limitations, he may give long time or evidence to raise a presumption that the debt is paid. As for example, the debtor was a wealthy man, the obligation was a long time, a debt frequently had borrowed money of the debtor. The debtor died and a bond was found among his papers by his executors who calls upon the obligation for payment. The debtor had no entry of it in his books, but says the debt was paid, and there is no remembrance of it. The bond not being barred by the statute of limitations, the executors is his duty both an action upon it to the debtor. The executors requires that the debtor testify the was admitted. The sworn to all the foregoing facts, and the jury found full payment. So was presumed from the relative situation of the parties.
as the obligor being such to the obligee prior to the bond had been paid, but sometime after the obligor paid the receipt, stating on the face of it that the bond was lost, as the full payment of it.

Yet this presumption of being paid from the length of time may be rebutted, as by proving absence, or the obligors not having the means to pay, or by showing that the payee had frequently called upon him for payment, or not obtain it, or that he had since been sometimes that withdrawn the suits or promiss of payment to any of those with rebut the presumption.

With respect to a collateral act to be done, per-
formance is the place. If the thing to be done is one, on which it apparent a question of law will arise, the party ought to state how he performed, that the court may judge
de, but if it is merely a matter of fact, he may plead that the payee ought to be barred because he has per-
hed the contract, or that the payee.

A man had contracted to obtain a billet, he cannot pleader to its performance, but he must state guano modo on it, and the court will have to determine whether it was good or not. So when a man is to give a deed he cannot say merely he did give a deed, he must state guano modo (as in the
case of a recital). So we see the thing to be performed is a matter of fact...
Defences to Actions on Contracts. Discharge & Release.

Another Defence is a Discharge. A discharge in its technical sense is where no right of action has accrued. A bargain having been entered, but giving up, as it were. A discharge is different from a release. A discharge is a discharge after a right of recovery has accrued. A discharge and release are sometimes used by analogy, by which they are not so. A release is not good without some consideration; it is of no avail if it cannot be made use of as a defence. Yet a trifling consideration as a mark of friendship is sufficient. But a discharge (before a right of action has accrued) is good without consideration. A discharge will only apply to those cases where a right of action has not yet accrued. See as to a Release, Co.C. 384, 385, 386, 387, 388, 392, 393.

Another Defence is a Release. A release (as supra) is after a right of action has accrued. Any instrument writing detailing a consideration is a release. But if it is stated it is good without any other consideration than that which grows out of the instrument, the idea is insufficient consideration. A release applies to what one is specific in it. If it is a release of all actions it includes of it be of one action, it includes that one only. It cannot be a release of any duty unless mentioned. But a release of "all claims due and\(\)arising is a broad release, includes to discharge not only all debts already due, but also debts to be recovered in future, as a Bond payable a year hence. It releases all actions on Contracts or for torts, or any delinquency in presence, selvedgeum in future. Co.Lit 291.

But a release of all demands, does not apply to cases
Defences to Actions on Contracts. Release.

that are not Debts due present solvency or future, which grow out of a Contract then in Existence. It was a man took a Bond to pay a debt or discharge the existence of the Bond he got a release or all demands, it was not a release of the Contract to pay the debt. This rule this is, that if such general release of all towards a debt not yet accrued is not discharged. Therefore a Co
erantor by such release is not be discharged from his liability for a subsequent breach of his Covenant. A release of "all covenants" would release it nothing else. Neither is one discharged from growing rent by such gen
eral release, unless indeed the rent is reduced to a due e
dition, or where it is not payable at Rent, but redu
ted to the common form of debt, in which case such a release, would release the debtor. Nor could such general release of all demands, release what accrues yearly as an interest. A release of all Covenants is? in a discharge

No collateral Cov. to be performed afterwards to be released, by such general release of all demands. By collateral. I mean a Cov. to pay something else than money. Neither are contingent obligations discharged by a release of all demands, but after this contingency has happened, the debt is ascertained, it will be released by such general release as well as any other debt. £20 S. 1767.

A Covenant to do something in future is not rela
d by such general words, but it would be by a Release of all Covenants. Co. Lit. 242. A release to one of several joint obligations is a release to all. Co. Lit. 232. 292. Salk. 690. Salk. 574.
Defences to Actions or Contracts. Release.

Courts will however confine the meaning of the words in the title of these expressions to a narrower compass than they would import, but in all these cases this must be something between the parties which warrants it. When the particular words of a release seem to include all dues whatsoever, yet if the court can gather from the whole face of the release or from the intrinsic circumstances that the purport of the release was not so general, they will construe it to those dues contemplated by the parties. As if A has a Bond for $100, B assigns it to C, and B pays the interest annually by to C, and afterwards A executes to B, a release of all debt. C calls upon B, next year for the interest, B says the Bond is in the name of A. I have a release of all demands, debts, etc. Now is this Bond released? It appears to be, from the terms of the release, but the court say no. They say it was not in the contemplation of the parties at first time, that the Bond A be released. The court restrain the words "all demands," in equity points out the rule. Another Case. T. S. owes a demand for $100. T. S. for $100, both of them die. T. S. died first, his will left T. S. a Legacy of $50. at the same time you will also. T. S. owes T. S. $100. T. S. dies and the Exec. of T. S. pay the Exec. of T. S. the Legacy of $50, T. S. took a receipt from him (the Exec. of T. S.) in full of "all demands." The court says taking into consideration all the circumstances, will restrain it to the subject matter, I let it apply only as a release of all Liabilities, not of the $100 debt. (P.C. 372, 373, 374.) cases there. (P.C. 327, 328.) 2 Dug. 205.
Defences to Actions on Contracts.

Bankruptcy or Insolvency.

This is another good plan. This Act of Bankruptcy or Insolvency (being the same) apply to those debts only which are due at the time of the Bankruptcy. If a man contracts to do a thing which is not due now, owing at the time of the commission it is not barred. Some of due at the time, it must cease if he does not pay it in it is barred forever. A discharge of one bankrupt partner is not a discharge of another who is solvent. § 1273 p. 465 p. 1103 p. 943.

It is debts of contracts only that are discharge under an act of Insolvency. It does not discharge debts. If A beats B, then becomes insolvent, his discharge finds his debts under a commission of Insolvency, still he is not discharged from his liability to B for the tort.

An Insolvent act in one State is no bar to the demands of Citizens of another State. The States consider it so. If the Contract is made to be performed in the same State, then a discharge under a commission of Bankruptcy in the same State is a good plea to an action on the contract. But if the contract was made in one State to be performed there, the obligor was afterwards discharged from his Contract by a general commission of Bankruptcy obtained in another State, where he returns to his original State, this discharge is no plea to an action on the contract. So that a discharge under such commission is only a discharge of such contracts as were made to be performed in the State.
Defences to Actions on Contracts.

When the commission issues. The Constitution of this
United States says "full faith & credit shall be given to
in each State to the public acts, Records & Judicial pro-
ceedings of every other State," but that has nothing to
do here; for the discharge of an insolvent Debtor in one
State will avail him in another State only for those
debts contracted in the State. When the discharge is
given, not so debts contracted in any other State.

The law of prohibition always contract was made must
regulate the dissolution as well as the creation & con-
struction of the contract. In the case of a new law, it
decides Nov. Term 1812, in "Whin's self his, Judge
Rush's words were these: "The Question before the Court
is whether a debt contracted in Penn. by both parties
residing there at the time, is extinguished by a sub-
sequent discharge of the Debtor under the insolvent
Law of N.York? We are clearly of opinion that it is
not. The general rule is that the law loco regulates the
creation, the construction of the dissolution of Contracts.
And we cannot see any reason why the present case is
from an exception to the rule. It is very obvious that
a contrary decision would be productive of the most
serious consequences of the most palpable injustice
to Creditors. The whole proceedings being in another
State the Creditors in Penn. have no notice given
them of the Debtor's application for the benefit of
the law. No opportunity afforded them of opposing
his discharge on the ground of fraud, or the concede-
ment of property. If a discharge in C.B. were held

("The Decisions of the Supreme Court of the United States, 1812")
Defences of Actions on Contracts.

Bankruptcy.

to be a law to debts contracts in Penn. a man has only
to get his debt tore, consent his property on the hand
of a Trustee to A.Y. and after remaining there three
months takes the benefit of their insolvent law. with
out any notice to his Creditors in Penn. if then returns
hew takes possession of his property. that his Creditors
to affect as. To give the discharge a civil sanction
constructions to be to open a door for frauds in justice. 
this the law will never sanction. In dependent upon
the authorities that have been cited, it appears to the
Court that the case of Evant v. Cotthard as stated by
Ch. J. Kent in 3 Cains 1346 is full a point for the present
case. In that case the Defendant had been discharged un
der the insolvent law of Penn. it was held to be no
to the recovery of a debt contracted in N. York pre
vious to his discharge in Penn. In short both L. P. A.
the parties of the case are as the Defendant and the Beam
of opinion that the rule (on the P. 4. to whom cause why
the Execution F. not be set aside) must be discharged.
3 F. 12 in 196. 1 N.H. by the other side. 7 Cains 134. 2 Johnson 238.
Defences to Actions on Contracts.

Arbitrature & Award. By Judge Read

October 3, Nov. 30, 1842.

The Law upon this subject has undergone a great alteration. The modern decisions are very different from past cases. In treating of this subject, I shall point out what is not as well as what is Law. The different rules grow out of these different premises.

In the first decisions the courts were very much anxious to give awards; it did not seem to establish them. They set them aside on many minor technical grounds. They looked into them with eagle eyes, if they could conceive from any circumstance that the award was not good they set it aside.

Afterwards the courts went over to ye opposite extreme, as wishing to establish every award. If they could conceive any circumstance attending the case which did not destroy the award, they availed themselves of it to save the award as good, and in this way often established bad awards.

But deserting both these extremes the courts determined awards upon the grounds of strict right. They do not look with eagle eyes into the award; nor consider anything which will affect it either way. If it appears good they establish it; if bad they set it aside. They regulate their decisions by justice and common sense. They understand to constitute awards as men of common sense do. This has given rise to a great difference of opinion upon the Law upon the subject. I shall mention what now is what now is not. I shall give the grounds of my own view, without taking notice of the modern grounds, once adopted.
Defences to Actions on Contracts. Arbitration & Award.

An Award is a judgment of persons appointed by the parties to decide the controversy between them. These persons so appointed are called Arbitrators. If the award has all the qualities of, or resembles to a legal award, it is about any action founded on the original liability, it may be so declared. No action can be maintained on the original cause of action, it must be on the award. The award is in lieu of the right founded on the former liability. It is a bar to all actions whether for contracts or torts, except where the liability arose from specially contracts or where the title to lands is concerned. But in all other cases, when the original liability or matter in dispute is arbitrable, the award may be pleaded in Bar.

So matter what the subject of the award is, upon the supposition of its being a good one, it may be pleaded in a Bar, it comes in lieu of the old contract. With respect to this question the old rule was, that if it was to be performed in a certain time, it was performed as to be a bar to an action on the original controversy or liability, but it was otherwise if it was not performed in the time limited. In such case the party might resort to the action on the original liability, but this is not so now. The award creates a new duty, so to it the party must resort for satisfaction.

What may be submitted by mode of effects of submission.

When there is a dispute about real property, an award is not a bar to a suit on the original controversy, nor be it is arbitrable, but the rule in favour of the nature of
real property. E.g. Suppose A, B, C, D have a controversy about their title to 'Blackacre' and leave it to A, B, C, D. The rule is, if the award is in favor of one, and this goes to A, B, C, D, then the award gives title to A, B, C, D. It is clear, if the arbitrators have awarded the land to A, B, C, D, that it is their land. If they have not awarded title, it is clear, if they have not awarded title, that it is A, B, C, D's land. They may refuse to give the deeds. They have no right to give the deeds. They have no right to give the deeds. They have no right to give the deeds.

The arbitrators hold their deeds given into their hands, as an escrow, and the delivery of the deeds to the arbitrators is a delivery of title to the person who is then judge, and can deliver the deeds. But this cannot be done in any country where the maxim is, 'That you cannot create an estate in real property by decree to commence in future.' The arbitrators hold the deeds given into their hands, as an escrow, and the delivery of the deeds to the arbitrators is a delivery of title to the person who, in their opinion, does not own the land.

In some of the States, the maxim is abolished by statute, and in others, the maxim is implicitly abolished. When this is the case, real property may be conveyed by judgment of the arbitrators, where the deeds are then executed by the parties delivered into the hands of the arbitrators, to be by them delivered over to the person in whom favor the award shall be, and the person to whom the deed is delivered obtains a complete title by delivering the deed recorded. In the Eng. Law it is not because the subject is not arbitrable, but on account of statute, that an award of real property is not good.
Defences to Actions on Contracts. *Aetram v. Flood.*

Suppose in this case of real property a Bond is given by one party to abide the award or one of them refuses to abide, or should none of them be perfect. So you see both real and personal disputes are in their nature arbitrable.

Public Offences—crimes (because the law prescribes their punishment) (Matrimonial causes, as divorces, because marriages ought to be free) are not arbitrable. They must take the course of the law. But the civil action which may accompany the offence, also the liability arising from contracts or marriage, as marriage settlement contracts may be submitted to arbitration.

The statute of charities of a person is not arbitrable. As questions of testimony, of evidence, it is a great objection. Questions depending on the testimony of testimony of parties, it is to be hoped, will never arise within the United States. The award in the above cases can determine nothing in any way.

Suppose a common controversy between A. B. is submitted to an award of arbitration as in favor of A. B. 20 $.

Here there is a debt created by the award, or what an action of Debt may be brought, if the award is conclusive evidence of the debt, or if a bond is given to abide the award, if the party for whom the award is refused, the Bond is forfeited.

Suppose it is not the payment of money which is awarded, but as a declarative act. You may grant a specific remedy, going in many cases, even beyond the powers of Chancery. Chancery, decree a specific performance or in cases of real property as a general rule.
Defences to Actions on Contracts. Arbitration & Award.

They may be sure, in some cases, that specific remedies cannot be had at law, as to decree a restitution of family pictures which are wrongfully taken away. But in general, they will not decree a specific performance in case of personal property, but leave the party to his remedy at law.

But Arbitrators decree a specific performance, and their award is conclusive of the right, and for this purpose many things are submitted to arbitration.

So arbitrators may award in case of a dispute of rights. As, if A have a dispute about a stream of water, as to who shall have the benefit of it for his stock. This may be left, Arbitrators to decide, whether the right belongs to one or the other. Suppose they award that it belongs to A's miller. How is the award to be carried into execution? It seems can be carried to execution in this way; but only make it a rule of Court, that the award be brought into Court, Suits as to who the right is. They may decree a specific performance. The award is conclusive of the right. Suppose the Arbitrators award that a man do a certain act, as that he shall build a pond of seven, four rods be had injured. The man refuses to do it. The arbitrators cannot award execution, but an action on the case may be brought to be heard for not abiding the Award. Or if a Bond is given, it is justified, then the money will be eventually recovered. So that you can in one way or in another, Arbitrators may award in cases of both real & personal property, and on either
Defence to Action on Contracts. Arbitrators' Award.

In a case if a Bond is given to abide by the award of the party to abide it is forfeited. When many is awarded the action of Debt may be brought on the award, there is no use of a Bond then. When the award is for the specific delivery of a collateral article, if the refuses to deliver the action of Tresser with lie, you the right is absolute by virtue of the award. A bond is supposed not to give.

It has become a Most point whether when Arbitrators award that property shall be put into, brought to the party of the refusal to return it. This suppose a Bond given; you there is a dispute but it lies when a Bond is given. The Question this is, must not the party request to his Bond in possession of bringing Tressor. The objections to bring the Bond to see that he is respecting to the original cause of action. But the judge thinks it not to. Whether the party had a personal right or not, the award of the Arbitrators has given him the property, of the same right is out of the Question. The rule is the same I think. Whether a Bond is given or not, the party bring Tresser or not. But state the party is at liberty to return to an action on his Bond if he pleases.

Arbitrators are governed by the terms of the submission. If they are by the submission to decide according to law only, they must so decide. But they have right to decide a case contrary to the laws of the land. If it can be proved that the award was made on any respect contrary to the laws of the land it may be set aside. But it sometimes difficult to decide that the award is contrary to law. If they should be unable to
Defences to Actions or Contracts. Arbitrators &c.

to determine that a contract enters into or an illegal considera-
tion is a good one, the award may be set aside. So if it appears evident or can be proved to be error-
ous it may be set aside.

They, as Arbitrators have all the rights of power a Court of Equity, acts calling in their just obtain-
ing evidences, tenor more, for they may both out of the parties themselves unless they are restrained by the submission. Chancery have no power to compel a par-
ty to testify for or against himself. Arbitrators have.

Various modes of enforcing Awards.

A submission is either by the Agreement of the par-
ties solely, or it is made a part of Court by agents of the
parties. And the submission by agreement of the par-
ties, may be by parole with a promise to abide the award,
or by parole promise before the Arbitrators, and in case either party does not abide the award, he is liable on the
Agreement. This now by custom, is now put into the Agreements implied by the submission to abide. But the Agreement being liable to be disputed, the parties very frequent-
ly reduced it to writing before others under one party is not abide an action lay on the Covenant. With
these modes have now gone out of use.

The common mode now is for the parties to exe-
cute bonds to each other delivering them to the Arbitra-
tors, with a condition that if the award is not performed
by such a time, the bond shall be satisfied. These
bonds are in the nature of Secours on the Arbitrators.
Defences to Actions on Contracts. Arbitrators: To Award.

...hands of the non-performance of the condition of the bond

write a peremptory one. The Arbitrators then deliver

the bond to the party abiding the award whom they

have in mind to whom they desire that the award be

made. This is the common

law in Eng. of the States. In Con. Some of the oth-

er States it is usual, instead of bonds, for the parties mu-
tually to execute promissory notes in favor of each oth-

er, deliver them to the arbitrators, who will deliver

the note of him for whom the award is made to him in

whose favor it is made. If they do not agree as to the

amount of the note, they endorse the amount of the note

above the award, so as to make it square with the

award to then the party to whom it is deliverable

recoeur that sum.

If the Notes are conditional, they are regulated like

conditional bonds. This is a practice in some of the

States which was formerly pursued in Con. (not to be

found in the English books). It is this that instead of giv-
ing awards the parties go before a magistrate of com-
petent jurisdiction, to mutually select a judge or

put their case into the hands of arbitrators. As much

as they award is then, so much of the judgment they

give up to the party in whose favor the award is

done, the rest, as by endorsing the note, and upon this judg-

ment so delivers up, the party may go out EXECUTION.

Now why is not this a good practice? The difficulty is

here, every award is not a good one. Here is an Execu-
tion from a bad man. It be a real or illegal perhaps, but
Defences to Actions on Contracts. Arbitrator's Award.

An award may be illegal for many causes, as, the arbitrators may either be tribunals. They had been bound by a contract or course of practice, he might have come in the place of any thing which is. Thus that the court was not a good one. But in this case what can be done? The only way of getting rid of execution is to take out an abridgment. This direction comes up for decision in the Ct. of Cond. the court was so apparent, but the court, in order to the most illegal. The question was again raised not to determine the same way in the superior Court, but an appeal to the Court of Error. Decision was affirmed. And judge thought the decision was correct, that other states where the practice exists to be decided upon, the question to be raised.

Submission is an agreement of the parties to any controversy to arbitrators, by this may be in writing or by parole. The arbitrators do not sometimes decide in the submission may be condition that on appeal in such cases shall be appointed. From this has the submission may be by the parties, by parole or by writing in court. (When made a rule of Court it must be in writing). I have thus far treated of the consequences of submission. Out of Court. In the second place consider the case where the submission is made a rule of Court. This may be where the action was pending before the Court or where no action upon the controversy has been commenced for in either case it is an agreement of the parties that Ct. will decide their submission. But what is the difference between a submission
Defences to Action of Contracts. All claims to
by rule of Court if otherwise? Samson, the interposition
of a Court is to give an additional remedy. If the par
ty refuses to abide by the award after a submission by
rule of Ct. it is a contempt of Ct. If he does not appear
before the Ct. a writ of attachment issues on him for
a contempt, for his appearing, he shows no good rea
son for not abiding by the award. The Ct. may com
pensate him for imprisonment is only additional rem-
cedy which the Eng. Law gives when the submission has
been by rule of Ct. If a writ however is given when
a submission by rule of Court, the party is not preclu-
ded from his remedy on that, he may sue upon it,
the rule of Ct. being only an additional remedy.

In Conn. by a Stat. where the award is in damages
the Court will issue an Execution thereon, then for it
is not necessary to resort to the Writ of Attachment for
a contempt, & the rights of imprisonment. If the awd
is to do a collateral act, the Court cannot issue an Ex-
cution to compel a specific performance. if one par-
ty on such case does not abide of award when the sub-
mission is by rule of Court, he is attachable for contem.

When a submission is by rule of Ct. it may be ac-
cording to any of the methods already mentioned of submis-
ion by the agreement of the parties orally. And on the
award all of remedies lie which to be enforced on was
a submission by sole agreement of the parties, as well
as that of imprisonment or issue of execution, but it
is always to be understood that taking one remedy has
a recourse to any other. Supp. on the English principle.
Defences to Actions on Contracts. Arbitrator's Award.

And to dispute about any thing done in it. Arbitrators they make out an award in favor of A, and have already seen that this will not be good that no title is thereby given. The if the party who agreeably to the award ought to make a conveyance, and not do it he will be liable in damages, whether his promise to abide the award be express or implied, by parol or in writing, or if bonds were given the party not abiding the award perfectly his bond. So that the whole of it is this. If a title is not given by the award, methods may be taken by which it is carried into execution.

The first Stat. in Eng' was made long after the emigration of our ancestors to this Country. It is the Stat. 9 & 10 Will. 3. So that there is no Common Law upon the subject. And if there is no Stat, in your States there can be no rule in Court like the above. This Stat. 9 & 10 Will. 3. is copied in almost every State with some few alterations & additions, though none in bond. we have no use for such a Stat. at our Courts upon execution on the award.

Where there is a submission by parole, no bond being entered into, no rule of Court, nothing in the case, but the submission 1 or that the Arbitrator made in all such cases where money is an asset the party may have an action of debt to recover it. But if they award as a collateral not to be done, then ends by the old rule no remedy, whether there was a consideration or not. Afterwards the Old decided there might be a recovery if there was a consideration with an
Defense to Actions on Contracts. Arbitration & Award.

A promise, i.e., a promise to abide by a consideration of something paid, as a test of the same, is not a consideration of the award upon which support an action. The law is now the same in all those cases, whether there is a consideration or not. Now he is obliged to perform if it appears whether any consideration appears or not except that growing out of the award, and if he refuses an action but a few times. So we see a complete revolution of the law upon this subject has taken place. See on awards p. 192. 2 Chitty, 242, 422, 962, 1029, 3 More, 250. 7 Term 76.

You are not to understand when bonds are given to abide an award that the party must resort to either or accept one or the other. In case of a Bond being given in settlement of a Book debt, the latter is merged in the Bond, but in this case the bond does not merge the award. If the party sues on the award he cannot sue on the Bond. The Bond in this case is an additional security only. This Bond may be given to any person else than the person entitled to it, as trustee for him, as if he is a minor. As a third person may give Bond for him with a bond by it.

The submission of a promise to abide is frequently in writing, or the submission only is in writing. But these cases depend on exactly the same footing as parol submissions, for the evidence of a written submission may be more plain & convenient than a parol one. See 155. Selin, 109, 212. 2 Bank. 375, 383.

This award may be by parol when the submission is in writing unless the parties direct it to be writing. The terms of a submission must govern the award.
Defences to Actions on Contracts. Arbitration of Award.

The extent of the submission is just as the parties choose. They may provide that the award shall be in writing, under seal, or in any other way. If such instructions the Arbitrators must follow, they deriving all their powers from the submission instructions of the parties, and if it appears extraneous enticing, when the terms of the submission were, that the award should be made out on vellum paper, this provision was considered frivolous and the award held good, even made out on vellum paper. The parties may submit as many or as few subjects as they please. The time is to be fixed by the parties, the Arbitrators may perform their functions at any time before the expiration of the time fixed by the parties.

Revocation. As are the powers of Arbitrators are derived from the submission of the parties, these powers may by the parties be revoked. And it is generally true that either party may revoke at any juncture of the controversy provided the award be not published. But Judge Crier supposes that could not be revoked after the award was made, that the not published. If the party knew how it was determined, as if he had come there by listening at the door. This notion however has never been it civil jurisdiction. For if a man has found how a jury will give to their verdict, he cannot by paying his money and draw the suit, this has he been ignorant he was not withdrawn at the last moment. This reads 16, 17, 19. The judge is of opinion that the law ought to be the same as this case, so that an revocation will be sustained.
Defences to Actions on Contracts. Arbitration.

On a renunciation the Arbitrators can proceed partly on their powers being the locality at an end. When one of the parties to a submission consists of more than one person, all the persons who compose that party must join or no renunciation can be made.

Suppose one party invokes after costs have accrued what can be done? There can be no decisions on this point but Judge Rees had no doubt but an action on the case would lie to recover all the damages sustained. Had the submission been by both the parties invoking such case forfeits his bond. The hearts of Chamany cases. Shamans down upon to the real damages sustained.

It has been questions whether there can be a reversion where a submission is made a rule of court. Judge Rees suggested a submission of this kind was as available as any other, that the party procuring and subject himself to imprisonment, it being a contempt of court therefore no one has yet been hardy enough to make a revocation under such submission.

The old rule on this subject was that if there was a bond given there could be no revocation but as the new now stands it may be revoked but the bond good and the bond good. When such as thing as a breach of the bond will out a revocation as if the party were not attorney for the Arbitrator, they may procure it at true, but it will not answer a very good purpose in many cases as it may be embarrassing for the party attending not out his case, without his antagonist is present. I wish to call on his conscience, or he may want judges
Defences to Actions on Contracts. Award.

When is in his adversary's possession. There would be a breach of the bond if it were by a rule of Court, it would be a contempt. 8 Ed. 2. Brown's report 67. 6 part e.

When the submission is in writing, the revocation must be in writing. Here also the party revoking may be liable to an action on the case. If a bond be given, it will be forfeited, but it may be discharged upon. (Note 2. Op. 57. 18.)

When a submission is by parole, the revocation may also be by parole. The old rule was that on such submission, revocation an action could be supported, a submission by parole being a notice submission. Late opinions are contrary. The rule is not so now. There may be a recovery on the express act. This rule supposes no bond given. 7 Ed. 2. 87. 257. Apr. 87.

It often happens that the parties (this rule applies commonly in case of Partners) enter into an agreement that if any controversy happens between them, it shall be submitted to Arbitrators. It has been questioned whether such an agreement was a bar to a suit in a Court of Law. But it is now settled that although he may be liable on his contract, yet it is no bar to an action for such a rule to exist the Court of jurisdiction which cannot be more. 8 T. C. B. 89, Watts 129, 235. 369. 9 T. B. 333. 2 T. 136. 626.

It may be laid down as a general rule, that whenever the controversy is one having a personal right, whether arising from contract or from tort, as there is a breach of contract, a trespass upon one
Defences to Actions on Contracts. Arbitration & Award.

Laws or a battery upon ones person it is arbitrary, & the award may be plucked at Bar, any action found on that original personal right, on the single matter. I had mentioned of an award concerning specially debt. From the foregoing propositions, this conclusion may be drawn, Which is also cogniz to the Books, that whenever an Award states fact, words be there also an award is a good plea at Bar in the action.

Dec 21st, 1837. Lectured Deb.

Who may who may not submit.

All persons incapable of entering into Contracts, are incapable of submitting their arbitrable controversies to arbitration. It is settled therefore that a minor not being capable of entering into Contracts is not bound by his submission, and for the same reason a married woman not being bound by her contracts, is not bound by her submission.

If a third person gives a bond that on a submission by an infant, in (the infant) their abide, the award, the third person is bound by this bond. Which is forfeits if the infant does not abide. The rule was otherwise the courts were then disposed to set aside every award said the minors own bond was no, that this bond give for him was also no, that this reasoning is contrary to principles, for if a father for instance should give a bond for good behavious of an apprentice (this bond) he would be bound by it, the the done bond would be void if he were a minor. So there was no reason for the rule. 1 Salt 207, 207, 207, 307, 307, 307, 20, 23, Comb. 318.
Defences to Actions on Contracts. Arbitration &c. &c.

Formerly it was held, that a submission of any controversy concerning the property of the testator, over which the executors had no power, was invalid. But at the Law courts, such submission is good if the executors be bound by the same. But by the English Law, it is dangerous for the testator to make such submission, for if the award is for a sum than he could have obtained at Law, or is for a greater sum than he could have been compelled by Law to pay, he must make up the deficiency or pay the surplus out of his own pocket. In short, the executors might himself pay such deficiency by making the submission, and pay the advice of the judge. But here if the submitter, the judge advice be constant, he is liable as in the English Law. 17th, 697. 12 Dyn. 216.

It is said in the Elementary Writers that if a purchaser of a Bankrupt may submit to arbitration and not be able for any cause to settle peace but proceeds to Law, he can find no such common law as he thinks it in court. By the English Law, there is a provision made that the assignees of a Bankrupt may submit any dispute concerning the Bankrupt's estate, but when they assume that the judge thinks the rule as laid down in the Elementary Writers will not obtain. Page 25.

It has been doubted whether one partner can by a submission of their point, affect the other without his consent. It must depend on their contract. But there can be no such construction given to their partnership contract unless it is expressed for the common law knows no such thing. Bolded 228. 
Defences to Actions or Contracts. Arbitration.

Thus originated this Question; it was a case of most importance from the number which were concerned. It was that, A ship's crew appointed A A B. C. D. by their company to submit a Question for the whole crew. They submitted to Arbitration if the awards was fair then. The crew were dissatisfied with it. It wished to set the award aside, and the Question arose were all bound, or only the two (A B C D) to the amount of their interest? (there being no doubt the A B C D were bound). It could not have been a Question of a power of A B C D, authorizing them to submit had been given by all, for thus it would have been of all. I can see no good reason why it was ever made a Question. I saw no appointment to which the crew all agreed. Hence it was a power for A B C D, if I conceived the whole crew were as much bound as they had executed power of attorney. It was or Awards B C D. In this case the two agents were bound, because they were parties. But when as Agent in common, cases having authority makes a submission, his principal only is bound by that submission, he must act for it in the name of his principal, & that the Agent could not be bound, but the Principals were. The master in your case. Your actions face per se. One if the agent specially appears himself not as agent merely, but in his private capacity then both principal and agent are bound. An Attorney to bind his principal by submission, must have express authority to submit that of the submitent without such express authority he acts in his own name, and then he is not bound. He is held principal and not as a general power.
Defences to Actions on Contracts. Arbitration.

You must attend to the business of the Court or Court—the Court's duty, but the Law compels no person in him to submit. State with the Court, has not an express authority to submit, if the submission is by rule of Court, the person it concerns, the Court, is not. For the submission being by rule of Court, it is his duty to attend to the business. P. 246. 1 P. 76. 1 Cr. 158. 246.

As a husband submits a controversy concerning his wife's property, whether the wife be Louis or not, unless upon the circumstance of the wife at his disposal. Also, he may submit the case to be bound, as e.g., dispute concerning his Chattels real or choses in action, but where he has no power over it, it is not at his disposal. Similarly, he has no right to submit that he does. The wife is not to be bound by the submission. So likewise, she will not be bound by any rewards on a submission of his, respecting her Chances, as for instance, a dispute concerning a trespass upon them, or for waste of cattle, or upon another to the husband, to her real property. All the right he has originates from the Marriage contract. The case of it is his wife, whatsoever continuing. So, as may recite the passions to which she feels passion liable to, profess for, but the ultimate property in the land is in his. That property which he can dispose of, will be bound by arbitration, and no other. 1 Co. 248.

So on all the above Authorities note that there is no strange ideas suggested by the Court, viz., that of your corpse comes in. The submission she will be content. But
Defences to Action on Contracts. Arbitration & Awards.

It is not so. The law is not ordinarily speaking bound by any contract of his, and it bears what the bond of the submission was by rule of Court.

You first find it laid down in 46 Books that when an award is brought to be made the law of action lies upon it by the party: this is an old rule: the action of debt, which was of usual action on award, would not lie. The rule was found on this, the action of debt was here found on simple contract: in such action, the recipient might have wages his Bond: the Award came as Act for him. This rule is obsolete, the Award is now as much liable as if the Recipient had given a Bond. See 600 to 621. 89, 119. Ray 248.

I have observed that almost every thing was a subject of arbitration: every action of a personal nature which arose from contract or tort, is arbitrable, with one exception, viz. Where a Debt by the instrument evidencing the debt is reducible to a certain sum as a single sum for $50, so a Covenant for $50 for a judgment for $50. This was a certain sum. They said there was nothing to submit. That it was the business of arbitrators to reduce uncertain things to certain things. There there was no uncertainty. They contended that the award did not extinguish the original liability on debt. it could not therefore be a Bar to an action on the specially contract. They did not contend that an action was not arbitrable for it was a question whether there was a debt. They did not say that it was arbitrable. They contended that an action was not arbitrable, for it was a question whether there was a debt. The reason was that the debt was about to be avoided by an award which was of a legal


Defences to actions on Contracts. Arbitrable & Award.

nature than the specialty of this was contrary to what
in "tamen quodque ligatur et ligamine quo ligatur dis
solutus". I have already remarked that this maxim is
away in Eng. by the Statute respecting giving proof of
evidence, the reason of which Stat. applies to this case.

When that maxim is disregarded it follows of course
that it extinguishes the debt. There never was any ques-
tion raised on the ground of its being a "Soe". If the debt
does not grow out of the instrument to be extinguished
it, when the debt is proved in paper, paper proof it extin-
quished the debt. Secundum quod it is not to be proved by part.
6 Co. 63, 1 Law. 272, 2 co. 528, 6 Br. 80, 12 Keb. 791, 4. R. 145, 1 N. 223.

You will remember I mentioned the case of an action
concerning real property, that if a bond was given it was
forfeited, but the award was nugatory. It is given as to
the. It is the subject of arbitration, but owing to the
consideration that of award can give no title, it is liable
to submit without a bond is given. But the instantes
is it arbitrable? In one Book it was said the awar-
non void. In another, that the award passes on Land.
Neither of these are true. In another Book an oft Judges
said an award of Trewhills was void; in another, that
of the submission is by deed at conveyance land, this last
is contradicts in another Book. In another Book it is
said that the award does not pass of Land over the the
submission is by deed, yet if a bond is given the party
refuses to abide, it is forfeited. This last is the true rule
of all ye others in connexion. Tor. Jones 168.

They after next pass that a case for a term emp.
was not a subject of arbitrament. This was untrue, for a
loan was a personal thing which as well be arbitrated up
as a pair of Shoes. Before the State of Fraud propri-
res a loan might have been made by parole, this or
chattel, interest being arbitrable, it was decided that by
an award of a term for years the estate by such award,
vested in him to whom it was awarded, as does a chattel
personal. Lord 5. 223. But since the State of Fraud,
interest to a chattel, real can be given by award, for
since that it can only be conveyed in writing. The great
difficulty was how to enforce an award when made.
The more magic of an award gives no title but of
the party to whom it is made will not agree, and
by law of award convey of land he will be liable in
damages on his promise to abide the award, either
that promise was express or implied, written or pro-
cur. Or if a Bond is given it is forgot or on the parties
refusal to abide the award.

Who may be Arbitrators

The rule is this. 1st. All persons who have not suf-

cient discretion. 2d. All persons who are under con-
trol of others, and 3d. All persons attainers of treason
or felony cannot be Arbitrators. As to the first, what
does sufficient discretion mean? It includes the
age, discretion; but persons 18. But suppose a sensibly
ment young fellow of 20 years of age who is capable of
doing business, is he included under this rule? Presuma-
Defences to Actions on Contracts. Arbitrators and Award.

have not sufficient discretion? An eye here does not suppose that the rule includes such persons as makes them incapable of being Arbitrators. It is not established on the same footing as their incapacity to bind themselves by contract or otherwise. It must be on some ground of a real want of discretion. A Minor may be appointed to do an act. This puts him in a position of person appointing himself, where he has to take an oath, and in that point alone I consider it. There must be a real want of discretion.

Deaf and dumb persons are included in this rule, but if they can be proved to have sufficient discretion, they may as well be arbitrators as to bind themselves by contracts which we have before seen they may do.

6th. As to the present class of persons under your control of others. This is no reason that Arbitrators women cannot be Arbitrators. Nor upon the supposition that they are lacking in discretion, but because the Law supposes them under the coercion of their husbands, in reality this is not always the case; on the same ground as a Slave subject to his Master cannot not be an Arbitrator.

7th. All the class of personsattaunts of Treason or Felony cannot be arbitrators, because it would be disgraceful to let those determine for other persons. The nature of Arbitration and the Law respecting it are different from all other things. In ordinary cases a man cannot be a Witness for himself, but before Arbitrators he may. A man of ordinary estate cannot be a Judge in his own cause, but here he may.
Defences to Actions on Contracts. Arbitration. 1. Awa

of this in the English Books: any thing in Eng. which occas

ons ye. death of a person is a Bone and a forfeit to the

King. By royal franchise a certain Bishop was to have

all dead men within his diocese, a man was killed by a car

tle while running over him! and the Subject was

agreed to be referred to Arbitrators to decide whether the

Bull was forfeit or not. The party chose the Bishop as

one of the Arbitrators, the decision in his own favor. The

party then attempts to set aside the award by saying

that no person can be a judge in his own cause, but the

man was confirmed the a good Comb 168. 4. Miss 175. 2. Dec.

100. Housd. 483.

Umpire.

It is a common thing in submissions, for the parties
to choose two Arbitrators to decide any controversy in
which case they do not agree to appoint a third person to
make the decision, who is called an Umpire. The proceed
ings are called an Umpire. Or sometimes the parties deleg
ate the power of choosing an Umpire to the Arbitra

tors, who must then in case they disagree proceed reg
ularly to elect an Umpire according to the instructions of the parties. And it is settled that Arbitra
tors cannot appoint an Umpire by chance; as by cas\n
ing lots, they must exercise their judgment. 117102.

This was formerly a notable dispute in a case like this. A nomination to Arbitrators to award by a

certain time, Sept. 10th. January. And if they disagree
to appoint an Umpire to decide the controversy by
Defences to Tolleson Contracts. Arbitrators.

That time. It was formerly considered the arbitrators could appoint a Umpire before that time, 10th Day, because they had time for themselves to agree; and it was held that there could not be a concurrent authority; and it seems if they could not appoint before the time 10th Day, they did not after its expiration, for with that expired their authority. Someone afterwards the Courts took another step; 1st, if the arbitrators did not agree in the limited time, but one to the Umpire notified him, he might make it in the limited time. But as the Law now stands it is considered that the arbitrators' appointment of an Umpire is an advancement of their authority; therefore they may appoint an Umpire, may award at any time before 10th Day; or Nothing mistaken but that of Umpire made up awards, 2nd nothing is the matter of Contra, the presumption is that of arbitrators there is their authority. So that where a further time was limited to an Umpire, as upon the arbitrators' time to decide by the 10th Day, if they did not agree, the Umpire was to decide by the 15th Day. It was formerly held that the Umpire must award to be the 10th as they said his authority did not commence till that of arbitrators was at an end. But the Law is now established the other way, the arbitrators and Umpire having a concurrent authority, therefore the Umpire may at any time before the 15th Day make an award; it will stand good provided the arbitrators make none by that time.
Defences to Actions on Contracts. Arbitrators' Award.

On a submission to Arbitrators limiting them to a certain time to make their award, and if they could not agree by that time, then to appoint an umpire, it was formerly held that no umpire could be appointed within the time limited but only on the last day. If their time was limited to the 10th, they could appoint only on the 10th. But it is now settled that they may appoint at any period within the time limited. It is frequently the very first thing the arbitrators do, they appoint an umpire. Then go on to try, if they cannot agree they call on the umpire. There was a case in an Old Report, that gives of arbitrators power to appoint an umpire pro loco. They reason ed elaborately to establish this; they said they could not appoint during the time, if they can post pone it till the last moment, that moment was as much of their time as any other part of it, as soon as that last moment claps the authority of the arbitrator was at an end & therefore they & the umpire are appointed at once. But this is all untrue. Rep 458.

2 TR 645, 1E Reg 267, 10 Selk. 71, 1 Mer 275, 2 Jess. 100, 1 Reg 287, 2 Binn 168.

Another great Question. It was formerly held that if Arbitrators appointed an umpire, he refused to act, that on notification of his refusal they c could not proceed to a second appointment, however by their first appointment exercized their authority. But it is now settled that they have not exercized their authority till the person appointed accepts. Consequently they may within the limited time
It refers to actions on contracts. Arbitrators are bound to continue their appointment, till there is an acceptance. The intention is they must appoint effectively, &c. &c.

113. 1叠 115, 4 May 1822.

The duty of Arbitrators.

Arbitrators on acceptance are to appoint a time, place, &c., where they will proceed with the business of their appointment, and are to give notice thereof to the parties. When they have not appointed, they may adjourn to any period with the time limits for their award. It is expedient to prolong the time, this must be done with the consent of all parties, as in the submission. If it is by rule of Court, the Court must prolong it. If formerly was questioned whether on acceptance parties by the arbitrators, they could proceed in the submission arbitration, unless both parties appeared according to appointment. But it is now settled that the one of all parties to continue absent, the arbitrators may proceed in award on the facts & evidence produced by the party present, &c.

It has been a question whether the Arbitrators &c., could part of parties or absent grant for the same. The said cases say they cannot, but the practice is contrary. This is when the submission does not in terms give them that power, you wish power may be given them by the parties otherwise it would be good.

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Sequences to Actions on Contracts. Arbitration and Award.

It has also been a Question whether a majority of the Arbitrators were competent to make an Award. But the Question is now at rest, for unless there be a provision in the instructions of the parties that a majority may award, no award can be made but by a joint concurrence of all the Arbitrators. In this respect it differs from a Court. The reason is their powers are joint, as it is in the nature of all joint powers that they cannot be exercised by one, but must be by all. But it is customary to insert a provision in the Submission authorizing a majority to make the award, for otherwise much inconvenience may arise, as one may be sick.

And where parties exist, the Submission that a majority may award, their award is, as it validly can be made in the presence of a minority, unless he willfully absents himself, or stays away after instructions that it be made, unless it be made at such time, &c. (By Berendt.)

If this point has been also made litigate, whether an award published in the absence of the parties, they not having had notice of the time of the award, was valid, the provision having been made that it shall be published in their presence. The point is now settled, it is governed by this distinction; if such award is made on or last day of the time limited it is good, but if at any preceding time the parties must be present, or have notice when the award is to be published, the award it is not valid.

The award must be pronounced all at once, the Arbitrators may make out the different items.
Defences to Actions or Contracts. Arbitration & Award.

of the award separately, but the complete award must be pronounced at once. 

There formerly was a dispute. Parties, viz., that the instructions to the arbitrators were that the award should be delivered to the parties by such a time, was this to be a written award or was a parol publication in presence of the parties a delivery? The Act of 1873 notwithstanding, permitting to set aside awards said that a parol publication in presence of the parties amounted to a delivery, as to the award delivered in that way was good. Another case was this, the provision was that an award still to be made. This ready to be delivered to the parties by such a time, the Court held that a parol award which was not ready to be delivered at that time, was a sufficient compliance with the provision. They said the last case governs this; if the instructions were to deliver it, and a parol publication in presence of parties was sufficient delivery; a readiness to deliver a parol award was a sufficient compliance with the provision that it ready to be delivered. From this it may be gathered that unless there be an express provision that an award be made in writing, it will be valid the parol, and the rule now is, once Ets. willing to form an award, that an award shall not be destroyed by implication. 6th May 1873. 5th 1873, 883. Dec. 7th Lecture 9th January.

Of the Arbitrators Power of Reservation.

You will see it is said that Arbitrators cannot receive any authority to do an act subsequent to the time limited.
Defences to Actions on Contracts. Arbitration. Second.

for their award. True arbitrators can reserve an authority to do a judicial act subsequent to the purport of their award. Therefore an award that it will pay £1000 by a certain time, but if more be afterwards paid, and where there the award was that it will pay £1000 for a certain Lot of Land, the number of acres being unknown, or its quantity being uncertain. This does not reserve a judicial authority, but the quantity is to be ascertained by a mere ministerial act, or the payment of an authority may be reserved. Or if the award that I give thee bond for 1000 £ it is good. In all instances I shall pay as a certain sum, the legal costs, which have arisen on the dispute, the costs at the time not being uncertain, as is not good; for the act of ascertaining the costs is merely ministerial. The arbitrators cannot decide the thing which is not submitted to them. Suppose there are five Notes submitted to them, they award that this is in- 

debts to B in three Notes; that is, these pay how.

On the award to be good as to the five Notes submitted to them, (they are being of the same value say 100 £ each) as to any three not submitted. For an award may be good as to four out of five if those five are not submitted. For an award may be good as to four of five if those five are not submitted.
Of the Arbitrator's power of Delegation.

 Arbitrators cannot delegate their authority to do a judicial act, but they may delegate their authority to do a ministerial act, such as they can perform themselves as e.g. they may delegate their authority to the clerk of court to pay the costs. They must award the substance of the thing to be done, i.e. the satisfaction either party is to give to the other, but they may delegate their power to do a ministerial act, so they may delegate to some person the power of determining the form in which that satisfaction shall be given, made as when the award was that a release of rent should be made, or that A (a 3rd person) should describe the going of the release, or in any example just given there an awarding the costs that have arisen in a dispute they may award to proper officer to assess those costs. 1 Sam. 4: 21. 358 or 35. 2 Sam. 19. 6 & 7. 137.

 It will not do for the arbitrators to delegate their power to an incapable ignorant person. See the example above suppose they had an idea Tom Dobbs a tenant, to assess the costs. The arbitrators may a prefer costs but if they refer it to some other person he must be capable person. So if you care about when they assess at £2. May 16. 1804 per acre, if they appoint one to measure the land it must be a person who understands surveying. 2. Sam. 100. 3.

 It has been made a question whether an award to stand by any one party as good as e.g. J. T. and J. H. stood.
Defences to Actions on Contracts. Arbitrators' Award.

The requisites essential to an Award.

It is essential to an award that it must extend beyond the submission to every person of a stranger. But that it embrace all, that the extent of the disputes submitted. That it be both physically feasible and possible. That it be reasonable. That it be mutual. That it be certain, and last, that it be final.

1. It must not extend to a controversy not with the submission, which means that the award must not embrace any disputes of others not included in the submission, and if it do the award is always void, and sometimes the whole award is so. If it is a submission of all actions, it is of all controversies disputes to demands, whether founded on Contract or Tort. But if the submission includes only all actions on Contract, or also founded on Tort, it embraces them only. Thus it was once done in saltation. Whether a collateral article can be awarded in satisfaction of a claim.

If not said there was a difficulty in this case, because arbitrators could not grant execution, and
therefore could not carry the award into effect. But if an
action have been brought in a court of law, they could
have granted execution thereon; or have compelled the
performance. But Judge Paine clearly of the opin-
ion that Arbitrators can award collateral, or incidental
satisfaction of a claim or injury done. It does not rest
on the property, but is conclusion of a right. The rule
formerly was otherwise, they said it was extending the
award to things without the submission. But how can
that be? The fact is, the award was about the thing sub-
mitted nothing else. It does not come under, nor is it
affected by the rule that the award shall not extend to things
without the submission? Their argument facts are the
same, yours are sufficiently numerous to establish the
doctrine that Arbitrators may award collateral
property. Here is one case which they rely upon, the
Arbitrators awarded that one party should cock two
ducks for the other, that this should in full satisfaction
of the dispute claim to. The court set aside the award,
but it was not because collateral proprietor was awarde,
but because it was too trivial. It is such that they do
not encourage such awards. (Mason v. Hay, 1639. Scott, Hay, 234.
There never was any instance but Arbitrators
might award a security for money to be paid at a fu-
ture time. They may order any appendages for the full
value of the award. Whatever was appurtenant to the object of
the parties to have settled may be awarded by the
arbitrators; as where there was a dispute between
a landlord and a tenant concerning the payment of rent.
Defences to Actions on Contracts. Arbitrators & Award.

The parishioner claims he was exempt from the payment of debts, they refer it to Arbitrators. Now what was due? The money was to be paid if the person was successful, but the grand object which they had in view was the right, and by arbitrators returned their award, that no money that no tithe was due and that the person should give up the parishioner a release of right, and this they had power to do. When there is a general submission they may make mutual discharges of all debts. So on a submission to partners, the arbitrators may if the submission is extensive enough break up the partnership. So on a dispute between Master and Servant is submitted to the arbitrators, they may release the Servant, towards that the Master shall give up the Indentures. 37 El. 3d. 92.

In the Law once was it was supposed that Arbitrators could do this, but the Law is (England) altered. They formerly considered that this was not within the submission. But the Law since is now otherwise. A Question arose on a case of this kind, Stiles v. Stiles had a dispute, Stiles is an Arbitrator they awarded that he was to give up to Stiles a Bond which Stiles had given him a few days after the submission. It was contended that this could not be done. There was no Question about of Bond being given at the time of submission, but whether they could do a collateral act to be done. The Law is now settled now, for I have told you a collateral act may be awarded to be done. Exp. 99.
Defences to Actions on Contracts. Arbitrator's Award.

I will now give you some history of the different revolutions in the Law concerning an award. Suppose an award that mutual releases of all disputes should be given up in the date of the Award. Now it was formerly considered that all the awards were void, because since the submission some disputes might have arisen, therefore the award was more extensive than the submission. This was at a time when Courts wished to set aside every award. If they said it was void, purely on the supposition that there might have arisen new disputes. Afterwards Courts said they would not set aside an award until it was made to appear to them that some new controversy had arisen after the submission, and if that appeared they would set it aside. But the law now is, that if they award mutual releases shall be given up, up to the time of ye award, the releases cannot operate upon any thing which occurs after the submission. It operates only on the controversy submitted.

N. 295, 60 Geo. 321.

(No ancient idea that Arbitrators, unless special provision was made therefore, recover no costs, they arising subsequent to the submission, therefore not within it, but costs are now considered as a part of the dispute submitted, more than for in all cases an award, unless special contrary provision be made.)

2d. Branch of the rule was that an award must not extend to any person who was a stranger to the submission. The ancient rule was that it was
In enforcing Actions on Contracts. &c. &c. &c.

Suppose the action was to be done (agreeably to the award) to order of A. then the award was made. The rule was, in some degree mitigated, but it was held an award to a stranger was valid provided it was for the benefit of the party who had received the injury the satisfaction of whose it was made. Suppose they award that B. has beaten C. that he shall pay C. a stranger, 500 and nothing more was said, the award was void. But if it could be shown that C. was a customer of B. it was good. As the law now stands an award to a stranger is prima facie valid in all cases, for it is presumed in such case to have been made for the benefit of the party injured it cannot be destroyed tille the contrary is shown. Thus when A. & B. had a dispute about 100 acres, they submitted to arbitrators, who awarded that B. sh. convey it to A. and his heirs, the award was good, for it was for property the handing over of it only. It was therefore proper that the 100 sh. be included all the sh. was a stranger to the submission. 6 Co. 138. Page 193. 1 Blk. 24.

So when C. had a claim of an assignee obligation of B. to C. (the obligation) A. said he did not owe it, upon which A. & B. submitted to the arbitrators, and awarded that A. should pay 1000 amount of it to C. The award was good for it being assigned to C. he alone was entitled to the money due upon it. 10 Co. 138.

Suppose again that A. & B. had given a bond to C. they had disputed between themselves how much the bond was to be paid, they submitted to the arbitrators—
Defences to Actions on Contracts. Arbitration and Award.

awarded that A B C shall pay 9/3 to B and 15/3 to C. This award was held good to be paid to a third person, to whom A B C (two brothers) had to support their mother, as they disputed about it. It was submitted to arbitrators who made an award, that A B C shall pay a certain sum. The certain sum, the award was good. There are all the cases that I know of where the award extended to persons who were strangers to the submission. But there is no sense in saying that the award cannot extend to 3 persons, when it is beneficial to the party in whose favor the award is. Bro s. 541. 1 Moe 9. 762. 105.

But an award that an act shall be done by a stranger is always void as it respects the stranger. The stranger cannot be compelled to perform the act. But it does not follow that one of the parties shall procure a stranger to do an act, is void. As if he was a trustee. But this 3rd person must be in the power of the party.

Another rule is this that the award to be valid, must embrace all or not a parcel only, of the dispute submitted. This rule is liable to much qualification, for on an apparent submission of more disputes than one, there in fact being but one, a decision that one dispute that really existed, without noticing the other named in the submission is a sufficient compliance with the rule. The award will be good. Suppose the submission is of "all actions personal trial," & the award says nothing of real actions, it is good, unless you think that there was
Some controversy of a real nature brought up. According to the old rule it was void. Sec 566, 567.

And this in fact more controversies are raised in the submission in general terms, & more really exist than one considers by the award of the Arbitrators. Awards upon which the Arbitrators decide to them, their award is still valid. But prima facie every award is clear of the controversies decided on, therefore cannot be considered like the contrary is actually shown. It is sufficient to show merely that there other controversies between the parties, but it must be proved that they were brought before the Arbitrators. If the submission was of all disputes an award about one is good, though there were more, unless they were more brought before the Arbitrators. If more than one is proved to have been brought before the Arbitrators, they are decided only on the one the award is void. Bro. 266, 267, 268. Bro. 1929, 355.

It was formerly contended that in a general submission of all disputes, if the parties put in an if a good, i.e. that the award will be good provided all controversies were settled, it would make a difference. But it does not now. It is now well settled that if one only is decided their award is always prima facie valid, can be destroyed only by actually showing that they did not award upon all the disputes brought before them. This may be proved by parole. Bro. 266, 267, 146.

These are all the cases where the submissions of all controversies in general terms are non-specific. Now you have already seen that there may be disputes
Defences to Actions on Contracts. Arbitrums to award.

If one or two are brought up before the arbitrators the award is good. But suppose the several controversies are specified in the names, as for instance, the submission is of all controversies vis. Slander Assault Battery Contract to write that make a difference? To write not the award or Contract only, and if no more were brought forward unless there was an item good, viz. that the award be void unless they decide on all the controversies submitted. But when more causes are specified without having the item good clause, one may be determined without the others of they are not brought forward. The award is no more to the actions that are not brought forward, because they which are. But in all these cases if more were not before the arbitrators than they decided the award is utterly void. When there is a submission of all controversies, as those specified, there is an item good clause, the award is prima facie bad unless all the disputes specified are awarded upon, but by showing that all the disputes which in fact existed or which were disclosed to the arbitrators were settled by the award, it may be rendered valid. If it be a case e.g. Where the submission is of all controversies they are specified, there is a provision for the good clause, the arbitrators to decide all submitted. Likewise decide another controversy not specified, the award is good as to what was specified. Last of one not specified it is void. They must settle those distinctly saying so much for slander, so much for battery, so much for contract. It will not be good, if e.g. last one not specified is mentioned,
Defences to Actions on Contracts. Arbitrant's Awards.

In such case the whole would be void. If they had been decided for each one, it then do not exist for the one not specified, the last only is wrong to the rest good. Step at 114 to 117, Proc. 216, 760, 449.

To return to, the requisites an award must have, one without which it is not good.

46th. An award to be good must be physically possible. The legal import of "possible" is the same as in Contracts. It must be possible in the nature of things, that it may be impossible to be performed by any party that was of the award is made. Suppose they award that the State shall procure a Decree of Blacks where it delivers it to the Sheriff. If he does not own the Land, and has no power or control over him, who does own it? Now T. S. could not procure it. Judge Blowers thinks this case may be classified under a case the physically impossible: but if the party has been awarded to procure an act to be done by a stranger, over whom he had a sufficient authority there for, it would have been valid. Suppose in the 2000000. first case, they had awarded that the State procure a Decree of Blacks where it delivers it to T. S. When the Sheriff did not own the Land, or knew who the owner of it was, or they had put the award on two alternatives, that he did, or pay [12000]; the award would have been good. Arbitrators, may award one of alternatives.

50th. An award must be morally possible, or it is not valid. Arbitrators, must not award what is not the Land, i.e., they must direct an unlawful thing to be done. It is laid down that they must award what
Defences to Actions on Contracts. Arbitrators' Award.

is Legal. By this is not meant that Arbitrators cannot award in a case where a recovery can not be had in a Court of Law. As where a man calls another a scoundrel, clear, a good for nothing dirty, stinking, lowly weaselled scoundrel, and the fellow, now if an action for these were brought into a Court of Law, if a recovery claimed for you, it would be galloped out of Court (before you say 'Jack Robinson') on Demurrer; but in this case if they had agreed to submit it to arbitrators, if they had awarded that the person who had such ready slack should pay the award and the fellow 400 for the injury he had received, it would have been good. Awards, 1822, 2812, 2563.

6th. The Award must be reasonable. But by this it is not to be concluded that one may enter into a mere discrimination of the justice or injustice of the decision or awards. But when upon the face of it the award appears unreasonable, Courts will set it aside. Or if an award is that a man shall do a thing which in the opinion of the parties is unreasonable, your award would be void. If the award were that one should bid himself in service to the other, it would be unreasonable, for this would be to take away his personal liberty. And on that ground all these cases are decided. Suppose the award is that A. shall give a bond to B. and procure C. to sign with him, it would be unreasonable, for to C. the award would be nugatory, as if C. did sign the award would be good. Or where the award was that B. should give such security as A. (the party) pleased, it would be unreasonable, because it ought not to be.
Defences to Actions on Contracts. Arbitrator's Award.

cite to determine what security he would have. But it is not unreasonable to award that the
compel C. own whom he has engaged to do a certain
thing, and on a ground of it being an unreasonable
thing, an award has set aside which directs that it
should pay money, which he can not do, at another (a
Strangers) house, as I did not know that the Stranger
would let him into the house. and if he did not, he
might be subject to this rule. This was the decision.
It is not so now, for he could not get into a house
he might go as near it as he could. R. 124.

Sec. 1103, 1812, Sec. 10, 10th January.

7th. An Award must be certain. Many awards
have been set aside on a ground of uncertainty. When
an Award is that a man shall enter into a Bond which
is extended 12. to a Bond with a penalty, for a certain
purpose, not mentioning of penalty to be entered, but
merely saying 12 Bond for 1000$ the Question was
how large must the Penalty be? But the Court said
the Award was not uncertain on that account, for
this is regulated by Custom, viz. double of sum.
When a man directed by an Award "to deliver up a
Trunk with certain Books" it was held to be uncertain
for "certain books" is a vague term. The double of a
trunk may contain a great many Books. This may or
this may not appear. But the thing may appear and
uncertainty on the face of an Award, yet if it may be
reduced to a certainty by a reasonable construction,
or of up meaning can be ascertained by context,
On may be learned from the nature of the thing awarded or from circumstances connected with it, that it will not sit it aside. As where ye submission recognized a debt due from A to B, if the award is in these words "that the debt shall be paid, a release thence given" this is a paltry award, because it is easy to determine who is to pay the debt, as it is mentioned in ye submission "that A owes it to B." But such an award was formerly held bad on ye ground of uncertainty, who was to pay the debt, it who gave the release. Again, there was a tenancy created by A to B, then that B had built a wharf on land that both A & B claimed, & the arbitrators to whom it was submitted awarded that "Defend the enjoy to B. Land and the wharf, but ye scaffoldings should be pulled down." Now who was to pull it down? The Defend says it is unreasonable that the Jeff. should not pull it down as he erected it on my land. This may be ascertained from the context; the scaffoldings was a nuisance, & so to person who put it up must pull it down. By this means ye award is rendered invalid.

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So where there is a rule by referring to which the apparent uncertainty may be done away, & the uncertainty ascertained, the award is good. As where the omission was that A & B pay the legal costs. By application to the proper office, or referring to the established list of costs, those costs may be ascertained. A further an award is not uncertain because it is conditional. As eg an award that A should enjoy B's house.
Defences to Actions on Contracts. Arbitration.

For the term of 3 years, on condition of his paying £300 yearly, he can be forced paying that sum annually to £500, not enjoy the house? Now this was certain enough. Co. 1, 1123, 2, 7. 292.

And it was settled the the lien formerly was otherwise that an action may be maintained with a penalty or is that nature. As when A has contract with convey Black A to B. But B coming or offering some thing more he says away to him (?). It seems A will not suffer A to the dispute to Arbitrators. The award that A should convey the land to B or pay him 100£. This was right. There was no uncertainty. Nolle 738, 12, 12, 596.

So formally an award was conclusive certain of no time when, or place when the payment was to made, was fixed. But now no objection can be taken to such an award; it must be performed or a reasonable time paid at my pays residence. Whatever apparent uncertainty there may be, may be dispelled by an agreement forward or some known standard or rule to which resort may be had. As e.g. when there was a dispute about land the Arbitrators describe that the dispute was about South down to North down. The an and make mention of South down, 10, 115 down, now in this ease by marking an arrow that South Down way south down 10, 13, 3, down North down, the award is rendered sufficiently certain. Co. 1, 506, 5, 592.

But you can't make an award when you have no facts to describe an act that on pay amount as a good conscience ought to pay. This is wrong because there is no rule or rule or expert to which it can be made certain.
Defences to Actions on Contracts. Arbitrable to Award.

8. An award must be final. This means that it must put an end to the existing controversy. It does not mean that the award shall not be a ground of a future controversy. When the award that, by ch. 56, was to be made, this was bad - it did not put an end to the existing controversy, for he might immediately sue again. ibid. 132.

Another case. An award was that a man should enter a retravit, and if the Com. saw a retravit, if suit is brought after suit being brought, the same suit is to be joined with the principles joined. This is very important to be known. In some of our States they have Statutes enacting that a retravit shall be no bar to another suit. So is the Law in Com. There this award would not be final. ibid. 142.

So when of award was "that all suits should cease." The Court said it meant that all suits shall cease forever. The finality of the award was good. It put an end to all of disputes. ibid. 133. 21 Ray. 261. 260. 3 Supra 1929. 902.

In one case where this question came up, the answer was "that the award (of a certain obligation) did not sue it or cause it to be sued." The case was not how, is not determined; it went out some other way. But I think it was as good an award as the one above that all suits shall cease. Suppose they award a sum of money to be paid at a particular day, thus formerly continued this was not final, as it would tend to a Bond suit, but such doctrine is not correct. It did put an end to it. In no case they directed a Bond to be given, it will have been the
Defences to Actions on Contracts. - Arbitrator & Award.

...the same. The rule meant that it shall put an end to the thing there in dispute. Pat. 110, 4; Prin. 1032. 1 St. 39. Com. 456. 1 T. R. 73. 2 Bla. 232.

9. An award must be mutual. They distinctly say it must be advantageous as well as mutual. They amount to one and the same thing. Under this rule, the law means that to make an award mutual, something must be awarded to each party, as a twopenny halfpenny and 100£ to the other. The idea was an absurd one, without one party was in fault. But it is not necessary that you give something to both, for it is considered sufficiently advantageous to both parties if the award will come to the benefit of both. As where A. did satisfaction of this paper committed to B. is awarded to pay 10£. The award discharges the trespass, where the said A. released B. to give the first step taken was that there, was no necessity of awarding a release, but it must appear that money was paid in satisfaction of the trespass, for they said an award of a thing to be done was not valid, unless the injury or thing for which it was awarded was pointed out by the award. But the Law is not so strict for it will in such cases presume the thing to be done was awarded in satisfaction of the dispute, or injury pointed out in the submission. Another case where the arbitrators awarded that A. pay B. 3£ concerning the premises. It was mutual enough. Again when the arbitrators stated that, "Whereas there was a certain dispute between A. and B. concerning," etc., and the arbitrators made a bare award in these words that "A. pay B. 3£,"
Defences to Actions or Contracts. Arbitrums & Awards.

without saying what it was for, or without saying "Concerning the premises." But the Court said the submission mentions the disputes by taking all the circumstances together. It was sufficiently sure upon that. The difference of any authorities is but about the principle, but that shall be evidence of it. In that rule in Nov. 259. 12th May. 1446.

I mention that formerly an award that a debt be paid, without awarding a discharge therefor, an awarding that the payment be in satisfaction of the debt due, was considered as void. But it is now be valid. I have to remark that the presumption of law now is, that it was to be paid in satisfaction of the debt due. The presumption is that the award must have been about the thing submitted to them, it is absolute, subject to anything else. The rule is laid down by Conyers that an award made on a submission is to be understood as concerning the thing submitted. Ex. 10. 128.

If an award wants any of the foregoing requisites which I have mentioned, it is not good in law.

Of Releases. Formerly an award of a thing to the done in satisfaction of all dues was void. For say they.

stipulates that may be many controversies, not submitted. But of modern ideas is that it relates only to that was submitted. Ex. 10. 128.

On the same principle an award to pay the result of all demands was void. After more. To the object of was that an award directing mutual relief to be given up to the time of the award of all controversies.
Defences to Actions on Contracts - Arbitrarily Awarded

was voice. But as the Law now stands, it is given, that releases operate only on Controversies up to the time of the submission. Such a release is now considered differently from what it formerly was. 3 Me. 159, Thaw 239, 15 Ra. 1152, 34 G. 311, 17 H. 261.

Of awards voidable in whole or in part.

An award may be void in part. Sometimes, a void part renders the whole void, as in other laws, the void part alone is rejected by law, the remainder is good. In other cases, I have some difficulty in reconciling the authorities, I have extracts from Law upon this subject from the leading ones. The old first idea was that of part of an award was void, the whole was void. This was unreasonable, and inconvenient if the rule causes the next Court to go to the opposite extreme, viz. that all, but the void part should stand office in every award. This also was found to work inconvenience and injustice, it was equally absurd as the former one. Courts have then few now adopted the middle ground, sometimes rejecting the void part only, and sometimes considering that part as rendering void the whole award.

If A $40 have claims & B is awarded to pay to B $20; all which is proper within the submission, & he is also awarded to do something without the submission, as to do something illegitimately, now this award was void a part, & good in part. The established rule is this. If A is willing to accept of the part that is legal & good, B can now refuse to perform the legal
Defence to Actions on Contracts. Arbitrator's Award.

part, because the rest was bad. But if it will not take up well the legal part, but claims the whole, I mean, refuses to do any part. Many of the cases stand on this ground. Another case I shall have mentioned before. Suppose they award that B pays at $100 in six months, or that he secure the payment by bond, I that B closes. I. B. is surety. That part of the bond which directs B to give A the Bond for 100 $ is valid as it affects B, but that which directs him to find security for the payment is void as to him. Yet if A pays give me the Bond only payable 3 to 6 months, I do not want you to get A, B, to sign as surety. B. cannot refuse, you are offering to accept the valid part only renders it good. But if A refuses to accept the Bond without the surety, may refuse, for the whole award is thus rendered void.

But contra suppose B. is willing to perform both the good 6 bad parts of the Award Can A refuse it? If that part of the award which is voidable is lawful. A cannot give B. If the case above B. is not to B. to find surety, yet he may by A's tender by him of the bond secure validates the whole award, and it cannot object to such an award if B. is to comply with it.

A third set of cases. Several claims are submit

ed to on both sides, and 2 arbitrators take in some matters not within the submission (which is a void act). Others make out an award in parts, i.e., awards on aggregate sum. From this part which is bad renders the whole bad. The award is void in toto. But suppose the different disputes had been specified. They allows so much for
Defences to Actions on Contracts. Arbitration.

Each dispute, that is, what is one of the submissions to be
may be rejected, the case which was within the submis-
ion comes into play. It being void in part, does not af-
fect the rest. The void part constitutes no part of the
legal award. If you can reject that, it is right, but
this cannot be done (it is just) unless the same award
ed to one group. Suppose on the same principles the arb-
itrators find on what is submitted that A shall pay
$100, B pays $100. For something else, it is said, by which
is submitted, but which is satisfied, is not, that A owns
$1,000 to them in the offset, or make out their award
"nothing due to another." The whole award is void, so
in all cases part of the award is void. That can
not be enforced, for that means the mutuality is
destroyed, the whole award is void, unless the mutu-
ality is restored. Ask when on a dispute between A and
the award is that A pays $100, and B pays $200. Con-
cluding thus, according to the old rule not allowable, how
the whole award was held invalid, then being no mu-
tuality of benefit arising from it, it would be just
that A 12 be obliged to pay the $100 when B is bound
to pay the $2. Yet if B would not withstanding the voidness
of the award, have a prima facie right to make payment.
If the $2 costs, it would have rendered the whole at-
critic of A, $12, thus have been obliged to pay the $200
the mutuality being thus restored. Because it is a
rule when one of the parties is awarded to do a void
thing in compensation of a valid thing to be done
by the other party, he may by a performance or his
Defences to actions on contracts. Ordinary Remedy.

part (the the award as a lien was void), and the party to perform the thing awarded, the award as to the performance of that thing being void. Agreeably to this principle, when the award was that of £50 to give a piece of land, together with his wife, to the party, and the award was void, it is said to be unreasonable, because I cannot compel his wife to join him in the conveyance, for if I omit to come forward with his wife, before conveyance, it is said under the award good the will be entitled to the land. To instance when a release of a that (i.e. of the award) was considered good, the award was that of £50, give me a release up to the time of the award, and £10 say 100 and the first part of the note, and the whole voice, not suppose it (as the same does) says give me a release up to the time of the award, the reader is good the cannot refuse. The point is that if the person to do the void part will do it, the award is good the other cannot refuse.

Again, if the mutuality of the thing to be done expressed, the award is good, the thing is not void, or in other words, when an award is void in part, but not in its invalidity, the whole submission of the land of the other party, the good part shall not thereby destroy, as when in satisfaction of housing third a £50 it was awarded that at £50 say 100, and then later at £50. £50 E eye a release up to the time of the award, such award of referees being the void by the ordinary, and refused to pay, savings the release was void.
Defences to Actions on Contracts. - Plaintiff v. Defendant.

The cause is not obliged to execute an order, but the payment of the debt will discharge it, as a discharge from that liability, and all other injuries, for which it was awarded in its satisfaction. This, from the nature of the cause, it would be of no advantage to the adverse party, consequently, if the debt must be paid to the adverse party and not have been executed. 2 Boc. 1246. 2 Fos. 36. 6 Chit. 334. 632. 6 Ves. 32.

The form of an award must be particular. Formerly, great particularity was required. It had to apply to Sawyer to draw an award. This gave rise of the disposition of the court to see them inside. Afterwards, they did not require strictness. Judge Renn thinks as favorable a construction to be given as to Wills. One of the awards is that an instrument as a deed should be made out, this must be in its proper form. There is no case when this opinion of Judge Renn has been determined, yet the elementary rules support this great strictness is not now required. Davis Nov. 35.

Performance.

An award to be a bar, must be performed. The rule on this subject is liberal. If the award is substantially performed, it is a sufficient compliance with the award. E.g., An award that A delivers up a book to B, is not an award that B delivers up a book to A, nor is it an award that he carries the book to the registry office, the B. not deliver it up, but an order to C, to deliver it up, but an order to D. Copy was held to be sufficient; it was sub-

D
Defences to Actions on Contracts. _Abatement of Award._

Substantially this not a literal performance. And in another case, an award that is to be performed, and is not precisely of the same meaning as retraction. And an award is performed that party accepts in some measure different from the award. E.g. an award that I convey Blackacre to B, and B requests A to make the deed to C, as he has paid to him, and C makes to C, this is a sufficient compliance, and so in all other cases of an award is performed in manner vested by the party to whom given. The award is, it is sufficient, that it is not a literal performance. _Pl. 185, 186._

(Where money is awarded to be paid on a certain day a payment before that day is a sufficient performance.) Where money is awarded to be paid the court gives no time for payment, or if it is a calculation not to be done at no times is fixed for performance, it must be done within a reasonable time. When the payment or performance is delayed by the party who ought to have made it, the party to whom it ought to have been made remaining easy under the delay, it has formerly been a question whether such case payment or performance is to be tendered this has an action on the original claim. But as a subject of an award it now considers the question must be at an end, for a good award totally extinguishes the original claim, it gives a new one on the award than you the lender can have no effect on the original claim that being already extinguished, but the lender has
Defences to Actions on Contracts. - Arbitrator's Award.

An action on the award. Suppose an Award that it is to give the lessee of Land for 3 years at 10. to pay 10s. per annum. A gives of lease the on rent, day refuses to pay, A may sue him for his rent. The award gives A a right to come after he has performed his part of the award, viz., by making the rent. When there is an award of a new duty or necessity of a former one, that security shall be given (say by Bond &c.) to perform the necessity, that Bond or State being given an action at law, on your non-performance of the new duty. If a new award or arbitration, Bonds. If he does not do the thing he is awarded to do, some think the submission is broken, but it is not so. If he give a bond to pay six months' hire, it is the same as if he had paid at the time. 1 Scra. 27. 7th. 1872. 1812. - Lecture 11th Dec. 1871. Bain &c. was.

Of the remedy which the Statute gives to every person in whose favor an Award is, and in what manner in case of a defect in the Award, the Defen- may take advantage of it.

The remedies upon an Award are according to its various modes of submission. When the submission is verbal, no Bond or Covenant entering into, or where it is written provided there is no Bond or Covenant, then the remedy is given for the performance of the promise, if made to abide, is on the award either by debt or Indebtedness, &c. if not, the award being of money. When there was an express promise to abide, the remedy being a sum paid on the express promise, measured by the amount, or the money being debt or Indebtedness &c. If it was collateral not to be done, the debt being an action on
Defences to Actions on Contracts. Arbitration & Award.

The case for the performance. When Debt or Indebtedness is brought, the Declaration must state the controversy (describing it); that this controversy was submitted to the arbitrators. Some things thought that the Arbitrators were duly distinguished from others, that they awarded upon the premises of the controversy or controversy submitted. What the award was, that it was made without any defect, therefore are that it has never since been paid. If the action be for such a defendant, in addition to the foregoing the plea must state the respects promised, and in the award. This is when there is nothing but a bare submission, if the award is to be performed at a future time when the plea shall state in the Defendant. he must state the demand and a capacity to the award. Every thing else, the suit requires to be done must be stated or of Declaration. The Declaration thus containing all the essential requisites to entitle the plea to a recovery, cannot be amended to. But the Defendant may in his plea deny any of these essential requisites, as that he did not submit. Such denial of the essential requisites is an essential bar to the action. When the plea alleges a breach he must specify it of that part of the award which is good, not of that part which is bad, for if he does the Defendant may demur to it. As when the award was that B. was to give to A. a bond for security, if A. states in his Bond that B. did not give the bond it does not prove B. as security, it may be demurred to. So if is it even come to terms and a Bond is given for it, the judgment will be arrested, for the breach of your award.
Defences to Actions on Contracts. Absence of Award.

If a Bond has been given to abide the Award, yet it is not given to it, yet the Award, if he pleases. The Bond does not merge the remedy on the award it is an additional remedy to enforce it. See 926.

The common mode of procuring it is to give a Bond; it is almost an universal custom. The Bond is entered into with a penalty, or condition that if they abide the Award, the Bond shall be void. If they do not abide the Bond is forfeited. The common mode of procuring it is by declaring or the penance part of the Bond, not noticing the condition thereof which points out the nature of the Bond, the dispute. Submission, Absoluteness of the declaration that not differing from one upon any other bond. If the Debtor is to have any sufficient defenses of the action, he must pray upon the Bond. After reading it state that there was a condition, and write it (the nature of the Bond appearing already on the Record) other as being that no award was ever made. This is the common practice. The Debtor liability is on the award. The pleader no award. On this is an equivalent term, it means that there was no legal award upon which a recovery could be had, or that there was no award at all. It may not do for the Debtor to reply, there was no award; for the Debtor may mean that there was no legal award, and by the pleader's thus replying it throws all questions of law to the jury. The pleader in his replication must state that there was an award, or that it was settling with every requisite which is necessary to constitute a good award according to the submission contains.

on the condition of the bond, the other assigns a breach that Deft has never fulfilled it. Thus for they have procured correctly. What will Deft do now? If, he such award on the Record, if he means that the award was illegal or defective, he may demur to it. But if he means there was no award he rejoiner no award. So that this plea of no award the rejoinder means no award. In fact, whether there was an award or not is now the only inquiry. What the plea contains is an award appears on the Record, the Deft may prove that it was forgery or is not the parties have got to the issue. If the Court say the award was a good legal one, (to which the Deft demanded) they decide in the Demurrer. Issue, if they do not decide it good legal. Suppose the Condition of it was that the award sh. be made by such a time, the Deft may state that no award was made within that time; he does not pretend to deny that the award would not have been a good one, if made within the time, and does not pretend to say that there was no award in fact, but that it was not made within the time. Therefore, therefore the plea ought to be barred. If the Deft substantiates this, first will be rendered in his favor.

If the Deft. has not the bond, the plea of 'no award' or the Deft. rejoiner 'award' is out. It is a breach, that Deft has never fulfilled it. Now can the Deft, or his rejoinder set out that he did perform the award? No. The plea of there was no award, and he cannot now depart from it, for it is contrary to a known
Defences to Actions on Contracts. arbitration. d. found.

known rule of pleading, which rule is not founded on any arbitrary principles of law, but on good sense. the plea is not prepared to prove non-performance, while he d have proved had to know that the def. meant to rely upon performance. it is not because performance is not a sort piece of made a proper cause, but here the def. pleads hot haste with the same breath, one moment he

edly no aware, & the next performance which admits there was no awareness. the law will not permit this.

If the awardee requires the plff. to do any act precedent which is necessary to be done by him to entitle him to a recovery he must aver performance of that act as well as a breach by the def., for until he has performed he has no right to recover, he must aver it.

Suppose the awardee was that A gave his bond to B. it is sure to the Bond & B. was to convey Black acre to A. Now when A gives the awardee that he gave a Bond & proved A's assent, either he may avoid himself of it, or B. cannot complain. these are the two cases where plff. must aver performance. Perhaps in an action on an awardee the defense is that he never submitted, thus def. pleads non-submission. But to a suit on a Bond he can never plead non-submission.
Deformed to Actions on Contracts. Arbitration & Award.

The nature of the Bivc appears on the Terror and not subject to the submission. But if Bivc. means that he does not infringe the terms, he may give an express pleasure to affect the terms. Hence, a suit to recover the amount to which he is entitled. But if the court does not agree, if it never declared. And it seems that to an action on an arbitration Bond, a judgment cannot be taken, but there is no act done, etc. What is the nature of being one it was illegal, or that there being a legal one it had been performed may be deemed in turn.

To preserve an action of the Bond of the plea is "no answer" the party in his reply to this plea of no award of the Bivc. It is forth a regular legal award, but assigns no breach, etc. may be demurred to, others destroy. It is the Bivc.adies of demurring, rejoins no award the award. For there was an answer, yet the party cannot have judgment on anything apparent on the Terror to entitle him to it. If he expects to recover, he must set out a breach, etc., 123. 34. 33.

When an award is only partially good, the Bivc must assign a breach on one part only. 123. 33. 32. 123. 30. 30.

In case of an award to pay money on request, a request must be specially made before an action will be sustained. In 123. 34. 30. 30. 30. That request must be specially averred, etc., etc.

Arbors may be alternative, or such as the party shall be to assign a breach, must aver that while alternative, has been performed, both alternatives being valid. But one of them being paid, a breach of that only must be assigned. Perhaps Bivc. holds to plea as some collateral matter in bond of the action, as performance of the award, and then thing, in accord of satisfaction, he must first pray order of production.
Defences to Actions on Contracts. Arbitrator's Award.

Defences to Actions on Contracts. Arbitrator's Award.

of the Bond, upon certain other performance, tendering it to be a good order. But by such bills of collaterals, the Def. truly acknowledge the existence, regularity of the award, according to the submission. Consequently he performs not yet, for, in his replication, he did inagini any breach, for as the Def. admits the award if it was not performed then was a breach of course.

But if my Jst. thinks the collaterals matter pleaded in their instance, he may go into it. If he thinks it untrue he may deny it. Co 1900.

Statutes of Limitations do not bar a debt created by Awards.

Perhaps the defence was that there were other matters of controversy not decided by the award. The Def. pleads no award of the promise. He denies that the whole controversy was decided. Def. thus sets out the award, Dr. apprehended not to contain all the controversies submitted.

Def., rejoins that it does not contain all the controversies submitted, the must set forth the others to the Jst., may reply to others brought forward to the Arbitrators, and Def. may surjoin that others were lost before the Arbitrators they did not decide on them. The Def. in his defence to an action on the final award of the Bond, not, when the award is a bad one, after your tender of the Controversy pleaded, but he may set forth on the Record such as it is, others a Domination once to a good defence; it appearing upon the Record that it was not illegal, is not sufficiently but the plea of his action, unless he can reply another answer having all of mercy and regularities. Co 8, 588.
Defences to Actions on Contracts. Arbitrator's Award.

Suppose an action to be brought on a past due part of a Bond, the submission being revoked by arbitrators having made no award, or the動き made no award after any breach of the condition, what can the party do? Why, he must reply: 'The award, by Def., that by Bond is a justification.' 8 608 208 2.

There has been a Question when a Bond was entered into, with a penalty, that the award is to be made by the party afterwards agreed that the time might be extended, whether this had any effect on the Bonds, causing extending the time on that 10 607 20. 20, the Bonds were forfei without an award was made within the time limits by the Bond, to make it answer the penalty as now Bond 3 2? have been entered into. 31 592 2 2.

When the submission is made by rule of Court the award is said you may bring your action on it, award or apply to it to C. for an attachment, or you may proceed on both at Once. But a recovery on one costs the other, it is therefore not common for Courts to grant an attachment, when the party has sued on the award. 10 6 2. -

The interference of Chancery where an award is made takes place only where the Law is defective, or where justice cannot be had at Law, where the submission is by rule of a C. of C. or C. H. 2nd 507 2, that the award is performed. They see that a collateral act be done or money paid agreeably to the Award. But in common on ordinary ca ses where the submission is out of Court, the parties are left to their remedy at Law, or C. H. will interfere only where justice cannot be had at Law. 20 72 643. -
Defences to Actions on Contracts. Arbitration & Award.

Chancery, denies the performance of awards made under a rule of another Court, not on the footing of an award, but on the ground of a subsequent agreement to perform: or especially, where they enforce the specific execution of the obligations under the said subsequent agreement: as the parties have on the faith of that agreement, pursues to the performance of his part of the award. Support of award is that A conveys Blackacre to B. Now if nothing more is done A, will not compel a specific performance. If they never will until there is a subsequent agreement between the parties, convey to C. If there has been this subsequent agreement: A, will compel him to convey, for on the faith of it B may have agreed to convey to C. But you will remark that this is not on the ground of an award. (Stb. 1425. 3 T. 627. 15 Wms. 157. Ch. 210. 6 B. & Ch. 211.

Where something was awarded to be done by both parties. A performed. B accepted it, then he (B) refused to do his part, but A compels him to perform, as he has accepted it. And it is a rule of Ch. that, when one party has performed, the other party is bound to perform on his implied agreement. (Stb. 2 Ch. 20.)

Where there was an award that A conveys Blackacre to B, and to pay goodwill. B was a debtor in that award, but A gives to B. says "do you mean to abide by your award or will you set it aside?" B answers: "I will perform my part by paying goodwill." B made arrangements to pay it, told his wife to set the award aside. But A, by demand he should not.
Defences to Actions on Contracts. Arbitrator's Award.

take advantage of the defect in it. You see that this was not on the footing of it being an award, but to cause it implicitly agreed to perform. It was in the first instance.

A dispute arose between a Brother of the other Share an Estate, they submitted it to Arbitrators who awarded that the 20,000 pay him 10,000 in 20 years from the first year, the other to Brother 50,000 convey a certain piece of land to her. The paid the first 20,000 in 20 years, the rest to pay the remaining 20,000 during the remaining years, he refused to accept it, and to return the first 20,000. In the second year, he conveyed the land to her, but she complied. He because her acceptance of the first 20,000 was an implied subsequent agreement to convey. The interference of her is always on the subsequent agreement. It is perforce or jointly implied from an acquiescence in the agreement. And she have gone further to say, they would interfere to prevent the future awards from being set aside. When the award, they declare had been a long time agreed to be.

They grant in question for the party attempting to set it aside, if he afterwards attempts it, they in just a penalty upon him. Van v. Chap. 46.

Excl. 19, Dec. 5. 1871. Then, madly, a few years.

When on the face of an award it wants any essential points, it may always be avoided by a defendant in a Chancery Law. But when from without causes the award is erroneous a side line, as when it had been awarded the party would debar, or partly, or when there had been undue haste or without due circumstances partially many
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be strongly presumes; or where the award has been obtained through the unfair conduct of one of the parties, the warranty in Eq. has always been on this, praying the case may be set aside of advantage cannot be taken of the award in a Ct. of Law unless the submission is by rule of Court, then the same causes that oblige it aside in Equity not to do it in a Ct. of Law. The party who by rule of Ct. is summoned to this cause why an attachment is not done when four more circumstances the man come in plead any of the foregoing circumstances, if the Court sees them to be such the attachment is given. I do not know of how many of the States this rule obtains. So far said it cannot obtain where they have no Courts of Eq. May 315. Code 199. Sect 52a.

Of course a Ct. of Eq. does not interfere when a submission is by rule of Court. But if the time is late it is required Eq. will interfere that the submission is by rule of Court. Judge B. says he can see no reason why application be made in a Ct. of Eq. What would set it aside or Eq. ought it to set it aside or Law. But the rule is established at above.

I shall now mention some cases. Two of the three Arbitrators were presiding. If one of the parties, an award must be made by all or Arbitrators, or the majority must be present when the award is made, unless the two who were concurred together continue to include the third person. If they set aside the award, as this was evident partiality. 2 Civil. 518.
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On the same principle where the arbitrators were observer to have frequent business & private meetings with one of the parties, they set aside the award. So when the arbitrators were invested with the right of appointing an umpire they cast lots for him. So set aside the award. In 2 Barn 485.

In another case where the arbitrators had power to choose an umpire, they did not agree upon their award, one wanted to give 35 S. the other 95 S. about the time they appointed the umpire, a servant of his ran on him: I know that my master will give 150 S. and the umpire awards exactly 150 S. So this was more than either party asked, upon the circumstances the Court suspends that all was not right, set aside the award. In 2 Barn 101.

In another case the arbitrators had heard the cause of the parties supposed how it was in favor of justice in testimony on this side I asked them to hear him further they promised they would but afterwards put their act out their award contrary to their promise without hearing him, the C. set it aside. 2 Barn 251.

In another case where there was a single arbitrator only appointed, there had been running accounts between two parties for many years back, there had been several settlements at different times by arbitrators too was appointed to settle the accounts. One of the parties told him he was not to go back of his settlements, but notwithstanding standing that he went back. He made out his award accord- ingly, but C. set it aside. 3 Plun 362.
Defences to Actions on Contracts. Arbitrant Decision.

In another case one of the arbitrators was heard to say before he sat upon the cause that he estimated costs, and set aside the award. 2 Mar. 63.

Another case—when the parties got together, and the arbitrators found to have paid one of the parties, one another observed that they had nothing to do with any thing but facts, the other replied, "he cares nothing about facts, he would mulct the fellows." set it aside. 29 Aug. 63.

Still there have been cases when there was a want of ground of suspicion or prejudice. But shall now mention a case where there was no ground of suspicion. The arbitrators just were 68£ a piece, and they did not give in their award two thirds were paid to them. (which was commending) they directed the parties to pay the fees equally between them. One party did not pay the other party paid 20£, and the year's award was made up at of time. Why set it aside. 2 Bar. adv. et cd 462.

Another case when the arbitrators were respectable and upright men, but they had an interest in favor as one of the parties owed them. But although they acted uprightly, yet I have no doubt on principles of policy of the law was in favor of the party who owed them. Why set it aside. Set it aside. Did not owe grounds of any connection in the men, but on a motive of policy, to exclude persons interested from sitting as arbitrators. 2 Rev. 157.

Another case. One of the parties may so conduct himself that a 68£, why set it aside an award in his favor. When the parties come before the arbitrators they must give the estate. In this case one of the
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If the arbitrators had made a mistake or error of law, or in point of fact, the appeal on the face of the award, they will set it aside. But that they will go to every issue, distinction, and every word. It must appear a part of the award. In the case of a lawful award.

Equity. The law together give a complete remedy when the award is bad for intrinsic or extrinsic circumstances. Reading the award is sufficient in a majority of cases, before mentioned, one case, where the award required some previous act to be done before the party will entitle to a recovery; the other is where part of the award to be performed by him is void. In both the cases the party must plead performance or his part. No action on the original claim, if having been awarded upon, a plea of the award is a sufficient bar in all cases where the party has a power to compel by

Do not premise upon, a plea of the award is a sufficient bar in all cases where the party has a power to compel by
The award or his damages for the trespass, is to an action for this trespass, may arise from the submission of 1866. And it is now the case when a party injuriously submitted, just satisfaction from one of the wrongdoers is a bar to an action 2/4e others. 1 Met. 367, 367, 368.

It has been said that when there is a submission entered into between the parties, and between the time of submission the award or action is brought on the original claim, a plea of the submission will be a proper bar to the action. This is an authority for this, says 2/4e Judge, it seems to me impossible. I say it was a simple renunciation, and if a bond is given, it is forfeited. Submission may be revoked, we have already seen; the party may resort to another cause of action.

As to the old idea that if the award is not comply with by the way, then you may resort to the original cause of action, that is entirely done away. The statute is no authority, but Judge 155. But rights authority on this subject is a good one. 1555 0/15.