Law of Charter party

Whenever a merchant agrees with a master or owner of a vessel to carry goods to a certain place he is said to charter the vessel 6 Com. Dig Mercht. E. 2.-

It commonly is so much per ton tho sometimes a sum in gross. the agt must be in writing to be binding on a charter party. unless it is entered upon when hiring the vessel. A vessel is sometimes chartered for outward voyage only. sometimes for the inward, sometimes both.

The law of charter parties differs from the C. L. If the chartered vessel does not arrive at the port of delivery — If she is lost returning the inward voyage is not to be paid for where the two voyages are engaged separately —

But if the voyage outward & inward is made one only thro whether lost going or coming the charterer has nothing to pay. 2 Vent. 212

This is mercantile law. C. L. knows nothing of it — It goes upon the principle of rewarding the last for the encouragement of commerce. the merchant hiring the goods to the owner or master the ship.-

Suppose the ship is chartered out & in — she arrives safe but there is no return freight — the merchants provided none — he must pay freight both ways — But if it was owing to the captain or owners that she returned empty — the merchant is to pay only the outward freight — the master is liable for damages

Notice of the abandonment is to be given by the merchant to the master by a simple note the first opportunity.

The agreem.t if parol it is binding if acted upon (but shd be reduced to writing) & if earnest money is pd. & the party rescinds as he may while it remains in parol merely the earnest is forfeited. —

Sulphose instead of being lost she gets damaged & the goods are injured — the merchant may abandon the goods & the [illegible] he need not pay the freight, but if he will not abandon he must pay the whole freight. he of course will abandon if the freight is worth more than the cargo saved — if not. he will not 2 Bro. 882. 888.

Suppose again the ship disabled by storm without fault of the master he puts in to refit & then proceeds it is the same as if she was not injured. — If he cannot refit he may abandon the job. or engage another vessel to carry the goods and save his bargain. — He may have a reasonable time to refit.

If the vessel cannot proceed. if the super cargo can & will take the goods & proceed with them in another vessel he must pay pro rata. — and this is not an uncommon method

This contract of a charter party is different from all other mercantile transactions — They are sealed.

A agrees by parol to charter B's vessel for $1000 & pays $100. he may after and be off but for this the $100 cannot recover this right is reciprocal if B. is off he must pay back the $100 & also $100 more. & this even if the contract is in writing. if not sealed. & is properly

1 D. Rep. 18.78.

Hard. Rep. 85. 194

Molloy. 220.

1 Vent. 190. 238
1 Mod. 85.
L^d Ray. 918.

In the case of carrier the words acts of god means
such acts only as could not happen by the act of man. 1 D.R. 33
Ships not governed by admiral law while in port corpus contains
1 Vent. 238.

honourable. —

Damages Injury to the ship may arise from the impressment of the master as sailing in a storm or unseaworthiness &c. the loss falls upon the master and the owners of ship both. but if the damage is by the acts of God the merchant loses. —

The owner of a vessel is always liable for the misconduct of the captain or any body who has the command of the vessel. whether they know of the given voyage or not. the master may be answerable over to the owner however. among persons in Eng & U.S. live by ship owning

The owner sometimes enters into a contract with the Master under penalty to answer all damages all the effect is increase the damages. as the penalty is commonly greater than the damages. Owners are also answerable for all the goods embezzled by the hands or the master even when he knows nothing of the persons employed by M. L. in Eng. however the liability extends only to the worth of the ship. I have been speaking of merchantmen but packet masters & coasters are viewed in the same light as common carriers, being liable for every loss except by the act of God or a public enemy. — There is another power that masters of vessels have to bind the owners for necessaries for provisions, repairs &c & this altho the master might have been furnished with money for those

Observe however that the master cannot bind the owners beyond the value of the ship. 1 Ld. K. 78. & if the owner will abandon the ship he is not liable on the Captain's contract. The master is the servant of the owners. 2 Vern. 643.

Hard. 85. 195.

Carth 26
Th. Ray 235
2 Vern 643.
Ld Ray. 223. 1285
Hard. 470.
1. Vent. 297.

purpose — The common way is to mortgage the ship & the ship will always be liable — & the masters contract bind the owners — this is for the encouragement of commerce — The ship must be first known & in sight — These debts are considered as favourable debts of honour. 1 Hardres 376. 2 Vern 443. Comyn. 636. 1 T. Rep. 73. 108. 1 Hen. Bl. 119. if the contracts are to be for the benefit of the owners, they are liable — And here where the owner has an interest in the voyage the vessel has gone out of his hands & is said to some one — & he knows nothing of the voyage.

The owners of a ship are about to send their ship on a voyage — three being a number of owners the majority of interest direct the voyage — The minority cannot be obliged to contribute any thing if they do nothing they loose the voyage If the vessel is lost the majority loose the cargo & ~~expected freight~~ — but the minority get nothing for their part of the ship. —

The major party may apply to a court of Admiralty & decree the share of the vessel to the minority the majority have all profits. or the minority may apply for security. If a good voyage is made when neither party have applied the minority can compel the majority to divide the profits by paying up their share of the expences & the interest. —

Nord. 85. 194

2 Shaba 259

The master as agent for the owner has an implied authority to do such acts that is necessary as to him hands — to hire goods from a wreck &c

Whoever may happen to be owner as in case of insurance where the owners abandon he is an agent for the insurers — this is contrary to the C. L. rule

The master by the Law Merchant is answerable for all damages that accrue from his own default or failing in performance in either a safe with out a perils of damage excepted —

The goods are a security for the freight this is a lien upon them — & the freight is due at the port of delivery —

The owner is answerable as well as the master. It has however been questioned whether the owner would be liable for damage accruing in unlawful trade — It has however been established that he is, if the trade in a foreign country is such as would be contrary to the laws at home —

But the owner is not answerable for damage that arises from deviation if the master has leased the vessel who is then owner for the time. and is an exception to the general rule

Question in Chy. whether the owner of the ship was liable for the deviations of the master. 2 Ca. Ch. 239. decided not. not being one of those wrongs for wh. he is liable. —

It is piracy wh. is a capital offence. by gen. law. pirates are to be tried by Adml. Ct without a jury. but in Eng & US. they are to be tried by Jury by the Constitution.

In all ca. in wh. the Mar. refuses to assist to save the ship. or absents himself at the time of sailing he loses the wages that have not been pd. him

2 Vern. 275.

If the ship is lost in the outward passage. seaman lose their wages. the Merchts. his goods & the owner the ship. if on the return. the sailors get their wages for the outward voyage 1 Sid. 179 and any agreement of the sailors will not make the master free from the liability to pay them those if they insist on it. 2 Vern. 727.

3 Burr. 1884
1845.

Mariners—

If a sailor is quarrelsome turbulent &c he may be put out of the ship among civilized people on being paid half his wages. but he forfeits all the property he has on board. &the rest of his wages. If however he goes so far as to use weapons he may be imprisoned & brot home to be tried. I do not know the punishm^t. only that all the wages are forfeited.—

If he endeavours to excite a conspiracy for a mischievous purpose to drive the capt^n. from his destined course; then the punishment is death.—if the object is executed There have been cases in which it was absolutely necessary to confine the capt^n. as when he was drunk &c.—

The mariners, when enlisted tho only for going such definitive voyages — they cannot leave the ship untill she is unladen & taking down, or they loose their wages & if there are there no carriers or carmen they must act as such but are paid for this last mentioned service. 2 Sum. 727

Their wages are due at the port of delivery and if the ship is lost. they loose their wages. this is to make them take care. 2 Sum 278.

As to what constitutes the port of delivery for this purpose there has been some question but it is now settled. to be where the cargo is to be left. (not at the first port touched. &c. eventually is left.—

What comes within the scope of this business is to be determined by the usage of the country. A country firm do not usually trade in bonds &c.

Partnership. Two or more persons enter into partnership in trade & go by some name — Any either partner can bind the firm as far as the business of the firm extends — As the purchase of goods &c that go to the use of the firm. — A Firm in a city in most groceries is different in its article of trade from one of country merchants. — The rule proceeds upon the implied authority & one can bind the whole in the business of the firm. —

But we are not to understand that if the property purchased is for the private use of the one who buys it & known to be so by the seller that the firm would be holden. The presumption at first is that the firm is bound but if the circumstances of sciences should appear which must be proved by the firm — the individual only is holden but he is presumed to know in what article the merchant trades —

e.g. suppose one of the firm buys property for the use of the firm & signs only his own name the firm is held by it & may be sued on it. stating the facts in the declaration & this even if the seller did not know of the existing partnership. —

The partners enter into an illegal trade as to cheat the revenues — & promise the payment to a smuggler — if one pays with the knowledge

(b) For although they are secret partners it is the agreement made between them that they will share the profits & bear the loss of the trade together which makes them partners. Doug. 356, 371 | 3 T. Wms. 402 | 1 Hen. Bl. 372 | Bl. Rep. 998

It is a mere technical diff.y that prevents being sued together. viz. cant arrest the body of Ex.r nor have a bill of costs ag.t him by him. — On these reasons the law is founded & the prop.y goes into survivors hands orig.ly they were joined, but not now — 1 Salk. 444

Once that.. that survivor might join an indiv.l debt of his own in a dec.n for ev. debt. but it is now given up. — 3 T. Rep. 433:5 | 1 Show. 183, 188 | 190

edge & consent of the others the firm can be forced to pay him. — if not with the knowledge he must loose it, if they are not willing to pay him The swearing of the case counts not in cover by law. It is not necessary in order to constitute a partnership & to make the partners liable, that they all be known as partners. (b) Suppose a man suffers his name to be joined to the to give credit to the firm without obtaining the profits he is liable.

Mr. Ch. in Co. are tenants in common of the property & there is no survivorship. tho the same proceedings at L. would make them joint tenants. If one dies the partnership is dissolved & his Ex. owns an undivided moiety as the testator did & may give receipts & sell property — Nothing survives to the survivor but the rights of suing & being sued. The Ex. & survivor are to account to each other. The survivor has a right to all the books notes &c It was formerly the idea that they must be joined in the suit, but it is not so now. for the inconvenience of so doing an action as to would go against the body of one & the goods of the other.

If the partners estate are solvent their partnership & personal property are both liable for the partnership debts. the debtor is not confined to the partnership property only.

If it is insolvent the partnership is dissolved & all the partnership property is liable. — You may come upon the company property for a private debt of a partner but still you cannot take the other partners property. — Refer to the insolvency of one partner that is as an individual. The mode of one in giving this business is ~~still as of~~ by buying upon double the amount & selling it & returning half to the other partner: this has been complained of as obliging a man to sell his property against his will. — It should could not be supported now this practice. —

The most common way is to sell an undivided moiety of the article so that the purchaser & the other partner are then joint owners. Part in both. The objection to this is that the property does not sell so well when the purchaser is bound to hold with another.

There is another way which is always the best when it can be executed which is to divide the property levied on & deliver half to the partner & sell the other half. —

The principle you see is the same in all, to pay the debt & not injure the partners property.

There is no necessity that either partner should be insolvent to bring these suits into operation & when they are not the levy only dissolves the partnership as to the particular article. —

By the mode of settling insolvent partners is by
they apply for the benefit of the act. the partnership property pays the company debts & the private the private debts. If any thing remains after the payment of the private debts of one of the partners debts - that goes to increase the dividend on the partnership debts. - If any thing remains after the payment of the company debts it is to be divided between the partners. -

Cases drawn by Judge Rowe to explain these rules.

1st The company of A & B. owes $2000. & the company property amounts to 1000. A's private debts are 500 & his private property 1000. he is solvent & has $500 left to go to the co. creditors. B's private property is 1000 & his debts 500 B is solvent & 500 go to the co. creditors this makes the co. solvent.

2d The co. owes 2000. the co. property is 1000. A owes 500 his private property is 1000. A is solvent & 500 go to the creditors of the co. B owes 1000 & his private property is 500. B is insolvent & his private creditors receive 10/ on the pound. The co. is insolvent & the co. creditors receive 15/ on the pound. A has paid 250 more than B. which B owes to A. —

3d The co. property is 2000 & the debts of the co. 1000 A's private property is 1000 his debts 500. B's private property is 1000 his debts 2000. A & B the co. is solvent. the

and the course by bill is usually followed by most of the States that have a Ct. of Chy. Its being in the form of injuncn. & agt. one only makes no diffce.

1 Show. 189
Co. Lit. 187
2 Vez. 265

creditors are paid & 1000 are left to be divided between A & B. So that A's property is now 1500 he is solvent & is really worth 1000. B's private property is 1500 but his private debts being 2000 he is insolvent & his creditors receive 15/ on the pound—

It is very important that these rules should be understood for the occasions in which they are applicable grow more & more frequent in our country.—Beames Lex. Merc. Part

I have mentioned that the act. lies agt. the surviving partner. he is a bankrupt. but the Exr. of the decd. one is rich— The suit is brot. agt. the survivor & the Exr. lays the foundation of a bill of Chy. to recover satisfaction of the Exr. this is Eng practice & was ours, but in 6t. now. we bring an action directly agt. the Exr. at law founded on the judgt. stating it to be ineffectual.— There is a practice among merchants carrying on business separately, to agree to share profits but not losses. but they are liable for each others debts. 1 P.Wm. 682. 2 Hen. Bl. 247.

Of the rights Partners have agt. each other.—A & B are Partners & at the dissolution. B has the most of the partnership property. how should A get relief—formerly in Eng. the only remedy was by act. of acct. & the books were referred to auditors & they settled, but

If one of the partners had turned the property into money it was said that indebt. ass.t would be the remedy but it is not so for you have to examine all the acc.t which cannot be done in this act.n This act. would lie if the part. 2 T. Rep. 478 had settled their acc.ts & found so much due &c.—

1 Salk 292
Bl. R. 993.
Comp. 449.

1 H. Bl. 458
2 T. Rep. 705
727

it happened that the number of partners in one of this method would be an endless job. but now the usual method is by bill in Ch^y. who settled it by commissioners. they call the documents and papers may be ordered in. which could not be done at law. besides it would take a jury a whole time. If however there were but two partners one action at law might answer which is the best practice common. the a bill in Ch^y would not lie. I see no room for an act^n of indeb. ass^t. to lie by one partner ag^t another except for a liquidated balance. for in this act you cannot go into all the accts. between the partners.

It is a common thing for one partner to be discharged with all the accts. of the partnership customers when the partnership is dissolved. It has been questioned whether this one could bind the bo. in a note signed by him in their name. but it has been decided that he cannot. he must pay the money or sign his own. name and call on the other partners. because the partnership is dissolved.

Whether private partners can be sued was formerly but it is now settled that they can be with the limited to the credit of society.

In order that partners may reward themselves of the dissolution they must give notice of it.

4

Provided the goods are perishable they may be sold
or eaten.

If you can shew the man knew of the dissolution it is enough — & also if the dissolution was a matter of notoriety when he is presumed to know. One of this kind notice was published in a daily paper six weeks that the Pltff took — it was notice.. Another case was it was published in a paper that he did not take, but it had been published a long time the Ct. determined that he did not know. — 1 Salk. 292. Bl. Rep. 993. Cowp 449. So that it depends upon the particular circumstances of the case. Thus when the man was proved to have access to the news papers at the Coffeehouse where several papers were read which contained the notice. —

Factorage. —

A factor & a broker are very much alike the first is employed in a foreign county from a commission from a merchant, running thus "to buy & sell property as if it was your own" — this gives power to sell on credit. & in case of loss the factor looses nothing if he acts without negligence — 1 Bulst. 103. Yelv. 202

Sometimes the commission ^runs thus "to sell & dispose" these words give no power to sell on credit & if loss ensues in consequence; the factor looses. 2 Mod. 100. 10 Mod 144 Molloy 493. (this comm. is special)

A acts as a

as between the owners & factor this is all right & he must pay them.

Stra. 1178
1182.

2 Vern. 635

factor to B & C separate merchts under a general commission to sell goods on credit. he sells property to a man who fails. B & C must divide all that A gets as a dividend in proportion to the amt of sales

All that is required of a factor is integrity Co. Litt. 89. Malloy 295. & to use ordinary diligence

Suppose a factor whose duty it is to pay the duty — thinking he can run the goods safely runs them — & then charges all the duties to the merchts — The factor runs all the risque of value & seizure as to his life. the merchts must pay. Law Ja 265. Bac. Abg. Tit "Factors"

The factor sale binds the principal, & yet the factor cannot use the property altogether as if it was his own for he cannot pledge that for his own debts. this supposes the factor known as such but if the property is held up as his own property it is in relation to all but the real owner.

Altho the commission gives no power to sell upon credit, yet if it is known to the purchaser it is only the purchaser gets a good title. tho the factor may lose & there is a singular feature in these laws of factorage viz. that if the factor give more than his commission warrants or exceeds his

Comp. 253

Burr. 489.
1 Vez. 509

2 Vez. 39

* Because if he had sold the goods of two diff.t merch.ts in this way the money rec.d would have been divided —

2 Vez. 39

commission he forfeits his wages.—

If the merch.ts is fraudfull that the factor will fail & gives notice that no payment are to be made to him. if money is paid to him it must be paid — q.re to the merch.ts if it is known that he is a factor. —

The factor has a lien upon all the property in his hands not only on acct. of his commiss.n but for any balance he may have ag.st the principle. — Suppose the factor gives more than the commiss.n amounts. the Merch.t is not bound to take them but if the merch.ts take them he must pay the factor all he gave for them.

If factor sells his own goods & those of the merch.t to the same man, (both on one bill) this must become a bar respt. but some money is recovered — the factor must pay the merch.t in full before he takes any thing on his debt. — This seems not equitable.x but it is a principle of policy to make factors careful.

There is a practice singular the usual — the merch.t writes to the factor to insure his goods then he is bound to do & if he does not he is considered as the insurer. — [illegible] him for the policy

When a factor ships all the goods that can be identified goes to the principle

1 Salk. 160

If the property cannot be distinguished it is part of the factors estate and is subject to the debts in favour of the principal. — Comp. 395.

Auct. acts for other persons but the contract is made with him & the suit is brot. in his own name. — Quest. whether if auct. is ordered to strike off a certain price (Comp. 395) & not under, he should strike them off under he is liable. decided not. —

With respect to auctions it has been long a question whether if a man is employed to bid off goods at a certain price set by the owner he can have them or the highest bidder. the courts decided it to go to the highest bidder. & rightly I think. Where a man makes a bargain at C.L. it is the man to whom it is sold: but by the mercantile laws the seller may stop these goods in transitu if the buyer is discovered to be a bankrupt. If to be sure, it has got to its destination or is assigned bona fide it cannot be stopped

Bills of Exchange

A bill of exchange is defined to be a request in an open letter from one man to another to pay to a man or his order, such an instrument as this ordinary person to whom the bill is payable the legal title - holding or paying over to whom who can sue in his own name the drawer. Suppose the drawer does not except. he has not become an acceptor. then the holder has a right of action in his own name agt the drawer drawee or endorser. Now this negotiation of a chose in action is contrary to the rules of C.L. for instance a bond is sold. it must be sued in the name of the original payee - suppose a man should sell a

1 H. Bl. 612. 6 Br. P. C. 332.
1 Wils. 229. 1 Vez. 411
3 P. Wms. 129.

The endorsee of a bill would have the legal title. but of a bill of sale of land he would only have an equitable title & could only recover in C. h. J.

2 Bl. 1272
1 T. R. 20
3 T. R. 182
5 T. R. 683

[illegible] that is the consideration of a specialty cannot be enquired into.

bond & covenant, that the buyer should collect the money it would be in vain –

But at length Chy interfered & protected the sale when done honestly, so not to vex. Now if a bond was sold & the promisor had notice, if he pays to the seller Chy will oblige the promisor to pay it over again – It must still however be sued in the name of the promisee – & if the promisor gets a release from him it would be good at law & then the buyer must apply to Chy. The mercantile law is different, & the whole right & title is immediately vested in the buyer. If then a note negociable was sold the buyer could sue the drawer in his own name. 7 T. Rep 763 4 T Rep. 340. 1 T Rep. 621.

The consequence of the C.L. rule subjects the owner to great inconveniency – since the promisor may withdraw the suit give a release &c, Ct of Chy compels the man who gets the discharge to pay the note where he ought to –

This principle of all mercantile law applies to policies of insurance, bills of lading & respondentia bonds but never to those instruments not of a mercantile nature –
another difference from C.L. contract, it is in the shape of a simple contract but has the qualities of a specialty this principle is extended to bills of exchange after

3 Salk 70
1 Bl. 445

*unless it was so constructed

B.N.P. 182

endorsement - but before that it may be proved that there was no consideration at a suit on it but if it is endorsed this cannot be done for it would destroy all confidence in dealing. The principle is apparent from that which prevents proof of this on specialty for in that you presume from the solemnity of sealing that there was consideration & it must not be questioned. but in relation to mercantile instruments it is to ensure confidence & afford facility to commerce.-

The name of the bill is called the drawer the person in whose favour it is drawn is the payee & the person on whom it is drawn the drawee when he has accepted he is called the acceptor when the payee has endorsed it over to one he becomes endorser & the person to whom it is endorsed is endorsee.-

Whenever A draws a bill in favour of B upon C. the law presumes that C owes A & C's acceptance of it proves it. nothing can destroy this presumption.-

There is no certain inference to be drawn that the drawer owed the payee - & suppose he did owe him this bill does not pay him. it has however this effect to operate as a waiver of the rights of the payee to sue the

& if it is not accepted he may sue on the original debt or on the bill. — 1 H. Bl. 586 602.

Bankers notes are always payable to bearer other notes are so some times but not necessarily so. These pass by mere delivery. —

An infant may certainly sue on a bill in his favour. Chit. 24 Keyb. 30. Bac. Inf. 16. & Except in the case of endorsement by feme covert. it seems that tho drawn endorsed &c by persons incompetent. it will still be valid ag.st competent parties Chit 25. 6

1 T Rep. 40.

drawer until it can be found whether the drawer accepts it.

Check. There is a species of negotiable notes on bankers, made payable to bearer & shall not note upon them at present.

If a bill is drawn to the payee to make it negotiable it must be indorsed by the payee.— Bills are due always when the time is out. Bankers bills must be demanded before it can be sued— A Bill of E. does not pay the debts but a bankers bill does if you take it, it being money. When you sue upon this you declare upon it the same as upon a bill of Ex.

Who can make bills of Ex. It was thought that no one but merchants could. but the fact is that any person capable of contracting can make a bill of Ex.

As to minors now I would say that generally (at C L) a minor is not bound by his contracts except for necessaries & there is no distinction between a specialty & a simple contract in minors— because you must go into the examination of the consideration of the instrument for this reason he is not bound by a bill of Ex. after it is negotiated— before it is negociated he is bound because you can thus go

1 T. Rep 648

(a) and if it happens to be by delivery only it must ever after pass by delivery. —

(c) for money paid without consideration. — & then it might be sent back to the drawer. —

1 T. Rep 760

Which is an acceptance supra protest.

D R 1930
Bcamp 89

into the consideration. If he arrives at age upon is pay it. he is bound so that the bill is only voidable not void. —

A. is the drawer. B. Payee C. the drawee. C accepts then he becomes acceptor. B endorses to D who is endorsee — who can pass it to E. by delivery. But B endorsed it in blank & delivered it to E & E to F & so on — the holder may fill up the endorsement of B & then sue B. but no one can be sued upon the bill but B or the drawer. — but any of all those whose names are endorsed may be sued by the holder If the bill has been passed by delivery the holder can see the man from whom he rec'd. it (C) but no other on this whose hands it has passed without endorsement. so that there must always be one endorsement to make a bill negotiable —

A man can make himself party to a bill without the knowledge of the drawer. as when a man accepts a bill to prevent dishonour of the drawer or endorser who owe them holden to him. —

An endorsement may be made by an agent. he should endorse by his own name in behalf of his principal if he does not state the behalf he becomes liable himself as endorser. —

It is not every request to pay money to one or his order that is a bill of Ex.

A bill may

2 Stra. 1271 (3 781)

Stra. 591.

There is one case directly to the point— Ld Raym. 25.

several requisites - It must be for money & not any other matter - it must be an personal order & not payable out of a particular fund. which may not be produced. it may be in this way be a good contract between the parties but is not a bill of Ex. L^d Ray. 1361. 3 Wils 317. it could not be indorsed 10 Mod. 294. 316.

However it may appear payable out of a particular fund when it is not in fact - being only a description of that fund from which the drawer could reimburse himself L^d Ray. 1481. 1545. It is said there is no instance of a note of hand

another quality indispensable to a bill of Ex is that it must be paid at all events & not depend upon any condition which may not happen. 2 Str 1151 3 Wils 213. L^d Ray 1362. 1396. 1563. 1 Burr 323. It is enough if it will or happen on the death of a man. or if the condition is morally certain as the paying off of a public ship - it is not good policy to doubt that the public ships will be paid off Burr 217 Str 1217. In all these cases the contracts as between the parties will be good but it will not be good as a negociable instrument.

As to the words "value rec^d" there are many obiter opinions that these words are not necessary

Judge thinks the words "value rec'd" necessary if the instrument is read before endorsement.—

Hand. 2d v. 358
2 Wils. 253.

So long as the bill before it is negotiated can be set per se by the illegality of the consid^n but its character is changed by negotiation and the purchaser ignorant of its illegality—

I cannot conceive why a bill that has been once negociated should need the words "value rec'd." they are only evidence of consideration & the proof of that is sufficient by the endorsement. It has been recd that the word "order" is necessary but it has been decided in N York Mass. & Conn. that those words did not exist any to make the note or bill negotiable. Chitty recommends that the words value received be always used.

When the consid'n is an illegal one the law Mercantile as to rights is diff't from C.L. for when a bill of Ex is negociated the consideration can not be questioned.— The Mercantile law allows it in some cases — C.L always: for by C.L. if the consideration of a bond is illegal it destroys the bond even the hands of a bona fide purchaser as well as of the obligee — the maxim is that whatever equity the assignor had the holder will have by C.L.

In mercantile Law this is allowed to destroy the bill in some cases — if a bill is on bad consid'n it is bad in the hands of the payee but if the payee negociates it. if the holder knew of the illegality it would be void in his hands. if he did not it would be good as the instrument if it does not come within that description of instruments which by statute are void to all intents & purposes

1 Bl. 445
Espel N. 166
6 T. Rep 61

[1] It being considered as a loan of 100. tho 5 be advanced — this rule however applies only to negociable instruments & not to bonds. 6 Mass. 73. 3 Bos & P. 152. 8.

[1] Not so as to stamps on bills — or as to wills —

If the agent knew of the illegality of the consid^n the instrument is void & whether he knew or not it will be void if it comes within the statute as of usury & gaming — If any thing is void it can never be ratified. Stra. 1155. Doug. 736. 1 W. Bl. 469.

It has been much litigated whether it is usury to receive the interest at the time of lending — it has been determined not to be by the custom of banks & bankers. — It is plainly taking more than the legal Int^t 2 Bl. Rep 792. 3 Wils 256. 2 T. Rep 82 —

It has become a practice to draw bills payable to a fictitious person and then indorse it in the name of the fictitious payee — Courts have now determined that it is the same thing as if made payable to bearer in which case no indorsement is needed. —

"The gen^l rule of law as to the validity of this instrument is that an instrument must be good according to the law of the country where the instrument is made 2 Stra. 733. However the time of pay^t is regulated by the law of the country where it is to be paid. As there are different numbers of days of grace in different countries. —

Usance is a term used in bills it means the time which by the usage of the country between which the bills are drawn is appointed for pay^t of them. 1 Salk 192

The requisites of the bond

Braun. 454
Camp. 572
Mason & Hunt Day

of the country where the bill is made gives it validity the time of payt is regulated by the Laws of the country where it is payable.—

State of the Parties & their obligation to each other.— Of the Acceptor. the same obligations lie upon the drawer of a note & the acceptor of a bill.

The acceptance of a bill is an engagement to pay the bill to any man that has it. & not particularly to the presentor. 1 Atk 715. Bevans 466. 3 Bur. 1663.

A man who previous by an engagement to accept a bill. has accepted it & may be so declared against it is no matter whether presented before or after the time of payt if it is accepted 3 N.P. 270. Hardw. 74. Str. 1000

An acceptance may be by writing or parol & is good both ways tho the common way is by writing. the acceptance is not a promise to pay the debt of another. Str 648. 3 Bur. 1674. 1563. but his own debt.—

This acceptance is not necessary to be made to the holder it may be accepted to the drawer—

Now a bill may be accepted in part so as to hold the acceptor - the holder is not bound to accept that but he may if he chooses - it is no harm to the drawer if he pays his debt in part. so he may accept if he pleases a promise of pay^t at a future time days. this you will remember is at the option of the holder. St. a 114. 11 Mod. 190. Barnes L 81.

There may be also a conditional acceptance as if such an assignment arising & if the condition happen he is bound 2 Wils. 9. Comyn 574.

What is an acceptance? any thing that is said or written that does not amount to a refusal is an acceptance as writing the word "Jew" or a direction to some one to pay it Stra 648. Gil Ev 618

An acceptance is an engagement to pay the holder or any indorsee who pays it & he may bring his action for it. agt any of the previous endorsers by excising the intermediate indorsers & the reason may be shown at bar.

The acceptor makes himself liable to the drawer. as if on the bills not being paid the drawer is sued. & he pays it. he can then come upon the acceptor & sue him if the drawer had effects in the hands of the acceptor to pay it. but if the acceptor can show that he had not. he will recover

himself. the law presumes that he paid it first.

If the bill is payable to bearer it may be transfered by delivery; but if to order it must be indorsed. — The drawer & all the indorsers are liable to the holder & so is the acceptor after acceptance indorsements are usually in blank. 1 L^d Ray 575 3 T. Rep. 80. Doug. 611. 633. 551.

This bill when drawn & presented is dishonoured unless accepted within 24 hours. There is an implied ag^t on the part of the drawer that the drawer shall be found. this does not mean that he shall not have moved or gone on a journey &c he must be looked up. but if he has absconded or never lived there the bill is dishonoured. — It may be accepted by an authorized agent as one who is accustomed to do such business. —

An acceptance is irrevocable by the gen^l rule of Law Merch^t the holder however may waive the acceptance if he chuses. Doug. 247 as when the holder found the drawer had no effects in drawers hands & the indorser able to pay. There was a case much litigated where the acceptor had paid a part & got a longer time to pay the remainder. the question was whether this discharged the acceptor. the court held it to be a discharge only as to that time. —

Whenever a bill or note passes by delivery & the party receiving it is a stranger to the bill, if not accepted he cannot by the law merch.t maintain an act.n ag.t any of the parties to the bill but by C. L. he may sue the man who transferred it to him. - But if it were accepted the holder might sue the acceptor.

1 Show. 165
1 Salk 127. 130
Ld Ray. 871

Of indorsm. et draw a bill upon B payable to
bearer who presents it. B would not accept it
he cannot maintain his act. agt any of the parties by the Mer.
A bill was drawn in favour of B upon C. D indorsd
to B & B to E in blank. this bill may be filld
up by indorsm for two purposes to vest him self
the property or with a power of attny to collect
it which destroys its negociability.
Another case. C
accepts the bill before the time of paymt. B an
indorsee presents it for paymt & C puts the bill in
his pocket without paymt. B brts his act. of
trover. the objection was that B had parted with
his property by the blank indorsement to C. but this
was nonsuit. for it might have been given to C
to collect & the act sustains the act.
When the drawer draws this
bill & delivers it to one there was one implied
contract to pay the bill not only to B but
to his order or to any indorsee or his order. the
common way is to indorse in blank one after the
other. — All persons indorsers are liable to the
last — the indorsee then holds the bills with all
the security that the payee did & as much more
as the credit of intermidiate indorsers.
Suppose the payee
has rec. a valuable consideration from the indorsee to

endorsement cannot be filled up so as to destroy the negotiability of the instrument. but if the holder is a mere agent it may be filled up in any manner.

When a draws a bill it must be drawn payable to B or order & it has been questioned whether it is necessary to put in the word or order, but the court held that the indorsement as the word order originally used was sufficient.

Where the transfer is by delivery, the bona fide holder has a right to recover of the drawer that it has intermediately been obtained by fraud or theft. As when a bill payable to bearer was taken by Robbery from the mail. it was said that the drawer was not bound to pay it because the thief came to it without consideration but the court held otherwise. if we were from privity & say that the thief could convey no title, the drawer has no title the true reason is the same as that by which money is governed by the rules of L.L. 1 Burr. 452. 471. 1 Bl. Rep. 485. Peacock vs Rose in Doug.

Two or more partners can joint payees of a bill. an indorsement by one will bind both. but when the bill is made payable to two who are not partners in trade the indorsement of one will not bind the other. so that both must indorse it was a great thing much

4 Ves. 516

Beam. 469

3 Wils 1

Court 5. 166

2 Show 509

Beam 266

This is often done and the money is usually paid in such cases
if it is not it seems to be a bill of exchange

litigated. that is now at an end — It was said that the payees were quasi hoc partners in trade. but it was overruled. Doug. 2 Ed. 4 Ap.

In two states N York & Mass it was said that they both were bound because they held themselves out as partners — It is still a quaere vexata.

There are some persons informed by law to endorse as the husband of a feme sole who was made payee — so the assignee of a Bankrupt. so Ex^rs. Ad^rs. a trustee. & many more —

A bill cannot be divided by partial indorsements so as to make the drawer liable in more actions than one. — as of 500 to A. 500 B &c. nor can it be indorsed so as to subject the acceptor except in one suit unless he accepts it after these divisions are made. — Stra. 516.

The different kinds of bills, or bill may be made payable "to B or bearer." "to bearer." "to B or order" — as to the first "to B or bearer" - the property passes by indorsm^t or delivery — When "to bearer" it passes by delivery — when "to B or order" then must be an indorsm^t. and after that it passes by delivery or only by further indorsement of the holder. B. passes it to D, by indorsm^t in blank when it becomes a negociable instrument Peacock v Rose Doug. 1 Stra Bl. 606. Now the effect of B's name in blank is to convey the property to D or

1 Salk 125
1 Show 63

to give D a power of Atty to collect it. & there is no certainty which ever title it is filled up or passed for a valuable consideration — something must be done with the bill to ascertain what is meant by the blank indorsmt: If D does fill it up in the name of himself the action must be brot: in the name of D. If it remains blank the name of B may be struck out & the action then brot: in B's name.—

After indorsement it passes by delivery any future holder may fill up the blank indorsemt of B to himself as if it had been originally indorsed to him: suppose there were half a dozen blank indorsmts & it was in the hands of G. he may strike out all the intermediate indorsmts & sue B. the indorsmt of B being filled up to him.— tho there be many so many blank or special endorsements the holder may strike out all the endorsements tho he comes to a blank indorsmt & sue that endorser. & to save a multiplicity of suits where one would do as well.— So long as there is a blank indorsmt so long it passes by delivery but its negociability may at any time be restricted by filling up the indorsmt with power of Atty &c or to pay E for my use. or take this bill & give credit for it.

Last Term

some one indorses who has nothing to do with the bill, is a stranger to it to give credit to it. this is a different thing the import of which is a warranty that the bill is then due & will be paid if due diligence is used. the only defence for such an indorser ag.st the def.ts bot. on the warranty is to shew that due diligence has not been used to collect it.

Engagements of the several parties.

of the Drawer — He as must engages as if he had specified it to pay the payee if the drawee is not capable of binding himself — 2 that the drawee is to be found 3 that the drawee will accept it & 4 that he will pay it when it becomes due — & that he will all hold himself under the same obligations to all that hold under payee or else. but not to all who came in post.y by delivery who cannot sue a party to the bill by M. L. but by G L he sues the man from he received it —

In case of non acceptance he is liable not only for the contents of the bill but for certain damages — this is by the law merchant. all that you recover by G. L. is interest in a note of hand. if a man contracts to build a ship the damages may be very great

at first in note or bills damages were required into; at length certain damages were settled by the custom of the merchants — before the non-

A man may render himself liable as drawer without actually drawing the bill or by writing his name on a paper delivering it to be filled up by another. 1 A. Bl. 313

2 Show. 441. 494.
3 Mod. 86

lution in our country the damages were 20 p cent besides the interest. Now they are different in the different states. in N York 20. In Boston 10. This is to be learnt as other customs are.—

It was not long since that this question has been settled. whether a drawer could be sued upon the refusal of the drawee to accept. you must demand twice.— Stra. 949. Chitford vs Major Doug. It was decided in Ba & Penn. that he could be.

There is another case of some difficulty. the drawer covenants that the drawee is to be found. if he is found after returning from a journey or moved & it is accepted as soon as possible the bill if is not dishonoured. each case depending on its own circumstances.—

Of the Endorsers engagements.

The engagement of the endorser is the same as that of the drawer to all subsequent holders — our endorsee is a new drawer of the bill & nothing will discharge him that will not discharge the drawer.

There are certain things that will discharge me at C. L. that will not at the M. L. Our intermediate judgt has the same effect at C. L. & M. L. & if you do not get

2 Bl. Rep. 1235

An ineffectual judg.t ag.t one in tort discharges all the others but not so in contract. but even in contract when there is one Ex.t by 6 J. a discharge to one is good for all.—

15 Rep. 717

15 Rep. 170

the money out you may sue the other. But an
imprisonment for by C.L. does this at L.M. it
does not. or if the debtor is taken and im-
prisoned & then released the right of action
a joint debtor is not an end by C.L. for the
maxim is that the discharge of one is a
discharge of the other — originally meaning
a discharge by payment But by M.L. you
may sue & imprison all however tho you
get pay. It is strange the law is not the same
law is not applicable to both.—

The holder of the bill thus is entitled to re
cover but there is something for him to do.
He must present in proper time & manner, not
let it lie too long. nor neglect to give notice.

If the bill be drawn due at a certain time after
sight the must shew it to the drawee within
a reasonable time for the drawee may become
insolvent or the drawer get his effects out of his hands.—

If the bill is payable at a certain
time after date if the payee or indorsee shew
it to him at the time of payment he may
demand his duty. I do not consider this as settled for it is grumbled at.
It is said it ought to be five
days before When it is presented in proper time
& it is dishonoured he must give notice to all
that he intends to make liable. & those are not liable

And there are contrary decisions as to whether he must give a proper notice that he looks to them for pay.

1 T.R. 410

1 Ld Ray 742
Stra. 829. 441
5 15. 649

The notice would be good tho not given by this method if given in a reasonable time. and the rule as to inland bills generally

who do not have notice. the drawer must have notice that he may depend his acceptt with the drawer - but if he had no property in the hands of the drawer he need not have notice - The indorsers must have notice that they may secure their remedy in season. if they should be a failure. 5 Bur. 2670. 1 Rep. 702. Str. 442. 2 Bur 669.

Now the drawer may accept a bill varying from the time of it's or to a longer time of pay.t by which the Drawer is bound. the holder must give notice of this fact. viz the variance.

The holder must pursue within the time of pay.t for acceptance & then again at the pay days. The law state presumes he will pay it. Brown. 261. 761. 2 Bl. Rep. 742.

The time of notice for all foreign bills must be given by the first post after the refusal to accept & also after the refusal to pay after pursued on pay day. If there is no post it must be given by the first opportunity. 1 Rep 169. 67.

The question as to what is diligence & what is negligence is to be summed up to the jury by the Court

1 T Rep 170
3 Bac. 514

and if the same notice be given of the dishonour of an inland bill as is required for a foreign it gives the same extra days. & by this the power of giving the same notice is granted. —

As to the manner of giving notice

The inland bills require no particular form of giving notice to only require notice in a reasonable time. The same rule applies to a promissory note. — What is a reasonable time is a question of law arising on the facts. As to the requisition of notice in case of the dishonour of these two bills they are made alike by our Eng Statute —

Both of foreign bills the law is specific & the method must be followed or the holder loses his security —

When the drawee refuses to accept the holder must go to a notary public or some public, reputable person if there is no notary; who goes & demands & then sets down on the bill the time circumstances &c & writes down the draft & all the facts & signs it officially, this is called a protest — all this is to be done in the regular hours of business — This protest is then sent away to give notice by the next mail & a copy of the bill preserved by the holder & the notary having certified it which is evidence — When the time of payment the same process is gone over. Then the bill itself is sent to the drawer & the copy taken by the notary is the evidence in their hands So that if the drawer is incapable not to be found or if he accepts the bill & aviants from its time

as to accept collateral entirely in lieu of money if the holder receives such acceptance it is to his own risque. —

It is usual for drawer to write to the man whom whom credit it is drawn & if he agrees to it all is well.

the same process is pursued unless indeed the holder will accept such a variant acceptance as he is bound by it.—

Where the holder procures after the acceptance & before pay day that the acceptor will fail, the holder is compelled to demand security — the law terms this case of the drawer & indorsers & a protest must be entered if the drawer does not give it.—

Of the effect of notice — The holder if he has complied with the legal requisitions he is entitled to all his damages — by C.L. no more recovers more than the interest by way of damages — but by all C.L. he recovers. —

At first the holder recovered all he had suffered but being alarmed with inconveniences the amount of [illegible] was fixed by custom. There is a bill now before Con. to make the damages uniform throughout the U.S.

There is a species of bills drawn on one upon the credit of a third person. As by A in favour of C upon B on the acct. of D. In this case there is no contract between the Drawer & drawee — there is no presumption of the effects of A in the hands of B. — B is bound if he accepts anyone may accept it for the honour of the drawer & this acceptor I holder must get the bill protested in all cases

1 T. Rep. 269

of this kind — & this raises the contract between the drawer & acceptor.

When it is thro' protested for non acceptance he may give no notice or protest it for non pay.t if the drawer having notice of the first protest shews himself pleased with the acceptance.

If the drawer has no effects in the hands of the drawee & the bill is paid the drawer has a right of action agt. the drawer at C. Laws. I suppose —

It is agreed rule of all L. that an acceptance cannot be revoked at tho the drawer is likely to fail or the has accepted without consideration

In the mercantile law there are a great many cases in which a man is bound in contract where there is no consideration. & the reason is that there are third persons concerned — but by C. L. if there is no consideration the contract is not binding — & even by all L. if no third person is concerned a contract without consideration will not bind — so that a seal on paper is a thing known to all L.

The holder of a bill may discharge the acceptance by writing or parol & he will be bound by it. even tho there were no possible consideration for the undertaking indeed in the wish to oblige the drawee —

Doug. 237

Str. 733

Doug. 247
Doug. 235

* The acceptor is not due until the stat of limitations runs
acg.t the contract.

2 Ld Ray
734
1 Wils. 48

So when the holder discharged the acceptor drawer from or not he had communicated any thing in consequence of a bond from the drawer the drawer proved insolvent & the holder suffered.

Nor indulgence implies to amounts to a discharge that the holder will not look to the acceptor will release him even tho the holder looked to the drawer for payment & received of him a while, this does not discharge the acceptor — neither does a receipt of part of the money from the drawer, making or indorsing except pro tanto —

If due notice is not given to the acceptor of the reception of the money from the drawer & any injury comes to him thereby as by paying into other hands he is discharged.

It was once thot that the holder was first to resort to drawer but that is done away Str. 441. 2 Burr. 669. this is fully settled by the case in Burrow

Nor length of time shorts of the Statute of Lim. discharges the acceptor of a bill. Suppose after acceptance the holder applies to the drawer & gets his obligation for the money this does not release the acceptor it only adds to the security of the holder —

Where the acceptance is variant

the holder may recieve the amt ~~a~~ acceptor & the Drawer is liable for the not if the bill be regularly protested

When the holder has indulged the acceptor & tied it to his ordering without giving notice of non payment he runs the whole risque

If the drawer or indorser promises ~~to~~ pay he will be liable — altho he has no consideration. if there is a moral obligation to pay it he ought to pay it; if not he ought not to be obliged to. it seems to me that this principle is questionable & there are different decisions. this is a ~~bill~~ promise.

The Ct however has said that if the promise is made under the idea that he would otherwise be bound he is not obliged to be bound by it 6 Conn. 102. note. I should suppose that if the drawer had lost nothing he would be forced to pay it. the moral obligation being the criterion.

There is a species of notes called bank notes, ~~drafts~~ drafts on bankers &c. Bank notes are money and pass by that name in wills &c & when the statute uses cash it includes bank notes. — The Ct has said that if the payee does not object because they are bank notes & not gold & silver it should be a tender —

Bank notes are called cash as are checks

1 Stat. 415

1 Stat 516

Stat.

and so pays. the demand must be made within a reasonable time. That was decided to be 24 hours after it has been n.p. in London. A case: a note was taken out 2 o'clock & drawn the holder
ordered pay't at 9 o'clock next day. the court said that as the banker had failed the holder wants not been the another case was the holder kept the note within 24 hours & then called after 24 to take the money: when the banker had failed the 6t. said he had not been negligent. — Another case in Str. 580 the last decision was questioned. —

another case was
where the holder called early enough

another case was
the bill was n.p. after dinner & presented within 24 hours. no loss Et. a. 1240. another case where more than 24 had elapsed it was said a loss in Bro. 1480. a case of the same kind the court charged the jury to find a loss. they did not & the 6t. granted a new trial.

There was a case where the parties to a bill of Ex lived near each other. it was not considered as governed by the same rule as other bills. 6 L notice was said to be enough.

Month is a time denoting a certain length of time used formerly much as Kid L. In Eng & US & all the Eng col. it means a month: a calendar month & not as C L. months which are lunar or 4 weeks

Days of grace are the time given beyond the time of pay^t in Eng & US. they are three as they are in most of the mercantile words —

By all L. if the pay^t day falls on sunday. pay^t is to be made on saturday. by C. L. on monday.

There has been much dispute as to words from the day & from the day of the date. it was decided at first at C.L. that from the day included & from the day of the date included the day of the date —

But by a decision Comp. it has been determined that the words are nearly synonimous — & Ld Mansfield says it must go according to the apparent intention of the parties. — An estate was given for life to commence from the day of the date as a freehold could not commence in future. the words were held to include the day — But in all L there has been no difficulty for by both interpretations the days always was & still is meant to be included.

* In Ct. a Statute makes them negociable. –

When a bill is payable at sight there are no days of grace — tho it would seem they were more necessary here than in any circumstance — but this is the law. —

If a note was given payable B or order it was questionable whether such note was negociable — the Stat of Anne made it so. It was before the act a disputable question & is really in favour of this construction of the Act since the Parl. thot this the correct interpretation of it. — This stat has been copied by nearly all the States of Union. & it is generally understood that where there is no such Stat. that they are not negociable. — Chipman Judge of Vt. has stated to my mind however the other way. He says that the note is a promise to pay to the person & to all to whom he shall order pay.

The drawer of a bill of Ex. & of a note of hand are different characters & by confounding them there is much confusion. the law that applies to the acceptor of a bill of Ex. applies equally to the maker of a note.

Previous to a Stat of Anne. Corporations used to draw & accept bills by their agents but by that Stat. they are prevented. There is no such Stat with us —

1 Show. 8
10 Mod. 286

1 Bl. Rep. 485
3 Burr. 1516

Bunn. 481

A bill in favour of the order of B is the same thing as a bill in favour of B or order & the declaration on both is the same

still payable to bearer passes by delivery and it may be endorsed & the endorser makes himself party — if it is not endorsed or accepted no one is liable but the drawer.

A gives a note whereby he promises to pay B or order $50 by means of it is understood as a promise to pay

A promise to accept to the drawer is an acceptance & if the drawer will not pay it may be protested for non payt & a suit brot vs the acceptor now it is said in some cases there is no consideration but the rule is that if a third person may be a loser must that he actually is. The person is bound by his promise according to all Ch. & there is no material practice in all Ch. where a third person is concerned. Mason vs Hunt Doug.

I have observed that a man may accept a bill warrant from the time of it. if he does he is holden by it. & when you see the acceptor the Dr. may be that it was an acceptance according to the time of it. A case was that the holder attend Lawr to Mich in the bill & the answer accepts

indorsement by C.L. was forgery & would have discharged the bill but by all L. the drawer was bound.—

It was once questioned whether if a man put his name in blank & gave it to a person to fill up it was a good note. but in Langstaffs case it was held good. Doug.—

A drew a bill in favour of B upon C. B indorsed it to D. C. put it in his pocket. if D loses it. it will sustain an action of trover. but B cannot. the action is used D as a witness the indorsement being in blank & uncertain:— for the property had not passed

Bills payable to bearer or to A or bearer are transferred by delivery & are as fully the property of the holder as if he held by indorsement. — The law presumes effects in the hands of the drawee. — If the payee is a creditor of the drawer. the bill is no payment & if the bill is lost without negligence the drawer must give another. or owes the payee the money as much as he ever did —

Negociable promissory notes are put upon the same footing as bills of Exchange Comyn. 9. 17.

Inland bills of Ex are not governed by L. Mr. & were not until the Eng Statute was made.

When you give

common notice you recover damages as at C. L. if such Notice as is required by Foreign bills you recover extra damages

In U.S. the rule generally is that bills inland as to one State are governed by C.L. but if drawn upon another State they are treated as foreign bills.—

The last convenient part of the day of pay.t is the time to make a tender & if made in the morning & he is not at home it is no tender. whereas if made at the last convenient time it is—

By M.L. any time in business hours is good. tho the earliest time of business on that day is sufficient for a tender & protest.—

Of the Remedies—

This brings up to view the Whole law on this subject.— When there is a privity between the parties the suit may be brot. at C. L. as B may sue A. & if B indorses over to D. D may bring his act.n at C.L. agt. B. but not A. now if D passes it by delivery to E. E cannot sue any body by L.M. but by C.L. he can sue A & him only.

The custom of Merchts is not such a custom as of that of London — it is as much the law of the land as the C.L. is — & the Court are presumed to know it.

Suppose the indorsee was about to sue the drawer. the old method was to state the custom that if one drawing on another who also did accept the drawer became liable. stating it at length & then to state the facts of the particular case setting the circumstances by means whereof the drawer became liable & the course was the same if the suit was brot. agt. the acceptor. — But this method is now at an end — They only now allude to the custom but not so formerly to give the provisions in detail but saying only that it according to custom Law of March 9 drawer a bill. in favour of B upon C that B presents the bill & C refused to pay it wholly he is damnified so much & need not state that he had effects in his hands this the law presumes. but if the acceptor sued the drawer he must state the fact that the drawer had no effects in his hands. The indorsee big sued has paid it. he states as before and that A procured the protest & received agt. B. & that A had notice of the protest & the like to promise — Thus all that is necessary to be done must be shewn in —

2 Ld Ray 1544

2 Show. 180. 422
2 Ld Ray 364. 1542
1376. 2 Stra. 817.
1 Wils. 185.

It is said in Selwyn at P. 383. 7 T. R 596 quoted ~~that~~ the delivery to the payee need not be alledged as it is a constituent part of the making—

You must state according to bank. that if note purports to be signed by two & is signed only by one it must be read as if signed by both. If signed by one

If a person who is clerk agent or servt. signs the operation is the same as if done by the master and is so to be declared.

To recover there you must state all the facts making your claim — as protest &c.
Some things are indispensable &c. The making of the bill, requesting pay.t directed to the drawee & given to the payee — payable to him or order the time of making is not indispensable to be stated tho it is usual. that it was presented accepted & pay.t was refused must be stated one bp it was paid when pay.t only need be averred. the quo modo is not necessary to be stated in L.M. by C.L. the quo modo must be stated as well as the quid.

The signing need not be stated for there is not to be same nicety required in all L. transactions as C.L. Where according to C.L. one circumstance so particularly is, that is shown the instrument was drawn according to law.

If the act.n is ag.t the acceptor the acceptance must be stated — presentment for acceptance need not. nor the manner of acceptance.
2 Show. 160

Suppose the evidence of acceptance turns out to be after the time of pay.t the acceptor is not liable. The endorser brings the act agt the acceptor of the bill. who does not pay it. — All their facts before specified must be stated & also that Benj. endorsed this bill to the endorsee D. which shews D right to the bill. — The word indorsmt. is the technical word necessary. if that is blk the indorsmt. is to be filled up at bar if the title under it is disputed. — If there are intermediate indorsements you must strike out them that the conveyance be directly to the holder whose if the former were blank a special until you come to the last or fill up all the blank indorsmts & declare specially on them

The word indorsmt. implies a written assignment & delivery of the indorsmt. only is not the assignmt. & delivery must be stated.

If a bill is made payable to bearer it is unnecessary & state any indorsmt. if there is one it may be stated & must be if you intend to prove an indorsement to have been a bearer —

Suppose an act. brot. by an indorsee who has already paid the bill. Dishonour the bill & regular notice is given. — one of the indorsers pays up the bill or D. to bring into the hands of E. when D. brings the action he states these facts above must necessary state the indorsmt. to shew his title. the the dishonour by which he became liable to pay & did pay which

the drawer or a prior indorser became liable to him & is frequently done to secure the indorser against the drawer

It is not necessary to state any promise for the law implies it at L. Mo. But at C. L. the if there is no reason for it & I think a decl. without the promise would be good on demr. for every liability is stated then is nothing added: the promise is never proved & cannot be for it was never made. the promise is implied by the facts — & I do not see why you never can draw the judge from the facts & know whether the facts alleged are a good ground to raise this promise. because by demr. you allow the promise. This is on the ground of an implied promise.

An indorser has a great security — can be sued all? the C. L. maxim is that he may insist all his indorsers at once & sue them all at once. suppose he thinks that he may recover judgt. against all & get he can never have but one satisfaction for the debt the he can recover all the costs. — Now Defendt may put a stop to the whole by paying all the costs & the whole debt. that stops the whole — Suppose he pays up the debt & his own costs. Pltff can have Ca. sa. for the costs only against the others. if he gets Ca. sa. for more it is contempt of court. & he may be fined & imprisoned & be forced to pay back the money.

(2)' c Dull the Cam is the same as to rates of Sound —

Kil. 208. to 268

& if after judgt. is rendered the money should be tendered by the Deft. he is bound to take it & if he takes out Ex'n. it's contempt. —

In the act. by holder agt. the indorser he must state in addition to what is before mentioned that you got it protested & gave Deft. notice. — & a foreign bill, the kinds of notice is to be mentioned. — in inland bills the manner need not be stated. —

(D) Suppose C gives the note to pay B or order — if there is no consideration & B sues he could not recover. ~~but~~ if B endorsed it over to D. & D should sue he would recover.

It is common to draw a bill payable to the drawers order — such a bill if excepted & then A endorses it over it is a good bill. — it is a process for A to raise money.

Now in all these Decl. you must state accor ding to ~~the~~ opperation of law.

There was a question very much agitated in Westminster Hall as to the effect of a fictitious payee & the drawer endorsed in the name of the payee. The rule ~~at~~ first was that the payees hand writing must be proved but this being inconvenient it was determined to be the same thing as a bill payable to bearer. 1 T. Rep 485. 183 Hen. Bl. 313.

A bill payable after date you must aver

it to have been made on the day of the date. if there is no date that it was made on the day of delivery. By L. C. date & delivery as to time are the same thing prima facie — this brings the presumption. it may however be rebutted —

If a bill were signed or indorsed &c by an authorized agent it is stated to have been drawn by the principal without noticing the agent.

so if the acceptance was warranted the same need not be stated. the acceptance only.

When an indorsee sues it is said he ought to state that he has demanded of the drawer when the payment or indorsee is sued but this is done away & it is not now necessary for all the parties are equally bound.

There is a question in which it is said that on no exact authority — viz can the drawer ever become the indorsee of the bill & sue any body upon it. I cannot see why he should not. — in the case in Blac. the bill had been dishonoured so that its negociability had been destroyed —

The drawer brings his action against the drawer because he did not pay when he had accepted. the question is ought he to state further that he had effects in the drawers hands P the 6th & did not. for he has presumed it & if the other side proves

had not the drawer contract accoun — But if the acceptor sues — he states the common facts & further must remove the legal presumption of the effects in his hands by an averment that he had not. —

109 When the honour acceptor sues he must state the protest & notice & that for the honour of the drawer he accepted himself & gave notice to those for whose honour he accepted. —

Altho the consideration of a bill after negociation cannot be inquired into; still the pleadings are as on a simple contract. – non asst or if on the Stat of Lim the Defs would rely non asst infra sex annos. — There was a case of a special plea of a bond, made by an endorser in full consideration in obligation the Ct held the plea not good for it amounted to the Genl issue. & should have this is a good plea — a Non Asst in pleading means that Dept is not liable at L.M. & not that he never promised & & seems to be an improper plea in some cases — in C.L. cases the plea is Non asst & the give any thing in evidence that destroys the liability. Non asst is no more in reality than nil debits. —

Of the manner of holders proceedings agt bankrupts. —

The holder may have security of the drawer drawee & endorsers – one of them may prove a bankrupt.

3 Wils. 13

1 Bl. Rep. 390
2 Ld Ray 244
Stra. 946
Bur. 1354

and he may carry the debt & prove it before the bankrupt commissioners — and receive the dividend if out of 100 the Drawer dividend being 25 the the drawers dividend is to pay when the remainder of 75 — If all are bankrupt the whole debt is proved before the Com^rs of all & according to priority of time receive dividends on the whole until he gets the whole debt. 2 P Wms 89. 507. 1 Atk 107 110. 2 Vez 114. 115.

When a man becomes bnk. the Law in his debts ceases if he turns out solvent the Law revives.

C accepts the bill without consideration. B the [illegible] & the drawer has become a bankrupt. & B good to C to oblige him to pay it & the bankrupt having been discharged of his debts the question is. how it ought his debt to be who paid that bill without consideration — & the principle is that the debts must be not only due but owing at the time of the commission issued

The holder sues the acceptor. the drawers hand need not be proved. for by acceptance the acceptor admits that fact. the law supposes that. but if it is in any other kind of case when he is sued upon a promise to accept it not appearing

17 Ref. 654

to any practical use till the drawers hand must be proved. —

The hand of the acceptor in this act. is to be proved: — if the bill were to be sued that would be all that is necessary to be proved. —

The holder suing his indorser he must shew & prove the writing of any blank indorsement before him. & they shew his right. — he need proove only one if that passes the right to him. & if the indorsement are special you must proove the hand writing of all. if not you can stick he out. — But why does not, it is said does not the acceptance prove the handwriting of the indorsers? the reason is the indorsers are strangers to the acceptor. —

The acceptance was conditional if the drawer is sued the event upon which way the acceptance must be proved.

The indorser now sues the indorser. he then have to prove the hand writing of the indorser. Doct. Dl. 313. the indorsee who is holder brings his act. ag. an indorser. he the hand writing he must prove that he has given notice by way of protest that he should look to him — if he sues the drawer he must prove his hand writing & also the notice. — But if the indorsee need the hand writing of the drawer

Ld Ray. 174
Stra 444
2 Bur 655

3 Wils. 18

& all previous indorsers are admitted by his indorsement & so need not be proved — if however he skips his immediate indorser the admission of that indorser will not help him.

If the drawer sues the acceptor he must prove acceptors handwriting or else and by the holder, & that to the bill has been returned to him & he has been obliged to pay it. but need not prove effects in acceptor hands

If the act: be brot: by the acceptor agt: drawer handwriting of the drawer, & payment by himself & also that Plff: had no effects in his hands. this is proving a negative.

The act: is brot: by an endorser who has not been indemnified, or any suit but seeing he must pay it. goes & pays it he may then go & sue any of the previous parties. — but in order to shew his right to sue he must prove the payt: by himself. In the case in Wilson imprisonment of the indorser was construed payt: so as to enable him to come agt: the others

As to the notice. — This protest is conclusive evidence & cannot be got rid of — if it is said to be a forgery it is not necessary to prove the handwriting of the notary. all you have to prove is that the notary is regularly constituted by a certificate from the Executive. — The forgery must be proved. this

Gil Co. 3 i 18

3 T. Rp. 2 p. 301

1 A Bl. 98
10 Mod. 37
1 Wis. 185

1 T Rp. 169

is to permit the inconvenience & clog to business one Pliff to take the onus.

When the Defts suffer a Default, then they come to oppose the damages, it is too late to prove any thing as to Non Delivery, the default admitting all that is necessary to substantiate the suit.

It is a common thing in the mercantile world to draw accommodation notes, nothing can be recovered by B the payee, but after its negociation the drawer is liable — Unless it comes again into the hands of B who never can recover any thing on it. it is not equitable that he should for a Friend him nothing, thus being no consideration.

I gave you a number of cases by which it seemed to appear that as to inland bills checks drafts &c the presentment for payt must be within 24 hours.

A gave a note to B or order. B indorsed it over to C. it was payable on a certain day. all parties lived within 20 miles walk of each other. C early in the morning called for the money. A was not at home & he left word for him to come & take up the note. the next day he promised to come & pay it within banking hours. The note was brot & the court said the note was dishonoured on the day of payt & was

2 Bl. Rep. 170

Gil. Ev. 118
Molloy 281

tice ought to have been given that day to the one doing as it was not. — The court granted a new trial after verdict for Plff. because they said the court only and the judge of a reasonable time of notice. — & this point was established. —

As to factors. they have a lien upon the property of their principals. — If the principal had been in the habit of drawing bills on all the factor & all of accepting them. — W drew a bill which was not a bill of exchange as being payable out of the next proceeds &c. — M. accepted to whom payable. W became bankrupt. & M would not pay it. The court held that altho a principal owes the factor in such case, if the factor accepts bills generally he shall pay them. he ought to have accepted specially if he would secure himself. —

I would remark several things that I have omitted. The law as it is in Eng & as we have adopted it is a mercantile custom. & not the Ld. general. —

Whenever there is a refusal to accept if the drawer upon notice will give ample security to pay the contents at double the time. he shall not be sued. In Every however & U.S. the writ may be commenced immediately. for this see Doug. Milford v Mayor.

Pothier. 146. 1 Rep. 4.
2 T.R. 336. 2 H.Bl. 61.

Esp. N.P. 516

4 T.R. 470
1 H. Bl. 538
5 Ves. 852

3 T. Rep. 801

It has been contended that if the drawer & indorser actually have become bankrupts they cannot make defence of "no notice" — 3 Bro. Ch. Cases Bankrupts 168. There are contradictory opinions & so it is not settled —

If the drawer has absconded only he has left on a visit & will return giving him no notice. The sudden flight or bankruptcy of the holder will excuse immediate notice for a reasonable time Chitty 89. — Formerly whenever proof by default into the K.B. or M.P. the damages were ascertained by jury — But now it is not done so if nothing is to be done for a principal but by plain computation it is done by the Clk. This was always our practice. — — It seems to be useless to call a jury for all is allowed — But if it is claimed there is a proof there is all the reason for calling a jury as in any case; however it is done with us by the 6th R. of H. 2 Wm. IV. — We have seen that notice is required in a particular manner — when the writ is brot the notice & also the grounds on by protest must be alleged — & tho the jury find a promise there can be no recovery for the jury find only what is proved & nothing is proved but what is alleged — suppose no consideration was alleged verdict would not aid — if the notice was alleged but informally verdict aids, tho a

Beams 86

Beams 231

a drummer would have notice to act. Rushton vs Aspinwall Doug. — But all this business can be done by agents is a settled point in all L. The only question is who is authorized. for if the agent does what is not in his power to do the principal is not bound at factum has power to do all that the principal could. — he must be supposed to have at any rate. — this supposition imposing nothing But with us at home the principal is bound as far as the agent has authority. — Lane. who gave B power to get a bill discounted to get money & told B not to indorse it. he would not purchase however without B would indorse in the name of A. — On the contrary, it did not come out that A ordered no indorsement. A was held bound. there being an implied authority in the premises. 3 T. Rep. 757. An express authority is not necessary if the thing done is in the usage of business it is enough — Ag. if it is a thing not in usual practice. still if the agent had been in the habit of doing this it is fair to presume he had authority — And if the has been no authority of any kind if the man assents to it. it is enough — A man has employed a servant to do business of certain kind. in all business of this kind the master is bound — by whatever connection is disclosed. — then the master must give

Geo. 75

6 TR 52

Bull N.P. 271
Cook Pub. 168
L° Ray. 744
Stra. 745

notice to all his correspondents individually or he will be bound by the acts of that agent in that business — if it advertised in a paper it must be proved that the man saw that paper or had the means of seeing the advertisement. — A man was arrested & gave his creditor a bill & he was discharged the bill was dishonoured. it was held that the man might be again arrested on that process. Ld Kenyon said the man had no authority to give the bill but as it was then a fraud it might be treated as a nullity. But if a case should be without such apparent fraud such release would be effectual It has been said that holder cannot accept a part without consent of the parties under a award made by Referees commissioners he may the bill his own but then is no reason in it. In case of taking a bond for it & giving credit is a different thing 3 Mod. 87. The court often call for quotations to prove the usage of merchts & will shew that there is a particular custom different from the gent. at L. it is proved. but if it is a custom very well known no witness will be called. It has been determined that if Ex. accepts a bill it is an acknowledgmt of assets in his hands. — As to inland bills there was no particular form of notice required under the Statute of Anne with which we have nothing to do. any notice answers — I doubt know that there is any such law in the U.S. 6 Mod. 80. Ld Ray 992. As to Luttrell

it was notice to mail a letter. it has been determined to be good notice — If a bill is sold it is a bargain out & out. If the seller knows the bill to be of no value the buyer may recover for it is a fraud. & the remedy is to sue the seller for a fraud. — Now it is the same thing as a sale of a bad horse. — You must however sue an act. of fraud. — I should say that the contract ought to be set aside entirely 7. T. R 427. It is as criminal to conceal as to tell falsely. a bill a bill payable by instalments — it is said that if the first is not paid a suit will recover the whole there are however contradictory opinions. 1 H Bl. 541. Geo I. 505. Andrews. 370 The C L is that if nothing is said of Int. Int. is due from the pay day But by M. L. there is no right of Int. till you make a demand. — the reason is that by M. L. you cannot sue until demand. it is not so at C. L. for there you do not demand at. — Again the old rule was for Int. to stop when the suit commenced. but now it is that Int. goes down to judgt. rendered. - Bur. 1085 If a note begins "We the sub—" & signed by several. it is a joint note if such note begins "I the &c" it is several. — If an endorser where he sells, the bill of Ex able to retain its negociability. as by endorsing to pay to E only it was said E would not be bound by it, but now the rule is if E consents to it it binds him. — The holder has three Ex. agt. drawer. accepter & endorser. it is said all the bodies may be taken but he can have no fieri facias agt. each. Str. 515. — only one fieri can be taken at once & so in succession.

Assumpsit. It is a promise to do some act or to abstain from doing it what will render it valid has been considered under the head of contracts the object of this lecture is to shew in what cases an asst is the proper action

Asstce of two kinds express as when the terms of the con are settled by the parties and when the rule of damages is the same agd upon by the parties either by parol or writing.

2nd implied asst. is when there is no definite stipulated terms or definite ones entered into between the parties but there have been such transactions between the parties that justice demands one party to pay a sum of money to the other.

There may not have been any contract at all but asst will lie because justice requires it. Suppose purchases a horse & engages to pay $100. the contract & asst is express & if stated & proved the Plff recovers.

But one goes into a store takes up goods without any agreement as to price. the action is bro't stating the facts exactly as they were raising the promise. the law raises the assumpsit.

But there are cases in which there is no contract at all suppose one carries a forged paper or order & on whom accommodating in settlement the law raises an asst from the justice of the thing.

Indebt & Covt are often concurrent in all cases where there is an express promise to pay money you may bring either

Substitutions is the ground of the action. All that is necessary to show is that it is just.

If the action is Indebt. agt. the express contract may be given in evidence.—

Express agt. may sometimes be brot. when no other action will lie as when one engages to do some certain act as to build a house by 1st Oct. & does not do it. contract is broken & remedy is by damages. the sum can be only ascertained by the jury. An agt. is either parol or written agt. if it is sealed it goes further and is a covt.

The principle on wh. an ex. agt. is founded is that the parties have assented to it. An implied agt. is founded on the justice of the case.

It is sd. that the ground of implied agt. is assent after all. now there are cases no doubt in which the law will presume assent as going to store & purchasing. but there are cases in which it would be presuming agt. evidence. as if a man obtained money by fraud. or by force it would be strange to suppose him honest enough to promise to repay it. & so if a man turned his out doors. forbidding people to trust him &c. The truth is that unless the principle of policy steps in to prevent. the law raises a promise from the justice of the case. as where one man unjustly obtains the money of another.

There are however exceptions, as where it is unjust to retain it yet the law will not enforce repayment. one is where the party claiming is equally guilty.

One cannot recover a gambling debt. nor, since the law, against one who has paid it over. to recover it back. It leaves them in statu quo.

If however they are not equally in fault. the innocent party may recover. thus the stat. of usury only punishes the lender. it declares the contract void. one has paid 12 per centum he being the oppressed party can recover the excessive interest: for in such assump.^t the party recovers back what justice & equity declares his due. This however makes the stat. the standard of equity. Hopkins v. ...

Again the law forbids any one to sign a petition to make another a bankrupt. for money if he were a bankrupt he should sign without. if not he should not sign with. A party applied to another and the creditor required pay.^t the bankrupt's sister let him have the money. & he brot the action. recovered & I suppose the sister would have recovered had she brot. the action.

In all these cases where there is a particular sum of money, engaged upon, Express or Indeb. Assump.^t or debt lies. Debt however has gone out of use to wager in whose law it was not abolished. but the assump.^t was established by the stat. of Westminster

There are certain cases in which debt cannot be brot. as where there is no privity of contract as by finding pound damage &

tho' you find in many books that debt lies where indeb. ass.t lies. but it is not true, in deb. ass.t will lie in many cases where debt will not. If one goes into a store & takes up goods debt will lie. it being implied by law to pay the market price

Whenever there is an express contract by which a sum certain is to be paid. Ex. ass.t indeb. ass.t & debt. either of them lies.

Where the promise is to do some collateral act ex. ass. ass.t only lies. for there is no sum certain to form a debt nor agt. to pay any money. i.e. no damages ascertained.

But on purchasing goods in a store ex. ass.t does not lie. for there is no precise agt. but debt will lie because the sum may be made certain as will indebt. ass.t.

But one has got his neighbours money by a forged paper. or the consideration has totally failed. indeb. ass.t lies. & no other action but ass.t lies.

In some of these cases another action lies as if one cheats another he may sue him for the fraud this action goes upon the ground of affirming the contract & demanding damages, Ind. ass.t disaffirms the contract.

So if by force money is taken. ass.t & battery lies or money had & rec.d Also if one takes your horse.

When there is an ex. ag^t & Def^t does not fulfil it, you may affirm that it as a contract & bring Ex. ass^t & recover the damages. or disaffirm the contract by bringing Assumb. ag^t & recover the money paid.

& sells him you may bring trover or assᵗ if you think he made a good bargain.

If one pays another money to purchase for him some article if he does not fulfil the contract you may bring an action for money had & received disaffirming the contract. for whenever one breaks the contract, the other treat it as broken or as if there never had been a contract. Or you may sue him on the special contract for not performing it and recover the damages.

Of these two actions you have your election as which is most for your advantage.

The action of indeb. assᵗ when concurrent with Ex. assᵗ in some cases goes expressly to the same point in others it does not. As if one pays money to another to transfer to him bank stock. Now if he sues in express assᵗ he goes for damages. if for money had & received he goes for the sum paid.

Now in these cases it is immaterial whether there is a writing in the case or not.

It is a rule that the only action is Ex. assᵗ when the contract is to perform a collateral thing unless the money has been paid.

And again whenever one retains money unconscionably you

unless some principle of policy intervenes.

may recover it in indeb. ass.^pt as where the consid.^n has failed. it is not necessary there should be fraud in the case as if one sells you property & you pay for it, which he really suppose to be his. you may recover in an act.^n for money had & rec.^d or on the implied warranty. Whenever one cheats you, an act.^n of fraud lies or money had & rec.^d or obtaining your property wrongfully you may sue in trover or for money had & received.

One set of cases are agreed to perform a collateral act. & the parties agree upon the sum to be forfeited an act.^n on the express promise or of debt or of indeb. ass.^t to recover the money, either of these, lies in this case.

In declaring in ass.^pt the fact whether in writing or not need not be noticed. the action may be brot.^t upon the writing with a profert or the writing may be adduced in evidence.

As to proff. an action was brot.^t on a contract within the stat of Frauds & Perjuries as to pay the debt of another. it is not stated in Decl.^n whether in writing or not. & Plff brings up witnesses to prove it. Deft. stops him with the statute.

But ag.^n a contract is written and act.^n is brot.^t on it. no other proff is admitted but the writing itself. this stands on a diff.^t ground than the other. in the case of the

contract within the stat. no other than written evidence can be admitted. but in this case. as if it were a promise to pay $100 for a horse. this contract might have been proved by parol had no writing been taken. but in all cases the best possible evidence must be adduced. which in this instance was written. —

Wherever a con. either parol or written is afterwards reduced to a sealed inst. the right of suing in assᵗ ceases, genˡ. but not universally.
When the bond or cont. embraces the same thing you cannot bring assᵗ. Thus if one promises to do a thing & fails & then gives a bond for damages.
But if the bond is only to enforce it you may sue on bond or in assᵗ. as if A. agrees to go to Hartford & gives a bond with a penalty. Whereas if the promise is swallowed up in the bond you can only sue on the bond. as a bond of arbitration. which is given to enforce perform-ance. you may sue on either the bond or award: but if the bond is given afterwards for the award you can sue only on the bond.

So a promise may be utterly nugatory, when there is a bond in existence. as to pay that bond.

Indeb. assᵗ. which extends over so many cases I will exemplify by cases. I will state the principle. I mentioned the case of money paid by mistake the principle is justice forbids retaining

Scif one is absent seven years an d administration is granted and his estate distributed if he returns he may recover his property back

La Mansfield observes in 2 Burrow. 1004 The ground of the action which prevailed) is not that the judgt was wrong, but that for a reason which the now Plff could not avoid himself against that judgt.) the Deft is yet not in justice to keep the money. The gist of this action for money had rec.d is that the Deft upon the circumstances of the case is obliged by the ties of natural justice & Eq.y to refund the money.

It is gen^l. true that money paid on judg^t. (however wrongfully it were (by incompetent jurisdiction) cannot be recovered back. except after reversal but this rule is not universal.
you never can recover money back which was paid in consequence of judg^t. on the ground of impeaching the judg^t. of the court. & when you do recover it does not at all impeach the judg^t.

Thus a ship has been gone so long & no one doubts her being lost. & the insurers are forced by a judg^t. to make good the loss. she then arrives safe. the insurers may recover it back. but it is on the ground of some new fact discovered. & not of impeaching the judg^t. & numerous cases may happen, in which, circumstances that shew the money ought not to be holden. may be made a good ground of recovery.

Ag^n. a Sh^ff is bound to pay the debt of the prisoner who escapes. suppose Sh^ff brings an action ag^t. escapee & recovers. then the Pl^ff recovers of the escapee. the Sh^ff ought not to retain & it may be recovered of him. ex aequo et bono & this does not impeach the former judg^t. the recovery by the Sh^ff was no bar to the Pl^ff's suit ag^t the escapee for Pl^ff was not bound to resort to the Sh^ff. 1. T^r. Rep. 281. 112

Another set of cases in which the action of Indebitatus Ass^t. lies is where the consid^n has failed; the thing purchased is of no value the seller

had no title fraud makes no difference. You may in such case recover back the money paid.

By Eng stat

whenever one engages to pay another annuity for so much money lent. which amounts to more than lawful interest but it continues only during the borrowers life the risk is run by the lender & it is not usurious. it is a calculation upon lives. this is an annuity bond. the Eng stat provides that such bonds shall be void unless the money is paid down. an action was brot on a bond where 1/2 was paid in money & 1/2 in goods. Defts plead the stat. & avoided it. but the Pltff could recover the considn in Indeb. Asst. there being no forfeiture, no fraud & the value unjustly detained.

Form the case of a sale without fraud, when the seller had no title you may recover the money paid. or when the considn entirely failed. for there must be always a quid pro quo. as if fish were sold & it prove good for nothing. In this case however an actn lies on the implied warranty affirming the contract and recovering your damages.

An Indeb. Assumpt lies to recover money which has been paid under void authority. There are diffnt opinions as to what is a void authority. A was a credr of B. C forged a power of Atty to receive this money & B pays it. A may still recover it with

2 T. Rep. 763

Money paid on an illegal contract when the law inflicts no penalty on the payer is recoverable back.

Bull N.P. 131
Comp. 419

If it were to do some act [illegible] not to pay money 3 T. [illegible] [illegible]

creditors release for 5s/in cent on their debts. one creditor however refused to accede unless he was paid an additional sum. the debtor gave two notes of £25 each he could not recover on these notes & if they had been paid the money could be recovered back in Indeb. ass^t.

So money attained by cheating or in any other manner wrongfully. this action lies to recover

As to those contracts in which one party is criminal or both are criminal the rule is that the party who is not punished by the law can recover his money back 2 Bl Rp 1073. 1 Term 31. 65. Cowp 790.

Money recovered on an erroneous judg^t may be recovered back when that judg^t is reversed. but if the judg^t were void as if a justice should render judg^t where he had no jurisdiction. but if not void it could only be recovered after reversal.

This is also the action for recovery of penalties under the bye laws of Corporations Carth. 92.

So for services rendered there being no express ag^t or for goods sold & no price agreed on. money lent no ag^t to pay it back. Indeb. ass^t is the proper action in all these cases. if the ag^t were express an action of Ex. ass^t also lies.

If then you can establish an express ag^t between A & B. Express ass^t lies, if it were to pay money Indeb.

ass^t dia. to establish exp^s ctr^t you must prove an express contract. to bring Indeb^t ass^t you have only prove indebtedness. So, in some cases, where there is no debt as if money were found. Whenever it is equitable & right that Def^t should not retain he must be subjected in Indeb^t ass^t.

If one stands by & suffers another to sell his property as the seller which really belongs to the former the former cannot recover it back. On same principle a mortgagee who does not give notice of his incumbrance, is postponed, if he were applied to for information.

You will find it laid down that where one pays money without the others consent the payer may recover it of him, in some cases, in others not.

If a man turns his wife out of doors. or his children. a man can recover of the husband or father for furnishing them with necessaries.

The person supplied must be a person entitled to the protection & support of the person against whom the action is brot. & further the articles furnished must be necessaries. Each one who is able to to support or protect a person whom it is his duty to support if he does not do it. & another person does he may recover of the former in an act for money laid out & expended for his use.

When there is an exp^s contract there is always an implied warranty of title. & if the title is bad.

5 Burr. 2639

the buyer may sue on the implied warranty or bring an indeb. ass^t. to recover the money paid

When you bring Indeb. ass. you recover no damages. i.e. nothing more than the money paid & in some cases not so much.

The rule is that if Def^t. has any equitable claim ag^t. Pl^ff. he may make an offset. As in the case noticed of the Sh^ff & rescapee. the Sh^ff may retain his costs. 2 Bl Rep 1078.

This action for money had & received cannot be bro^t in some cases in which no reason at first appears. As, where a Landlord refused to admit to common without paym^t. of additional rent. this action would not lie for the money because a title to real estate cannot be tried in this action of Indeb. ass^t.

So where one agreed to take two horses & paid for them & if he did not like them to return them & take two others. he returned the horses & then bro^t. Indeb. ass^t. for the money it was not sustained because the bargain was not at an end. it was still open, he having a right to take other horses.

So a man bo^t. a pair of horses with leave to return them if over four years old. they proved to be over four. yet the purchaser kept them too long. the court deciding that he did

not fulfil the implied contract to return them within a reasonable time, so that he could not recover in Indeb. Asst. Yet on the warranty by which the purchaser affirmed the contract he recovered the damages arising from the horse being five.

There was no form of action founded upon promises; an action on the case was given in the room of debt. by Stat of Westminster. before that no action could be brot. upon a promise to do a collateral act unless it was under seal.

The genl. issue is non asst. by which is not meant that Deft. never promised. but that it is not binding upon him: Under the genl. issue of non asst. performance may be given in evidence

The Ex. Asst. lies only on express agt. either written or parol. the only difference is if there is a written promise you cannot prove the parol one. and the written evidence must be the rule of damages.

The ground of recovery is the agt. which must be proved in express asst.

Implied asst. is founded on the moral obligation to pay. where there is an ex. prom. Ex Asst. also lies.

It is not any supposed promise that founds the recovery in implied asst. the rule is whenever one is bound in good conscience to pay Impl. Asst. lies. there is no rule of damages. the man recovers what is equitably due

That an case in which Defts has reserved to himself the right of performing in performance on condition of forfeiting the penalty when Pltf sues for the penalty and not Ex. Pltf for specific performance or damages. The proposition however is true that when the penalty is not intended as satisfaction for the disappointment the remedy is only by ex. Pltf & Defts

2 T.R. 648

When labour is performed the rule is the worth of the service or the value of goods when sold without agt. as to price.

The usual mode of suing to recover a sum due by note in most states is on the insp. ass. tho ind. asst. lies, but in Con. the practise is to sue in ex. asst.

When one promises to do a collateral act, if he does not & you have not paid him. ex. asst. only lies. if you have paid, indeb. ass. lies.

So when the parties agree upon a penalty for non performance, you may sue in indeb. assn. in the penalty or in ex. assn. to recover the damages

But it is not true that in all such cases you can sue in ex. asst. when you can only recover the penalty. 5. T. Rep. 603.

There is no such thing as debt now brot. for goods sold when no price agd. on; tho debt would lie. indeb. assn. is the action. 3 Bac. 163. Cowp. 116. 796.

The proposition that the action of indeb. assn. will lie only when debt will, is not true. 2 Burr. 1008. 1 do. Rep. 285.

When money has been obtained by fraud, you may sue for the fraud, & affirm the contract allowing him to keep the money or rescind or disaffirm the contract by an action for the money had & received.

Ed. Dig. 141
Bullock 129
U.S. Rep. 110

But if both are not equally guilty, the aggrieved party may recover it back, as in case of usury.

It was long questioned whether a man might be subjected for the reward promised in an advertisement: it was said there was no promise: but it has been settled that it can be recovered by the man who actually brings back it. the case is like that of a note payable to bd or order. there is no need of a it to make it negociable.

When one has given money you can recover it back if he has no right to hold it. unless the contract is executed as in the case of the contract for the horses before mentioned.

if man may be a tort feasor as by taking your horse & selling him. trespass or trover. or in debt upon his. it amounts to this that you can treat the man as your agent. 2 Ld Ray 1217. Comyn. 419. Bull N. P. 131. 1 T. Rep. 38. 2 T. Rep. 667. Defendant cannot say that he stole the horse & thus saved the action.
Money paid on illegal consideration cannot be recovered back. where the parties are equally guilty 1 Wils. 266. 5 T. Rep. 405. 7 in. 535. 1 Esp. 218.

So if vendor has no title this is the action to recover the money. Stra. 206 1 Salk. 363. 5 T. Rep. 716. tho if the property were of no value. so that the consideration entirely fails.
Money may be recovered when paid under void authority. tho known to the party of error when it became unreasonable for him to retain it. 2 Doug. 409. 416. 1 Doug. 665. 4 T. Rep. 482. 7 T. Rep. 269. 2 Burr. 1005. 3 Burr. 1354.

The Decl.n by C L does not state how the money was required, tho' the stat requires the quo modo to be mentioned in the Decl.

2 Ld Ray. 1210
4 T Rep 462
[illegible] Rep 824
Burr 2638
Cowp 565

There is a question which appears not settled. If A. delivers money to A to pay to B on A's account A. does not deliver the money; can B maintain an action on the contract agt A? I conceive the person who is entitled to the money has a right to sue on the contract i.e he may treat him as his agt. 1 Bac 242 an analogous case Esp. 576. 1 Vent. 318. 3 P. W. 35. So decided in S. Carolina. This is no doubt true that in such case he.

The rule that Plff cannot sue in in such case when he has a remedy of a higher nature must be understood with some qualification nothing is clearer than that if a bond is given for a debt due on note or promise no action lies on the former. But if the bond was not given to swallow up the former contract but to enforce it you can sue upon either.

Where one employs another to pay money or rather it to pay in consideration the man may pay it & then recover in an action for money paid & not the money being acquired by application. So in all cases where one tortfeasor has an advantage of another whether the latter was in fault or not. & gets money of him. it may be recovered back in this action. Comp. 197. Bacon 198.

Where money is paid by mistake into the wrong hands or too much paid this action lies. If paid by mistake to an agt the action lies agt him if not paid over.

This action lies in all cases both where paid after paid over agt the principal. the agent receiving is the agent of the principal

Defences to this action of Assumpsit.

Coverture is a defence not only to Assp. but any other action growing out of contract. Infancy and in most cases must plead infancy specially but it may be given in evidence under the gen. issue in Assp.

Infants are liable in some cases on contracts & this is the reason why the debt is not demandable if it appears on the face that the Defr. is a minor.

This is one case in which infancy is no plea that is in action on a contr. of warranty. brot. ag. the heir of covenantor.

Impossibility of performance is a good defence. by that is meant that which is impossible to perform in the nature of things. If the contract was spread upon the deed it would be demurrable. yet if the thing were impossible to Defr. merely as for a pauper to pay £1000. it is no plea.

If the consideration of a contract executed becomes afterwards impossible. the contract remains good.

But if a consideration which is executed to an executed contract becomes impossible by the act of God or by the act of the party to be benefited. the obligor is discharged. case the same if prevented by stat.

So where one is paid for doing a thing which becomes impossible or unlawful the party paying may recover it back

1 Salk. 172
Plowd. 32

If at a sale the owner employs puffers to bid for him without declaring it, it is a fraud on the real bidders, & the highest bidder cannot be compelled to complete the purchase made under such circumstances. Esp. Dig. 16. 6 T. Rep. 642.

If an promise to do an act impossible the promisor is not bound but if an impossible condition is annexed to a bond the cond^n is void & the bond good. But if the condition were inserted in the body of the bond or cov^t. the whole is void. Hence it would seem that the rule of the condition is not founded in principle. for I consider a bond with a condition

A contract which is unlawful it is not binding: If the thing to be done or the consideration is unlawful the contract is not binding. As a contract not to appear at court to testify. A contract to pay money for an illegal act is void. the act having been done at the request of the other. & it is immaterial whether the act was malum prohibitum or in se. So a contract having a tendency to encourage a breach of law as a promise to pay a sum of money to beat another &c or a printer who requires an indemnity for publishing a libel. the indemnification is void. So a contract to pay wages to a underbidder at an auction for that is a contract entered into to cheat bona fide purchasers. ^d Where the contract is reduced to writing or is in parol if all the facts are stated you may demur to the decl^n but if it were in a bond it must be proved. If a promise is made to pay 12 p ct. for a debt in writing you demur stating it your demurrer. If it were in bond you must plead it. & cannot as in ass^t prove it in evidence under the gen^l issue. & then the proof of the usury is by parol.

the usurious contract is a void one & if the usury is proved there can be no recovery.

There are two kinds of usury. one of them avoids all kinds of contracts bonds covts &c. the other kind does not avoid anything but the taker subjects himself to a penalty.

Reserving too much in a contract voids the contract but does not subject to the penalty.

But if too much is taken on a contract i.e. in paymt the contract is not void but the receiver subjects himself to a penalty. and any person in community may recover it.

And if too much is reserved in making the contract & too much is taken, the contract is void & the receiver is subjected to the penalty. Doug. 223. 3 Wils. 250. 2 Bl. Rep. 792. Co. Eli. 20. 1 Saund. 294. 2 Mod. 307.

On this subject there is one case much disputed. Suppose one wishing to borrow money gives a premium of 5$ & takes $100 & then gives a note for $100 is the note void? Now it seems to me that it is immaterial out of which pocket the money is paid. the contract is usurious he plainly gave a note of $100 for $95. & the premium thus not under the name of int. constitutes the usury. A man loans money takes an oblign for the present sum & then takes a separate note for the excessive part. so that only the exc.

rest part should be uncorrupted; [illegible] the law under the whole considers the same as if it had been inserted in one oblig.n the instruments being read & presenting the same subject at the same time.

It was decided that it was usurious to pay the int. at the time of the money loaned. But the custom of Banks has established the practice & tho in strictness it is usury, still the law does not now consider it usurious from the inconvenience attending that method. For if one should wish to pay the int upon a note at any period except precisely at the end of a year it could not be cast.

If the object of a sale is a loan & the article is sold wickedly for more than it is worth the contract is void, but if the contract were a mere bargain it is not usurious. Thus if you pay down the article shall be much cheaper than if you pay in 6 mo. as is the constant practice of merchants.

*There are bargains in which more is to be received than the legal interest which are still not usurious. In these cases the principal & interest are both hazarded; the hazard must be bona fide. As in the case of bottomry bonds, by which money is received here but to be returned with int. or not returned at all according as the ship returns safe or not & this is the principle on which annuity bonds are held not usurious

[illegible] 39
5 [illegible] 40
[illegible] 508.253
209. 507
6 [illegible]
2 1 [illegible]. 83
[illegible] 551

the principle & interest were both hazarded. But if they are a mere colour for usury they are void.

Likewise bonds with penalties are not usurious as for $100 conditioned to pay $50. because the man is not obliged to pay the penalty. but if that were part of the bargain that the penalty should be forfeited it would be usurious. for intention it is which destroys the contract so that a mistake cannot make a paymt usurious as in casting the interest. -1 Hawk 245 248. Cro. Jac. 509

An usurious contract may be purged, the common mode when too much is reserved is thus A gives an usurious note to B & B then endorses over to C who ignorant of the usury takes a new note of A for the full sum the usury is purged & collectable. But if the new note had been given to B or to his representatives it would continue corrupt forever & so in the case supposed if C had endorsed it back to B it would be void in his hands.

A was indebted in two notes, one usurious the other good. he gave a new note for both & B the creditor sued upon the new note & A avoided it but B. after much discussion was adjudged able to recover upon the original good. Read all analogous cases justify the decision. If one falsely misrepresents his debtor & exacts a bond for the debt, altho the bond may be avoided for duress. still the debt on the origl contract may be recovered

Aug. 791

Vt. 38.

the court held the language in prosp.

Conn 1077

B made a contract with C which was usurious & got A to be his security by giving him a bond of indemnity, & when the time came paid the money. the court held that he could recover upon the bond. B said "why did you "pay. I intended to avoid the bond & you would have been indemnified." The case of a contract made when it would not be usurious & a security given for it in a state when the stat. made it usurious. A of N.Y. gave a note in N.Y. & after many pay.ts A gives a new oblig.n in Con.t for eleven per cent would it be usurious? the difficulty is entirely technical. the contract was a fair one originally but is not of that class of cases contemplated by the statute the contract was fairly entitled to recover. it would be strange to suppose that the legislature intended to make the security on a good bona fide contract void. It has been decided in Mass that such an oblig.n was not void on acct of usury. there have however been contrary decisions in other states.

Suppose a contract made where usurious not to be presumed where not usurious. thus a contract in Eng to pay 7 p.r cent the Irish interest, payable in Ireland. In the case of R & Bland. L.d Mansfield declares it not usurious for nothing is necessary to make it good but crossing the water, & that has declared such a contract not usurious for the safety & accomodation of West India merchants

Suppose a contract made when it would not be usurious, to be performed when it would be usurious. -

Suppose A goes over with B to Boston & there gives him a note at seven p^r cent the object being to make the sale. I suppose it would be usurious.

The recovery is to be of the sum with such int. as the laws of the place where the contract was made declare legal. the lex loci governs.

Whenever a contract is entered into by which some right is claimed under the positive institutions of some country, that right may be respected in any other. And the only exception to this general rule is where the right arises out of some act which is malum in se. in good conscience. Upon this ground it is that usurious int may be recovd in Conn. on a contract made in N. York

There are many cases in which contracts are void tho not malum in se or malum prohibitum. they being ag^t good policy, and they can no more be recovd in a Eccl. than in law. as in restraint of marriage, or not to marry any but A. Yet there are two classes of contracts which may be recovered at law which Eccl will relieve on acc^t of the exceptions annexed to the contract. and the reason is as strong at law as Eccl. but courts of law have always shut their doors against a good defence to the full extent which the jurisdiction of Eccl having arisen when the minds of men were more liberalized

Thus a court of law would now chancer down a bond. and win very inculish rules. Lord H'moor applied to them to adopt the rule of Eqty. He was timidly about it

Marriage brocage bonds entered into to secure the influence of some persons in advancing a marriage on these bonds a court of law will suffer a recovery & yet Chy will set them aside.

The other class is that of contracts with heirs by which the latter engage to convey their expectant inheritances. A court of Chy void these contracts. and courts of law altho they do not say that they are positive still they will enforce them. 2 P Wms 121. 2 Vern. 346. 2 Atk 34: 1 Atk 354

It has become settled in Eqy & at law that a contract to pay interest upon is not usurious. still it is so far agt good policy that no more can be recovered on it than the principal & legal int. simply.

Such a contract is clearly not usurious. if the interest is paid it clearly may be loaned & as well to the origl lender as to any one. it is clearly then legal & the only ground is policy. the creditor must call upon debtor & get his interest he may sue for the interest & then otherwise have a scire facias upon that judgt to recover the principle. –

4 Leon 208
1 Wils. 236 90
2 Lev 7.
Aud. 121.
2 Bl 801

A contract is given to pay simple interest. & after 1 year at that time a new note is given including the int. it is usurious. Comyn. 112. 770. 793. 47. 5 Burr. 2082. Yelv. 7. 1 Bals. 17. Long. That is provided the debtor does it voluntarily & acts when threatened with a suit if he does not.

I think it questionable whether the surplus money could be recovered in all cases. Suppose the lender can use his money to great advantage. & is no usurer. not on the habit of lending money, suffers great inconvenience to oblige a neighbour. ought he to be subjected & obliged to refund? I think it should be determined from circumstances. the question is can he in conscience retain it? the stat is a mere positive regulation. Another defence is that there is no consid. the quantum is not material, tho it must be something. but without one a contract is void. This does not apply to executed contracts as if one should give another $50.

In any civil contract there must be a consid. whatever be its form. & if a parol contract without consid. is declared on without a consid. you may demur.

But if one puts his hand to a written instrument in knowledging a consid. (when there is one stated in a deed, or a writing contract) nothing but written evidence can contradict it. & it will not do to demur.

But the writing of an instrument imports a consid^n & you cannot go to shew there is none but the quantum may be shewn & if a suit is brot. on a cov^t & the quantum of consid^n cannot be shewn the damages will be merely nominal & a court of Eq^y will not decree a specific performance of it.

Suppose however the cov^t points out the consid^n and on examination it appears mere nominal & pro forma then can be no recovery for the legal presumption is completely rebutted by the instrument itself.

Suppose a bond (& not a cov^t) to pay a sum of money could you enquire into the quantum of consid^n? the rule is that you recover the whole sum, whereas in a suit on cov^t you recover as before stated, where no consid^n can be shewn damages are merely nominal. the reason of the difference is that the action upon bond is strict in which you are to recover the whole or none, so that the enquiry into the quantum of consid^n would be entirely nugatory. Pow. Con. Ch. cit.

If no consid^n appears in a written agr^t you may state one in the decl^n & parol proof is admitted to prove it. for this stands well with the written inst^t, altho it cannot be introduced to contradict a written inst^t. As a note given without an insertion of "value received" you may state the consid^n in your decl^n as a horse & prove it by parol.

A good defence to an action of assumpsit is the statute of limitations, for which see post. I now observe that there is some question arising from the application that does not fall within the stat. There is some necessity before the administrators can be appointed the stat. runs upon some of the obligations or contracts of the deceased, but the courts will allow a reasonable time after the death of the intestate before the statute attaches. So in case of 34

Also if judgt. of court is reversed & the party commences de novo the court will give an indulgence of one year.

Promises are taken out of the statute, but must be [illegible] whole if at all within the time limited by the statute —

The next defence is a Tender, which is an offer to pay a debt or to perform a duty which when lawfully made shall render the same privileges on the tender as if the debt were paid or the duty performed.

Custom of the person to whom you would tender designedly keep out of the way or is not to be found nor any agent of his: then if you prove that you were ready to [illegible] or to inform the [illegible]

Exp Dy. 159
1 Sta. 5/6.

duty is to pay the money, that you had the money tendered for the purpose it is sufficient.

When is this plea a good defence? It is a good defence in all cases where the demand is certain or the damages ascertained, as where you owe $100 or have contracted to do a certain piece of work by a certain day, then if tender be lawfully made it is a defence. But where damages are uncertain, as in torts it is no defence.

Whatever can be rendered certain is considered certain, thus if one works for you a day without agreeing on the price a tender of the usual price is good.

Tender then is a good defence to an action on an express promise to pay money, on note or quantum meruit, quantum valebat, on contracts to do a collateral act &c. — But is no defence to torts where damages are uncertain, nor on contracts where the damages are to be ascertained. — A young lady once brot an action on a marriage promise, thereupon the Deft. pleaded tender! & it would have been a good defence if the jury had not resolved that the tender was not sufficient! —

Next as to the duty of him who makes a tender

If the contract be to pay money if the tenderee will not receive it when tendered you must keep the money ready to be delivered to him when he calls for it. if the tender were sufficient he becomes bailee from the moment & as a depositary is bound only to good faith

But if the contract be to do a collateral act as to deliver a hhd of Rum or a yoke of oxen if the tenderee will not receive them you may leave them or if you please keep them till he calls for them & if you do not then deliver them up you are liable in trover. for notwithstanding the refusal the property is in the tenderee the debt or duty required by the orig^l. contract being discharged.-

It has been a question mooted whether in case of money the property is vested in tenderee after refusal. I consider the tenderer the bailee of the tenderee & accountable like all other bailees of that class otherwise he has not the advantage derived from a pay^t. & I think that if the property is then lost by accident the tenderee must lose it and that the contrary authority cannot be correct. the truth is tenderer is a bailee & liable only as such. He keeps no interest unless he afterwards refuses to give it up. This question arose in a Case tenderee was absent & the money was either lost by fire or mistake. It was decided that tenderer should bear the loss

And altho there are many authorities ag^st it, yet we shall find an important parallel case in Davis' Reports, (an Irishman of good authority) certain shillings were made current by proclamation of Queen Eliz. & there was soon a gen^l complaint that they were deficient in silver. a debtor made a tender of them to his cred^r who refused them. on trial these shillings were found worth only nine pence - after the cred^r sued the debtor on the ob^n the latter plead tender & that he was still ready to deliver the money in such shillings which were good when he first tendered - that the money had ever since belonged to Pl^ff & that he had kept them for him as bailee which money in shillings he was now ready to deliver - this plea was held good by the court & it was decided that the loss occasioned by a subsequent depreciation of the coin should fall on the tenderer. Davis Rep. 18. 27. 1 Dyer 81.

Such was the result of the deliberate examination by the twelve Judges of England & the contrary authorities are only certain elementary propositions that the debt & duty is still in the tenderer.
Why then it may be asked [illegible] the [illegible] to remain the right [illegible]? I answer that strictly speaking [illegible] not be said to remain the [illegible] the [illegible] is only a de- mand by tender of his property, and the tenderer is

only to carry the money into court & deposit it in the the Bank & the costs of suit are cast upon the Pltff.

If the debtor is ready after having made tender & there has been no other demand of the property he is only to plead the tender & bring the money into court & the Pltff

If however the property has been demanded before suit brot & he refused to deliver it up he loses the benefit of the tender, with this exception that the interest is not to be computed from the time of time of the demand — from demand it draws interest.

The demand must be reasonable suit made when the tenderor is home — home within he cannot be supposed to have the property & the money by him — If no demand the property is not due until up. if any thing other than money the tenderor may maintain trover: but if money trover will not lie unless it be in a bag or something of the kind debt is the action

The law of tender is generally reasonable but there is one thing, which seems to me unjust & unreasonable This when a contracts with B. to do such a piece of work on a day certain for £500. A tenders performance: B does not accept & ups for the bill damages: yet A will recover the whole sum

agreed upon $500 the same as if he had performed the work. But I conceive that Ch^t would give only ample damages for the disappointment. and this is the law in Con. how far it prevails thro the U.S. I do not know.-

What constitutes a tender. It is not enough for tenderer to come to tender with his money he must absolutely _offer_ unless tenderee says he will not accept. Esp Dig. 160 Latch 73. 2 Lev 209. 3 do 104. Co Lit 208

If he carry the money in a purse or bag it is not necessary that he should take it out & count it for tenderee. that is tenderee's business. His refusal however must have ascertained the sum in the purse. Co. Lit. 208. Ld Ray 686.

If tenderer is indebted on two or several contracts he may direct on which of them the pay^t is to be made or applied as (e.g.) on the one that draws interest. If he does not direct however, the tenderee may apply the money to the pay^t of either of the contracts at his election.-

If the sum tendered falls short in the least it is a bad tender. & it was once a question whether a tender of more than was due was a good tender now settled that it is good for same ways a contract

in re minim & the other party ought to accept so much of it as is due to him 5 Co. Rep. 115. Extra 916

The money tendered must be current by law. Money current with the people is not enough yet if such money be tendered & tendress make no objection on that account it is good whereas if he says "I do not take such money" or "I do not or will not receive bank bills" it is not a good tender. 5 Co. 114

It has been said & it is laid down also in 5 Co 115 Sir Geoffry Wales, that if counterfeit money is paid by tender to tendress both parties being ignorant of it being counterfeit, there is no remedy for tendress who received it. for when he accepts the money it is at his peril & after that allowance he shall not take exception to any part of it. Eq. Ca. Abg. 390. 2 Brownlow Co Ent 208

But I think this questionable, for then should one might be a remedy on the footing of a mistake & it is a good rule that where a man parts with that which is valuable, he must receive that which is valuable in return. 3 T. Rep 554 1 Silvers 173 1 B & P 526. 1 Bay 62. 185 2 Mass 282 1 Dall 406.

Where a tender to be made. Where the contract specifies no place agreed on. The money is commonly made payable to the person without specifying the place where. The rule then is to pay it at the debtor's mansion if he be there, if not to his agent if there be any. If there be no agent then send it to him if he has removed. And if he is absent then not removed to a distant place then get witnesses to testify that you were ready to tender but could not & you will derive the same benefit as if tender had been made Esp. Dig. 159. 5 Co. 114.

It is said that the following case is a reservation of the rule. A man who lives at Oxford in the summer & at London in the winter but moving to a person who is in the latter place. The debtor went to his residence in London & told him he would pay the debt on a certain day he made no objections. On that day the debtor accordingly took witnesses with him & went to make tender but the creditor had removed to Oxford. This was decided to be a sufficient tender without going to O. on the ground that there was an implied promise on the part of the creditor to receive the money in London at the time appointed 2 P. W. 378.

In case of Rent however the rule is different in Eng. By a law of that country the tenant may

tender at the door means or bound to his store as if he was himself present: if both are out of the way proff of an offer to tender thereat is sufficient This law was made in favour of tenants to include the necessity of their travelling about the country after their landlords.

If the tender is to be of some collateral article as grain, cattle, corn &c. and living or offer of the article at the house of the tenant is good but if it be equally convenient it must be delivered wherever the tenant directs as if tenant lives at a place 5 miles distant & had sold it to a man that lives 5 miles distant in another direction; at the request of the former it must be delivered to the latter. And it must be delivered to tenant at his dwelling or place of residence at the time of the contract made or if he has removed to a place equally convenient for delivery than at the latter. So that if A has then contracted to deliver to B who lives at the time 20 miles distant but has since removed to a place 10 miles distant: & B having sold the article to C who lives 15 miles distant requires A to deliver to C A must comply for it is now convenient to carry it 15 miles than 20 the original place of residence at the time of the contract made & cannot plead in defence that he was ready to

deliver at the distance of 10 miles the present distance of B. Co. Lit. 210.

By C. L. there can be no tender made after suit is brot. Since in Eng^d. & several States have altered the C. L. rule: the gen^l. C. L. at present in practice is to ask leave of the court to tender. Cro Chk. 264.

But suppose the place is settled & the article is to be delivered on or before a certain day. Gen^l. this is the same as if it were to be paid on a certain day that is the last day. If however tenderer should meet with tenderee before the certain day, a tender at the time of meeting would be good. — The law will not suppose a man to be at home before the last day, so that a plea of tender before that time, but that tenderee was absent is insufficient. But if he be absent on the last day tender will then be good. Cro El. 73. Plow. 172. 12 Mod 421.

But tender must not only be on the last day but on the most convenient part of the day. The last part of the day is the time appointed by law, yet there must be light enough to count the money — In case of collateral articles there must be time enough to measure & weigh it &c so that in this case the morning is as good as any time Cro Jas. — Ely. 1314

But the circumstances of the case sometimes point out a different time, as pay^t. on the transfer of stock which must be from 10 to 12. and other cases in which the tender must be made in office hours. 12 Mod. 530. Show. 777. Bac Dig. 157

Next suppose a place is appointed and time fixed upon for the tender then a tender at any reasonable time is suff^t. on the month day. If debtor do not meet tenderer with the article ready. he must give notice to him that he will tender on such a day &c. Co Litt. 211. 1 Dyer 354. 8 Co. 72.

I find no case allowing tender in the morning when the day has been ag^d upon. Quære. it would be good in many cases.

If no day be appointed & a place is fixed upon & the parties should happen to meet there a tender there would be good 5 Co. 116. Cro Ely. 11.

There is one question that has lately made some figure in Eng. tho not in our country, a bond is not assignable like a note, so that no suit can be bro^t. upon it in the name of the assignee, it must be in the name of the orig^l. obligee. But the practice has now become common this protected in court of Ch^y. ~~a bond for money~~ a tender in ~~discharge~~ of a debt

~~to C.~~ ~~But suppose the bond~~] It is well settled that if A gives a bond to B for the pay^{t} of money & B assigns it to C & A is notified of the assignment the law will not protect him in paying the money to B.

But the question arises from this. A gives B living in Goshen a bond conditioned to pay money on a certain day or to deliver a certain quantity of corn or wheat &c. B assigns the bond to C living in N. Haven the question is to whom is the money to be tendered or the goods delivered? Now according to a rule already laid down A is not to be put to any inconvenience by the assignment of the bond. Therefore if it be to pay money it must be at Goshen on the day or have an agent there else A will be justified in paying the money to B. So too with the heavy articles A must appoint some place not more inconvenient for A than Goshen. else A may deliver them to B at Goshen.

It is laid down by elementary writers that delivery must be to A private at his place of residence. because able he might be a bankrupt. But it is unreasonable that A should incur expence & trouble for nothing. I have seen no decision to support the position. If the assignee has an agt. I greatly conceive the delivery should clearly be

1 Libr 1 B
2 Vent 109.
Co Eliz. 108.4

be to him.

The consequence of tender is that it discharges all liens mortgages pawns &c. not debts however. Tender in some cases not only discharges the origl. obligation, but vests the tenderer with a right to something which if not performed by the tenderee renders him liable. Thus in Cro Eliz. 88. 9. Crane vs Exelby. Defts. was possessed of a lease for years, the inheritance being Pltffs in consid.n of a promise to pay a sum of money Deft. also promised to surrender to Pltff his lease on paymt.: Pltff tendered & Deft did not surrender the lease. The court held abiter that Pltff by a payt or a tender & refusal would have acquired a right to the lease which if Deft did not surrender would make him liable But as Pltff here did not prove refusal as well as tender he failed. Cro Jac. 245. Ld Raym. 688 Acc. to previous principles. 9 Co. 79. 2 Roll 523. Cro Eliz. 755 1 Show. 129. 2 Cha. Ca. 206. 1 Brownlo 71. Cro Jac. 245. 2 Saund. 352. Ld Raym. 964

The mode of pleading Tender. — You must plead that you tendered at the most convenient part of the day appointed. Cro Jac. 123. 1 Salk 624. Also that tender was refused if the tenderee were present: & if he were not present at the time, you must plead that you were ready to state the fact of his absence

That you were always ready to take and to tender. 1 Lev 30. 2 Show 163. These rules apply to a tender of money.

But if the tender were of collateral articles you have only to plead that you tendered in the most convenient part of the day.

With regard to one point in the tender of collateral articles there has been much dispute. A engages to deliver one of two things to B who is to have his choice of them. A must tender them both for till then obligee is not compellable to choose. Such was the point. Doug 14. But if A is to tender one of two things without giving B his election between them a tender of either is a good defence.

Suppose Deft pleads tender & refusal & tout temps prist & Pl'ff replies a subseq[t] demand then the issue is taken on the demand & it will not avail tender unless he show that he has acted the part of a faithful bailee.

Money tendered must be produced in court to substantiate the plea of tender; and a practice has obtained in Eng courts whether prevalent in this country I do not know of bringing certain collateral articles into court as furniture &c. &c., however rare usage. The production

stops further cost & proceedings in court ag.st Deft. For the mode of pleading tender see Salk 623. 7 T. R. 139, 7 Co. 10. 9 Co 79. Stra 576. 577. 2 H Bl. 374

The next defence is Accord & Satisfaction — Accord is an ag.t to take up with something else by way of paym.t than that orig.ly agreed on by the parties. Satisfaction is the fulfillment of that ag.t But an accord without a satisfaction is no plea. i.e. the ag.t must have been performed to avail as a plea and the performance must be actual, for no tender will avail. 1 Mod 69.

I have known an instance however in which accord without satisfaction was a good defence. A man who had some property but could not sell it for money accorded with his cred.r to give him lumber in lieu of the debt. He tendered the boards & the tender was refused. I informed the tenderer that it would be no defence. he however insisted & to satisfy him I plead the accord without the satisfaction. I supposed the opposite counsel would demur of course & then I should lose it whereas he only traversed the accord & thus I obtained a verdict. But even then I ought not to have obtained judg.t tho I did. My client has ever since told me that he knew the law better than I did.

yet at the accord without satisfaction is not pleadable
in bar yet the true cause can never be the accord
in some cases, damages for breach of promise.
after
of part performance & tender of the rest will not suf-
fice. There must be a satisfaction in fact. other-
wise the accord is exec. & cannot be pleaded Esp.
Dig 147. Sir T. Jones 6.

Accord & satisfaction is good
plea in personal actions where damages only are wrong
but in all actions which suppose a wrong vi et armis
as in trespass detinue &c. Accord Dic. Def must
not only plead accord & tender but acceptance &c.
or the plea is bad. Hob. 178. 5 Mod. 86

In Eng however
there is an exception of cases excepted. as where a debt grows
barely out of a specialty. thus a single bill for pay. of
money. So too a covt with seal for pay. of money
To an acc. or these instruments accord & satisfac-
tion cannot be pleaded. Why? Because in Eng
land profs cannot be admitted to prove pay. on
specialty of this kind. This arises from the max-
im unum quodque dissolvitur eo ligamine quo
ligatum. — This state to be the case because
in a bond having a condition the condition is
no specialty) acc. & sat. may be pleaded. In many
states & particularly in this no regard is paid to the

the above rule. for it has been decided that parol evidence is admissible in such cases to show paymt & therefore acc. & sat. also 1 Brownlow 134. Cro Car. 16. 9 Co. 78 6 Co 44. Cro Jac. 188. 1 Roll 266.

If there are more defts than one a plea of acc. & sat. by one of them is a bar for all. For a man cannot have but one satisfaction.

But in real actions acc. & sat. is no plea the reason is that tho a right may be acquired to real property thus no title a title cannot be conveyed except by deed. In such case however Ch. would grant relief. 4 Co. 1 9 Co 70. 79.

What are the qualities of a good accord? You will sometimes find it laid down in in elementary writers that it must be in full satisfaction of the origl. debt & you would from that infer that it was not a complete & valid accord unless the satisfaction were as good & valuable as that debt. But this is a proposition that requires limitation. It is true that there must be a consideration for the accord or it is not a good plea; but the accord is good if there be any thing no matter how small, that the law terms a consideration. But when A owed B $50 & plead that B had accorded to receive $10 in discharge of the debt, as no

consideration for such an account appears to the plaintiff. But in a similar case where A shewed that B had agreed to receive a lesser sum than the right debt because he apprehended that A would soon become bankrupt where the debt would probably be greater than the security of part was held a sufficient consideration. And the same was suffd. again. A went into B's house & probably took away certain obligations in which he was bound to B. B thereupon agreed with him that he would discount the debt if A would give them up. A appeared in court on the writ of D for the whole debt & had the account stated but the court held that the plea was bad for there was no consideration. Plow 5. Yet where a man took away cattle they & the latter told him that he would drive them to a fair 3 miles distant he would not prosecute him except upon the right debt, the plea was suffd. for the driving was a consideration 1 Roll 128 4 Mod 88. 6 Mod 126.

Not it has been said that there must be such a consideration as is valuable in the eye of the law and hence it has been held in 2 Wils 86. Preston v Christmas that a release upon Exd of redemption was no consideration for an account i.e. not a satisfaction for the original obligation whereby Defr was bound to Plff. Such now is the Eng law yet in Va it is contra. An Exd of redemption in my opinion lays a good foundation

for an action as any other right & unless if it is a suff.t consid.n for an accord.

Again it appears to be a rule that the satisfaction must be worth something in a pecuniary point of view. Thus B calls A thief before a company of gentlemen A then has a right of action B agrees with him by way of acc. & sat. to ask his pardon before the company & does so. A sues him for slander. B pleads acc. & sat. It will not hold & for want of consid.n to it seems yet a £ or 5 pense would be a suff.t consid.n 1 Roll 128. In my opinion the former is the better satisfaction 1 Mod. 128

Again the satisfaction must be certain. many singular accords are stated in the books. A delivery of a quantity of what has been said to be void for uncertainty & correctly I think for the quantity was not specified in the accord. The contract must always be executed no tender will be suff.t this question was tried sometime ago when the court held that the satisfaction must not only be tendered but actually rec.d or it will be no bar. 1 Roll 129. 9 Co. 79. Cro Eliz. 193. 310. 1 Mod 169. Stra 573. 5.

The Mode of pleading an accord & sat: was formerly this The Pltff. ought to be barred of ever maintaining his act.n because it was accorded & in satisfaction &c.

Defts that of certain articles were delivered to them should be rec? in satisfaction of the debt &c. Pltiff to recover they were delivered & received. They now plead that he ought not to be barred &c because certain articles were delivered & rec? in accord & satisfaction of the debt &c.

If rent be reserved before the time of delivery arrives the accord is no defence for the rent that must be rendered.

It is a defence also in case of contracts that there be no demands. But this is not universally true. There are several cases in which a plea of no demand would be unavailing.

Demand. (Fr demander) is the calling on a man for the payt of a debt or the performance of a duty. 8 Rep 153. It there appears that there are two kinds of demand, the one is express as in a precipe quod reddat. the other is tacit or implied as in case of entry into lands &c Others have divided them into three classes written verbal & implied. 1 Salk. Abridgt 630. 1 Lill 432.

The stat of Lim. compels demand to be made within a given time.

Where a demand is necessary to support the Pltffs action it must always be specially alleged in the Decl: the usual clause "&c often" is not sufft.

If a man promise that he will pay on demand & only note, it does not follow that the cdr must make a demand. But if there is no debt or duty till demande demande is necessary 1 Hill 282.

The gen. rule on this subject is, that there is no necessity of a demande in any case where the opposite party can discharge himself by a tender Thus if A promises to pay B $100 on demand. A knows as well as B that A is to pay it & that he can discharge himself by a tender. There is no necessity there of B's demanding it. By the phrase "On demand" is meant "within a reasonable time".

What are the contract incidents which furnish the means of avoiding this point, Thus if one contracts to transport merchandize for a merchant in consideration of the discharge of a debt. there can be no tender of service sufft. to discharge him. otherwise he might tender when the merchant was not ready & thereby receive the benefit without performing the duty. In this case therefore there must be a demand & a plea denying that fact would be good. So if A contracts to build a house for B. & should come when B was not ready the tender would be ineffectual there a demand is necessary in such a case.

Of the same nature are all dumbells given by merchants. they cannot discharge themselves by tendering goods, otherwise they might force upon the creditor some article that to him would be useless hence a demand is necessary in such cases tho' Plff institute an action before demand. a plea of no demand will bar it.

The case of corporations stands upon distinct grounds. a demand being indiscriminately necessary in all cases. The treasurer is supposed to be ignorant of the debts contracted. and he does not make the contracts & the rule requires a demand in this case to secure the necessary information Jacs. Dic.

There are cases in which notice must be given but has the same effect as a demand, creating a debtor liability. Co Litt 202. Thus if I employ a man at a distance to do some particular business for me in the progress of a year. he after performing it must give me notice & then if I do not pay within a reasonable time I am liable. So also if one receives an order in satisfaction of a debt & it is not accepted, notice must be given to drawer before payee can sue him. In such cases plea of no notice would if supported by proof bar the Plffs action.

There are some cases which go on the ground of genl. notoriety. Thus where a man bound himself to pay a sum of money to his nephew when he married. The nephew married & the money was not paid thereupon the uncle was sued, he pleaded want of notice, but the court held a marriage to be a matter of genl. notoriety & that the uncle was bound at his peril to take notice of it. (see the contr.) Cro. Car. 34.5.

If one be bound by an asst. to do a thing for another, credr. must give notice when he is to perform: but if one promise that a third person shall do it, then the credr is not bound to give the third party notice for there is no privity of contract between them, but the party must procure notice at his peril. 2 Lill. Abr. 239.

It is also a rule that where the fact is such as to be equally within the knowledge of both parties, notice is unnecessary, but where this is not the case credr. must give notice. March 156. Mod 230. Latch 15.

Notice is not to be given so strictly upon a cont. as upon a bond. Cro Jac. 391. — In case of promises it has been adjudged that where a penalty is to be recovered notice is requisite, secus, where damages are to be recovered. 1 Bulst. 12.

It has been held that a Deft having undertaken to do a thing undertakes to do all circumstances incident to the performance of it & that without notice provided he is not ignorant of the thing to be done 2 Bac 143. Want of notice on various occasions has been the cause of arrests of Jdgts &c. The best books to be examined on this subject are Bohuns Institutio Legalis & Jacobs dictionary under the head of notice & Demand.

Another defence to actions particularly to a Deft is Foreign Attachment. If a man absconds or leaves the country in which he resides & there are people in the same country who owe him or else have his property in their hands it is the object of suing out attachment to draw the property & the hands of the latter to pay the debts of the former & when this is done it becomes a complete defence for the absconding debtor in an action brought for the money thus recovered. 1 Bac 689

This mode of attaching the absconders goods in the hands of third persons originated from the custom of London. Formerly it appears to have been nothing more than the attachment of a foreigners goods to satisfy his creditors. Cunth 66. 2 Inc. Dic. 111.

Foreign Attachments are made in this manner A owes B £100 & absconds i.e. leaves the county

B can find nothing in which to levy but C owes A
B knowing this fact takes out this writ of attachment
ag.t A. he leaves a copy at the last place of residence of
A for the use of A. friends and one with C to at-
tach the debt wh. C. owes A — The cause as
between B & A is continued for a reasonable time
till A has a chance to return — Then if the court
give judg.t in favour of B ag.t A C is bound to
pay over the debt which he owes A. — and this
judg.t will in any part of the country be given
a bar to any action which A may bring ag.t
C. — C is called garnishee in most states he is
allowed to make a defence for A. the proceedings
being regulated by stat.

C is called garnishee because
he has had garnishment or warning not to pay the
money in his hands to A but to appear & answer to
the Pltffs writ. Jac. Dic.

The practice in this
subject is different in the different states but the
principle is the same in all. e.g. In the New York
the garnishee state thus received is divided ca.
mong all the creditors of the absconder.

You observe that I have as yet treated only of a
suit between A & B. the judg.t for B & volunta-
rily pay.t thereon by C. — Let us next suppose that
C refuses to pay after the judg.t during that he owes

A B then obtains a sci. fa. on the judg.t ag.t A commanding C to shew cause why the Plff B should not have Ex.n ag.t him for the debt. B must do this & be prepared for trial by the next court or A may appear & give bail to the attachment & so remove the suit him. this is the custom of London.
Four court days in Eng.d must pass before C can be compelled to shew cause &c.

C is sued as the factor agent Atty. trustee or debtor &c of A the absconder which he may deny & issue is taken upon that fact on which the parties go to trial. C's liability then depends on the evidence. & here it is to be observed that the law gives B the Plff a right to call on C the garnishee to swear as to the fact of his indebtedness to A. It has been questioned however whether C can wage his law unless B call upon him to do so. Seems he can. Jac. Dic. "Attacht." By the Eng law or custom Plff may hinder his waging his law by producing two suff.t witnesses to swear that garnishee had either money or goods of A in his hands at the time of the attachment of which affidavit is made & being filed is plead by way of estoppel. — C can give evidence of pay.t to A before the attachment under the gen.l issue.

C has no right to carry on the trial in defence of A in the suit between A & B

if he deny that he is A's debtor. The reason for which this writ of Fer. Att. is issued is that an Exn cannot be levied on a debt which is due. yet if C owed A £100 worth of horses &c. B might levy on them. — If C pay over without judgt agt A he does it at his peril

It is a gut rule that if C pay over to A after the att laid he must pay it a second time to B. But this must be understood to a voluntary payt for if C is obliged to pay by process of law he cannot be liable to B. To this however it is said that payt is in all cases voluntary as it might be resisted by an audita querela. but there is no good reason in this as it would put the party to great expence for which he could have no remuneration. — If at the time of A absconding the debt was in Exn & C pays the money to save his property for being sold then he will not be accountable to B.

The debtor must never be found in a worse situation by the absconding of his credr than if he be one A a debt payable one year hence B obtains a judgt agt C. the garnishee will not be obliged to pay B till the end of the year.

Again suppose C does not owe A money but owes other property &c. he is not obliged to pay B in money

the collateral article must be turned out or else held at the post to discharge B's debt. C is not bound to deliver them to B but B must keep the articles

If a commander an action ag.st to pending the action between B & C. the course of the court is to continue the latter

Foreign att. is no defence in case of damages recovered ag.st a party. but only in debt. the writ cannot issue in debt except in the case of a bb of course it is no defence for action for tort. as battery false imprisonment slander &c Neither is a defence to Town for A's right is not attachable. & C is liable only, not indebted to A by the hypothesis in such case. 1 Bac. 689.

a matter defence is Payment of money or performance of acts collateral This is a fulfillment of the contract & consequently a discharge.

With respect to payment it always is of a sum of money. this proveable either by parol or written evidence. Sometimes it will be intended result from the lapse of time since the contract made or obligation incurred

The mode of pleading performance is different in different cases. In writing. but a question of

fact arises. it is suff.t to state in pleading simply the performance. But when a question of law is involved Deft. must aver the quo modo with the fact & state how it was performed. as in case of an agreement to convey land. it will not be suff.t for Deft to say genl that he conveyed, but the manner in which the contract was executed must be shewn & proved by exhibition of the deed & for this obvious reason that a question of law ought not to go to the jury but to the court. 7 T. Rep. 164. 184. 2 Bac. 43. 1 Mod 203. 408. 577. 1 Salk 124. Ld Ray 980.

Another defence to actions is a plea of Prior judg.t or that the merits of the cause has been tried before. The genl rule on this subject is this, that where the evidence must be precisely the same in both actions a judg.t in one case will be a bar to an action in the other. Where there is the same evidence there must of course be the same matter cause or thing. Thus if A take the horse of B. & sell him A can be sued in Indeb. a s.t for the price. B treating A as his agent or he may sue in trover for damages. If B should be defeated in one action A can plead the judg.t in bar of the other, since every judg.t carries with it truth & absolute verity.

But if the evidence is not the same a defeat in one action will not be fatal to another

that is opposed every day in our courts. especially when a Plff mistakes his remedy. Eg. A borrows a waggon of B refuses to return it. B brings trespass & fails. He then brings trover & recovers for the wilful in this two cases is not concurrent.

Many attempts have been made to evade the defence of a former judgt — It is a singular fact that the St. of Lim. bars all actions of trespass brought 3 years after the right of action accrued yet does not bar trover at all which may be often brot for the same cause in which trespass is barred? tho the evidence is concurrent in the two cases. Can then if the decision on this subject be correct which Sowell is an instance in which a prior judgt for the same cause would not bar an action. Sid vid St. Lim. Esp Dig. 164 Ball ch. P. 49. 1 Q. 2. 6 63. 7. Does the St. affect the action itself or only the form of the action? My own opinion is that the St was meant to bar the right of action in any form whatever.

The most defence to be considered is insolvency eg. a discharge under the insolvent debtors act is a good plea. Esp. Dig. 165. But in such case Defdt shd shew that he was a person within the benefit of the act that the discharge was regular & pursuant to the

statute. in anc. post Salk. 521.

It has of late become no unusual thing for persons in failing circumstances to notify their creditors thereof & take advantage of the insolvent act. This is never done but when all the creditors agree to give up their full demands for so much in the pound. When the debtor has thus paid to each his proportion, the remnant of his fortune is reserved to himself & sets him up again in the world as a new man. If after such a compromise he is sued by his creditors, he may plead in bar to the action the discharge thus given.

When an insolvent debtor has entered into such a compromise with all his creditors except one who privately stipulates with him to agree to the arrangement if debtor will give him his note of hand for a sum above his average proportion thus taking advantage of debtors situation: then upon action brot. by that creditor on the note, debtor may avoid the contract as a fraud on third persons i.e. the other creditors. So is also as respects himself extortion the unpaid. A decision in T. Rep. shows that [illegible] C. L. court can rescind such a contract, tho it is other-wise said that Ch.y only can afford relief. Powel Con. Vol. 438. It is agreed that Eq.y will set aside such contract, & I think the decision in T. Rep. correct.

"The reason why a discharge will not be good after a right of action has accrued is, the old maxim that there must be a consideration. In this case there is no consideration.

Tho often spoke of a discharge & a release as the same thing either of them is a good defence both pleaded as an executed one. A discharge properly so called is one made by parol before a right of action has accrued for breach of the promise. A release on the other hand cannot be made by parol and is given only when a right of action has accrued. Thus A covenants with B. to deliver 100 Bush. What in Bro's Abridgm 2 mod 83 by parol without satisfaction discharges A. But on the other hand supposed he fails to fulfill the contract when the time elapses B's right of action has then accrued B then may not by parol discharge him. he can release him "to liquidum quo liquatur" Cro. Ca. 383. 384. 2 Mod 46. 1 Ab 205 1 Bro 177 297. Esp Dig 167 also appears to confound them. A man may release any claim that he has.

A release formerly could be given by a man sealing without signing because the seal of a man had a particular mark & the impression by that was equivalent to his signature. This has now become obsolete so that sealing is not now indispensable. yet if there is no seal to a release a consideration must be shown.

It has been made a question whether a release of all actions & demands should operate as a release of a debt in pras. solv. in futo. or an oblig. for pay. of money

at a future day. Thus in Cro. Eliz. 300. Tynam v Bridges where suit was brot. on an oblign. to abide an award of arbitrators who had given Pliff £20 agt. Dft to be paid at Mich. 2 y. Sept. On the 10th April preceding Dft obtained from Pliff a release of all actions & demands & this release Dft. pl. [illegible] in bar to the action. The obligation was a deb. in pres. solv. in fut. yet court held that the release was no bar to Pliffs action. no judgt. was given however. On this trial the following distinction was taken by J. Williams abitre. "A deb. in pres. is discharged by a release before the day of payt. But it is not so in case of an annuity, rent or in an actn of debt for non performance of an award made for payt. of money at a day to come". A concession that it should be a release of every deb in presenti. Co Lit. 192.

And it is now pretty well established that a deb in pres. solv. in fut. is also included in a release of all demands Cro El. 623.

But that which becomes a debt by contts subsequent is not released tho the thing out of which it springs existed at the time. A leases B a piece of land at $100 rent to be paid quarterly. This rent is not be discharged by general words of release, tho it might be by those which are special. for it is not a present debt

to be paid at a future period as it depends upon a subsequent event viz. enjoyment. On this point I agree with the decision in 2 Lev. 202. Sid. 168. Cro Eliz. 606. Cro Jac. 487. 1 Sid. 141. 1 Salk 578.

It has been a question whether interest is discharged by a release of the bond or not on which it is payable. thus a note or int. payable 1 year from date the note is released. I think the interest such an appendage of the note that it follows the same course. a release of the one is a release of the other.

But a cov.t to do a collateral act to be performed in future is not discharged by gen.l words of release. this stands on distinct grounds from the case of money. Special words of release only will discharge this. as a release of all covenants whereon a release of all demands is not to be seen in case of money. Lev Jac 179. Cro Eliz 292.

Rent which is not due is not discharged by a release for it is incident to the reversion. it grows out of the enjoyment of the land. it is real not personal, [illegible]. But if due it may be discharged or barred by a release. for it is then personal property I grows to be not to the hire. Rent not due is an incorporeal hereditament. Cro Eliz 606 Cro Jac 487. 1 Sid. 141. 1 Salk 578.

A contract of a higher nature if given for a lower one is a defence to a suit upon the lower contract. This depends on the principle. If the lower one is merged & swallowed up in the higher one it is a defence. But if the higher one be only given to enforce the lower, it is no defence to say that there exists a contract of a higher nature. Vid "Contracts" Comp. 129. Bull. et P. 159. Esp Dig. 164 3 Bac. 124 2 T. Rep 277. 1 Pow. Con. 219. Burr. 9. 1 Bac. 17.

A release to one of a number of joint obligors or of joint & several obligors is a release to all. So too a release to one of several joint trespassers is to all. 2d Ray 677.

There are cases in which a court will let in parol proof to narrow the general words of a release, not indeed to shew that there was any parol agreement or conversation between the parties as to narrowing the express words used but to shew facts from which it must be inferred that such instruments were not contemplated by the parties at the time of giving the release. Thus A held a bond agt. B. he sold it to C. B paid interest on the bond to C. Afterwards A & B set ~~tle~~ & B took a release from all claims & demands. A died & C sued on the bond. B plead

the release in bar. The court admitted parol proof to shew the facts & circumstances of the case from which it appeared that the bond was not contemplated at the time of giving the release & of course the plea overruled. To exclude such testimony would be to presume A & B willing who had conspired to defraud C.

Again suppose A owes B $1000. & dies & leaves B a legacy of $5. C the Exr. in settling the legacy & takes a receipt "in full of all demands" the court will admit parol proof to shew that it was not B's intention to release the $1000. 1 Pow. 377. 392. 398. Swift. 117. 2 Ath. 577 9. 2 Ray 235 336. 664. 2 Ld 237.

Discharge under the Bankrupt Laws is a defence This discharges all debts due & owing at the time the certificate was obtained but such as became payable afterwards. 1 Wils. 248. 7 T. Rep 103. Doug 97. 4 T. Rep. 94

It has been a question whether this discharge is to be considered as a judgt. of court. If it be so it is a bar to an action brot. in a different state on a debt due & owing before the discharge for our constitution provides that a judgt. in one state is a bar to an action of the same kind in

another state. It was formerly held in Conn to be the same as a grant of court. It has however been decided in N.York that a discharge under the bankrupt laws of one state is no defence to an action in another & this decision I think correct. See also 1 Kent Bl. 123. 136. where it is held that confiscation of debts in this country is in Eng no defence to an action on a debt originating in this country prior to the confiscation.

The next defence is that of DURESS. a contract or security obtained by duress is void. Duress is of 2 kinds. by mines & imprisonment.

Duress of imprisonment is when a man is deprived of liberty or the power of locomotion by illegal restraint until he seals an obligation or the like 1 Bl. 136. In such he may allege the duress & avoid the void his contract. And it is to be observed that it must either be unlawful or else an undue advantage must be taken of that which is lawful to extort more than is due. But if a man be lawfully imprisoned & either to procure his discharge or on any other fair account seals a bond or deed this is not duress the cannot avoid it 2 Sect. 4 22.

Duress per minas is either for fear of loss of life or else for fear of mayhem or loss of limb

or some other great bodily harm. 1 Bl. 131. That a contract was thus obtained is a good defence. ibid.
But if the threatened danger in any case fall short of duress no relief can be had against a contract thus obtained but in Eqy. Thus a fear of battery is no duress. nor of having one's house burned or goods taken away & destroyed but fear of loss of life or limb of his wife or child is duress. tho not of his parents. So that in this case C L will relieve & Equity ought to relieve in the other cases. Chy will rescind all such contracts by an extensive & proper application of those same principles that courts of law use in a too limited manner. Rev. Do R. 427. 1 P. Wms 118. 639. 1 Bro Ch. 369. 2 Pow Con. 160. 5. 187. 264. 3 P. Wms 298.

How far fraud is a defence.

Whenever there is fraud in the execution of a contract it renders the contract void. Thus a blind man intending to sign a bond for $5. is made to sign one for $50. he may plead non est factum.

But if the fraud is in the consid.n it does not render the contract void at law; tho if it be a contract of suff.t importance to be cognizable in Ch.y it will then be relieved against. This distinction

is recognized in law. so that fraud either in the consid.n or execution generally renders a contract void But unhappily Ch.y does not take cognizance of many contracts & hence if there be fraud in the consideration a court of law will not relieve ag.t them. the injury must pass without redress In such case the party injured may indeed recover in damages. yet such damages are regulated in courts of law by the genl. value of the article not by the benefit that the party would have derived from it had there been no fraud in the case. Thus a gentleman purchases a horse for $200 the seller having informed him that he is good carriage horse, for which purpose he was purchased he proves however to be calculated only for the plough. to the buyer the horse proves of no value. He cannot file a bill in Chy for there cognizance is not taken of such matters. He sues in C.L courts. a jury pronounce the horse worth $160. i.e to the generality of mankind. thus the purchaser recovers but $40. Many of you may one day see courts of law going on a more liberal principle & I hope the period is not far distant. Rees. D. R. 433.

The defence of arbitration & award extends to all personal claims. it is a decision by men chosen by the parties a domestic tribunal. & is a good bar to all pers.l claims either of torts or contracts.

Awards cannot pass title to real estate. as if two persons submitted their dispute to arbitrators. the award is not binding so as to confer ~~the~~ title. & they may however make an agreement about it & enforce[d] by means of a bond.

But with respect to personal property it vests the title absolutely & enables him to maintain trespass or trover for it.

So if one claims his injured by battery, slander or breach of contract & arbitrators determine ~~that~~ a certain sum he cannot sue on the orig.l contract, ^original^ but debt or assumpsit will lie. If the debt be a substituted one [illegible] or a [illegible] action lies if the party is disturbed in his [illegible]

They have a power that c[our]ts do not exercise them. In c[our]ts if the Party does not comply they inflict a penalty. & the C[our]t of Ch[ancer]y never conveys the title unless the penalty is ineffectual. & In many States C[our]ts of l[aw] have power to do it [illegible] in itself

y But not of persons interested not parties

Whereas Arbitrators convey the title immediately

In C^t of law an interested person may testify by the consent of both parties.

& In C^t Eq^y if one appeals to the conscience of another he must answer or it will be taken for confession.[x] But arbitrators sift out the truth according to their discretion

A court of law can never give a specific performance. but give damages in money. Eq^y can decree specific performance & Arb^rs can not ~~the title~~ absolutely & immediately

Whatever is provided in the submission the arb^rs must be governed by or by law or Eq^y &c. —

The award being made puts an end to all P^tys claims & as to title it is immediately either in his favour or against him. and the old rule that a man may wait till his old claims grow at an end. he must sue on the award only.

A & B make a contract & convey this contract conveys no title. but it requires obliges conveyance. now suppose an award of such a conveyance. he knows no reason why that should not execute the award.

Suppose a contract

where a sum of money was awarded [illegible] by parol. debt

lawe.

Ri 8.7.8.4

Ld. Ray 248

960. 1039.

43 & 13 to 5. In delivery the award to Plt. was to be passed by ~~the~~ delivery. For freehold will not pass to ret. in fee tenure. &c. Arbitrators cannot convey title thus. But in all states where a freehold may pass in fee tenure this conveyance is void. The grant without more.-

Plt. may award in the alternative if they please. as to deliver up a certain horse or if he does not at such time to pay $100 — if delivered by the time it satisfies the award — if not $100 may be recovered. This cannot be done by Cht.

When a bond is given to abide the award you may sue on the bond or on the award. For the bond does not swallow up the award, not given to satisfy that claim it was given before the award was made. The bond was given to enforce performance of the award. & whenever this is the case you may sue on the bond or award or contract whichever it is.

The laws relating to arbitration are entirely diff. from what they were in the days of good Queen Bess.

The rule that an act may be brot. on the award has always remained the same. But if to perform a specific collateral act its contempt be enforced. submission was of course nugatory. The first alteration was if

5 Mod: 35.
1 Salk 74

then if there was any promise without consid: it was suffic:
still later however a new subscription was sufficient
consid: being assumed implied

there was refusing to abide the award to be enforced or if there was any consideration as of finance it was wrong.* Now if there is a mere submission it is suffic.t to bind to the award.

If the collateral acts an award to be done respecting lands a court of Chy will enforce it. But they do not interfere in disputes of personal property except in a few instances. & these are cases in which money does not replace the property as in case of a family picture.

If disputes were about performance of contracts as to build a house or convey land they could award performance of collateral acts & it was said that a collateral act must not be an award to satisfy a claim as for an abuse for slander or battery or debts as to deliver up a bond or note or to cart fowls where no such contract exists. but now decided that it may be so awarded, unless guarded ag.t in the submission.

And it is said that the collateral act must be of some value so that kneeling & begging pardon was decided not good. I conceive however that as it was troublesome & degradation to the party, it was consid.d & should be suff.t a perfectly idle act or consid.n is no base.

If the power is to three to decide a majority of them

cannot decide it, i.e. two cannot determine it, if all are present two can make the award & this is plainly the intention. two alone however may make a valid award if so agreed in the submission.—

Now it is a common thing to obtain a rule of court to abide the award when the parties have agd to submit.— & then the court can enforce the award by punishing for contempt sometimes a bond is also taken. then the suit may be on the bond. the award or the party that will not perform the award may be committed for contempt.. This practice of courts began in the reign of Wm. 2d & a stat was soon after made in all the states of the same nature & effect.

In Conn. however the award is entered as a verdict & judgt. rendered & Exn. immediately issues.— where that will enforce the award.' But that is not done in other states I believe. the only practice is to issue an attachment & commit the party who refuses to abide the award.—

Suppose A & B are sureties for C in a joint bond. C has failed. A & B submit to arbitrament to determine the proportions each should pay in case the bond the joint.

An award is a decision of men selected by the parties to decide the dispute. — Arbitrators are to be governed by the directions in the submission otherwise their powers are more extensive than that of Cts. of Chy. This award is a bar to a subsequent suit for the same thing. thus for slander; that is at an end after the submission tho an action will lie on the award. So it is the case with all personal disputes arising from contracts or torts. except in those cases where there is bond covt. or any sealed instrument, for a sum of money or judgt of court, in which cases an award is no bar. If Arbrs award nothing done still the party may pursue the covt. or bond: if he has given a bond it will be forfeited if he does but it is no bar by the Eng rule.

Now if the same reason does not exist here this should not be law here. It is a maxim of Eng law that no evidence is suffit. to discharge an obligation but that which is equally high with the deed: now an award is no more than a parol testimony or at any rate writing without seal

When a right of recovery accrues from something subsequent but not from the bond or covt. itself it is always a bar. as where one gives a bond & covt. agreeing that it shall be void if he builds a house for him within one year it shall be void. parol evidence is given in evidence.

Payt.
could not be given in evidence some years ago to an action on

6 Co. 43. 1 Leo. 292
Cro. Eliz. 442
Cro. Jac. 99.
1 Keb. 937.

on a bond. I now in Eng & almost every State & it is adopted allowing Parol to be given in evidence, so that this principle is done away & award should probably would be considered a bar.

An award can have no effect upon real property because there can be no conveyance of realty except by deed. Why then do you not send before & ask to declare the award void? The reason is that a freehold cannot be made to commence in future according to the old Eng maxim. In many States this maxim is either expressly or impliedly abolished. Where the maxim is in full force the Lawyers must aim.

Among the authorities we find it said that an award concerning real property is void but not so for the bond is good. Again we find it said again that it is good & will pass the land.

Another said the award would be good & pass the land if the submission were by deed but the deed cannot affect this.

The first decision which I cite might seem fit says that an award of that kind does not pass the land but the bond is binding. Kid awards 3 J 240. 2 Ld Ray 115.

There are certain things that cannot be arbitrated upon as all criminal matters and

formation [illegible] causes. these cannot be decided by courts of justice. & a bond given will not be binding. Refer to crimes & questions of divorce.

The character of a person whether peasant or prince, or question whether he cannot be arbitrated upon. but whether one is a bastard or not might I suppose. it cannot. see Kid

If a sum of money is awarded it's creates a debt & is conclusive evidence, so long as it remains unimpeached, that at the time so much was due you can make no inquiry as to the cause of the debt. & this award will support an action and if there is a bond you may sue on either the award or bond. the bond does not swallow up the award

Arbitrators have power to give specific remedy & will vest the property. or give an award that the horse be returned or the party pay so much

The first method to enforce an award is to sue on the award. another upon a covt. 3d is by suing on the bond which is the usual way. 4th mode is by note of hand to be void if the award is kept. a 5th: the arbitrators get a power of attorney before a magistrate & confess judgt. the judgt. is delivered to the arbitrators. & then the magistrate is to send the Exn. immediately. & for any sum by inserting [illegible]

It is a very common thing especially among merchants to enter into a covt to submit to arbitrament whatever disputes may arise between them shall go to law. Hence a question has arisen whether if one of the parties break the covt & bring an act: before resorting to arbit: the court can countenance such action? It is known now settled that the courts cannot be ousted of their jurisdiction by any agreement whatever. Wyse 98 & T. Raym. 137

8 Co. 82

the judg.t It is clear now that this practice is a very bad one. for the man is with an Ex.n upon his back with no say in court.- If a bond or note had been given it could have come before some court & have been rectified if the award had been given by partial arbitrators.-

When a submission is made a party can revoke the power of arbitrators. but the bond will be forfeited or if no bond you may recover your damages & costs in a suit at law. it is absolutely an injury.

There has been a great improvement made of late. thus the parties apply for a rule of court & then if the award is not performed the party may be imprisoned as for contempt. There are certain qualities required in every award that it should be binding & to take advantage of these defects you apply to courts of law-

For extrinsic causes as bribery & corruption &c &c. In my states an application must be made to Eq. in Conn however it is set aside by courts of law for extrinsic as well as intrinsic. Every stipulation to be done by arbitrators must be done if not whimsical.-

A is a minor & B becomes bound that A shall abide the award. is this bond void. It is said the submission is void & the bond is so of course. the premises are not true tho if they were the conclusion might be. his contracts are but voidable

86. 80

1 Brooke [illegible] 6[illegible]
2 [illegible] D. 290

Brook. 218
3 Lev. 17.
[illegible] Tel. 207.

1 Dyer 216
1 Com. Dig. 28[illegible]
1 D. [illegible] 641

2 Mod. 22.

If submission is in writing, a revocation must be so also

A bond is given to abide the award should judgt. be given for the full amount? Our courts I believe determined that the principle of chancering down bonds extended to this case altho the words in the stat. did not reach this case.

Another question is what should be his damages. clearly all that is equitably due all that he has lost — it is determined in Eng. that he recovers all even lawyers fees

Suppose instead of revoking the power the party does not appear nor send witnesses. this prevents an award. determined in Eng. to be equivalent to a revocation.

The consequence of Ex. submitting to arbitration any claim, against the Test.? The rule formerly was that they must submit at their peril if less were recd. than would have been recovered at law it was as if the Ex. lost it. But now it is questioned & it is admitted that he should have the same rights as Testator & not be subjected by mistake merely.

Questioned if one partner should submit a claim to arbitrament is the other partner bound so that he cannot claim any thing of the other partner? One partner has no such power by law. Must agree to submit to it.

Dyn 210

Ro Ban. 234

Eo Em. 247

When one binds himself by Attorney he is considd. bound the Attt. provided the Attt. had power so to do. But the Attt. in such case cannot submit to arbitrament without rule of court. If he does & binds himself as Attt. the Attt. would be bound but not the client for an Attt. in no case cannot bind his client witht. authority for the purpose.

Suppose a case of sevl. claimants as owners of a prize & one or two became bound where all agreed to submit to the arbitrament question is are the others bound by that bond i.e. did the others sign as Attornies – the person was considd. as acting for all the rest. Kid. 25.

Two persons jt. tenants submitted to arbitrament & gave separate bonds. the interest was joint. was the person who recovd. the award entitled to the full reward on his suit on one bond or must he sue both and recover half on each. Decided that he can recover the whole upon either tho he can have only one satisfaction each is liable to the extent of the award by submission

The power of a husband to submit respecting the wifes property if it were such property as he acquired a right to dispose of at the marriage this includes all persl. chattels & respecting such property she is bound by his submission & if he should die & an award be made she is bound as [illegible]

But that property over which he has not control will not be bound by such award as pers. property to her separate use. So an annuity altho the sum when paid in belongs to him.

One case says that if the wife joined with him she would be bound ~~but this~~ is not so for she is supposed to be under the coercion of her husband. the conveyance of lands is an exception to the gen. rule. 1 Roll. 269.

You will find it laid down in the books that if there was an award agt. a. who dies before recovery upon the award no action of debt ~~[illegible]~~ could be brot. agt. the Ex. but it is not so now. It was supposed that in debt without specialty, Deft. might wage his law & discharge himself. whereas his Ex. could not. but all done away 2 Vent. 269. Cro. Eliz. 600. 1 Ld. Ray. 248. & an action will lie agt. Ex.

Who may be arbitrators? almost any person may that the parties choose. but insane non compos. infants deaf & dumb. & all those that are under the control of others as slaves minors where the law presumes a bias. So attainted of treason but denied. & it is said that a man may be arbitrator in his own case if the party choose him. – Comb. 218. 4 Mod. 226. Hardr. 43.

An umpire is a person to decide when the arbitrators disagree. The parties may choose the umpire or the arbitrators may choose one. Arbitrators must use sound discretion & not choose by chance — as by throwing up a copper. It avoids the award.

At first awards were overset if possible afterwards all were established that could be established & then common sense regulates the matter. So that we have three sets of cases. 2 Burr 100. Kid. 47.

If arb^{rs}. make no award within the time limited & not then the business up the umpire may make an award within the same time. 2 Keb. 263 332. T. Jones 168.

I will notice now the cases in which arbitrators may appoint an umpire. — They may appoint an umpire any time. Kid. 51. So also where further time is given. Cro. Ch. 263 Ld. Ray 205. Salk 71 1 Ld. Ray. 671. 2 Tr. Rep 645.

After settled that arbitrators might appoint one question arose could they nominate a second the first having refused. Now settled they can. 1 Salk. 70. 2 Vent. 113. 1 Ld. Ray 222.

It is the business of parties to have the award made & for the arb^{rs}. to appoint ~~time~~ & place of hearing & then notice is given to the other party under the

If the parties prolong the time & not alter the bond the bond is void & the award only is the ground of action. i.e an award made after the time set in the bond cannot be enforced by a suit on the bond. such a suit must be determined from the bond. the award not being made the bond is of no force. See. 3 Tr. Rep 592. note. b.

Barnes 57

hands of the Arbit. The Arb. may adjourn from time to time. & the parties may prolong the time for the award & the court will sometimes enforce the submission is by rule of court.

16 a Eq. Ca. Abr. 84. pl. 6. 3 Keb.

it is said that if one party does not come the other may go on & the arbit. make a binding award. & this is the only case of the kind. a question

Suppose arbit. decide part case this calls on one party to settle the rest Kid. 57. 58. 64. 1 Salk. 70. It is decided that they cannot split it is done continually those cases where it is decided that they cannot it must be where there is to be no just balances.

of the Difference

is to be settled by 3 or any two of them. if one was absent formerly held not bind. formerly held that no award could be made but now held that two may make the award under such submission. It is decided that under the word "delivered" implied writing or speech & so of "ready to be delivered" Kid. 37. 45. 6 Mod. 162.

It appears to be a rule among arbit. if parties disputes on submission the award is still to be made in one day.

Arbitrators can waive the power of doing a thing intended act after the award made but not a judicial act. so they could not judge the matter over or upon new evidence after the time limited. But the ministerial of

mere ministerial acts they may make, as to measure the articles to determine the amount of the same &c the quantum being determined nothing being to be done but mensuration. –

But if they should reserve judicial power over matters not submitted the award would be good & the reservation only void. — as to the power of umpire Kid 78. Com. Repts 214. Cro Jac 315 Palmer 119. 146. Dan 63

They have no authority to delegate power to any body. Suppose they award that such a bond should be given & such as somebody should approve, no such acts as should be tenable these are mere ministerial acts & of course good. – So that arbitrators may award the substance or thing to be done & refer to another the manner of its being done. – 2 Atk 501. 517. 1 Salk 75. Hardw. 171 1 Sid. 358. 2 Stra. 1025.

It is one that an award must be certain & the submission is divided into two branches 1st they have no authority to decide concerning any thing not in the submission. – 2d It should be of all that is contained in it. It does not follow of course that an award containing other matters is void, or if it contains any thing uncertain is it of course good.

As to the first branch of the rule. – Submission of all actions [illegible]

commenced. no other being specified. not cause of action but words more inclusive as all demands causes of action disputes &c matters of controversy in since mean. or such suits or causes of action

It has been disputed whether arbitrators could do more than a court of law. i.e. give anything else than money. but decided they can. 2 Ld Ray. 1039. 6 Mod 201. So a bond was given up. thus giving satisfaction in a collateral action. the question then is not set. 1 Sid. 12. Kid. 99

Formerly every thing was suppd out of the submission that was not in existence at the time of the submission. so no costs could be awarded but now done away & arbitrs can award any appendage as costs. So they can award that A shall give B a bond payable 6 mos hence. any foolish appendage does not affect the award.

Altho the submission does not directly include the question disputable. yet if the arbtrs decide the question it is good. as dispute as to whether tithes were payable on certain property. the question submitted was what tithes were due. they decided the article was not titheable & that award will bar any future action of that kind for tithes.

If parties dispute as to their claims upon each other & leave to arbtrs they may award a distribution according to the decision & a similar arrangement—

between Master & Aff. reason not obvious but the rule is settled. Submission of all matters of difference between the parties in this cause. includes all disputes. but it was said if it were all matters of difference in the cause between the parties. refers only to that particular suit. yet I conceive the intention the same. in both cases.

By the old rule a reckoning at the time of reference could not be awarded. but now it can 'Kid 99. when bond given since submission was ordered to be given up.

Formerly held if an award & a release to be given and specification to be of all matters previous to submission it would be void. otherwise it would cut off all claims originating since the submission but it is not so now. unless the parties shew that there have been such dealings or the court will not void the award. The courts have gone further & say that if a release is awarded ~~the~~ award is good & is complied with if it includes all matters previous to the submission

It was said that an award must not extend to any concern of a stranger. but merely on that ground it is not now void. if a good reason for it is given it will be held. thus A & B refer ~~the~~ ~~the~~ [illegible]

that B should convey to A. this wife [illegible] the fee. 5 Co. 77.

So where award was that B should pay a sum of money to the cred[ito]r of A. 1 Ld Ray 123. So often held that it is good to award the pay[ment] to one [illegible]. So where ob[ligor]s submit their dispute ab[out] to the service to be p[erformed] to a stranger by each. Kid 105 Cro. Car. 541. 1 Mod. 9. So as to the probations that churchwardens should pay toward the support of parents Salk. 67:74

But suppose the award is that something shall be done by a stranger. An award that A shall give B a bond it is good; but suppose that it were that A shall with C give B the bond. this is void ~~[illegible]~~ is that part of it entirely unless A has it in his power by contract perhaps, to compel C to execute the award. As if under oblig[atio]n to sign a bond or writing contract to convey land. 10 Co. 131; 1 Ld Ray. 123. Kid. 165. 5 T. Rep. 77

When the award was to make a release of all claims what effect that has upon a thing held in right of another or as trustee he having the legal title. orig[ina]l[l]y no doubt but it did release ~~the~~ trust property. but now decided that in Eq[uity] such trust will be protected. but it does not appear to be a doubt in trust upon the face of it. Now can parol proof be admitted to shew that

trustee had no beneficial interest in the bond. Now it always was true that a trust might be proved by parol. the arg.d is to it cannot be proved by parol but you can prove facts which go to establish the fact wished for. as payt. of interest &c a trust upon a bond might be shewn as well as in any other case. A & B submit a specific demand as concerning a battery. they have other controversies not submitted. B is ordered to pay sum & A to release all demands. Now it is not of course void the burden of proof to shew it void in consequence upon of other demands lies upon him wishing to set it aside.

The 2d branch the award must be of all parts submitted. as if it were of all personal actions & the award spoke only of personal actions. orig.y it was bad but not so now. 8 Co. 98. there might have been no real action but before them otherwise presume. Suppose of all suits & Arb.r decide only on one suit it is good unless shewn to have been more brot. forward Cro. Eliz. 858.

controversies are often specifically named & only parts is brot. forward & decided as a claim for battery slander or a bond. but it appears not is decided but the battery. it is good provided nothing else was brot forward. but if there is one it is void provided the

If only one matter is decided it is no bar to the others being moved upon

the award is made in the premises when all the claims must be noticed: being specifically named.

Suppose the submission does not specify but agt. mutual from of all controversies & an item good. - how can the old disputes be known? it is decided that the award is good of one cause if no other is brot before them. 8. Co. 98. Cro Jac. 200. 255. 1. Burr. 274. Cro Eliz. 216. Andrews. 399. Com. Rep. 547. Kid. 114. 117. 120. Hob 49. The quantity heard may be proved by parol. + the presumption of law is that only one was brot up. 1 Wils. 738. If arbrs declare they will decide on one of the controversies only the award cannot be good -

Suppose specific controversies & an item good. the award includes all specified & some others also - is the award void in toto. it depends upon the manner of making it if they separate the claims to be paid on the bond for the slander & for the battery & then scor for ... a claim not included in submission the award is good as to all but the horse. but if agent. balance is struck by offsets the award is bad in toto. so it is void if it affects the other things in the award it is void otherwise not.

1 Lib. 12.
2 Part 243

Lib. 126
Part 2.

Lib. 136

Requisites of an Award—

1st requisite is that the award must be legal. it is void else - anything that will render a contract void will render an award void. You are not to understand that if an award is made upon something from which nothing could be recovered at law. it is of course void. if one charges another with lying & they leave it to arbit. who award $100 the award is good although not 6d could be recovered at law

2d Requisite is that the award be possible in the nature of things.— Suppose A mortgages to B. B conveys to C. A redeems & brings his bill for conveyance Ch. will order a conveyance & fix a penalty if he does not. So too if one articles to convey land & then for a better price conveys it to another Ch. will order a conveyance tho' a ct. of law would not. he must reacquire the title if possible if not pay the penalty— So that an impossibility if brot on by the party is no excuse—

3d An award may be void because it is unreasonable as to order a bond by one & another not render the other power. so to procure surety to Pltff satisfaction it is void. So to award one shall serve the other by work on his farm. not on acct. of being collateral but because it deprives him of personal liberty

2 Saund 292

2 Ld Ray 1076

Sid. 59.
Rolls 223

A was trustee. B had beneficial int. B & C submitted to Arbitn. who awarded it in favour of C. how could it be enforced. A had legal title. Prior dispute B could in Ct. of Chy compel conveyance of legal title & if no reason to contrary appeared to the court, so award was good and according to the result of B's appointmt. Litt. 2 Mod 304

4th

An award must be certain. there controversy was whether A should pay for B services. Arbt. said he should but did not say how much. So award a bond but not the amt. of it. So an award to deliver a bench & several books. these were declared too uncertain. If however you can from the circumstances infer the intention certainly it is enough. A claimed title to Blk area & B claimed it also & built scaffolding. Award belongs to B & the scaffolding to be pulled down. said to be good as the intention was manifest. Certum est quod certum reddi potest. Nor is an award uncertain because conditional. as that A shall have whole if he pays into otherwise not. Not uncertain because in the alternative. 2 Keb 838. 12 Mod 586

If no time is fixed it is like a contract payable instanter or within a reasonable time. If it is money you must set out the condition.

Uncertainty may be helped out by averment.

Palm 110

as to bills of cost market price. but when you have standard to resort to ~~to term~~ in the obscurity the award is void.

5.^thly An award must be final as to that controversies 6 Mod. 232. Kid 142. By 6 L an award that A suffer Nonsuit not final but retraxit was final. An award that all suits shall cease. 6th said meant forever 1 Wild. 33. 2 Ld Ray. 1114 2 Sha 1024 efect however is only to the controversy. Award that a bondsman see the bond nor cause it to be sued was held final here suits could after arise on it.

It is final where awarded to pay at future day 2 Sha 1082.

6thly An award must be mutual, or advantageous to both. The idea once was that something must be awarded on each side. but if you can understand the award to be in satisfaction it is suff^t to answer the rule.

As to awards good in part & in part void & when a void part voids the whole.

The old idea universally was that if part was void the whole was void but this rule being very inconvenient the 6^th went clear over & established all but that which was void but neither is now the rule

Suppose A & B have claims. B is awarded to pay or do collateral acts. all this is prop. respecting the matter submitted. but arb. go on & decide something beyond their power as not submitted or illegal or impossible. this part only is void.

The submission is of all under the award is of a sum of money & also something else & give a watch not owned by him. & his Pltff. if he will accept of the good part to wit to pay $100 B is bound by it. So to procure a surety if A will accept without surety.

Suppose Deft. is willing to perform the void part is Pltff bound to accept the award is good & Pltff cannot complain. he must accept.

Suppose the award be of matters within and without the submission. clearly void as to that part without the submission but the good part stands if not connected with the void part so as not to be separated as by striking balances Wherever the party cannot get that intended to be given that is where the mutuality is destroyed. it is all void unless the mutuality can be restored.

A is awarded to pay $100 for a piece of land & that B convey the land to A & B's award as to the wife void: formerly but B having his wife to sign the deed & offering it. the award is good

In all cases then in which the party will perform the void part which is intended as an equivalent the mutuality is restored & the award thus made good.

Again A is awarded to pay B $400 in full of all trespasses & B to give A a release of all trespasses. it is said tho at the time of making the award the part relating to release was void. because the award when satisfied had every effect of a release from B.— Authorities as to awards void in part. 2 Roll Abr. 46. 2 Lev. 6. 3 Cro Jac 584 639. Yelv. 98. 2 Saund 293. Cro Jac 352. 1 Ld Ray 114

Formerly much nicety in the form of the award from the wish or inclination to overthrow awards. but now no precise form is necessary it need only be intelligible Barnes Atty. 56

Formerly it must have been performed literally. but now it is suff.t if it be substantially performed. 1 Sid. 365. 6 Mod 34 An acceptance of performance in a manner diff.t from that awarded will bar the party from saying there has been no performance. Ld Ray 167

If no time is set for performance or pay.t it is due & payable immediately. the award settles the orig.l cause of action he might sue on it at any.

Stra 963.

distance of time between this is the case or time will be good at any distance of time the party could not insist to his original cause of action & the award is a debt.

As it was that A made a lease to B pay the rent. the lease was made & B cou'd to pay the rent. this cou'd cannot in lieu of the subscription bond & the state of things were then changed. the award may fulfilled two rents would lie on the subscription bond if B did not pay the rent at the time to an award to give a bond payable 6 months or by giving the bond then payable the award is kept & no action lies on the bond of subscription if pay't is not made on that bond at the end of 6 months.

Remedies on an award. If no other remedy than the subscription in writing or by parol no promise or bond except the implied promise debt or indebitatus ass't lies upon the award in the declaration state that was a controversy between the subscription to A & B. that they took it upon them to decide & after that they did decide that you should recover this money & that this award has not been performed state this & time raise the promise.

1 Kab-414
2 Kab-156

If there was a promise to abide state it in the same manner or state that he refer, by promise.

If the award was to perform a collateral act your action is case stating these facts & averring that the award has not been performed, alleging breaches specifically. If the award were that A & his wife should convey, state that you accepted offered to accept w[ith] his deeds alone, & aver that he refused. Tho' for the award as it relates to the wife of A was void quoad hoc certainly, & tho' even breach of it was would prevent recovery.

If the suit is on a bond. Pl[ainti]ff does not notice the award, the Def[endan]t prays oyer & pleads no award. Pl[ainti]ff cannot rejoin "an award" because Def[endan]t may mean only that the award was not legal. which must not be referred to the jury. Pl[ainti]ff then must set forth the award & assign a breach, the Def[endan]t demurs & judg[men]t is had. If no award however the Def[endan]t instead of demurring rejoins "no award" which is not equivocal as it was in the plea. — If a time was set in the bond the Def[endan]t rejoins no award within the time set. If instead of this rejoinder, should rejoin performance it would be a departure & good ground of demurrer.

When Deff replies setts forth the bu— & he must state all the provisos in the submission 6 co Jac. 278. 2 Mod 77.

It does not follow from ~~that~~ Pff should in all cases aver performance of his part of the award. If however the Pff is to do something first it is a condition precedent to any right of action agt Deft. then must aver performance. & he must also state performance of his part when part of it is void as for a deed to be made by him & his wife.

If the action is on the award Deft. may, if he relies on a variance between the award & Decln, sets forth the award & demurs saying Pff. Decln is insuff.t as the ~~true~~ award is made part of Decln. (small variances are not noticed) Or if the award appears, when produced in evidence, to be different any issue as nil debit, non asst will give you a chance to take advantage of it. If you did not execute the bond, plead genl issue & then show anything which goes to substantiate it as no submission &c.

Actn on bond. Deft may oyer spreads the condn & pleads no award. Pff replys & spreads the award upon the record. Defn replies or either joins no award. &

Find on award Plff cannot have proof for he assigned no breach. assigning a breach indispensable. Kid 192.

If the award is in the alternative one part ill & one part good. Plff must reply a breach by averring non performance of either.

Where to submit to a nonsuit sometimes it is necessary to give notice. & it depends upon the nature of the award. & in such case our direction. If the award is to pay a sum of money no need of a demand. But if the act was collateral the demand is in most instances to be made. - If the award was to build a house & it was not known to him until he had notice because B could not discharge himself by knowing the nature of the case determine it. it ought to be performed within his time &c. So if a blacksmith contracts with A to do all A's work in his line of business three hours &c. notice must be given &c. — Suppose the contract of this kind a contract between a Mercht & farmer Mercht father is awarded to transport $ &c with the farmer cannot discharge himself by tender so the farmer must have notice. -

If the award is in alternative a breach must be assigned in both.

6.20 9d.3.6

Era, Ely. 835.

Suppose act. on bond. Deft. prays oyer & spreads the condition on the record & pleads performance. Pltf need not then assign a breach because Deft. acknowledges the award & that he is liable if he has not performed it. — If the performance involves a question of law Deft. must plead the modo of performance as in cov. broken.—

I know of no state that has a stat. of limitations agt. recovery on an award. nominally.

Suppose Deft. means to rely on the fact that the award did not include all the disputes submitted. Deft. after oyer &c. pleads no award in ~~the~~ premises & the submission mentioned a dispute about trespass, slander & a bond. yet the award mentioned only a bond. — Plaintiff cannot demur, but must set out in rejoinder that ~~the~~ two other matters came up before the arbitrators & they refused to make an award ~~there~~ unless there was an other ground. Pltff concludes & issue is joined. If Deft. relies on no legal award he at once spreads the whole on the record & avers no other award. Pltff then demurs.

1 Stra. 675.

3 P. Wms. 189

1 Atk. 74

Suppose an actn on bond & defdt after oyer pleads no award. Pltff replies there was an award, & he rejoins there is no award, but says that before the time of making the award Defdt revoked the submission 8 T.R. 81

When the submission is made a rule of court an actn will lie on the bond, on the award, and get an attachment from the court. but Pltff can have but one in every. [illegible] 136.

When a right is submitted as to a stream of water & the arbr award the right belongs to A. if bonds are given that right must be interrupted before a suit would lie on the bond, nor an attachment issue. There is an advantage in making such submission a rule of court. no action will lie on the award but it goes to the court & is pursued like a verdict.

But if you have not this advantage & perceive that the witnesses will die &c. Chy will in matters of realty or incorporeal hereditament compel a conveyance of the right of water. Chy will not usually interfere in enforcing awards of personalty in specie, unless indeed the submission was made of their own accord when a performance will be inforced, or when a voluntary subm is a rule of the court.

Ch J will inform an award on the implied agst of 36 ha Rep
I think

2 Vern 24
3 P Wms 167

2 Vez 315
2 Wils 104
3 Atk 521

2 Vern 25

You will remember that an alt. award will not be upheld unless applied for within a certain time. Ct. sometimes interferes where the events will not because this time has elapsed

An award was made long ago in the dispute Ct. would not let it be disturbed. / Cha. Rep. 46

Where an award is illegal the remedy against it is in a Court of Law. But there are cases in which the only remedy is in Ct. only in Eq. As if the dispute was downright bribery the award is still good at Law. Hence Eq. practice is pursued in most states. the appr. being always to set aside the award for intrinsic defects.

Where the submission is by rule of Court you may not go to Ct. a Court of Law will set it aside. 2 Atk 3 76. Where there is any undue partiality Ct. will set it aside 2 Vern. 515. 50 private conference with one party / decided by cross bill. 2 Vern. 485 / The diff. arbitrators wanted to award diff. sums Ct. would not agree. as they had power they appointed new umpire. 2 Vern 101. the umpire must be told before parties how much would be given. the umpire decided on which was much more than it

highest arb.[rs] the case was strange & Lt[d] set the umpirage aside. Another case 3 P. Wm. 360
2 Vez 316. 2 Vez. 216. One paid all the fees before the award was made. 2 Barnardiston 463 the Ct. set it aside from policy. The award was in favour of one who was a debtor of the arb.[rs] & their debts would have been lost if decided ag[t] the debtor after the cargo was taken by the arb. 2 Vern 151. this was set aside for mere policy.
A paper was suppressed which would not of itself set aside the award 1 Atk 771 yet one arb. swore the award would have been otherwise

Ch[y] will not interfere for defects intrinsic but refer you to courts of law.

When the arb[rs] have made a mistake appearing on the face of the award it may be rectified if it were a mistake in fact there mere wearing doubt or a miscalculation &c. [illegible] they will also [illegible] mistakes of law made upon their own principles. Ch[y] does not [illegible] decisions merely because contrary to [illegible]. but if they have made a mistake according to their own principles. As when the arb[rs] determined to divide property in certain proportions and then took the wrong times or data to make the division there is a mistake upon their own principles which they have adopted 3 Atk 497 2 Vern. 151.

Coll. 208

But if $100 should be awarded for changing an alteration with Lying the court will not correct it tho' bad law. —

This award is pleadable in bar of action for the orig.l cause of action in all arbitrable matters. Land is the only exception for it may be plead in bar of a bond.

In pleading you need only state the existence of the award if you are to do something first state it in your plea i.e. when it is a condition precedent. & when the award is mutual you must aver performance of your part.

There are cases in which a stranger to the award may plead it in bar. A so where A & B has trespassed on C. C sues B & then submit it to arbitration award of $100. If he afterwards sues C, C may plead that award in bar on the ground that C has had satisfaction. The same law but one action trespasser is bound to pay the whole.

B pastures cattle for C. they trespass on A's land. B pays A on award or &c. or simply on demand if then A sues C, he may plead the satisfaction in bar. Conn. Rep. 328.

A & B submit to arbit. & bind themselves to submit. & before anything done A sues B for the same thing. It has been said that B

can plead the subscription as a tender [illegible] ~~tents~~ now it is no defence, if however has forfeited his bond the note [illegible] yet it is clearly a renovation & has the effect of a revocation—

You cannot resort to orig. cause of action after an award. tho' it was that you could formerly

Action of Debt July 1817.

Orig^l. debt was consid^d. as a sum of money due by some exp^s. contract bond note or special bargain. no matter what form it was in whether parol or written or under seal. if the sum was certain & contracts exp^s. but now it is enough if there has been a contract concerning it & there is a standard by which it may be ascertained. as if you buy 10^yds of cloth at 2$ p^r yard. & so now it is if you purchase without exp^s. agt. as to price. for you can apply to the market price. E of Dig. 1/2. 313 Doug. 6 1 Hen. Bl 550

Orig^l. when the contract was implied & the sum not ascertained by exp^s. contract debt would not lie. & now there is no indebtedness without privity of contract. as if money were found. ass^t. will lie for it. but debt will not. so that indeb ass^t. will lie when debt will not. So when money has been acquired wrongfully by mistake. dem^d. debt does not lie. but indeb ass^t. will. for debt there must be a contract.

This action of debt is never now used upon a bare promise as notes &c the wager of law has done that away. Afs was given to do away the wager of law in afs ~ Defs is charged with fraud & cheating which was to prevent the wager which was equivalent to a verdict. Debt is now brot on specialties for here there is no waging of law —

In actn of debt the rule always was that the whole sum must be recovered if anything. it is not so now. less may be recovered than the demand now. this rule arose from this that parol proof could be admitted prove payt on a bond Doug. 6. 703. note 1 Athen Bl. 249. 550. But now facts may be proved to alter the amount to be recovered ... 1 Dyer. 219.

Owing to this rule debt on parol contract would not lie agt. Exrs because he could not wage his law — Debt lies for services rendered.

It is not in all cases where a sum certain is to be recovered that debt lies is the proper action thus A promises to pay a debt due from B to C he is never considered the debtor A's is a collateral promise. Suppose B holds an endt of A. B attaches. C then promises to pay A's debt to him if he will release his hold. debt is not the proper action agt. C. he is not the debtor. credit was not given him.

D. Exp. 842

Esp D. 178

Debt mon lies when damages are to be assessed 1 Term Rep 482
ergo it will not lie on a contract to do a collateral act
as to build a house. but when they have been ascertained a.l
proof debt will lie

If A promises B to pay him a debt due from C. debt does not lie. because A never was the orig[l] debtor credit was given to C. But if C takes goods & A at the time says let C have the goods I will pay you B having no pass[d] to let C have them on his own credit. here A is orig[l] debtor. credit was given to him & not to C so that debt lies ag[st] A.

A draws a bill in favour of B upon C. it is endorsed over to D & E. C accepts & C dishonours it E may sue either the drawer or any endorser he cannot however sue A in debt but as there is privity of contract between himself & D. E may sue him in debt. but he can sue no other in debt because he had no privity of contract with them. 1 Salk 23.

The drawer is said to be liable in debt but to no one but B with whom he had privity. — There are cases in which debt lies where no privity. as on a penal statute. the lawyers say however that by accepting the benefits of society he impliedly contracted to obey the laws the truth is however that it is an exception to the gen[l] rule requiring contracts to found debt. so to this action on a stat. not greatly is agreed gen[l] [illegible] as well as [illegible] debts but there is no other case [illegible] debt is the gen[l] [illegible] to [illegible] [illegible] of debt.

debt on judgt will not lie if Defdt is committed on Ca. sa. while he is in gaol. Imprisonment is a satisfaction only for the time that Defdt is in gaol. It has been said that if Pltff lets him go voluntarily the debt is discharged. (By Lee Mere. this is not so) If you take a new note when it is good. but the debt is gone if no new note is taken. The rule was that a Pltff should not be suffered to swear after a voluntary escape. it was a punishment on the Pltff. afterwards it became transfered to Pltff wrongfully. every voluntary escape is said to be a discharge therefore if Pltff lets him go it is a voluntary escape of course a discharge. A wrong method to satisfaction is good for nothing but if you discharge one joint debtor from prison the other is discharged say the lawyers. here is no satisfaction wrought in nature. the authorities are that a release is a discharge of the debt. & a discharge of one is a release of both. 1 T. Rep 55. 6 T. Rep. 525. Fitz 420 8 T. Rep. 120 3 Wils. 12. 5 Burr. 2482. If prisoner dies in gaol or escapes away the debt remains agt Ca. or himself.

Debt lies on judgt. but you can have exon & it is said that debt will not lie until the year & day is out for taking out exon & this was my opinion but I found cases in which actn: for pt. in bro't within a year & a day in Eng. so that it seems to be a concur- rent remedy with exon - court observed it should be allowed to force a collection. & so it was deter- mined (Stra 923. Carth 30. 1 Sid. 351.) in our national court 2 Bac. 362. Bro Id. 364. 6 Mod 288 1 Roll 600. 2 T. Rep 65. 2 Bac 14. and was held debt lay to pay [illegible] without [illegible] So also debt lies where there is an [illegible] to pay sum certain,

The action of debt founded on erroneous judgt. will always be maintained the reason is not that you ought to recover upon such judgt but you cannot attack an erro- neous judgt. in this collateral manner - judgt. must be set aside by writ of error or new trial & such a judgt. cannot be pleaded as a nul tiel or aside (2 Bac 211. 7 T. Rep 458 3 Wils. 348. 5 Co. 142) until actually reversed

A question of some magnitude has been agitated in this state. a judgt. of law here in the state when rendered uncontestable verity you cannot shew it ill or wrong in any way except by writ of error or new trial. - A Foreign judgt. as in Eng is here only a simple contract debt. & if debt is bro't
(above the line: "on account of it")

Long 1
2 Dall. R. 410

Further says A. Dunn. I think it should be treated as a domestic judgt. in consideration of the nature & object of our federal union & compact from the respect due to each other's courts, without reference to the constitution which I think to be decisive on this point. —

I doubt the policy of the rule which considers a foreign judgt. only as a prima facie evidence of a debt. because it would be more equally decisive when the judgt. was rendered

on it you may prove it ought not to have been rendered. Now ought a judgt. rendered in N York to be considered in Conn. as a foreign judgt. or as a judgt. rendered in Conn. I should think the constitution settles the question that it is the same as a domestic judgt. In 5 States out of 8 it has been so determined in Con for one of the five I speak of proceedgs in genl. as to any C.L. judg. The question ought to be settled by the U.S. courts.

So if the majority or decisions is correct when debt is brot. in that manner you cannot enquire into the origl cause of action -

A foreign judgt. is prima facie evidence of debt ever that. act. on it must be case Str. 1090 but not so now. You need not shew the origl. consideration Doug. 1 on foreign judgt. you may bring Indeb. Assn is concurrent with debt. 2 H. Bl. 410. Doug. 45.

There are one set of cases where a judgt. may be attacked without writ of error or new trial. It goes upon the ground of fraud for fraud blots out all contracts. So if one comes with a false token from your friend, you deliver money to him. It is as much theft as if he took it out of your drawer. notwithstanding the delivery so the case of the silk stockings. Goods bot. with the

* In the first case as to build a house & pay or forfeit a sum greater than the cost of the house cov^t broken lies as well as debt. but in the other case where the penalty or damages agreed on is the price of reconciliation. cov^t broken does not lie. but debt does. -

2 &c. bills of exchange clear proved. So fraud will blot out time. case of escape from jail or feigned escape to prevent Pltff from having money with jailor for his support.

And when judgt. is obtained by fraud it may be set aside directly when debt is brot. upon it. the judgt. is void it is no judgt. 6 Co. Jd. 514. 2 Wils 27. 3 Wils. 341. Bl. Rep. 645. Ha 507. 993

For money due by bond or single bill debt is the only action 3 Bac. 13. Suppose the bond conditioned for the performance of a collateral act if you sue on penal part it is debt. But if you please you may treat it as an agt. to do the collateral act & bring a bill in Chy. For specific performance. So tis if the bond was to convey lands, maintain wife &c. &c. —

So when a sum is due on cov.t being a sum certain you may bring debt or cov.t briefly 7 T. Rep 124. If a penalty is annexed to the performance of cov.t you may sue in debt for the penalty, or in cov.t action for damages —

There are cases in which the forfeiture is to compel & enforce performance & others in which it is merely a fixed damage between the parties leaving it optional with the obligor to perform or forfeit. 2 Y Burr.

2 Bac. 24

Debt lies agst. an officer for money collected — Sexton Hob. Rep. 206. 2 Com Bl 553. this seems to be founded on the implied contract to pay over the money

Action of Detinue.

Detinue has now gone out of use since trover lies where it would lie many cases where it would not. It is the only action at law in which you get specific relief, thus having the effect of a bill in Eq. Thus it is specific where one gets possn of something which money will not buy as family pictures. Trover would only give damages but the property in him. & damages are assessed by the market value of the article. 3 Bl. 152 & no 2 361. When judgt is rendered it is that the property be delivered up. or a certain sum be paid which is a penalty.

It lies for any personal thing that can be identified It is no remedy where left to the proprietor to finish the principle on which this was founded, & can always for it was once said that a tortious possn alienated the owner of the property, it is not so now. 3 Reeve Abst. 67. 2 Wms. 11.

Action of Account

Where there are courts of Chy this action is out of use except Con. in which this action is brot.

This action is always founded upon some contract express or implied. at C L it lay agt. none except Guardn. in socage & Bailiff & Receiver. There used to be a diff. between Bailiff & Recr. but now treated as synonimous — This act.n has been extended to tenants in Common. Partners in trade by statute. So Ex.r & adm.r are answerable in ~~this~~ act.n 1 Bac. 16. 1 Inst. 172. 89. 1 Com Dig. 85 85. orig.l not so for there was no privity with them

These extensions were in Ed. 1st & 3d except as to jt. tenants & tenants in Com. which was passed in the time of Anne.

Owners may sue upon cargoes one partner sue other. the Plff declares that he delivered property to Deft. for which he has not accounted. when requested & for him to render his reasonable acct. & to recover damages both. If Deft. acknowledges the recpt. & judgt goes by default damages are not awarded but judgt. quod computet.

The auditors examine every thing even the parties three selves.

If Defts. pleads never B & Rr. i.e. the genl. issue, the jury finds that he was bailiff & Rr. the judgt. is quod computet. auditors are appointed who report & their report operates like a verdict & judgt. is rendered on it.

After judgt. of quod computet. Deft. cannot plead that he was never B & R. before the audrs. but he may shew that there is nothing in arrear. the term fully accounted is technical – All evidence that he has fully accounted, or never B & R must be shewn in the first instance as a release &c. And every thing that goes to shew that he is able to accot. goes to the auditors.–

Before court & jury Defts. may plead any thing that goes to shew that he is not bound to acct. as release, an award of arbtrs. never Bailiff or Rect. that this business has been settled, i.e. that he has fully accounted but it is not a good plea before court & jury that there is nothing in arrear. a plea of fully accounted is diffr. from nothing in arrear. and to make a good plea in bar it must appear that there is no room for settlement. every thing else is to be pleaded before the auditors. Whatever can be pleaded in bar must be pleaded & not go before the auditors. 1 Roll. 123. Cro. Car. 82. 1 Com. Dig. 91. 94. Cro Eliz. 830 3 Wils. 115. 1 Bac. 20. 6 Co. 7.

Before the auditors any thing that shews that Deft. ought not to be liable is good accounting

But in Ch^y. it is all settled in an action.

1 Com 98
1 Rob 120

Trover or detinue lies ag^t. the bailee and trespass against the disseisor for in this case it is in the nature of an action of account for the rents & profits. 1 Com 8, 7, 8, 9

as that property was destroyed by inevitable accident as by fire shipwreck &c. 1 Rolle 124. 1 Com Dig. 93. Co Lit. 89. Stra 680.

Any reasonable disposition of the property is good accounting, provided his commission did not forbid it as if the goods were perishing. In accounting Deft. is allowed all losses by inevitable accident or robbery. 2 Mod. 100

If Deft. is found in arrear judgt. goes for Pltf to the amount.

These rules apply to proceedings in Chy. But in the case that follows the process is diff. in law & Eqy. It is said that if $100 is delivered to trade with you are not to bring acct for it but recover it by two actions in debt for sum certain $100. & acct. for the profits (a) Suppose A sends money to B by C. the question was whether B could bring the action. Strictly the contract was with A & C. But I think L. Chiefman demonstrates that B could maintain the action for C makes an implied contract with him tho he never saw him

If one receives goods as bailee merely acct will not lie because he does not receive them to improve. neither does it lie after tortious taking nor for the rents agst an species disseisor except indeed in the case of minors who may treat a disseisor as guardn. & call him to acct. the reason in these cases is that there is no contract which is the foundation of the action of account.

Of Injuries affecting the character.—

Torts may be to a man's person his character or reputation. & his property.

1st As to injuries to reputation this is accomplished by 3 distinct injuries for which 3 distinct actions are given. 1st Slander. the act. defamation. 2 Libel only differs from being written. 3 Malicious prosecution in order to convict an innocent man.

Now as a contract you cannot recall an joint & several contracts you may sue all or any. In torts generally you may sue all or any a any number at once another difference is that in torts if you sue & recover judgt against 2 of 3 wrong doers you cannot sue the third. the first judgt is a bar. now in contracts you may sue all till you get your money.

Slander is of two kinds. one is called actionable in itself i.e you may recover if you prove the charge whether you prove damage or not. the other is founded on the offensive tendency is rather words actionable by reason of special damages in which you must state actual damage & prove it.

All words that if true would subject the man to punishment are actionable in themselves as charging one with stealing but not with adultery one with lying.

I should think it good policy to make cunning with the law actionable.

2 When a man is charged with that which goes directly to discharge a man of all his business. as a lawyer with being a knave. but to call a physician a knave will not be actionable for altho it goes pro tanto to lessen his reputation it does not go directly to destroy his means of living. tho to charge him with being a quack would

3 And the 3d sort of cases is charging one in office in official capacity with corruption or any thing that goes to spurn him in the view of the public it is actionable in itself whether relating to his integrity or ability.

4th & last is charging a man with a disease which would banish him from society as leprosy

As to words not actionable in themselves but become so by reason of special damage. they are all words which eventuate in damage to 3d & the damage must be laid in the declr no matter how scandalous the charge is if not actionable in itself nor productive of special damage.

In Eng to charge of prostitution is not actionable except in the city of London where prostitution is punishable

In some cases when the punishment is merely a fine the words are actionable & some not. in all cases of corporal punishment the words are actionable. —

The distinction appears to be this. If the charge is with an act that affects his reputation & it is punishable only with fine. is actionable. As to charge one in general with stealing property of his value to the Board in Eng. charge of keeping a bawdy house is actionable tho punishable only by fine. but to charge one with having been arrested or found in anything but words is not actionable.

The charge must be both false & malicious. truth is complete justification. — But if not true circumstances may be such as to prevent the Plff from recovering. as to this we must explain the word malice. this is better expressed by the Latin term malitia according to the legal signification. — it means wicked motive that need not be enmity. want of benevolence is enough. If the charge is false. the malice is presumed and insane is considered as proved if the words are proved the onus lies on Defts to prove the truth of the charge, or that he spoke them without malice. Speaking the words is primâ facie evidence of malice. —

as Pltff's character is in issue it has been questioned whether he could prove his character perfectly fair. & decided that he could but goes to enhance damages

Words actionable in themselves may be so coupled with other words as not to amount to an actionable charge. as that A is a thief for he intend upon my land & cut down my trees. this is a mere trespass.- A Gaby said of a lady with child. for she had stolen his heart.

It is said often that certain words spoken in heat of passion are not actionable. passion is no justification; but that great provocation may mitigate damages. but never justifies the offence. the law regards the feelings of men. but not their vices. anger without cause should enhance damages. the maxim this is without foundation.-

In every action of slander the Plffs character is put in issue the Plff puts it in issue & refers it to examination. if one charges a man with being a thief for he has stolen his horse. if he proves the theft of the horse the charge is justified & Deft has judgt. if he proves Pl's good character to be that of a thief. Plff has verdict but mere nominal damages.

Altho the words are false if Deft proves want of malice the Plff cannot recover, as that the words were spoken in such a manner & under such circumstances as to preclude all suspicion of malice. As when one came to a former in order to know the character of a dismissed servt Bull. N. P. 8

So when one sees his neighbour about to trust J.S. whom

he knew to be in existing circumstances or supposed to be so tells his neighbour what he thot to be correct to prevent his loss. Agst. when a charge is made in a course of legal proceedings & it turns out to be false. many malicious, no suit of slander will lie. policy prevents. the remedy is an act. for malicious prosecution. when probability will warrant

Agst. witnesses are not to be subjected in this action even tho' the witness was prejured. he may be subjected for perjury & true if they spoke what they supposed to be true they can be subjected in no action. although no evidence could be had. perhaps the charge could be proved by weak witness

It has been questioned whether the reporter of a story which he rec'd from another & believed to be true, could be subjected in this action. the decision are that he cannot, but reason he would come forward & give his author & the author is a means of property so that Plff could have his remedy against him. case once formerly decided that he should be reconsidered but it is not so now.

Counsel in his argument may attempt to support his client & charge the Plff with the offence which he is to justify. the law allows him to do it. But the Atty. must not take this opportunity to maltreat the party & charge with other crimes.

Pff maintained the great expense of his family. Def'd said he could not afford such expense, for he did not know how to counterfeit. held to be actionable.—

1 Salk 69.

"Have you heard D'd state Pl'ts case? answer I do not say "he did" the last said is scarce remembered."

2 Ld. Ray. 1500
1 Str. 276

Whatever language is used if it conveys the idea it is actionable. Palm. 68. "as you deserve to be hanged" "for what" "any man deserves to be hanged that stole Jones' horse" you may sue for charging with theft. Cro. Car. 247. 2 Wils. 300.

The charge may be made by way of question. 1 2 Co. 134. So by way of conjecture, as "were I to guess I should guess stolen state this horse". 1 Vent. 157. So by way of report. as that "he heard a bird sing that one stole the money". 1 Roll. 64. 1 Lev. 277.

So by way of an tithesis as "I know what I am & I know what Knotes is, and I never stole sheep." —

Charge of teneurse of mind as that A. is a thievish fellow not actionable Hardr. no fact being charged. But a charge of a "thieving rogue" is actionable. 1 Sid. 37. Palm. 64 1 Roll. 47. 51.

The charge may appear vague as that one of your brothers "stole" if from circumstances it could be shown which is meant you make out your charge —

Character is not brot. into the question where the charge is of a punishable crime. Cro. Eliz. 638. as treason —

The word murder is used in a diff.t sense often from its legal signification as, here one charged a man with having murdered his wife when she was by a liar.

1 Rolle. 65

Glan. 102
Cro. Jac 114

There is a decision that if one charges another with murder and it proves that no one was killed, the words are not actionable, because it is said the Pl[ainti]ff could not be subjected to the punishment. I believe the decision to be incorrect. For persons are sometimes punished who are not guilty.

Umam, perjury, to be guilty of that one must have taken a false oath in a court of justice. & it must be proved to support the charge. it is not supported by proving neglect of duty in an officer who has taken an oath of office. swearing false before Arb[itrato]rs has lately been determined perjury. the oath must have been taken by a person proper to take it. not by Arb[itrato]rs as such merely. formerly tho[ugh]t not. because it was supposed & that the false swearing must have been in a court of record. but perjury might always be committed before C[our]t of Eq[uit]y & the late decisions are doubtless correct. 4 Co 15. 3 Lev. 166. 1 Roll 39. 69. 70. Cro. Car. 268. Cro. Jac. 158.

As to forgery there is nothing particular to be said. it must appear from the whole said that it was intended to charge with the crime. forgery is in legal signification to do a thing for prevention of justice. Obligee altered the bond from £ to $. it was not forgery (but from a maxim of policy no recovery could be had upon the bond.) so that the charge of having done this where he did it for the furtherance of justice & Eq[uit]y. — If there is no qualification after the charge of forgery the party is supposed to use it technically

Cro Js 39. 674
Dal. 331. 2 Vin. 51

1 Vent. 213
L^d Raym. 959

a man was charged with being a pick pocket by one to whom he often came for money. —

4 Co. 17.
1 Rol. 39. 51. 65. 71
1 Lev. 156.
Cro Jac. 622.
Stra 14 2.
Cro Eliz. 268.

(d) Now I conceive I do not see the reason of this distinction words which are not actionable for the purpose of showing the quo animo with which the others were spoken. It is said that justification is to be admitted in the first case because the Ct cannot discern upon which charge the damages were assessed or whether upon both. How can it be discovered in one case better than in the other?

There can be no theft of that which cannot be stolen, as to steal trees &c. — If charge of theft is gen. & connected as it comes out in evidence, with such acts as were not criminal, & shew it not to have been the party's intention to charge with a crime the words are not actionable —

Formerly it was actionable to charge one with witchcraft & have many actions founded on such charges. but as the law is repealed which made witchcraft penal. such a charge is now not actionable.

To charge a man with a crime after he had been pardoned for it was formerly actionable. the ground being that he was never honest. But now it is understood that the person is not pardoned for not being guilty. & it is not actionable (semble) thus to charge one. Mod. 81. 1 Str. 304 Otherwise charge may be justified by the innuendo.

Suppose the Def. in slander uses actionable & other words are not. as "liar & thief" & verdict is found for Plff in $100. the Defr having pleaded the gen. issue. he should have demurred to Plts & gen. issue as to the other, as this verdict of $100 it is sd. judgt. cannot be rendered. & they even if no evidence were adduced as to the charge of lying. for the court can not to know upon what the verdict was found. here the words are in two counts. i.e the words actionable & not actionable. But if one count contains words that are not actionable as well as some that are. judgt. is not to be arrested when the verdict is gen. because it is said that the court will see that the jury know the law. [illegible]

Words actionable in themselves may be proved on the trial tho not laid in Decl^n this seems to be a hard rule, but I do not know but it must remain a rule. the ground is to shew with what temper of mind the words laid in the Decl^n were spoken. no damages however are to be recovered for the words not laid. ibi anc. I am afraid to it because it influences the minds of the jury & thus is the man punished twice for one act.

As to the slander of an officer. it is to be remembered that the words must have been spoken of him in his official capacity. merely lessening the man in the eye of the world is not enough. but a charge upon his ability or integrity as officer is actionable. 1 Rolle. 57. 1 Lev. 280. Cro. Car. 223. Cro. Jac. 240. 8 Mod. 270. L^d Ray. 1369. 1 Salk 695.

To charge a man with principles inconsistent with his office or inability to perform it in a colloquium concerning his office is actionable & it is not material whether it be an office of honour trust or profit. this is the language of L^d Vandwiche. You know it must be spoken of the officer in his official capacity. & must be so laid in the Decl^n

A charge of corruption or want of integrity are not actionable unless spoken & applied to one in his official capacity. It has been said that to say of a man in an office of profit that he wants ability is actionable but if the office

1 Sid. 327
3 Wils 89
1 Lev 247.

Comb. 253.

Cro Jac. 144
230. 1 Roll
243.

were of honour merely such a charge would not be actionable - but I see no room for the distinction & it is contrary to L^d Hardwicke's opinion. - the only true distinction is as to the relation the words have to the character whether individual or official

Words spoken of one in his profession which tend to destroy his means of living are actionable. as of a lawyer that he will ever throw his clients cause. cont. and a declaration of a physician that he is a quack. Cro. Eliz 589 Cro. Jac 222. 1 Lev. 115. Cro. Car 385. 1 Rolle. 54. 62. 2 Ray. 1417

So to charge a clergyman with "being a liar." preaching heresy. is actionable. 3 Lev. 17. So of breaking some salutary regulations of society of which the punishment was by fine. As to the question whether the clergyman preached orthodoxy. We are to find out whether he preached what that denomination considered as orthodox. -

Charging one with an infectious disease is actionable. the charge must be in the present tense. as the ground of recovery is that it causes persons to avoid Plff. words implied the intention was to give the idea that the party is still afflicted with it.

There can be but one Defr. in this action. the words of one means are not the words of another.

a man is presumed to have fair character until contrary appears, so that this allegation may not be unexpected or exempt from long usage. — Yelv. 159

4 Bac 514

When the words are actionable only because of special damage. the damage must be laid in the declaration or you cannot prove it.

Words actionable in themselves may be proved tho not laid in the decl^n &c they go to shew the quo animo. but no damages can be recovered for them. and it is said they may be proved true. but I doubt it or it would not remove the presumption of malice.

Declaration. It is usual to state that Plff is a man of fair character especially in that respect in which he has been slandered &this may be necessary from long usage. If words were spoken of one in his office the statement must contain his office of what kind: &that they were spoken in a colloquium concerning his office. bco. 6 Wh. 282.

It is usual to state that the words were false &maliciously spoken. it has been determined that if the word malicious. is left out, the decl^n is good after verdict. &the ground of the judg^t goes to shew that the decl^n would be good on Dem^r it being that falsity implied malice.— Malice is the gist of the action. and if that is implied it is suff^t. 1 Com Dig. 195. &it can be implied no more after verdict than before. A Judge in N York said this adjudication was questionable. 1 Keb. 273. Bule N P. 8. Days Esp. 516 &says further that if an ass^t implied by law. after stating the facts on which the promise arises it is indispensable to raise the promise in the Decl^n the words then used are technical.— Now I think this is ques-

Cro Jac 499
2 Jon. 118

Stra 666
2 Wils. 114
Cro. Car. 443
Cro Eliz 416
1 Roll. 84

tionable. in Lee Mass. you are not obliged to raise it & there are three decided cases of it. the statement does not mean that he promised but that he is liable on the promises as stated in Declr. L'a Roy.

The words are usually stated to have been spoken in the presence & hearing of some particular person or several persons. & there may be some danger in not inserting both. for all the cases sustaining a declr in which case only was innuendo were after verdict.

must be averred to have been spoken about the Plff by way of innuendo unless the conversation was directly with Plff.

When the words are not actionable in themselves, the special damage must be stated & so particularly that Defts counsel must this proof. so that "whereby Plff lost her marriage" is not sufft; it should have been stated with whom, decided by Judge Kent

The innuendo does not enlarge the declr it merely ascertains the charge. If the words spoken apply to person by way of description, you must aver your relation as landlord. brother &c if merely addrs as Capt it will not be averred that Declt was capt in less it were used in a colloquium concerning his office. If the charge was "Every sheep stolen in Litchfield for a week. Declt stole" here you must aver that there were sheep stolen. this is correct but if the charge was the greatest thief in Ct it would be harder to require such aver than the rule does require it.

12. The truth of words must always be pleaded. if true it is damnum absque injuria. under the genl issue the truth will not by B.R. be received in evidence: - 2 Stra 1200. Esp. Dig 518. But if Pltff after proving the words laid goes into evidence of other words to shew the quo animo Deft is allowed to shew the truth of these words. Bull. N P.

you may defend yourself by proving the change true. Defendant must by C.L. plead this specially & stand upon the words. & the truth cannot be given in evidence under the gen. issue (20) It is allowed in some states by stat. to plead justification in evidence under the gen. issue. but there is an inconvenience in this practice. & some courts have made a rule that the Defts to do this shall give some days notice & after that you cannot deny the words.

Defts plea of justification then admitting the words. shall these words before to have been spoken. it is admitted. Pff wants to desist to shew malice. & again Defs want to shew the publicity circumstances. this is a great question. In Eng the prevailing opinion is that there is no occasion at all to prove them. in some states the decision is otherwise Dougl 2 ed. 818 2 Geo. 16. 5 Geo 125. Stra. 1200. Doug 323 In N York Foster & Ring. 1 Johns 46. the court were divided. 2 My own opinion is that it ought to be proved. not to shew that the words were spoken. but to shew the circumstances of the case. B. N.P.C. 4 vol. 159. 1 Chr. 250. 280. 6 Geo Eliz. 486. 6 Geo Lac. 39. Cro Car. 190.

It is laid down in the books that if the charge were of having committed the person should be allowed to be heard on the ground of the principle that slander will not lie unless the person is injured if it would.

Slander is no offence at C.L. that it is by stat. in Eng. & this is a ground of giving vindictive damages. that argument as used in other cases is a fallacious one

Cro Eliz. 239

It may be by pictures signs [illegible] &c.

2 Wils 302.3
5 Mod. 165
2 Ld Ray. 418
5 Co 125

In actl. Bat. it is said you must give great consideration damages to prevent repitition. true great damages might be given but no more than is sufft. to pay the damages done to Plff. for the public has taken care of itself in punishment. by fine &c. the public prosecutor is bound to brig his action agst. the Deft. for breach of peace. the fine should not be thrown into the pocket of the Plff. Wh is you observe is not the case with the slanderous. 1 Roll. 82. Wils Exa. 666.

The gut. allegation that by that Plff has lost his friend is immaterial & amounts to nothing but if he has lost any thing by loss of particular friend it would be may do good. — may be proved.

Justification admits the malice. but it may be proved that the words were true to mitigate damages. as Plff may affect his character. If the charge of a theft you may prove any theft. but if it were of a particular theft you can prove no other than are spoken & charged.

Libel

Libel is a civil offence & public wrong. any thing which tends to blacken a character or affect a man's reputation if reduced to writing would be libellous. as a liar or reprobate &c. So that a libel includes all slander which is reduced to writing and besides that all other words that tend to make a man ridiculous in the eyes of the world. So that the

2 Stra. 895
1 Hawk 194

Stra. 498

as no inquiry as to whether the words were actionable in themselves. — Another difference is that but one can be sued at once for slander tho many suits may be had yet in libel many may be found all that can be proved to have had a hand in printing or publishing the libel —

The principle of not allowing proof of the charge in case of a libel does not apply to prosecution for the civil injury & damage to the individual only. i.e. Defendant in this case prove the truth. But when the public prosecute for the crime of publishing the libel, the truth cannot be proved because the real ground of public prosecution is entirely distinct from that upon which an individual prosecutes. the individual prosecutes for damages for the injury: the public for disturbance of public peace. & the public is wronged most commonly more, sometimes by truth than falsehood so that the principle is perfectly correct according to my opinion. —

As to libels upon the government. I can conceive that the measures of government may be so corrupt that the discussion may be conducted in a libellous manner & then the truth could not be proved.

For libel one action lies after two or more against each. or for slander one each after two cannot. 2 John. 7th Tillotson v Cheetham.

A libel must be published. to write it for amusement & hand up is not a libel. what is a publishment?

1 John. 2 80

This is a question of some difficulty. by the book, giving currency is publishing. if one reads a slander to any body he writes for the purpose of disseminating it is publishing. but merely reading it to one's family is not. there must be malevolence. A private person is liable tho he knows nothing of its tendency.

Question of evidence. could a former libel by Pliff be given in evidence to show provocation. the Ct admitted such evidence on the ground that one libell was an answer to the other. Now the principle is that immediate provocation may be given in evidence in some cases of tort or of small penalty. but not a provocation that took place long before the act sued for. for the law is tender of the feelings but not of the wild passions of men.

Lindley's second letter is clearly indictable. if it contains personal abuse to one of his family. but could one sue for damages if it published? 1 Cain. 583. Decided that in case. that one action for damages would would not lie. for want of proof.

B. N. P.[s] mal. pros.

Hob. 286
Co. L. 132
1 Saund 228
1 Vent. 12
2 Co. 14

Malicious prosecution & Vexatious lawsuits—
In libel reputation is damaged. in malicious prosecution affects also his property altho' here also reputation is the great thing. in Vexatious lawsuits expense alone is complained of & not trouble not reputation.

In vexatious lawsuits. the suit must have been brot. since there was no right of recovery. & the suit must have been brot. to vex. or for revenge. & when this disposition is discovered in the proceedings an action lies. It does not follow that all Pffs that fail are liable. It is enough (as decided) that Pff knew he had no right to recover without the design to vex.—

There are three classes of cases of vexatious suits. 1st If Pff was sued before a court without jurisdiction he can recover all expense & damages for trouble. In all cases there must have been an end to the vexatious suit. It was formerly tho.t that no suit could be brot. after retraxit or judg.t on demurrer to bad decl.— because the court knew not but the man was liable. the rule now is that the suit must be at an end. no need of acquital

2 When an action is brot. to recover money to which party knows he is not entitled is clearly actionable. I think that if the suit were to establish reputation the Pff in it is not liable. But decided in case that a girl who brot. an action of defamation of her chastity & withdrew it when she saw proof coming to justify what had been said. was liable to an action for malicious. I was agt. it. decided 3 to 2.

Act. 266
1 Stat. 114

3 Class of cases is where one has a right of recovery but conducts it in a vexatious manner, as suing for a great sum when but a small one is due. which prevents Deft in the suit from getting bail or from getting a receipt or bond after attachment in Conn. So the conducting a suit in any way that shews malice & determination to revenge. as where a man arrested a wealthy man in the streets of Newyork which made him trouble by alarming his creditors at the arrest for no more than the sum due. the money could have been obtained at any time. he lived in Conn.t heavy damages should have been given.
No matter now whether the suit ended in abat.t or non suit or retraxit or any way. And the damages are to the amount of costs & charges as att.d fees &c. the court will not be particular as to the amount. In Conn. we give treble damages & fine the rascal besides.

In act.n for Malicious prosecutions the jury give more liberal damages than in any other for it endangers a mans dearest interests. — Any one who promotes the prosecution by relating stories such as to induce the public prosecutor to take it up. or any one who maliciously sues in spiritual action. The expense of defence is calculated in the damages but the chief thing is reputation. no action of slander lies for [illegible] was at law. — It must have been brot without probable cause of prosecution. & this probability covers the malice. So there must be probable cause & malice

1 Salk. 18

2 Bul. N.P. 16.

x) If it regards a felony. & there could be no probable cause without nor malicious pros.n with. but neither of these positions are in fact true. Case of a horse lost. & a man found riding him who fled immediately to ~~the~~ woods. &c. So the case of the lawyer & sea Cap.tn who paid him in singular kind of coin. & charge of theft upon a serv.t for stealing ~~it~~ &c. —

Probable cause is a concurrence of circumstances such as would induce a cautious man influenced by reason & intent on public good, to believe that conviction was probable.

It is laid down in the books that there must have been a felony committed: the reason of the rule is not apparent: and I do not consider it as well settled and I do not consider it a good one. Now if there was no felony committed would it not follow that there was no probable cause.

To be entitled to recovery for malicious prosn malice must be proved i.e. a wicked motive. & want of proper cause. they are both indispensable. acting unwarrantably is malice.

'Suppose a man brs before grand jury & enquiries it appears that there was no probable cause the onus is on defr to shew want of malice. but if one is bound over by justice of peace or a bill by the grand jury it then devolves upon Pff to shew malice. that defr acted improperly & without probable cause. The finding on finding it a bill, prima facie rebuts the presumption of malice.'

The only ground that Pff has of complaining is malice in this case. — Pff in this action must establish the malice & the want of probable cause. this is indispensable. want of probable cause implies malice. tho this presumption may be rebutted.'

All these actions mentioned for slander libel. malicious prosecution & vexatious lawsuits. are actions on the case

Trespass vi et armis

Assault & Battery—

An assault is an attempt with force or violence to do a corporal hurt. it is an attempt to do a thing which when done would be a battery.—

The party is put in fear & his feelings are insulted & these are grounds of damages feelings are regarded & notice taken of the time & place.

I see no reason why a man should not have case for fear & anxiety by words. But an assault cannot be committed by mere words. The assault must be made within reach. shaking fist at one 40 rod off & bawling that you will knock his teeth down his throat is not an assault. a threatening posture &c may not be assault in consequence of the words spoken. as drawing sword & saying were the court not in session &c. the act was not an assault.

I should differ from J. Blackstone so far as this or to call that an assault which actually frightens the Pltff. & that it depends upon the relative situation of the parties & perhaps their peculiar situations.—

In all these actions of ass.t & battery all abettors & encouragers are principals. there can be no accessory. no matter how little was done if any thing. any or all may be sued at once.

A battery is an actual contact of violence upon the person of another. — an actual hurt is not indispensable for spitting upon one intentionally is a battery. pulling a chair away from under one is a battery. crowding one into the corner. —

A man is injured by another who is doing an unlawful act. he would not for the world have injured the Plff still the action lies. because he is in pursuit of an unlawful act. — And if his in pursuit of lawful business with ordinary care or such as ordinary men use. no action lies. but if this case was not such. if he was careless. the action would lie. Thus a sold in haste scoured that up his gun soon after found it in the same place, took it up to snap it. it had been loaded by some one else with small shot & went off & injured some one slightly. he was held not liable. —

A man is about unlawful business no matter how much care he takes: but in lawful business can use any care

In trespass the injury must be immediate. in case the injury is consequential. See the cases in Bl. Rep. When one struck B's horse & he was thrown by it. it was held that the striker was liable in trespass & the injury immediate, aft. or rather to the horse in forcing or startling are not actionable unless there is foul play. because the act is lawful.

Intention of the actor is not regarded. the business about which one is engaged & the manner of doing it determines whether one is liable. — Bull. N. P. 16.

Two persons go out with agreement to box. both are hurt & one brings the action. the contd. the agt. was void & of course the Dft. liable. Lohoundary this very reason ought to prevent a recovery. we do so in all contracts. If two or more are engaged in breaking the salutary regulations of society let them take the consequence of it. policy requires this rule. the rule as established in Eng tends to encourage such combats. And of this opinion are many of the great lawyers in Eng. 2 Lev. 174. Bul. N.P. 16

As to justification for asslt. & bat. see "False imprisonment"

False Imprisonment. —

Every Battery includes an assault & every false imprisonment includes both. This action is often brot. Restraining the power of locomotion is imprisonment. if done without authority it is false imprisonment. & so it is, if done under authority, unlawfully exercised. Any restraint is false imprisonment. —

This action lies agt. any person who undertakes to exercise unlawful authority. If however judges act erroneously they are not liable. I am not speaking of judges of genl. jurisdiction acting maliciously, & acting judicially & passing Eqn. But if they act beyond their jurisdn. as committing to prison without authority or commit by parol.

But if the Exon were issued ~~without~~ authority the justice & Officer are both liable. —

1 Ld Ray. 229.

2 Stra. 1134

where the state requires a written entitlement. This action is most usually brot agst Offrs. A Sheriff bailiff Constable &c. for illegal arrest.

When an case where the arrest is illegal & officer liable & when where the arrest is illegal & officer not liable — The Gen. rule is Whenever it appears upon the face of the warrant that the Offr had no authority to execute it or the court to issue it, the officer is liable. Now the Offr is bound to know the Laws of the land. Suppose the Sec. of State issue a warrant to commit a person to Newgate for burglary. now this court has not cognizance of that crime. if the Sheriff commits the man to Newgate he is guilty of false imprisonment. — Suppose it does not appear upon the face of the process as one viz. for $20. it might be that the justice who issued the Exn had not authority of the subject matter, but this the Sheriff is not to enquire into & he is not liable for executing it. 4 Co. 70. is a very clear opinion. it was a warrant without the 12 miles of jurisdiction after marshalsea court & decided to be illegal. the want of authority did not appear upon the face of the warrant. & this case in L^d Ray decided directly agst it. to aid the case cited to support the case in Sorter did not support it. If the Offr commit all anything illegal on the face of the precept he is bound to execute it.

A bill obtained agst B before the mast. by A and ex parte Bland obtained a protection to come before the Legislature to attend upon his petition. before the gen. Appl. Durham

1 Mod. 95
1 Salk. 785
Sta. 702
9 Co. 66
Cro. Eliz. 227
Bev. Inc. 280

he was going up under the protection of a writ to him, the Assembly had him up by habeas corpus & then released him & took his action agt the Sheriff for releasing him. — It was said that the Assembly had no power to grant an insolvent act & determined that they had, & were acknowledging that they had not the Sheriff was not liable.
under this circumstance as

It was decided in the courts that a Sheriff has a right to execute all precepts that appears legal on the face of it 2 Mod. 195. In this case the protection namely state that Broad a cause before the legislature. now if the Assembly had authority as a court in any case the Sheriff was not liable. ~~It is that authority~~ in certain cases they have such authority. so that if the Sheriff was held not liable as he could not, receive from the face of the warrant that it was illegal. — & however if the Sheriff knew that the warrant was illegal yet if it did not appear upon the face of the process the Sheriff is not liable. — 2 Bl. Rep. 1057.

By the L. all judicial acts ~~on~~ sunday are void & but this bill was did not extend to ministerial acts. they were made void by statute. it first extended to arrests of persons going to public worship. but the statute afterwards extended it to all arrests on the sabbath. & this is considered as B. R in K. S. & such arrest is false imprisonment. unless in case of escapes. & criminal cases of felony. or a person with intent to carry away the child &c

"Delivery is the ground on which a bail is allowed to arrest his principal in another state with his bail piece if it were a warrant the authority of it would extend no further than the jurisdiction of the court.

without cause ante. his bail pleas is only evidence that he was bondsman. When one gives bail for another that other is his prisoner the may remand him to gaol at any time.

An arrest on sunday is void. but the man keeps him untill monday & then loses his execution. 5 Co. 92 Semaines case. from that case it appears that this arrest is good. but 1st case in Comp is directly agst it. Vide many other analogous. only the case is that the outer door of a domicil shall not be broken for civil process. & it is not reasonable to suppose a house was broken & a key made. in Semaines case it was held the Sheriff ought to be liable for the trespass yet the key good. The whole question in Cowpers Reps. Gainsford & Lee was whether the door was an outer or inner door. & if the court that the case in Co. good authority. that question would have been immaterial

I believe it correct to say that no man shall wilfully receive any the least benefit from the breach of the regulations of society. On this ground I think the arrest on monday would be ill. 5 Mod. 95. Comp. 209. 1 Salk 153. 2 Bl. Rep. 823. 2 Burr. 1048. 6 Mod. 95. 154. 2 Bac. Abr. 256. 5 Bac. 170

Where are cases in which a man is allowed to take advantage of a wrong act viz. A took B's horse without liberty. B demanded her. refusal. Knocked A off. took the horse. altho' Knight

I Haush 130

might be liable in Aff. & Battery still a court could not order a restitution of the horse

Of Justifications For battery & false imprisonm.

A battery or false imprisonment may in legal language be justified i.e. the act is not considered as battery & false imprisonment. Thus if one is about to break the peace or commit a crime another may restrain him without warrant. Even when the man was not actually about to break the peace, yet if it appear to the tiers that Defft had good reason to suppose the commission of it he may restrain with force. this will not justify fighting in behalf of a man who is attacked but all per may pay to restrain from breach of peace.

An offr is justified in arresting if his warrant is not defective on the face of it. even tho sometimes even beating violently & imprisoning. If Plff complains of batt & imprisonment. Offr need only to plead his warrant setting it forth that its legality may appear to the court. If however the Plff goes further & says that the offr beat & wounded him. the Offr is then not only to plead that he had such warrant but also the resistance made by the party. for the Offr is bound to take him. as all must but with as little wounding as possible. —

Another defence is son assault demesne. & for this it is not necessary that Pltff first struck. if he held a stick over your head you need not wait for him to strike. the justification is good. The plea is that Pltff first assaulted him

The ground is that a man may defend himself so far but as to prevent another immediate attack. but the party can never justify in this way the effects of a malicious revenge. this line is extremely difficult to be drawn. the man ought not to be compelled to let the attacker go the moment he gets him down, nor indeed to give him one revengeful blow.— If the, several men come up blows beating would be necessary to incapacitate the attacker.—

Words will not justify any thing tho they will mitigate damages. but will never diminish down to nothing. words spoken at one time & place may go much farther in mitigation than if spoken in other circumstances.

Another defence is relationship of parent & child. husband & wife. &c by which one may justify an attack in defence of the other. one would not be justified in entering into the quarrel. but the nature of the rule is this ~~that~~ the parent may do precisely what the child would be justified in doing.—

another defence is Mollitu manus imposuit. now one may knock down one who attempts to get away his property & his defence would be "mollitur &c" if nigger may break the peace to protect & preserve his property. but after a wrong doer has possessed himself of another's property the owner may retake if he can without breach of peace. but not with breach of peace. this plea is used when the property is attempted to be taken without any assault upon the person. if there is such assault the plea son ass.t is the proper one.

When the words & circumstances are very provoking the jury always give very small damages. Passion is no justification but the provocation which excites it may diminish the damages to almost nothing.

It is often a justification that if p.l was a father or master or schoolmaster. the rule is as laid down, that he might moderately chastise what is moderate chastisement is very difficult to explain. A German would be shocked at a Scotch licking. On this subject I consider that the party acts in a judicial capacity & that a master or a parent or schoolmaster is not to be subjected for an error in judg.t but if he corrects malo animo. from a spirit of revenge he ought to be subjected. the animus is collectable from the manner in which it was done. the temper shown at the time and the instrument made use of.

A suit was brot in N York by a child by his prochine ami
agst his father who threw him down stairs & stamped
on him. the parent was affluent. & as it was ap-
prehended that the child would be a cripple the
jury gave a handsome verdict in order to take
enough of his fathers estate to support him through
life. But when the party beats as much as
much as he in conscience believes his duty to do. he ought not
to be liable.

A species of aggravated battery is mayhem which
is depriving one of a member useful in defence.

Now there is a rule of law in Eng which may be
in force in some states of which I never could dis-
cover the history. it is this that after the jury
have given damages. the court may superinduce
corporal punishment upon the damages. This is the only case of the
kind in the law: tho the court in case of delay to table the damages.
If a recovery has been once had for a battery you can
never recover again for the same injury but whatever
other damage may afterwards accrue in consequence
of the battery at the time of the recovery no
such future damage was anticipated. And this is
the rule in slander. but it does not apply to actions
on the case as for a nuisance. in that you recover
for the injury you received up to the time of bring-
ing the suit.

In this action Defts. must plead separately tho they plead the same plea.—

The first verdict ascertains the amount of damage Pltff suffered and Ex. for that sum goes agst. as many as are found to have been engaged in the trespass. 6 co. Jac. 350. 1160.6.7. Bull. N. P. 20. Stra. 1222. The jury can never sever the damages.

(d) Viz when Defts. all plead genl. issue. or one pleads genl. issue & another demurrs.

If several are sued the jury has no right to sever the damages as for A to pay $100. B, $200. C $300 &c because the Plff is entitled to the whole amount of damages from each & every of the Defts. they must all be found guilty jointly that are found guilty because one might be a bankrupt. And if only B were sued & recovery had agst him. C may plead this judgt in bar of a subsequent suit against himself but he could not if B had been acquitted.

But these three may plead diffr pleas. thus A. non assumpsit. B a warrant. C. guilty upon. Here there must be three separate trials there being three distinct issues. Suppose the jury that tried one gives Plff one sum as $100 the jury that tried the two others gives $200 agst one $300 agst the other.

Suppose agst B & C. sued B pleads guilty upon & C demurs. the jury finds $2000 agst B. & the court give judgt agst C. for $2000. that being ascertained by the verdict agst B. then C may pay B & C jointly for 2000. Now in all such cases each (d) is bound to pay all & his damages & he ought to be able to collect it all of any the he may have separate sums agst each of he so chooses to endeavor it. In the above case the jury supposed Plff ought to recover $600. but they have no right to do. the laws does not apportion it. Now Plff is injured if he cannot have it agst all for $600 but they he cannot have. he can take out Ex agst all these for the highest sum as $300

if he please. but this he must not do unless he chooses but may object to the verdict & have a new one. The law will not allow him but an execution & satisfaction

already told how diff. battery might be found in one act in such case jury must apportion the damages. but this practice has gone out of use. as by Bar monday to or tuesday se.

Many attempts were made to introduce the verdict found in a former criminal case, as evidence in the civil injury. but it is now settled that it cannot be given in evidence. because Deft is not the same person whose testimony convicted the Deft. and the verdict is ~~to~~ into alios.

But shall a verdict in favour of Pltff be given in evidence to convict Deft. in public prosecution. it cannot be so given being between different parties.

Injuries to Personal property.

The three remedies for injuries done by force to personal propy. are Trespass vi et armis properly so called Trover & Replevin.

Trespass is an injury done by one to another's property by direct act. & it must be by a misfeasance not by non feasance or nonfeasance. This is not the only action for direct injuries. trover also lies. If one takes the property of another & carries it off. trespass or trover lies. But if there is no amotion no carrying off as when property is destroyed trespass is the only action. the line is nice but any amotion gives you a right to sue in either. But when the taking is lawful & you know of conversion trover lies without demand. but if you know not of the conversion you must make demand & in this case trespass does not lie.

Pltff must have possn. to be entitled to this action. If the party had such possn. as not to be accountable to the owner, he cannot have this action. Neither can one who holds by an unlawful act or felony as in case of stealing. — But an unlawful possn. will support the action where the party holds claiming title.

When a license is given by law if it is abused the orig. license will not shelter the trespass. but if the license was a private one. it will. Thus every man is licensed

2 Rol. 561

to go into a tavern. if he breaks things he is liable in trespass as if he broke glasses the act must be a misfeasance & the party is a trespasser ab initio.

This is said to be an

an except. at the Shff arrests B. the Plff in the action tells A not to return the writ. B sues A in trespass it is said that the act was only nonfeasance because he did not return the writs & A must be subjected in trespass for mere non feasance. But the truth is A cannot produce the warrants in evidence for no warrant is evidence until returned. & the Shff stands in the same plight as if he really had no warrant. altho 20 persons saw the warrant. no other proof but the warrant itself can be evidence. If the injury could have been proved otherwise than by the writ itself Shff would have been acquitted.

If a license is given by an individual trespass does not lie, for a subsqt. abuse of the license. except indeed in the case of fraud. Thus one brot. forged letters of recommendation & procured credit for a large quantity of hats. it was determined ~~that~~ this delivery was not a contract. & trespass would lie. & there cases in Leach C. L. that go to prove such acts felony prove it a trespass. As where two sharpers in company with an innocent whom they intended to defraud, pretended to have found a jewel as all were in company they were to divide. they went to a jeweller who set into the place. pronounced it a diamond of the first water. the sharpers sold out to the innocent man & made off with the money. they were arrested & executed for the theft.

4 Mod 391
2 Roll 555

a Judgt. obtained fraudulently is void. but as it is not apparently void the offr. is not liable. but as the Pltff knows the judgt. to be void from fraud he is liable in trespass in it serving. such a judgt. is as if it were not. Suppose a judgt. erroneous, no one is liable for the levy for this judgt. was good as any other judgt. until reversed. 1 Lev. 90. but apparent judgt. is a mere nullity. the law however protects the offr. in obeying an order apparently legal.

If an authority is given by some statute. that authority must be strictly pursued. Thus St. giving licence to impound cattle damage feasant & sue them provides that the party give notice to the owner & if he does not he is trespasser ab initio & this altho the owner knew of the taking & the party knew that he knew.

I am inclined to think that notwithstanding the cases in Bac. are not law i.e. those which go to subject a person for charitably intermeddling with another's property, as to get a neighbour's cow out of the mire to prevent her drowning. tho' no cases to support me.

Here is a case where trover lies & trespass does not altho the taking was tortious. A stole B's property & sold it to C. C honestly came in possn. but acquired no title & trover lies. each possr. is liable to an action at the suit of B.

Cro Eliz 196

for Plffs right to commit ended at once on the approval of bail.

(d)
In the water spout case, the Defts had no right to enter the Plffs land. the erection of the spout ~~[illegible]~~ was held a consequential injury & not an immediate one in itself & that case not trespass was the proper action. 2 Ld Raym. 1442. Stra. 634.

B takes from A his persl. property trespass or trover is the proper action suppose B sells it to C. who is not privy to the tortious taking. trespass would not lie agt. C for his possn. was lawful. but as he had no title. B not having any title could not convey any so that trover lies agt. him.

It has been much questioned whether Tresp. or case is the proper remedy in certain cases. A Shff is bound to let to bail. responsible bail is offered but Shff will not receive it. but commits the prisoner now is he liable in trespass or case? it is said that the commitment is forcible & a positive injury (a) & agt. it is said that refusing to take bail is a nonfeasance. & in Eng the rule is that case is the remedy. in Con. trespass is decided to be the remedy. -

Agt. one erects a water spout that throws water onto his neighbours house. if the act was lawful trespass would not lie: but it might have been required, the act was unlawful as land extends usque ad coelum.

So a mill dam may be raised so as to overflow a neighbours land. the building the dam is a lawful act. & the remedy is case Stra. 604. Ld. Ray. 1399.

It is laid down in all the books that if the act amounts to theft the party cannot be sued in trespass. because it is S. the injury is merged in the felony. As the law once was. an actn. of trespass would be nugatory for all the goods & chattels of Deft. would be immediately forfeited on the commission. neither could you take the body for that must be punished. But in this country there are

2 Roll. 557
2 ib. 556
4 be. 38.
Pop. 1^{5}01
Cro Cht. 254
1 Dy. 25. Pky. 608

A tenant at will may dig away emblements but if he should abuse this licence he would be liable in trespass. Cro El. 147. the licence is given by law.

Latch 214
Pop. 5
1 Lid. 38
2 Roll. 569

no such loss. no forfeiture of goods & chattels or presenting with death for stealing. therefore the trespass is not [illegible]

If cattle do damage by breaking in. they may be impounded. but they may be driven out & chased with a dog that will not damage them by tearing them. trespass vi et armis lies training cattle with a big dog. But a man must not let them out into the road unless he knew they came from that way. for if they were lost he would be liable. unless they found their own way out without his letting down fence.

Poss.n is the foundation of this action. in contemplation of law ownership draws the poss.n if anyone else was in poss.n claiming title it is a diff.t thing. The rule is diff.t as to real prop.t in Eng. where writ must be rel.d or actual poss.n taken. But in law. the rule is the same as to real & personal prop.t

Suppose B hires A oxen. & while in B's poss.n C commits trespass upon them. there is no question but B the special prop.t man can recover the whole damage that A could viz. the whole value of the oxen & besides that his special damage. & after that A can bring no act.n ag.t C. B can recover because there are cases in which B is liable in such cases. & as between C & first he can recover of him the value of the oxen & then B may sue C & recover his special damages. If it could be ascertained absolutely that bailee would not be liable there would be no room for his action ag.t the

1 Wils. 55

Tho entering upon the land to [illegible] time is trespass. 2 Bob. Rep.

trespass.— If A brings his action ag.st B. he waives his action ag.st the bailee.

A man intruding possn without claim of title of any kind, when turned, will not support trespass. If however he had possn so long as to furnish evidence that the owner had discontinued him to keep possn he can maintain trespass.

An offr is liable for taking property by mistake as much as if he did it knowingly. Now the Shff is not obliged to be sure he is in doubt as to the ownership of the property untill the Plff directs him to. if then the Plff directs a stranger goods to be taken he is liable even to the Shff. this liability is not founded on a criminal act. there was no criminal intent.

Suppose one should forge a warrant to arrest a man under a fictitious name to imprison the man, he did no wrong and is in trespass. A subpoena a promise of indemnity may implied in the request to imprison & the offr or forger is liable even to the tavernkeeper who had no criminal intention.

Killing beasts from natural is not trespass unless they have this animum revertendi. Lyttleton & wise men are ancients that it would be trespass to kill them before they were able to get away.

Suppose goods delivered to one to be delivered back. then a Shff delivers goods to B. after he

"i.e when Pff cannot prove it.

had attached them as A's at the suit of B. they said it was the goods belonged to A. & he came & claimed them of C. he is bound to keep them & restitution to shift he if prop^y. is claimed while one goes a journey. or a horse to a tavern keeper. thus if the bailee chooses to run the risk being satisfied that the person claiming is the owner he may if he chooses deliver them over to him.

Trover.—

Trover is an act. much used. it proceeds upon the ground that the property was formal but it is now used in all cases in which property is taken without reference to manner of taking.—

The first case is where Pl^ff. came wrongfully by the goods here it is concurrent with trespass & the same evidence supports both actions.

2^d class of cases is where Pl^ff. came lawfully into poss^n but converted an act of ownership which he had no right to exercise. trespass does not lie.

3^d class is where the flagrant act of ownership is not apparent. but it does not know what Def^t did with the article. here demand is necessary & refusal to deliver is evidence of conversion. in the former cases there was no evidence of demand. In this 3^d case demand & refusal is not always decisive evidence of conversion. there must one case prevail in watch. & the owner does not exhibit evidence

Portion, set in plus convexe

of ownership to the satisfaction of finder. So if the prop^y. cannot be given up without great damage when rafts drifted upon valuable land in Middletown. for no proof of intention to convert. These facts would justify the holder in not delivering the goods

This action is confined solely to pers^l. prop^y. so that corn standing cannot be trovered. but if gathered it might be. - Trespass will lie. So if one takes apples from a tree it is only trespass. but if the apples lay on the ground it is felony to take them. So cutting & carrying off trees is trespass but if the tree were already cut to take them would be felony.

Pl^ff must state that he had prop^y. & poss^n. & that the Def^t. came in poss^n. by finding which means & includes any manner of getting poss^n. & then the conversion must appear. Demand & refusal need not appear upon the decl^n. for that is only evidence of conversion & it is not always conclusive evidence.

An actual poss^n. is not necessary to the avert. of it is not indispensable. if prop^y. is proved it is enough for it proves actual or implied poss^n.

The effect of judg^t. is to vest the property in Def^t. & the damages are a satisfact^n. to Pl^ff: so if two trover an article. a judg^t. ag^t. one vests the prop^y. in him.

But if horse or other trovered article is returned before act^n. brot^. the

propt is not vested in Deft. the return goes in mitigation of damages. Bull. N. P. Esp. D. 5 Bac.

If propt were bailed the rule is the same as laid down under trespass. The bailee is not allowed to sue for the trover because of the certainty of his liability to bailor but because of the nature of the bailment which is such that he may be subjected.

If A bails one to B. & A comes & takes them away. I do not know why A in this case is not a trespasser. A lessor may be a trespasser. the law is however that neither trespass nor trover will lie agst. bailor.

Suppose B by fraud obtains posn. of A's propt. & is a bona fide purchr. — now if B stole it there is no doubt but A might sue C. but if A were defrauded he could not recover of C. for he was suffd. himself to be gulled. the maxim of qui prior est in tempore, potior est in jure applies only when the case is equal.

Collateral articles if stolen as horses &c will not pass by sale if they have been stolen but money if stolen will pass. because it is a currency & this is the only reason. if otherwise commerce would be at a stand. an action then will not lie for money unless indeed it could be identified. Rex vs Miller. in Burr. Bank bills. negociable notes. specie &c stand upon the same footing.

In all torts judgt. is a complete satisfaction, altho' nothing is taken out. In contracts on the other hand. if three or four are liable you may get judgt. until you get satisfaction — If it were so in torts litigation would be encouraged.

It is gen'ly laid down in books that there can be no other plea made in trover except rel. & and genl. issue. This is not true in practice & I see not why other pleas might not be made. Under genl. issue any thing may be proved that destroys the right of action.

There are cases in which the courts have allowed articles to be brot. into court. as pictures. jewels &c.

If property is owned jointly one owner cannot bring trover agt. the other. there is no conversion each has a right to him. There is an exception if one tent. in common has destroyed in which case trespass or trover may be brot.

We have stat. enabling one tent. in common to bring act. agt. the other. whether the propy. is real or persl.

If an injury is done to partnership property if one party sues the deft. cannot take advantage of the nonjoinder under the genl. issue, he must plead it in abatement. Pine & Smith 5 Burr. And it seems to me that nonjoinder might not to abate the writ, because it is no damage to deft. the judgt. will be a bar to a subsqt. action for the same thing. as when the same evidence is required.

If one draws off 10 Gals wine & takes it away leaving the rest. we should not have of trover for the whole pipe but if after drawing the 10 Gals. fills it up with water. the whole pipe is recovered. Now Lebourd suppose that trover lay for the 10 Gals. & trespass for the remainder. But it seems settled that such an alteration in the property is conversion.

It was determined that if property were taken which belonged to feme sole & converted after marriage. the husband may join the wife. The transfer took place before the conversion, the true reason is says judge R. that when the wifes propy. is the meritorious cause of action the husb. may join his wife if he pleases.

Possn. is prima facie evidence of propy. & may be rebutted.—

The writ charges the said with trespass.—

Replevin –

A replevin may be an adversary suit. or it may be only an act to recover back your propy. which has been attached or distrained by substituting a bondsman. Distraining was a terrible instrument in the hands of Landlords to recover rent. We have no such power in this country except perhaps in large towns where the landlord has a lien upon the goods & is to be paid before other credrs. the object of it is that distressed persons may find shelter.

The process is to take the cattle (or other articles) with a warrant & keeps them until the rent due is pd. Here the tenant gets a bond man to answer the propy. upon the writ of replevin in money or to return the cattle.

The 2d kind is when the cattle are taken & impounded being taken damage feasant. Bond is given to answer all damages & the owner recovers his cattle. If the owner says there has been no damage done &c. the cattle being unlawfully impounded. Replevin becomes an action of trespass vi et armis.

By C. L. all propy. upon tent. estate was pledged for the rent. not so but that he could sell it but it was a pledge as long as it remained. – the Landlord did not sue for cont. propy. but went with a warrant to distrain. to prevent oppression an statute stat. allowing the tent. to replevin. this writ directs the Shff

to take the cattle & redeliver them to the tent. this writ is precisely like a writ for trespass. or bondsman binding himself to answer the writ or return the cattle. how this writ is tried to claim for rent. if rent is due judgt is rendered for sd Lord (the Defts) agst the Pltff in replevin the tenant. If no rent is due, judgt goes for Pltff in replevin precisely as in case of trespass. So if the cattle were impounded if the fence was good. or cattle did not get in Pltff in replevin recovers as in trespass. The writ charges Deft with having taken the cattle with force & arms and impounding them. However the double purpose of remedying diff- -iculty like Hudibras sword. to dig parsnips. & run a man thro gentlely.—

2d case when this writ is used is common throughout the U.S. whoever finds cattle in his lots. may either sue in trespass or impound & when impounded the cattle are considered in the custody of the law. then the cattle are released by compromise. or an replevin. when Pltff enters bond & summons the distrainer to appear & answer to the trespass. If found agst. cattle owner judgt. & extn. goes agst. him which if not paid, a suit on the bond recovers it.

There are certain creatures not commonable & others that are by C. L. Commonable creatures are neat cattle. sheep, if these get into a lot when running in the street & where the fence was good, they are liable to be impounded, But horses & hogs are not commonable. no right to be in the highway, & if they get in. they are liable whether a stick of fence or not.

We have bye laws allowing hogs to be in highway if yoked & rung. By C.L. there was an offr. appointed to take them up if found in highway & all the privilege allowed is that they shall not be arrested. & if they get out of highway over a fence ever so bad the owner is liable. so decided in Conn. supr. 6th.

As to land not joining highway it depends upon this. whose fence did the cattle get over. C.L. does not ascertain the quality of fences. The height & quality of fence is to be determined by the jury if no express stat.-

There is no law relating to geese & turkies the way is commonly to give notice & if not removed. kill them. that is they cannot be impounded. - An action lies for the trespass they do. but not this summary method. I imagine the killer would not be liable if he sent them home.

Impounding is a temporary suspension of other remedies. if the cattle escape the poundkeeper is liable. (the law is like that of Gaoler & Gaol.) or the party may distrain again.-

This suspension is of great use where propy is allowed to be attached for debts.

Quaere vexata. A attaches for $1000. & gets only $500 worth property & B gives bond. & when judgt is recovered for $1000 he delivers up the property to the amt of $500. On a bail bond altho the bond is expressly to be forfeited if the defdt. does not appear yet if he is delivered up to Ex.n the bond is answered. so I should think if $500 worth of propt. are delivered up the bondsman should be discharged.-

for the parties are in the same situation as after attachment the object of the law is attained. for Pltff is placed exactly as he placed himself.

Trespass on the case.-

This action lies in three classes of cases.

1st For wrongs not accompanied with force. 2d for consequential injuries occasioned by acts accompanied with force 3 for injuries arising from culpable omissions.

The 1st wrongs not accompanied with force were considered when we considd. slander. malicious prosecution, trover &c. which are actions on the case. in trover the force is waived.

As to 2d Kind we have an example in ones beating his servant. the servt. has trespass vi et armis agst. the beater. the master has case per quod. Esp D. 598. 3 Bl. 153. Ld Ray 1399. 2 T. Rep. 167

3d Class is when one is bound to do a certain thing & does not do it. as a justice is bound to sign a writ enclosd in a discontinuary case so if a clerk of town refuses to record a deed. or in case one is bound to keep a ditch open. case lies in these cases.

This action was instituted by Westr. 2d. It has been said that an acn. for escape lay at C.L. but this is not

nothing of it. I presume it was not known. In case juries give discretionary damages.

Wherever there was a remedy by case & law & no other remedy was given by Stat the rule of damages must be the same under the C.L. & Stat. Now if the remedy existed before the Stat 13 Edw. 1 the rule of damages is diff. from it would otherwise be, provided the stat did not ascertain the damages.

All the difficulty is hearing what is immediate & what consequential. This is explained in the 13th case. Am tot where a mad ox. the court held trespass vi. lies. they held the man to use the mild bull as an instrument. 2 Will. 174, Stra 638. Esp. Dig. 698.

A man rode a horse into Chesterton's corn field & the horse ran away & did damage. he was held liable in case. Com. Dig. 208

1 Vent. 295. 2 Lev. 92.

When the person is literally the agent it matters not whether the will concurs or not if done with force. ie to arrest him. If commanded by a master to do a wrongful act but if the servt were about his master's business & does an injury agst his master will case lie.

J. Patteson says that if D throws a ball which by bounding & rebounding breaks Nokes's window D is liable. but a rational agent carrying it would take away D's liability.

If a master order his servt to do some act he does it figures a man the master is liable in trespass. but if we order from the

1 East 106
6 TR 125
2 H. B. 442

Comp. 406
2 Bl. R. 832
Esp. D. 603.
2 T. R. 154

8 T. Rep. 188

master would in some case be liable in others not. As the old law stood. If a servt was about his masters business or driving his carriage & dog ran injury, wilfully the master is liable. but if the servt left his masters business to do a trespass. the master was not liable. 1 Salk 441. 5 T R 648 Bur. 562

But in the case in East it is held that a master is not liable for the wilful torts of his servts. The court did not mean to impeach the old principle. they considered a wilful tort, not maliciously done according masters orders, to be an advancement of masters business. But I see no room to distinguish this case from that of Sheffs & Dispr Sheffs which is well decided, the abandonment is as complete in one case as the other. See this question discussed in Rivers. Dom. Rel. & Gould Dom. Rel. "Mas & Servt."

I take it the old law is established in this country that case lies agst the master for the wilful torts of the servt. if the act is agst the servt trespass is the remedy. 1 T R 279. Stra 1083. Bur 2093

So if an injury is done by the dog case is this action. it is said that if the owner is knowing that the dog is wont to bite his sps. his that only lies. however when the master sets on the dog.

There are several diffr chapters of cases in which case lies. It is the proper remedy where damage is occasioned by a crim-

inal omission of some act imposed by law. (not that imposed by contract) as if one finds any thing & does not take ordinary care of it. so if an officer neglects his duty as by not serving writ. Ld. Ray. 917. (contra [illegible] law) 1 Com. Dig. 206. 1 Roll. 93. 1 Bac. 366. 1 Sal. 328 1 Doug. 42.

It is almost universal that where one undertakes to do an act professionally he is liable for any neglect in case. but if not of his profession. he is not liable except on the special agst. there is no remedy if not in the profession & this is founded in policy. Ld. Ray. 214. 2 Wils. 359. Esp. Dig 601 3 Bl. 122. 166. 1 Com. Dig. 165

It has been questioned whether this action lay agst. any one who injured the health of another. by the acts of another in his own business. As of wine. if the seller did not know it to have been adulterated there is no criminal liability. tho' he is liable on the warranty implied in the sale. as to the warranty the rule is no where laid down except in Blackstone. the maxim of caveat emptor is in some cases too much strained. I should say that where one sells moonshine an action lies. there must be a qu. pro quo. tho there may be no wrong. no fraud.

As to Trs. on case. for injuries done by cattle if the creature never did wrong before the master would not be liable but having once bitten he is liable for subsequent damages. as where the dog bit when [illegible] one. having bitten one

Com. 208
4 Co. 18
1 Roll. 4

3 Bl. 165
2 Bac. 245
1 Show. 175
6 Co. Eq. 17. 625
2 T. Rep. 126
2 Sa. 879
2 Bl. 1048

6 Co Lebt 141. 196
2 Will. 313.
2 Mod. 31
8 Co. 126

If Defts. were actually committed to the walls on mesne process that will
is the reason as if committed on final process. Esp. 610. 4 T.R. 789

before in the same circumstances. But if a beast is in its nature feræ naturæ, the owner is liable in the first instance. Ld Ray. 606. 6 Co. Ent. 254. scienter may be proved under genl. issue.

Tres. actn. lies for disturbing right of way or rights of water. 9 Co. 112. 1 Vent. 275. 2 Vent. 186. Stra. 5. 638.

This is the actn. brot. agst. Shff for an escape whether on mesne or final process. if on mesne process it must be case. if on final, debt lies for the sum is in that case ascertained. It has been said that case would lie for escape before st. 2 West. but I do not believe it. the fact was no offr. was made liable at first at 1 Rich. 1

An erroneous judgt. is good foundn. to subject Shff. because a judgt. cannot be attacked in this collateral manner. it is good until reversed the Shff could not impeach the judgt.

When a person is rescued on mesne process the credr. can maintain the action agst. offr. unless he neglected his duty. because he is not supposed then to have posse comitatus. Shff is a trespass. but his liability does not increase the damages

But in final process the offr. is liable & he may recover for the force & insult and also for the amount of the debt. the Shff is always suppd. able to keep a prisoner arrested on final process. the credr. may sue the rescuers, if he does he waives his right of actn. agst. Shff

Exp. says that for escape on mesne process, the question of Shff's liability depends on the fact whether Pltf was thereby delayed in his suit. –

Same confusion here where the body is determined not good satisfaction after the rescue.

both cannot recover the whole [illegible] [illegible] – if a man is obliged to pay twice he may recover it back.

If a rescuer mesne process cred.r may sue the rescuer, but not if the Shff inexcusable had been guilty of breach of duty, i.e. if no collusion. & he may return a rescue & this is good evidence. —

If orig.l

Plff. sues rescuers the jury may give such damages as they please the rescuers may counter-evict & prove that the person rescued is a man of property &c. Attny will be subjected for servant moneys which will not lessen the debt. the whole of that may be recovered of the debtor or Shff. But if no such proof were had & the body could not be had again the jury will give damages to the am.t of the debt in satisfaction of it. for if the whole sum is given it goes in satisfaction of the debt. but if any less sum is recovered it is damages for delaying the plffs satisfaction. The Plff then must show that debtor is insolvent or out of reach of process.

Suppose Shff sues, his action is trespass vi & armis. the cred.r can recover the whole sum. & the cred.r is not obliged to sue the Shff. — No man can have but one satisfaction. Shff is not compelled to wait until the cred.r sue him the point being settled that mere liability gives a right of action in torts. Cro. Eliz. 53. Esp. Dig. 610.13.15

Esp. says that if both Shff & cred.r bring act.n ag.t rescuers the action of Shff is suspended because the Plff has waived his right ag.t the Shff. but this I doubt because merely bringing action does not discharge the Shff. Plff must be satisfied.

Exp. 613

The Shff may bg his act of escape because he is liable as if it were on mesne process but the rule of damages would be diff.t this action is case ag.t the rescuers it is trespass.

In case of vol.y escape the shff. cant. sue the escapee it is a rule of policy. he cannot pursue for he can after negligent escape when a retaking will secure him if he does it before action brot.

Suppose the under shff suffers vol.y escape can the shff sue the escapee? he is clearly liable as well as escap.r to the cred.r by the former cases it was said that he could not but modern cases say that he may sue either the under shff or escaper. Co. Eliz. 399.

By C.L. the really antient stat. there were two kinds of escapes. vol.y negligent vol.y escape is by the consent or neglect of shff. Negligent escapes are all other ~~others~~ except those occasioned by the act of God or of public enemies. The shff is liable in both cases the difference is that if shff retakes before act.n brot. he is not liable. but not so if vol.y. If shff should retake after vol.y escape he is liable for false imprisonment. What is vol. escape? prisoner escaped by prying out a stone. was retaken & put in same place & not repairing the prison escaped held to be voluntary. A bond taken to keep pris.r within the yard is held a good bond. so the escape from it is not vol.y if prisoner

Eq. Dr. 617
1 Wis. 325
1 Salk 86
4 Burr

Nutter 125
3 Wis. 377

runs over the Shff must shut him up or the next esca-
cape is void. If pris. runs out & back agn. before
act. bro. the Shff is not liable so that on the bond
only nominal damages are recovered. 2 T. R. 126. ~~
strict construction by broken

Cred. bribed the man to escape. act. was bro. soon after the
prisoner returned. Cred. recovered nothing by the suit.
Shff sued on the bond but recovered only nominal
damages.

This act. is the professor to be bro. agt. agents
Atty.'s &c. For mere ignorance or want of skill the
lawyer is not liable but for a breach of trust or neg-
ligence he would be. want of skill gen. subjects, but as
judges disagree lawyers must be expected to mistake
The Atty may be liable to his clients adversary as
for fraud &c by which he brot. him ~~into~~ difficulty
& that altho it was all for benefit of his client & if he
has pd it over to his client he will not be able to re-
cover it back. being tort feasor.

There is a diffy. in sustaining this action
agt. Physicians. 3 Wils held liable for want of an ex-
periment.

1 Lev. 328 Justices & magistrates are liable for neglect
of duty. or refusing to sign ~~& sign~~ a writ in a case not dis-
cretionary. refusg to take bail or an acknowledgment.
The ~~act~~ must be ministerial act. for if judicial the
act. does not lie, if the offr. has jurisdiction. power
is requisite in some ministerial acts. there may be a mistake

Held Esp. 603. Hutt. 120 Shff not liable for taking insuff.t bail as the act was judicial. the Shff could not reject any bail off. on the ground of insufficiency thus serving his real practice

3 Salk. 303. 44
1 T Rep. 651
Esp D. 623

8 Co. 32
B. N. P. 373
1 Dy. 66

leaving horse constitutes a guest. & the Innkeeper may keep the innkeepers goods as a pledge for his bill. 1 Salk 388.

A Sheff must judge of the sufficiency of the bail offered at his perill. The coron & jury must judge whether offrs or not tho they will not be sworn. 1 Hawk P.C. 90.

This act. lies for breach of trust in bailee. as delicto as well as ex contractu. 4 Co. 83. 1 Salk. 26. Esp. D. 618. Where a cargo is lost by negligence of master &c. you may sue any one or all of the owners. for it is a tort. it was once held to be a contract but decided to be a tort

When a offr employs others under him. he is liable for their acts. There is an exception in the case of the post master. there is no contract between the sender & the post master. if he neglect his legal duty he is liable Salk 17. Comb. 754 Esp. 624. 3 Wils. 443.

This is the act. brot agt Innkeeper when prop[t] is lost at an Inn. The innkeeper is secured by the act of Geo. for public convenience he is however liable for loss by thieves & robbers & in cases where common bailees would not be. this is to prevent collusion between Innkeeper & robbers. But if goods are deposited & the guest does not stay with them the Innkeeper is liable only as another man would be: Lowe 135.

The person entitled to this remedy must be a guest. transient. traveller not a neighbour who calls to stay all night. nor a boarder for a length of time. (he must pay as traveller does) Mor. 78. 8 Co. 3. 9. 5 T. Rep. 273. not a friend staying there

C. Eac 188

Cro. El. 188
Cop C 28

Cw. E. 327

Bull N.P. 70
1 Dy. 158
9 Co. 87.
3 Wh 166.
2 Show. 327

For innkeeper must also receive some profit from the guest or his goods as a horse. for this he would be liable. but not for a trunk receiving no profit for keeping it. 1 Salk 388. tho he might be subjected as bailee. as to the horse receiving other goods the are the dis agree. The guest is a pledge for his keeping. the horse for his keeping. & I should say the horse for both as the person of the guest is.

Suppose one lodges his goods & goes off the goods are lost. the liability depends upon the fact whether the person came there as a guest. It is not every temporary absence that destroys Innk[p]rs liability. —

Insanity or sickness is no excuse for an innkeeper. if he receives guests. He is not liable for injuries to the person or battery 8 Co. 33

Like a gasoline car[n] car[r] he is liable in all events and like them to be has a lien upon the person &c. He cannot refuse any guest if the room is unoccupied even tho his house is full. (that his family is sick. whom he must take care if any) The Innk[r] may take the person without a warrant & confine him. but I conceive that this could not be done if there were a house because the object will be accomplished without restraining pers[n] liberty. — Innk[r] may get his friends to assist in securing him.

1 Roll. 99
Yelv. 20
Cro. El.
1 Salk. 211

2 Ld Ray. 118.

iv. anne
3 Bl. 155

This act is the remedy for frauds or deceits in the sale of prop.

In 1st place for false warranty. there is no exception of case founded in ab. we subjects the party may sue on the contract. But if the party knew it false this act lies. if seller did not know it does not lie. for there is no fraud to found it upon. 1 Com. 166.

2d False affirmation. if known to be false when made the action lies. But act of fraud will not lie if the party did not know it to be false. There are exceptions however, in case that, ordinary man would not be deceived. If the defect requires close examination there is no excuse. Scienter is material. 3 Bl. 165. If purchaser incapacitated to discover the defect then would be fraud. -

A man will be liable now when he would not formerly have been.

A mere matter of opinion will not amt. to false affirmation. as that my horse is worth $200. Or you can get $200 rent &c. But if the statement were matter of fact it may found fraud. Thus I.S. yesterday offered me $150 for this horse or $250 rent last year. This may be imputation of fraud. So if one says that wind & water don't hurt him I used him all summer & it did not impair his strength &c. it would be fraud.

Rule is that what a man is bound in good conscience to disclose he must not conceal Exp 632

Decided by Roman courts to be a void contract.—

Both parties unignorant. Const. court sets it aside on ground of fraud. But U. S. Ct. sets it aside on ground of time quia non brij in courting

Time once was when concealment would not subject: but now a man to be subjected for concealing defects. Our neighbour bot a horse that he thot he knew all about had often tried to buy him. & did finally without any thing being said as to faults. it was proved that seller knew of a secret disease of which the horse died. the court held it to be a fraudulent concealment.

Our unsound articles is sold for a sound price. I think it going too far to imply a warranty where the seller was guilty of no fraud. — no scienter so no action for fraud. It has been so that the buyer must bear it. But Eng. say that such a bargain is void. 6th says that if the thing which is the sine qua non of the contract, the contract ought to be set aside. the minds of the parties do not meet. as the sale of the girl for a boy & both seller & buyer beingignorant of the facts, as the sale of the land for the purpose of getting possn of a salt spring. But if the point about which the parties were disappointed is mere incidental or a pleasant thing the bargain will stand.

In all this case case is the remedy but not founded in fraud. & recovery be of the damages suffered.

In case occurred in Cant. of sale of Virginia land set out & described as bottom land. but which proved mountainous

Gro. Jac 474
1 Show. 63.65
1 Salk 210
1 Fonb. 109.37
6 arth 90
L. Ray. 590

Parliament contended that the party could not recover unless after they had determined his right, but the court answered

In all cases there is, in sales of pers. prop., an implied warranty of title. It is said he would not be liable unless the seller knew title to be bad: if so there could be no implied warranty.

This action for damages for making a false affirmation (3 T.R. 51) concerning property in which the affirmer has not the least interest. So concerning the erection of another Bartholomew & Clark Dags Rep

So for affirming the name of a notion, to get credit, or for any other trick of this kind 1 Com. 167. Esp 633. Com. Dig. 90 Bull. N.P. 32. 1 Lev 247

So cheating a person by false cards is actionable. if playing is not agst law. Com. Dig. 90.

(((tho you may sue for damages affirming the contract, you may also sue in trespass disaffirming the contract tho if A takes B's horse, you can sue in trespass or trover or if the horse is sold in agst to So if counterfeit money is put for a horse, you may take the horse when you find it, or sue in case for the damages if he knew of the money being counterfeit.

This is the action when an individual has been injured by the infraction of a public right. in this case there must be special damage must be alleged. As where an inspector of elections should refuse to receive a vote. the voter or the candidate may have an action. even disputed but it is now settled. 5 Co. 72. 1 Salk. 19. 3 Salk. 17 Esp. D. 647. 5 T.R. 1 Salk 502. 6 Mod 45. 49. 1 Wils. 122. K.B. 862

4 Burr. 303

An obstruction by a stranger to a precept lays foundation of an action as to shoot up goods. Burr the officer Geo E. 908 56. 98. 93 break down.

By 7 & 8 Wm. 4 & 1 Vict. it is enacted that when a false return is made by one who should have been returned shall recover double damages & costs.

Case will lie agst an officer of Corporation inferior court for making a false return to a mandamus

Case lies for violating an authors right. the question was whether any author has any right at C.L. When had published their works before published them. it was held to be an injury but supposed to be without remedy. And authors commonly applied to Ch. to grant injunctions to those who attempted to republish. A great question was whether there was any C.L. remedy & if there was, was it taken away by the Stat. granting exclusive privilege for 14 yrs. The 12 Judges decided there was a C.L. remedy but that it was cut off by stat. 7 to 8. I conceive there was no C.L. remedy. but if there were I conceive the legislature could not take it away.

It has been made a great question whether one doing it is a violation of this right (2 Ld Ray. 739.) It is decided (Cro. 441) that if it appear to the court from the work it is a violation. Quere as to a translation?

There is no power for discharging in this action except verdict thereon & perhaps demurrer. you state the case at large.

1 Salk. 229

1 Vern. 176
3 Bac. 560
Bun. 1267
4 Mad. 281-2.

Of Mandamus. The object in this writ is a specific remedy very like an application to Ld. Mt. but it avoids his when a bill in Eq. does.

So is ejectment from B. R. how from the supreme court. the object of it is to invest the party with some right which is taken from him or withheld. It relates to some public act. as recording deed. If you make a bargain with a man to deliver you 100 bush. wheat. you must go to a court of law Eq. will not interfere for big pay. It lies when an inferior court will not try a cause. So when one thinks he is legally chosen to some office in a corporation. this must be tried & is done by a mandamus. So an inferior court may throw one over the bar & a superior court may by a mandamus restore him to practice.

This does not issue to compel performance in one individual capacity.

This writ is demandable of common right. it is not discretionary with the court if proper evidence is adduced. it must be issued and without bond. So if a corpn. to refuse to perform a duty required of them by which an individual is injured.

You can sue a town for it is a corpn in law. but a county is not. so if a Co. owed you. you recover by a

mandamus. which orders paym.t if he returns no money one other issues to all the justices ordering them to lay a tax.

Any off.r who holds an office concerning the public. a mandamus issues. As if a Ct. of probate should refuse to appt. J.S. Adm.r Cartht. 457. 1 T. Rep. 431. 11 Co. 94. 1 T. Rep. 422 but not unless specific relief is wanted.

A vol.y ass.n is not a corporation. as for a library. 2 Salk. 428. 175. 1 Wils 11. 4 T. Rep. 125. Doug. 506

Of proceeding. The clerk would not record J.S.'s deed damages might be recov.d in Ct. of law but that would not give title. Ch.y would not interfere because there was no contract.

By C.L. It goes with an ex parte complaint accompanied with affidavit. a summons then issues to the clerk to shew cause. if he appears he makes a return which is not suff.t a peremptory mandamus issues. if the clerk returned that no deed was ever delivered to him. this by C.L. was conclusive. the party then sues if he pleases at law. if he recovers. judg.t for damages goes ag.t the clerk & a peremptory mandamus goes with it.

There is a stat. of ann & a similar one in some states allowing the party to traverse the return & a peremptory mandamus may then issue as the case may be.

1 Lal. 639
1 Stra. 56
1 Vent. 111
3 Bar. 225

11 Co. 49
Carth. 179

Stra. 808
1 Lutw. 430

If the party makes no return at all nor appears a peremptory mandamus issues & the offr is imprisoned for contempt.

Appn for mandamus may be made to the court if in session or to one of the judges if not. with affidavit which is always in writing. — A return is always made on the

If first mandamus issues against several only part are engaged in the following, part only are punished & if part only return to the writ of Mand. issues to them only. 3 Bac 547. If the party brings an action for false return, he may use only one or two or all letters will decide the character of the return.

If a peremptory mandamus issue & not obeyed the party is committed on procss for contempt. As to the power of the court in this case the court may keep the party in jail until he does it. if it is for life. When the commitment is for contempt in absence or disturbance of court the imprisonment ends with the session of the court. procss only issues against the majority i.e. the party but the minority. — Co. Litt. 168

Hard. 475
2 D. Ray. 1408
Barnard. 428

If prohibn. issues the agst. Pltf is obliged to pay costs of all proceedings & nominal damages. Cro. Car. 559
4 Bac. 262
1 Vent. 348
3 Lev. 360

In an attachment upon prohibn. Pltf shall recover damages & costs agst. the party for proceeding after the writ of prohibn.
4 Bac. 262

Prohibition. may be issued from any of the sup^r courts in West. Hall. by any sup^r ct. It is meant to prevent inferior cts from proceedings contrary to law or in cases where they have no jurisd^n. 3 Bl. 112. 4 Bac. 240. 12 Co. 6. 4 Com. 487. 1 Hen. Bl. 100.

It issues not only ag^t the c^t but ag^t the Pl^ff in the orig^l action also. The mode of obtaining it is much the same as obtaining mandamus. It may appear from the face of the proceedings that the ct. below has no jurisd^n. then there can be no difficulty in issuing a peremptory prohibit. at once. ~~But it may~~ depend on extraneous facts. here affidavits become necessary. a rule issues to shew cause why prohibit. sh^d. not issue. the ct. there & party come forward to shew cause. if it is suff^t there is an end of it. 1 P.W. 476. 1 Salk 549. 2^d Ray. 211. Hob. 57. If not suff^t a peremp. prohibit. issues. 2^d Ray. 220. If disobeyed then attachm^t issues. & the inferior ct. & Pl^ff are committed.

It may be questioned whether the court have cognizance. the Pl^ff then institutes a fictitious suit in which he sues one for not obeying the prohibition. the question is then formed. the party had procured the prohibit. & the court below suspended the proceedings. if the complain succeeds a peremp. prohibit. issues. If he does not succeed an order to proceed issues. 3 Bl. 114. 4 Com. 517. 470. or writ of consultation

commencing of same suit afterwards before same court is contempt in Pl^ff & in court if the court proceeds.

1 Bac.

Cro Jac. 29
Cro Eliz. 443
Wm Jones 378

1 Roll. 306
1 Sid. 43

Audita Querela. This remedy is wanted when one is pursued with ex'n. & has no day in court altho altho he has a good defence. As when it has been paid up. &c. a released &c. The process is rare. the party applies to some judge & the hearing is ex parte. the signing the writ is discretionary with him. If granted a bond is taken from a responsible person to answer all costs damages &c. The writ contains a supersedeas of all proceedings & voids all former process. discharging the body goods &c. & all remedy after that is on the bond. If Deft. is not [illegible] in the writ which always follows. he recovers damages & a discharge. If it goes ag't him the remedy is on the bond & no defence is good to the writ unless pay. & a court renders judg't immediately. Bonds in no case except they release & discharge every thing. the bond on writ of error does not release from jail.

This remedy is frequent use when the party is deprived of the use of his defence by the misconduct of the Pl'ff in ag't action or by neglecting to withdraw suit according to promise.

The C. J. of C. B. issues this writ in Eng & by the S. J. of C. P. in Conn. I presume a judge of any of the courts might grant it where statute did not interfere. the course in Eng is singular & not explained.

Quo Warranto. This is when some person claims & exercises some franchise or right which it is contended he has no such right to exercise. As of alderman, the corpn. or pt. of them say he was chosen, but the attorney & another person say he is not. The question is tried upon this writ.

So when one holds a ferry or a mill which the complainant says he ought not to. Yelv. 191. 2 Roll. 205. Stra. 116 299. Cro. Car. 527. 544. 561. D.Ray 1559.

If agt. body corporate. it goes agt. all by corp. name, or admitting to the [illegible] 2 Bur 869 / 2 Roll. 115 / the body. & judgt. is rendered in behalf of the public. 1 Salk. 174. 1 Show 284.

Habeas Corpus. There are two kinds of this writ applicable to us at last, ad testificandum & ad subjiciendum. The first is directed to Shff bring up a prisoner to testify in a certain case. the party may demand it. It was once a question whether the Shff could be subjected if the prisoner should escape without default. it was decided by the judges that no law to be found that excused Shff. & then a stat was made excusing him in time of war which is sd to be in affirmance.

The second is, a hab. corp. ad subjiciendum. this is claimed to be coextensive with the existence of Eng nation. it was regulated by stat Ch. 2. Now I conceive that by the opinion of eminent men that stat has not added anything to C L. except perhaps in form 3 Bl. 131. 6 & it is so consid. in America. so we may not it to know of our law

The object of it is to call the body before the ct to know the cause of detainer. complaining of illegality of proceeding, to let to bail or relieve. It is directed to the imprisoner & it reaches all species of restraint of locomotion.—

It is grantable in term time or vacation. by the judges of the Sup. Ct. It is a writ of right. but does not extend to restraint on final process. 2 Co. Inst. 52

In the stat of Charles there is a provision allowing app. for the writ in vacat time. The business of the court is to discharge, bail or remand 2 Hale P. C. 143. to the same or a diff. prison

There are persons to whom the writ is not grantable, as persons of war. not being subjects.

1 Lat. 351
2 Inst 55

1 Cid. 78
5 Mad 23

Hor. 794

It has been questioned whether subjects of a neutral power is entitled to this writ. 2 Bur. 765. they being neither subjects nor enemies.

If the object is to bring up one charged with a crime, the prisoner ... the ct. is in session must be in vinity. The writ is signed by clk. in ct. time. is directed to the off. for him to bring up prisr. with cause of detention. the shff must return the name of the person committing 2 Lev. 129 an alias & pluries issues sometimes. & if not obeyed it is contempt. Bunb. 31.

In Conn. a hab. corp. could not issue to bring a prisr. from at J. because a Conn. court could not punish for disobedience.

If a false return were made to a hab. corp. the offr. is doubtless ... on that the imprisonment was an extn. the court would receive it if suffd. & leave the party to his remedy. 2 Inst. 55. Vaughan Rep. 156.

There may have been cause of imprisonment but circumstances may evade it. not by traversing the return, but upon bail or where the bail is offered after he was shut up. the question having been agitated as to rights of bail in such cases it is now settled that bail offd. after imprisonment must be accepted. & the court does not send back to offr. to bail the ct. bails on the spot.

If one is confined on sentence after conviction the writ lies if it is claimed the court that tried had no jurisdn.

Criminal Law

There are certain principles in Criminal Laws that are universal in all countries — particularly in relation to capital offences — The C.L. has been adopted through all the States

Crime is said to be an act in violation of some public law which forbids it. or omitting to do some act that a public law orders to be done. —

Misdemeanor in common parlance means something less than crime. but some of the most heinous crimes are misdemeanors. —

Any offence which is not described by some technical name is a misdemeanor — as an attempt to murder — no intention is a misdemeanor unless accompanied by some overt act shewing that intention this when thus accompanied it is a misdemeanor —

So when any thing is omitted for which omission there is no statute penalty, the C.L. steps in and punishes the offender as for a misdemeanor. —

When crimes are committed there is generally an offence against an individual and this generally the public & individual both, as crimes, damages — as in affrays, riots breaches of the peace generally &c.

We find in Eng Law many crimes are committed from which an

and this goes when the ground that the private injury is merged in the public offence

injury arises to individuals & yet the individuals as such can have no reparation.

Why should not a thief be answerable to the person injured for damages — there is no reason why one should not make reparation for injuries he has committed as far as he is able. —

The reason is that in all these cases where the individuals injury is merged into public wrong. by L.L. the offender was punished with death & his property was forfeited so that there was nothing left out of which the injured person could get reparation. — But of late years these punishments have been meliorated & and particularly in the U.S. there is no attainder of blood. and tho' few of those crimes which were capital by L.L. are punished with death. — So that the reason if good originally cannot operate here. —

So too we find that in all the other offences, the offender was subject to damages at the suit of the person injured. —

In Eng. have you often hear of the benefit of clergy — this grew out of the wish of the courts of reform the penal code of L.L. — The first Clergyman were not to be punished with the full rigour of the law — & the proof of being a clerg man was the ability to read — a text or the sign of a book — no woman was admitted to the benefit of clergy. tho at that time it was extended to them —

[r] That case however is so much the better which produces reformation also. —

Crimes are divided into those that are mala in se & mala prohibita — The first are such as would be crimes in a state of nature & whether there were statutes against them or not. The others are those which are illegality consists in transgression of the statute. —

The object of punishment is not to reform but to deter others. —

Reasons for capital punishments are two. to deter by the terror of the punishments & effectually to secure society. —

The B. L. punishments are fine & the pillory &c and not generally being proportioned to the crime as stated by statute. — When a statute is newer than the B.L it does not repeal the B.L. but the prosecutor may prosecute on which he pleases. —

If the punishment is less it is a repeal of the B.L. & the prosecutor can never indict on B.L.

In the case of the States Blackburn was punished with death by statute. by B.L. the punishment was much less & now practitioners recollects and indictments for the State — it was not an offence in relation to society sufficient to warrant capital punishment. —

When an indictment is made on a statute where there is an punishment provided & B. L if any thing prevents

conviction on the stat. it is still good C.L. in indictment & the C.L punishment may be inflicted. —

Of those persons who are exempt from punishments for committing acts for which others would be punished. —

There can be no punishment for a person who does not act will — for in will consists the whole blame — where there is freeagency the actor is accountable — but if not there is no blame — altho there may be some fault in letting himself to such circumstances as prevents a free exercise of the will —

So that when one is void of understanding he is not to be punished. —

Yet there are cases in which this rule is altered — If the act was by pretty accidental it is not criminal —

So you will remember to make a man the subject of punishment there must be will & act. both vicious. —

and thus the will may be criminal in foro conscientiæ yet if there is no act there no crime. —

The Lunatic & idiot are not subjects of punishment — The law is however that if he knows enough to discern right & wrong he is criminal — but if he is entirely deprived of reason he is not criminal. —

An infant is never punished for any crime he may commit under the age of seven years — founded on a presumption of law that cannot be questioned, that they are not of judgt. enough to distinguish right from wrong — this is the age called in the civil law called *infantia*

But between the age of seven & fourteen their judgt. is to be inquired & tried and is to be determined from proof this is the doubtful period called *pueritia*. —

After fourteen years the plea of age is of no avail.

I observed to you that want of understanding does not always excuse as in the case of drunkenness — & still however the principle remains entire for it does not proceed upon the ground of the criminal having brot. this state of delirium upon himself for then many lunatics might be punished. — But the true reason is in the policy to prevent crimes being committed under false pretences — so that we must punish intoxication with death or punish the crimes committed in that state without any reference to the alleged cause. And I do not see how Justinians code answered any purpose, the maxim there being Qui delapsus in vino, culpabilis non est. — There would be no safety if it was generally adopted. —

When the act done was not intended ~~to~~ if he were in pursuit of a lawful act to is no crime — and I do not see how the distinction introduced by Alv can be supported. to wit. that when the actor is about lawful business he is not accountable; but if he was doing something unlawful he is accountable for all consequences.

The fact is there is no will in either case and certainly is not accountable if acts occur when there is no will. — This is founded in policy and seem to be an exception to the general rule and is ridiculed and I think justly by D. Kames —

When a man is ignorant of the real state of things or in attempting to drive out robbers he kills one of his own family he is not guilty, here is no union of will & deed. —

The obligation of civil subjection is always on the same as if an unjust law is obeyed; it is no crime — so if an enemy gets possession of a section of the country & obliges the inhabitants to obey them. the inhabitants are not guilty of treason for furnishing provisions &c — but if the inhabitants enter voluntarily into the enemies service they are accountable or if they continue longer in their service than they are obliged to —

But compulsion is no excuse in case of private coercion as of master & servant

Tho in some cases where the wife does not act under the coercion of the husband it is an excuse for her. tho in no other case if private coercion and in case of the command of a master is no excuse for the servant &c. see 1 Bac. Abr. Pleas &c. N. 4.

There is one exception to the general rule in case of the wife, but the
is no other — and there is no remedy against the commanders
only those commanded. here no means of knowledge, as
where an officer orders one arrest under a forged warrant
here is a remedy against the officer & the agt who may be
convicted.

So if labourers are sent
into a field they cannot know to whom the land belongs
& they are liable to be sued for trespass but have their remedy against the hirer.
With respect to the wife the law is different. — for in many cases
she is not to be punished for what she does under his coercion. —
If the husband is present & operating the presumption
seems has ceased. — & extends to all cases except cases
of treason & keeping a brothel, — for peculiar reasons,
but if the crime is malum
in se & purely so she is answerable tho by the coercion of her
husband as much as — but if it is a crime by the laws
of civilized society only she is not answerable if coerced
& the husband alone is punishable. —

There is one case in which if
the wife is not liable but what the husband is punishable — it is
not merely being in company, he must also assist and
then the acts of the wife is presumed to be by coercion
in such case.

Of stealing to satisfy hunger: this is a crime in foro
hominis from policy and the case is kept up for the
exercise of mercy. But it is no crime in foro con-
scientiae I do not believe —

Of Principal & Accessory — An unpremeditated crime can have no accessory — But there are crimes in which there can be no accessories as Treason from its enormity & the lesser crimes as trespass for the opposite reason - all intermediate crimes can have accessories —

A Principal is the person who perpetrates the act and those who stand by aiding & assisting are accessories — The only question is what is presence — If any one is in the combination watching against interruption &c is enough bodily presence is not necessary

A person can commit a crime as principal without being present as poisoning setting traps — turning out a wild beast without any particular object. here he is a principal when absent. Foster 6th Law 453. Hale Pl. 615.

If then it is necessary for the actor to be present to do the act he alone is principal who is present.

Accessories are of two kinds before & after the fact.

An accessory before the fact is one who advises commands or procures a man to commit the crime and is never present at the commission —

Sometimes he advises to do an unlawful act and something heinous follows — as if one commands another to assault C. & in doing this C is killed

But if I had been robbed the adviser would not be an accessory

it is now settled that the adviser is an accessory to every thing that takes place as a "consequence" (notable or accessory) directly flowing from the deed advised.—

Again if one advises to commit an act it is immaterial in what manner it is committed he is a an accessory before the fact. as if shooting be advised & the object is poisoned the adviser is accessory to the murder. If he were present at the time of commission he is a principal, but the adviser merely makes him only an accessory. Hale. 615.

An accessory after the fact is when a person knowing the fact conceals the criminal — helps him away. furnishes him with the means of escape &c — It is not every act of charity that constitutes one an accessory. — but it must be an act that has for its object the escape of the prisoner from the hand of justice —

He is an accessory after the fact who receives the property acquired by the commission of the crime as a receiver of stolen goods — it was not so at C.L. but by a very ancient Statute it is since made very penal Hale 618. 2 Hawk. 319.

To make a man accessory after the fact the crime must have been completed — he may be guilty of a crime but is not an accessory of that crime as if one receives or assists one who has wounded another from which death ensues — he is not accessory to the murder if the act is done before the death. Here is one exception in favour

1 Hal. 621.

On the other hand if acquitted when tried as accessory he cannot be tried again as principal. — Nat Laws. 4 Bl. 40 — this general.

of the wife who may be an accessory before but not after — But the law is not so in relation to parent & child — in case of husband & wife the presumption is compulsion — One would suppose it should extend to parent and child but as the governing principle is compulsion & not feeling it cannot.

2 Hawk. 320 — There is such a thing as a case where there can be no accessory before the fact as where the act is unpremeditated —

C. L. punishes an accessory as severely as it does a principal ~~but~~ the punishment of accessory is made less by statute —

A good reason is that no one can be tried until the principal is convicted & the guilt of the principal cannot be tried in the trial of the accessory —

If one is tried as a principal he cannot be convicted as an accessory at the same trial — the offences are distinct, the reason of his acquittal might be that he was an accessory — But if the principal is afterwards convicted this same man may be convicted as accessory —

I shall now notice particular crimes & show you the C. L. which is the foundation of all laws on this subject — the constitution of the crime is still the same — tho statutes may vary the punishment and the definition in some small degree

& I'm sure it that the probability is if the sale house is burnt the dwelling will be endangered.

Arson is defined to be at C.L. the wilful (felonious) malicious burning the house of another. 4 Bl 210.

It must be wilful. for if it was unintentional. or thro negligence it would not be arson —

It must be malicious — the legal signification of this word is that, it be with a wicked motive. & it is not necessary that the actor should have any ill will to the injured — the latin word malitia is much better than by our English — it is to be done malo animo. — Hale 615. —

The word house in the definition has occasioned much dispute — the latin term is domus — a dwelling, house — & if the house burnt by C.L. is not a dwelling; it is not arson the statute have made it so. — 1 Hawk. 155.

Out houses within the curtilage of the dwelling house are considered parts of the dwelling house & the subjects of arson by C.L. but a distinct house is not. (dr)

Some states have made it arson to burn others but I believe no statute makes it arson to burn a barn by itself unless it is filled with grain. —

The Eng. law is so doubtful that it is not arson to burn ones own house — Our statute, left out the words "of another" got rid of our uncertainty

Arso if not malicious for the act is illegal. ita &c. &c.
Contrary to the analogous case of Homicide

have decided it not to be arson to burn our own house yet by the Eng law if a neighbours house is destroyed by burning ones own it is arson — if done maliciously 1 Hawk. 166. Cro. Ch. 377. 1 Hawk. 166

Suppose according to Eng law that the lessee or lessor burns the house — the decisions has been contradictory.

I suppose it would be arson in either of them if done with malo animo — it is the lessors house & more peculiarly perhaps the dwelling house of the lessee —. Hale Crim. Law. Tit. Ars.

The least possible burning in [illegible] is sufficient to constitute arson, even tho it went out of itself if the fire was set malo animo.

If A intended to burn B's house & by mistake sets fire to C's it is still arson —

The C.L. punishment is death without benefit of clergy — In many states it is death, in other perpetual confinement. — In our state, it is confinement in newgate unless life is in danger when it is death. — as if fire is set to a house with a family in it. —

The law of N Jersey is the same as that of Con. and in one trial there for burning a barn. the criminals life depended on which way the wind blew. —

9 The principle is that there is not so much danger & terror in an attack by day as when the world is at rest.

Burglary

Burglary is the breaking & entering a mansion house in the night season with an intent to commit a felony — all these are necessary to constitute burglary — it is not necessary you will observe to actually prove the actual commission of a felony —

Felony in Eng is a crime which is punished with forfeiture of all estate & punishable at C.L. with death. — .

We then mean in our indictments by the word felony that offence which is followed in Eng by forfeiture of lands goods & chattels & the punishment of which is death.

What is meant by night season? — it is not night when a face can be distinguished by the light of the day — It may be felony tho so light from the moon that a face might be distinguished 9 Co 6. Moo 660. 1 Hawk. 160. 6 Co. Eliz. 583.

What is meant by mansion house — it is a house in which some one dwells — so by C.L. a stow or a house not inhabited is not included. —

A church is a mansion house or included in the term. 1 Hawk 162

But the house is sometimes deemed in & sometimes not

for the law is not scrupulous in favour of rogues. –

it is burglary to break them. — altho it happens at the time when there is no one there —

The law is the same respecting all buildings that are within the curtilage of the house. — but not without by 6. E.

A shop with goods in it are not within the Law by Statute for the protection of property in Lon. it has been determined that any thing built for the protection of goods is within the definition of a house — So too in Lon. the rule has been extended to wharfs, packets, stores, shop shops &c —

4 Co. 40. Kelinge 27. 52. Pasq. 42.

There must be a breaking not a mere legal breaking viz it amounts as going in, in the night. — one entry thro — door shew or window when is not breaking thro it would be trespass but if it be shut it is enough to shut lifting a latch is enough. — Kelinge 52. Hutton 20. Lev 62. 65. So crawling down chimney is breaking.

A person may be let into a house and still it be breaking, as if fraud is practised by answering a friend when asked who was there — so when the villains entered by means of a constable's procured on false suggestion to if an accomplice admitted them —

There must be an entry — thro it would in an entry if one put in his arm or a stick to get the goods. so the putting a

If one watched while another entered the watcher is deemed to have entered. — Hawkins. III.

Key in the door when nothing more or no clothes was entered save nothing so holding a Pistol put one leg within a window — So if one puts his foot in the sill of the door and is thrust frightened away — 1 Hawkins 111

It must be with an intent to commit felony it is not necessary that felony should have been actually committed. Show. 3 Geo. 381. 1 Hawk 164.

The punishment of burglary by 6 E. is death without benefit of clergy — In U.S. it is different in different states. in some states it is death for the second offence in Cons. it Newgate —

Perjury

Perjury is defined to be false swearing, wilfully in a point material in the case by a person under oath administered by lawful authority upon a cause proceeding in a court of justice

The oath must be administered by a person qualified to administer it by law. 1 Hawk. 318.

A man may be guilty of perjury when the fact he swears is true. is absolutely true if he understood it to be otherwise than he knew it was — or if he knew nothing of the fact & he swears concerning it —

It must be done wilfully a man may swear positively to fact concerning which he was mistaken this would not be false swearing 5 Mod 315. 10 Mod. 195 1 Salk 513. 1 Hawk 319. neither would it be if he was surprised

So it would be proper to swear falsely before persons appointed to transact some public business or proceeding—

It must be relative to some proceeding in a court of justice — it can not be given in court vive voce perjury may committed before persons authorized to take an affidavit or deposition —

It is perjury if a man swears wilfully to what he does not believe —

But if it relation to something not before court it is not perjury — as an oath of office is not the object for perjury 1 Hawk. 319.

It was a long time questioned whether perjury could be committed before arbitrators. but it is now settled that they are a court & false swearing before them is perjury

But there can be no perjury predicated on an official oath. or private affidavit or promissory oath Cro. Eliz. 135. 609. 168. 907 1 Roll 39. 2 Roll 207.

It must be administered by lawful authority 4 Bl. 137. Arbitrators cannot administer an oath & if they do, perjury is not predicable on it. unless one of them is a justice or they must call in a person authorized to administer the oath

This has raised a question, whether a court could suppose they can try the case when in fact they cannot - If the governing principle was that

it is perjury if any one is injured by the false swearing as an individual. it would not be perjury— but that is not the principle — for the witness knowing nothing of the fact as to the jurisdiction he is just as guilty — the injury to the community is the ground principle & it is perjury — 1 Vent. 181.

If a man swears the fact to be as he believes it to be it is never perjury —

A deposition is always falsely made when a man swears a thing to be so when he knows nothing about it. or believes it to be otherwise — 3 Mod 222. 1 Hawk 322 Palmer 292

Some rules are laid down in the books that can now laid aside — It was said that the witness must swear absolutely — a man might in this way cover up all the perjury in the world. — and the old rule is done away — but if a man says I am really at a loss it really is not evidence. of course no perjury. so that positive swearing is not necessary. It must be in a point material. now witness like long stories and anything not material is not foundation of perjury —

But if a witness tells his story to be artful to gain confidence by a smooth story to gain credit & the story is false the nothing to do with the main point it is perjury 2 Roll Eliz 570. 1 Salk 514 Comth 422. Palm. 382. 1 Hawk. 324 for but it is not to all intents immaterial. —

[illegible] to see also why the party injured by perjury could not recover the actual damage suffered besides the amount of the penalty, for this was never intended [illegible] Civil and Criminal are different —

Statutes have made many things forgery that were not so by C.L. tho there is nothing which was forgery at C.L. that is not so now.

How far material has been a question. Is it relevant or does it conduce to prove the point. that is the principle 2 Ray 258. 589.

Subornation of perjury is nothing more than inducing a man to swear falsely and is punished exactly as perjury is. 1 Hawk 325.

This punishment is very severe it was statute. Afterwards the barbarous punishment was introduced of cutting out the tongue after that banishment — Now the C L punishment is fine imprisonment & the pillory, at discretion or the criminal is guilty of the crime of false & can never after be a witness

The statutes of the several states so far as I have seen them give a remedy even by private prosecution, in addition to the penal statutes, to the person injured — this does not do away his liability to public prosecution unless expressly so provided — some states have limited the time of imprisonment others have left it as at C L. to the discretion of the court.

Forgery

Forgery at C L. was making or altering any record or any authentic matter of a public nature or any deed or will with an intent to pervert justice

& including judg^ts of courts not of record of decrees in writing

At C. L. forgery a writing not under seal as a note or bond would not be forgery tho' a high misdemeanor. —

and equity — 1 Hawk. P.C. 335 —

Under the head of record is included records of courts or statutes of a private nature

By authentic matter of public nature is meant records of births deaths marriages or certificates of them. or proclamations or grants by courts — affidavits

By deeds are meant instruments under seals as deeds of lands notes &c. bonds not notes without seals (tho' these are included) by statute, as to wills covenants & bonds. —

Many new things are the subjects of forgery by Statute. — But statute was printed before all kinds you can think of & then says all other writings. 1 Hawk 335. 5 Geo 2 Eliz 196. 353. 1 Roll 66.

It will be necessary to mention examples to explain this subject. — A sells to B by deed & then after wards sells the same land to C & to carry on the cheat he antidates his last deed to cheat B this is forgery you will remember if it is not done to promote justice & equity it is not forgery. now we will suppose a case — A borrowed money some time since & now to secure to B the interest he antidates the record this is not forgery — so that antidating of itself is not forgery 1 Hawk 336 Moor 655. 759. Hugs this is to be our golden star in cases of this kind. —

the servant omitted a legacy which he was ordered to insert & that fraudulently. the whole will was considered a forgery.

So altering "beef" into meat before "cattle" — [illegible] [illegible] attorney gen'l

In the case before mentioned of inserting the legacy it had no other effect than giving a man property to which he was not entitled & making an addition to the will but here there is merely an omission & it would be singular to destroy the will on this account.

A scrivener writing a will for the testator & finding some interest that his friend should have a legacy he introduced one without the knowledge of the testator & omitted reading that item when he went for signing. — It was for forgery being an attestation

If a man

writes a note over a blank name with a design to cheat sign it it is forgery — but not without. — It is however a dangerous to meddle with these things. If to carry on the joke the man had denied the note & the drawer had paid it it would be forgery

The following case is a very old one — A man made a bargain to make his neighbour indebted to him 100 marks the bond was drawn for £100 and the owner when he got home finding the bond larger than it ought to be altered it back to 100 marks the bond was made void but as the attestation was made with design to cheat it was not forgery

A man was directed to insert a legacy in a will and he omitted to do it & read it as if he had. was it forgery? — if it is the whole will must be considered as a forgery as being different than was intended this case does not appear to have been determined — but is a new suspicion — not doing in itself is not forgery

1 Hawk 307

Punishment of this crime is fine imprisonment and pillory at discretion of C.L. By Eng. State it is now death And in U.S. it is rarely punished as it is a great offence in a commercial country.—

Robbery

Robbery is a felonious violent taking away from the person of another his goods or money no matter how little — it is likewise added putting in fear but this is never laid in the indictment & not necessary to be proved so I think the addition made by the law pursuing the putting in fear if the other parts of the definition are established

The goods must be taken away feloniously — with a view to steal. — if not so however violent no matter no odds if not done feloniously — Neither is it robbery unless done with violence for simply stealing is not robbery —

By violence is meant some act by which the man sees his life is in danger and or by words used — this delicacy may be practicable L.H. and K. 147

If the goods are once taken, giving them back does not purge the robbery — it is sometimes done by high minded robbers 1 H. and K. 147.

So the delivery must be in consequence of the fraud this is the criterion —

The property must be taken — The robber cut a girdle whon which was attached the purse that was frightened away before he picked it up — it was not robbery —
1 Hawk. 148.

Any one who is by watching is guilty of the violence & as much a robber as the principle.—

We find in the definition that the taking must be from the person.— Case — Robbery or the means to deliver up the cattle in a certain tot — the court held it taking from the person since it was purloined property 1 Hawk 148. & in his possession. 1 Salk. 613. Comb 145.

It is true that it must be such taking as would tend to make a man afraid before delivery — so privately taking a watch from one pocket privately is not robbery whatever violence might follow. So a threatening aspect such as is used by stealing hogs &c is insufficient. Foster 6. L. 128.

Threatning to accuse a crime whon a man would be for a enough to occasioning fear & he prays prosecute to prevent it. Kelinge 70. The case on when the charging is false.— This offence of theft has no relation to the value of goods taken. I mention this because at C.L. if the property taken in theft did not exceed 12d the law did not punish with death. This crime of Robbery is punished with death at C.L. & so in most of the states. For 6th. if the Robbery is effected without weapons so that life is not endangered the punishm. is for life — otherwise for life —

Benefit of clergy was extended to felonies in the reign of Anne.—

& when so taken the punishment is death & forfeiture of goods and chattels at C.L.

It was once thought that goods bailed could not be the subject of larceny, but now if proved that he had the notion of stealing when bailed it is theft but if the animus is formed after

The offences of Burglary and Robbery are commonly called compound Larceny and are excluded the benefit of clergy — but the species of thefts now to be mentioned are simple larcenies which are again divided into grand & petit larceny. Petit larceny is stealing in value less than 13$. In general same species of punishment is applied to grand & petit larceny but in different degrees. The present value of 13$. above what it was when the rule was established gave great latitude to juries in construing the meaning of the rule.

Theft or simple Larceny.

Theft is defined to be the felonious taking and carrying away the personal goods of another by any person not from his person by violence that would be robbery nor in the night season that would be burglary — or from his house 1 Hawk. 134

It must be feloniously that is with the animus furandi. A man may take with out liberty & make not be stealing much will it if he claims it. So taking a horse for any other purpose than to steal it would not be theft. so if after using he turned up the horse it is not theft.

If taking is procured with a view to steal it is theft but it may often that it would not be theft but if circumstances show or bring the horse to gate Hence

[illegible] it is not theft.

Case of Cotraveller finding the Broken stone — [illegible] of the man in a hurry carrying off the silk stockings

If miller takes too much toll he is a thief, but if he keeps the whole, he is not. — If a carrier carries unlawfully the whole he is not a thief but if he takes a part thereof. But if propty is delivered to a servant & he runs off with it, it is theft. The distinction is on the ground of the continuance of the owners possession — but the case of the miller the tailor & carrier I do not understand. 1 Hawkins 136 Chap. 24

& he is next seen at Hartford offering the horse for sale it would shew the animus furandi — unless the circumstances plainly shew his intention originally to go to Sharon. — Leach. Cr. Law. 355. ~~[illegible]~~ ~~[illegible]~~ 253.

Another set of cases where the goods are delivered in bailment attended with benefit to the Bailee — as corn carried to Mills — it is delivered to be ground & having rewards is told he is a thief if he steals it. 1 Hawk 130 Kelinge 35. 43. 1 Roll 73. Moore 246. Pop. 84. 1 Sid. 254 so of a common carrier —

Case. A steals from B & then C steals from A. it was said C was not a thief because A had no property but the court said the property was never changed by stealing & C was convicted of stealing from B.

Crimes are punished only where it was committed but a thief may be punished wherever he goes with the property — it is said the thief steals in every county through which he passed: but I think this an objectionable point, for the crime is only once committed. I think the thief must be tried where he stole. —

There must be also a carrying away — The least amotion amounts to carrying away. — 1 Hawk. 141

A man was found tying up sheets — so leading a horse under suspicious cir

circumstances it was carrying away — So taking some books out of the trunk he was convicted of stealing all he took & laid on the floor. So a sheep half shaved. — It was decided however in one case that as the thief only set a bale of goods on one end was decided not be theft. so taking one casing out of the case & it lodged in the hair it was sufficient asportation. Kelings 315. —

To the definition of theft there is an exception as to "every person" in favours of a wife, it is said — a wife may give away the property of her husband. — But there is no authority to this point & I think if the wife was made use of as an instrument and the man took the goods against her and it would be theft. — 1 Hawk 108.

It must be personal property — so that cutting & carrying off trees or reaping & carrying off what it is no theft. but if he carrys off apples which are on the ground or trees cut or what reaped it would be theft — because the property has become personal in these latter cases this distinction is very nice — it is adhered to the old maxims — For in reality how long does it take for real to become personal property — 4 Bl. 229

A writing cannot choose in action be stolen or bonds notes &c the principle is that the thief gets no advantage by it — But I think

that a bill payable to bearer is a species of money & may be stolen.— Some states have made bank notes the subjects of theft. but there was no occasion of it for the decisions have made its theft for they are in fact as much money as shall suppose the bill counterfeit he took it as money and had a right to treat it so.

If a horse is stolen & sold the owner can reclaim it. But if it has been a bank bill the owner cannot call upon the man who received it of the thief — it is a matter of policy for it would otherwise be ingrossed to take money for it might once have been stolen 4 Bl. 233. 1 Mod. 891 1 Raym. 187. Stra. 1737. 8 Co. 33. — 1 Hawk 141

Whenever a man takes money & pays it to bona fide holder it cannot be reclaimed by the owner —

Creatures of which as dogs. cats monkeys &c cannot be stolen tho they are subjects of trover — Theft cannot be committed on fish in a fishing place tho it may be if they are inclosed in a pond — 1 Hawk. 144

A man may commit theft on his own property as by one erecting his own property to make one in his power liable or any bailee so if property is delivered on contract & the owner takes it to make the other contractor liable. it is theft — Cro E. 536

Blasphemy is a crime at C.L. it is said to be the denial of any of God's attributes, contumelious reproaches. punished by fine & imprisonment.

By C. L. grand larceny was punished with death with benefit of clergy
Horse stealing is generally now severely punished than other thefts.

Piracy.

Every species of theft or robbery at sea which would be
to felony if done on land is piracy — unless it is done
by the inmates of the vessel & in which it is embezzlement
& may be done privately or publicly 1 Hawk. 152. 4 Bl. 71 2 Wood. 421

Now it must be done without au-
thority for privateers are not piraty.—

As to the punishment
of piracy it is by the Law of nations and is death. the
pirate, is to be tried in an admiralty court & not that of 62
& in all European countys. except G.ᵗᵃ Brittian is by
the judge. when it is tried by jurys so it would
be here as the right of trial is preserved by our con-
stitution. — It would not be piracy if committed within the
limits of a county.—

Riot.

A riot is a disturbance of the peace by three or more
persons assembled together of their own accord with the in-
tent mutually to assist each other against any body that
shall oppose them in the execution of some enterprise. —
This en-
terprise must be of a private nature — must be actually
executed & by violence, so as to imply force & it is not material whether

[illegible] after the act [illegible] to public view if they omit for the purpose then [illegible] guilty

By stat there are accumulative punishments if the party does not dishonor in hearing the act read or recited.

the thing to be done is lawful or unlawful.

It must be by three and if three are indicted & only two convicted they are not guilty they must be all convicted. unless indeed the jury find the two did it with another to them unknown

They must be collected of their own head. 1 Hawk 293 4 Bl. 146. 6 Mod. 43. 1 Salk 595. 2 Roy. 484. 1 Str 196. i.e. not called together by public news.

They must be assembled to execute a project of a private nature i.e. against an individual if it amount is a rebellion or treason —

They must accomplish the their objects. if they try & do not make out it is a rout — if they do not attempt before then it can't fail then it is neither riot nor rout but an unlawful assembly —

It must be done with violence — in such a manner as to excite terror — 3 Burr. 1263. Doug 1.

Whether the thing to be done is lawful or not is perfectly immaterial — for there may be a riot in abating or destroying a nuisance 3 Mod. 3. 2 Show. 235.

A Rout has all the incidents of a riot except the thing was not executed.

An unlawful assembly has all the incidents of a riot only they did not

only not ^ to execute this project but they did not attempt it
But any assembly to draw a riot is an unlawful
assembly. Hob. 92. 1 Salk 594. 1 Vent. 369. 3 80. 1 Hawk
299. 4 Bl. 146

Now this is such a thing as to assemble to protect
ones house or castle 5 Co. 91. 11 Mod. 116. and it be a
lawful assembly for a man has a right to assemble his
friends to protect his castle

These officers of which I have
been speaking are of more extensive power than any officer of
the peace need not wait for a warrant & may command
the posse to suppress it. & he is warranted if he makes
a mistake. Private persons may also suppress if
they chose but if they make a mistake it is at
their peril. Dalt 121. 1 Roll. 76.

Punishment at C.L. is fine & ^ imprisonment sometimes pillory.
at discretion
pillory ^ however is done away by our Statutes

Battery is
also punishable by fine as well by private prosecu-
tion — This is distinct from affray, which is fighting
together by two without premeditation. 4 Bl. 145
Punished by fine —
Treat for this offence is not to be used in a private
prosecution.

Usury

It is not all usury that is criminal usury — A makes a bargain with B to lend him $100 at 12 7% & this bargain is void — but it is no crime unless the unlawful interest is paid. — It is all criminal in our sense but I mean by the word that which is liable to prosecution

Whenever a man receives more than the legal interest the bargain is void. if he receives more it is criminal —

If the note is good at first it is good at last tho the payer is liable to the penalties. —

If the note is void he is not liable unless he receives more than lawful interest given to B a note for $100 — B did not let A have but 90 this note is void. —

A gave to B a note for $100 + B let him have $100 but B demands and receives more than legal interest. it does not void the note but B is subject to the statute penalties. —

A wants to borrow of B $100 goes to him & tells him he wants to borrow $100. B says he must a minimum — to wit $7. when the interest is 86 & then B lets him have a hundred — the question is. is that note void or is the payer liable? — if he has reserved too much the note is void. if he has taken too much he is subject to the penalty. They say he has not usurped

too much text to be able a jurer to make no adding
out of which doctrine the punishment is based —

Subpoena

against the summons is but $.5 It does not alter the
case. for it merely taking back part of the sum loaned
& is the same as lending 95 & taking a note for $100.

Of Libel as a crime —

It is said sometimes that a libel is only slander written
a libel must be written & all that of slander if
spoken would be libel if written. yet there is a great
difference — In order for a man to recover a law
for slander he must be charged with a crime that
would, had he committed it, have subjected him to punishment.

Every thing which has a tendency to excite
a man's passions to render him indecorous in the eyes
of the world. tends to a breach of the peace — or tends
to prevent mankind associating with him 2 Wils. 403.
is a libel —

A libel may be effected by signs & pictures without words

You may indict two at once for libel where
only one can be sued in slander & slander is not
indictable at all

For truth when told are a likely to excite a breach of the peace as untruth, & sometimes more. —

I conceive that no man may plead what the government has done (that is, the truth might be given in evidence) in a prosecution for libel on government, tho in such states have provided by law for this.

If D is sued by A for damages he may give the truth in evidence

But in public prosecution for private libels the truth cannot be given in evidence this has been grounded with but I think unjustly — for according to principle it is perfectly correct — and it perfectly immaterial whether the story is true or false — and whether one or the other the public peace is equally endangered — But if the prosecution is a private one for damages the truth may be given in evidence — these are the principles of C.L.

From this it was supposed that when the public administration is libelled the truth could not be given in evidence & there was a statute made to permit it. but I do suppose that by C.L. only the same thing might be determined as is under law by the statute. — It would be a disgrace that would not allow of this — We ought to be allowed to discuss the measures of the government. The opinion of one man as that he thinks different from the government is no libel — If an editor charge the government with having done what they have not done it is a libel — Further there is no occasion to use reproachful language in discussing public measures. or to ascribing to the government wrong motives if actors of this let them answer for it.

By enacting this statute a door is opened for giving in evidence the truth in public prosecutions & thus from its vague language the C.L. principle is destroyed.—

There may be such books as are libellous, as ~~those~~ which are of an immoral tendency as tending to excite hazy questions of the laws of society. & ~~this~~ has been extended or ~~tried~~ to be to an unwarrantable length. A book may contain principles which you or I think may tend to loosen the bands of society ~~but~~ this is not the thing. Any sober discussion of any question is not a libel.— But vile books and such as ~~tend~~ to excite vile practices which are contrary to the laws of society are libels

This libel must be published. for if one writes a libel & locks it up in his scrutoire & is not got at except by breaking it open it is not a libel.—

A private letter was considered as a libel as it tended ~~to~~ break the peace—

Reading libels to one's family from a newspaper because it was humorous is not publishing.— But if a man sees a libel in a newspaper and goes about & spreads it. it is slander. In short it depends upon this the man taking pains to spread it with a view of disseminating slander.—

Champerty. This at one time understood to subject any man who purchased debts of any kind as notes bonds &c or any other evidences of debt. & sued for them. it was an offence because it encouraged lawsuits but in process of time it became a matter of great convenience to part with such notes bonds &c & therefore it became general to sell them & this sale began to be supported by the law from whence it has become the idea that the law has become obsolete in all cases but the fact is the law remains the same so far as it is necessary for the good of the public e.g. a man has money & A & B & C hold notes against him if he buys up these notes for the purpose of vexation & harassing money the old law remains as it was & the offence is punished by fine & imprisonment. but where such notes come in the way of trade and are received for the payment of debts the old law is done away with. 4 Mass. 135. 1 Hawk. P.C. 525.

Upon the same principle is the law with respect to selling a disputed title to land there is an antient S. preventing these sales & both the purchaser & seller are liable to punishment because it is nothing more than purchasing a lawsuit. It is the business of the party out

of possession to bring the writ & get possession & then he may sell. this was an offence at C.L. by St. of Glos 8th added new punishm which was inflicted in addition to the fine inflicted by C.L. this St. makes the deed void. how it has been questioned whether in those states where there is no St. making the deed void whether it is void. the answer to this is that on answering both this old statute & the St. is as much binding upon us the C.L. itself. Plow. 80. 88. the whole case. 6 Co. Chit 369. note.

A question of some nicety arises out of this supposn a man sells a mortgage when another is in possession claiming it. as suppose mortgagor sells would he be guilty of this offence. this is dependt upon the light in which mortgages are to be considered. if the mortgage is real property then he is guilty of the offence if personal it is not an offence The court of mass in this state decided that it was not an offence & this I think is correct Observe that it is no offence to sell to the one in possession for this settles the dispute. when the whole thing a purchase to speculate merely is an offence & which is aggravated if done with a view to sue otherwise it is no breach of the law. 1 Bl. 135 1 Hawk 524 5.

Cheating — This is sometimes a mere private injury & sometimes it is a public offence & it is my object to show when it is a public offence. When one man sells to another property which he knows he has not a right to it is a private injury only for which an action will lie. All this kind of commercial dealing as making good bargains &c it is called is no public offence but it is a public offence when the means by words or conduct imposes upon the man with whom he is dealing. & this is indictable. ex. gr. a man goes into a store at night & gets another to call him up. During which the strength of which he is allowed to take up articles upon credit & then runs off this is a public offence & indictable.

Every thing of this kind when a man appears in a style different from his usual by which he cheats it is a public offence. when a man cheats by taking it is the same thing. so is selling by false weights & measures. — this is punished by fine imprisonment or pillory according to the nature of the case & the court may make them find sureties for good behaviour or commit them.

Bigamy This is when a man has two wives at once it is an offence at C. L. and is punishable by fine imprisonment or killing as the case may be.

Not the When the husband or wife is not heard of for 7 years at C. L. the husband or wife may marry again without being guilty of this offence.

Forcible Entry or detaining a mans house or land is an indictable offence. If a man attempts to get possession of his house when another is in possession or when the other remains in after the expiration of a lease it is an indictable offence if he does it by force but if he does it by artifice it is no offence because he has a right to be in possession. the reason of this distinction is a consideration of policy in order to prevent the breach. the law does not allow a man to take himself possession of his own if it will lead to a breach of the peace.

If a man and come to the house armed & bring a mob with him at the time to attack them if they do not give up the house it is the same as if he actually entered by violence for it seems to imply

terror. — But there may also be a forcible detainer & if the one in possession detains a house with violence he is also guilty of a public offence & liable to be indicted. the mode of proceeding is that the party complaining calls a court & they enquire into the circumstances & they go & turn the one in poss.n out but they does not decide the title. the one so turned out may be fined — whether he can be imprisoned I don't know. Co. Lit. 256. Stra. 443. Ld. Ray. 1514 Cro. Jac. 199.

Obstructing public justice — When an officer suffers a man to escape this is an offence even when it is ag.t his will. but it is punished by nothing but a fine. Every escape by accident is called a negligent escape & however it may be ag.t his will it is an offence punished by fine. But if it is a voluntary escape it may be punished with imprisonment. By the old C.L. when the prisoner broke prison he was punished by death. but now it is fine & imprisonment. rescuing the prisoner from the officer is an offence for which formerly the party rescuing was punished in the same manner as the prisoner would have been. but now it is fine imprisonment &c at the discretion of the Ct.

Compromising a felony is an indictable offence. — A conspiracy be

Bribery is punished: in the giver & party bribed is fine & imprisonment if the officer is executive. & death if he is judicial —

twenn two or more men to get an innocent man indicted in order to have him punished. then if the man is acquitted the others are liable to be indicted & by C. L. they could not be prosecuted & their goods & chattels were forfeited & their lands forfeited for life. their sons were to be worked up. their land thoughts & they themselves imprisoned for life & fed on bread & water. This was the old Saxon law & shows the indignation with which it viewed this offence. In Eng a modern statute makes it punishable with death if the man was indicted for a crime that was capital. but at present the punishment is imprisonment for life — In this country the punishment I suppose would be at the discretion of the courts —

Treason —

Much of the Eng. law regarding treason we have nothing to do with —

Levying war agt. the government. any attempts to change the government or forcible to change the administration. — So if army be taken to create a uprising as in Gordon mob. this is treason — arming with force to hinder the repeal of a law is treason or if it be done with a view to compel the enactment of laws it is the same There are certain things which however are different from treason — as suppose there is an in

sumnation when they have none of the objects above mentioned in view. but when they have some object in view & they arm themselves such as these are nothing more than high handed riots.

There are certain things declared treason by St which before the Stat. were not so. as when in Eng. the Ld lords used to get their vassals together & attack one another this was in feudal times. now there are declared treason by Statute & was owing to the peculiar circumstances of the country. This is one of the same nature as guards between students & sailors —

Lending aid to the enemies of the republics is treason & this when the enemy is a foreign nation or your own countrymen who have rebelled. sending them intelligence. giving them clothing &c or in short any thing which enables them to pursue their warfare is treason. But when these acts are done the com. pulsion is no treason. King v Gordon Doug. 1 Hawk P 37. Hale 132 to 136 Fos. Ex L. 211. 19. — In case of mob times when in fact the supreme magistrate is an usurper those who obey him are not guilty of treason. Words now constitute treason. there must be some overt act. 6 ca Ch II 125 — It has been questioned whether writing was treason. but now the law is that it is not. There was indeed a violation of the law in the case

of Storey Pas. 198. 1 Hawk. 118. All are principals who are concerned in treason there are no accessories It is laid down in the Eng. books that there must be two witnesses to convict a man of treason whereas in other cases one is sufficient. It is said a wife may be compelled to be a witness against her husband in treason but I see no authority to support this — probably it is the dictum of some lawyer or judge on the bench. —

Homicide —

This is an interesting & important subject & there are no Statutes varying the principles of the C.L. in any of the States, the punishments are altered by the.

Homicide includes murder, manslaughter, excusable & justifiable Homicide. There are some cases of murder not governed by the general principles, but then this is the policy —

To constitute murder there must be malice, by malice is meant acting from a wicked motive, in other words motive it discloses the malus animus. The circumstances that attend the act must disclose the malice & be such as shows an unrecited heart or the acts was totally regardless of consequences & when this principle is not disclosed it is not murder. unless in the case of policy as I shall mention.

Involuntary manslaughter: when the man did not intend anything & when it is contrary to his wish & intention that the act should be done that constitutes the manslaughter.—

Manslaughter

This is of two kinds voluntary & involuntary

Voluntary manslaughter is when one from sudden unexpected provocation kills another with or without the intent to kill it does not disclose such a character as makes it dangerous for the actor to live — it is unpremeditated if he had time to cool before the act done & after the provocation it is revenge & murder —

And you will understand that a slight provocation is no excuse — words are never an excuse — Heat & Passion are not the excuse it is the substantial provocation which reasonably actuates them that constitutes the excuse — He might not design to kill but death follows from the act which he voluntarily does — The reason why it is not murder is because he has not had time to cool —

The second kind is involuntary manslaughter & happens in two cases when a man is engaged in some unlawful project & in the execution of it he kills a man it is manslaughter — Again when a man is engaged in doing what is lawful but does it negligently it is involuntary manslaughter — so that it must be done in the course of some unlawful business or of some lawful business negligently done.

If a man however kills another in such case this negligence is involuntary homicide.

Another kind is excusable homicide as it is called This happens is done in defending ones self when a man does all that he can to escape Killing the man attacking him. — In some cases human killing is justifiable homicide as in the prevention of a felony as killing robbers, burglers, rapers &c — this is with differnce

Excusable homicide

presupposes or grants an affray & the man is bound to do every thing he can to prevent the injury before he kills the offender — & then is no question in such cases who was to blame. —

If a man in the prevention of lawful business kills another without negligence it is excusable homicide. by mis adventure or chance usually as it is called —

Justifiable

homicide is the execution of a criminal by the Sheff. so when an officer has arrested a criminal he is bound to keep him & may use violence for this purpose. — If he kills him then must be an apparent necessity — & if one is killed this revenge is a different thing.

Case — a child creps into a house unknown to any one — a man unwitting of it in getting out may kill him it is not murder then was no malice It was not justifiable homicide as technically used for it was not done upon anything to prevent public justice

It is excusable homicide by chance medly — to shoot at a fowl & kill a man is not to be excused — it is the same

But if the act has been used to fly off — it is involuntary but involuntary manslaughter as done in the negligent execution of lawful business. — So was the shooting a man when one went to shoot a thief in order to steal it. —

The Eng. law is an entire deviation from this principle — that says if one is in pursuit of an act that is felony & kills a man it is murder — but if the act was less than felony it is only manslaughter. Here the animus is exactly the same & this distinction is not followed by any court in our country & has been successfully ridiculed by my Lord Karney.

Suppose in our country a man in shooting a partridge kills a man without cardpunch. it is excusable homicide by misadventure. —

Some games are lawful, or unlawful, or wrestling, some are not as throwing at cocks — Now suppose one is killed wrestling it is excusable homicide by misadventure — but suppose one wrestles unfairly contrary to rule & the man is killed. it would be involuntary manslaughter —

Suppose a man in throwing at cocks kills a man it was done in pursuit of an unlawful act it is involuntary

manslaughter. — The temper of the heart is to be calculated from all the circumstances —

I give you a case a man in his wrath with a great club beats a man till he dies — it was done with an intention to do great bodily injury — for the big club — it was not an manslaughter because premeditated not in self defence — It is murder it discloses the unsocial heart the malus animus —

A man was offered to a company, he threw a large stone in among them & killed a man he had been laughed at but had used no unlawful provocation as to make it manslaughter it was murder —

A man slipped a chain away from behind another who then pulled & by the pull came to his end this was held to be involuntary manslaughter —

A without provocation aimed a blow B in such a manner as killing B would have been murder — but by mistake C was killed it was held to be murder —

Case of self preservation will explain it — One whispered a boy in a proper manner — but unfortunately it was followed by death. it must be reasonable homicide by provocation

Another case the boy was whipped with an improper instrument & the boy died – it was doing a lawful act in an unlawful manner and so involuntary homicide. —

Where a schoolmaster when mad knocked down & killed the boy with a pair of tongs it was held to be murder from the instrument. —

A man on the roof gives warning sufficient & throws off a man was killed. — There was no malice or design to kill or do bodily hurt — It is excusable homicide by misadventure if it had been done with due attention It would have been involuntary manslaughter although it was not usual for people to pass there but if carelessly done in a village much more in a city it has been held to be murder on showing the usual heart.

A driver of a team kills a child without carelessness by driving a wheel over it. There is no guilt. It is excusable homicide by misadventure. —

But the team the negligent driver in a street as by leaving it & a child is run over. it is involuntary manslaughter — And if with the time & gives orders to the children to go off but drives on & kills on it is murder. —

It was held to

be murder to draw a mad bull into the streets

A squib to make sport was thrown into a crowd & one was accidentally killed — The burning was unlawfull & that constituted it involuntary manslaughter —

Another case was the same only the squib was very large & dangerous & this was held to be murder. —

A man had been invited to a dinner — he knew there was a pond near his friends house about which there was game — he loaded his gun & took it along — drew the charge knowing as he found no game. — a question arose afterwards catching the gun loaded it & returned it to its place — the owner in attempting to shew his wife how it would fire kills the wife whom he dearly loved. — this was determined accidental homicide by misadventure because there was no want of due caution. — This case was tried by Lord Foster.

With regard to justifiable homicide L. Coke says that if a sheriff should execute a man in obedience to the warrant of a court who had no authority it would be murder but this I take to be wrong — the only ground of it is a technical rule that every man is bound to know the law — but here the officer did as

Homicides for the advancement of public justice are where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults him. — If an officer, or any private person, attempts to take a man charged with felony & is resisted, & in the endeavour to take him kills him — in this case there must be an apparent necessity 4 Bl. 179

he that its his duty to do without the malice aforethought — The most that can possibly be made of it is involuntary manslaughter from the circumstances Again with respect to justifiable homicide there is a distinction attempted to be made — An officer may take the life of a criminal if he cannot retain him without. but suppose he had escaped could you shoot at him after he had been once taken? — it is said if the criminal was guilty of a felony might do that if of trespass only you may not — I very much doubt the propriety of this distinction. it might be a good rule if every person charged with a crime was guilty; of situating as far as possible — when one does so & is still pushed he may defend himself at any hazard —

It has been said that it is manslaughter if the killer is the attacker but there is really no difference — If the man killed had killed the other it would have been manslaughter. but it is in both cases excusable homicide se defendendo —

There is a case in the books where one attacked another on purpose to bring on a quarrel in which he might kill his enemy it was called murder —

Manslaughter must be a unlawfull act voluntary with an intent to kill or do some great bodily hurt & death ensues

It must be upon a sudden quarrel & it is murder if he had had time to cool. It is not the injury that constitutes the crime for if so it would be equally strong in both cases — but it is the absence of proof of the unprovoked heart. Being in a passion is not itself the excuse. it must originate in some personal abuse. words do not amount to it. —

The intention to kill is to be learnt from the weapon used. By an unfortunate blow of a cowhide applied to resent an insult by words occasioned death it was determined not to be murder — for from the instrument used it is plain that there was only an intention to chastise insolence & not to take life.

A man caught a boy stealing wood. in a gth tied him to his horse tail & whipped upon the horse the boy died but tho there was no proof of intent to kill it was held murder. —

Another case a boy was whipped by another & the father enraged cut a knife & struck the other boy by which he died it is stated in some reports to have been determined manslaughter — this may have been right — circumstances will alter the case much — A great deal depends upon the

Husband may kill a man to prevent a rape upon the wife
when it is known at all.—

instrument used. — some say he followed the boy with a whip some with a cudgel — this is the great point in my opinion.

The husband kills the adulterer when caught in the act it is manslaughter but if he had time to cool it would be murder.—

There are cases where the general principle yields to policy & in most of these the malice cannot appear or does not.—

In all cases where an officer is killed in the execution of his official duty in whatever manner it is done it is always called murder. There is no inquiry to be made with respect to the malice animus.—

Even if an officer should make a mistake & take an innocent man he must submit & if the officer is killed it is murder: tho if the arrest had been by a private man & the one arrested had killed him in his own defence it would have been excusable.—

There are instances of jailors having been convicted & executed for killing prisoners as where one put a prisoner in a cell where he took the small pox & putting an unhealthy prisoner in a damp room where the 2d [illegible] he took his death.

The mother of an illegitimate child is punished for murder if the child is found dead — By Stat. Adopted in but it has never been executed here. without proving the child born alive. formerly so required by the Statute —

In some of the states there is a difference in the species of punishment of these crimes — In Conn. the punishment for voluntary, is forfeiture of goods & chattels in addition to the other punishment & is only implied in this case. — Involuntary is hardly punished at all. the court inflict a fine at their pleasure —

* But if the court has jurisdiction of manslaughter only, they could not be done —

In several states duelling is declared murder. in many cases there is a total want of malitia & the duel in consequence of only a mistaken sense of honour.

For the prevention of duelling it has been enacted that every man on conviction to an office must swear that he has not been engaged in any duel since the enactment of the act & that he never will be. this is the law of Virginia & N. York

Punishment of Murder is Death. of manslaughter it is fine & imprisonment & burning in the hand. the punishment is the same in quality in voluntary & involuntary but different degrees. Excusable homicide was formerly punished by a forfeiture of goods & chattels. It has however been the fashion to say that no such one verdict of guilty in such case is now only an acquittal.

If a man is indicted for murder the jury may find him guilty of manslaughter if the court has cognizance of both.

A man is indicted for murder — the killing is proved. then the proof that it was not murder belongs to the prisoner. Hawk. P. Cr. Lead. Cr. Law 3 B. Com.

Finding sureties to keep the peace is sometimes part of the punishment & sometimes when it is not when there is no conviction.— It is most commonly taken at the suit of private persons. when on affidavit the warrant issues.—

The law as it respects binding over to keep the peace & also binding over to good behaviour

Sureties of the peace are sometimes made part of the punishment. it being part of the judgt by law & here there is no discretion as it regards the sum.

In this case it is discretionary & as in breach of the peace in presence of an officer he may bind over. it is not necessary that there should be an actual breach of peace. if there is any appearance of or danger of it. this is not part of judgt

If not done in the presence of a magistrate - but the offender is brot before him altho he cannot have cognizance of the case he may bind over: not as pt of the punishment for there is no conviction. but only witness of a breach of the peace

There is another class of cases as where one is afraid of his life or of grt bodily hurt. if there is reasonable ground of fear the threatener may be bound over to keep the peace - this is remedy given to husbands & wives. tho they have no action agt each other - & the oath of the party is part of the evidence you will observe.

This binding to keep the peace is upon some fear of a breach of it.

Binding to keep the peace is an antient as the L.

Walk in the night. sleep in the day. vagabonds. who are those. no one knows where he comes or whither he goeth. Ridiculed in Eng as a Cruel Statute

If the recognizance is forfeited the money belongs to the Public.—

Binding to good behaviour you will observe it a different thing — It is a part of the punishment of some crimes and depends upon a St of Ed. 3. & proceeds upon the ground of securing obedience to the laws of the land — Such as persons not of good fame who may not have been convicted — it depends upon the character — This statute is a singular thing & has been copied by most of the States — By it Justices are empowered to bind to good behaviour all common scolds, vagabonds all those who act contra bonos mores. You will do very wrong [illegible] to bind a beggar in a strip it would be contra bonos mores —

If the security is not found the offender is committed of course & remains confined untill the county court comes —

In the commitment in both cases must state the grounds of the offence that the cause of it may appear. The bond is never forfeited if the person keeps the peace or good behaviour. The justice must state all the facts proved to the next court.

This recognizance may be discharged by the court at discretion. or if the person at whose instigation it was taken or if he is no longer in peace 1 Hawk 126. 129 all the cost must be paid before he is discharged

This bond is forfeited by the commission of any act that would be ground of taking it — any breach of the peace — or that which tends to it. by unpeaceful words or a threat off or hands on into suspicion challenge to fight however is —

attachments There is a mode of proceeding agt. an offender by attachment by which he is committed instantly — as for any abuse, improper conduct in or near the court, or insolence to any officer of the court. — The court directs the clerk to issue an order to bring the man before the court immediately & if he does not give a good excuse he is committed that can be confined in this way only during the session of the court. he may afterwards be prosecuted for the contempt. —

So where a man refuses to obey a peremptory mandamus the committment here is to force obedience & he may be confined until he obeys —

There is another kind of attachment agt. the officers of the court as Sheff. jailor Sheff. Justices &c for contempt. — as if Sheff takes unlawful fees for any neglect of duty he or either of the others may be committed to execution for a limited time. Sheff. too are not only liable to be thrown over the bar but to be committed

1 Hawk 142
1 Salk 84
1 Stra. 185.
4 4 4. 526
6 mod 73

So jurors for receiving a bribe refusing to be sworn – or to try a case – . So upon to appear so it is with witnesses –

Any legal rule of court making the duty of a man to perform certain acts if they do not they are liable to attachment

The mode of proceeding is if not immediately in the presence of the court an affidavit is made & an order is issued to the man to show cause. & if he does not show good cause he is committed: in this case he is bound to answer all questions upon oath that are put to him for this is not such questions as would tend to criminate him – & what is very singular if the man clears himself by swearing. the court proceeds no further but leaves it for any one to prosecute for perjury – [illegible] with regard to attachment to state witnesses at C.P.

Haw. Pb. 96

Add. 97
1 Lw. 209

Bail

In most case if a man is arrested he may be admitted to bail on finding security to appear in court.

The security is called the bail & has the security of the prisoner just as the officer had — the body is pledged to the bail who can take it wherever he finds it it is his property — not as an officer but as to his own property — even in Virginia if he may throw with impunity call bail away from the court of being bail. — He may also commit him when ever he please. —

If the man runs off & the bail is liable & paid up — & the offender returns he may be again arrested & tried. — unless the St. of limitations do stop the indictment. —

The C L appears to be that all offences except homicide were bailable — even treason was a bailable offence if bail was found before commitment. in other case bail might be taken any time after commitment.

The old law was that no bail could be taken after commitment — but this old law has been altered —

The supreme court may bail in any

Hale 98.
Latch. 12
5 Mod 323

1 Salk 193
1 Bulst 55
5 Mod 554

cases. but it is discretionary & not demandable as in those cases where bail is allowed by Law specifically.

Treason & murder are now deprived of the privilege of bail as much as homicide. so do breakers of prison — & Thieves taken with the stolen property upon them 1 Hale 101 so when the offence has been confessed.—

I observed that there was no bail after conviction to this: there is one exception, if a physician of respectability will certify that confinement endangers life.—

The Judges courts are very careful about granting bail when the magistrate cannot as in a Star. where a man stabbed himself to get bail by endangering his life. the courts refused bail

yelv. 99.
1 Sid. 414

Poulm. 388
Show. 399
Salk 460

Stra. 679
1 Vent. 69.

Of Indictments & informations

It was a gen.l rule of the C.L. that there must be a trial before the grand jury before the indictment is laid in courts for all criminal prosecutions, except when a thief was taken with the goods in his possession. But our customs have made it usual to omit the trial before the grand jury — & as I think was probably the spirit of the rule not being neglected for it was formed in the security of the punishment of felony —

Where a statute makes an act criminal the particular process must be followed as laid down in the statute

When the penalty is merely pecuniary it never goes before the grand jury

Informations are carried on before the courts without the intervention of the grand jury —