Ensign Church
March 14.
1862

It has occurred to me that I have or might have 10 or 12 vol of written books in the Sheriffs possession which they are of no use to any person, perhaps they may be useful to you and I authorize you to call for them and keep the same until I ask for or send a written order for them (assigns or admr having my claim thereto)

Respy

To E. Chunk

L. J. Warren
Atty at Law

March 14/62

Salisbury March 26, 1862

S. C. Jacquelin Esq delivered to me 9 vol. of manuscript books of Lt Colonel das. which are to be delivered to Ensign Colonel whenever demanded as herein directed

D. G. Warner

DONALD J. WARNER
SALISBURY, CONNECTICUT

November 18, 1941.

Yale Law School Library,
New Haven,
Connecticut.

The 9 Volumes of manuscript notes used by Judge Leman Church at the Litchfield Law School are delivered to you upon the same conditions which my grandfather, D. J. Warner, prescribed in his memorandum of March 26, 1862. That memorandum is attached to Volume 1.

D J Warner

*Frederick Chittenden 1804-1869*

*Lectures by Reeve and Gould, 1824*

*Practiced law in Kent and Washington, Ct.*

*Leman Church 1794-1849*

*Lectures by Reeve and Gould, 1815-1816*

*Ct. States Attorney, 1833-1838*
*Ct. House of Representatives, 1835-1836*

Memorandum about the books used by Judge Leman Church at the Litchfield Law School.

Leman Church was born at Salisbury, Connecticut on June 24, 1794. He was the son of Nathaniel Church and Dorcas His half brothers were Ensign Church born July 2, 1782 and Samuel Church born February 4, 1785. Ensign and Samuel Church were the children of Lois Ensign and Nathaniel Church. Lois Dorcas Church was half sister of Leman, Samuel and Ensign and was the daughter of Ruth Hamlin. Lois Dorcas Church married Samuel C. Scoville, the grandfather of my wife. Judge Samuel Church was chief Justice of the State of Connecticut. For further information as to Judge Leman Church and Judge Samuel Church see Kilbourn "The Bench and Bar of Litchfield County". Ensign Church, at the age of 80, must have signed the letter authorizing the delivery of these books to my grandfather, D. J. Warner.

These books passed from my grandfather to my father and from my father to me.

In 1841 Judge Samuel Church delivered a historical address in honor of the 100th anniversary of the Incorporation of the Town of Salisbury. In 1851 he delivered a centenial address at Litchfield, Connecticut, on the occasion of the centenial celebration held there. This address is published in Kilbourn mentioned above. The Salisbury address was privately printed. It is amusing to note that Lois Dorcas Church, the daughter of Nathaniel Church and Ruth Hamlin was named for Nathaniel's two wives. Either Ruth Hamlin Church was very submissive or Nathaniel Church was rather over bearing. Perhaps it was both.

"Salisbury March 26, 1862

S. C. Scoville, Esq. delivered to me 9. Vol. of manuscript books of I. Church, decd. which are to be delivered to Ensign Church whenever demanded as herein directed. D.J. Warner"

(The above is certainly in the hand writing of my grandfather)

On the page called "General index" appears the following in pencil:

"Leman Church died July 9th (Monday) 1849 at 7½ o'clock P.M. A.E. 55"

Copy of letters in first book

Ensign Church March 14, 1862 (In hand writing of D. J. Warner)

There follows in what is apparently hand writing of Ensign Church. "It has occured to me that I have or ought to have 10 or 12 Vol. of written books in Mr. Scovilles possession where they are of no use to any person, perhaps they may be useful to you and I authorise you to call for them and keep the same until I ask for or send a written order for them (assigned or admr having no claim thereby)

Yesty

E. Church

To

D. J. Warner

Atty. at Law,

March 14/62"

Lectures
Vol. 1st

Leman Church.s

# General index.

James Brown died July 9th monday 1849
at 7½ o'clock P.M. Æt. 6 y 5 m

# Municipal Law.


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# Law

No. 1

1 Bl. 43 — Law in its most significant and extensive meaning is strictly a rule of action & when thus defined applies to every species of action

See Thor. Notes the second Ch. Bl. 6 — Of law however thus understood there several kinds

1st. The law of nature which is the universal law of God & obligatory on all men

2d. The law of nations which is merely the law of nature applied to nations

See Preface Vatt. 1. 6. 8 — 3d. The municipal law which is a rule of action prescribed by the supreme power of a state, commanding what is right & prohibiting what is wrong

1 Bl. 6. 45 — See also Thor. Notes — In one word Municipal Law is a rule of civil conduct — Natural Law of moral conduct & revealed Law of moral ~~law~~ conduct & faith —

The particular subject of the ensuing lectures is the consideration of that branch which regulates civil conduct — and first therefore of —

## Municipal Law.

1st. Therefore to be obligatory according to the sup

## Municipal Law.

religion it must be a rule permanent, uniform and universal. It is however never more universal than its peculiar object requires and it is always general and not personal, within its own particular limits. This differs from a contract as it is a compulsory command issued to the person obliged to perform, whereas a contract will necessarily be void unless it proceeds voluntarily from the person bound by it.

Vide 1 Bl. 45.

L 1108

2nd. It must be prescribed. A retroactive law in its essential nature must necessarily be void, because the definition requires such a publication of the law that no person shall be liable to its retroaction unless furnished with a knowledge of it. There is however a material difference between a retroaction & Ex post facto law, the first constitutes a Genus of which the latter is a species. A retroaction law does not comport with the definition that it must be a rule prescribed. A a retroaction is one which has a retrospective view and it is immaterial whether the operation of it penal or remedial.

The Supreme Court of the U.S. decided in the case of Ball vs Calder that a retroactive remedial law can never constitute one of post facto law as the last is contemplated by the constitution of the U.S.

See 3 Dallas 389 - 386-391.

Prop that a bona fide contained the reputation of a bona fide purchaser before the law prohibiting it went into operation is admissible as it conducing to that it contained such reputation afterward 17 Ct 472. Sed qu if there is no other evidence of it such reputation after the law went into effect 17 Ct 472

So a Law impairing the obligation of contracts is void 4 Wheat 122. an insolvent law passed after the making of the contract discharging the debtor from all liability 4 Wheat 209 - that such law discharging a contract entered into ~~after~~ during the existence of the law was equally void - 6 Wheat 131 - that tho the parties were citizens of the same state when the contract was made the law was equally void - 3 Ct. R 255

An insolvent law prospective in its operation is constitutional 7 J. C. R. 309 -

A St. creating a new tribunal or giving jurisdiction to an existing court to try past offences is not ex post facto 16 Pick 38

A law taking the land of one individual & vesting it in another for private purposes is unconstitutional & void 2 Dall 304 title can only be divested in such cases 1 by stipulation between the proprietor of the land & the Legislature 2. by commissioners mutually elected by the parties - 3 By the intervention of a jury 2 Dall. 304 - see 5 Pennsylva 137. Backhouse v Lawrence & N.R. 67. 4 Hill 140 taking land for private road 2 Mont 13. 340 contra 4 Pick 463 2 Bro 394 10 Watts 63 = 4 Hill

If the apparent intent of the act can not be satisfied by a strict & literal construction of the words and their more literal & popular import must be adopted 7 Dall 181

The provisions in the Const. N.Y. providing that no man shall be deprived of property without due process of law & that trial by jury should remain inviolate are restrictive on the Genl Govt only 4 Mason 100 2 Cranch 448 n 6 "trial by jury" relates to issues in fact in courts of justice in civil & criminal cases.

## Municipal Law

Ex post facto laws are prohibited by the laws of the U.S. This rule must be prescribed by the supreme power in a state. by which is meant in Eng: the Legislature as this is the highest power known in a state to human society 1 Bly 40b

Cor. 1. 31. 45 & 90. Const States — art. 8. 9

## Rules of interpretation for Laws

1st The words are to be understood in their most known usual & popular signification — But terms of art are to be construed according to their acceptation among the learned in those arts — If legal terms are used in Statutes those words are to be construed according to their common Law meaning & with this exception the rule is perhaps universal —

Cor. 6. Mad 3. 14. Vin. 513 Ba. 647 to. 47 = 9 Vin 514

2d If words are dubious we may ascertain their meaning from the context, with which it may be useful to compare a sentence whenever they are ambiguous equivocal or intricate — For this purpose the preamble is often resorted to for assistance in the construction of the Statute — On this principle also other laws made by the same legislature respecting the same subject maybe compared with the dubious one to obtain a just and proper construction

Plowd. 206. Ba. 545. Bl. 60. Ed Ray. 1028. 3. Dall. 185 1 Mad 344 4 Ba 652 — Plow 485

# Municipal Law

1 Bl. 60 — 3d. The words in which the rule is couched are to be understood as having reference to the subject matter of the law

4 authors as upon

4th. The effect and consequences of different constructions are to be regarded in order to select that which is best — The rule is that where words bear either none or a very absurd signification, if literally understood we must a little deviate from the rec. sense of them. But where

1 Mac 384
1 Mac 344

4 Ba. 652 the meaning is plain no consequences are to be regarded for this wd be assuming a legislative authority

5th. The spirit and reason of the law must be consulted when the words are dubious rather than the letter of it — The object of construing laws, is to discover the intention of the legislature, and from this arises the Equity of law which means nothing more than the Equitable construction, as the reason of law means the reasonable construction — The Equity of the law is defined by Grotius to be "the construction of that wherein the law by reason of its universality is deficient" This definition Mr. G considers correct as far as it goes, tho it is not sufficiently extensive to include the spirit of the subject —

3 Bl. 431
1 do. 62.
6 Ellc 24.
19 Ves. 314
5 Ab —
Plowd 232
4 Ba. 647
1 Inst. 246
3 Mac — 431

Municipal Law is of two kinds

1st. The Lex non scripta or written law. —

When the scope of an act appears to be in the gen.l sense the law looks to the meaning & it is to be extended to particular cases within the same reason 2 Atkins 74
2 Saund 121 2 n 4

Private property cannot be taken for public use without restitution to the owner but if the Legislature provide the restitution & bounds is given it is Suffl 15 Wend 374

B the immortality & C.L are not synonomous the latter is merely a branch of the former.

# Lex non Scrp.t — Municipal Law

2d. The Lex non scripta - or unwritten law —

1st. Of the Lex non scripta - This is call.d the unwritten law because its original institution is not set down in writing — It derives all its authority from general and immemorial usage which implies general acquiescence of the people & Legislature in

1. Bl. 54 57-3 the adoption — It consists of three kinds - 1. Common

637 — Law so call.d — B 2d. Particular customs authoris.d by local usage — 3d. Particular laws by customs obs-

erv.d only in certain courts & jurisdictions —

1st. of the Common Law - It may therefore be ter-

med customary law - It is founded on imme-

morial usage and is call.d Common Law to distinguish it from particular & local customs —

1. Co. 60. 2. 31 A custom to be immemorial must extend back

2. Inst 238. 9. to the of legal memory at the accession of Rich.d

1st. to the throne of Eng.d — This rule however was

2. Roll. 264. not establish.d till about 60 years after the accession so that what at first required 60 years to trans-

cend the bounds of legal memory, now requires centuries — It is built on the decisions of courts of Justice & may be found in their records

1. Bl. 63-4 reports &c Handed down from the remotest

70. antiquity —

This records & Reports are mere-

1. Bl. 63. ly evidence of what the unwritten law is —

Questions of fact are decided by the jury

Questions of law by the Judges & courts of Justice

These decisions as before remarked are not the C.L. itself but merely evidence of the C.L. This evidence is merely prima facie evidence & may be rebutted by other testimony & circumstances and all these decisions may be overruled by every succeeding Court & Judge — But if these decisions were conclusive evidence or constituted the C.L. itself they could never be overruled — A Precedent is a former decision upon the point in question — It is only evidence of what the law is —

1. Bl. 69.

1. East 498–5

With regard to the binding force of precedents — I take the rule to be this, that they are always to be followed unless flatly absurd & unjust — It not to be overruled ~~unless~~ because the reason of it is not satisfactory the onus probandi lies upon the objector ~~to~~ the precedent — Justice Buller observes that stare decisis is the most important maxim in the law or rule more so than this would destroy every system of Jurisprudence —

But if the original institution was not set down in writing, and the most we know about it is from the evidence of it, we presuppose the existence of the thing —

"He who relies upon a particular custom must prove two things that there is such a custom & that his case comes within it —

## Particular Custom. Municipal Law

The Common Law was in part built by courts of Justice - However it may be asked does the C.L. fall within the definition. To this it may be answered that the supreme power is supposed to have acquiesced & thus the sanction of the Legislature is inferred - Most of the mercantile law - contracts drafts &c were unknown at the time of Richard 1st - Whatever rules we find in the Books are considered evidence of what the law was at the time of Richard 1st -

This is the theory of the Law, but there are some branches of the Common Law which were not known at that time in legal theory - however these rules are regarded as what the Law immemorially was or ought to have been -

2d Particular Customs. which are local usages and are probably the remainder of those provincial customs out of which the Com Law was extracted - It is true in general of all particular customs that he who relies upon them must plead them specially - that is that the Judge is not bound ex officio to take notice of them - The existence of the custom itself as well as the applicability of it to the case in question must be proved -

Sal 165 -
1. Bl 73 -
2. B 263
1. Sw. 173

C As a particular custom is a private fact & is regularly to be tried

Dang 3/15 ly a jury as any other fact is - If however it has
Lill Ab 275 been once tried and recorded in the court
1. Bl. 76 where it again comes up the existence of the
custom need not be tried but the applicability must be

D To the general rule that
1. Bl 75-6 particular customs are to be tried by a jury
there is one exception in the case of Gavelkind
& Borough English for of these customs the
1. Inst 75 - judges are bound to take notice ex off -

Blackstone classes the Lex Mercatoria
1. Bl 75 - 2 459 - among particular customs but this can-
4 bb 7 - not be correct for it is not limited in its
Ld Ray 175 operation - It governs particular transactions
Salk. 125 to be sure, but is not confined in its legal
Cowb 45. 152 limits 8.833

It need not be specially pleaded -
It is not to be tried by a jury - It is proveable
1. Bl 76 - by witnesses expert when a new case arises
to 79 - in which it is doubtful - Merchants are then
9 Co 5 b to be consulted. but Lord Coke thinks their testimony
1 - Co 72 has no right to go to a jury but is to
144 - 378 - instruct the court in the same manner as
Chitty on Bills 28. 109 a book of science - The law Merchant then
is a branch of the Com. Law - There are cer-
Dang 72 - 3 tain rules with regard to the legality of
4 TR 208 particular customs - ~~1 Bl 218 22~~

In the construction of particular customs it is a rule that customs in derogation of C.L. are to be construed strictly (that is) cases not within the letter of the custom are not by a literal construction to be brought within its operation — As in the custom of Gavelkind an infant may make a feoffment but he cannot make any other grant of his lands not even a lease for life or years —

(3d Particular Laws adopted in certain jurisdictions — These are the civil & common Laws adopted in Engl in the Ecclesiastical, Military, Maritime & University courts — These laws of the Roman Empire are binding in Engl only by adoption — The laws of any one sovereign are not binding as such on another

1. Bl. 77-80-82-83 —

The adoption of foreign laws may be by immemorial usage in Courts of Justice or by legislative acts or by Statute — When they are adopted by immemorial usage they become a part of the unwritten Law

1. Bl. 79-80
2 Bl 83.

The Com & Stat Laws of Engl so far as they are binding in this country derive their authority from a similar sanction — I take it to be the opinion of very eminent Lawyers that the com L cannot be rejected by our courts except when

it is totally absurd or contrary to justice or inadopted to the circumstances of our country
B1487-411-

English precedents are for guide
1713.410 the Com Law of this country - On this subject there has arisen a great diversity of opinion

There has arisen a question in this country whether we can have a C.L. of our own (ie) whether there can exist in either of these States a C.L. distinct from that in Eng. To which I observe that so far as any part of the C Law of Eng. is applicable to us we must have a C.L. of our own - For it is impossible that Statutes should always afford remedies - Nate - This question was agitated in the Circuit Court of the U.S. (not ~~reported~~ reported) and decided that we have a C.L. of our own -

The reason why a Statute is not an adequate remedy without the aid of the C.L. is that the Stat is a rule - but the C.L. a system of Ethics of connected principles wh. may be extended to meet every emergency

Suppose it should be declared by Stat. that there should be no C.L. & further a Stat declares that he who commits a Battery shall be mulcted in

That the United States have no common law jurisdiction in criminal cases see 2 Dall 393. Chase Jun. in negative Paterson J. affirmative —

reasonable damages. This Stat. must be enforced but but how? By an action. But what is an action? The Stat. has not explained it.

But even suppose the Stat. has given an action the next inquiry is what action? Say an action of Trespass. But what is Trespass? The Stat must explain all this; But what next why a writ

Suppose this also explained what is to be done with it? How is it to be returned? what answer must the Deft give. A common Lawyer wd. say by Pleading. But what is pleading & what evidence to be admitted?

Indeed without the C.L. the Court wd be unable to proceed.

We must then of necessity have a C.L. of our own. I say in defiance of all trifling theories we must have a C.Law so far as that of Eng. is really absurd or unjust. But there is one question stated that the C.Law must have existed from time immemorial. This is emphatically and physically inapplicable to our country & it seems to me futile to say that we cannot have a C.L. of our own because we were not a people when the date of legal memory was affixed. but the date

was established only 60 years after Richard 1st ascended the throne — so that a custom of 60 years old was C.L. — we are old enough then according to this principle to have a C.L. of our own — &c

General consent — long usage & acquiescence tho not immemorial in the strictest sense is here sufficient to establish an unwritten law of our own —

Lex scripta or Statute Law — A Statute is an act of the Legislature — The ancient English Statutes are said to be binding in this country in the several States as far as the C.L. (ie) are pr. facie binding — The reason is that our ancestors brought with them all the Statutes, as well as the C.L. that were in force in Eng. at the time of our Colonization — Eng Stats passd since that time are not pr. facie binding —

1 P.W. 75 — 1 Bl. 106-7-8 — Paw D. 52 — Tucker 32. 343. 90 1-303 — Chitty 369

In some States in the Union the Eng Stats Law down to a certain period have been adopted ~~by the~~ by Legislative acts and these incorporated with their own laws — In NY all Eng Stats are adopted that were passed from the year 1775 —

a ad Mkite 319 2 Mfs 530.

# Lex Scripta — Municipal Law

1 Bl 85.6 — Statutes are divided kinds, Publick & private general or special

A Publick Statute is one which regards the whole community State or Realm —

A Private Statute is one which regards particular persons or private concerns — This distinction is intelligible in its terms but in its application is sometimes misunderstood —

A Statute in relation to its rights is either General or Publick & private or special — In some cases a Stat relation to a class of individuals immediately & in terms is held to be publick & in others private — The rule as to cases of this kind is this — If the class of persons contemplated amount to a genus the Stat is publick but if the class amount to a species only it is private — 2. Bl 571. Cay 4 Co 7 Hab 19 Ven 4 98 C 9

When the class of persons is so general as to admit of a division into subordinate classes it is a genus — but when it can be subdivided into persons only as individuals it is a species — Thus a Stat regarding Mechanics is a publick one because mechanics may be subdivided into shoemakers, taylors &c but a Stat respecting Taylors is a private

# Lex Scripta — Municipal Law

one end of the Stat regards an individual or any number by in name it is of course private

4 Co 76 — Again all Statutes regarding persons are
1 Bl 86 — altered to some purpose are publick - But
4 Ba 139 — a Stat regarding Bailiffs is private - There
2 Lord 154 will still be some difficulty in the application
2 Ray 120 of this rule qu. 2 Hl 57. cited in Hob 12. 18 Hob Dy 119
381 —

In Engd every Stat - relating to the King is a Publick one for he is the head of
1 Sid 209 the body Politic - A Stat giving a forfeiture
4 Ba 640 to the King or him to the State is a Publick one
Plowd 65 tho this forfeiture be inflicted only on a species
4 Co 77-8 of individuals - And on this principle every
138 613 Statute which covers the Publick revenue
209 is Publick
2 Mod 249
613 —

It is hardly necessary to add that a Stat may be partly Publick & partly Private -

All Statutes are again devisable into such as are declaratory of the C. L
1 Bl 86 and such as are remedial of some defect therein - This is not a subordinate division of the former but coordinate -

Declaratory Stats are such as declare what the C. L is & what it always has been

That a county commissioner is a taxpayer & inhabitant of a town thro which a contemplated road is to pass on that his down has joined in a petition for the road does not constitute any objection to his acting on the petition on the ground of interest 11 Pick 322 6 Mass 90

Where a St. granted a pier quayage & willed that grantees sh^d repair the shore &c A was held that grantees by accepting the charter became bound to make all the repairs mentioned & that an indict. wd lie for non repair or any action on the case by an individual for particular damage sustained by reason of neglect to repair 23 Ld 33 13 Cant 220 14 do 317 3 Mod 526.

# Remedial Sts. — Municipal Law

Pa. D. 1141 2 Ba. 650. Salk 54 — — How is a species of Stat declaratory of other Stats but the species is very rare. Salk 354 —

Remedial Statutes introduce some new rules by abridging the superfluities or supplying the defects of the C.L. — The Stat 13 & 27 Eliz — against fraudulent conveyances are declaratory but the Stat of limitations is remedial

1 Bl. 86

All Stats inflicting a penalty or punishment are Penal — Those not inflicting a punishment of any kind are called remedial or beneficial

4 Bac. 450 1. Profe 31 145 3 Co. 6 7.

The word ~~has used~~ remedial is here used in contradistinction to Penal — Penalty as used in the Law is synonymous to the word punishment — In the common sense it used to denote any forfeiture of property by way of punishment, but in its extensive sense it is synonymous to punishment —

In strictness indeed all Stats giving remedies higher than the rules of natural justice require, seem to be in the nature of penal Stats, for in giving the expr they operate penally but they are not considered in law as penal, nor are they so treated —

1 Wils 125 — Profe 414 Comb. dig. Ab. on Stat. A 7 7 Rep 25 9 —

But Stats giving costs of suit are holden to be

1 Ba 511
4 do. 451 –
1 Ak 205 –

penal. Costs were unknown at C.L. – These costs given by the Stats stand in the place of amercements given by the C.L. – Co. Litt. 189

They were nominally given as a sort of punishment of the unsuccessful party – The amercement now is merely nominal, costs were first allowed in Eng. by Stat of Gloucester 6 Ed. 1st.

1 B. 189.
4 Ba 441
1 Bibs 125
7 J. Ref 257 –

An action brought by an individual in his own right to recover a penalty inflicted by Stat. – is a civil action – the form of which is an action of debt and therefore strictly civil – for whether an action is civil or criminal depends upon the form – 4 M. 753 – 2. 182.

1 B. 189 –
4 Ba 441 –

The last division into affirmative or negative is founded altogether on their phraseology – This distinction is useless –

Hob 111. 222
1 Siderfin
310 – 2 Ld Ray
370 –

The rule of the Eng Law is that every Statute commences its operation from the first day of that session in which it is made. the reason is that all the acts of parliament are dated on the first day of the session which is founded on the fiction that the whole session is but one day (i.e.) ~~that is~~ there is no fraction of a day – Under this rule many Stats will have a retroactive operation – If two Stats enacted the same session neither will have the priority –

A H. which treat of things or persons of an inferior rank cannot by any good words be extended to those of a superior
22 Cd 391 2 Co. 46 2 Bl. 88

But for the attainment of justice the very moment may be proved – A. L. J.

Where a St. declares that an act shall be done in a certain number of days Sunday is counted as one day, it happens to be the last. 7 Cowen 147. Same as to rules of practice established by the court 1 Cowen 18 2 Dall 125 11 East 271 13 do 21. 6 John 326 4 B & R 121 4 Burr 2130

Penal Statutes sometimes receive an equitable construction i.e. cases not named may be included in the penalty Ba. Ab. S. pl. 6. 9 Co C 71. 13 John 494 But such a construction cannot be applied when all offences are enumerated & a distinction is made in the punishment 7 Cowen 255

But Mr. G thinks it the better opinion that the last in point of fact shall repeal any other repugnant to it pro tanto. So the distinction has been expressed by our Courts.

By construction is meant the mode of process by wh. the meaning of language is ascertained and all the rules are extended to lead to the discovery of the meaning or intention of the law giver. In the construction of Stats especially Beneficial ones 3 points are to be regarded. 1. the old law. 2. the mischief. 3 the remedy

8 B1. 97. That is what the old law was, the mischief for wh. the old law did not provide. & lastly what remedy the Stat has provided.

It is very evident that the consideration of these three points will most assist the inquirer in discovering the object & intent of the Stats. The construction should always be such if possible to suppress the mischief & advance the remedy.

8 Co. 67. 1 B1 87.

The two first of these points are chiefly to be regarded. for it seems they will themselves show the latter

1 B1 87.

An example to illustrate this rule is given by Blackstone. The rule already laid down with regard to the interpretation of laws in general are to be observed in the construction of Stats. as that words are to be used in their most popular signification

1814

# Construction of Municipal Laws

1 Bl. 88. 107 294 Plowd 17 — It is a rule of the C.L. (for all laws are construed by it) that penal Stats are to be construed strictly or according to the letter 1 Bu 50

Thus of making the offence of stealing horses felony without benefit of clergy was but not to extend to the stealing of one horse the nature of which rule has of late been much relaxed — The rule that penal Stats are to be construed strictly according to its

3 Co. 7 8 Plowd 17 1 B 88 — 4 Ct R 64

true import is that they are to be construed strictly against a subject but liberally for him —

A person shall not be adjudged within the penal stat unless he is within the letter &

4 Ba 671 4 B 193 Leathes Co 310-387

a person within the letter shall not be adjudged within the operation of the stat unless he is within the reason & spirit of it —

The amount of the rule is this that the spirit & reason of the penal stat may be consulted to take a person out of the operation of a stat where he is within the letter; but not to put a man within the penalty, where he is not within the letter — The consequence then is that a person accused must be both within the spirit & letter of a penal stat — to be within its operation —

4 Bl 3. 3 Co 7 8 Plowd 86 4 Ba 651

The authorities do not point out

3 A.L.J. 177 such construction ought to be put upon the St.
as does not suffer it to be eluded by Bon 341
14 Johns 206
.... 338 3 A.L.J. 177

Penal St. one strictly local — an St agst. buying notes &c. is strictly penal & will not be enforced in another State 14 Johns 340 3 do 265 1 Johns Ch. 139. But after the party buying &c. has been nonsuited the contract may be disaffirmed & a new suit instituted on the same note & proceeded to effect 14 Johns R. 340. 17 do 4

13 Johns 468.

St. Ct. 335 prohibits lotteries on the Lords day — one can be subjected to but one penalty for a breach of one & the same day however many & different breaches may have taken place on that day 3 Stark E 1124 & n Peake 4. 58 Cowp 640 10 Mod 24 2 T.R. 512. 3 do 509.

If a Statute specify the time within which a public officer is to perform an official act regarding the electors & rights of others it is directory merely unless the nature of the act to be performed or the phraseology of the St. is such that the designation of time must be considered as a limitation of the power of the officer. Ex St. says the off. shall call a brigade meeting to impose fines before a certain day. he may call it afterwd. 6 Maud. 487 5 Cowen 269. So where a St. says the assessors shall assess a tax within 30 days after they are furnished with a certificate &c they may assess it afterwd. 2 Mas 250.

The Stat. after providing a remedy for injuries to particular specified property & then adds "or other property" we are to understand other property of the kind enumerated 17 t 479

this distinction but it may be collected from the whole —

Pl. 1. In general any universality of expression does not include (in penal Statutes) those persons who by reason of legal incapacity are exempted from laws of a similar nature unless they are named —

Pl. 2 And when a Statute makes an offence and inflicts a penalty an infant is not bound by it unless expressly named

1 Saunders 64 — Sid. 85 — Sim 501 —

Pl. 3 These rules are founded on the benignity with which Judges construe such Statutes — The intention of Legislature however is not to be disregarded in construing penal Statutes — agst the subject — But this intention is said to be agreeable to the rules laid down — This intention when appears ought to be the rule in all cases & the rule of construction

1. Salk 3 —

Pl. 4 The rule of strict construction as against the subject has not been uniformly observed

Croke 701
3 Read 65
4 Ba 651
4 T Rep 3

Pl. 5. [~~Not bound~~ Peake 157] If the repetition of an offence receives an increased penalty the offender is not subject to the increased penalty unless he was convicted of the first offence before he committed the second [(Penal laws are strictly local) The lady offender by a crime in the community]

1. Hilo 168
1 Hale 170.
3 24. 695 —
2. do. 344 —
2 Bulstrode 349 —
10 Rod 52. 103
2 Sw. 289

Pl. 6 Suppose a person has been guilty of horse stealing at two different times, if the second was

committed before judgement was given against him in the first, he cannot be subject to the increased punishment — But the inquiry may be made how such a rule as this came to be adopted? It is said to be hard to inflict the increas^d. punishment before the Deft has had the benefit of the first — the penal laws of one country cannot be enforc^d in another, nor can any notice be taken of them, for penal laws are strictly local

3 T.R. 733 Rud. 79-80- Vide - Vattell Book 1 Ch 19-219- 14 John 340 Antea - 18n

N.1 (If goods stolen in one state are carried into another state he may be punished in other state)

If a forbidden act is committed in this State it is an offence against this State and not agst. the State of N.Y. and upon this principle it is there is no common general law between the several States & the U.S. It is for this reason if I publish a libel agst. the President of the U.S. in this State, it is a crime against this State & not agst. the U.S.

1 Mass R 116 2 John 477-78 1 Burr 52 2 Swift 289 Peake R 57.

N.2 (Remedial & Beneficial Statutes are to be liberally or equitably construed — In the case there of a remedial Stat — the liberal import may be enlarged or restrained to effect the intent of the Legislature —

Pl.3. The Stat of Hen 8th. which gave a remedy vs ex^rs. unknown to the C.L. was held to extend to adm^rs. as well as ex^rs. tho not mentd.

Plowd 365-465-1 Ro. 300-3 Bl. 430-Cowp 140-1.

When a new offence is created by St. & a penalty is annexed to it by a separate & distinct clause the prosecutor need not sue for the penalty but may sue on the prior clause as for a misdemeanor 14 Ld R. 205 Le Strange v. Gibbons & 644 2 Burr 803 that when a St. creates a penalty for doing a thing which was no offence before & appoints how it shall be recovered it shall be punished - by that means & not by indictm.

A St. authorizing a sale of lands for taxes will not justify a sale to pay expenses for village improvements 4 Hill 82 11 Johns 77. 3 Wend 213 6 Johns R 92

Where a St. provides that for all debts due & owing by a company at the time of its dissolution the persons then composing such company shall be individually responsible to the extent of their respective shares. it was holden that in an action against such stockholders they should be allowed all advancements by them made for the benefit of the company beyond the value of their stock whether made before or after dissolution 8 Cowen 387

A corporation must show a grant either in express terms or by necessary implication for all the powers it attempts to exercise especially when it claims the right to divest others of their property without their consent 4 Hill 83 4 Pet. 152 2 Dall 316 & the due execution of such power must be proved. recitals in conveyance no evidence Cowp 26 4 Wheat. 77 4 Pet 349 6 Wheat 119 7 Cow 88 20 Wend 241 7 do 148 2 Hill 9. 14. 4 do 86 1 do 111. 115 1 Binn. 377. 4 do 2244 part 24

## Construction. Municipal Law

¶ 1 This is a case where a Stat is interp^d. The stat Devises 32 Hen 8 does not embrace infants fame counts & tho it mentions all persons This is an example of a restraining effect given to a Stat - An action declared by the Stat to be void is void after in the construction of the Stat - only voidable - See 1 Cowens 741. 742 -

¶ 2 The rule is this, if the mischief intended to be prevented by the Stat would be let in by construing the void act as voidable the courts are bound to treat it as strictly void but not otherwise. Hal which is void is common nonentity but where voidable it is good till set aside by due course of law - 2 N R 413.

1 Bl. 37 - 1 Co 60 - Eq - 10 Co. Eq - 2 T.R. 667 - 7 Cr. El. 141 - 207 - 1 Inst 45 - 7 T.R 310 -

¶ 3 That which is voidable may be satisfied by the parties, but that which is strictly void can never be satisfied - To illustrate this distinction, the Stat 13 Eliz - declares all conveyances to defeat bona fide creditors absolutely void and the construction is that the conveyance is void for were it construed merely voidable the mischief intended to be prevented by the Stat wd be let in -

S. 08

¶ 4 Where the terms of a Stat enable a court to do a matter of justice to the Party, the court is bound to do it, in all cases falling within the Stat -

5. TR 538. In such cases where enabling words may be
8. Haw construed as if they were imperative - thus
263-3745 the Stat. 4 & 5 Wm & Mary which merely enabled
2 Stra the Court to award costs to the Deft - in certain
1131 cases has been considered as binding 4 Ba & 644.

Rule This rule will not hold in Politics as where an Executive may do an act of Policy or expediency -

Rule A Statute taking a E.E. remedy away must be construed strictly, because
10 Mod 282 such Stat abridge the E.E. rights of the subject
and in pursuance of this rule it has been
4 Ba & 650 holden at E.E. that the action of Trover very
where concurrent with the action of trespass
is not barred by the Stat -

Rule 4 The words of an
Cro Ch 396 explanatory Stat. are always to be construed
4 Ba & 650 strictly also they can never be extended
5 Ad & E 594 by construction

Rule 5 The object of an explan-
atory Stat is to give a construction to an
1. Bl. 38 - other Stat & if the former itself would be con-
3 Co. 87 - strued or explained the object of the Stat
Plowd 157 would be defeated

Rule 6 Statutes that are partly
penal & partly remedial are to be construed
strictly as to the penal and liberally as to

Ex. enacts "that any one who shall think himself aggrieved by any act of any Justice done in or concerning the execution of that act may appeal &c" means one who is immediately & not consequentially aggrieved 2 B. & C. 224

3 Day 137

In cases depending on the Statutes of a State & more especially in those respecting titles to land the U. S. courts adopt the construction given by the State courts where that construction is settled & can be ascertained 5 Cranch 22. 32 9 do 87 1 Wheat 279 2 do 316 6 do 119 10 do 152 11 do 361 12 do 153.

The jurisdiction of one court is not to be ousted by implication unless there be an incompatibility in the exercise of jurisdiction by both 17 Johns 5.

If two Ch. pass the same decree & one to go into operation the same decree are repugnant that which last rec^d the royal assent is to govern 22 Ch 190 Fitzg. 195 2 Dwarris 675 5 Peck 148 1 do 43.45 21 do 373 12 Mn 537 5 do 380 13 do 324. Said in 5 Hill 225 n that where a provision is directly repugnant to the provision of the act the provision repeals the previous one 1 Mont 463 Fitzg 195

the remedial parts as in the Stat. fraud cov-
-eyance 27. Eliz. — That part of the Stat which
acts upon the fraud is to be construed lib-
-erally, and that part which acts upon the
offender is to be construed strictly. The de-
-ficient part of the Stat are to be construed
if possible so that the whole may take effect
when the whole act stands together, when how-
-ever there is a saving clause totally repugn-
-ant to the body of that Stat. that clause
is void — The rules of construction are the
same in Equity as in Law. ~~It~~ rule of relief diff.

§ 123.
Coup. 432
Plowd 57.
1 B. 88
4 Bu 650
3. B. 1. 431-
38 —
1 Co 47.
Cumblanche
12 — 34
Powell's Ch.

# Repeal of Statutes

It is a rule that all laws written or unwr-
-itten are repealable & when there is a contra-
-diction between a former and a latter law —
the former is repealed by the latter so far as
the repugnancy extends.

4 Bu 638
1 B. 89
1 Inst 111-
-115 —

So upon this princip-
-le that when the C.L. & Stat differs the former
yields and upon the same principle if the latter
parts of the same Stat are repugnant to
the former the former is repealed pro tanto.

Ballad.
287. 11. Co
63. 4 Bu
638-641 —

A clause in a Stat providing that it shall

1 Bl. 20 not the repealed is void. for it is an derogation of the
4 Bo. 638 power of a subsequent Legislature —

The law does not favour an appeal by implication to have a repealing effect the repugnancy in the latter must be clear — St. cannot be repealed
non mod. 2 Hl. 28 and 3 - 102

It is said in the
1 Ins. 111. Books that an affirmation Stat. may or
115 - 1 Bl
39 Lent may not repeal a rule of the C.L. —
66. 252. It does repeal it if it is repugnant to
Plowd 206 the C.L. on the same subject and so does
11 Co 63. a negative Stat. This distinction is without a
10 Mod 118 difference and probably nonmunicipal —

when a Stat gives a remedy in a case where
2 Burr there was one by C.L. and does not imply a
403-5. negation of the C.L. remedy there will be two remedies —

In this case the Stat remedy is
2 Bo. 3.4 called accumulative or additional by the supposition that the Stat does not repeal the C.L.
Cowper 476
Bolled 140
11 Co 63 2 Hill 41

10 Mod 337. If a Stat inflicts a higher or lower remedy or punishment than is inflicted by an older
4 Burr 2846 Stat. the older is repealed. as if an former provided that a thief should be punished by whipping
4 B. 138
4 Bu 654

and a late Statute punishes him with death the former is repealed, and if a penal Stat. inflicts a less punishment than was inflicted by C.L. rules the C.L. rules is abrogated. This rule is not laid down in the Books. The practice is either to prosecute by the C.L. or Stat. The party cannot be punished with both. This is founded on the benignity of the law. 4 Bl. 138. 3 Hill 41

It is also said that an affirmative Stat. does not repeal a former affr one there is no sense in this rule. If they are repugnant or contrary the latter repeals the former 2 Show 30. 4 T.R. 3. Plowd. 232. 11 Co. 73. 1 B. 139.

I will here observe that the distinction which I have mentioned with regard to the repealing operation of Stat. containing express clauses of repeal for in these cases there is no question of construction. If a repealing Stat is itself repealed the original Stat. first repealed is again revived. 1 B. 90. 4 Ba. 438. 4 Inn. 325 Ld 438 4 Hill 111 7 Co. 53 2 Hill 118

and on the other hand if a Stat. which has been repealed, has been or is revived the repealing Stat consequently becomes repealed. 4 Ba. 638. 2 Inst. 686.

Tho a Stat. is repealed yet acts done under it & in pursuance of it

before it was repealed remains good & lawful
The repealing laws merely make them to cease
from the time of repeal Jenkins 233. 4 Bac. 638.
2 Inst 686 It is said however in some of the Eng Books
if a former Stat. is declared void & null & void
that all former acts done under the former
Stat are void. but I consider this rule to be
wrong for it supposes that a subsequent
Legislature can destroy all of the acts of
a former.

Where a Stat. is expressly repealed
by another which makes a provision for
its continuance for a time limited the former
Stat does not revive upon the lapse of the time
unless it was specially provided for by the Stat
3 Ca. R 205.

If a Stat. after being violated &
before judgement rendered agt. the offender a
new one is made upon the same subject
1 B.R 431 the offender cannot be punished by either unless
1 Haw 169 the latter Stat. provides that the former shall
4 Bac 636. be in force till the latter can take effect.
10 R. 159.
11 Rich. 390
Wade 37

This rule follows from the rule formerly
laid down. that the laws cannot have a
retroactive operation. The same point was
determined in the circuit Court of the U States
in the case of U.S. vs Friedwell 1 B.R 457. 1 Haw 169

The St. authorizing an appraisal of damages by fence viewers is cumulative 3 Hill 41

If a St. give a new remedy without any negative words implied the party may have his election between the old & new 3 Hill 41 18 Wend 220 15 Johns 220

Where a new St. embodies & re enacts a former one such former St. is not repealed 11. Pick 32.

1 Roll 459. 4 Bac 436.

Notwithstanding the general rule that a Stat. cannot have a retroactive operation still if a covenant is made to do an act which is lawful at the time but made unlawful by a subsequent Stat – the covenant is annulled. This however is not a retroactive effect. Thus if a citizen of the US. covenanted before the embargo to transport a cargo to England the embargo would annul the covenant

S. 410.

Salk 198. 8 TR. 267. 2d Ray 317. 1 Pan C. 445. b. 8 Mod 55. 324. 2. P. 88. 218.

And on the other hand if one covenant not to do an act which he had a right to covenant agst but which a subsequent Stat makes it his duty to do the covenant is annulled Salk 198 –

S. 410

But if one covenant to do an act which ~~is un~~ lawful. a Stat afterwards makes it lawful does not annul the covenant S. Ak. 198 –

S. 410

If a covenant declared illegal by Stat. is made whilst that Stat. is in force a subsequent repeal to that Stat does not give validity to that contract – This contract was good or not good ab initio The repeal of the Stat does not abrogate the contract ab initio. Thus if a contract was

made on paper not duly stamped when there was a stamp act it would not be good, tho the act should be repealed 1. H. 131. 15-

If complete performance of a Stat. is made illegal by a subsequent Stat. though it can be performed in part, the part performance may be enforced. Plowd. 284. 24 Bl. 183. 581. Tuck 131 209-11-2 Ther 254-2 Co 31. 1. Fonb 209. 112. 2 Pow C. 31. 448-50-

The Constitution of the U.S. (article 1. Sec. 10) prohibits all ex post facto laws and all laws impairing the obligation of contracts- A Stat requiring an impossibility is void It is said in some of the Books that a Stat contrary to reason and the divine law is void- I consider this proposition as totally indefensible 1. Bl. 91. 41-8 Co 118. Hob. 87 (379) 1 Fonb. 23-43-

If a Legislature will make a law which is unjust & wicked I know of no power in Courts to set it aside indeed if it were otherwise & Courts had it in their power to say that every Stat. of this description was void the Judiciary would at once be the supreme power. Divine law is not the law of the land it is binding in the consciences of Legislators but Judges are not bound to execute it- It has been made a question whether Stats opposed to the written

Where one leases lands which by a power he may lease also lands which he has no right to lease reserving one entire rent the whole is void 27. C L 81

A St. authorised trustees to bind out children "provided "such children should not bound for a longer term "than till they have attained the age of 21." An indenture binding for a longer term held not void but merely voidable 39. C L 42.

1 Sw 81

Corporation of Lewes under a power 29 C 2 182

If a Corporation authorise one to sell the land of another for the payment of taxes the seller must perform all the prerequisites of the Act before he can sell & the buyer is bound to ascertain from performed the receipt in the seller's hand is no evidence not even primâ facie of their performance of law 90 4 Wheat 77 4 Cranch 413 & cts 64. unless the Corporation shall answer & will be evidence that the sale was regular 7 Mass 149 Acts 21

If a Corporation a company to loan money on land & mortgage it can loan it in no other way — Where it is prohibited from taking a particular security but has a power to loan money if it loans money & takes the prohibited security such security is void but the contract of loan is valid & the money may be recovered back under the common counts — but where not only the loan but security is prohibited nothing can be recovered back 7 Mass 34 2 do 583. 19 John 1. 8 Cranch 20. Nor if money is thus illegally loaned can the corporation consider it an embezzlement of its funds by its agents & recover the amount of the loan — 7 Mass 35 — Said in 1 Mass 101. Charles G. 67. v Dana, that if a corporation sell goods not being authorised by their act of incorporation the buyer must pay for them & that the only consequence is the Legislature may seize the stock — Charles

223
543

Constitution are void. A written constitution is paramount to all State. This question has been repeatedly discussed in the Circuit Court of the U.S. (not reported)

If a State makes a new law concerning an old offence and appoints particular Judges to execute it. Still the Jurisdiction of Courts is not excluded by the law. So if a State provides that all crimes of a particular denomination shall be tried by particular Judges still the Jurisdiction of those courts which before had ~~Jurisdiction~~ cognizance of the same crimes remains 4 Hawk 89 114-118 - 5 Mod 568 - 3 Burr 1042 - 9 Co 118 - Cro 39a

The ancient Jurisdiction of courts of general Jurisdiction is not to be ousted by implication - But if the State creates a new offence and a new Jurisdiction for the trial of it. the better opinion seems to be that the offence is cognizable by the new Jurisdiction only - here there is no established Jurisdiction to be ousted - Cowp 529 - 1 Hawk 9 - Cro. Jac. 643 - 2 Hawk 302 - in note

1. Sid 196
2. Hale 5

If a State gives special authority to certain persons affecting the property of others. they must be strictly followed or they become trespassers - this applies to

Cowp 26, 30

[illegible] 1 Hb. [illegible] 4 [illegible]
[illegible] power [illegible] 1 Hb 3 Hb - 2 Peere 204 - power to sell must be exercised in the mode provided by the instrument giving it.

Every exn of a power must have reference to the original instrument creating that power & where an claims under the exn must make title under the power itself - 2 Hb. 252. 380. 81 and 1 Bro PC 471 - If the uses limited by the power must be such as would be good if limited by the original deed

If an act of Parliament require the concurrence of two or more they must act together & not separately - 3 Hb 41 380 2 Vol Hb 1017

## Commissioners of Highways — with Special Powers as created by Statute

If a statute confers certain powers affecting the property of individuals upon certain individuals or persons, that authority must be strictly pursued and it must appear upon the face of the proceedings that it has been strictly pursued Cowp 26-2 3 Johns Cas 107 -

If a stat confers a power on a body of men constituting a certain number of them a quorum enabling them to do certain acts by vote of the majority, it has been questioned whether a majority of the quorum not amounting to a majority of the whole number could act 1 Bac 642 - 11 Co 30 - Hob 211. 3 JR 594 & 810-22. 3 Mod 13 -

The better opinion seems to be that an act of such majority does not bind for such body of men have no other authority, than such as is expressly given them, but the power of a majority of a quorum to act is not necessary to the existence of this power nor the due exercise of these powers —

If an authority of a special nature ~~is given to two or more persons~~ is granted by Stat. to two or more persons —

## Special Powers.

### Municipal Law

the authority is joint & not several unless the
nature of power and of course the authority
will not survive on the death of one of
them to the other all must concur in the act
or it will not bind 1 Root 67 1 Sw 187 4 Bac 463
442 –

But if the authority thus conferred is of a
public nature the authority is several as
well as joint and on the death of one will
survive to the other – Suppose then A. B & C.
are made commissioners of Highways they
are public officers & their authority is several
as well as joint, but in the other case
their authority is mere agency –

Again
while the power thus conferred is of a private
nature the act of the majority in conjunction
of their authority (is the act of all & binding)
In the case of Corporations the rule is that
a majority of the Corporation will bind
the whole however small the number present
may be unless in deed there is a special
designation of the number there shall be
present – It is (not) necessary that all body
be summoned to attend 1 Bosanquet & Puller 229 –
Burr 1617 – 1020 – 2 Ld R 592 – 1 Sw 181 – Atk – 212 –

2 Burr 1020
3 Ld R 592
1 B & P 229

1 Bac

4 Ct 245

St C 2362 provides that if any one encroach upon the highway the Selectmen are empowered to give notice to remove & provide by Stat 360 that the Selectmen must meet & deliberate upon the subject of the alleged encroachment & if a majority think see fit they may order the encroachment to be removed so that the highway shall be of the original width the breadth of the road extent of the encroachment & the place or places where shall be particularly specified so that the party may be enabled to obey the order

If the power conferred be of a private nature all must join in exercising it 6 Johns 44 3 Mc 542 4 Ct. R. 245 50

Where a judicial act is to be done by two or more persons all who engage in the act must be present together at the time of executing it 1 Burr 115b 8 Mo 454 1 Bos 229 11 Ves 160 2 East 244 8 ds 319 327 n 3 Ba 293

In laying out a public highway those who are authorized to lay it out must all be present tho a majority may decide 1 Bowen 239 5 Ct 194 3 Wend 47.

If a statute invests a body of men with the exercise of a power affecting the rights of others & prescribes a mode of redress for an improper exercise of such power Ex. by appeal from the doings of Selectmen in laying roads - & their proceedings appear regular on their face can they be questioned in a collateral action - Sank not 3 Mass 475 - vid 19 Johns 39 15 do 152 16 do 8 13 do 424 4 Cowen 190 6 7 do 531 na 8 Pk 424 1 Stark. E. 226 n1. 2 Pk E 257

Where a will authorises a sale of an estate a sale of the whole except the wood growing is valid 21 Ld 130

# Municipal Law

## Of Pleading Statutes & the mode of prosecuting upon them

To plead a statute is merely to state the facts which bring the case within it. suppose the Defe- in an action of ass.t would plead the stat- of limitations of James 1st it is not necessary nor indeed is it Lawyer like to go through the whole stat- it is only necessary to say non assumsit infra sex annos 2. Ld. Ray. 11-221-

Counting upon the stat- is an express reference to it by words "agst the stat- in such cases made & provided" or as the case may be Virtute statuti

Reciting a stat- consists merely in quoting its contents - It is distinct from both the former - sometimes stats are plead by reciting them, but still pleading and reciting are distinct things

These three are frequently confounded Judges are bound to take notice of publick stats ex officio so that ~~that~~ there is no need of setting out the stat- But private stats Judges are not bound to take notice of ex officio - 1 Bl. 86

2. Mod. 57 Cro. Eliz - 236 - 4, Co, 76. 10, Co, 57 - 1 Bo 88 -

In order them to take advantage of a private stat -

it is necessary to shew it upon record. It is said in many of the books that a publick Stat. need not be pleaded. This is not true. It need not be recited. It is necessary sometimes to read a Stat. ~~This is pleading it~~ but it not necessary to recite the provisions of a Stat. 4 B. & C. 635. Fortescue 125. Vide 4 B. & A. 401.

Stat. Ct 342

As to private Stats. they must be recited as well as pleaded. The recital of a publick Stat. is in some cases fatal even Judgement. It seems not to be necessary even to recite a Publick Stat. but if a party will recite it a misrecital will be fatal. In some cases it saved the misrecital it is said will be cured by verdict if it is an immaterial part, tho in a material part it must be fatal the verdict notwithstanding. The true rule seems to be this. That the misrecital of a Publick Stat. is not fatal unless the party reciting it ties himself up to Stat. as recited by words of reference. Ld Mansfield says in such a case he will tie the party up to half a letter 4 B. & C. 38. 11 Co. 524-96.

2. 36

2 East 341
1 B. & C. 38

If however the conclusion is contra formam Statuti the Judge will take notice of the Stat. as it really is & not as it is recited. This seems to be the rule when

Bull. 224 that the a private A. will not be taken notice of unless shewn yet it is otherwise if such private land be recognised by a Public one. v. Swan 1556 n. 4.

2 Mun. 245

the mistake is in a part immaterial as well as material 2 East 341 Cro Eliz 236. 245 Cowp 474 - Ld Ray 382 - 2 Mod 99 - 136. 376. 559 - Plowd 76-81 - Doug 102 - 4 Ba 657 - Cro Car 136 - 273. 376 - 532 —

On the other hand a mistake is not of a Private Stat - is not & cannot be fatal after verdict or even on demurrer - The Judges will take it to be as mistake unless the other party takes advantage of it by pleading nul tiel record or by specially pointing out the variance on exam oyer & then demur 2 Mo Rat 517 - Ld Ray 382 - 1 Sid. 356 - 2 Mod. 241 - 4 Ba 652 -

Cro Car 136 - 273 - 376 - 532 — Doug 90. 90 — 2 Mo Rat 517 — Ld Ray 382 — 1 Sid. 356 — 2 Mod. 241 — 4 Ba 652 —

In case of a Publick Stat it will be nugatory to plead a variance for the Judges are bound to take notice of a Publick Stat - but even a Publick Statute when to be used for the purpose of defeating a specialty must at Common Law be specially pleaded - Thus in an action of Debt - on bond if the Deft will avail himself of the Stat of Usury he must plead the Stat specially because as Ld Coke says the Law deems so lightly of a specialty that it is not competent for a party to defeat it unless by specially pleading the Stat - But the true reason is because when the Stat - is relied on as evidence. It is inconsistent with the general issue - Hob 72 3 Salk 391 - 5 Co 59 b. 119 a. 5, Ba 579 -

2. 256. 7. 393. 4

## Municipal Law

2 Sw. 207
Ruby, 287.
Stat Ct 342

This is not the rule in Lon. here the Dft. may plead the general issue & rely upon the Stat. for defence. This is merely by Stat. In declaring upon Private Stats. it is necessary to recite them substantially tho not literally or verbatim 4 Co 57 76b. 2 Root 466. 2 Mod 57.

It is never necessary however to recite the title of any Stat. it is usual however to recite a Stat. by reference to its title, but it is not necessary to mention the title or even preamble, because neither of them being any part of the Stat. the title

2 Str 658

3. Co 33.

being the name & the preamble explaining the reason of the Law 2 Roll 466. Com. Dig action on Stat. La Ray 77. 6 Mod 62. 4 Bu 655. 658.

6 Mod 62
2 Sud. 609
2 Bl. R 1104
L 34
1 Ld. M 317
1 Ld. Ld 279
3 Mod. 344
4 Gelt. 127 an
Com. Dig. Action on Stat. I.

It was once holden that a mere misrecital was surplusage and did no harm but it has been since holden otherwise Mr. C. supposes the rule now to be that the misrecital binds the party. In Eng the recital of a Stat. when it is necessary must contain the date of the act and the place where it was enacted otherwise it is ill on general Demurrer. This rule is not followed in Lon. as to the place where it was enacted Cro Jam 211. Car 232. Cowp 474. 2 Haw Pr C. 246 — See 3 Ba. R 411.

Whenever a Private Stat —

It is not necessary to recite a public St. Co E. 286 2 Mod 99
Willes 210 But if it is misrecited in time or any other material
circumstance the misrecital is fatal even after verdict if the plea
of the St. be tied up to the St. i.e. if the conclusion be contra formam
statuti recitati. Same if the conclusion be generally agt.
the form of the St. it is good notwithstanding the misrecital for
the genl. conclusion sets the matter at large & the Court is
bound to take notice of public Sts. 1 Roy 192 1 Salk 140
1 Ld. R 210 843 382 1 Stra 214 Doug 94 2 TR 688 Co
71 - 1 Ch. Ca 276 - Yelv 127 a n

A St. authorised persons to enter upon & take lands
w of another making or tendering satisfaction to
the owner or proprietor for any loss or damages
they might sustain. Held 1 that a lapse was an
owner or proprietor within the St. said 2 that
the person entering was not bound to make
or tender compensation at the time of entering
or taking the lands 34 C L 51

When one St. prohibits a thing & another gives a penalty in an action for the penalty the declaration shd. conclude against the form of the statute. Yelt 116 n. 1. Plow 206 2 East 333 Esp. on penal. St. 111 & the same rule applies to information and indictments Hale P.C. 172 2 Hawk. c. 25 s. 117 Owen 135 —

But where a Statute refers to a former one & adopts and continues the provisions of it the declaration & indictment shd. conclude against the form of the St. Hale P.C. 172 1 Salk. 212 — So where a thing is prohibited by several sts. if one only gives the remedy & the others are explanatory or restrictive Yelt. 111 Cro Jac 187 Noy 125 Comb 160 Hardres. 409 Andr. 115 3 Saund 377 — 7 East. 51 & Bennet 212 —

1 Saund 135
230
1 Mod 295

is pleaded the opposite party must plead nul tiel record. but to a publick Stat. such plea is wholly unnecessary & in fact inadmissable. The Courts are not to be informed whether there is such a Stat. and the question whether there is such a Stat. is a question of Law and if a party plead such a Stat when there is none the opposite party may demur 4 Co 76. 2 Mod 57. 3 Co 28. Cro Car 355. 4 Ba 655.

In declaring upon publick Stats. it is a general rule that it is not necessary to count upon them. To this rule however there are some exceptions. Cro Eliz 601. Carth 382. 19 Vin 513.

I. If there are two concurrent remedies one at C.L. and one by Stat. he who founds himself upon the Stat must count upon it otherwise it will not be known which remedy he will accept or rather he will be presumed to pursue the C.L. remedy. 4 Ba 38. 11. 18. Cam Dig action on Stat. g.

II. In actions upon penal Stats it is necessary to count upon the Stat tho it be a publick one. I find no reason for this rule & I believe there is none. Ld Ellenborough says it is necessary because it has always been the

practice Mr. Q. & thinks possibly the ~~mere~~ may be the extreme case of the rights of the subjects

1. Ba. 38. 2 Haw. 356 - Plowd 206. 1 Vint 103 - 7. TR 521 - 2 East 333 b - do. 125 b -

III. If a Stat Publick gives a new action not merely a new remedy but a new species of action not known to the C.L. it necessary to count upon it - the rule in the books is that the party must recite it - formerly recital was necessary but not now. Thus the action of Waste to recover the subject in which the waste was committed was wholly unknown to the C.L. - The Stat Gloucester gave the action - The rule is this - that he who sues upon this Stat must count upon it - The Plaintiff ought to show upon what his action is founded - There are exceptions to the general rule 4 Ba 55 b. 19 Vin 504 - 1 Salk 505 - Holt 634 - 2 East 339 - 41 - 34

When a Stat extends an old remedy to a new case it is not necessary for him who pleads

Dyer 83. B the Stat - to count upon it - Here the general rule prevails 2 Ba 22 - 439 - 445 - Com Dig ad. on — Hul. 19 Vin 504 - 4. Ba 655 -

It will follow from the distinction in action upon Publick Stat not penal when the action is not a new one and there is no C.L. remedy it is not necessary to count

Where the act prohibited was not an offence at C.L. it is necessary in all cases, criminal & civil to conclude against the form of the Statute or Statutes 1 Saund 135 n3. 2 East 333 1 Ch. Pl 358 1 Saund 249 7 East 516 2 Mp 116 7 do 9. 11 do 280 1 Gallis 30 –

If the act prohibited by St. is an offence at C.L. the indictment or declaration may be in the C.L. form & the St need not be noticed even tho it provide a form of pleading action 2 Hawk 200 2 Burr 803 4 do 2355 3 do 1481 2 Wils 146 2 Leach 3 Ed 622 13 Mp 515 –

Where a St only inflicts a punishment in that which was an offence at C.L. the punishment may be inflicted tho the St is not noticed in the indictment – 2 Burr 332 –

Municipal Law James Gould Esq.
Litchfield
1815

The jurisdiction of the U.S. is not taken away by mere negative words in a St. there must be special words to that effect 2 Cain R 179. 2 Burr 1040 3 Will 52

If a St. expressly enacts that a Sup. Court one of general jurisdiction shall not judge of a particular thing as of an election still it may judge of collateral things appertaining to the principal subject 3 Will 52. Cutting

upon them — if then is a new action counting is necessary as before — If then a Stat creates a right, or duty, and gives damages for the violation of one or the neglect of the other. it is not necessary to count upon it; for 1st. then being only damages the Stat. is not penal 2d. then being no common Law remedy there can be no doubt on what the action is founded Carth. 382. Lak. 212 —

The rule is the same when a Stat not penal merely creates a right or duty and does not expressly give any remedy at all — If an Stat prohibits an act another inflicts a penalty both are to be counted upon, for the one creates the offence and the other must be resorted to for the penalty — Plowd 200 - 2 Ear 233 - 1 Vin 515 - 4 Ba 666 - 656 - 5 n

An offence may be laid in the indictment to be both agt the CL & Stat. but this must be in different counts. Leach 66 - 235 - Lak 42 - 202 - Carth 382

When part of the Trespass consists of connected acts agt the Stat & part agt the CL. the counting words contra formam Statuti are to be confined to that part only which comes under the Stat. as breaking & entering the close of another is contrary to the CL and the

act of hunting per se is contrary to the Stat these two may be included in the same prosecution Last Cl. 235 - Salk 42 212 - Carth 382 -

If a temporary publick Stat having expired is continued by a subsequent one & the case is such as requires counting it is sufficient to count upon the former St only - The reason is that the first only contains the Law - the latter merely contains the duration of the former. It does not contain the Law - 2 Strange 666 - 4 Bur 638 - 656 -

§ 39

Contra Rex v Co 1 Ld Raym 444 Dang - 1129

If in a Prosecution for an offence at CL only and the indictment should conclude contra for Stat when there is not Stat these words may be rejected as mere surplusage 2 Haw 25 - 115 6 - 5 Term 162 1 Sanna 135 n 3 B -

An important rule on prosecuting ~~for~~ upon a Penal Stat - and also upon others is that exceptions in the enacting clause of the Stat must be negatived ~~in~~ the declaration upon it, tho in a distinct separate clause it need not be negatived, for in the former case the exception enters into the description of the offence & not in the latter 1 Burr 153 - 1 Term 141 - 5 do - 83 - 7 do - 27 - 8 do - 542 6 do 559 - 1 East 156 - J. Ray 55 6 - 10 549 Jones 125.

§ 343

Esp Dig 300 --

2 Mass 231

4 BR – 202 B Seems if it conclude arg^t the form of the St. afs^d volume St. has been previously recited 1 Bla. Co. 276 289 4 Ind 196 n 1. –

Ct. 12 So if one St. provides that all persons not professing certain
Pick – 117 qualification prescribed therein shall not be allowed to do
.do 139 certain acts specified by another St enacts that all persons not qualified by law that do such acts shall be fined $5. on a conviction upon the latter St. every qualification in the first St. must be negatived by the information Vide Bb. Sc 1415 Com 522 Bum 148 613 Doug 345 3 Ed^n. Salk in 1 BR 125 127 that it has never been decidedly decided that the prisoner should negate every possible qualification Le Loc D R 1386 the same by Tenison J in Doug 345

Any act in violation of a Statute which provides certain requisites to the validity of an act is void but if attacking where the act is directory 29 L.J. 105
5 Hill 21 3 Mass. Rep. 330 & B & C 29.

See. 76
Stat 555
... 11.01
SR 320

See 5 Hill 22 where the court in commenting upon a declaratory statute which declares a certain act to be an offence say the act if done is not indictable but is more matter of accounting between the officer committing the act & the Govt

## Municipal Law

There a great number of cases which turn upon this distinction - The most simple is to be found in a Ct Stat agst breaking the Sabbath That Stat prohibits all similar business on that day except work of necessity & mercy - the same Stat contains a clause distinct that no person shall be indicted in less than one month after the offence committed - This constitutes no part of the description of the offence therefore it is wholly unnecessary to negatiate this distinct provisso in the complaint upon the Stat - The assumption of negatiating the exception in the enacting clause ut supra is fatal & is not cured even by verdict - Where there are two concurrent existing remedies one at C. L. the other by Stat - either may be pursued. this is often the case 2 Haw 302 - Leach 235-55 - Cowp 648 -

The Stat remedy in these cases is an accumulation - If the Plff pursues the Stat remedy and fails to bring his case within the Stat - he may in the same suit resort to the C L & recover if his suit is well founded at C L - It may sometime happen that the same offence at C L & Stat - may be punished by the C Law but not under the Stat - Cro Eliz 231 307 597 - Moor 750 - 2 Bl Rep 960 5 Co 99 - 2 Haw 302 - 56 Leth 212 - 2 Ell & Bly 483 95 - 2 T R 169 - 2 Hale 171-170

2 Bl 1331

## Municipal Law

On account of some rules of evidence prescribed by the Stat this rule holds good both in civil & criminal prosecutions. It was formerly holden that the rule did not hold in criminal cases, but it is now settled that it does. Hawk 211 2 Hawk P. Cl. 91.

So that which is no offence at C. Law is made illegal by Stat, and by Stat a particular mode of prosecution is pointed out by Stat - that mode only it is said can be pursued, and suppose a Stat provides that whoever shall do a particular act not punishable at C. Law shall be guilty of felony to be prosecuted by information in this case information will lie & not indictment or any other mode tho Jam 441 Selk 45 - 7 - Co. 36. 2 Burr 233 - 803 - 805 - tho Ja 643

4. Burr 2323

This rule holds only in two classes of cases these classes may indeed be in a great all cases that come under the Stat -

I. When a particular mode of prosecution is prescribed in the prohibiting or enacting clause of the Stat - 2 Burr 803 - 5 - ut supra

II. This rule holds when there is no prohibiting clause - These can the only classes of cases, where the rule holds

## Municipal Law

for in those cases the rule holds the offence & the remedy are so blended they cannot be separated. But on the other hand ~~the~~ where the particular mode of prosecution is prescribed in a separate substantive clause the general rule does not hold. Thus if Congress should make a law that after such a time it should not be lawful to export corn from the U.S. & that whoever should do it should be punished ~~with~~ by information in a fine 2 Mass 302 note

: Gen'l rule

2. Burr 803

4. T. Reports 305 — 205 202

Thus suppose the mode of prosecuting is prescribed in a distinct substantive clause & therefore according to the distinctions any other action would lie as well as information

The only reason of this diversity is that in the former class of cases the offence & remedy are so blended in the stat that they are not to be seperated in the prosecution while on the other hand they are seperated & no any other mode of prosecution (which is proper) than that prescribed is not to be assisted by implication 2 Mass 302

Thus suppose the mode of prosecuting is prescribed in a distinct substantive clause

If that which was punishable by Stat. was before punishable by C.L. the C.L. proceeding which may be pursued tho. the Stat. prescribed in the enacting clause another mode of prosecuting 2 Burr 803 4-5- 4 T.R. 202- 2 Haw 302.

There is a remedy independent of the Stat. The Stat. has merely provided another remedy and has not taken away the one at C.L. for here C.L. is not to be excluded by implication. If a Stat. creates an offence but gives no remedy the C.L. will find its offender & punish the offender 1 Burr 544- Cro Eliz 655- 10 Co. 75- 4 Ba. 553-

Doug 435

The rule is the same where the Stat. creates a particular right & gives no remedy the C.L. will enforce the right by some remedy of its own for here the breach of the Stat. is a violation of the C.L. & there is no right without a remedy- Doug 422- 3 Lev 290-

It is said in some of the authorities of the last rule that if a remedy is to be sought in such cases it is by an action on the Stat.- yet I have observed that C.L. furnishes the same remedy- The meaning of the rule is this, that the right to be enforced is given by the Stat. but the remedy for the violation of this right is furnished by the C.L. & the offender is punished as for a Misdemeanor-

When a St. requires an act to be done within a certain time by an officer for a public purpose it is merely directory & if the act be not done until after the expiration of the time the public shall not suffer by the delay 6 Mond 486 12 Ct 243 255 3 Hill 47-

## Municipal Law

To obstruct the execution of laws granted by State is an offence at C. Law, & when such offence is prosecuted in such a case the Indictment ought not to conclude contra formam statuti for he has violated no Stat – The Stat does not prohibit the act. But it does so conclude Att. G. a thinks it would be surplusage on general demurrer & bad on special Bang 415-425 —

## Who may Prosecute on a penal Statute

It is a general rule at C. L. that a Publick offender cannot be prosecuted by an individual in his own right. It is a publick offence & the penalty belongs to the Publick – It is true indeed that almost all publick offences work some private injury but in this case the individual prosecutes on the ex post ground of having received some private injury 4 Bl. 25 6 J. & 2 Haw. 265

It is true that in Eng. private individuals prosecute offences for the King & in his name and this they do where no part of the penalty goes to them & may be done by information or indictment

2 T.R. 47
90.98.205

The only interest which the individual has is in the costs to be recovered – Indeed in Eng. individuals may prosecute in cases of felony – These rules indeed it

## Municipal Law

Lions are no where expressly authorized but have grown up Sub Silentio. 2 TR. 41-190 198-205 Leach C Co 71-242-289- 3 Bo 568-

This practice is wholly unknown to the laws of Ct. there is however a mixed species of prosecution partly Publick & partly private call'd a qui tam Prosecution which is carried on by individuals, a Qui tam action is brought partly at the suit of the King and partly at the suit of the party individual prosecuting - It is call'd qui tam from certain words - This action is carried on by civil process - this is all that constitutes the difference between them 3 Bl. 1624 do- 208- 304 2 Haw 244 - 1 Bo 37-87-

Qui tam Complaints with forthwith Process are properly speaking qui tam informations but if they are commenced with civil process they are qui tam actions - Cowp 382 - 4 TR. 574-8- 8 do 448- 7 do 257-

and an action by one individual in his own right the on a penal Stat is always in a penal civil suit for the form of the process determines the character of the prosecution

(an action brought by an individual in his own right on a penal statute is a civil action)

Com. Dig. action 4 B. 304 2. Ch. 162

Vide the Ch. or Stat. no form in the

A person injured by a forg. note tho not forged in his name may have an action on the st. for the forgery 1 Day. 100 — neither is such action barred by the st limit. one year — Id.

In an action on the st. agt. town for damages sustained thro, the insufficiency of roads as it is a good defence to show that the defect was occasioned by some sudden act of the elements a non which agt. had no control & that the road in immediately previous was in good repair — 15 6 L

3 & 6 1 B & C 477 —

The rules of pleading are different – in criminal it is one tenor, in civil by writing – 1 Wilson 125 – Cowp 382 – 3 TR 448 – 4 do 756 – 7 do 257

Prosecutions qui tam are generally on penal Stat to recover a penalty or forfeiture of some kind – indeed those prosecutions are now considered as mere creatures of Penal Stat – 4 Bl 308 – 1 Ba 37 – Finch L. 340 –

Cot. 877. 2 H. 377 1 Ann 1.

It is not true however that qui tam prosecutions are wholly unknown to the CL In a very few cases prosecutions similar to qui tam prosecutions were known to the CL. tho not call. by that name 1 Ba 37 – 2 Hawk 377 – 1 no Eliz 877 – Ja 360 – 552 —

A Popular action is one given to any one person that will sue for the penalty incurred by the violation of some penal part or Stat – the action is call. Popular action because it is given as the expression denotes to the People – (ie) to any person who will prosecute for it – Sometimes the whole penalty is given to the prosecutor & sometimes a part only, in either case the action is popular 3 Bl. Com 1 2: 2 do 437. 2 Hawk 265 – Cornwlys – Stat El –

 **Popular Action**

## Municipal Law

A Popular action may not thus be a qui tam one for the whole penalty may be given to the prosecutor, & a qui tam may not be a popular because the right of prosecuting for the penalty may be confined to the party aggrieved by the offence - These two actions are confounded in the Books but incorrectly -

1. B. 37. note — When the whole penalty is given to a party it is not settled whether he may commence a

§ 34.5 qui tam, but Mr Gould thinks there is no propriety in it. 2 Wm 1 Bl 161 Dy 159 | Com Dig Pen 49. 50

If an individual is civilly injured by an offence prohibited by the Stat. he may have his private remedy by action on the stat, for the Stat impliedly gives him a

4 B. & C. 653 remedy - for as the supposition it makes that wrong for which he is damnified - Haw 377 - 2 Bac 37 - 4 Co 130 - 12 Co 134

And whenever a Stat prohibits or commands a thing for the advantage of Individuals those individuals may have an action on the Stat tho the Stat is merely Penal & no remedy is expressly given by it - 2 Haw 377 - 6 Mod 26 7 -

A Stat prohibiting an offence injurious to an Individual is within the meaning of the rule as being advantageous to the -

In a Popular action Pf. has no right to compound with or discharge Def't without leave of Court or receiving payment of the Judgt.
Gilb Law R 251 11 Ad & E 476 11 Ad 118 15 Eos. 18. 5 BR 258
1 Wils 79. Statutory provision & procure—

" "

Where an individual prosecutes for a public nuisance or other matter not of a private nature & neglects unreasonably to proceed the public prosecutor may pray judgt. 28 C.L 154 & n

Individual - Hence it has been holden that an individual may have an action in Engl. on the Stat of hue & cry; 4 Bl. 453 - Com. Stat. 5 -

When a Stat inflicts a penalty agst any one for dispossessing any one of his rights & interest & does not appropriate the penalty it belongs to the individual who is injured by the violation of the Stat - & not to the King or Publick & an action lies on the Stat - to recover it - The rule is the same where the right is withheld - Com. Dig. a. Stat E - 3 Salk. 290 - 4 Bac. 53 -

Action of Ejectment lies in N.S. county to recover the penalty incurred by the St. Mary & enforced by S.C. the infant lost to evade the St. Limitation. 8.56

## In what cases qui tam actions will lie.

As to the question in what cases qui tam actions will lie, there are a number of rules upon wh. I now will enter - If for an offence immediately injurious to the people, only the Stat gives the penalty, or part of the Penalty to the individual who shall prosecute for the offence, any person may maintain a qui tam prosecution for the Penalty - In a case of this kind where the whole penalty is given to the individual prosecuting there is no propriety in laying the qui tam action for he is the only person interested. I hold however that the prosecution may be thus laid

When Q.t.m actions lie. Municipal Law

though for principle I think it improper — 4 Co. 13. 2 Haw 377 & 1 Bac 37 — antea 48 post 55

The rule is the same if a fine or Penalty is given to the Publick & ~~or~~ same certain to the prosecutor — The ground on which the individual is allowed to prosecute is because he has an interest in the sum to be recovered but when the offence is immediately injurious to the Publick no individual can maintain an action for the offence unless some money or profit is by that given him — I speak here of those cases where the individual is prosecuting in his own name with the King or State not where he prosecutes in the name of the King or State alone — on the other hand if a Stat prohibits an offence immediately injurious to an individual as well as the State and specifically gives the individual injured a penalty or damages he may & according to some authorities ought to bring a qui tam action — 4 Ba 37. 4 Co 13a. 12 do 134 — Cro Ja. 134 —

Ante 45

3. B. 161

But if there is no penalty specifically given still by a former rule he has a right to damages by implication & can bring the action — for he has an interest in bringing the action tho he has no interest in the penalty till he commences the prosecution

Where a St. gives double damages the Jury are to assess single damages & the Court to double them 1 Mf. 155 White 434.

the commencement of the prosecution gives him an inchoate right - as to the right given by a remedial Stat - The rule is otherwise where the party injured has a right to damages immediately on the commission of the wrong - 2 Hawk 139 - 2 H. Bl. 310 - 2 Bl. 437 - Fra. 1189 - 3 Burr 1428 -

2.52

When a civil remedy is given to the party & a fine to the Publick on a conviction in favor of the party the fine is inflicted of course, tho' a civil action - 4 Ba. & Ald. 5 do 191 Cath 390 -

2.53

2. Burr 501

But in the case of a penal Stat as above the inchoate right is not consummate till Judgment; before the prosecution is commenced the penalty is unappropriated & after the prosecution is commenced no one can interfere with it 2 Bl. 437 -

It follows then when-ever a Stat gives a popular action the Stat or publick can bar the prosecution by releasing the whole penalty or by pardon provided the one or the other be done before the individual commences the prosecution - But after prosecution commenced the State can only release their part of the Penalty they cannot defeat the inchoate right of the Prosecutor & upon the same principle when a prosecution

is commenced by an individual the Atty Genl cannot enter a Noll. Pros. - except for the part which belongs to the Public or State - Cro Eliz 180-583 - 138 - Haw 32. 11 Co 65 b - 6 - (Hutton 82) contra -

2. Haw 392 note

And as the State cannot release the part that belongs to the Prosecutor - So it cannot in any other way suspend or discharge it except as to its own part - It is said by Blackstone that Parliament can do it - 2 Haw 392 - 2 Bl 432 -

Parl Comp. or State Legislatures can do it? see 2 U.S. Ins p 10 £55

When the penalty or part of it is given to the party grieved by the offence the King or State cannot sue upon action brought for the fact - for as to him the Fact is immediate, he has a right upon the commencement of the fact immediately upon the injury done - 2 Haw 392 - 2 Hob 311 - Moor 58 Noy 110

£51

This Prosecutor ~~must~~ might also in a Popular action at C.L. release his part of the penalty after conviction in order to make that fact a bar to a subsequent - To release it before conviction would be nugatory for his right is not consummated 2 Haw 392 - 2 Roll R 33 -

£547

But it is now ~~decided~~ provided by Act that no recovery

The person who first commences a quitam or popular action attaches a right in himself which in subsequt suit can never be he may demur to a plea of recovery in such subsequt suit
6 John 103 2 Lev 141 Stra 1169 3 Burr 1423 1 Bl. R
So the first suit may be pleaded in bar of the second Cro E
261 3 Burr 1423 Stra 1169

otherwise than by verdict by collusion in a Popular action shall be a bar to a subsequent action & also that no release by the Prosecutor pending the suit shall be of any avail the object of this Stat is to prevent collusion between the Prosecutor and Deft - but I have no doubt that a recovery or release would be strictly void at CL - for as a general rule fraud will vitiate any transaction whatever - 3 Co 77 - 1 Burr 395 - 2 Haw 392 - 3 B 1 162 -

2 Roll. 33

But lest the restraint of this Stat should not be sufficient it was enacted by Stat 13 Eliz - that no prosecution of a Popular action shall compound at all without the leave of the Court upon Pillory &c this Stat cannot be an affirmance of the CL

1 Bac 43
Hob 157
5 T.R. 98.

A fraudulent composition of the suit would be void at CL - I apprehend - But this prohibits all compositions upon at discretion of the Court - This Stat is not binding in CL - in NY a person who compromises a Popular action without consent of the Court forfeits £100 and forever disabled from prosecuting in a Popular action 1 Burr 43 - 2 Haw 397 Strange 167 - 5 T.R 198 - 1 Bac A. 18 - 1 Wilson 79 -

When Qtm actions lie.

# Municipal Law

When leave is given the King's or State's part is paid into Court. But on the other hand the King cannot release that part which belongs to the Individual nor cannot a Qua Tam release by the Prosecutor at C.L. Law the King's right - But after an Indict the Deft - no leave will be given to release unless upon proof of Poverty of the Deft - 4 Burr 1467 - 11 Co 65 b - 2 Haw 275 - Bra - 187 -

If the Deft in a Popular action withdraws or suffers a non suit the King or Publick Prosecutor may proceed in the suit or he may commence a new
L52.3. prosecution at his election 2 Haw 393 - 2 5 Co 48 a 3 Bl 162 -

But when the action is given by the Stat to the party agrieved & he dies, releases, or withdraws, or suffers a non-suit the King or Publick Prosecutor cannot proceed in the Suit; the reason that part of the Penalty belonging to the party injured cannot go to the King nor can he prosecute for his Representatives - In a popular action under the same circumstances the whole penalty is recoverable by the King or Publick Prosecutor - I do not see the propriety of giving a qui tam action when the whole
L.48 penalty goes to the party Prosecuting -

John H. Russell.
Salisbury. 1849.

The Books say the party ought to bring a
S.48 qui tam action especially when there is any penalty or damages given to the King or State
But I can see no propriety in bringing this action when no ~~penalty~~ goes to the Publick
the contrary seems to be the opinion I write
-ten - Moor 58 - 2 Haw 392 - 3 Nay 100 -

If a Penal Stat attacts expressly the Penalty to a Party aggrieved by the offence he may sue for it without giving the King or State
(c) he may have an action which is not a qui tam prosecution Salk 188 - 4 Bac 11
506 - 5 do. 191 - Carth 390 -

Generally when a fine
S.51 is given to the King or Publick & a civil remedy to the party aggrieved by the offence the fine is inflicted of course upon the decision ~~of~~ for the Plaintiff - This is analagous to the rule of C.L. in actions founded on force as Trespass - There are penal actions of this kind in C.L. - giving to the party injured damages merely - that is a civil remedy & a fine to the State - When no form of action is prescribed to recover a penalty imposed by Stat - the appropriate action is Debt which is founded in Contract when in fact
S.152 there is no contract -
58
52

When Q.tm actions lie. Municipal Law.

The reason is that the party prosecuting first begins a prosecution and he becomes entitled to the penalty & the Deft becomes indebted to the Pltff in the sum the Deft is in the nature of a debtor to the Pltff — This ground of the rule is ~~in the nature~~ less artificial that the one stated in the Books — It seems questionable here whether the action of Indebitatus Assumpsit will lie in this case — The general rule is general that Indebitatus assumpsit will lie where debt. This action has been brought to recover a penalty for breach of the by laws of a Corporation Cartt 92 — Esp Dig 7 —

(240)

If a penalty is given by Stat partly to the King & partly to the Prosecutor the King may prosecute & be intitled to the whole of the Penalty — The reason why he may recover the whole of the penalty is that the part is given to the prosecutor merely as an inducement to prosecute for the King or State. besides the State is really the prosecutor in the case suppose & and as such is intitled to the prosecutors part 3 B 172 2 Haw 292 — 11 Co 65 b a —

A bona fide conviction on a qui tam information or action is a bar to any other action for the same cause & is also a bar to a Publick Prosecution for no man is to be twice punished for the

same offence 2 Haw 278 - 398 folio - 3 Bl 262 - 11 Co 65 b - Cro Ja 480 - 2 - 1 Ba 41 -

And on the other hand a bona fide acquittal is a bar to any other qui tam Prosecution or indictment for the same offence - This proceeds on the ground of Estoppele - It is conclusive that the party acquitted is not guilty - The rule requires that the conviction or acquittal must be bona fide or a prosecution may be commenced by collusion with intent to evade Publick Justice - The rule then is that the conviction or acquittal must be bona fide - on the other
L 51. hand a conviction upon Indictment in a Publick Prosecution or an acquittal is a bar to a qui tam Prosecution so that the rule reciprocal - 1 Ba 41 - Cro Eliz 241 - Hatt 209 - 1 Rol 49 - 139 - 3 Bun 1423 - 2 Haw 391 -

It is said in some of the books that the pendency of a qui tam action may be pleaded in bar to a subsequent prosecution for the same offence - This is not true the pendency may be pleaded in abatement but not in bar - a person claiming a penalty given under a penal Stat - which gives the penalty to any one who will prosecute has no right to the penalty till

he brings his action - But this is different in remedies Stals 2 How 391. 2 Bl. 437 - 2 Lewis 141 - Strea 1169 - 3 Burr 1428 - Fun Bl 311

When several persons are convicted of an offence in a popular action one penalty only can be inflicted on the whole - but when they are convicted on an indictment the whole penalty may be inflicted on each for it is said the former is a satisfaction for the debt the latter a punishment - But I apprehend the distinction is founded altogether upon the different forms of the prosecution Mr Gould thinks that the penalty recovered in a qui tam can in no sense be considered a satisfaction but merely as a compensation or an endowment to prosecute - Cro Eliz 480 - Salk 182 - 4 T.R. 809 - Bulls N.P. 189 - Cowp 610 -

Debts are joint but crimes are several - When the action is founded in debt - the consequence is that all the offenders are debtors to the Pff - There is but one debt due from the whole & the action is founded in contract but when the prosecution is by indictment there is no such thing - In violating a Municipal Law several acts may constitute but one offence when

they are of the same kind & committed the same
may be cases where a single individual act may constitute an offence — Thus if
a man does a days work of several acts on Sunday it is but one offence — But if
a party should commit a murder in the presence of a Court of Justice he would be
guilty of a felonious homicide of the breach of the Peace, & a contempt of Court
Cowp 540 —

In a popular action in Eng^d the Pff is entitled to no costs except they are expressly given by Stat — But a Pff being a party informed is entitled to costs — For in the former case the prosecutor represents the King or State which will pay no costs — but in the latter case the party prosecutor suing in his own name & right as much entitled to costs as in any other action

Salk. 200 1 Ba 42 - 511. 519 - Salk 781 - 2 H. 131. 10 —

The rule for awarding costs in a Popular action — Ct — is the same as and other —
The rule is the same here as in any other civil action

2 Inst 289 Gilb. 258 When any St. subject to the St. Costs of the first giving costs / increasing damages to damages taken where damages were before recoverable the Pff should recover costs — Sometimes when the damages are newly given by the subsequent St. bounds 8.18

(1.D.)

# Notes to Municipal Law

Page 2 A. A retroaction law cannot comport with the definition of Law, that it must be a rule prescribed—

5. B. The unwritten and Civil Law are not synonomous; The Civil Law is merely a branch of the unwritten Laws

7 C. He who relies upon a particular custom, must prove two things, that there is such a custom and that his case comes within it Gaulo—

8. D. In this case it is only necessary to prove that the Land &c comes within the custom Gaulo—

Where the offence is in its nature single & cannot be severed the penalty inflicted should only be single — by Impounding in a wrong place — Term where the offence is general & may be committed by two or more &c Existing custom house officers &c Cowp 612 and Com 271 Croke 280 Moore 453 Noy 62

Where an action is brot in consequence of a right liquidated by St. the St. is the only ground of action — Cowp 470—

# Set Off.

At C.L. if Pff was indebted to Deft in a sum or more than Deft was indebted to him yet Deft could not set off his claim 1 Salk. N.P. 164 1 Lt. R. 397. 399 –

But now by St. 13 Eli. c. 32. if Pff lies a resider out of the State or is a bankrupt or insolvent and where there shall be mutual debts between the parties one debt may be set off against the other in such action & such matter may be given in evidence under the gen. issue if notice be given at the time of pleading & on what account it became due – So a debt by assignment may be set off if Pff had notice of such assignment before action brot. – to such debts may be pleaded in bar of the action & if Pff is indebted to Deft after such set off is made Deft shall have judgt. for the balance & costs –

The terms bankrupt & insolvent in this St. are relative terms & have an appropriate C.L. signification & a question fairly arises whether the St can have any operation upon a Pff resident in this State who has never been declared a bankrupt or insolvent by judicial proceeding altho his property may be such that he cannot pay his debts –

A demand against with the view of being
set off before suit brought may be set off
through the assignee has not paid for it 5 Hill
163. see 7 Johns Ch 65

# Set off.

Where an equal debt is set agt Pff demand Deft may conclude his Plea with a prayer of judt if Pff should maintain his action precisely as if he had pleaded a release or other matter in bar for both equally destroy the action.

But where Deft owes Pff a greater sum than Pff is indebted to him Deft to entitle himself to deduct his debt must prove that so much be deducted from the Pff demand Salw 165 – 2 W 97

Pff in an action on a note took a verdict for the whole amount – Deft at same court had an action vs Pff for a larger sum Pff notwithstanding his verdict was permitted to set off so much of his note as Deft cannot Deft claim but must in such case enter a remittitur on the first record to the amt so set off. Bull NP. 2 Burr 1229 Salw 166 – 3 Bl 186

Rule – Matter of defence arising after action but cannot properly be pleaded in bar of the action generally therefore if a plea of set off state merely that Pff before at the time of plea pleaded was indebted it will be bad on genl demurrer 3 Bl R 186 11 East 507 / Cases. now. qu. to the commencement of the suit & not to the time of Plea pleaded

# Set Off.

If the debt to be set off accrued before action but plea of set off shd state that Pff was indebted to Deft at the commencement of his action – if it accrued after suit but plea should be in same form in which pleas after the last continuance are generally pleaded to wit that Pff. ought not further to have or maintain his action Salk 167 n 98 –

The debts must be mutual – a joint debt cannot be set off against a separate demand nor a separate debt against a joint demand – 1 Lev 79 1 Hen & Mun 176 1 Vaugh 176 2 Esp R 594 1 Ld 47. vid Montague. 23. 24. 25 Addis. 259. Salk 167. 597 – 11 Mod 140 4 Day 474 3 Mun 402

But a debt due Deft as surviving partner may be set off against a debt from him in his own right – for in such case Deft must alone bring a suit to recover such demand & in such suit (5 Th 1193) suit may join a count for any sum due him in his own right 1 Esp R 117 240 & concord 6 T. R 582 – 2 Mod 198

If the debt sought to be set off is a joint & several one dual Deft may set off the same for in a suit upon such debt he might sue Pff alone or join his co debtor with him –

A Bond debt may be set off against any demand that can be recovered under the common counts in assumpsit

B Bond 1. over the deft. expressly engaged to pay the pltf demand in money bd. 1 Cat 375 2 Atk 510

2 Esp R 626

To show A. was indebted to B. he became a Bankrupt

C became surety with A. to B. & B. sued both it was held that a debt due from B. to A might be set off 1 Chp R. 180

# Set off.

But a debt duely it as executor of a surviving partner, to B – cannot be set off agt by B – agt a debt duely him as survivor to A. the Exr – 2 Bull. 291 1 Binn 64 –

So Deft sued as executrix cannot set off a debt due to her personally & vice versa Salk 167 –

By St. 2 Geo 2. where either party sues or is sued as executor or where there are mutual debts between the testator or intestate of either party such debts may be set off – no such provision in our St –

If the ext sues for a cause of action accruing after the death of the testator Deft cannot set off a debt due him from the testator – in mutuality – Willes 103 Bull 180 – So if in such case Pff declares as ext Willes 264. So if the cause of action arise partly in the life time of testator & partly after his death – no set off Salk 168 Comb 133 –

A debt barred by the St. limit.ns cannot be set off – if pleaded Pff may reply the St. Hts. 1271 – if omission offered in evidence under no notice it may be objected to on trial Bull 180 Salk 168 –

# Set Off

A question may arise under our St. whether a simple contract debt can be set off against a specialty? decided 8 Vin. 562 561 - Lille. 262 that it cannot be done - remained Salw - 296 n -

Said in Cowp 57. that debts to be set off must be such as an indebitatus assumpsit will lie for - but that was an action of ent. to recover damages & Deft. offered to set off greater damages which he had sustained by reason of breaches on the part of Pff - but said it could not be done - the question really to be decided in the case was whether unliquidated damages were the subject of a set off - decided they were not 2 Johns 155 - 2 Ba 299 - 33. 3 85 - 2 Ills 232 that a note can not be set off against an open policy of insurance because the debts are not mutually liquidated - Lenton 1 Burrow 429 - / But one bond may be set off against another & assumpsit cannot be sustained on either

In a suit on a penal bond the amt. of the penalty is the legal debt - so if a bond is pleaded as a set off the amt. of the penalty will be the sum to be set off Salw 296 - but as our courts are authorized to change such bonds & enter they will permit the sum really due only to be set off -

# Set Off

Land debt on penal bond it is said Deft cannot plead a set off of a less sum than the penalty for the penalty being the legal debt the jury must find that sum or else that it was not the parties deed & that they cannot sever the debt Selw 296 n

Said that unliquidated damages are not the subject of a set off Cantea . 15 R 488 - 2 Burr 1024 1 Esp 379 - a n - 14 East 578. 1 B.R 394 4 B.R 511 - But a sum stipulated to be paid on the non performance of a contract may be set off being in the nature of liquidated damages a not a penalty 2 B.R 32 -

If a creditor of an insolvent estate bring his action to recover a claim which has been in fact or in toto rejected by commissioners the ex may set off any claim his testator had agt the Pff & recover the balance if any 2 Ills 448 So if the ex should sue the creditor whose claim has not been been allowed the creditor may set off such claim but cannot recover any balance 2 Ills 498

In an action on a cov.t for rent deft. cannot set off damages that he may be entitled to recover on covenants agt. Pltff in the same instrumt. 2 Wend 410 2 Johns 155 6 Cowen 618 – 4 Wend 506. 12 do 529 15 do 560

If the action is in form ex contractu & the subject matter of it such as might be recovered under the common counts the Pltff cannot by declaring specially deprive the deft. of his set off 15 Wend 58 5 Johns 105 4 Comp 585 overruling 1 Esp R 378 (vide also 1 East 375 2 Mod 310)

where wife's property was attached for debt of her husband it was held that the creditor have no right to clear up the timber land Stat Ct 337. L. 1/7. 146. It will be made 15 Ills 108.

# Set off.

A debt funded - assgd. Off on record after notice of assignment of the debt sued cannot be set off 20 Johns 112 ind 11 do 140 5 do 417 1426

In an action by ex^r for a debt due his testator Deft cannot set off a debt funded after testators death 20 Johns 137 - 1 Johns ch 1 Paige 405 5 Mad 457

So if ex^r sue for a debt created to them after the death of testator Deft cannot set off a debt due him from testator 20 Johns 140 14 Johns Rep in Ch 13 -

If the assignee of a debt bring suit upon it in the name of the original creditor a debt due from the assignee to the deft may be set off Cases of Craig 1 Wash 421 1 Pat. & R 417 n - See. 5 Cranch 231 6 do 693 qu. ind 5 Wend. 342 5 Johns R 118 19 do 342 3 Wend 402.

If a note is made negotiable at a Bank the maker authorizes the Bank to advance on his credit to the owner of the note its amount & it would be a fraud in the bank to permit offsets against the note in consequence of any transactions between the parties of bank of 4 Day 472

In an action for damages for negligently performing services the defdt. cannot set off his services for performing the services, must bring his action 1 Marsh 93 1 Pet C. R. 417 n So in an action for wages the hirer cannot set off the value of goods lost by negligence of Pltff altho he has admitted his liability unless it was a part of the original contract that their value shd be allowed from the wages. 4 Camp 134 3 Starkie 1312 n

In an action by indorsee of an inland bill or note the maker has no right to set off a debt due to him from an indorser who held the note when it fell due 10 Bing & Cres. 557 3 Kent Intell. 425

If bankt sue on a note given to his wife after marriage and in suit the maker cannot set off a debt due to him from the wife dum sola 3 Kent Intell. 425 10 B & C 557

Where the sum sought to be recovered was intended to satisfy a demand of the defdt. a plea or notice of set off is unnecessary 4 Burr 2133 Tate v. Sullivan

In an action by bona fide holder of a note taken before maturity maker cannot set off any claim he had against payee at the time of transfer tho the note was taken in payment of a pre-existent debt unless it was originally made for the accommodation of payee or was satisfied in his hands & fraudulently put into circulation nor can then if holder can show that he received it in the usual course of trade paid value parted with his property or gave credit at the time of transfer 16 Wend 659

The Pltff cannot after receiving the defts. bill of particulars set off & keeping them dormant at the trial that they were not active in time. 3 Stark 1318 Holt. C. 553.

[illegible]

If a set off exceed the pltffs demand an action lies for the surplus 3 Esp 104 3 Stark 1319.

Ch. Jt is not bound in any case to set off his own demand then the action is lost to recover the balance. If he does not pltff. make take judgt for his whole demand and refer the balance with an special indorsement on the pocket. 3 Stark 1319 - 1 Camp. 252

Can a factor by a broker that he will sell goods for his principal & pay over the whole proceeds without settling off a debt due to him from his principal will not dispense him of the right to make such set off 22 C L 383 1 Mth. 230 2 Ma & S 510 1 East 375

If a proper subject of set off is submitted to the Jury & they pass upon it rejecting it their verdict is conclusive & the party can never afterwd. argue the claim. 5 Mass. 244. 2 John. R 210 6 do 168 7 do 22 6 Cowen 262

So if the matter found upon was not a proper subject of set off a defence if there was no objection to the investigation 3 Mass. 154 2 Caines 152

A. sent a Bill of Exch. to B. to be paid to C on A's account B. discounted the bill but retained the proceeds. Held that A. might maintain assumpsit agst. B. for money lent or on a special action on the case for breach of duty or trover for the bill - if he instituted the first sort of action B. might set off any sum due from A. to him - if the other no set off could be made 23 C & 146

Where the damages to be recovered are purely unliquidated & the def.t compromises with Pl.f after notice from his att.y not to do so the court will not interpose to preserve the Att.ys lien 20 L.J 462 see Doug 235 6 T.R 361 2 M.R 97 1 Barnet 341

An indorsee of a note overdue is liable in an action against the maker to all equities arising out of the note transaction itself but not to a set off in respect to a debt due from the indorser to the maker arising out of collateral matters 21 L.J 128

Tho the indorsee of a negotiable note taken after due taken it with all equities yet the must be such as attached to the note itself before the transfer & not such as arise out of collateral matters - hence where the original payee that a sum payable in future & the defendant applied on the note & it was then negotiated it was held that in a suit by indorsee agt the maker that such sum could not be set off 10 Ct 31 21 Ed 128 8 Mass 418 10 Ct 58.

A sold B a piece of wood for which B gave his note at the time A agreed by parol that if the wood was injured before taken away he would pay the damage wood was injured & in an action on the note it was holden 1. that deft might recoupe such damage tho there was no fraud on part of Plaintiff

2. That a set off as such could not be made unless the demands were liquidated or capable of being ascertained by calculation

3. In a case proper for recoupment deft may use his claim in that way or assume it for a cross action

4 If he use it by way of recoupment he can recover no balance ~~in~~ case of set off he after having been allowed a part sues in an action for the residue

5 That recoupment can only be allowed on a contract relating to the same matter if the contract contain various stipulations relating to the same subject & deft is sued as to part he may recoupe his damages arising from a breach of another part gave the one part in in writing & the other resting in parol – 2 Hill 174 8 Wend 109 11 Johns 50 2 Wend 431 4 do 183 3 do 236 20 do 87 22 do 158

The Surety should be exonerated only where the obligee has refused to bring suit or to suffer the surety to use his name after a positive request & explicit declaration by the surety that he will otherwise hold himself discharged

15 Serg.t & Rawle 28 8 do 110 116 Lab

# Sheriffs.

## Nature of a Sheriff's office and mode of appointing him.

The word Sheriff is derived from the Saxon words "Shire & reeve" which means the Governor or keeper of the Shire or County - In modern law language the word "County" has supplanted that of "Shire". 1 Bl. 329. 43 -

In Eng. Sheriffs are appointed by the King from a nomination of three persons from each County selected by the twelve Judges & other high officers of State - Formerly they were chosen by the inhabitants of the several Counties. 1 Bl. 340. 4 Bac. 431. 2.

By virtue of several old Statutes the Sheriffs are to continue in their office no longer than one year - this rule however is frequently dispensed with & Sheriffs are appointed "durante bene placito" & so is the form of the royal writ - It is now very common for the King to appoint what are called pocket Sheriffs "durante bene placito" 1 Bl. 342. 4 Co 32. 4 Bac 1134. 5 -

In Conn. Sheriffs are appointed by the Governor & Council & holds his office during the pleasure of his creators - so that the office can determine only by death, removal or resignation. Stat. 383.

At C.L. the Sheriff must reside in the County for which he is appointed & if he removes out of it forfeits his office - Semb. this would apply here. 4 Bac 235 -

# Nature of the office.

4 Ba — 449.
435.

If a deputy of the Sheriff of one county receive & collect an ex^n directed to the Sheriff of another county the Sheriff of the first county is liable for it, it having been collected by color of office 15 Mond 575 7 Ster 35 1 Mu 530 4 do 63 1 Peck 271

Mond — 34.
4 Ba — 425

All writs directed to the Sheriff may be executed by his gen^l or special deputy altho, not mentioned in the direction Kirby 240 1 Sw D 588

Abb — 13
4 Ba — 439.
Kirby .. 240

Stat — 386

# Sheriffs

A Sheriff has regularly no jurisdiction out of his own County - yet if it is necessary for the purpose of completing an official act that he should go out of it he has authority so to do for that particular purpose. Ex. As if it should become necessary that a person should be removed from Litchfield County Goal to the Superior Court now sitting in Hartford County & the Court should issue a writ of Habeas Corpus for the purpose - here as no officer could take him from Goal but the Sheriff of L. County he has authority to complete the act by conveying him thro Hartford County to the place of the Court's sitting

So if the Sheriff of L. County should be required to attach goods in his County belonging to a Deft. living in another County he may & has full authority to go into the latter county & there complete the service of the writ by leaving a copy at the Deft's abode -

So also if the Sheriff has custody of a prisoner who should escape & flee into another County the Sheriff or his officer and fresh suit may retake him in another County.

The Sheriff may at C. L. appoint deputies or Under Sheriffs who become his servants & therefore may execute all the ordinary ministerial offices of the Sheriff - the maxim being "Qui facit per alium facit per se".

By a recent act of our Legislature a Sheriff cannot appoint a General Deputy without the approbation of the Court of C. Pleas of the County for which he is appointed. But he may without such approbation

# Nature of the office.

If after Sheriff has made return that he has levied a certain sum Pltff receives it he cannot sustain his suit for a false return 11 C L 351 — Stat. Ct. 501

A Sheriff is bound to do execution yet when reasonable doubt exists he is not bound to proceed without an indemnity 12 Ct 261 —

Salk. ... 95
2 Brown. — 281
Hob. — — . 13
Nel. — 95
4 Bac. 439
Stat. Ct. 501

Stat. — 501

Salk — 95.
4 Bac. 437
Comb. 65

# Sheriffs

appoint a special Deputy. that is one appointed to do some particular act & who has no authority to execute any writ but such as have a deputation endorsed on the back thereof by the Sheriff.

So also by an Stat. 386. the Sheriff of one County may appoint the Sheriff of another County his Deputy without the Court's application. But this Deputy cannot act out of his creator County. Whether any other person than a Sheriff can be appointed out of the County is uncertain — the rule is founded on usage & sanctioned by Statute.

The Deputy is removable at pleasure by the Sheriff for he is merely the agent servant or attorney of the Sheriff — but while he continues in office the Sheriff cannot abridge his power or take away any of the incidents belonging to the office — Thus if one is appointed Deputy for the County of L — the Sheriff cannot limit his authority to any particular town or to any particular precep.

In certain cases under an Stat. the County Court may on complaint being made to them fine a Deputy — suspend the exercise of his office for a time or disqualify him from ever after exercising his office.

In Eng.

the Deputy or under Sheriff acts officially in the name of the Sheriff — when he executes a precep therefore he does it in the name of the Sheriff — He derives all his authority from a contract made with the Sheriff — Indeed writs in Eng are never directed to a Deputy but to the Sheriff himself & the Deputy is authorised by

# Nature of the office.

Stat. 24. 212

Hirly ... 237

* And even in his own name.

Hob. ... 14
4 Bac. 498

4 Bac. . 442
Nel. ... 96

Wood. 211
Cod. 101. 181
Stra. 517

If the Sheriff directs a warrant to two persons either of them alone may make the arrest 4 Bac 442 - Cod 181. Stra. 517.) The authority being of a public nature. see Middlow 32

# Sheriffs

a general or special warrant from the latter –

In the writs

may be & generally are directed to the Deputy as well as to the Sheriff or they may be directed to the Deputy alone so that the Deputy is here treated as a public officer & he makes his returns & indorsements in his own name –

It

It has been decided by the Supr. Court that a writ directed to the Sheriff may be served by his general deputy or special deputy tho they be not particularly described in the direction, that whether it be mesne or final process – *

A covenant

by the under Sheriff not to execute process of a certain description is void as it is against law & contrary to his duty which is that he shall execute all process offered to him.

The authority of a Deputy being itself derivative cannot be delegated to another. This rule holds true as well in politics as in jurisprudence – The Deputy therefore must do his duty in person the others may lawfully assist him.

Hence it is

that an arrest made by the Assistant of the Deputy is not good – This rule must be taken with some qualification. The authority given by the C. L. – when personal & original may be delegated – Semble when given by Statute.

If the under Sheriff is

guilty of a neglect of duty as suffering an escape &c. the Sheriff may have an action on the case against him for the Sheriff

# Nature of the office.

4 Ba. 442
1 Roll. 98

4 Com. 34
9. Co. 119.
4 Ban 443
Stat. Ct. 222

Hob. 202
Latch 16
1 Sid. 318
5 Ba. 171
Sal. 408

**B.** I should suppose a Sheriff might be arrested for any civil cause by a Constable & that the constable might confine him in his the constables house or any other proper place over which the Sheriff had no circuit & Salem 25.

Kirby 48.
2 Ba 239
Styles 465
6 Mod 22

Decided that the Marshal of U.S. may be confined in goal. contra - Semble) 2 Dy 304

In a criminal case I suppose the Sheriff might be confined in the goal of an adjoining county - I know of no decision in point

is liable over to the Sff. in the process. If however the Sheriff has an indemnifying bond he may bring his action on that & waive his other remedy.

A Gaoler is also the Sheriff's servant appointed & removable by him. he is a Deputy for a certain purpose viz. to keep the Gaol. The Sheriff is ex officio keeper of the Gaol or common prison in his County & hence his right to appoint & remove the Gaoler.

The Sheriff has no right to confine his prisoners in any other place than the Common Gaol this being the place appointed by law for their custody & keeping. If therefore a Sheriff should confine a prisoner in a private house or any other place but the Common Gaol he would be liable in an action of false imprisonment except where he was necessitated to do it - as if the Gaol were burnt &c.

**B** The Sheriff himself cannot be arrested in ct. for any civil cause or he cannot be confined in any Gaol out of the County but that would be unbecoming - nor in the Gaol in his own County for of that he is the keeper & can get himself at liberty - If a Ct. only Sheriff should arrest him he would discontinue his authority by removing him from office or if a Constable should arrest him he would not commit him to Prison for this is done by the Gaoler who is the mere servant of the Sheriff & removable at any time by the Sheriff. But should a writ of attachment be directed to a Constable, he would be to execute it upon the goods or estate of the Sheriff if to be found. Bac. Const. 511

If the Deputy take more fees than the law allows the Sheriff is liable to the party grieved whether he have knowledge thereof or recognize the act of his Deputy or not 7 John 8 J. See also further as to his liability 2 JR 512. 712 2 Sec 158. 8 JR 424 2 Lip 507 555 1 Mc 530 1 Binn 240 1 Leach. 159 and 11 East 25 2 Bos 157 in which latter case certain questions were submitted ag^t the Sheriff for breach of a penal St. by his Deputy

H

2 Lev 198
3 Wils. 309
9 Com 98
5 Co. 89
2 Mont. 314
Doug. 40
Espin 392
Bl. R. 832.
Styles. 18.
Roll 94
Latch. 18.
Cro. 330
Mont. 238
2 JR. 154
2 Ray. 154
Doug. 422
4 Bos. 441
2 JR. 154

B. that is — he is not liable to an indictment. 2 JR 156.

Roll. 94
Cro. El. 195
1 Leon. 140
4 Bos. 443
Bail Court is not liable

# Liability of the Sheriff for the acts of his Deputies

The Deputy being the servant of the Sheriff the latter is in many cases liable for his acts & defaults – The acts of the servant or under Sheriff being considered as the acts of the Inferior or Sheriff. Suit against for abuse &c – Hence the Sheriff is allowed to take from his Deputy security for the faithful discharge of his duty because the Sheriff himself is liable to the Pff in the process – The security taken is in nature of a bond to save the Sheriff harmless. vide 119

The Sheriff is in many cases liable for the acts of his Deputy. General Rule that the official acts of the ~~Sff~~ Deputy as to all civil purposes are the acts of the Sheriff – But for the criminal acts of the Deputy he is not liable – not constructively the acts of the Sheriff – Ex. A Deputy to whom the writ is directed refuses to execute it & in consequence of which the Pff in the process sustains damage – the Sheriff himself is liable – So also for a false return. But if after the Deputy has made an arrest he commits murder on the body of the Deft – the Sheriff is not liable – for he is never liable criminaliter for the acts of his Deputies. "Nemo in reundi" b

Upon the ground that the Sheriff is not liable for the private torts of his Deputy it is made a question whether if the Deputy under an execution against A. instead of levying on the goods of A. by mistake or some other cause levies on the goods of B. (the Sheriff not being privy to the act) whether the Sheriff is not liable the Deputy

# His Liability

* And he is liable in trespass. Same as to the liability of other masters for their servants acts

Shed. he is liable 200
3 Wils. — 309
Bl. R. ... 832
Doug — 62. 42
Noy 27.
2 Rol. 352
Co. S. 211. 200
Ld. ... 995

Neither Sheriff or his Deputy are liable for any mis-mad or nonfeasance unless the action is brot within 3 years - St . This St. does not extend to an action for money had & rec^d - 1 Rol R 216

Unless Sheriff use reasonable discretion in taking bail he is liable for its insufficiency - if the bail appears to the world to be responsible Sheriff is excused unless he knew or had the means of knowing his insufficiency in his power & neglected to inform himself 1 Ld 6 & 196

Cowp ... 403
Esp ... 503
Salk ... 18
5. Com ... 89
1 Roll ... 94.
4 Bur 242
2 Bur 2 43
Cro. E. ... 185. 6/43
Salk ... 18 -
3. Mod ... 326.
Cro. ... 330
East. 186.
Esp — ... 103
1 Bos ... 146
3 Bur — 258

For the defaults or acts of a special deputy appointed at the request of the Pff. in the process & upon his nomination Sheriff is not liable to Pff. (Esp. 607. 1 B.R. 120.) the appointment so far as respects his rights being at his will & risk -

not having pinned his warrant - or whether the only remedy is not against the Deputy? There have been no decisions on this point. I think it ought to be considered an unofficial act & therefore the Sheriff ought not to be considered as liable - Unofficial because the writ does not direct the Deputy to levy upon the goods of B. but upon those of A. - That the Deputy pretends to act under an authority of Law is no reason why the Sheriff should be subjected. Semb. Sheriff is liable - *

attend to opinion

At C.L. the Sheriff alone is liable for a neglect of duty in the Deputy - as if an under Sheriff or Gaoler suffer an escape neither of them are liable in an action to the Pltff. in the process. tho' the Sheriff is & the reason is that at C.L. the Deputy or Gaoler are not officers known at Law & hence they are total strangers to the Pltff. in the process.

But for a tort committed by the Deputy in his official capacity he as well as the Sheriff is liable to the party injured - The Sheriff is liable because the wrong is committed by his servant in his official capacity - & the Deputy is liable I think because the party injured may consider him as a mere tort feasor - By a tort is meant a misfeasance & not a mere nonfeasance or neglect of duty there must be a positive wrong done & not a mere negative one to make it a tort - Thus for a voluntary escape permitted by the Deputy the Deputy himself is liable for this is an actual tort but for a negligent escape he is not that him nothing more than a mere nonfeasance

# His liability

If a Sheriff is sued for an escape he cannot protect himself by error in the process it protects him in making the arrest if it is good with a warrant 1 Brown 309 – 5 Johns 100

He is liable for suffering goods attached by him to be lost 4 Hill 112

& If the new Sheriff regularly receive a prisoner from his predecessor he is liable for an escape effected even tho' an voluntary escape may have existed in the time of his predecessor – for the latter cause Trover lies against whom he will bring his action – & the being a mere cost one discharge the other & Salmon 1167

3 Com. 12

Cro. El. 366.

1 Mod. 14

4 Bac. 1115

so also if a Deputy has an execution in his hands & omits to levy it he is guilty of a ~~misfeasance~~ ~~misfeasance~~ nonfeasance only yet if he levy it upon a wrong person he is guilty of a misfeasance & is liable as well as the Sheriff.

In Eng the under Sheriff is liable for a neglect of duty as well as for a tort committed in the execution of his duty & the sheriff is also liable in both cases as at E.L. The Deputy is liable because he is known as the officer of the Law. the process here being directed to the Deputy whereas in Eng the writ is never directed to him & in that country he is not a known officer & the process is never executed in his name. In Eng Deputies may bring suits in their own name as is every day done on receipts by them taken for property.

* If after the death of the Sheriff & before a successor is appointed a prisoner escapes from gaol, no one is liable - The Sheriff cannot be liable for acts committed after his death nor even his estate for those before his death for "actio personalis moritur cum persona" - It is equally clear that the successor cannot be liable for acts committed before his appointment neither can the Gaoler for by the death of the Sheriff his power ipso facto ceases - therefore no person whatever can be made liable for the escape. In such case as this if the prisoner escapes the Pff in the process has no remedy except by retaking the prisoner & I doubt whether the Pff could do this until a new Sheriff was appointed as he could not commit him to prison there being no Sheriff or Gaoler in existence to receive him

# His authority and duty.

Sal. 323
Cro Ja. 73
1 Roll. 893
Moor. 557.

It is not the duty of the Sheriff to grant indulgence (2 R.
1 Ro. per Hull) it is his duty to do ev'ry immediately. 7 R 111.

Sheriff is entitled to poundage on the whole sum in the ex^n when he is directed to levy on particular property & does so levy the the debt be answered by the parties & to no sale & the, the property was levied amounted to more than its value 17 Hard 14 9 do 435 1 Levinz 192

1 Bl. 343.
2 Ba. 448

1 Roll. R. 237.
1 Bl. 343
Stat. Ch. 384
1 Rol. 237.

## Sheriffs

If a Sheriff having begun execution he may still proceed & complete ~~for~~ for the service of the exn is an entire act & it is said that he holds over until he has completed the service.

## Authority and duty of Sheriffs

In Eng. the Sheriff is a judicial as well as an Executive & ministerial officer he holds a court & presides in it. the in Ct. he has no judicial power it is principally ministerial & the in part Executive.

A Judicial officer is one who hears & determines causes & is called a Judge. Executive is one who executes law by virtue of his official power without any command from a superior. Ministerial one who executes law under the command of ~~another~~ a superior officer.

The Judges of our Courts are Judicial officers. The Governor of the State is an Executive officer & Sheriffs are principally ministerial tho sometimes Executive officers. Sheriffs considered as Conservators of the peace are purely Executive officers.

As conservators of the peace they act by virtue of their general authority. They are the first Executive officers in the County & superior in rank to any person therein during their continuance in office.

At C.L. the Sheriff may apprehend & commit to prison throughout his County all persons who break the peace or who attempt it

# As Conservators of the Peace.

1 Bl. . . . 343
Co. L. . 168
4. Bur. . 430
. . . . . 453
1 Brut 168

Sheriff may take an indemnity from Pff if there be a doubt concerning the property of the goods & fully the court might interpose if the doubt now or accumulate one At least it would give him time to make his return or he might file his bill of interpleader & compel the parties to settle their right in Chancery 1 Burr 37.

Stat. Ct. 384
L. . . . 71

1 Bl. . . 344
Plead. 94
Cy. . . . 60
4 Bac. . 449

# Sheriffs

to break it & this he does in character of conservator. He is also bound ex officio to pursue & apprehend all ~~[illegible]~~ criminals & commit them to prison pro safe custody. He is also bound to defend the County against all the Kings enemies when they come into the bounds & for all or any of these purposes he may command the posse comitatus & at C.L. every person is bound to obey the summons who is above fifteen years old & below the rank of a Peer & if upon warning given they neglect to attend they are punishable by fine & imprisonment.

In Ct. the Sheriff is bound to suppress all riots tumults routs & unlawful assemblies & for this purpose he may command the posse comitatus. This seems to be merely in affirmance of the C.L. The same Stat. authorises him to apprehend all breakers of the peace which is no more than the C.L. authorised him to do. The same Stat. says he may command all suitable persons within his County being of sufficient age & ability & in case of their disobedience of his command they are liable not exceeding thirty four dollars at the direction of the County Court. This Stat. has given to Constables within their respective towns the same authority that it has given to Sheriffs within their respective Counties.

As ministerial officers Sheriffs are bound to execute all legal process regularly directed to them & on refusal they are by C.L. subject to fine & imprisonment & likewise liable in

# A's Ministerial Officers.

*In Eng. he is rated to return it & on neglect is proceeded against by attachment for a contempt. Cong. 446. 2 W.Bl. 233. 1 Ba. 58 - 206 - 2 P. 461. 2 Bl 291. Esp. 616 - Stat. Ct. 606 - Stat. Ct. 385

Sheriffs & Constables shall receive all mesnes & fees & disp within their precincts when tendered to them. 1 Ch 600. 1. Cro Esp 606 2 Bl. 415.

Stat. Ct. 611

9 Co. . . 89
Cro. J. . . 485
Esp. . . 604
8 T.R. . . 188
1 Ba. - 452
8 B.R. - 187

9 Co. . . 50
1 Ba. 452.

# Sheriffs

a private action on the case to the party injured.

Our Stat are

clear that when a writ is tendered to the Sheriff or other officer he must if demanded give a receipt for the same in order to facilitate the proof of the delivery & if on demand he refuses so to do the Pff. may call on any who are present to set their names to it as witnesses of the delivery. This also applies to constables in their respective towns - This however is seldom practised *

A known

officer is not bound to show his writ to the Deft. before he arrests his body or levies on his property the the Deft. should demand it but as soon as he has arrested his body or taken his property he must make known the contents with all convenient speed in order that the Deft. may obtain bail or agree with his adversary.

But a

Special Deputy who is not a known officer must if demanded shew the writ before he makes the arrest the if not demanded it need not be shewn - This shewing if required is because he is not a known officer - The true principal is this - no individual is obliged to submit to an arrest without having some evidence of the person's authority to arrest him. Therefore one should attempt to arrest without furnishing this authority the Deft. may lawfully resist him - In the case of a known officer this evidence is furnished without shewing the writ - Thus in case of a special Officer he derives all his authority from the particular writ therefore the writ which contains his authority must be shewn if required.

But in criminal cases an

## As Ministerial Officers.

2 Inst. 193.
453.

Stat. C. 384.
4 Bac. 453.
2 Inst. 193.
..... 453.

If an officer having taken property by virtue of process it is rescued from him he may command what force he wants to prevent its being taken away. Ex. On the time of sale a watch the subject of sale is snatched from the offr. 2 Rawl. 2 Ba.

S. 69

5 Co... 91
Cook ... 1
Cro. E... 904

From

individual may without warrant arrest the offender. Here the person arresting cannot show any warrant or authority but the principle is still pursued here for as to this purpose every member of the community is a known officer with full power & authority given him by law to arrest the offender & the law of the Land which gives this authority every man is supposed to know.

The Sheriff or his Deputy may at C.L. command the posse comitatus if necessary in the execution of his office. This applies in Ct. as well as in Engd. But we have a Stat. declaring that in case of great opposition made against the Sheriff in executing Civil writs or process or in case there is reasonable that such opposition will be made the Sheriff is authorised with the advice of an assistant Justice of the peace to raise the militia of the County. The Stat. further declares that the Sheriff shall not return that he cannot do execution & all the military officers & soldiers are commanded by the Stat. to obey the Sheriff's orders & on neglect or refusal the officers are finable not exceeding $67. & Soldiers not exceeding $10. This is a distinct provision from the C.L. for at C.L. all persons in the County were bound to assist but by this Stat. only the military force. The same authority is also given to Constables in their respective towns.

A Sheriff is bound to execute all legal process regularly directed to him but the execution of them must be regulated by the mode prescribed by Law. He may not therefore break

# As ministerial Officers.

What is necessary to constitute a breaking? Does lifting a latch or raising a window amount to it? see Esp. 382 Bull 82 - Hard. 168 - 5 Co 91a - 3 see Dr. Phag. 783 1 Esp. R 99. 100.

4 Bu. 454. 466
Coup. ---- 1
Cro E - 909
Hob ---- 67
Esp ---- 604
Kirby 383
2 Bu - 367.
Bl. R. - 823
L. 210
— 783
79. 80

C 5 Co 93. 5 Mp 155 - pl. Parson Dig of Cr. R 172. Seamayne case
. 1 Ld Gabet 29 b - c. a -

B Bailiff having peacably entered a house may lawfully break inner doors in the execution of legal process without demanding admittance 4 Taunt 619 Gilb. t. 29 a b -

Hob. . . 62. 263.
Palm. . . 54
Coup. . . 67
Cowb. - 17
- - - - 327
Esp. . . 604
L. 783

May he not break to attach goods the owner not being in the house - first demanding admittance?
3 Bos 223. no 2 Bu 367 L 783

3 Bos 223
5 Johns R 352
1 Bay 358

from any outer door or window of a dwelling house to arrest the body or take the goods of another for the law considers a man's house as his castle & the breaking in might expose the family to robbery. I think the rule for this reason very frivolous & in fact no longer existing. The rule remains established only by authority. If then a Sheriff or other officer break the outer door or window of a house for the purpose of arresting the body or taking the goods of another he is a trespasser & the service void - the arresting to be determined in Tilt & some other authorities the arrest is good the the officer is liable as a trespasser - but this I think is highly unfortunate for that a person should acquire a civil right by violation of law is against the fundamental principles of the science. The modern practice of the Courts of Westminster Hall is to set the service aside & give an action against the officer & so decided in Selanwanie's case - the the question has never arisen except in this one case yet I think this is as well the practice of Wm Hall as the Law - 6 Mod 95 - 1 Bos 456

This privilege of the outer door & window is to be construed strictly & not to be extended to any equitable analogous construction or interpretation. If however the officer can get peaceably into the house thro the windows or doors he may break open inner doors &c for the purpose of arresting the body or taking the goods of the Debtor. but in this case he must first demand admittance. B

This privilege of the outer door & windows extends only to the person family and goods

# As Ministerial Officers

5 Co ... 93
1 Sid ... 181
Cook ... 67.4
Ruby. 383
Hob .. 62.263.
Ej ... 604
2 Show. 87
Comb. 17.327.

If an under sheriff remove from the County in which he was appointed his authority ceases so that he cannot complete process begun q Mand 258
So too if he resigns or is turn^d out of office –

5 Co -- 91
Hob ... 62
4 Ba - 455
yr. Cook. ... 7.
L. 783.

2 Co ... 31
Moor .. 606

4 Ba. 455.

2 Haw. 80
L. 783

of the owner or person dwelling in the house & not to a stranger. The mansion of A. is his castle & not the castle of B. if therefore B is in the house of A & the officer is refused admittance he may break down the outer door &c. for the purpose of arresting him. These are the principal distinctions relating to this subject as to civil process - but I doubt the propriety of this privilege in any case & think it altogether arbitrary there being not the least shadow of reason existing for it at this time. 4 Bac 454. 6.

This privilege extends to cases of civil process only for if an officer has a criminal process the mansion will not protect the criminal he must in this case demand admittance before he has a right to break - Here the peace of the family is as much disturbed as in civil cases & the house as much exposed to thieves & robbers. So also on a prosecution to compel one to find sureties for the peace or good behaviour the officer is authorised to break the outer door or window.

So also in a prosecution for a forcible entry & detainer which is of a mixed nature partly civil partly criminal. the officer is allowed to break open the outer doors or windows.

In criminal cases there need not be a warrant or known officer to justify breaking the outer doors &c of the criminal for where one has committed a felony an officer or individual with or without a warrant may break outer doors &c for the purpose of arresting the offender & even demolish the house if he cannot be taken without. But

# As Ministerial Officers.

The Bail of deputy sheriffs are sureties & only be liable for his official acts as a general deputy 15 March 1774

4 Ba. 456
1 Root 66

4/5 Co. 94.
4. Ba. 455.
8. 783.

1 Nicl. 180
1. Rob. 698
4 Ba. 455.
5 Ba. 182.

Palm. 52
Cro. J. 555

Palm. 54
1 Roll. R. 138
6 Mod. 183.

in order to make it a burglarious felony the offender must be detected flagrante delicto.

So also to suppress an affray or to prevent a breach of the peace every officer or private individual may break into a house where it is — If the offenders escape & are immediately pursued by an officer of the peace outer doors &c — may be broken open to arrest him — So also in a writ of seizin or habere facias possessionem in Ejectment the Sheriff may justify breaking open doors & windows of the house if admission is refused him for the writ commands the officer to turn all persons out & put the Pff. into full and actual possession consequently the Sheriff has all power necessary for this purpose — Besides in this case the law does not consider the house as belonging to those in possession but to the Pff. in the proceeding for he has had a determination in his favor.

In any civil process the doors of a house not (adjoining the house may be broken open) Mr C. thinks however near it may be if it is not a component part of the mansion house it may be broken open. So Semble as to

If the Sheriffs bailiff having entered the house lawfully is locked in the Sheriff — may justify breaking the door to set him at liberty.

So also if a person after having been actually arrested escapes into his house it affords him no protection for as he is an escaper the outer doors may be broken open to (arrest him) retake him. This point has been

4 Bur. 450
Cro. J. 555

B. When the first arrest is illegal ~~a nullity~~ all detainings
lodged under it are also illegal 4 Bur. 1. 691 5 ac 2
8 ac 598 9 ac 69 Gelt. 29 a n

P. C. 3 b. 7
L. 210.
2 Bl. R. 823
Esp. n 605

11 Mod. 51 if a man is wrongfully brot into a jurisdiction and there
lawfully arrested yet he ought to be dischd for no lawful thing
founded on a wrongful act can be separated - So if a pt
was taken & confind without any writ & against an act
whilst so under detention was dischd unconstitutionally Gelt -
29 a - 2 Ant. 462 2 H. Bl 29 1 NR 135 and also 5 TR
25 8 ac 187 - Is not the rule this that if the officer
making the first arrest a which is unlawful or is coguisant
to it also make the second the Ctf shall be discharged
Sauer not. 23 Ld 384. 2 B & P 382 2 B & A 743 he will be
dischd from the ~~first~~ unlawful arrest only

Tud. n 18
4 Bur. 455
Stat. U. 390
8 Mod. n 95
L. Raym 1028
Salk. 526.
5 J. R. 25.
2 Bra. 245.
L. 79. in n

4 Bur. 455.

Stra. 509
5 Com. 54
8 Com. 141

decided in Engd. in a very strong case. A Deft. opens the window to converse with the officer & the latter touches him - this was holden to be a good arrest & the officer therefore justified in breaking into the house to retake him.

B. In ordinary cases an arrest made by breaking open the outer doors &c. of a dwelling house is illegal yet if the Deft. relate in such illegal custody is fairly charged with another arrest such last arrest should be good but there must be no fraud or collusion first to arrest the party unlawfully & then charge him with another action.

By the 29. Car. 2. c. 7 it is provided that no civil process shall be served on sunday therefore any civil process served on that day is void & the officer serving it of course guilty of false imprisonment & the person arrested relievable by habeas corpus. But where a person actually in custody escapes he may be retaken on sunday by virtue of an escape warrant for the retaking is nothing more than the means of continuing the officers custody. 5 Mod. 95 - Cro. 253 - 8 219. 10 PCC 43

## Of Arrests

Every arrest in civil cases to be lawful must be made in pursuance of lawful authority, an arrest then made without this authority is void.

When an arrest is made by virtue of a writ or warrant the rule is thus If the Court by whose authority the writ issues has jurisdiction of the subject matter the arrest is lawful.

# Arrests.

A Pff attending from day to day waiting at a tavern in the vicinity of a court in which he has a cause pending & in expectation of its trial tho not assigned to any particular day is privileged from arrest in civil cases (10 East 438.) So one under recognizance to appear before a court of criminal jurisdiction while attending such court. 7. John. R. 538

Moor — 274
2 Ellis — 384
Esp — 233
3 Q1 - 659.
2 Bo. 234
Esp. 608
E. 212.

A In Ct. the officer is not liable to the person arrested unless the defect of jurisdiction appear upon the face of the process — Peirly — 110. 182 — 2 Sco. 387.

For distinction between void & voidable process — see false imprisonment — 210 a.

Esp. 328
3 Ellis. 341
1 Root 315

One officer may justify under an exn. which he never returned 8 John R 52. 10 East 73 —

Ket. 273
Co. E — 148
Earth — 148
Esp. — 608

of course if the person so arrested is suffered to go at large without due course of law it is an escape. On the other hand if the Court from which the writ issues has no jurisdiction of the subject matter it follows that the arrest made under it is void - if so & the Debtor goes at large it is no escape & the Officer first making the arrest is guilty of false imprisonment. &c. Suppose a single magistrate in Ct. issues a writ for an assault & Battery demanding some trifle $15 - returnable before himself - here it appearing from the face of the writ that the Court has no jurisdiction of the subject matter the arrest will be void. But if the demand of damages is $15 - or less & there should be a misnomer in the writ yet the Officer must serve it & the arrest will be good for the Court has jurisdiction of the subject matter. &c.

This distinction however is not universal for there are certain cases where the Court has complete jurisdiction of the subject matter yet the arrest will be illegal & void - as if the process has no signature of a magistrate annexed to it & so in Ct. if there is no anticipate of the payment of the duty - the arrest being void if the Prisoner goes at large it is no escape. So also if before the time of making legal service for the next court has expired the officer should serve a writ returnable to a more distant court such service would be void & illegal for no Pr. is permitted to overleap a court. it follows then if the Debtor goes at large it is no escape - the rule laid down in the second & third sentences herein does not

# Arrests.

Can a Sheriff bring suit on a receipt before judgt. obtained in the suit in which the receipt was taken & if so what is the rule of damages? vid 16 Wlf 7 between that sheriff receipt due the bond of his deputy for the purpose of obtaining security on bond on there was a breach of duty. vid 13 Ac Escape D. 12 Wlf 127 2 BR 172 5 do 37 –

writ & therefore the third example just mentioned as being an exception to the rule are more properly qualification.

In ct-meme process does not usually issue from the court applied to for redress tho it sometimes does & always may. Most of the writs returnable to our County courts are signed by single magistrates but when brot before single magistrates they are usually signed by those who try them. The general rule of C.L. therefore is not sufficiently broad to reach all arrests on meme process in our practice. The general rule of C.L. is indicated on the Eng practice where the same court who issue the writ try it. So far as the C.L. rule extends it applies & is ours. Here then if a writ is issued by competent authority & returnable to a court having jurisdiction of the subject matter the arrest is legal & the going at large is an escape. As if a Justice of the peace issues a writ to be served in his County & made returnable before the County Court of the same County.

But on the other hand if the process is issued by incompetent authority or returnable to a Court not having jurisdiction of the subject matter the arrest is void & the going at large no escape.

At C.L. an officer having made an arrest on mesne process cannot delegate to a stranger a right to hold a prisoner in custody during his absence. If therefore the officer does attempt to

# Arrests.

1 Bos. & P. 24
S.80 in m.

A sheriff who is party on the round on guarantee to the Pltff. cannot execute a writ of Replevin 2 Serg. & R. 363.

A receipter for property attached cannot in an action on such receipt set up title in himself 3 Hill 219. is estopped by his receipt & to do so would be to permit him to practise a fraud on Offr. who might have taken other security had he been informed of such claim vid Denio 15 Pick 140 12 do 557 561.

1 Sal. 79
5 Mo
Esp. 504
Brell. 62
4 Bos. 236

Might he not show the bailment to a third person for the sake in that case would be a trespass in taking them also the receipt to a relation might perhaps be held to be without consideration

delegate this right he is guilty of an escape - This point has recently been decided in Eng - It is uncertain however what the decision would be here were the question to arise - I presume it would be different as our practice is different in direct opposition to the principle established by the Eng decision -

To make a good arrest it must 1st be made in pursuance of lawful authority & 2d it must be an actual & regular arrest. The first of these has been considered - the second will now be treated upon -

I There must be an actual arrest.

Bare words will not constitute an arrest - there must be an actual touching of the body or a power of taking immediate possession of the body & the submission of the party thereto - Where the officer said to the party he being at some distance that he arrested him by virtue of a warrant he had against him & the Deft having a fork in his hands kept the officer at a distance till he retreated into his house it was held to be no arrest - But when the officer met the Deft on horseback & said to him "you are my prisoner" upon which he turned back & submitted it was determined to be a good arrest tho the officer never laid hands on him - but had the Deft fled it had been no arrest unless the officer laid hands of him.

While one is under an arrest at the suit of A in the custody of the Sheriff

# Arrests how made

* In Ct. where the writ goes as well against the property as the person - for Pff. may elect to take the former but not both

* Said that the doctrine in this case applies only when the prisoner is in close custody 8 Johns Rep 379 -

* 5 Co. 89
Sal. 237
2 Ba 236
1 Esp. C. 115
1 Bos. 388

Esp. 604
Comp. 64
6 Mod. 211.

One who is convicted on a penal St. cannot be apprehended on Sunday for non payment of the penalty 13 Ric 2 c 3 and 5 Hen 4 Ch Esp 13 b 4 Hen 4 b 80 pl no 8.75.

Esp. 501.5
2 Ba. 236
6 Mod. 75
Sal. 78

Esp. 505-

a writ at the suit of B. is delivered to the officer against the Deft. this delivery "ipso facto" amounts to an arrest in the last suit — The Deft. is considered as immediately in custody under B. suit — if therefore after such delivery the Deft. goes at large it is an escape. *

II. The arrest must be regularly and legally made

If the arrest is otherwise made than in a regular and legal manner in general there can be no escape. Thus in all civil cases the arrest must be made by virtue of a legal writ or warrant or it will be no legal arrest the it may be said to have been actually made. The strict rule of the C.L. requires that the arrest be made by authority of the officer to whom the writ is directed — that is the officer must be in company, tho he need not be the hand which arrests or touch. Or in sight of the party arrested — as when the officer sent an assistant forward who made the arrest he being at some distance & out of sight — this was held to be good — It is sufficient if the officer is near at hand & in pursuit of the objects.

An officer is not liable for an escape of one who is arrested on Sunday for the arrest on this day being void there can be no escape. (Cutler v. P.)

So it seems if the arrest is made by breaking an outer door or window — the arrest being void & thinks the going at large no escape — this is not a settled point the

# Escapes.

Esp. 724.

2. Ho. -- 23-4
Le Ray. 334.-
1 Pet. Rod. 251
2 Bu. 236

Esp. 608
Burner. 259
Coup. 65
2 Bu. 235
Pet. R. 106
3 Co. 44
Reed. 36
3 Bl. 485.
1 Red. 4.

Jurisdiction in N.Y. upon the subject of escapes. vide - Bernardis v. Marshall. C. & 1813 - 2 1 Caines R. 81. 2 Johns C. 205. 239 3 73. 1 Johns R. 214 2 433. 454. 4 45 469 5 86 7 182 250 337. 8 22 51 62 121 158 270. 9 137 159 165 168 175. 178 189 477 8 20. 366 369 379 472 9 82. 85 146 234 292 300 329 369 -

seems to follow from the unlawfulness of the arrest. qu. how far though there can be a rescue where there has been no previous arrest yet the officer is in many cases liable for not making the arrest when he might have done it - If therefore an officer having an opportunity to make an arrest neglects to do it he is liable to the Pff in an action on the case - Tho the officer should have an opportunity to arrest the Deft & should neglect to do it at that particular time yet if he afterwards arrests him he is not liable.

## Escapes.

An escape is where a person being under a lawful arrest & restraint of his liberty either violently or secretly evades such arrest or is suffered to go at large without due course of law - It is essential to an escape that there be a previous legal arrest & an evasion of it.

Escapes are either voluntary or negligent - Every person committed to prison is to be kept in safe custody - If then the Sheriff or keeper suffer a prisoner to leave the limits of the prison even for a moment he is guilty of an escape - A subsequent return to the prison makes no difference the officer is liable - he is guilty of a tort & nothing ex post facto will discharge this liability.

## Voluntary escapes.

A voluntary escape is one which takes place with the consent of the Gaoler or officer

# Voluntary Escapes

1 Rol. 800
3 Co. 44
Plowd. 36.
3 Bl 415
2 Ba 237

1. A prisoner released by act of the Assembly no escape to indict the Sheriff even tho he has taken a bond of indemnity. 1 Root 72.3. but if he goes out of prison upon bond it is negligent escape. 1 Root 116. post 82.

Taking a bail bond of debtor no escape if apparently suff. — and a Sheriff takes for any act in the line of his duty, 7 Johns 139 3 Bl. 415.

qu. in Root.

2 J.R. 170
1 Bos. & P. 26

* & a voluntary return upon arrest but will enforce the Sheriff. 2 Salm. 63.

making the arrest. If therefore a Sheriff arrests a person upon final process & permits him to go at large before commitment for a moment it is a voluntary escape - The same if the Gaoler permits the prisoner to go at large after ~~an escape~~ commitment. The definition of Bl. 415 - is not sufficiently large for it includes such escapes only as are from the prison & not those before commitment. If a Sheriff or Gaoler admit to bail one who is not by law bailable he is guilty of a voluntary escape. & if the Sheriff &c - suffer the prisoner to step over the limits of the prison but for a moment altho he has a keeper with him or even the Sheriff himself be with him still he is guilty of a voluntary escape - If he can permit him to go at large or out of the limits for a moment he can for a day or year - If he can permit him to go a foot over he can a mile or ten miles - The object of imprisonment on civil process is a coercive mode of compelling the Deft to discharge his debts & for this reason it is that his transcending the limits of the prison is considered as an escape - Imprisonment on final process is here contemplated -

If the officer after arrest on final process permits the Deft to go out of his custody but for a moment he is guilty of a voluntary escape - Reasonet supra - qu in &c -

Persons committed to prison on criminal process are to be kept within the walls of the prison - But those committed on civil process may on

# Voluntary Escapes

To constitute an escape there must be some agency of the debtor 4 Mass 370 White 495 n

1 Sid. 13
Bull. 71
1 Root – 72 qu
Kirby. 137.
2 Strange 84

If a prisoner is liberated on giving any other security than that provided by the St. the Sheriff is liable for an escape 13 Johns 366 – 7 S R 105.

3 Keb. 305
3 Bac. Ab 399
Ev. 6 – 14
Bellew. 78
Sc. Ray 246
399 788

x But when the offence happens for an act done with him 2 or 3 miles out of the circuit and legal for the purpose of enabling him to settle the case not an escape 10 Johns 120 for the making an arrest of a man for the

2 Pa. 176

providing security to save the Sheriff harmless at his discretion be permitted to go at large within the limits of the prison yard which limits are fixed in each County by the court of Common Pleas & any slight transgression of the limits will be an escape.

It has been decided in Eng. that if one confined on final process is brot up to Court on a writ of Habeas Corpus ad testificandum the officer is guilty of an escape. I think this to be one of the most remarkable decisions which ever entered the human mind. Does not the C. L. clearly allow the writ. Does it not compel the Sheriff to serve it? And cannot be possible that the same Law should adjudge him guilty of an escape in doing an act which it compels him to do. He is not liable. Johnson 357

But if the officer who thus brings up a prisoner on a writ of habeas Corpus grants him any unreasonable liberty he is guilty of a voluntary escape. He must bring the body to the court in a reasonable time & in the most convenient way. If a writ is issued by the S. C. sitting in L. County to bring up a prisoner from N. Haven goal and the Sheriff goes round by S. London he would be guilty of a voluntary escape. The same or a similar rule obtains when an officer has made an arrest on final process & does not committ the Deft but indulges him with an unreasonable time he is guilty of an escape. X

So also if after the arrest and

# Voluntary Escapes

Sheriff has no right to discharge a prisoner committed on ex^n upon payment to himself of the contents of the ex^n but is liable for a voluntary escape if he does - Not Pff attorney - has no right to receive his money. 2 Ba. 248 Cro. E. 404. 1 Mod. 225-306. vid Pooke 146

1 Bos. 176
Hob. 202
Plowd. 17.
Hard 318

Proof. 106
109. 127. 8 -
2 S.R. 131.

In an action for an escape upon an ex^n if a receipt is taken no appeal lies 1 Root 153 add qu -

An action for an escape is not local to the County in which the precept by which the prisoner was arrested is filed of record - qu whether the same ought to be tried in the County in which the escape was made? 1 Carrier 1. S.D. 8

2 S.R. 131

before committment the officer suffers the prisoner to go at large with a keeper he is guilty of an escape. So too Semb if not permitted to go at large 8 205

It is a principle of C.L. that if a sheriff marries a woman committed on exⁿ he is guilty of ~~an escape~~ voluntary escape & it is of no avail to him to attempt to prove that he has kept her in confinement all such testimony being inadmissible. 2 Bo 239. Esp 608

If a prisoner having the liberty of the yard manifest a disposition to escape as by one transgressing the limits it is the duty of the sheriff to recommit him to the walls of the prison & if he does not he is guilty of a voluntary escape. Notice of that disposition must however be given by the creditor to the sheriff. If the prisoner escapes before he manifests or has manifested any such disposition the sheriff is guilty of a negligent escape only. Ante 81 n

The sheriff is never bound to grant the liberty of the goal yard tho a sufficient indemnity is offered him yet he may do it - it being a matter of discretion with him - if he does it it is at his own peril & he must rely upon his bond of indemnity if there be an escape. There is a prevailing idea that the sheriff is bound to grant the liberty of the yard when sufficient bonds are tendered - but there is no C.L. or Statute requiring him to do it tho he may do it if he pleases and the bond which is taken is valid in law - After a sheriff has actually admitted a prisoner to the liberty of the yard he may at any time recommit him to the walls of the prison without assigning any reason for so doing -

A discharge from jail upon taking the poor debtors oath the, obtained by fraud & perjury is not an escape 1 Wheat 447

If the creditor permit the debtor to leave the limits & he afterwards returns again the Sheriff or Bail lord & then leaves the limits the Sheriff is not liable & the bond is void for a voluntary discharge from one arrest on the 4th is a discharge of the debt the rest to be intended by the parties 3 Wand 185 2 East 243 7 TR 420 6 do 525 5 John 364 11 do 476 16 do 183 2 do Chancy 480 1 Burr & Ato 297. 4 Ct.

S. 8293

Schenck 182

## Negligent Escapes

There are such as happen without the officer's consent (3 Bl. 415.) Thus if the person arrested under his restraint by fleeing from the officer or by using violence the escape is negligent - So if one committed escapes by using violence or breaking the door of the prison or in any other way to which the keeper is not consenting - as by rescue &c. (3 Bl. 416. F.N.B. 130. Cro. J. 419.) In an action for escape against the officer his indorsement (of non est) is a sufficient evidence that the writ was delivered to him - Coup 53.5 -

## Difference between escapes on mesne and final process

If a person arrested on final process tho not committed is allowed to go at large for a moment the officer is liable for an escape (Cro. E. 605 - 2 T.R. 172. 2 Bl. 415 - Ante 82.83 Ind. Litly Exp. ) So the enlarged on security given that he shall be again surrendered "into custody" (2 Rol. 133. Con. sed qu.

But at C.L. a person arrested on mesne process if not committed may be permitted to go at large without subjecting the officer if he is forthcoming at the return of the writ - In Ct. during the life of the exn (2 St. Bl. R. 1049. 3 Bl. 415. 2 W. 172 - St. Ct. 39. Rich. 209. 382 - 2 Sev. 174. 5 R. 37. Sal. 408 2 Wils 295 Barnes 372) If not then forthcoming the officer is liable in case for the escape (2 Roll. Ab. 807. Cro E. 623-52-868. 2 Wils. 294. Ex. 609) The escape in this case is negligent - if forthcoming at the return of the writ is suff.

But if a person arrested on mesne process is committed the Goaler's voluntarily permitting him to go at large for a moment subjects him to case for a voluntary escape for upon commitment every prisoner is to be kept "salva et arcta custodia" 2 Wils 294 - Roll 807.

# Negligent Escapes.

An officer having an opportunity to levy an exⁿ & neglect so to do is liable to the creditor if a return of non est to such exⁿ is false – 1 Day 129 2 Ld. Ra 476 3 Jones 40 1 Bos 24 1 Stra 650 1 Johns 218. 10 Mod 369 16 L. L. 232

A jury. creditor told the offr who had charge of his exⁿ to do the best he could with it & that he wd take no advantage – held to be a good defence in an action agst the offr for not awarding the body 11 Mod. 77

x In debt no interest

£ 994

x vid 5 Day 221
3 Lt 425

If can recover no more agst the Sheriff than he has lost in consequence of the escape 1 Johns R 218. 7 Ca 189

Esp. 610. Skinn. 582. Sal 271) and a return of the prisoner does not bar the action (2 Wils. 294 Sal 271) for by a voluntary escape the gaoler loses his right of custody. HA 222

Neither if Pff. proceeds to judgment against the prisoner does it amount to a waiver of the right of action against the Gaoler & Sheriff 2 Wil. 294-

But by a Stat. Ct a person committed on mesne process may be enlarged by the Sheriff upon a bail bond (Stat ) So by Stat. 23 Hen 6. (1 Bac 275 1 H.Bl. 474-) If one arrested on mesne process escapes the Pff's remedy against the Sheriff is by action on the case (2 Bac. 245-) The damages are presumptive and the action cannot be supported unless Pff proves a legal claim against the person escaping (2 Wils. 295 2 Ph. 129. 2 Bl. 611. Esp. 609. Cro E. 19. Stra - 873) But prisoner's acknowledgment of the debt is good evidence 1 Esp. E 169 4 Bl 150 Peake's E 152 - Semble on final process

For an escape on final process Pff. may have case at C. L. or by Stat. 1 & 2 Vict. c. 2 debt against the Sheriff 2 H Bl. 110. 13. 2 Ph. 129. Esp 203- Stra - 152 2 Bac - 245 - 2 Salk 154

These Stats. extend as well to escapes before commitment as afterwards - In the former action (case) the Jury may give what damages they please - the whole debt or less - that is - special damages - for this action is really but for the loss of the original action (Esp 609. 2 Ph. 129.) If special damages only are given Pff. may recover his debt against the original debtor. 2 Ph. 129 2 Wil 195-.

If the Pff brings debt against the Sheriff the jury

# Negligent Escapes.

+ If cannot give interest. the original debt & damages are all that is allowed 2 Salk 611 ind 3 Bt 425 qa

but debt will not lie for an escape unless the prisoner was in ex.tion 1 Salk 270 not in ex.tion unless on Capias

A Sheriff may maintain trespass or trover for goods which he has taken on ex.tion 2 Saund 47. for by the levy the ex.tion debtor is dis.ch.d from the judgment & the Sheriff is liable to the creditor 2 Saund 47 n 1

May have Debt on case agt. an escape on 7 Johns R. 120.

I. 625.

× must give the whole sum for which the original debtor was charged in ex^n – that is – the original debt & legal costs – (2 B.R. 126 132 – B.L.R. 1028 Esp. 609.) & such recovery is a bar to Pff. claim against the original debtor (qu – without satisfaction?.

Our Statute however seems to require that in case of a voluntary escape from prison whether on mesne or final process & whatever the form of action may be the Pff. shall recover of the Respondt the whole original debt & damages. Stat 222 – 366 – 516 –) Hence if this is true construction the Stat – gives the same rule of damages in all cases of voluntary escapes from prison as obtains in Eng^d only in the action of Debt for an escape on final process – 5 Day 221. 3 Bt 425

If a person arrested on mesne process but not committed is rescued the officer is excused – Semble if on final process for he ought to have sufficient force – power of the County – (2 Bac 240 – 3 Bl. 416 Cro. Jac. 149 – Esp. 610 Cro E 873 –) He is supposed in this case to have time to raise the posse comitatus (Esp. 610 –) But after arrest on mesne process & commitment rescue is no excuse for the Sheriff unless made by public enemies –

Rescue by robbers & traitors in such cases is no excuse – No power except that of public enemies is presumed to be greater than his (Esp. 610 1 Roll. 808 Sta. 282 – 160 – 84) The same rule when one is arrested on final process but not committed –

× In these cases where Sheriff is liable the Pff – may sue either the Sheriff or the rescuers – But by suing the rescuers waives his remedy against the Sheriff. Semb. (Esp. 65?

After an escape on ex. Pltff may prove agt. the Sheriff for the escape & at the same time take out a fi. fa agt. the property of Deft. (8 Johns R. 361) for the remedies are not inconsistent with each other.

Where the Law assigns one to the custody of the Sheriff he is entitled to full notice that such custody is at an end before he is liable for not discharging him & if after such notice he retains him in custody is he liable in trespass or case? Rule if the Judgment alone shews the party to have constituted an illegality all along. trespass. Same Case. 34 L.L. 73

A. In which case a special act of Parliamt. was passed indemnifying the Sheriff.

557. 59. 610. 6 Mod. 211. Cro. C. 77. 109. Hutt. 98. 4 Ba 399.) Said that he may have trespass or case against rescuers Hob. 180 Cro. J. 486. 4 Ba 399) Qu. Is not case the only proper remedy? Semble.

In an action against rescuers jury may give either the whole or a part only of Pltff demand (original) if part only the Pltff. may still proceed against the original debtor. Esp 557. 9. 6 Mod. 211.

In an action against the officer for an escape on mesne process his return of a rescue is conclusive - But Pltff may sue him for a false return. 4 Ba 404 Cro. E. 781. Dy 212. Comb. 295. 1 Vent. 224 - 2d 195 -

The Sheriff may also have case against rescuers - but this I suppose is only in case when he is liable to Pltff in the process - not in case of arrest on mesne process - 4 Ba 399. Cro. C. 77. 109. Hutt 98 - Hob. 180.

If Sheriff brings out a prisoner on Hab. Cor. rescue is no excuse Esp 610. Stra. 282 -

After a person arrested is actually committed even on mesne process nothing but the act of God or Public enemies will excuse the Sheriff in case of escape - (Esp 610. 4 Co. 84. 2 H. Bl. 113. 4 Pr. 789.) fire occasioned otherwise than by lightning is no excuse - L. Gordon's riot - Kel 2 Ba 224. 1 Roll 803. Dy 66 -

(Difference between the consequences of a voluntary and negligent escape)

It was formerly holden that in case of a voluntary escape the prisoner was absolutely discharged & that his liability was entirely

# Difference between the consequences of a voluntary and negligent escape.

If a man sue the Shff. for an escape & at the same time pursue his remedy against prisoner, till he obtain satisfaction for the damages are not inconsistent 8 Johns R 361 – 1 Maud 405

If after a voluntary escape prisoner returns or is taken he is not the prisoner of the creditor without some constitute a prisoner on his part as on the back-side any night – if prisoner after such return go at large the Sheriff is not liable for such going at large unless creditor has sometimes by some testimony at his suit return 1 Maud 3[illegible] 2 Nib 205 2 Johns 63 15 Johns 258

2.323

transferred to the Sheriff (2 Ba 209. Hob. 202) But this is not law - the Pff as the nature of the case may require may have a new action of debt against him or by Sci-fa - a new ex^n 1 Ba. 196. 2^d 240 Hob. 60 Sid. 330. Show. 174 - 2. Mod 136 - 1 Vent 4. 296 and now - by Stat - 8 & 9 Lo^n 3^d a new ex^n may issue without a Sci-fa - 2 Ba. 241 3 Bl 415 - or Semb. Pff may retake him on the original ex^n at C. L. Esp. 611. Bull. 69.) If committed on mere process Pff may retake by an escape warrant Esp 611. 3 Co 52 - 2 Wils. 295 - Ante — But the officer suffering the escape cannot retake or maintain any action against him for he is particeps criminis (3 Bl. 415 - 3 Co 52 - 1 Ld 330 2 R. 196 -) & if the officer does retake he is guilty of false imprisonment (2 Ba 240 Carth. 212. 2 R. 196. 1 Vent 269.

A bond to save the sheriff harmless of a voluntary escape is void as being against law - 1 Saun 196. 2 Bulst 213 - 10 Co. 100 - 7 John R 139. 2 John R 255 -

But Pff may retake the he has recovered against the gaoler if the sum recovered was less than the debt - Esp 611. Bull. 69.

But in case of a negligent escape the Sheriff may retake or have an action on the case against him immediately for an escape - for Sheriff is liable to Pff - (Esp 612 - Cro E 234. 53 - 3 Co - 52 - 1 Ba - 415 -) or if a bond has been given against a negligent escape he may sue upon that (1 Root 151) But Sheriff's Bailiff cannot at C. L. have case against the escaper - The Sheriff has recovered against him - for he is not liable by the law but by his contract with the Sheriff. (Esp 613 - Cro J. 349)

Difference between the consequences of a voluntary & negligent escape.

In an action against an officer for neglect in returning a writ of attachment the rule of damages is the actual injury sustained by such default 18 Ct R. 9 do 379

18 Mass R. 205

The escape may be retaken by an escape warrant in another State 1 Root 107. Semble correct.

If a person arrested on criminal process escapes he is punishable by fine & imprisonment - & for prison breach he is guilty of felony - 4 Bl. 129. 2 Hawk. 122. 8 v

Officers who after an arrest suffer a negligent escape of a felon are punishable by fine - but for voluntary escapes they are punishable as the offender being considered as accessories after the fact - But they are not punishable till after sentence passed against the original delinquent (4 Bl 130. 1 Hale - 590. 2 Hawk - 104 -) But before conviction of the principal the officer may be fined & imprisoned as for a misdemeanor 4 Bl. 130.

If for negligent escape Sheriff has been compelled to pay the debt he may doubtless maintain bad. assumpsit against escaper for money paid &c - & the same point has been decided twice at Nisi prius where the escape was voluntary in the Gaoler or Deputy. Esp 612 -) Decided contra by L Kenyon - Peake C 116 - Esp. R see Sect. 18 2 T.R. 154 - 5 b & 1223

If after a negligent escape the Sheriff retakes the prisoner on fresh suit before action brot against himself his liability to Pff. is discharged - & any taking before action brot against Sheriff is a taking on fresh suit. Esp. 611 2 Bac 247. Stra 908 - 3 Co 44 - 52 - 2 T.R. 126 - 1 Vent - 244. 17. 1 Root 106 -) It must however be pleaded specially in Engd 2 T.R. 126 - Semble in Ct. But if the action against Sheriff is brot before recaption a subsequent recaption does not discharge him - for by bringing the action the Pff. attaches in himself a right of recovery

# Difference between the consequences of a volunty. & neglig.t escape.

If the officer is sued for a voluntary escape he cannot defend on the ground that Plff. Atty. permitted the action to be discharged - for the Atty. has no authority so to do - he can merely receive the money & acknowledge satisfaction. 8 John R. 361 / So if Plff. leave Deft. in custody on ex.n of discharge him by order of the Justice who rendered judg.t it is no defence. 9 John R. 114 b x 10 a 220 acid 4 b 521.

Lsa 313
312.

x said that he cannot retake or detain Deft. without a new authority from Plff. 2 John. C. S.

Ltra 905

Sheriff cannot take advantage of error in the proceeding ex.n under which Deft. was arrested. 6 John R. 89.

Esp 688. Cro. E. 657. Stra 893. Cro. J. 657. 1 Roll. 888. 3 Co 44. 52. 2 Ba 24)
A voluntary return of the prisoner into custody before action brot against the Sheriff is equivalent to a recaption on fresh suit. 2 Y.R. 126 - Com. R. 554. 1 Bos. 413 - 2 Salk. 206

But in case of a voluntary escape retaking is no excuse for Sheriff - he has no right to retake (Esp 688. 12 - 3 Co 52 -) for the party permitting a voluntary escape is particeps criminis - & besides a pledge or right of custody once relinquished or suspended is abandoned forever - & in such case a voluntary return does not save the Sheriff. Esp 682 - 2 Coils - 294 - Salk 271 * 2 Salk 5.

Nor will a subsequent agreement by Pff - in the action purge a voluntary escape - he may still sue the Sheriff or retake the party & Esp 682 - Salk. 271.) But if the escape is negligent the Sheriff may for his own security retake even after action brot against himself Reb 99.

If after negligent escape Pff. in the process discharge the escaper gaoler cannot retake for his fees for by the escape his lien is gone - On a negligent escape by a prisoner leaving the liberties of the prison yard a retaking on fresh suit or a voluntary return before action brot saves the Sheriff (1 Root 106 -) yet the Sheriff may recover nominal damages on the bond of indemnity for the condition is broken (1 Root 127) & after such escape neither the prisoner or bondsman can compel the Sheriff to receive the former. 1 Root 128 -

But the bondsman is not liable for the debt after the Pff remedy against the Sheriff

# Difference between the consequences of a voll.y & neglig.t escape

f.50b.

In an action for an escape on mesne process if pltff. having compelled security from deft. for his debt relinquishes it after he has ~~notice of~~ the escape the Sheriff may avail himself of that fact in mitigation of damages 7 Johns R 189

a quietus for the under Sheriff is a known officer. L 70. b7.

f.50b

Contra

is barred by the Stat. of Limitations, tho the prisoner is not retaken - (1 Root 151.) & if judgment is recovered against bondsman before - audita querela lies - for the object of the bond is to indemnify the Sheriff against the claim of the original Pff. & in the case supposed that claim is barred - 1 Hill 119 16 Ward 5 Cy. 8 21 Pick 83. 87

Under a count for a voluntary escape Pff. may give a negligent escape in evidence & Deft. may of course plead to such count a retaking on fresh suit without traversing the averment that the escape was voluntary - 2 T.R. 120. 1 Vent. 211. How then is the Pff. to avail himself of the distinction between a negligent & voluntary escape? In his replication - It is "impertinent" to state it voluntary in the declaration - it should come out in the replication in an answer to any defence that may be made against a negligent escape. 1 Vent 217. 2 Ba 248 - For a voluntary escape the under Sheriff or gaoler is liable - for a negligent one the Sheriff only - (Esp 603 - Comp. 2103.) If then in the first case Pff. sues the under Sheriff &c - the Sheriff seems excused Esp 612 - Semble -

If after debt brot against Sheriff for an escape & before plea pleaded the original judgment against escaper is reversed Sheriff may plead "nul tiel record" - But if after judgment & exn against the Sheriff the original judgment is reversed the judgment against the Sheriff stands good - 8 Co. 142 - 2 Ba. 248 Hob. 209. 3 Mod. 335 - qu - may he not be relieved against the exn by audita querela? So semb. 8 Co 142 - A voluntary escape works a forfeiture of Gaoler's office - Semble if negligent Cal 272 - 3 Lev. 288 - 2 Str. 2 Ba - 240 - 3 Mod. 116 - 2 Haw. 136

A return upon an exn. by the officer that he has taken the body of debtor & that he is dead is good without saying that he died in prison. Hardin's Rep 1189. — & the court will allow the officer on his affidavit of the omission of a fact in return which he intended to have stated to amend the return by inserting the fact Hardin 1199

* So if he collect money on an exn. & fail to return the truth he is liable to the Pff. & not to Deft — who is not injured Hardin's R. 1189

* At C.L. the Sheriff is liable — 1 Co 84th Stra — 1182. 1 Roll 808 Esp 610

8 Pennsylva — Sens.

# Sheriffs

## False Returns

If Sheriff makes a false return he is liable to an action on the case in favor of the party injured - Ex. Return of service on Deft - when there has been none (Esp 615 - 1 Wils - 336 -) & in Ct. Pltff Deft - may sue him - & in Ct - Pltff - may sue if Deft - disproves the return as here he may - So for false return of non est inventus Pltff. may sue. Esp 606 Stra 650 - Cro. E. 729. * - for another pl 1 Ed L. 189

## Liability of Counties for escapes in Connecticut.

In Ct. if a prisoner escapes thro the insufficiency of the goal the County is by Stat. 223 - made liable - for here it is the duty of the County not of the Sheriff to keep the goal in repair 1 Root 150 - Stat. 220. *

The remedy is by petition to the County court not by action (Stat. 367). Heil - 318 1 Root 158. 275 - 357. 150 - 505 - 2 Root - 30 -) & appeal by petition is allowed to Supr. Court. Stat. 223 - In general the liability of the County is but nominal - for it is holden that if the debtor is responsible the creditor must pursue his remedy against him & if not the creditor suffers no actual loss by the escape & therefore can recover only nominal damages - so that the County is virtually only made liable for the special damage actually sustained. Reily 318 1 Root 155. 55 - 278 - 305 - 357. 505 - gen - & However

the person escaping is of ability at the time of the escape & by means of the escape is enabled to evade the demand the County (I suppose) would be subjected to the whole debt - for an escape by means of external assistance the goal

If an officer holding an ex^n for collection pay the amount thereof out of his own money to the creditor the ex^n is discharged & the officer only remedy is by action on the contract against the pris^r 7 Johns. R 129 – So if he take from debtor in ex^n or bond or other security to the amount of such ex^n such bond &c is a payment of the ex^n 7 Johns. R 129. ~~Dig. 551~~ – Rule. 551 18 Pl. 713

If the def^t refuse to indemnify or pay the officer thus paying the ex^n he may recover for money paid 22 Ld. 331

being otherwise sufficient the County is not liable. 2 Root 196 qu- I think it opposed to the C.L. rule & unauthorized

In these cases of escapes thro the insufficiency of the goal the Sheriff would be also liable if the escape were facilitated by any actual negligence in him or the gaoler Stat. 368-224-

## Effects of a discharge from execution

If a creditor discharge from custody a debtor taken in exn whether committed or not he can never afterwards retake him nor in any way enforce the judgment- It is a discharge of the debt- the body in exn being deemed a satisfaction. Burr 2482-7 B.R. 420. Stra 658 8 B.R. 123. Pr. 557. Bn. 525- Ch. 182-

Tho the discharge were in consideration of a new promise by the Deft to pay & the promise is broken the rule is the same He cannot be retaken or sued in debt on the judgt but on the new promise he may be (Burr. 2482- 1 B.R. 557. Bn. 525- Pn. 400. 2 East. 213-) And the judgt is satisfied by thus enlarging the Deft even tho the new agreement should be afterwards defeated for informality- (1 B.R. 557. Bn 525) & a bond conditioned for the rendering in exn a person taken in exn & released by Pltff is void (1 Bos. & P. 212. 2 East 213-) - against law- It is a ~~false~~ bond for false imprisonment- But such a bond has been holden good in Ct 2 Root- 133- See qu- ante- 84.

If two joint debtors are taken in exn a release of one by Pltff is a release of the whole debt- (1 Saund. 98. Salk 574 Ld. Ray 690 Cro E 557) qu- If joint

# Effects of a discharge from execution.

£889

£264

If a Deft. be arrested on exn. & the offr. while holding him in exn. takes a bond conditioned to indemnify such officer from all cost & damage to which he may be subjected for not committing the prisoner & to pay the debt & costs for which the exn. was issued - the bond is void - being taken for an indemnity for an escape then contemplated and the party not being entitled to bail. 10 East 138. 7 Johns. R. 538. 2 Johns. Cas. 253. 10 Co. 99. 1 Select. 129.

If an officer instead of taking a bail bond from Deft. arrested on mesne process takes a negotiable promissory note payable to Deft. & by him endorsed in blank to the offr. - the note is void. 8 Johns. R. 98.

£93

& several? (Ch. 182. 5 Co 86) Does not the debt become joint by judgment against both? Semb. it does

But under the Law Merchant the holder of a bill &c. after having taken one indorser in ex^n & discharged him from custody without actual satisfaction may sue another - for they are not joint debtors - Each is bound independently of the rest - W.R. 1235 - Ch. 115-24 4 T.R. 825 - 2 Show 481.

Formerly decided that if a sole Deft - imprisoned on ex^n died in prison the debt was forever extinguished on the ground that he had elected his highest remedy & ought to be bound by it - (2 Bac 354. Hob. 52 - Cro. E. 850. Cr. J. 136. 43. 3 Com. 310) Also if one of two joint debtors thus imprisoned died the debt as to the other was always holden not to be discharged 5 Co 86 Cro E 850 Cro J. 136. 43 -

By 21. Jac. 1 it is "declared explained & enacted" that where a sole Deft - dies in prison the Pff - may sue out a new ex^n against the estate of the deceased as if there had been no prior ex^n. 2 Bac 354. Hily 163 -

A penal bond by a prisoner to the Sheriff conditioned that the obligor shall remain a true prisoner till the debt fees & expenses of board are paid is wholly void - it being as to the board & fees against the stat. 23 H. 6 - (1 Vent 234 1 Saw 6 173 12 Mod 683 - 1 P.W 195 10 Mod 159 10 Co 100 Plowd 68 4 Bac 438. 2 Ld Hob. 11 2 Wils 351. Contents - being bonds for ease & favour see 1 Roll 158

By an Act 1000 54 it is enacted that any person authorised to serve process shall endorse thereon as fees any more than the law allows or he shall repeat twice the excess to the party aggrieved. 2 Ch 148

It being extortion 1 Dust 388

Our Supr. Court seem to have adopted the idea that it is used as to the board only - This perhaps is correct in Ct. as the penalty may be changed 1 Root 158 ~~that~~ see Stat. 23 H.6. 4 Bac 461 -

## Statute regulations in Connecticut

Premise - all prisoners are by C.L. to support themselves except felons attainted Bloud. 68 1 Mod 132 12 Vn. 683 -

A person committed to prison for any offense is to bear his own charges & expenses of commitment if of ability & his estate is subjected to the payment - If he has no estate he may be assigned in service Stat. 221. 1 Root. 232 - 368 -

But the expenses are regularly paid in the first instance out of the State or town treasury - If a gaoler receive from any prisoner any greater sum for fees than is allowed by law he is liable to treble damages & to a fine at the discretion of the County court / Stat. 221. 368 - / When a person is committed in any civil case he is obliged to bear the charge of his own support unless admitted to the "poor prisoner" oath - the amount of which is that he has no estate of the value of £17. nor sufficient to pay the debt for which he is imprisoned &c. On taking this oath he is discharged from the prison unless the Pff. furnish a weekly maintainance for him to be deposited with the gaoler Stat. 221. 368 - / 1 Root 117 /

But

# Liability of Counties for escapes.

the debtors estate if he has or afterwards acquires any remains liable & new exn may be obtained by ri-fa- 1 Root 58 -Before the oath is administered creditor is to be notified to appear & shew cause &c - 8 days notice - if no sufficient reason is shewn against it he is to be admitted to the oath - by any magistrate Stat. 221. 365 -

If the application is unsuccessful he cannot make another except to the chief Justice of C. court & a Justice of the peace or to 2 Justices quorum unus Stat. 222. 366

If the oath is administered in the first instance the creditor may apply to the Chief Justice of C.C. and a Justice or two Justices quorum unus who have power to order the allowance of support to cease - (Stat 222-366 -) But the charge of support when borne by the creditor is to be defrayed eventually by the prisoner and if the creditor chuses to continue him in prison he cannot procure his enlargement without paying that as well as the debt - Stat - 222 - 366 -

Felons and debtors are not to be lodged in the same room - if they are the keeper is to pay treble damages. Stat - 366. Poly C. L

When any County is destitute of a goal any person liable to be imprisoned may by Court authority be committed to a goal in the next adjoining county. Stat. 223. 366 -

# Liability of Counties for Escapes.

The County Court in their respective Counties have authority to order into close confinement all prisoners committed on exn. for debt damages fine or costs except when the exn. is issued by the Supr. Court which in such cases has like power - Sheriff is bound to obey or he is liable for a voluntary escape & in the same manner as if he had permitted a voluntary escape. His refusal to obey is deemed a voluntary escape - for the mode of prosecuting see Stat. 367.

But this authority of the two courts extends not to cases in which judgment on which the prisoner is committed does not exceed $17. Stat. 367.

In an action by sec. office for quadrantem in exn. upon a special undertaking by Dep. to keep & redeliver them it is not necessary to aver that he posted them or that the judgt. remains in force unsatisfied - 1 Root 140

What the law enjoins to be done need not be inserted in the writ. /1 Root 148 - / If direction in the writ for offr. to return it

*So that here creditors of fraudulent grantor can defeat a subsequ bonafide purchaser. 1 Ct. Ch. 527 n S. 121 — S. Rice 3 Mat 338. Hence it is holden that a fraud^t conveyance may be made good by matter ex post facto a Purchase & Lapse of a period 2 Peck 198 2 Wilson 252.

Conveyances fraudulent as to purchasers and creditors stand on the same ground — Accidalla only 3 Mat 339.

Non is it as respects fraudulent sale of personal prop^y. 1 Ct 497

# Fraudulent Conveyances No 1.

By St 13. Eliz. & like St in Ir 354 all conveyances, bonds, suits, judgts. fines & contracts made to defeat & defraud creditors of Grantor are as against those only who are intended to be defrauded & their representatives successors & assigns utterly void. Rol. 2.3 — 2 Ba Fraud pl. 601. Cy 245 Rol. 589. — Proviso in Eng St. that it shall not extend to any bonafide purchaser having no notice of the fraud Rol. 4-3 — No such St. here proviso in Ct. & 21 x

By 27 Eliz. all conveyances &c made to defraud bonafide purchasers are also void — with a similar proviso. Rol 7.8. All Supp — No such St. in Ct.

Both these Sts. are said to be in affirmance of the C.L (Cowp 434 2 Shem 357. 3 B R 5 Mb Rol 2.9.) Seems that fraud must be proved at C.L & cannot be presumed — sed. qu. (Rol 80 Mb 52 b. 528. 573) Formerly holden to be in affirmance of C.L only to prior creditors & purchasers — Rol 9. 14. 15 3 Co 83 Same 105 Cro E 444. 1 Inst 290. 2 Litt 601. Seems now not so — 1 Ct R 295

Such conveyances are good between the parties, Rol Ab 1. 33. 57. 1 Rol 104 1 Sq. 3 Ple 222. Cro E 445 6 Co 72. Cy 295 Cro J 270 1 Leo. 283.) Qu. If fraudulent grantee gives his obligation for the consideration of the conveyance can it be enforced? Quere — Augt. 1812 —

But a fraudulent conveyance within the 27 E. is void as against a subsequt. purchaser for valuable consideration even if he has notice of the prior conveyance. Rol Ab 29 214 233 5 Co 60 Cowp 711 2 Bro C 14. 18 19 East 59 — Seems rule in Eqy. Rol 233. 2 Bro C 14. 8. 9 qu. cid post 99. 100

# Fraudulent Conveyances

Settled that fraudulent conveyances to defeat creditors are void as well against subsequent as prior creditors (Rob 17 to 20 194 Sty 246 2 Br. Ch 90 1 Atk 94 2 Ld 600 Ballot 64. Comyns D. Cavin 32 Dy 351. 3 Co 83 1 Root 324 4 Day 284

(The propriety of the principle mentioned before the last has been doubted 1 V & B 335 2 Br. C 148 9 Rob 71. 4 Cranch 378 1 Bond 271. )

298

A conveyance upon a valuable & adequate consideration will be fraudulent & void as to creditors &c if made with an intent to defraud them – & so also of a judgt. Rob 23.5 - 490. 517. 2 Vs 10 2 Atk. 520. 418 3 Co 81 –

In some cases arising under these Sts – the fraud imputed to the conveyance is express – in others constructive – but even where actual it is not necessary the creditor should have been deceived – suffit that the conveyance was made with intent to deceive – (Rob 35.) & this intent may be inferred from various circumstances (post 123. Eg. Voluntary conveyance to A – & a subsequt sale by Grantee of the same subject to B for a valuable consideration – suffit evidence of fraud in the first conveyance – Rob 35.3 4 Cranch 374 5 Co 60 1 Eq C 334 Cook 288 Cowp 280. 2 Bro. C 148 – Cowp 280

If a fraudulent conveyance is defeated by a subsequt sale & the latter is itself afterwards defeated by non performance of a condn – the first is not made good having once been destroyed by the land – Rob 1.2 2 Roll 35

It was formerly supposed that if a conveyance was made to defraud any particular creditor of grantor no other creditor could defeat it

Contra if the grantor then had other property suffit to pay his debts 15 Wend 588

The motion of Creditor in entering judgt upon a bad summons of attorney where he has no security but his judgt cannot be questioned but where he has other security & takes the only fund against which the other creditors can proceed his motion may be submitted to the jury 4 Wend 104 5 J & R 235 4 East 1.

If the judgt is taken for more than is due or assigned & levied for more than is due with intention to defraud other it subjects the party to the penalty 4 Wend 106 2 Young & Jervis 304 - yet a judgt may be taken to cover future advances if done bona fide - 5 Cowen 547

The rule as laid down in 9 East 59. 63 denied in N.Y. & the
old rule in Eng. adopted to wit. that a voluntary covenant
made of holy no bridge & Lewis / 12 Johns R 553 / grantor
must be indebted at the time of fraudulent 8 Ct 190

vid 6 Ct 113 as to the effect of voluntary settlements where creditors
are not interested & the necessity of establishing the badge of fraud

1 Ct. R 525
12 Johns R 553

such construction having been given to other Sts - in suppression of fraud (Rol 46 1 Co 93 Cy 192 1 Ro 56) Now settled that if the conveyance with an intent to defraud any one of the Grantors creditors it is void against all - the tendency of the conveyance being to defeat all. Rol 53.58.60 Lane 27. Palm 415 2 Ba 605

If Grantor is indebted at the time of the conveyance it is a badge of fraud under the 13 Eliz - but not under the 27. E - Rol - 53.59.60 contra Lane 711.

Voluntary According to many opinions the want of a valuable consideration is only presumptive evidence of fr and under the St. 13 & 27. Eliz - & not per se fraud - Rol 13.15.18 61. 395.366. 1 Bond 268 1 Ves 150.93 237. 2 Ch 105 - 1 Mod 119. 1 Peel 186 2 Vern - 44 6 Ann 2 Ch 324 705 -) But it has lately been decided (9 East 59) that a voluntary conveyance is as such fraudulent within the 27 E. - i.e. one not founded on valuable consideration (Co 158 1 Sid 133 1 Eq. C 334 - Rol 191 204 626.628 Pr Ch 13 - 2 Ves 10 2 Vern 261. 1 Ch R 1019) Qu whether this rule holds as to conveyances under the 13 E. - It seems it does not - Rol 16 61 2 Ves 10 3 Ath. 412 2 Vern 327 1 Bond 268. Rol 190. 395.6

Decided that reasonable family settlements & advancements to children are good against subsequent creditors & there are no badges of fraud - & this is not judicially denied - (Rol 76 n. 448.452. 517. 398 18.22 - Talbot 65 - 4 Burr 388.938 1 Ath 94 - Str - 446 8 Mod 529 Bull 257) Qu Is not this the only case in which a voluntary conveyance is not per se fraudulent against creditors and

Valuable Consider^n Fraudulent Conveyances

as well as subsequ^t purchasers – Semb. it is Rol 395 1.37. 57 1 Ch. C 69 2 Atk 152 1 Bro C 34 2 Ver 1.91. Amb 387. 396 vide 8 Cowen 440 for a collection of cases on this subject

Valuable consideration of which marriage is one Rol 103. 105 200 503 – Eyl. 1.134 4 Burrie 388.93 24 2 Bl 297. S. 108

Hence a conveyance in consider^n of marriage is good against a subsequ^t bona fide purchaser under the 27 E – (Rol. 105 Eyl^e – 1.134 4 Bra – 388.93) & such conveyance is entitled to the benefit of that St – against prior fraudulent conveyances – Rol 105 – 23. 367. 502 4 Bra – 383 Mond 398 1 Br. C 99. 1 Sid. 133 P. Ch 275 – 377 –

But there is a difference in one respect between marriage & other valuable considerations – If a conveyance is made to Ca B. & C – for a pecuniary consider^n received of C – only they all are protected by it – But if in consider^n of marriage a conveyance is made to C – a party to the marriage & to issue &c – & to collateral relations – the consider^n it is seen as a valuable one will protect those only who are within the object of the settlement – qu – 4 Bra – 393. 8 Mond – 395 – 2 Sev. 105 2 P. Wms 175. contra Rol 123 453 – 664 129. 109. 10 Rol 1784 Moor 504 Cowp 711 7 Co 39 10 Mod 534 Q^e 132 –

Sir Lawrence Cowp 711. that the limitations to collateral relations in the last case are good against creditors – 2 P. Wms 85 – qu Rol 123. 5 2 P. Wms 59. Rol 113 con – qu are they good against subsequ^t purchasers under the 27 E? Semb. not Rol 109. 10. 114 23 112. 62 2 P. Wms 268. 55 2 Sev. 105

These latter limitations are good without doubt as between the

A conveyance by one in debt without any actual consider^n absolute on the face of it but intended to enable grantee to sell the land & pay grantors debts rendering the surplus to him if any is fraud^t & void under St N.Y. 20 Johns 5.

To render a conveyance fraudulent within 13 Eliz. the party at the time of making it must be indebted to the extent of his indebtedness but if he owe, to the value of his property, he may render himself insolvent by conveying it to a third person 23 C L 98

## Valuabl. Consider^n Fraudulent Conveyances

parties & when executed may be deemed in Eq^y. Rd 109.10 13 664 18.47.9. 7 Co 39 9 Mod 80 2 Pl. 594 3 Ath. 189.

But a settlement made after marriage not in pursuance of an agreem^t before marriage or upon or new valuable consideration is considered as a voluntary one – Rd 107. 213 Comp 287. 2 Br. Ch 148 –

The such settlement, being made at a time when the settlor was unincumbered have usually been supported against creditors yet if he was involved in debt at the time I conclude the conveyance would be void as to both prior & subsequ^t creditors (Rd 187. 94. 18 24 228 – Sty 146 2 Ves. 10 2 Ath 520. 600) but such settlements are void against subsequ^t bona fide purchasers. R 191 213 Ch. S 158 2 Lev 146 2 Vern. 326. Comp 278 2 Br. C 148 1 Ath 621 2 Ves Jr. 617 1 Ch. C 225 1 Vern 294 2^n 272. 9 East 159. 8 Wheat 339 –

Purchasers are more favoured by the construction of the 27. than creditors are by the 13. E – for they advance their money for the property itself & not on the personal credit of grantor or owner as creditors do. Rd. 187. 94 16.17. 395 2 Vern. 327. 564 Pow. M. 234 3 Bro 643 19 Ld. 1191. Sel 1249

How a voluntary settlem^t is affected by fine or recovery by 27. E vide Rd 20 – 13 3 Co 79 Dyer 254 1 Sid 133 1 Ch. R 78 2 Co 7. 2 Bulst 423 –

# Valuable Consider.n Fraudulent Conveyances

But a settlm.t made after marriage in pursuance of a covenant made before marriage is not considered as voluntary & is therefore supported against creditors & purchasers - for in such cases the original agreem.t which is a valuable one upon consideration of marriage & the settlem.t being in ex.n of the original agreem.t is supported by the same consideration. Rod 218. 113 1 Eq. C 384 3 Rel 6 1 Vent 103 2 Rel 700 Stra 237

Rule is the same tho the agreem.t made before marriage was by fraud - but if the settlm.t varies substantially from it it will be considered as fraud.t Rod 220. 115 Cro J 154 2 Ver 248 Ver. 196 2 Ver. 304. Rod 228 4 Mod 82 Stra 236 738 Plo 618 P. Wm. 370 Cant 288. 2 Ver 146 ) but the settlem.t may be good so far as it conforms to the original agreem.t & void as to the residue Rod. 217 1 Vern. 285

If the settlem.t is not executed after marriage but rests in articles only & recourse is had to Eq. to compel specific performance that Court will enforce it only as against creditors & volunteers & not against purchasers and mortg.ees without notice - for the interposition of this Court being discretionary & the eq. being equal it will not deprive the purchaser & mort.ee without notice of their legal title Rod 227. 9. 31 41.2 2 Ver 304. 9 1 Plo 622 Bull. N. P. 89

And a settlm.t after marriage without any other agreem.t & without any other consider.n than that of providing for children is supported both in Law & Eq. against subsequ.t creditors provided it is reasonable and

If the settlmt. after marriage is made in pursuance of a parol agreemt. entered into before marriage it is not void against creditors 3 J. C. C. 488 2 id 1 Ves. Jr 196 12 do 67. 24 Rot. 243 Contra

A voluntary deed to a daughter who then marries a husband having notice of such deed is good against a subsequent bona fide purchaser 1 Johns Ch 271 12 Johnson 536

Whether a deed from parent to child for material loss or offering is fraudulent or not is a question of fact for the Jury. There is no such thing as fraud in law or such evidence of fraud to be pronounced upon by the court it is now but prima facie evidence to be submitted to the Jury 8 Cowen 406 4 Wend 203 7 do 438

unaccompanied with any charge of fraud. Rd 18. 25. 187. 91. 22. 3 Pb 28 Ve 10 2 Ch 520

But when application is made to Eq.y to rectify settlents made after marriage in pursuance of a prior agreemt. that Court will not extend its relief so far as to defeat a purchaser without notice per ser. Rd. 229 he is not supposed to be conversant to the rules of Eq.y — qu Cmd 288 1 Pl. 622 —

But where articles made after marriage in pursuance of a prior agreemt. Eq.y will enforce the articles against a purchaser without notice — for he has notice of the real eq.y — Sens in last case Rd 233 2 Ch. C 246 —

If a purchaser under articles therefore a valuable consider.n, but with notice of a prior voluntary settlmt. applies to Eq.y for a specific eq.n his bill will be dismissed for he has not the legal title & no eq.y — Sensest Sens when he has a conveyance executed Cante 98 Rd 234 507 n 1 Ch. C 287.

A recited in an agreemt. after marriage of its being made in pursuance of one made before marriage is with very slight concomitant fact suff.t evidence of the prior agreemt. Rd 236, 41 Pl. Ch 101 2 Ve. 304 2 Ves. 196 1 Ch 188

A settlemt. made after marriage upon a new & valuable consider.n is not considered as voluntary against creditors or

# Valuable Consider^n — Fraudulent Conveyances

purchaser – & in consideration of wife's property Rod 242. 9. 52. 62. 72. 2 Ath 49. 2 Ver 70 P^r Cr 113 –

So if made in consideration of a portion given by the wife's friends – & it is no ground of objection that the stipulated portion has not been paid – the agreem^t to pay is itself a valuable consider^n 2 Ves 18 P^d seq Rod 252. 8 Amb 125 Cr J 158 Sellot 64 1 Ath 16 188. 2^d 477. P^r Cr 425 –

If a husband being obliged to apply to a Court of Eq^y to obtain his wife's fortune is required by the Court to make a settlem^t on her – it is not considered as voluntary tho made after marriage (Rd 278) but is good against both creditors & purchasers Rod 288. 2 Ath 420 1 P^r Wo 383. 3^d 305 –) The settlem^t in such cases is the means by which he is obliged to purchase the enjoym^t of his wife's property – & if the trustee of wife's property requires a reasonable settlem^t on her the rule is the same tho there is no decree in Eq^y for that purpose as Eq^y would have prescribed the same conditions – Rd 280 P^r Cr 22

But if trustee voluntarily & without condition resigns the wife's estate to husband & the latter in consideration of it makes a settlem^t on the wife during coverture it is voluntary & the settlem^t void as to purchasers of value (Rd 281 P^r Cr 414. 5 4 Ves Jr 18 2 P^r Wo 639 3^d 11 Ves 539. 2 Ath 67. 420 –) Qu – Is it void as to subsequ^t creditors unless the husband was involved at the time? It seems not

But if the settlement required by trustee greatly exceed what a Court of Eq^y would deem reasonable it seems that as to the

Voluntary conveyance of stock or personal property cannot be set aside in chancery by grantee there being no constructive trust nor by a purchaser if not being within the St. of Eliz. that St. referring to conveyances of lands 8. Cond. Ch. 107 & 1372 n

A voluntary conveyance made by a solvent man is good against subsequent creditors 8 Ct 190

In an action on a promissory note by one not a bona fide holder another may depend on the ground that it was given on the consideration of lands sold to defendant which courts will not aid either party in enforcing an illegal speculatory contract 4 Wheat 1214
1 Ferrif. 91

except it would be void even as against subsequent creditors - Semb - (Rob 285 395 2 Ves 18 Pitch. C. 69) As to what is a reasonable settlement. see Rob 283 1 Pl. 519 3 Ves. Jr 506 -

And if an Eq.t in whose hands there is a legacy belonging to the wife requires a reasonable settlm.t on her as the condn. of paying it to the husband the settlm.t is not voluntary but is good against creditors & purchasers. Rob 285 B Stra 239 2 Ves 18 2 Atk 420 Pr Ch 548 3 Pl 11.

If the wife has an equitable title to a chattel real the husband may dispose of it free from any claim even in Eq.y for a provision or settlm.t upon her - here Eq.y follows the Law. 2 Pl 222. 4 Ves. Jr. 354 2 Vern. 270 Rob 299 662. 3 Vern 7. 18. 1 Ch. C 306. It would seem that a settlm.t on wife during coverture in consideration of such chattel interest would be voluntary as well in Eq.y as at Law - Rob 299.

In some cases a disposition of property by a woman to a third person in trust for her own separate use or the use of marriage is in Eq.y fraudlt. & void as against the husband (Rob 218. 58 2 Pl. 257.) Under these circumstances the claim of the husband to set aside the conveyance is not such it seems as the Law cognizes -

Distinctions If a woman before any treaty of marriage reserves exclusive dominion over her property with a great view to future possible coverture the husband having made no

# Fraudulent Conveyances

**Valuable Consider.**

settlt. upon her cannot set it aside even in Eq. tho he has no notice of it at the time of marriage – there must be fraud (Rd 354 59. 2 Br. C. 345-50. 1 Ves. Jr. 22. 2d. 194) Seems (Semble) if done pending a treaty of marriage – or in contemplation of a particular marriage afterwards had – for here is fraud. Rd 354 2 Br. C 345 2 Ch. C 41 2 Vern. 1. 2 Ba 292 1 Bonb. 259.

2. But if he has made a proper settlt. upon her of wh. a Court of Eq. is to judge he may in the first case be relieved against the reservation on the ground of fraud inferable from his want of notice – Seems if he had notice. Rd 259. 357. 2 Pr. 533

3. If a man in contemplation of marriage is pending a treaty makes a settlt. for the support of her children by a prior marriage the settlt. will be held against husband tho he had no notice – & it has even been held as called against creditors & subsequ. purchasers Rd 359. 60.5 1 Bonb. 259. 2 Pr. 357. Wms 408 1 Atk. 265 & 2 Ba 292 Coup 705 – qu. as to purchasers vide 9 East 57. 65 –

So tho he has made a settlt. on his wife – But if he has made a settlt. which he was induced to do by an intentional concealment of the provision for the children & by fals & fraudulent assurances studiously holden out – the settlt. for the children may in Eq. be set aside as being fraudt. against husband Rd 358 60. 50 2 Ch. C 42 – ) In all these and similar cases actual fraud seems necessary to entitle husbd. to relief – Rd 354. 2 Br. C 350

That a prior voluntary conveyance is primâ facie fraudulent vide
1 Vent 193 Hoard 398 1 Ver 150 2 ver 146 1 Ch Ca 486 Hy. 446
Gilb L.E. 205 9 East 64 Cowp 434 708. 710.
That it is fraudulent & void vide 1 John Ch 268 2 Bro 148
9 East 59. 70 4 Bro 332 2 Saund 82 Cro J 188 1 Lid 133
P. Ch 14 1 Eq. C 334 Ab 3 Atk 412 2 Ker 10. 2 Wil 356
2 Bl R 1019 Cowp 278 8 Mod R 528. It is of no consequence
whether the subsequent purchaser had notice of the prior voluntary
conveyance or not 1 John Ch 268 5 Co. 60.

# Fraudulent Conveyances.

If a woman on the eve of marriage makes a voluntary gift to a stranger it is void in Eq. as against husband 1 Vent 259 2 Ch. Pa 41. 2 Ves. 264 vid Rob 353 –

So a wife has in some cases been relieved in Eq. against clandestine agreement of the intended husb. with persons prior to the marriage in fraud of her expectations. Rob 350. 3 Pl. 74. Pa. 65 – 1 Vern 136 2nd Ch 131

## Who can take advantage of the 27. Eliz.

No other than a purchaser bona fide & for valuable consideration can avoid a prior voluntary conveyance under this St. Rob 369. 78. 82 88. 425 – 641 38 . 3 Ec 81 Cowp 105. 12 Talbot 54 3 Wils 356. Co E 246 Burr. 396

But marriage is a valuable consideration within the rule. Rob 369 103. 5 – 23. Cru 383. Ved 398. 1 Ch C 99. 8 101.

Can a trustee to whom a fraudulent conveyance is made for payment of grantors debts take advantage of this St. Said to be no such case – Rob 369. 1 Pl. 358 2 Eq C 718 Pl. 536 2d 379. 1 Atta 613 2d 22

There seem to be at least an artificial objection in the way – for tho at law he has the nominal title he seems not strictly to be the party intended to be defrauded & in Eq. there is the additional objection – that he has no interest – If these objections are valid the remedy must be sought by

# Fraudulent Conveyances

## Who may take advantage of 27. E.

the creditors themselves in Eq. secus qui ind Rol 391 Noy 105 –

A purchaser under a family settlt. made in consideration of natural affection cannot set aside a prior voluntary conveyance to a mere stranger – for he is not a purchaser of value & a voluntary conveyance is good against the grantor his representatives & volunteers (Rol 33 641 1 Rood 104 1 Eq. tro E 445) & the same rule applies to a woman who claims a jointure made after marriage she cannot take advantage of the St. Rol 371 tr E 445 –

But if one purchases for valuable consideration mere inadequacy of price is no objection to his taking advantage of the St. (Rol 371 Finch 104 –) the inadequacy of price accompanied with circumstances indicating collusion between the parties for the purpose of overturning the prior voluntary conveyance may be a suffl. objection – otherwise a purchaser mala fide might take advantage of the St. & the binding force of the prior voluntary conveyance on the grantor might be eluded Rol 371. 548 Cawp 103. 13 1 Eq. E 168 –

But gross inadequacy of price amounting only to a colourable consideration is itself a suffn. objection – for the same reason. Rol 271 2 Ro 618 Cawp 113 114 –

But if a subsequt. purchaser for an inadequate consideration appears to have overreached the grantor he cannot defeat a prior voluntry conveyance – for he is not a bona fide purchaser Rol 272 3 Ro 33 tr E 445 –

If vendee who is indebt conceals such fact from vendor & then obtains goods without intending to pay for them it is a fraud & the property is not changed in consequence of fraud - but a bona fide purchaser from vendee who has paid for them without notice of such fraud will hold them 1 Pierce 493 10 Mass R 53. 15 Johns 147 1 Pierce 303 - the fraudulent grantee is treated in chancery as trustee of grantor 10 Pierce 152 14 Pet 234 1 Ves 289 2 Atk 254 1 Ves 296 1 Johns Ch 582 -

said in the books Hunter v Matthews 1 Vern 408 King v Cotton 2 P.W. 674 358 Strathmore v Bowes 2 Bro. C.C 345 6 Bro P.C 427 1 Ves jr 22 2 Cox 28 Ball v Montgomery 2 Ves. jr 191. Blanchet v Foster 2 Ves. Jun. 264 that a voluntary conveyance by a woman while marriage is in contemplation is avoidable by the husb. who had no notice of it as being in fraud of his marital rights but in 8 C. & Ch 410 all the cases are reversed & the rule laid down that evidence of fraud or want of notice to husb. must be shown id Map 485

A. in embarrassed circumstances executed to B. his relative a mortgage of all his property for the payment of $300 - when the only dealing between them was that B had become his surety for $100 - held on fraudulent as to creditors & Bond 344 & being fraudulent in its inception it would not after wd be made good 5 Day 341 15 Johns 543 5 Cowen 571

# Fraudulent Conveyances

Who may take advantage of 27. E.

Cumber is a purchaser within the St. & may take advantage of it if the mortgage is bona fide & for a valuable consideration (Rol 373 Shen. 423 Rolt 277. 2 Vern 272 Cowp 713 - 1 Ch C 220 Cumb 289 -) So does the consignee of a St. or recognizance. Rol 372. 462 n

But a mere lending in Eq. only a purchaser for the purpose of security & to the extent of his debt - the voluntary conveyance whether prior or subsequent is void only pro tanto & the voluntary purchaser will hold the eq. of redemption & be entitled to redeem - this does not interfere with mere creditor's claim - Rol 273 - 657. 1 Ch. C 59. 219 -

St remembrancer by. will never open or foreclose in favor of a voluntary alienee subsequent purchaser he being entitled to no favor (Rol 373 1 Ch C 217. see also Finch 38 -) St seems also that a surety to whom a lease is made for his indemnification is a purchaser within the St. tho he has not paid the debt. Rol 374 455. 6 2 Roll R 305. 2 Lev 70 5 Co 24 Talt 84 2 Rol 499.

The rule is said to be questionable - but is it questionable if the lease is made by way of mortgage (Rol 374 Cro 205 Clayt. 38 2 Roll 783 ) If it is an absolute lease it seems to be valid on principle - to third persons for it is an absolute transfer of property when the payment for it is altogether contingent - Indeed it is a fraud in not trust between the parties on which ground Ld. L. & L.C. decided the conveyance to be fraudulent as against creditors - Beach vs Cattin 4 Day 284

C. R. Lewis v Rumney S.C.

To constitute a purchaser within the 27. E. the purchase must be of the identical thing which was the subject of the fraudulent conveyance - Seems he cannot take advantage of the St. Rd 375 (Fut 3 -) Thus where A. having a lease for 80 years on contn. forges an absolute lease of the same land for 99 years & for value sells the forged lease (reciting it) & all his interest in the land to B. - Sworn that B was not a purchaser within the St - for he claimed contrary for the true interest of A the as between the parties the true interest passed by the genl. words yet the valuable considn. did not extend to it

But if a fraudlt. valuable considerat. is paid it is immaterial it seems what species of interest or right is purchased whether the subject purchased is an actual positive interest or the mere extinguishment of an interest &c. Lessee makes a fraudlt. sale & then for value surrenders to reversioner - the latter may avoid the first - Rd 376

A Lease for years for a valuable considn. is a purchaser within the St. & the reservation of rent is a suffn. valuable considn. Rd 376 2 Leon 327. 1 Ab 1019. Cro J 181.

Said that to render a conveyance fraudlt. within 27 E. he who makes it must be the same person who afterwards sells to a bona fide purchaser & that if it be otherwise the

latter cannot take advantage of the St. Rob. 377. Gilb. Rev. 312 1 Vern. 45.

This seems to be true only in those cases in wh. the person making the latter conveyance has not the estate in him at the time — or rather where he is a stranger to the estate at the time — as in case of G. Fatter — Fatter & Son — G. Fatter made a volunty. conveyance to his G. Son & died — the Father then mortgd. the land for a valuable consideration — holden that mnce. could not set aside the volunty. conveyance — for the Father was a stranger to the estate it beginning fee to the G. Son — Semble if mortge. had been made by G. Father 1 Rev. 45 Rob 377. 9. 87

But if the person making the subsequt. conveyance (tho not the same that made the prior voluntary one) has the estate in him at the time the subsequt. purchaser may take advantage of the St. E. G. F. F. & S. — G. F. made a fraudt. lease to F. — after the death of G. F. — F. assigned to S. — & then sold to a bona fide purchaser — holden that the lease & assignmt. were both void as against the purchaser — for here the F. had the fee simple by descent at the time Rob 377. 80. 77 8. 2. 3. 6 Co. 72.

But if A. makes a fraudt. conveyance to B & then makes a voluntary one to C. & then C. sells to D. for valuable consid. D. cannot avoid the fraudt. conveyance — for C. takes no estate even as between himself & A. — hence the sale by him to D.

was the act of a stranger to the estate & in this case it is not material whether ye knew of the first fraudt. conveyance or not Rol 233.4 385 Moor 802 833 Rol 558 3 Ch R 123 2 Vern 173 Atto 833

A trustee under a voluntary conveyance cannot become a bona fide purchaser within the St. so as to defeat the settlmt. in Eq. for he cannot acquire a right in Eq. by a breach of trust — he does not act bona fide Rol 389 13 Vin. St. Fraud. p. 52) 3 Ch. 222 + 2 if trustee by direction of cestui que trust makes a voluntary conveyance he cannot without the direction of cestui que trust defeat it in Eq. by a subsequt. sale to a purchaser even without notice — for the first sale is in Eq. a sale by cestuique trust & the latter being a breach of trust is disconnected with it & thus is (as considered in Eq.) made by a stranger to the estate — Rol 389. 390 Smith R 1139. 13 Vin 527. 2 Mon 767.

But a person who makes a purchase in his own name with the money & for the use of another is a purchaser within the St. — for he acts in pursuance of the trust & takes advantage of the St. for the benefit of cestuiquetrust Rol 391 Noy 105

A person purchasing an annt. or profit out of land may be a purchaser within the St. — 24. of trees growing — & the same rule holds of all incumbrances — as Bonnice of a St. or engagmt. Rol 391.2.3. 452

Where there is a voluntary gift of money or other personal

chattel if it is consumed or waſted away by the fraud^t donee before the creditor can take it in ex^n. or is not to be found his remedy as to the profits is gone in Eng^d - for the only way in gen^l. by which he can set aside the conveyance is by seizing the property on ex^n - & (Semb) Eq. cannot in such case ſuſtain a remedy (Rob. 223.4) In Ct. he may ſecure a lien upon it by attachm^t on mesne process - But if gone or consumed before attachm^t the remedy is gone here also - for no action for damages will lie against donee 1 Cay 258

But here & in Eng^d. the creditor may in all cases prosecute for the penalty of the St (Rob 3.n 1124 St. Ct. 35) & there is a similar penalty provided for purchases by 27. E. Rob. 7.n

And it seems by some opinions that a volun^ty gift of money is not within the 13 - E. - for as it appears to be supposed it cannot be seized on ex^n (Rob 1124 13 Vin 527. 1 Eq C 1119 2 Bacon 1190) but if the specific sum can be found in the hands of donee what is the obj^n to its being taken in ex^n? - Cay 219. 280 - 2 Show 166 -

In case of seduction if the seducer by way of reparation gives a bond it is void in Eq. as against creditors the good inter pares - & hence it would seem that a conveyance upon such consid^n would be void under 13 & 27 E as against creditors & purchasers for value Rob 1128.87. 2 Wils 339. 3 Ple 339 222 Salk 153 - 2 Eq. C 182 258 Pr 187

# Fraudulent Conveyances

## Conveyance for paym^t of debts.

A conveyance to trustees for payment of debts, no creditor being a party to it is said to be void as against ~~[illegible]~~ dissenting creditors & bona fide purchasers - Rob. 429.30 1 Bro. 191 - 1 Ba & B 219 2 Vern 510. qu - ) It is considered voluntary (Semb Rob 429.30) because the trustee is a stranger to the valuable consideration - qu Are not the creditors presumed to assent till the contrary appears? 4 Cay 305 - 2 Root 26 3 Co 26.7. 2 Lean 253 Sta. 165 2 Bl 292 case of a purchase by one non compos mentis

But if a creditor is party to such conveyance to trustees it is supported by a valuable consideration & is good against a creditor not included Burr 478 8 J.R 521 5^d 235 - 2^d 16. 1 Binney 502 Comp 148 2 M.J.R 42 - Cay 671 Ped 431.6 3 Co 81. 5 J.R 420 530 (Nailor vs Huntington C.E. 1811. & Naylor vs. Bodich C.E 1811. contra) 3 Cay 340 2 John 226 1^d 156 5^d 413 - How is this conveyance good except as to the creditor who is a party to it if the former rule is correct? 8 J.R 508.30 4 East 1 -

A conveyance to trustees for the payment of debts made in another State by the laws of which it is good against dissenting creditors will be good in this State - the lex loci governs - (Naylor vs Huntington C.E. 1818 3 Hall 370 2 M.J.R 89 1 Bos 138 1 H. Bl. 665 - 4 J.R 182 - 2 Burr 950 1 R.R 258 Comp 175 323 1 N.Y.J.R 402 2 Vern 540 3 Cram. 73 Sw.E 258 5 East 124 -) & such a conveyance for the payment of debts as is valid under the foregoing rules is so it seems tho the debts are barred by the St. Limit^n - for the remedy only is taken away by the St - the debt remains & (Semb) the conveyance ipso facto

Vid. 4 Day 146.

# Fraudulent Conveyances

Conveyance for paym^t of debts:
reviews the remedy Rd 432.3. Comp 548 5 Burr 2630 Ba R 389 4 20 741 1101 Reily 303 3B 157. Cowp 629 2 Burr 1099 Cro 152 3 BR 454 2 Ch Bl 340

And if after a conveyance to trustees without the privity of any creditor the creditors included in the trust bring a bill in Eq. against trustee for performance of the trust (which in gen^l will be granted of course 3 Pl 222) the decree will validate the conveyance ab initio - for it receives the sanction of a Court of competent jurisdiction & to set it aside would be to impugn the decree Rd 434 1 Ch R 33 -

Donations to charitable uses are void as to creditors if donor is indebted at the time (Rd 438 1 Pr 265 2 Ch 675 1 Vern 230) (gen^l law they are if donor was not indebted at the time (Sand. not) Rd 438. see ger) And a purchaser cannot set them aside (even if for valuable consider^n) as he may common voluntary conveyances - but this is by construction of 43 - Eliz - Rd 439 Duke 64

Donatio causa mortis must on principle be void as against donor's creditors it being testamentary Rd 442.4 Roper 2 1 Pr 206 Stra 777. 2 Ves jr 111 - Lb 81. 6 Ch. 711

Been determined in Eq. that a conveyance to trustees for payment of debts was not void as against a Pl^f in an action of debt for a tort made pending the suit & with the premeditated intention of defeating Pl^f of his damages - for there is no debt or ascertained

## Fraudulent Conveyances

duty existing at the time in Pff favor (Rot 456 v. 574.8 Eq. C 149 1 Vern. 459) Semble if made between judgt. & exn. - So holden also at C.L. Rot 573. 1 Leon 14 v. 10 L 126 n

It seems however that any other conveyce. than for valuable consideration would not in such case be good against Pff Rot 1378 gen -

But it seems that a voluntary settlmt. made between the date & breach of a covent. giving a right to damages only is not void as to Covenee. unless there appears actual fraud - for there is no present debt or duty Rot 460 Pr. Ch. 377 -

## Purchase in another's name

If one procures an estate to be conveyed to another originally, (as to a son) instead of himself it is not void against a purchaser under him (except under the bankrupt laws Rot 492 1 Litt. 94) unless the conveyce. appears to have been in trust - for here there is no conveyance by the person procuring the purchase of his own property for it is never lost Rot 436 n Ch. R 550. Vin Abr. Ch 2 2 Vern 490. 70.

Holden that it is not proved the the father hold the posn. & took the profits among the sons minority, - for he was considered as acting in the character of guardian (Rot 458 2 Ch. R 231 19 Ro 111. 2 Eq. R 415 -) Semble in Eq. if the father continues to enjoy after the sons full age for that month shows a trust for the father Rot 469 19 Ro 207-8

# Fraudulent Conveyances

It seems then that if there is actual coin in the purchase the creditors &c may have a remedy in Eq. against the son considered as a trustee –

## Power in another's right –

In gen.l if one has a mere power over property in another's right a conveyc.e of it by the former the mortgagee at the time cannot be fraudulent against his creditors – As if husb.d sells a term in right of his wife as Ex.x – for it is not a disposition of his own property (qr as to purchasers bona fide) Rob 467.8 Cr & 291) Semble Semb. if he conveys in trust for himself or to be disposed of as he shall direct – for this would give him an equitable interest & if he should make a voluntary conveyance of this estate it would be void as to creditors Rob 470.1 2 Vern 287. Q Ves Jr. 190 Sugd. 237.

When one having a gen.l power of appt. over property makes a volunty. appoint. it is in Eq. deemed fraud.t as against his creditors for he may make it his own & as he has this right putting it into other hands without consider.n is considered fraud.t (Rob 472.). 2 Ves 10 P.Wms 52. 232 2 Vern 319 465 – 1 Eth. 465 – B – 269 556. Q Ves Jr. 190. Sugd. 437) Semble if the power is special Rob 475-6 –

The validity of voluntary bonds is more frequently tried in Eq. than at Law – for till obligee takes the property of obligor in ex.n there is no opportunity in obligor's life for his creditors to dispute the claim at law – But in Eq. a volunty.

# Fraudulent Conveyances

hence while resting merely in contract may be postponed to debts founded on valuable considn. Rob 478 Pr. Ch 17. 1 Atk. 293 Bennard 399. Pr. Ch 370.

After the death of the obligor the qustn. may in many cases be tried at Law – by Eqs. pleading a bond outstanding against testator (Rob 479.80) As to the mode of pleading such bond vide Rob 480n. Ch. S 8.35 9 Co 109. Ch. S 182. 625 1 Brownl. 50 –

But usually where the claim rest merely in contract the question is tried in Eq. being implicated with matter of discovery & account Rob 480

A bond remaining in the hands of obligor is very strong badge of fraud – As where a father gave a bond to his daughter but retained possn. till his death – it was held void against creditors. Rob 480.5 656. Pr. Ch 370 182 – 2 Eq. R 256 1 Atk 625 1 P. Co 577. –

But such bonds are in genl. good against mere volunteers – as legatees – & are not to be disputed by Eqs. unless it be to preserve the assets for creditors Rob 485 643 1 Atk 625 8 Devn 2,27

And when a volunty. bond has been delivered up to be cancelled Eq. has under special circumstances decreed a performance of it against volunteers – As a voluntary bond after marriage to settle a jointure – the jointure being settled. the bond was given up – jointure afterwards failed. Eq. C 87. 1 Devl 2,27. Rob 486.7

It is not a badge of fraud that all the debtors estate has been assigned of at diff. times by deeds & levy of executions 1 Ct R 393

## Fraudulent Conveyances

Rule of Eq. that if one claims on a bond for money lent & fails to prove the consideration he cannot afterwards set it up as a voluntary bond on a meritorious consideration Rd 488. 1 Cth. 294 Rd. 478.

## Voluntary Judgements

If the obligation is voluntary the judgt. confessed upon it will be void. Rd 489.90 Pl. Ch 17. 2 Vern. 202 — but does not amount to an act of bankruptcy Cowp 1127. in 632.

If the judgt by confession is claimed to be fraudt. Pltff in the judgment must prove a just debt — but if obtained by trial the onus probandi is on the other side Rd 489. 90 Holt 327.

But the mere preference of one creditor to another does not make a judgt. or conveyance fraudt. under the 13 E. — But the debtor's bkt. can prefer only as between creditors of equal degree. Rd 436 90.4 1 Bl R 690 5th 235 — 420 3 Bay 340 4th 146. 2 John 226 1 Vent. 329.

But a rule somewhat diff. has been introduced in Engd by the bankrupt laws. Rd 492. n Cook. B. L. 85 1 Burr 707. 77 — Bong 282 Cowp 629 3 Pl. 298. 1 Bro. C 160 —

## Ex post facto

A conveyance void in its creation may become good in favor of a bona fide purchaser by matter of post facto — as if J. S makes a fraudt. conveyance to A. who conveys to B a bona fide purchaser without notice of the fraud — J. S then conveys to A. B will hold against A. 1 Bia 243 Skin. 423 Rd 495. 8

# Expost facto. Fraudulent Conveyances No 2.

Holt 477. Stra 243 3 Lev 287 Comb 222, 1, 8 1 East 95 Sug. 436 1 NR 332 –

It is within the proviso of the 27. E for the fraud. grantee at the time of his transferring the property had the same right of transfer as his grantor originally had & as a conveyance by the latter to a bona fide purchaser would have been within the proviso a conveyance by fraud. grantee is within it – but the conveyce. would be good in both cases without any proviso – Rob 497. 502 – 3 Holt 277 1 Sid 133 –

Rule the same as against creditors under the 13 E. Sug. 437. Q Ber. St. 190 Rob 497. Goodl. 161 10 Johns 197. 6 Cran. 134. 3 Burr. 54 8 Johns 141 – see the proviso to 13 E. (Rob 4.5) that the St. shall not extend to conveyances bona fide (Rob 502.3) – but this proviso makes no difference – the conveyance would be good without it –

No such proviso in our St. Hence holden that the creditors of grantor may set aside the conveyance made by fraud. grantee to the bona fide purchaser Preston vs Cropsey C.R. 1811 by bus 3 Judges – see opinion Holt's reasoning – Holt. R 277. Comb 249 & Gordon vs Judson S.C 1809 – The proviso seems to make no difference – 10 Johns 197 6 Cran. 134.5 3 Burr. 54 – 1 Ct. R 527 n

Under the 27. E – a valuable consideration fraud. bona fide

# Ex post facto Fraudulent Conveyances

whenever it arises entirely obliterates the fraud so that it can never again affect the transaction – thus a purchase for value of fraudt. grantee will hold against a bona fide purchaser from the original grantor – So also will the voluntary grantee of a purchaser for value & he may avoid a prior voluntary conveyance by the original grant Rob 497. 8.

In some cases of marriage settlemts. a constructive considern. has been holden suffn. to support a conveyance originally voluntary against a bona fide purchaser for value (Rob 503 Thus where one having been long in possn. makes a voluntary conveyance enters into a treaty of marriage & the other party trusting in his appearance of ownership is induced by it to consent to the marriage & accepts a settlmt. of the property – the settlmt. has been adjudged good against purchasers under the original grantor Rob 503 – ib Bid. 133 – P. Ch. 275 377 Comp 705 –

But e contra a conveyance originally good cannot become fraudulent by matter ex post facto – So if a bona fide mortgee permits mortgor to remain a long time in possn. – the mortgee is not by this rendered fraudt. Rob 517. 8 Ch S 455 Shep. S. 65 – Bulst. 225 –

But a fraudt. grant can never be legitimated in favor of a fraudt. grantee by lapse of time or length of possn. – possn. under the fraudt. deed does not entitle him to the benefit of St. of

12th Johns 552
1 do Chn. 166
4 Wend 26

In case of a Bill of Sale or other conveyance of property apparently absolute proof of any secret trust or agreement inconsistent with the terms of the instrument is evidence of a fraudulent bargain to defraud creditors but not conclusive unless in a conveyance of real estate where every thing affecting the title ought appear in the deed itself or in some other instrument of as high a nature 16 Ala. R. 279.

# Ex post facto. Fraudulent Conveyances

Lim^n Rol. 521 Salk. 63 2 Ca. 284 1 Saund. 322

Construction - The Sts. 13 & 27 E. like all other Sts. against fraud are to be construed liberally - i.e. so far as they act upon the fraud^t transaction they are construed to enlarge the remedy - hence if tent^t for life commit a forfeiture that the reversioner (who is privy to the design) may enter & defeat the creditors of tent^t - the creditors may avoid the forfeiture as fraud^t Rol 542. pl 131. 88 3 L 82 Plowd 59. 78 1 Co 130 3^d 77. Rol 75 1 Vent 257 S. 23

But the penal provisions of the Sts - are to be strictly construed 1 Bl 88. ante 23.

## Badges of Fraud - S 99

The signs or badges of fraud usually enumerated under the 13 E. are the following 3 Co 81. Moor 638 Rol 546. 85 -

1. If the grant is gen^l - as of all grantor's property - 3 Co 81 Moor 638 Rol 546. 85 1 Ch. Ca 395

2. Grantor remaining in poss^n.

3. Being made in secret

4. Being made pending an action against grantor Rol 878. 1 Ban 159

5. There being an apparent trust between the parties -

# Fraudulent Conveyances

## Badges of fraud

6. Suspicious clauses – as that it is made bonafide –

7. Made in grantee's absence

8 Grantor's retaining the deed 2 119

9. His being involved in debt –

10. Clause of Revocation Rd. 611.41 –

There may however be many others – the marks of fraud being indefinitely numerous – All other badges are important in gen. only as they conduce to prove the 5th. – but this is not the case where the conveyance thro fraud. is for a valuable consideration & intended as a real disposition between the parties & not merely colourable – Of these badges of fraud profn. by grantor after an absolute conveyance is one of the most plain & strongest – especially if accompd. with acts of ownership – for the profn. being inconsistent with the purport of the conveyance evinces a trust – Rd 548.55. 71 17.58 197. 9. 200. 3 8 R 620. Orth 286 1 Ves. 245 2 Atk 1 Dil 24 2 R 252 7 Mod 37.

But such profn. is not altogether so strong a badge of fraud where the subject of conveyance is land as it is where it consists of personal property – for title to the former is to be sought in the title deeds – to the latter in the profn. Rd 549.50 2 313 &c.

Where a conveyance is challenged as fraud.t it is not competent to prove that other conveyances made at other & diff.t times are fraud.t to raise a presumption that the conveyance in quest.n is so. 162. R 395

Sums of conveyances made at the same time. Id.

Inadequacy of price no ground to set aside a conveyance unless it be so great as to be evidence of fraud 14 Johns 557.

Ref 205 ~

Pop's d'minor is primâ facie evidence of what may be explained. 5 Selden 261 8 Ac. 446 2 Bos 59. 1 Saund. 381 4 Ac 823. And the facts being conceded which are designed to make out the explanation whether the defendants such explanation is a question of law for the Court. 2 Mand 447 7 Cowen 307 732. But if the facts are not conceded it is the province of the jury to ascertain their existence but not to decide on their sufficiency with Sup - 9 Ct 63 216 not suff. to show that the sale was in fair & honest transaction. some good reason must be shown to the court 9 Mand 200.

# Badges of fraud & fraudulent Conveyances

Poss.n of title deeds however by grantor is very cogent evidence of fraud - or possn. of land if inconsistent with act of ownership - even it is almost uncontroulable evidence of fraud Rol 334.5.1

When land is the subject however possn. by grantor is only presumptive & may be explained & repelled - as if one having conveyed to trustee for payment of debts is left in possn. as bailiff - Rol 333 -

But it has been holden that possn. of goods by vendor after an absolute bill of sale makes the sale fraudulent in point of law & as such void against purchasers creditors 2 SR 387 Rol 563.58 Dr. Cy 287. 2 Bulst 225 - Sed qu. if it any thing more than a badge of fraud 3 Co 81. Cowp 432. 2 Bos 82.59 1 John. R 156 Rol 563.71. 1 Lev 44 3 Esp R 22.52. Bull 258 Decided both ways by our S.C but according to the amount of our authorities it is only a badge of fraud 2 Bibb 138

It is clear that if immediate actual delivery of goods sold is impossible the want of it is no badge of fraud - as in the case of the sale of a ship & cargo at sea - wh. makes the sale is good not only under the 13 E. but also under the 21 Jac 1. concerning bankrupts - Rol 550 1 Leth 160 2 SR 462 Esp 542 bb. Bos 354.368 Selw. 197. 220.42 7 SR 71. 1 Burr 478 2 SR 485 - 491. 1 Bro. R 125 - 1 Bibb

And where immediate manual delivery must be attended with much inconvenience the want of it is no badge

## Badges of Fraud. Fraudulent Conveyances

of fraud - symbolical delivery being suff.t - C, the sale of goods in a warehouse the delivery of the key is suff.t - vt. Sup -

where grantors poss.n is consistent with the deed of conv.ce, it is no badge of fraud - In deed of land on cond.n precedent - the poss.n does not contradict the deed of conv.ce there is no presumption of a trust Rol 558.28 197.9 561 2 Bulst 225 2 SR. 594 L. 315 &c

So of sales of goods on condition precedent under the 13. E. - So also of mortgages - mortgage being but a security mor.ly usually retains poss.n. Rol 561.57. 197.9 200 577 2 SR 594 n 1 Ves 365.9 R.Ch 287 Cro J 455 Shep. 55 -

Seems as to mortgages of goods under 21. Ja. 1 - the provisions of that Stu being intended to remedy the evils of false credit without regard to fraud Rol 557.6.2. 1 Leth 100 2 Ves. 348 1 Wils 260 Cro 556 1 Ves 244. Selw 226 - L. 315 & seq.

Making the conveyance pending a suit against grantor for debt is a badge of fraud under 13 E. (Rol 573.8. 1 Leon 47. Cro 295 1 Roll 549) not so (Semb) under the 27 E - Rol 573.9 60) & the rule is the same if the suit be pending in Eq. Rol 578 1 Vern 459.

But a conveyance after a judgt has been had against grantor & before satisf.n has always been regarded as a strong badge of fraud Rol 578.9 Cong 88 1 Vern 460

(12)

notice

Decided in 4 Colm 261 that when poss. of vendor is consist-
ant with the use of the deed the poss. is not considered fraud
use in case of mortgage of goods

A voluntary conveyance to defeat the claim of a
third person arising from a tort is not within St.
Eliz. act. fraud. conveyances - but is void at C. L. -
1 Ld R 295. vide L 116. 117 15 Colm 262

(1127)
Badges of F

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# Fraudulent Conveyances

But if one purchases for full price & bona fide tho with notice that Grantor is indebted by bond or other contract his title is not affected even in Eq. - for property is not to be made unalienable because the owner is indebted Rd 579. nb. -

Under the 27. E. if one conveys his land with an intent to commit a forfeiture & then commits a felony the land will be forfeited - So if the grant is voluntary & the crime is committed shortly afterwards the inference of fraud will prevail Rd 582 1 Roll 34 Vin. Fraud C. pl. 1. 36 pl. 3 3 Co. 82 Shinn 357 Lane 34

The word "forfeiture" is not in our St. St. Ct. 355 -

## How avoided

The party taking the benefit of the Sts. has a right to treat the fraud. conveyance as void - as if it never had been made - The property is considered as to creditors as a part of grantor's estate Rd 591 5 8 Cy 295 - Cr. E 233. 2 Roll R 178 -

Thus where to a writ of possession against fraud. grantor he pleaded non tenure it being found he had conveyed to deprive those who had cause of action for the land judgt. was given against him upon B. E. Cr. E 233 Rd 591. b 3 Co 78 Cy 295

They are considered in law as against those who are intended to be protected by the Sts. as no conveyance & so treated in

# How avoided. Fraudulent Conveyances

pleading - Ex. seised or not - Assets or not - Rol 597. Hob 72 Cro E 233 Rol 603 5 Co 60 Dy 149

So in the common case of a conveyance to defraud creditors - Creditor having obtained judgt. & exn. seizes the property on exn. as being the grantor's title in profn. of fraudt. grantee. Rol 59. 2.5 Cro E 810

And if one having made a fraudt. sale of goods or chattels dies indebted the property is considered as assets for the payment of his debts - as if he had died in profn. of it - & in Engd. may be taken on exn. upon judgt. recovered against him. Rol 592 3.5 Cro E 810 2 Roll. R 173 -

In Ct. the real property of a person thus deceased is never taken on exn. for his debts & excluded - It is sold by Exs. under the order of a Court of Probate. St. Ca. 2 66. 76. 2 Sw 282. contra, Hence therefore the course must be for the Exs. in some cases at least to pursue the remedy for the creditors - thus the personal assets may be taken - So decided formally by S.C. 2 Sw 282 Sedgw. unless they are tendered by Exs. for otherwise average law would be defeated - Lib

But in Engd. if one dies after a fraudt. conveyance of his real property his creditors on simple contract cannot take the property on exn. - for such contracts bind the personal assets - Secus as to specialty creditors. Rol 592 8 2 Bl. 343 78 3 Br 280 Lovel. 93 3 Ba 25 - 598 Shep. 58 Pr. Ch 521.

14 Ct 244 that there are cases where possn of personal property is retained by vendor that it is the duty of the court to instruct the Jury that no presumption of fraud arises from it —

# Howa voided. Fraudulent Conveyances

And in an action against the heir proof that the ancestor's conveyance was fraud.t supports the averment of assets by descent Robbos 5 Co. 60 Rd 597. Hd 72 Cr. E 233 Cy 1249.

In Ct St is assets for the payment of all debts –

Under the 13. E. the fraud.t purchaser of goods if he takes possn after donor's death may in some case be charged as Ex.r de son tort – Rule – If he obtains possn by permission of donor's Ex.rs he may be thus charged by the creditors, R 593 Cr 271 Yelv 197. 2 Salk 233. 3 Ch. 57. 2 SR 587. Esp 542 Bull 258 –) Seems the creditor might be defrauded by the act of Ex.rs – for he would not if he would reclaim the property for their benefit against his own delivery – Lfb 631.

So if he takes possn after testator's death but before probate of the will or administration granted he may be thus charged – If the person that at the time of taking the property there is no legal representative qualified to act & therefore an intermeddler is an Ex.r de son tort Rd 594, 5 5 SR 587.

Can there be an Ex.r de son tort in Ct when the estate is insolvent? St. Ct 264. Lfb. 681

But it is said if he takes them without permission after probate be granted he is a trespasser to the Ct & he & may be subjected as such & that the creditor's remedy in this case

# How Avoided, Fraudulent Conveyances

is against vendee as an Ex^tor de son tort (Cro E 810 Rol 594 - qu Bull 258 Cro J 270 Lip 542 cont - Idea qu -) - for in such case it is said there can be no Ex^tor de son tort & tho' a fraud^t sale regularly binds the vendor & his representatives yet the Ex^tor may claim against it for the benefit of creditors (Sand Rol 843 7. 57. Cro E 810 Cro J 270 Rol 485 b. 643. 61

This was formerly so decided in Ct - & has often been claimed by S.C

If an heir makes a fraud^t conveyance of an estate descended to defeat creditors of his ancestor the conv^ce is void under the 13 E. tho' the debt is not originally his own - & the same rule holds as to fraud^t sales by Ex^tors &c - Rol 601. 2 509. 2 Leon 11. 5 Co 60 Plowd 441 Popl 155 -

(As to the effect of a bona fide conveyance by the heir under of the debtor under the 3 & 4 Wm & M. cid. Rol 600. 1. 4. 9 )

And a Court of Eq. will in such cases pounce the effects specifically in the hands of the fraud^t vendee & treat him as a trustee for the creditors. Rol 609 2 Vern 616

Leon 60 11 at Law & Eq if vendee is a bona fide purchaser - In such case the creditors only remedy is against the Ex^tor 1 Atk 263 Rol 609 2 Plo 149 but qu in Ct £ 121 1 Ch R 527 n

And if creditors or next of kin can prove collusion between

A. agreed to make B. a gig. B. selected the paint & paid a full price for the whole & A. agreed to finish & deliver it shortly. before it was finished A's creditor caused it to be taken on exn. it was then finished & with the consent of the judgt. creditor delivered to B. from whom the Sheriff retook it to satisfy his fees on the exn. without deciding whether the first transaction between A & B vested the property in B. the Court say that the Sheriff had no right to retake the property from B. & he left it in the care of the judgt. creditor who claim. it to B. the Sheriff is bound by such act as the creditor could not afterwd. retake it 14 C. L. 9. 10

If two or more engage in a fraudulent transaction to injure another neither Law or Equity will relieve them or a gainst made either from the consequences of such conduct 3 Paige 154 Eq. A. agreed with B the administrator of C. to exchange his farm for the farm of C & B agreed to procure an order of sale of C's farm & give it a valid deed of it which was done this agreement being fraudulent & so the sale could become void to sell land for which no order had been procured to sell it was holden that it could have no relief against E. 5 Wend 579 –

## Fraudulent Conveyances

Ex^r & sections of the estate to diminish the assets they may by bill in Eq. prevent the payment of debts to Ex^rs &c. Rod 610 4 Ves f^n 651.

## How far binding on the party

A fraud^t conveyance is binding upon the grantor his representatives & those who claim as volunteers under him - Ex - against his Ex^rs heirs &c - Semble in Eq - as to operating voluntary conveyances - Rod 641-7. 104 489. 557. Cro J 270 9 Mod 80 Mod 166 2 P.Wms 222 3 Co 12. Moor 169. 2 Sw. 383 -

But voluntary operating agreements are not in gen^l enforced in Eq. Rod 660 1 Pow. C 341. 2 P.Wms 243 - 1 Ves f^n 51. Cro 406 2 Pow. C 16 3 Bro. C 12 3 Bay 402 -

And where on the death of A - admin^n was granted to B - who pending a suit for the repeal of his letters of admin^n sold the assets the sale was holden valid against the admin^n afterwards appointed. Rod 644.5 6 Co 18 - L 288

And where the grantor attempts by a collateral act (as by destroying the deed) to defeat a volunt^y conveyance Eq - will in some cases interpose against him - This I suppose is on the ground of fraud Rod 648 52.4.5 1 Eq. C 168 2 Vern. 69 1 P.Wms 577 -

And no one can defeat his own fraud^t conveyance by his last will even for payment of debts - the former being

# How far binding on the Party.

# Fraudulent Conveyances

binding upon him 1 Rol 649. 52 4 65. b. 1 Ven 100. 132. 1 Ch 264
1 Ch 225 - see also Pr. Ch 182 Cunl 264

So when one having made a voluntary settlmt on his wife afterwards cancelled the deed - it was holden to bind him in Eq. Rol 662 - Pr. Ch 235 -

But any equitable interest remaining in grantor may pass by a subsequt voluntry disposition - As Grantr mortgage & a subsequt voluntry conveyance of the eq. of redemptn - here the purchaser under the latter conveyance may redeem Rol. 657. 373 -) So if the fraudt conveyance had been before or after a bona fide mortgage

And if a deed has been unduly obtained relief may be had against it in Eq. by a person claiming under the will of Grantor - for the party claiming under the deed holds by fraud Rol 658 Pr. Ch 112 - 2 Eq. C. 86 2 b o 391 479.

And a voluntary bond for a sum certain is good in Eq - if it does not interfere with the claims of bona fide creditors Rol 661. 3 Pr. 222 - 1 Ves 514

As respects the aptn specifically of executory agreemts contra Rol 661

Are agreemts in consideration of consanguinity or natural

# Fraudulent Conveyances

affection will be specifically decreed in Eq. only in favor of a wife or children - not of a grandchild or illegitimate child Rob 664 2 Ves, 584 -

In sales of personal property unless posn accompanies & follows the deed it is fraudulent. & void / 2 BR 595 / & absolute bill of sale without posn - seen if there be a condn. / 2 Ch. 595. b Pr Ch 287. / or posn of vendee be not inconsistent with the deed - Comp 432 3 BR 620 or 2 B & C 605. 2 125 quod vid

A sold to B. a yoke of oxen on these terms B. to take them prepare them for slaughter & slaughter them within a week then weigh & pay A. for them by weight. Whilst they were in Bs posn & before the expiration of the week a creditor ~~whom~~ of Bs whose debt accrued before the sale levied upon & sold the oxen - in an action by A. against the creditor this transaction was holden not fraudulent because 1 No new credit was given - 2. there being no credit given between A & B. for the price no property passed to B. 6 Cowen 110 4 Mas 405 5 BR 232 3 Sarg & Rawle 20. 24. 2 Kent 391. 1 Camp 427 / 3. if they were delivd - with a declaration that they were not considered to be sold until paid for no perfect id. passed to vendee 4 Mas 405 17 do 606 - 4 That where any thing remains to be done by vendor before the article is to be delivd - no property passes 6 East 615 - here the fat perfect was to be prepared & weighed to ascertain price / 7 Cowen 36 / & sale being for cash vendee was not bound to receive till payment made 7 Wend 406 2 Pings 172 6 Johns Ch 437 4 Mason 289 1 Pings 312 that a bona fide purchaser from fraudulent vendee will be protected 2 Pings 172 & Wend 256 4 Pick 516 Rob 262

# Covenant Broken.

This is an action founded upon a covenant & claims a recovery for breach of it – Hence called an action of cov.t broken –

Cov.ts contracts & agreem.ts are often used as synonymous. 1 Ba 526 1 Pow C. 244

Cov.t is a contract written & sealed & may be by indenture or deed poll – If by indenture it is suff.t to maintain the action that covenantor sealed the cov.t and not. B.N.B 140 145 Esp 266. 2 Ins. L.P. 118 Shep. T 160 Co C 242 – fact 142

It is the usual remedy at law for damages the debt will lie on a cov.t to pay a sum certain or where the damages can by any event be reduced to a certainty. Stra 1089 Bull Nij. 3 Ler 429

But where the cov.t is to do something in specie the most common & proper remedy is by bill in Eq. for specific performance. 1 Ba 526 1 Pow. 27. 139. 156 Selw 463 note

If the matter in a bill in Eq. on a cov.t claim a right to damages only if damages are an adequate remedy it is not retained – for damages are not ascertainable by the Chan.r conscience 1 Pow. 27. 139. 2 Br. C 341 1 Pl 570 1 Ba 526 –

But if the relief prayed in these cases is merely consequential or collateral to a ground of relief properly cognizable in Eq – the bill will be retained – Eq Matter of fraud mixed with the damages – Cases B. on cov.t at Law – to file a bill for an

135 **Division.** **Covenant Broken**

injunction on the ground of fraud - a files a cross bill for relief on the cont. - If no fraud Eq. will assist sufficient to ascertain the damages - In Ct. the Court will enquire into the damages or refer it to a committee. 2 Pow. C. 216 1 Eq C 17. 1 B a Sq. 526

**Division** Covenants are of two kinds - in deed & in law - the former are expressly stated in the agreement between the parties - the latter are raised or implied by law - this distinction arises from the nature & form of the agreement. Esp 266 2 Co 80 Selw 463

Conts. in deed are founded on the words used as amounting to a cont. express tho the words are not the most direct & explicit Cs. yielding & paying rent &c - there as well as the words "cont." "agreement" &c create express cont. - Conts. in law are implied not from the phraseology but from the nature of the contract &c which is expressed - Ex "Confiteri" "demise" &c import a cont. in law that lessor has good title &c - & if lessee is evicted cont. lies against lessor - (So before eviction on the implied cont. of seisin - Semb) Esp 267. 2 Co 80 Sm 17. Cutts 98 1 Roll 519 Cro 257. Palm 388 2 Moo 92 - Selw 463

Another division is - real & personal - the former where one binds himself to pay or assume things real - as land &c (S. N.B 343 Esp 294 1 Saut 139) - the latter where the contract is confined to the person or concerns the personalty only - as to an out of service only &c - this division is derived from a reference to the subject of the contract. S. N.B 146 Esp. 366

Where a cov. goes only to a part of the consideration on both sides & a breach of such cov. may be compensated in damages it is an independent cov. and an action may be maintained for a breach without averring performance 1 Saund 320 b. Ex. a cov. not to interfere in certain business & also to assign certain property in consideration of which the other cov. to pay &c an action to recover the pay performance need not be averred by Pff nor a breach on his part cannot be shewn to avoid a recovery 4 T.R. 23. 10 East 564 6 T.R. 570

4 Concurrence 4

# Division — Covenant Broken

No set form of words are necessary to make a cov.t — any words shewing the commencem.t of the parties in the agreem.t is suff.t (1 Burr 290) or any words importing an agreem.t — as if a lease to B reserving such a rent & B accepts the lease — Cov.t for non payment lies against B — the lease deed be full & the words those of lessor — for it is a constructive cov.t by lessee as he accepts the lease (Esp 267. 1 Roll 518 1 Bac 527 Brownl. 23 Leon 324 1 Vent. 10 1 Lev 267. 2 Mod 86 Cro E 202 657. 1 Raym 242 1 Sunt 141 1 Saund 375) Said in 1 Saund 241. that there are cov.ts in law — qu — for the cov.t is raised or created by the words or terms importing an agreem.t & not from the nature of the contract — vid 15 Ct. 434

A cov.t may be to do something past — present or future — Past — by which one cov.t he has done a thing — & if he has not cov.t lies against him — Present — as cov.t of seisin — Future as common executory agreem.ts Plowd. Com. 308 a

Cov.ts in law are restrained to express cov.ts — Thus a lease by the words "demise grant &c" (which amount to a cov.t that lessor has a good title & that lessee shall quietly enjoy) followed by express cov.ts against eviction by lessor — here the cov.t is not broken by the eviction of a stranger — Yelv. 175 Esp 273 1 Co 806 Cro E 675 2 Mod 92

On a lease by the words "concessit et dimisit" cov.t said not to lie for stranger's entry (Esp 268. Cro E. 214) This must mean a tortious entry — not one under an ext or title Cro E 214

A recital in a deed of a former agreement creates a cov. on which action lies "whereas it was agreed that A should pay £50 &c" - the deed by relation confirms the parol agreement & makes an express cov. Esp 268 3 Rol 165 1 Leon 122

But on a cov. in deed if the word "cov." is not used there must be words which import an agreement or the action will not lie. If a lease for years cov. to repair" provided & it is agreed that lessor shall furnish timber" - this is not only a qualification of lessee's cov. but a substantive cov. by lessor. Esp 267. 1 Roll 518

Lease to B for life with proviso that if B dies within 10 years his Exr. shall have the premises for so many years as remain of the ten - this proviso is a cov. & not a lease - for it is void as a lease for its uncertainty as to beginning & length of continuance. 1 Co 155 1 Roll 518 Moor 418 Esp 269. Ray 27

If lessor executes a bond conditioned for performance of covts. in the deed it extends as well to implied as to express covts. 4 Co 81

If a lease contain a clause "provided & on condn." that lessee does not cut de it is no cov. but a condn. to defeat the estate - so whenever a stipulation in deed is in nature of a defeasance cov. does not lie at Lew 2 Com 560 1 Roll 518 1 Sid 48

Construction. In the construction of covts. the meaning of the parties is to be sought without such strict adherence to positive rules as in case of deeds or grants executed conveying

If one wot to convey land by a certain day he is not in default whether payment has been made or not until requested to convey by him who is entitled to the deed & then covenantor must prepare the deed with all reasonable dispatch & have it ready for delivery when demanded 7 Mass 131 3 do 250 6 Cushw 2.

6 Solm 3 . 49
3d . . . . 49
10d — 57
111 ind 230

A cov.t to convey title means the legal estate in fee free from all certain claims 10 Solm 266 / so a cov.t to convey a farm means the whole farm. 70—

A Bond reciting a conveyance of land & covenanting to indemnify & save harmless the obligee from all certain lost for the security of the land & against all costs & expenses in consequence is an indemnity only against lawful claims with a warranties deed was given of the land at the same time 6 Mond 404

present interest – therefore in many instances a literal performance will not be suff.t – Eg. A. cov.ts to deliver B a lease on such a day B being the obligor – If before the day A mes B & recovers & then delivers on the day he is liable on the cov.t. 5 Com 699. 1 Roll 419 Plowd 140 1 Inst 45-6 1 Burr 339 Moor 458 Cro Ej. 1 Sid 48 Esp 270 Ray 464 1 H. Bl 276 1 Ba 429. 242 Skinn 39. Selw 465. Cost 241 – 1 Wms 78

But what is called a substantial performance is suff.t tho it may not satisfy the words of the cov.t (1 Saun 52 –) Cov.t to pay £50 money not mentioned – generally holden that delivery of £50. collateral article was no performance Sid 151 –

When the words are uncertain they are most strongly taken against the coven.tor & Pl.ff covenanted if Pl.ff would marry his daughter to pay him £20 per ann. – holden payable for Pl.ff's life 1 Sa 102 1 Sid 151 Esp 271. 1 Ba 529. Selw 466 in n 9 Cost 15. 3 Burr 399 2412

If one cov.ts to convey land to another on a certain day & before the day conveys them to another the cov.t is immediately broken 5 Co 21 Pl 15 Moor 313, 23 Sid 339

When an exception in a lease amounts to a cov.t & contra vice versa Co Ej 697. 690 Com Covenants E.2 1 Roll 431 1 Ba 521 Cutts 232 Sal. 196 10 Mod 170 1 Saun 238 Selw 466. 1 Saun 116 7 Mod 241

Rule – When the lease is of a given subject except a certain part the exception is not a cov.t that lessee will not occupy – Eg. Lease of a manor except such a close – Semble where the

# Construction Covenant Broken

exception is of a thing or profit to be demised out of the thing demised – as a right of way &c – qu. unless the deed is by indenture 1 Pars C 238 – Supra –

Express cov.ts are construed more strictly than implied (Burr 1639) As if one expressly cov.ts to perform a voyage in a given time – he is guilty of a breach unless he performs it tho performance is rendered impossible by causes beyond his control – he is considered as an insurer against such risks (3 East 233 – 3 B R 259 N R 258 ) Seems I suppose if the cov.t had been to go a voyage of 1000 miles in a day (qu.? think)

Absolute cov.t to pay rent for a house – it is burnt down – cov.tor must pay at all events – qu. whether Eq. can relieve lessee after destruction of the thing leased the cov.t being absolute to pay – 1 Ch. C 83 – no other case till Calct. 1819 – point not decided Chancellor's opinion in favor of relief – Contra in favor of lessee in 1773 L.d Apsley – subject dis.ussed 1 B & Ald 366. Dunb. against relief – 2 Strange 783 1 B R 780 310 L.d R 1177. Esp. 270 3 Pay 33. Solo 172

In case of implied cov.ts it is said accident excuses the covenantor – as in the destruction of a house by tempest (3 Burr 1639 Pay 259. 1 Dunb 366 – ) qu. Is this strictly a diversity in the rules of construction? – The reason of the diversity is that the law does not imply a cov.t against inevitable accident – tho' the party may make one by express words –

Rule – Performance of express cov.ts is not discharged by any

Rule. When the law creates the duty of the party is disabled to perform it without any default on his part the law has no remedy and he is excused - Ex Prisoners released by Public Enemies Speaker excused - Same when the party by his own contract creates a duty upon himself - he is liable - Def. Cont. to keep a bridge in repair - destroyed by flood - 1 BR 750 3 Saund 422 a n 2 Com R 627 1 BR 450

Cont. to pay "all taxes charges & impositions" which should be imposed on the claimed premises extends to impositions of a permanent nature extending beyond the term imposed by virtue of a law made subsequ.t to the cont. 3 Mond 263 cite. 10 Johns 97. 11 do 77 2D R 317. ind 3TR 461 1458 8 do 602 Cathew 438 11 Johns 1443.

# Construction. Covenant Broken

collateral matter. Esp 270. 2 Str 753

Exceptions - 1. One covts to do an act then lawful & aft. makes it unlawful - covenantor is not liable. Esp 270 Sect 198 qu - Does this case fall under the Constitution Art. 1. § 10 - "law impairing the obligation of contracts"? Semb. not - the law is not made for the purpose of affecting the contract - the effect on the contract is merely the consequence of a rule of policy. E. 27.

2. If one covts to do a thing which is lawful at the time & aft compels him to do it - the covt is prevented - So (Semb) if the act was unlawful at the time of covenanting. Sect 198 Bull. 138 L 27

But if one covts not to do an act unlawful at the time aft - making it lawful does not annul the covt. - Sect 198. Bull. 138 L 27.

Rule - Covts are confined in operation respecting any particular subject matter to that which is in being at the time of making the covt. - As covt by lessee to pay all taxes extends to such only as were in being at the exn of the covt - not to those of another kind imposed afterwards - 1 Sev 68 Vent - 223 - 3 T R - 177. Str 1191 -

A covt contrary to policy or law is void - a rule applicable to all contracts - 4 Burr 2225 Cowp 729. 341 1 Bos & P 160. 7 b 3 T R 17 -

If one leases a personal chattel & covts that lessee shall have the use of it for a certain time & it becomes useless for want

# Construction. Covenant Broken

of repairs or is worn out during the term the cov.t is not broken 1 Bac 531. Vent 26. 44 1 Sid 429 Saund 321

Choses in action are not negotiable at C.L. yet they are often assigned & such assignmt. (if by deed) is an implied cov.t by assignor that assignee shall have the benefit of them – 1 Ld Ray 24. 619. 24. 1 Inst 214 Cro E 230 2 Roll. 45 – Ch. B 2. 3. 7. 109 Sal 125 – 1 Pow 317. 2 Ed 605 2 Vern. 540 1 Mod 113 –

If then assignor receives the amount are releases his lien on the cov.t L.R. 683 – 1242 – 3 Rep 304 – L.885 –

The practice in Ct. is to sue assignor for fraud – or petition in Eq. against obligor he knowing of the assignmt. – Lately decided that a petition in these cases does not lie – action for fraud being sustainable against him –

A cov.t in one deed cannot be pleaded in bar to an action on a cov.t in another deed unless it bears the nature of a release or defeasance 2 Vent. 217. Cro E 305 –

Cov.t not to sue a certain time is no bar to an action – but waiver by suing within the time makes himself liable on his cov.t (Cro E 352 – 1 Show 46 1 Roll 939 3 Lev 41. 6 Bac 65) for if construed a temporary release it would be a perpetual bar as a permanent action once suspended is gone forever. 2 Ld Ray 1110 1 Bos 633 Roll 10 Beatte 63 Sal 578 2 Pow E 255 Ray 187 393 413 –

In a simple contract a promise to a third person is valid
10 Mend 91. 154 But in a deed inter partes, "between
A on the one part & B of the other" by which is meant
such a deed the covenants are intended to be made
between those parties & none other & if it contain a
cov.t to pay a third a sum due cov.t is inoperative
except to show for whose benefit it is made & no
one but a party to the deed can sue on it. Show
8 Q. & no one but a party can take under such
deed but by way of remainder Cartis. 76 3 Mad 8
322 9 Johns 73.5: But one not a party to a deed
may by cov.t bind himself to one that is Cartis.
76 as if at the end of the instrument he says I
"hereby bind myself" & seals it 10 Mend 92

19 Johns 133 via 2 Vol. 2 250 n
2 Sanders 48. a
6 Mass. 471

If A. by deed poll covenants "and the said B. is to occupy the land in consideration of my Annuity as for which he is to allow me £100 per annum" if B. takes possession he subjects himself to pay the rent in case action of assumpsit Bancl 618 on the principal that whoever takes an estate under a deed shall take it subject to the terms of the deed Goodtitle v Gilbert 7 Mod 468 1 Bat 505 20 Johns 338 by Woodworth. 14 L.J. 390 3 Cow & Payne 358 5 Bar & C 589 8 Dow & R 368 23 L & J 23 anton 134 11 Pick 477

Formerly rent reserved in a deed poll was recoverable by writ of annuity Fitz. N.B 152 356 Gilb on Rep. 6 Woodfall Land & Tent. 145 pay entering of debt 323

6 Johns Ch 250

# Construction Covenant Broken

If such cov.t makes a part of the instrument sued upon - as by endorsmt. &c it prevents a right of action till the time has expired - for the indorsmt. in such case being parcel of the same instrument the whole is to be construed together. 8 Ab 483 Esp. 306 6 Ab 737 Ld Ab 690 1 Leon 152 Moor 679

But one cov.t may be pleaded in bar to another in the same deed without words of defeasance - for the sense is to be collected from the whole deed 6 Ab 737. 1 Leon 152 Esp 306 8 Ab 483 Moor 679.

The above rule that a mere cov.t not to sue for a limited time is no bar seems not to apply to any other than personal actions - for a temporary suspension of a right to a realty is not an extinguishment (2 Ab 1 4 - -) Seems if a cov.t not to sue at all - this operates as a release & must be so pleaded (8 Ab 170 480 Moor 23 (2 Bulst 95 290 2 Roll 95 Cro E 352 - 13 Ab 426 1 Roll 939. -) & this rule is to prevent multiplicity of suits 13 Ab 426 L 333

But a cov.t not to sue at all one of two joint tenants or several obligors is no bar to the other - nor it seems to the covenantee (8 Ab 168. 71. Ld Ab 690 Molt 178) Release to both I conclude - tho a release to one is in either case a release to both - but the cov.t in the last case is not construed to be a release - Hetto 254 12 Co 551 Rib - 44 1 Roll 92 - [illegible]

743 Cov^t of Seisin. Covenant Broken

If one grant to another that "the shall not be sued before such a day & if he is he may plead the grant as an acquittance & that the obligation shall be void" it is a condition of release for there are words of defeasance 1 Roll 939 4 Bac 266 Carth 642. 10 Cont. 123 Mod 619 2 Show 446 - Pa. 46 330. 50

A cov^t not to sue in a foreign country is a good bar to a suit but in a foreign country & yet not a total release - as a release it is local - As a cov^t by foreign reason of a foreign disp. with a foreign master not to sue him in any other country than his own is a good bar to an action but here against the master - the one cannot by contract exclude himself from resorting to the proper Cours of Justice in his own country - 2 Ld Ra 603 - 7. Ld R 690 11 Mod 254 Com R 139. 3 Bac 298 -

Covenants used in Conveyances. 2 748

In all deeds of conveyance except quit claim there are two cov^ts express or implied - Seisin & Warranty (4 Co 8) implied from the words "dedi concessi" Esp 266 1 Roll 519 (25) 2 Atto 9:

On cov^t of seisin grantee may sue before eviction & it is suff^t to shew that grantor was not seised (1 Rule 3 Esp 299 Cro J 369 170 9 Co 60) Qaere on cov^t of warranty 1 Rule 3 Esp 201 Cro E 917 4 Johns R 72

In actions on cov^ts of seisin it is suff^t to aver that Def^t was not seised - Def^t must then shew that he was seised which puts Pl^ff to shew a higher title in another Cro J 369 9 Co 60. Esp 209 (2 Root 14 contra)

A gave B a lease with covt. that he sh. have the sole & uninterrupted use & occupation - A former tenant whose term had expired was in Ev.ce. Held that A was not liable on his covt. to B. 3 Hill 320 - Sem if the former tenant had been in by paramount title 6 Ed. 4 58 1 Saund 322 na 2. - 8 Coke 3 b

An outstanding mortgage where there has been no foreclosure or repn. taken by mortgee is not a breach of the covt. of seisin - 7 Johns R 376

Where there is an outstanding incumbrance on the land the purchaser need not wait till he is evicted but may satisfy the incumbrance & then resort to his action on the covt. against incumbrances 2 Johns Ch 388 Semble on a covt for quiet enjoymt or warranty express or implied 7 Johns 358 / an entry & expulsion 3 Johns 471 / by superior title must be alleged & shown 5 Johns 120 / 15 do 236 a judgt without eviction is not suffict 2 Wend 5 b 7 do 285

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|---|---|---|
| 2 | 2 Johns R | ... 1 |
| | ... | 395 |
| | 7 Do | 358 |
| | " | 376 |
| 11 | ... | 122 |
| 15 | | 484 |

* The covt. for quiet enjoymt. goes to the possn. & not to the title & is broken only by an entry & expulsion from or some actual disturbance in the possn. 3 Johns R. 471 & 120.

13. Suff. for eviction by a stranger for Pff to say he had good right & title before the lease made to Pff - in lease & release - 2 Saund 181 a. n. (1) 1 Show 70 2 Sec. Sy. 3. 323. 4 T R 619 8. 281. 283 1 B R 691 2 Bos. 124 2 Show 431. 425

| | |
|---|---|
| 3 T R | 578 |
| Bos. | 425 |
| Bos | 5 |

# Cov.t of Seisin and Warranty. Covenant Broken

Cov.t of seisin is broken by an existing incumbrance on the land unless it is excepted by Mov.r cov.t he is well seised - But in such cases the breach must be special shewing the nature of the incumbrance & interruption 4 Johns 18. 3 Cow 491 2 MSR 433. 7 Cu action on cov.t of seisin is bad. 1 Caines 5.

On cov.t of warranty covenantee cannot sue till eviction & it must appear in the declar.n not only that the eviction was under claim of title or lawful act but also that it was under good and elder title (Esp 301. 1 Mod 292 4 Co 80 4 BR 611 Cro J 315 1 MB 3.6. 277.) Lawful right of title in the in the evictor not suff.t for it might be derived from Pff (1 Sid 466 2 Saund 177.

But if it appear in the declar.n that the eviction was under elder title it need not be formally stated to have been so (Esp 302 2 Sev 37 4 BR 615 8.n 288 -) But it is not necess.y to state under what title the eviction was. 2 Sev 37. 4 BR 614

13. Said in 2 Saunds 177. 1 Sid 466. that Pff must shew what title not Sufficient if "what title" means any thing else than good lawful title 2 Saund. 181.

Reason why eviction must be stated to have been done under title &c. is that cov.ts of warranty extend not to tortious acts of others who are themselves liable - stating that the eviction was by suit not suff.t Bra 400 Esp 278 Mod 34 Co. Lit 917. 4 Co 80 1 Roll. 379

But one may expressly cov.t against the tortious eviction of another

# Covt. of Warranty. Covenant Broken and Seisin

& the moment "under good & clear title" is unnecessary. Co. Lit. 273

So covt. against the acts of a particular person extends to tortious eviction by that person – this rule is founded on the supposed intention of the parties. Co. Lit. 274 Hob. 95 Co. L. 212 Roll 413.31 Hra 400

If the warrantor disturbs the grantee even by a tortious act under claim of title he is liable on the covt. & Plff need not state that he had any title or even that he claimed under any if the act appear on the declaration to be an assertion of right – This rule holds even where the covt. is expressly confined to lawful evictions – for he cannot defend himself by alleging that his own act was unlawful 1 Bl R 671. 1 Roll R 21 Co. Lit 302. 273 2 Show 425 7 Mod R 376

Eviction by Sefor suspends the rent – Semble where of a mere trespassing act (Cam. 242) Same rule where the tortious eviction is by any person included in the covt. as "heirs" even tho he is not named 1 Roll. R 21. Co. Lit 300 2 Com 564 Cy 257 [i.e. – that the rent is suspended – for what does it mean?]

A covt. by Exors &c for quiet enjoymt. against "any person whatever" is restricted to themselves & those claiming under them & further covt. and are liable only in their representative capacity. 1 Bl R 31 34. Shep 163 –

Rule of damages on covts. of seisin & warranty are diff. & our rule is diff. from the Eng one. In Eng. & Ct. on covt. of seisin Plff. recovers consideration & interest (Rily's 2 Root 294 4 b 2 M. & S. R 433 4th 108 4 Johns 1 5th 49 4 Call 45 Selw 551 n

If an estate for years be granted by indenture of lease the words "grant & demise" import warranty of warranty & for quiet enjoyment 4 Mand 502 8 Cow. 36

In a cov. of warranty of lands where grantee covts agst himself his heirs & agst. "all persons claiming under the party of the second part" who was the grantee" the words "the second party of the 2d part" will be rejected as surplusage 7 Mand 287 1 do 231 394 3 Caines 417

Where one sells property as his own representing himself as the owner when he is not grantee is not restrained to nominal damages 21. Cal 102

Pl. Rec. 423

If when he sues on a cov.t against incumbrances he is entitled to recover the price he has paid for it / 7 John R 358 / if the incumbrance is still outstanding he can recover but nominal damages. T.c. 10 Wend 142 & he may pay off the incumbrance without suit.

In a suit on a cov.t against incumbrances where a part of the premises have been sold under an agt. covenants grantee can recover only the consid.n for such part sold & not for unchanged value improvements 10 Wend 142 8 Pick. 346

2 John R. 1
4 " " 72

If a bona fide purchaser vendor of bond cov.t that he is seized in fee & has good right to convey & that agt. ones holds the bond free from all beneficial claims whatever & agt. he writes in anticipation of cut by vendee agt. under the value of the bond at the time of the sale is the measure of damages & D agt. is liable to refund the purchase money together with interest from the time P has been the income profits & the costs which P sustains in the action wit which he was evicted together with reasonable fees for counsel but not costs of the suit for income profits / 3 Barnes 4 Pl. III. 4 Johns R 1. D. 134 / & vendee is not entitled to recover anything for bailings he may have made on the bond 4 Johns R 1.

On cov.ts of warranty in Eng.d he recovers consideration interest & all his damages in being evicted (1 Caines 115 4 Johns 36 Does he recover counsel fees? -) But in Ct. he recovers the value of the land at the time of eviction or at the time of cov.t broken & damages Rich 3 2 Mt. S.R 240 4 Johns 1 - i.e he recovers only the consideration interest & cost of eviction - not for improvements or increased value - vide 14 Ct 257.

In cov.ts of seisin assignee of grantee cannot maintain an action against the first grantor - for the cov.t was broken at the moment of ex.n - therefore the right of action accrued before assignm.t & a right of action cannot be assigned Sylar vs Tiffany. N.H. S.C 1800 2 M.S.R 439. 99. 2 Johns 1. Esp 295 Bull 158. Sems on cov.ts of warranty (5 Co 15 b) If broken in assignee's time he may sue upon it - qu. How can this be except as to cov.ts of warranty?

In action on cov.t of seisin the Def.t having acquired title since action brot is no defence. 5 Johns 49 2 Saund 171 3 B.R 186 1 East 507

If Ejectm.t or Disp.n is brot against grantee he ought to notify his grantor that he may appear & defend - this when the interest in quest.n is a freehold is in Eng.d called "vouching in" the grantor as warrantor" - If feoffee does not appear feoffee must defend as well as he can (3 B.R 300) This is the practice in case Ejectm.t & Disp.n - In Eng.d vouching is only in real action 1 Da 532 1 Saut 101 365 5 Coke 614 - vide 8 Ct Qu to form of a voucher -

## Covenant Broken

Usual mode of giving notice of this kind is by a summons called a writ of warrantee – & if warrantor is not warrantee he is not concluded by judgt. against his grantee 5 Com Dig Bulst. or Bull 232 –

Quit claim deeds contain neither of these covts. yet in some cases the quit claimant may in Ct. be answerable for defect of title – (2 Day 128 contra – see also 1 Swift 384 1 Swift 366 2 Caines 193 Cruise Dig. 38. Ch 5 § 57. Sed 211 Pa R 1118 Ch S 196 386 3 S R 51 – My opinion is according to the weight of Eng authorities – an action on the case for fraud will not lie –

## To pay by installments

On a bond with condn. to pay an aggregate sum at several times debt lies for the first breach 1 Litt 118 1 Wil 80 Hob 313 Ch S 358 Bull 188 Esp 205

On single bill debt does not lie till the last installment is due 1 Roll 601 1 Swift 47 292 10 Co 128 Bull 188 1 Ld Ray 548 Esp 205 – vide St. C 35 b

Rent is payable for when part is payable – for this is considered as a reservation of part of the issues of the land which shall have accrued on the day on which the – no debt before that time – the diffn. reservations are in nature of certain debts – Covt. for paymt. of an aggregate sum by installments – Action of covt. for damages will lie when the first becomes due – see table quotes. Ch E 175 – 1 Com 107 3 Co 22 4 Co 94 8 Co 153 Cro 103. 13 Ch S 105 Sed 165 3 Mod 153 Bull 166 1 Ld Ray 547. Ch E 776 867 Esp 205 1 Ch 212 – (Gro E 118 contra)

The costs which under sustained in defending the action wherein he was evicted must make part of the damages in an action by him against the vendor for a breach of cov.t of John R 173

The grantee can recover interest only for that time only for which the real owner can recover for mesne profits of John 324

In an action on cov.t of warranty under the plea of non est factum Pff is bound to prove nothing but the exn. of his deed 1 Ch 482 10 John 47 of Lowen 307 10 Mand 205 & in such case warrantor cannot show title in himself if he had due and proper notice of the suit against the grantee of warrantee 10 Mand 205. being concluded by the judg.t in such suit.

Ld Cond - by the assignee of a contract to pay the money due thereon when collected by due course of law is broken if the covenantor suffer a term to elapse after the money is due without prosecuting therefor 1 Connecw 98 19 John 69 —

## Covenant Broken

Cov. lies to recover damages – Debt to recover a sum certain in numero – Esp 172 266 Bull 167.

Cov. & Ejectt. are always brot to recover damages for non performance of a contract – Debt is brot to compel specific performance – Cov. to pay several sums & no aggregate – action lies for the first & rotatés quotés – it being in the nature of several debts – & Semb. debt will lie for each tho' & heard of no such case. Bull 168 Cro E 776 807. 1 H Bl 550 Cro E 118.

The above rules of notice apply mutatis mutandis to notes 1 Smit 292 Cro E 807 1 H Bl 518.52 –

Debt will lie on cov. in deed to pay a sum certain or when the damages can be reduced to a certainty by averment 1 Roll 591 Cro E 561 758 3 Leo 429 Stra 1089 Bull 167 2 Ba 15 –

A clause in a cov. that on nonpaym. of one installment the whole shall immediately become due is good – without such clause Pff recovers only such installments as have become due – Semb Ch. B 212.13 Cro J 305 contra

On cov. any number of breaches may be assigned – Litt's case at C. L one bond, one being a forfeiture of the whole 5 Com 36. 4 Ba 134 2 Vent 198 1 Roll 112 Comt 297 2 Wil 293 3 Sel 108

By act 8 H 35.C enables the Court to change bonds Pff may

## Covenant Broken

assign as many breaches as he pleases — Land may be by the 5 & 6 Wm 3 Pl may assign as many breaches as he pleases in actions on bonds for performance of covts. &c there in. 1 Bos 544 2 Wils 377. 8 TR 126 2 BR 1016 Burr 820 8 BR 459. 69. Cowp 407.

Rules. The Exrs are implied in covenants & bound without naming unless the covt is fiduciary, i.e. to be performed by testator himself & even then if the covt is broken in his life time. 1 Saun. 128 2 Pl. 197. 1 Roll 519. Cy 14 Co 2 553 1 Bac 55 2 Com Covt. Cl. Cr. 2 Selw 80

So ancestor seised in fee may bind his heir by covts. — if he covts to sell land & before conveyance dies — his heir may be decreed in Eq. to convey & the money will generally go to the Exrs especially if there is a defining of assets — 2 Dem 213 Cy 338

Genl rule — Covts real bind the heir of covenantor & also descend to him — he may sue on a covt. tho not named if the covt runs with the land & appears designed to continue after covenantee's death — Ex. Covt with lessor to leave the land in repair — being an estate of inheritance — Esp 294 Y.N.B 343 2 Com 561 Bull 158 1 Roll 520 2 Lev 92 Shum 305 —

But Qr It has been decided that heir as such having assets by descent is liable at law on ancestor's covts of seisin as well as warranty — 1 Com 561 1 Vent 176 34 Hy. that he is no liable at C L no doubt — qr. as to covts of seisin here for there was a right of action against the ancestor on the covts

Father conveys land to his son on his cov.t to pay an annuity to his mother – she may maintain an action on said cov.t & having for her benefit of a release of the same by the heir – is fraudulent & void as regards her. 7 Johns Ch 63 2 Sen 210 1 Nevt 318 2 Jones 103 Coup 443 Doug 142 1 Bos 101 n. 1 John R 139 —

Ce Covt. of seisin broken the instant it is made cannot be assigned 12 Johns R. 24 / If a covt. running with land is assigned before broken the assignee must bring the action if he is obliged to indemnify assignee for such breach – if not assignee must bring it 2 Ld Ray 1460 14 Johns 93

Proviso in a lease giving power of re-entry if lessee "shall do or cause to be done any act matter or thing contrary to or in breach of any of the covenants" is broken only by doing some act – not broken by neglecting to perform some covt – Ep. to repair – 23. C L 75 4 Mod 265

## Covenant Broken

& our law makes it the duty of the Ex^r to discharge the claim outstanding against the estate. H.Ct. 269.75

## Covenants running with the Land and e contra

Cov^ts which do not run with the land are called collateral. Distinction here arises as to assignee's liability on assignor cov^ts. Assignee of a lease is liable for breaches during posf^n tho not named if the cov^t runs with the land. 1 Bonl 345

If the thing covenanted to be done or concerning which something is covenanted to be done was in esse at the time of the legal part of the demise the cov^t runs with the land. Ex. Cov^t to repair buildings &c (1 Roll 521 Cg. 13 Cro E 457 1 Ba 534 15 Co 16.24 Mor 399 Esp 293 4 Co 86 2 Co 64) Here the thing to be done is considered as annexed to the thing demised & follows it.

So a cov^t to pay rent which tho not substantially is potentially in esse - there are cov^ts which run with the land or are annexed (Paw C 152. 1 Roll 521. 1 Ba 534 Cro E 383. Bull 159 Mor 337)

But if the thing covenanted to be done or concerning which he was not in esse at the time of the lease or part of the demise the cov^t is collateral & assignee is not bound by it unless named - & not in all cases if named - Ex. Cov^t on lessee's part to build a wall de novo on the land - assignee not bound unless named - 5 Co 16 2 Burr 1271 3 B R 393 1 Ba 534 Cro E 552

# Running with Covenant Broken land & Be contra.

So cov.ts run with the land if it goes to the support or preservation of the thing demised - As cov.t to make repairs - Assignee is bound the rest named 5 Co 17 24 Cro Ja 125 3 Lev 233 Hay 303 1 Leo 215 2 Vent 228.32 4 Mod 71 Cro J 309 521 2 Com 566

And on a cov.t running with the land of the nature of the last case - action lies against assignee of part of the land - Qu. Is this rule universal - I fear no settled rules 2 East 580 - Cro E 222.82 - Salk 510.

When assignee is named he is generally bound by all cov.ts whether they run with the land or not - as cov.t to build a wall on the land Se 5 Co 16 1 Ba 534

But the cov.t in this case must be to do a thing which relates to the thing demised or assignee is not bound - for the named he is not bound to do an act which does not relate to the thing demised - Ex - To build a house on the land of another. 2 Com. 502. 64 5 Co 16. bb 1 Ba 534 1 Saut 352 Cro J 138 Jones 223 -

But where assignee is bound it is only for rent incurred or cov.t broken during his posses.n - If the breach was before assent must be had to lessee the assignee was named - for assignee is only bound on ground of posses.n (Cong 143) & privity of estate. (2 East 575 1 Green 336 Holt. C.N.P. Bat 17999 . 2 Com 565 ) Salk 510) Ex - Lessee cov.ts to rebuild within a certain time & after the time assigns - here is a complete right of action against lessee & his liability

A lessee who has only an equitable title may sue his own lessee the existence of such lease cannot be denied 3 Br 393 29 C.L. 379. & such lessee the assignee from showing that lessor had nothing in the premises, yet he may plead that his interest has ceased 29 C.L. 379 1 Saund 233 n 2

Covt. to leave at the end of the term the premises with all fixtures & improvements includes additions made for the purpose of trade & which by the custom of the plaintiff might have been removed at the end of the term 23 C.L. 249 1 Vent 19—

Covenants that run with land extend to every part of the land hence the assignees however numerous may have their action against the original covenantor. Doug. 230.

A. for B on the one part & C. on the other cov.d to A. being authorised by writing from B. not understood. Held that B. could not maintain cov.t agt. C. tho the cost were expended to be made by C. to A with B. 11 Co. & L. 251

Ag.t Held for several years under a void lease paid the rent reserved & not having re-signed was held liable to repair according to a covenant in the lease 32 C. L. 354 5 T. R. 471

is not transferable — Sel 81. 199. So assignee is not at Law liable for a breach after his assignment — if he assigns the very day before rent is due he is not liable for any part even tho he assigns to a beggar & by fraud unless a trust is proved 1 Bond 356 Cath 177. Cang 735 3 Co 221 1 Sel 81 2 Mod 71 2 Vent 228 3 Lev 295 1 Show 340 s.c. Poxw 90 1 Cay 261 Bull 159. 1 Bos 22 Camb. 485 Stra 221 1221 Mod 72 166 1 Vent 329. 31 contra & that fraud may be replied & is not such replication good if assignor continue in poss.n? qu 1 Bos 22.3 — So if he assigns to a feme covert Cang 435 - 457 Liable by reason of privity of estate & not of contract — which liability follows the estate & not the person — 3 Co 22. Selw 511. n — But Eq. will compel assignee to account for the rent while he was in poss.n in this case — 1 Bond 251 353 1 Vern 165 - 87.

If assignee is evicted of part of the premises the rent must be apportioned at Law — the contract with him being real (2 East 575 Selw 510) So in debt against lessee — sems in cov.t — 3 Co 22 — 2 East 575 — Selw. 497 —

Whether Eq. will under any circumstances restrain assignee from assigning to a beggar qu — no decision on this point (1 Bond 351 2 Cath 219. 548) Eq. will not restrain at any rate if assignee offer to surrender to assignor & he refuse to accept

Cov.t by lessee not to assign is binding — (formerly doubted — 3 Rho Ch 832) (1 Esp. 8 1 Salm 267 Selw 488 — ) But such wd is not broken if lessee's creditors take the term in exn (2 Bl. 1125) — nor

# Running with. Covenant Broken land and e contra.

by an underlease of part of the term (3 Wils 224. 2 Bl Rep 1166. S.C) nor by surrender of the term. 8 Ill R 57. bo. 800 Esp 276 Cowp 803 133. 7 Vin. 85 - 2 Eq C 100 - Cy b Sty 463. Selw ~~[illegible]~~ to 488. to 492

Lessee is always liable to lessor on the express cov.ts even after assignmt. by lessee 3 Co 22 Poph 120 4 Ill R 98 Paw Ill. 91 Cang 443 1 Ill. Bl 439, 1 Ba 535. b. Vent 252 Sel 199 -

But if lessor has accepted assignee for his tenant as by receiving rent of him he cannot afterwards in any case maintain debt against lessee - for the privity of estate is gone. Co S 234 1 Ill Bl 439. 44 1 Vent 254 3 Co 23 - 1 Saund 240

Yet if the cov.t be express - he may have an action of cov.t in this case - for the privity of contract remains - 1 Vent 354 Bull 159. Co S 309. 34 522 1 Ill Bl 438 2 Com 563. Co C 188 1 Sid 402 1 Saund 237.

But if cov.t is only implied by law Lessor shall not have any action against lessee for any failure after accepting assignee - tho he otherwise may - such cov.t being founded on privity of estate - which tho lessee alone cannot destroy it yet both parties may 1 Ill Bl 439 Co S 522. 1 Sid. 447. 1 Vent 354 - 3 Co 22 1 Saund 241

He may accept assignee by accepting rent - by assenting to the assignmt. &c. which are implied assents - or in any other way which implies an assent - Ill. Supra -

An action of debt for rent by assignee of the reversn. is local & should be tried where the land lies - for such action is maintainable by reason of privity of estate Hob. 39 Cro C 143 183 3 Mod 338 Carth 182 Litted 194 Doug. 97 2 Salk 551 1 Wms 165 Wm. Jones 43 Stra 775 1 T R 445 But an action of Covt. by assignee of reversion covt. Supra is transitory 1 Saund 237, Cro J 521. Cro E 715 13 R. 92.95

Where a covt. running with the land is divisible in its nature if the entire interest in diffrt. parts of the land pass by assignmt. to diffrt. individuals the covt. will attach upon such parcel pro tanto Shep. Touch 199 Co Litt 385 a 1 Rep 445 2 Ld 78

Covt. of warranty runs with the land & assignee may sue covenantor in his own name nor is he affected by any equities existing between the original parties nor does actual or constructive notice of an incumbrance derived from the registry of a mortgage or otherwise affect his right of recovery 10 Mend 183 14 Johns 89 5 Cowen 137 2 Mn 460 1 Ct Booth & Ellis 244 1 Saunt 427

# Running with Covenant Broken Land and e contra.

When the cov.ts is express lessor may pursue his action against lessee & assignee at the same time - but only one exn. can be enforced - after satisfaction of one exn. if C. off. in the other is taken except for cost Cuncta 2 Ins. his - for lessor is not entitled to two satisfactions tho he may have several remedies. Co. § 523.

By St. 22. H8 the grantee of lessor has the same remedy on covts. running with the land against lessee &c as lessor had at C.L. - C.L. extended the remedy only to the representatives of lessor - By the same St. lessee has the same remedy against the grantee of lessor as at C.L. grantee had against lessor - 4 Bac 279. 1 Saund 345 1 Sust 215 Co § 522. 3 Co 22

A derivative lessee or under tenant (Semb) is one who takes a conveyance of a part of the residue of the term - no privity of contract between him & the original lessor - hence not liable on the covts. in the lease. 2 Wil. 234. 1 M.R. 766. 1 Saund 347. Doug 74, 438.

Same rule was held applicable as to the rent of the whole residue unless he takes prom.ry C. Doug 438 1 M.R. 114 1 East 502 Denied to be law in 1 Ves. Sr. 235 3 Bro. Ch. 166 1 Ves. 12 3 Atk 512 Allot 19. 20 7 M.R. 306. 12. Selw 511 in notes

An assignment is a sale of lessee's interest in the term & the assignee is tenant to the original lessor An underlease is the creation of a tenancy by lessee under him & the under lessee is tenant to lessee Stra 405 3 Wil 234 2 M.R. 766

Whether a mortgagee of leasehold premises who has never been in posn or in receipt of rents & profits can be sued on the covenants in the lease as the assignee of it seems to be a disputed question - that he may be sued 2 Vern 275, 374 1 Brod & Bing 72 Cortice Doug 438 - Powell 241 2 Paige 76 -

Day 32

Assignees (of the whole term) are liable on the cov.ts according to the preceding distinctions whether acted or by eviction & if the assignee of the premises liable for the rent or any part of it? Cro Eliz 786. Poug 177. Cro E 633 How can it be apportioned? – that lessee remains liable for the whole rent. Cro E 633 Ld. 162

If lessee cov.ts for himself & assigns as long as they shall be in possn & assignee continues in possn after the term he is liable on the cov.ts tho not strictly an assignee 2 Com 661 Hz 407

If the cov.tee entitled for quiet enjoyment his heirs & assigns (even in a real cov.t) & the cov.t is broken in Bs life time his Exr tho not named shall the action – for the damages to be recovered accrued in Bs life & belong to the personal fund & grantee being entitled could have no heir to the land – but if a cov.t real is broken after covenantee's death his heir shall have the action. for the right violated is his. 2 Com 561 1 Dent 176 347. Esp 295 2 Lee 26 Bull 158 Sel 141 2 Ath 63

Gen.l Rule that Exrs of covenantor tho not named are always liable for a breach in covenantor's lifetime – for the right to damages accrued in his lifetime & would have diminished the personal effects – & it will always lie against Exrs tho not broken till after covenantor's death & tho not named if the cov.t is affirm – for then the action is founded on privity of contract. 2 Com Cov.ts C1. 1 Roll 519 35 40 Cy 14 Cro E 553 1 Pow 128 2 Ro 197 1 Ba 537

Running with Land Vice versa

# Covenant Broken

But on a cov.t in law not broken till after covenantor's death the Ex.r de is not liable — for it is founded on privity of estate & the reversion is in the heir. 2 Com 562 (Cy 257) 1 Ba 533 Cro E 157.

If Ex.r be come into posn. of a lease in his representative capacity he may be sued as assignee for breaches during his own posn. — he is assignee by operation of law. Esp 294 1 Ed. 4 Sal 309 —

Heir of Covenantor is liable for breaches committed either before or after covenantor's death if named & if he has real assets — Sem. not — & in an action against him on cov.t running with the land inferior is no bar & he may be charged as assignee — 2 Com 564 Esp 294 Lutw. 287 1 Saut 357. 1 Saut 384. 65 70. 2 Bl 378 4 Bl 77 3 Ba 27.

Cov.ts to save harmless are not broken by the tortious acts of others as in cov.ts for quiet enjoyment — Ex. Assignee so cov.t with lessee & lessee's goods are distrained — Sem if it is against the acts of a particular person Esp 301 295 1 Roll 434 4 Co 80 Cro E 443 1 Mod 219. Stra 400 Cro E 212 Mod 35 2 Lev 37. 1 Rost 401

On cov.ts to save harmless covenantee may in some cases maintain an action on the ground of his liability to a suit — This is the case when his liability arises after the cov.t of indemnity is given — Thus — If a Sheriff takes a cov.t or bond to save himself harmless against the escape of one having the liberties of the prison yard & the prisoner escapes — he may sue immediately & not wait till sued himself. Cro E 53. 123 1 Root 510

The dft. covenanted in 1822 that the Pff should have a continued supply of water for his mills from dftts dam which cont. dft failed to perform after 1826. In 1835 Pff brot an action for the breach & recovered damages sustained by him up to that time. Held a bar to a second action for damages arising from a subsequent failure to perform. 6 Hill 54 Vide 2 Saund 171 n.1 13 Mass. 530 19 do 207 2 do 369 16 Johns 136

The law will never intend that express covenants agst the wrongful acts of a stranger unless his cont be express to that effect 3 Saund 178a n y. 3 B.R. 557 Croke 914 Croke 425 Croke 5

A cont to indemnify a purchaser agst a particular person named by name extends to entries & disturbances by that person by act or tort Croke 212 Mod 35 Shep 160 Bacon 103 1 Mass 100 Pyl. 30 n1.

So a cont agst all claiming or pretending to claim any right extends to a trespass & disturbance Com. R 230 10 Mod 384 1 Mass 100

Mere liability to pay money for another as surety is no ground of action 2 Ld. R 138 14 Johns R 368.369

Where the condition of the contract is to discharge or acquit Pff. from any particular thing &c. he bound &c. unless it be done Deft is liable - Semble if it be to discharge &c from any damage Pff. may incur by reason of such particular thing there there must be actual damage sustained before Pff can sustain his suit 1 Ld R 249 1 Saund 117 n 1

If the contract is to indemnify & the obligee has become absolutely bound & liable to pay & his demand for indemnity is reduced to a certainty he may sustain his action tho, he has not actually paid 8 Cowen 639 - 10 Johns 549 563 6 do 158 7 do 168 8 Mand 436 4 Mass 627

## Covenant Broken

So if a surety takes a counter bond of indemnity & the creditor fails to discharge the debt for which the surety is bound according to the terms of it – the counter bond is immediately forfeited – the condn broken & the surety may sue on his sure liability – 3 Bulst 234 Sel 196 5 Co 24 1 Root 507. Comp 525 1 BR 599 2 Ld 640 Sd 714 Ld 714. 377. Sd 307. Yd 97. Bd 539 3 Wils 271. 307 Ruly 314

The question whether liability alone will give surety a right of action has been decided both ways by S.C. = C.B have decided in favour of the action. 2 Sun 156 1 Root 507 Cro E 53. 123. 264 1 Root 291. 3 Wils 262 Comp 525 vide 1 BR 599 2 Blk 102 mg – 105.

If the principal has been obliged to pay the surety on the latter's liability & has afterwards been obliged to pay the creditor Eq. will oblige the surety to refund – Semb. would not indebitatus Cpt. lie in this case? 2 Sun 1005 quere the surety has recovered by judgt of court – 7 BR 104 269

But if one having obliged himself as surety takes a bond of indemnity after his liability has attached no right of action accrues till actual exoneration. Eq. C. executes a single bill as surety & takes a bond of indemnity – or takes the same against a penal bond after condn broken – otherwise it would be absurd – per his liability would commence immediately – Sel 196. 2 Bulst 234 1 Root 507. Seems if he had executed a penal bond & taken a bond of indemnity before condn broken 5 Co 24 2 BR 105

If surety takes no bond of indemnity & pays the principals debt

# Covenant Broken

he may maintain Sue Ejmt for money paid &c (personally holden he could not) (Comp 525 2 Str 104 - Ruby 139) But in this case mere liability does not give an action (Comp 525-7 1 B 599. 3 Bos & 2 N.R 180) Seems if he has taken a bond of indemnity (2 Str 100) he then must take his remedy on the bond

The same remedy exists between co-sureties for contribution when one has paid the whole or more than his proportion. - So also the bound by separate instruments. 2 Bos 270 Comy 492 2 Cas 492 1 Vern 256

In Ct. if lessee dies during the term a breach of cont happens after the time of exhibiting claims has expired Ex^r is still liable - St 1 Ch. enables Ex^r to provide for such cases by taking bonds of the distributes - If he has taken no bonds Eq - would probably grant him relief -

Distinction between cases where no claim exists & covenantee has no power to create one within the time - Ex - Where the cont allowed covenantee to make a demand at any time during his life - the demand being precedent to the right of action & he delayed the demand till the expiration of the time limited - Here judt was against covenantee - 1 Root - This is contrary to the terms of the contract

Rule – Where Pl. is ready give day of payment – to the principal so that he cannot sue him until the time given has expired the surety is discharged Sears of a mere delay to sue – 15 Johns 432 13 do 174 2 Johns C 554 Holts N.P.C. 82 1 Gallis. 32

If one cont. to be bound by the accounting of another who does not account but such account is taken in chancery he is not bound by such proceedings 24 Wend 35 4 Hill 122

A bond or other specialty may be dischd. or released by parol especially if the parol agreement constituting the discharge has been carried into effect - 7 Cowen 48 3 Johns Ch. 60 - 1 Esp 35 2 Johns 528 1 Cowen 250 14 Johns 330

held in 15 Mass 25 that a contract under seal cannot be annulled except by deed but that the rule does not apply to cases of payment - tender accord & satisfn or of performance of covts

A release by one joint covenantee will defeat an action in the name of all 21 Ed 99. 100

# Covenant Broken

## Release of Covenants

In case of obligations & choses in action generally a release after assignmt. is in some cases good - in others not - If the instrumt. is not negotiable a release is good - otherwise it is not good - So if lessor after assignmt. of reversion release to lessee all cont. he yet the assignee of reversion may recover for all breaches after assignmt. (4 Ba 279 2 Lev 206) for the cont. runs with the land & is assignable since St. 32. H. 8 & according to some it was so at C.L. 2 Sane, 102 1 Bull 345

Where the lease has been assigned by lessee he it is holden may not assist assignee of actions for breaches even after assignmt. by release given before action but - Seems if after action but for the right has attached to his person Esp 208 Cro E 351 508 2 Roll 411 5 Com 235 -

A release before cont. broken of all ~~cont.~~ damages does not release the cont. - for there is no damage at the time - So a release of all actions suits & quarrels does not release the cont. - but a release of cont. before breach as well as afterwards is good. Esp 207. Bull 166 1 Saut. 292 All. 38 Cro J 99. 2 Show 90 5 Com 235 Sal 175.1 Ld R 518.57. J 249

## Pleadings in this action

Declarn. in cont. should state that the cont. was by deed the case will lie on an instrumt. not sealed Esp 208 Stra 814 Cro E. ~~208~~ 517. Cro E 108, 209 Selw. 517. 1 Wils 171 Stra 1156 S.C

# Covenant Broken

Pand cont. as used by Pow. C. 244 seems an inf. for term. Esp. 266

When cont. is gen. or gen. assignment of breach is suff. – As a cov. not to lay or sell certain article within two years – Avernment "that Def. had sold to C. & others" (not mentioning to whom) "at divers days within two years" is good (1 Saut 139 Esp. 298 DR 478 Holt 176) Aver. cont. that grantor was well seised &c – allegation that he was not well seised &c is suff. Selw 519 9 Mans 421 4 Kent 479. So of cov. that grantor has good right to convey &c

Most generally assignment is in the words of the cov. – (generally) As cov. that lessor is seised in fee – avernment that lessor was not seised in fee is suff. (Co 3 369 Q B 60 Esp. 229) Suff. in assigning breaches that the words of the cov. are negatives if such assignment amounts to a breach (2 M & S R 433) Same in cust. on bond to perform cont. as for a penalty in H. DR 107. Selw 521. in. note 3 Sev 190 3 Ellis 69 4 Bay 107 Carth 124

The breach should be so assigned as to appear clearly to be within the cov. – As cov. by lessee not to cut more timber than should be necessary for repairs – avernment that he had cut to the amount of £100 is not good. Str. 1 Cr & 348 Craig 203 Esp. 299.

If by subsequent words Pff. narrows the breach first assigned he must confine his proof to the subsequent words i.e. to the breach narrowed & can recover for that only – As if Def. has not used the land in a husbandlike manner – but has committed waste 3 B & R 307.

# Pleadings.

Geo. 160 A Lease of a ct. for quiet enjoyment & of good tenantry or
Croß. 304 specific entry by permanent title must be shewn 9 Ward 421.
2 Show. 461

It is not always suff. to aver performance in the words of the ct. the intent of the contract must be shewn to have been performed & he performance must be set forth with such certainty as to enable the court to judge whether the intent of the ct. has been fulfilled 1 Cole Pl. 316. 17. Ex. Ct. to sell B. are covenants must aver not that he sold but that he conveyed & shew in gen. terms the nature of the conveyance 4 Ward 552. So on a ct. to indemnify & save harmless from the payment of a bond a bond that he was forced & compelled to pay without stating how & in what manner it had on special demurrer - 1 Ward 309. 7 Brown 442

# Pleadings

1 SR 640
1 Lev. . 88
1 Saund. 234 n2

In assigning breaches of Cov.t Pl need not aver a general performance on his part 2 Mod 309 Hardw. 343 1 Saund 235 n5.

Where an agreem.t under seal is enlarged or varied by subsequ.t parol stipulations the party's remedy is not in covenant but f.- must be confined on such parol variation Eg Cov.t to build a house by a given time, subsequ.t enlargement of the time by parol if the party w.d sue for his damages for building in pursuance of such enlargem.t he must sue in assumpsit & not in covenant Wilson 3 Mand 587 4 Cowen 566 3 SR 590 592 8 Johns 392 Q Ch 110. But such parol variation may be given in evidence to support an action on the cov.t brief in the alone case the builder is sued for not building the house within the given time 2 Mand 591 3 Johns 528

# Covenant Broken

Where there is a proviso in the clause defeating the cont. in a certain event Pff need not set it out & negate it - Deft. should plead it - Cs cont. to deliver goods &c - proviso - that if Deft. was prevented by sea the clause should be void - Seems if the exception is in the body of the cont. - for it then enters into the description of the cause of action & of the covenanting clause. Esp. 300 3 Bay 65 Do 88 Ch. Pl. Vol. 1.

If Pff sets out his cont. & assigns an inconsistent breach under a videlicet (to wit) it shall be rejected after verdict - Eq. Cont. declared on Dec. 18. & a breach assigned "afterwards to wit" Dec. 5. cured by verdict Stra 232. Esp 300

Cont. in the alternative - breach must be assigned, as to both Esp 300 (Leon 250) But on cont. "to pay or cause to be paid" - "has not paid" is suff. - for causing to be paid is paying Stra 229.

Cont. to pay on one of two contingencies "which shall first happen" - averment that one had happened is suff. without averring it to be the first Esp 301 -

Cont. that an act shall be done by covenantor or his assigns - if action is not against his assigns - breach must be in the disjunctive - "not done by him or his assigns" - this rule does not hold where the action is against the original covenantor - for then assignment is not presumed - it is confined to actions against assignees. Stra 228 Sal. 139 Esp 302

# Covenant Broken

On cov. to do an act to a man or his assigns - assumpt. by covent. that it was not done to himself is suff. - an assignmt is not to be presumed 3 Rol 410 5 Mod 133. cit Sup - Stra 231 1 Saund 235 n b

If there has been an assignmt. & it is done to his assigns Pltff must shew it.

Suppose the action is brot by assignee - then the breach must be in the alternative. Semb.

In cov. for a sum certain there can be no apportionment of demand & breach must follow the cov. - As cov. to pay £10 per ton for goods &c - breach assigned for removing tonnd one hogshead - on demurrer breach holden ill assigned in changing the tenor - Semb if cov. had been to pay £10 per ton remuneration. 3 Lev. 124 Esp 303 Cll. 19. L 135

But in the first case Pltff by remitting the excess may take judgt for the residue. Esp 304 Sal 658.

When covenantee is to perform some act precedent to his right of recovery he must aver performance - As cov. to pay after proof & request made - Rol 19. Esp 304 -

So if the precedent act is to be performed by a third person performance must be averred - Semb law after execut. 8 Co R 366 Sal 171 7 Co 10 2 Ld Rd 574 5 Co 23 a

But where there are mutual & independent covs. (i.e. where A covs. unconditionally for one thing & B for another performance

# Pleadings.

If a deed of sale appear on its face to be void all its cont^s which are relative & dependant are also void - Same as to those which are collateral 11. Pick 285 2 Bar Cont. G. Mch^t 19 - 8 East 231 8 B.R 411 11 East 165

Rules to conditional covenants vid 1 Saund 320 n 3

# Pleadings

Where the condition is to indemnify & save harmless non damnificatus is the proper Plea & if there has been any damage Pff must reply 1 Saund ~~upon~~ 117 n 1 So if all where all the matters to be secured - are in the affirmative suff. to plead performance generally 2 Saund 411 n 3 But where the cond. of a bond consists of several particular things to be performed by obligor he must set forth particularly in his plea how he hath performed each particular thing 1 Saund 117 1 Sid 215 1 Lev 303 Cro J 359 20 John. 162

# Covenant Broken

by A — in consideration by him need not be averred — So in all cases where the covt. on one side is in consideration of the covt. on the other side — Mod 88 — 7 Co 11. Cro E 889. 1 Roll 414 5 Com 46 1 Saun 359 Sal 24 Stra 615 1 Vent 177 1 Saund 320

In Ct. Deft. in action of covt. often pleads that he has not broken the covt. — not good — for it refers matter of law to the Jury & generally does not form a direct issue — neither is it sanctioned by any Courts — 2 Vent 56 4 Ba 88 2 Bl. R 1312 2 Mod 33 L 403

But would such plea be good were the declaration to conclude "& so Deft. has broken his covt." — said it would then form a direct issue 8 Bl R 278 2 Mod 311. Sed qu. Is the averment issuable? 2 Bl. R 1312

Laid down as a rule that when the covts are all affirmative pleading performance generally is suff. (1 Saut 303 Esp 306 5 Com 83. 2 Bacq 1.) This rule must relate to cases in which the things covenanted to be done are in some measure indefinite in kind or number — or multifarious (Comp 595) 5 Com 236 2 Bacq 1) As covt. by Sheriff to return all writs &c or only to discharge the duties of his office — Here a plea that he discharged — or returned all writs is suff. — for the rule if not thus limited contradicts another well established rule — that where Deft. has covenanted affirmatively to do a number of specific acts he must plead performance specially — i.e. of each act — As covt. to pay all legacies in a will &c Cro E 749 1 Saund 117. Sal 498 2 Bac 88. 91 Cro J 359

# Covenant Broken

1 Bensoo. 1 Sia 215 1 B R 753 5 Com 82 257

And a plea of performance otherwise than in the words of the cov.t (i.e. corresponding with the nature of it) is ill on gen.l demurrer - As a cov.t to pay all legacies in the will of S S - Then that Deft paid a legacy to A - one to B &c - without alleging them to be all - 1 Bos 455.

The rule that where there are affirmative cov.ts for the performance of an indefinite number of fact. &c - Deft may plead performance generally - is established merely to avoid prolixity & lengthening the rend. Cowp 578 Esp 305 Sutw 421 1 Bos. 643 Croft 749. 916 1 B R 753 4 Bar 91 5 Com 83 236 - Ch Pl. 1

Same mode of pleading is allowed in replications assigning breaches of cov.ts in action, on bonds, where the assignment of every breach specially would tend to great prolixity. 8 B R 459 2 Wils 11. Bos 535 1 B.R 182 1 Bos. 464 Burr 272 - (Doug 203. extra)

Where some of the cov.ts are negative Deft cannot plead performance generally to the whole but must plead specially to the negative cov.ts that he has not done the acts cov.d against - but advantage can be taken of a gen.l plea of performance by special demurrer only. Croft 233 691 5 Com 82 1 Saut 303 Cowp 576 4 Bar 91 Esp 305 5 Com 236 2 Bos 142

If in this case the negative cov.ts are upon the face of them void he may plead as if they did not exist. 5 Com 236. 83 Hob 13. Moor 856

# Pleadings.

Wms 303b
1 Saund n1. 11b
3 — n3. 410
Burr — 772.
8 B & C — 439

Fraud as to the consideration cannot be set up at law to avoid an appeal — under such but may as to the execution 1 Mand 618 2 Johns 177 13 do 430 20 do 130 & Lowes 508

Where Pff in an action of covt. assigns a particular breach a genl. plea of performance pursuing the words of the covt. is bad on genl. demurrer
13 John 404 vide Co. E. y. Ibid 48 1 H. Bl 270. 258
10 John 267 3 East 38

If one covt to keep premises in repair during the term he may be sued whenever a breach occurs but if he covt to leave them in repair he cannot be sued until the end of the term
15 Mass 400 1 Burr 584 2 L R 403 1125 1 Sal 141 Shep 173. Platt on Covt. 289 -

# Covenant Broken

Where the cov.ts are in the disjunctive Pltff must plead which he has performed otherwise the plea is ill on gen.l demurrer Lip 305 1 Saut 308 Cro J 650 8 Co 133 1 Saund 117 Cro E 233 1 Lev 338. (4 Bacq. that it is ill on special demurrer only –

If the cov.ts are to do something which consists of matter of law – as to convey discharge &c – Pltff must plead performance specially & quo modo that it may appear to the Court – So if the cov.ts are to do an act which must appear of record as to levy a fine – for the performance must appear of record that the Court may judge. Cy 229. 3 Com 82 Noll 67. 107 4 Bac 92 9 Co 25 Cro J 660 1 Saut 303 –

So in cov.ts on bond of indemnity Pltff may sometimes plead by way of performance non damnificatus generally – In others he must plead that he has paid or discharged Pltff & quo modo. 1 Saund 117

Rule – If the cov.ts or bond is to "discharge" or "acquit" from any particular thing ascertained in the instrum.ts non damnificatus is not good – (Cauth 374 2 Co 4 5 Mod 244 4 Bac 94 Cro E 433 914 1 Saund 117. 1 Bos 639) he should plead that he had discharged or paid &c & show how – i.e. by what acts – 1 Saund 117 Seems if the cov.ts was to indemnify & save harmless – non damnificatus is good – for here no specific act is ~~to be~~ covenanted to be done Cro J 363 634 2 Co 4 1 Lev 196 2 Wils 126 5 T R 309

# Covenant Broken

But if the cov.t or bond is gen.l to save harmless - discharge or acquit of things not ascertained ut supra - as of all damages cost &c - if no specific mode is prescribed non damnificatus is good - for non constat that any damages be have accrued - & if none has accrued Deft. cannot show how he has relieved Pltff against it - Cro E 91b Coutts 374 3 Mod 253 1 Bos 639 n 5 Mod 244 - 4 Bac 94 Story Pl. 246 -

Where non damnificatus is proper if Deft. plead affirmatively (that he has discharged or saved Pltff harmless &c) he must plead quo modo - for the affirmative allegation supposes an act of performance which Deft. can plead - but pleading generally "saved harmless" is ill on special demurrer only. 1 Saund 117 n 2 Co 4 Cro J 363 663 Cro E 91b 4 Bac 92 1 Lev 194

But (Sent) if the cov.t is to discharge or acquit in gen.l terms (from things not ascertained as cost &c that may arise from a law suit) by any particular act as by paying &c - non damnificatus is not good. Coutts 375 1 Leon 75 1 Saund 117 2 Co 4 1 Bos 638 - Not good in debt on bond conditioned to pay money at a day certain tho it appear from the cond.n that the bond was given as a gen.l indemnity. 1 Bos 638.

If cov.t is for an act to be done a man by a stranger performance must be pleaded specially - i.e. where the preceding distinctions require it (2 Roll. R 159 Cro J 559 1 Show 1. 5 Com 82 Esp 305) Exceptions Sent. in case of multiplicity of cov.ts - ut ante 164

Can a covenant or contr. to deliver a particular article at a future time & a particular time 2 Esp 522. 7 East 161 12 John 274 for the covenantor dispense of it before the expiration of the time his contr. is broken for he has put it out of his power to perform at the time. Seem if it be to deliver a horse generally for he may have the horse at the time 7 Cowen 27 1 L.R. 1040 -

(qu. if he purchase this particular horse before the time & offer to deliver -)

A cont. to convey title by several persons may be taken distributively. Also there be no words express of severalty. 1 John C 319

## Covenant Broken

If Deft. plead non damnificatus - a replication consisting of a gent. traverse is ill - Pltff must shew the special damage - as if in declar. that Deft. has not saved Pltff harmless &c. Plea Pltff not damnified - special breach in replication necessary - for as Pltff. undertakes to shew the damage he must shew in what it consists. 4 Bac 92 124 1 Ber 83 1 Sid 114 11

But a defeasance in a separate deed may be so pleaded yet the second deed must appear clearly to have been intended as a defeasance - it must contain words which in legal effect amount to a release - Cro E 126 1 Bul 573 Lfo 506 Cro J 300 623 3 Bul 298

## Joint and several covenants

If three covenant jointly & severally all may be sued or one but two only cannot - it must be treated as wholly joint or wholly several. 3 Mr 782 3 Bac 698 Yelv 26 1 Sid 238 - Ch. Pl.

If the cov. is joint only all must be sued 3 Bac 697. 2 Dam 99 3 Bul 393

If there are two or more joint covenantees &c all must join in the action - Ability Deft would be doubly charged - If all do not join Deft. on oyer may demur (2 Mr 232 Stra 1146 5 Co 18) In this case if one is dead his ex. &c. cannot sue living the other - the entire remedy survives to the survivor 1 Bac 1115 1 Lev 297 Cro E 729 J 333

1661

# Covenant Broken

In some cases where one cov^ts with two or more jointly & severally (as with them & either or each of them) one of the covenantees may sue alone — in others all must join — If the interest of the covenantees appear to be several one may sue — as demise to J. S. of B. acre & to J. N. of L. acre (5 Co 18.19 Bull 157 2 Leon 4 p. 3d Abc Yelt. 177 1 Saund 153 2d 116 Cro E 729 1 Br ) & each may declare on the instrument as made to himself without naming the other obligee — or he may declare on it as joint & several Cro E 729 Stra 76 819 Carf 832 L 345

But if the covenantee's interest appears to be joint they must all join in the action — e.g. B. acre is demised to two & lessor cov^ts with both &c 5 Co 18.19 Sands 262 1 East 497 1 Bar 532 3 Burr 898

So that co-obligors &c may bind themselves severally for the same same yet each cannot have several rights of action for the same cause. 5 Co 19.

If two cov^ts jointly & severally either may be sued allow for the other's neglect tho the one sued has not been negligent — Stra 553

Recovery against one is no bar as to the other. 3 East 257 6 Co 46 2 Bar 176 Cro J 73.4 qu.

So taking the body of one in ex^n is no bar — actual

1 Selw. 481.

A & B & his wife & C of one part & D & E & the same C of another part in an indenture between them it was recited that F. who a party to the deed had requested to have certain funds given up to him in which B's wife was interested he F. giving the same D. E & C sureties for paying the wife an annuity It was witnessed that in consideration of the covenant of A. B & his wife & C & of 10/. the said D. E & C each & every of them covd. with C. A. B & his wife ~~for quiet enjoyment & for exonerating an assignment to F.~~ to pay the annuity - There followed covenants by A & B for himself & wife & C severally for quiet enjoyment & for exonerating an assignment to F whom required the deed was signed by D. E. C & F. only - In an action brot. by A & B after C's death for non payment of the annuity. Holden that they might sue in the action the they never executed the deed 2. that such omission did not amount to a total failure of consid.n - 3. that the covt. to pay for quiet enjoyment & to assign were not mutual & dependent & that after the death of C. D & E. the suit could be sustain. agst. D's executors the the covt. to pay was made both by & to C. 22 L.J. 191 119 -

Where two ~~[illegible]~~ let premises Redendum to the tenants for 5 years with covenants on their part to pay each of the lessors a moiety of the rent Holden that as the Off. gave a joint lease their interest in the subject matter of the contract was joint until severed by the payment of a moiety of the rent to each & therefore both must join in a suit as well on this principle as that where the contract is under seal & between the parties the persons to the cont. must also be parties to the suit 10 Vaus 374

Where one warranted with several part owners of a Ship their several & respective assigns to pay certain moneys to them & to their & every of their several & respective assigns in such parts & proportions as were fit according their respective names Held to be a several cont. & that the owners of the Ship could not join in a suit upon it but each must sue separately for his share 21. L & G 98

£ 1218

# Covenant Broken

satisfaction by one is no bar 5 Co 86 Co 182. 124 qu. is not satisf. by one Cuff. 1 Mod 82 —

If one of two joint obligors die his ex.r is not liable to the obligee — the remedy remains against the survivor — Semb if joint & several 1 East 100 2. 344. 345

If two cov.t jointly or severally or is continued and Caus 832 Ryd 185 Stra 76 —

If several are bound jointly & severally & one is made Ex.r by obligee the obligation is released at Law. 13 Bac 99 8 Co 136 Sal 300 1 Saut 264 — 1 Sown Eq. as to obligee's representatives but not as to creditors or legatees (Sulb. 240 2 Ba 344 Yelat. 180 Bro. C 273 2 Pow C 254 9 Mod 82. 10 Co 515) for it is in nature of a legacy to obligor & legatees are postponed to creditors

If an instrument begin with the words "we cov.t &c" & is signed by one only he may be sued upon it Burr 323 — 2 B.R 32

If the instrument state A. B & C cov.t on one part &c & C did not execute covenantee may sue A & B alone & aver that C. did not execute — Stra 1146 2 BR 37 Burr 323 7 Mod 358 1 Selw 482 n.

If two or more bind themselves together in an obligat.n that contract is joint of course (Semb.) tho the word jointly is not used unless words implying a several

# Covenant Broken

obligation or only one cited 3 Ba 697. 1 H Bl 236 5 Burr 2611
Ch 175 Dr R 1203

But if co-vnt. begins "I promise to pay &c" & is signed by two it is joint & several Ch 175 Peake 130 Str 76 809
Dr R 1514 Comp 832 5 Burr 2611

When an administrator has covenanted for premises demised to the intestate it is no plea to an action of covt. for non repair to say the premises yielded no profit
27 Co. L 315 Lessee in covt. agt. him for rent & repairs 1 Saund
112 n C. 8 Saunt 191. 4 Bandcock 1. 341

Account will not lie between Partners where there are three or more the remedy is by bill in Chancy 2 Ch. R 427. nor in such case any other action at law—

Chancery exercises a concurrent jurisdn with Courts of law in all matters of account— 2. C.C.E 1.38.52 9 J.R. 470 493 10 do 587. 596 3. J.C.C 348. 361—

Last action of account in Engd 3 Wil. 73 and 2 Camp 238 5 Taunt 431—

# Account

This is an action founded upon an express or implied contract that one who has received property of another to account for will render his account for it – if not this action lies – At C.L. this action lies only against Guardians in socage – bailiffs & receivers & between joint merchants – 1 Bac Ab 1 Saut 172 190 2 Roll 117. 61 Dects. 227. 1 Saw N.R. 1.2 2 Com Account. C 1 Litt f. 123 Selw 2. 2 Sw 148

By 4 Ann – the action is extended in favour of one joint tenant & tenant in common against the other as bailiff – before this St. they had not this actn. 1 Bac 17 1 Saut 172. Selw 2

At C.L. the actn. lay between the original parties only – not for or against their Exs &c – being founded on such privity that one party was supposed consenting to the others disbursements – 1 Com Acc. B. C. 1 Saut 89 Litt f. 125 F.N.B 117 1 Bac 17. 2 Saut 404 Selw. 3. 4 – –

Exceptions at C.L in favour of Exs of joint merchants – not against them – 1 Saut 90 Com Acc. B 2 Saut 404 –

Sts. 13. 25 & 31. Ed. 3 – extended this action generally to Exs in case of guardians bailiffs & receivers – the Exs. of Exs & admrs 1 Bac 17 1 Saut 89 2 404 Litt f. 125 Selw. 3. 4 –

St. 4 Ann – extended it against Exs & admrs of bailiffs & receivers & to & against Exs & admrs of joint tenants & tenants in common as well as to the joint tenants &c – so that it

# Account

now lies generally against the personal representatives of the original parties 1 Ba 19 3 Bl 164

Our St 3. extends the action to joint tenants, tenants in common coparceners their Exors &c against their co-tenants their Exors &c - also ~~in~~ favour of Exors. who are residuary legatees against their co-Exors. - & to residuary legatees, ingent. - By usage it lies here against Exors &c of bailiffs & receivers - or for the Exors &c of those whose bailiffs &c have not accounted 1 Mod 276 - 2 Sw 118

In every case of wast of guardians Coptn is charged as bailiff or receiver or as lotts - 3 N.B 116. Com. Ch. E 2 C 3

A bailiff is the agent or servt. who has received the property of any kind of another to improve for the owner & account & who is entitled to an allowance for his reasonable expenses & charges - he must account for the profits which he has made & for those which he might have made by reasonable industry. 1 Sut 172 Com. Ch. C 3 1 Ba 19 Selw 2...

A Receiver is one who has received money to the use of another to render an account & who has no allowance for his trouble - Ex. Receives money due on a bond to B - 1 Sut 172 1 Ba 19 1 Roll 19 Com Ch. C 4

Generally receiver has no allowance & is not bound to account

After the termination of the particular estate by the marriage of the widow an account lies to recover personal property limited over 2 Day 28

# Account

for profits – Exception on between joint merchants Deft has allowance & account for profits (1 Inst 172 1 Ba 19 1 Com Ct E 10.13 ) therefore a bailiff cannot be charged as receiver – if he were he would lose his allowance. 1 Inst 172 1 Roll 119 1 Ba 19

This action being founded on privity lies not in case of tort except in favor of the King in Eq. & infants. 1 Inst 172.90 Com. Ct. C.89 1 Co 89 1 Vern 136 1 Atk. 189 2 Vern. 295 – 312 3, N.B 118 Cro E. 229 Cro J 89 – R £179

If there are three or more partners in trade account does not lie at law to adjust their accounts – the remedy must be in Eq. to adjust their accounts to prevent a multiplicity of suits – 2 Ba 269. 2 Bac 192 – 2 Ct. 427

In declaring against bailiff or receiver Pff. states that he delivered such property to Deft. as bailiff &c & that Deft. refuses to render his reasonable account to his damage &c – & demands of Deft his reasonable account & together with his costs & damages &c – In case of partnership (Semb) of joint tenants &c) Pff. states that Deft. has received more than his part &c 1 Ba 1147

Said that account lies not for a sum certain – as if one delivers £100 to a with which to trade the former shall not have account for £100 but for the profits – (1 Ba 19. 2 Brown 7 b) Finly 184 in contra should not the rule be that for a sum certain in receiver one cannot be charged as bailiff? Com Ct C.3

174

# Account

Account lies against a Sheriff for a sum certain received on ex.ⁿ —
So for money received by C on a bond to B. Mod. 206

So where one receives money to the use of another & refuses to render an account this action lies for the money received — So if money is delivered to be re-delivered on a certain event. 1 Sunt. 172. 1 Bac 201 2 Mod 101 Com. Ct. C 4 & N B 116 1 Roll 14. 22 116

Quære by S.C. that account will lie for a sum certain Pirly 163

If money has been received by C to the use of B account lies by B. & here Pff. must declare of whom the money was received 1 Sunt 172 1 Roll 120 & N B Com Ct. C 4 1 Root 319

Still if S deliver to B to deliver to C for my use & B delivers it S cannot have an action against C — for he is not privy to the use (1 Com Ct. C — 1 Roll 118.) Semb. not law now —

If bailee of goods wants or refuses to deliver them acc.ⁿ will not lie but trover or detinue — for he does not receive them to improve & acc.ⁿ for. 1 Bac 19 1 Roll 116 Com Ct. C

So it lies not against Executors for the profits — for this action is founded on contract (1 Com. Ct. C. 3 Leon 244) exceptions — Servants & Bring £ 172

If the bailiff &c of C make a deputy A cannot have the action against the deputy for want of privity. but against the bailiff &c

When A. sold assigned & transferred to B. all his right title & interest in a policy authorizing B. as his atty. to collect the same for his own use to secure him for advances to be made to A. & B collected money upon it. Held that account could not be sustained but the remedy was in Chancery 10 Ct 209

When the deft is charged as bailiff the declar.n specifies the particular goods of which he had the care and mismanagement. – When the action is brot by one joint tent. against another the declar.n states the potentialitas of the parties & alleges that the deft has more than his joint share of profits Co 3 410 5 Bing N.C. 288 3 Hil. 73. 3 Ch Pr. 1297. 3 Hill 61.

When the deft is charged as receiver declaration must state the writ is general the count must be special stating by whose hands the money was received – 2 Lev 126 Cowd. Ac A. 4 E. 2 3 Hill 61

Will an action of account lie between partners unless they are merchants 3 Hill 59 Co L. 172. a – ?

# Account

may. Com. At. C. 89 1 Roll 118 S. N. B 119

The an Infant may be Ex.n & liable for torts yet if made bailiff he is not liable to account – for he cannot contract & is supposed incapable of accounting. Com. At. C. 1 Bac 17 1 Roll. 119. S. N. B 118 1 Sun. 172.

If he who receives property of another to acct. makes an express promise to acct. this action or assumpsit Aft. lies on the promise lies 1 Bac 21. 1 Sal 9 Carth 89 Reeby 164. 254 Esp 96.7.

Said by Holt that in Aft. Pff shall not travel into the transaction of the acct. but confine himself to the damage he has sustained by Deft. not accounting. Esp 97. Sal 9 Carth 89 Com. 119 – qu 1 Bac 20 –

If one by deed acknowledge that he has received property to acct. Pff has his election to bring his action of acct. or on the deed – 1 Bac 19 1 Roll 118 Cro 20 Pow C 219 255 2 Bl 497 Com Acct. C 4 –

If one finds property of another account does not lie against him – no privity of contract. Com Acct. C –

## Mode of proceeding.

If Pff prevail in this action there are two judgts. 1. Quod computet – that Deft. account – Auditors are then appointed before whom the accounting is had. 1 Bils 99. 1 Bac 21. 1 Mod.

# Mode of proceeding. Account

42 1 Com 92 Com Acct. E 15 – 3 Wils 192 Cas. T. 134

The auditors then make their award – & final judgt. – general remedy is rendered thereon as on an account. 3 Wil 164 1 Selw. J. 9. 11 Co 4 0 Com Acct. E 15

This cannot be joined in a declarn. with any other claim whatever

Before auditors in Ct – the parties are of common right entitled to testify – they may also be required to testify & on refusal may be imprisoned by the auditors until they comply. St Ct. 28

If Deft. refuses to attend before auditors & exhibit his acct. the auditors must award Pff his whole amount or demand St. 28 In Engd the Court do it. Cro E 806 3 Wils 117

In Ct – if the auditors find a balance in favor of Deft. they may award it & judgt. goes for him to recover damages as well as cost. 2 Sun. 150 – Semble in Engd as ext in Chancy. Semb. 1 Barb – 2 Root 121

As to what Deft. may plead in bar there has been considerable controversies. 3 Wils 113 –

It is competent for Deft. to plead to the action any thing which shows he is not bound to acct. – a good plea therefore "that Pltf never was bailiff &c – & this is the Gent. issue. Com Acct. E 11

# Mode of proceeding. Account

1 Ba 20 1 Roll 121 .

So a release of all actions is a good plea in bar - an award of arbitrators that Deft. should be acquitted - if operates as a release - 1 Roll 123 4 Ba 85 - 1 Ba 20 Cro E 82 -

Plea that Deft. received the money to deliver to P. & that he had delivered it is ruled to be good (Com Dig E. 5 - 1 Roll 122. L.) Cro E 830 3 Wils. 111) qu - for it shows that he never was liable to acct. amounts to gen issue - not a good ground of demurrer 2 Day 432

These pleas all go to shew that Deft. ought not to acct. and therefore go in bar of the action - But a plea that Deft. has made payment or satisfaction of the money is not good in bar - for he was bound to acct. & his liability is not released - but such plea is good before arbitrators as this is accounting 1 Ba 20 - 4 Ba 85 1 Roll 123 Dy 22 115 6 Co 7.

Fully accounted is a good plea in bar - on this plea Deft. cannot go into the account but must prove the fact 3 Wils 113 1 Roll or Rood 425

But if Deft. shews he has once been liable to account no special plea in bar of the action is good except "fully accounted" & a release or something equivalent to it - as an award of a release or in discharge &c (Comyn 3 Wils 73. 113) other things must be specially pleaded & cannot be given in evidence under gen. issue - 3 Wils 113-14 2 Sev. 149

# Mode of proceeding — Account

Before auditors parties may plead & join issue either in law or fact — which is then to be carried back to the Court & there tried. 1 Com 93 3 Wils 99. 117 Cro E 84, 806 1 Ba 21 Com Act. E 11 — qu if the issue is nothing in — Does the rule extend to any other issue in fact than a special one? This rule as to issues in fact is not accepted in Ct —

Whatever may be pleaded in bar to the action must be so pleaded & not before auditors — this is to avoid trouble & charge to the parties Leon 219. 1 Ba 21 1 Com 93 3 Wils 93 101. 13 Cro E 82. 116 Sti — 211 —

Nothing can be pleaded before auditors contrary to what has been pleaded before the Court & found — & nothing which impeaches the judgt. quod computet — hence the pleas "never bailiff" & release "fully answered" — are awarded in disbarrance & not good pleas before auditors — for they clear Deft. liability & are contradictory to the judgt. quod computet. 3 Wils 113. 114 Cro E 82 2 Day 116

But it is a good discharge to Deft. before auditors to show anything which could not be pleaded in bar to the action & which discovers that he ought not to be eventually liable — As that the property was lost at sea &c — (1 Roll 124 1 Ba 21 1 Lut. 89. Com. Act. E 11) Or that the goods were taken by robbers or by publicans without default — (Supra et — Stra 880 — 1 Com 91 — 4 Co 84 —) qu — was not the plea in Stra 880 that the goods were taken by

Mode of proceeding. Account

ownership or plea in bar to the action?. 1 Com 91

That the property was perishable &c & in danger &c & that he sold it therefore on credit is not good accounting for he had no right even in this case to sell on credit without a special commission to that effect. 1 Bac 21 2 Mod. 100

Exec. in accounting is allowed all losses occasioned by inevitable accident without his fault. Com Dig E 12 - 1 Saut 89.

Bailiffs are allowed their reasonable expenses - Same bailiffs in their own wrong - As disseisors of infants infants &c - So also of a receiver. 1 Saut 89. Com Dig E 12 - 13 1 Saut 172 - 1 Leon. 219.

When the award is returned to the Court final judgt. is rendered for the sum awarded - & in Ct. the fees of the auditors are a part of the bill of cost tho to be paid at the rendering of the award by the unsuccessful party St. Ct. 37. 2 Sw. 150.

Auditors are not appointed in Ct. in action, before single ministers of the law - he takes the amount himself - Stat. does not authorize him to appoint auditors. St. Ct. 37. 2 Sw. 151 1 Ros 217

In actions of book debt for more than $17. the Court

## Account

may appoint auditors & proceed as in acct. – From judgt. given in County Court on the award of auditors no appeal lies in Ct – St. Ct. 37. 2 Sw. 171 – B.D. 3 –

In Eng. the action of acct. is not much in use – the usual remedy being by bill in Eq. – for in Courts of Law Pff is not entitled to a discovery of books &c – nor to Defts oath 1 Bac Ab 3 Bl 381 437. 49 Watts – 228

Our St. has virtually given to auditors all the powers of Eq. in this respect –

If either party is dissatisfied with the award he may apply to the Court for relief 1 Bac 21.

An award may be set aside if the auditors exceed their commission – or mistake on their own principles – or if they mistook the law or given facts – &c for corruption or misbehaviour – 1 Root 268 413 2 Cay Ab Dig 253

In Ct objections to the award are made in writing by way of remonstrance – The Court will not however generally enquire into the facts – but for mistakes in law appearing on the record or from the examination of the auditors in Court the report may be set aside 1 Root 137. 261. 8 2 Cay Ab

But as to mistakes the Court will enquire of the

In actions of Book debt where no quest.n of law is involved the Court will in all cases appoint auditors Sup. C day 1818 -

If one tenant in common will not suffer his co tenant demand & claim a right to the property the co tenant to enter upon may treat it as an ouster but it will not deprive him of a right to account in the same manner as if he had not been ejected 16 L 26

# Account

auditors only — Sums of misbehaviour & corruption in auditors —

In an actn of acct for money how recd of a 3d person such third person may be a witness to prove the receiving 1 Rot 55

# Debt

The legal acceptation of the word "debt" is a sum of money due by certain & express contract - tho there is no necessity of an express contract for this action - as by a bond for a sum certain (2 Bl 154 Esp 92) so far as a sum certain is capable of being ascertained - so it lies also in some cases on implied contracts Cowp 1. 1 Bl 550. 2 Bac 13 2 Ld. 94 3 Bl 155 -

Debt on simple contract is aided in Engl by reason 1. of wager of law - i.e. Defts swearing that he owes nothing & compurgators swearing that they believe him - which is equivalent to a verdict for Deft 3 Bl 115 Co 219. 3 Bl 341. 3 -

2. Because by the old rule the whole sum demanded if any must be recovered (3 Bl 155 Co 219. 2 Roll. 1221. Cowp 703 n Co B. 219.

In some cases debt on an express simple contract does not lie against Exors &c. because no inselleteness on their part (Plowd 182 1 Sec 200 Co 219 -) for testator might have waged his law but his Exors cannot (Esp 172 9 Co 87 Co B 135 187. ) this reason has ceased to exist —

Debt lies on a promissory note against the maker (bent) tho qu - against the indorser - he seems to be in nature of an insurer of the debt & on principle it will not lie against him. Co B 221. 11 Mod 38 1 Mod Ent 312 Stra 680 - 8 Mod 375 Burr 94 Salk 173 - Esp 173 Id 898 n

Where action of debt is brought on simple contract the deft. may waive his law by answering that he does not owe in manner & the debt in any part throwing a 12 other answers that they believe him & then the Pltff is not allowed to contradict 11 C 2 406 2 Sal. 682

In debt on bond cond^n that def^t should account for all monies received - Pl^f must set in his replication set forth the manor & the place where def^t received the money. 1 Bos & Pul 640 8 T.R. 459 14 C.L. 136 But in assumpsit charging a clerk with negligence in suffering his employer to be defrauded of money the particular sums must be specified 14 C.L. 350

In debt to recover double the value of a specific article as a penalty 4 H. Pl^f may recover a less sum than demanded in Dec 20.

# Debt

If one expressly promise to pay a sum certain for property delivered to him for his own use debt lies – Sed sic generally if he promise to pay for another – here must be a special action on the case – which will lie when the person for whose use he is never liable Semb. Esp 173 Burr 1886 Ch 220 Cy 21. Bro C 880 2 Bac 20 L R 842.

Debt will not lie for freight against owner of a bill of exchange became in the nature of a guarantee &c – Esp 23 Ch 220 1 Roll 597. Cy 21. 1 Vent 152 12 Mod 345

Rule of C.L that Pf in debt must recover the precise sum declared for or nothing – F.N.B 119 Cy 219 3 Bl 155 –

This rule is not now observed in case of debt on simple contract 2 Bl R 1221 Cowp 703 1 Tb Bl 249 3 Bl 155 –

Debt lies in some cases on implied contracts – as against Sheriff who has collected my money (Mod 206 2 Bac 4 Ch. 220) So where there is nothing like a bargain or other commercial transaction, as on a penal Stat – where the penalty is certain & no specific mode of recovering it prescribed – this is a civil action and is common both here & in Engd – 2 Bac 14 1 Roll 598 4 B.R 755 Gh 257. 2 Bac 203 3 Bac 448 Cowp 282 1 Root 1 Kirby 179 L.Ch.55.

So will on penal St. "not guilty" is a good plea Semb. the cont. –

# Debt

not good to debt on specialty. Carth 361 13 R 462 Do R. 1800

The debt lies not to recover damages yet when they are recovered debt lies on the judgt. – for the demandly the judgt. is made certain 2 Ba 14 1 Roll 600 2 Bl 465 Hob 206

So upon an award of arbitrators to pay a sum certain – it being in the nature of a judgt. Stra 923

When Deft. in judgt. is in custody on the exn. debt on judgt. does not lie – So if having been in custody he is discharged by Pltffs consent. So if goods are taken – for a taking in exn. is a satisfaction in law. 4 Burn 2482 Esp. 196 13 R 557 Bro 525 – Pro. 420 8o 123 3 Wils 12 Sal 223 2 Mod 214 2 Bac 235.55 1 Rob 551. Lg3

But it lies if part only of the amount has been collected or levied Esp. 196. 1 Bac 92

Time when &c. In Eng. generally exn. cannot issue after a year & day & in this case at C.L. Pltff only remedy was by debt on judgt. by original writ – payment after such length of time being presumed 2 Bac 301. 61 Carth 30 1 Sid 301

But St. Westm. 2 gave Sci-fac in this case to shew cause why exn. should not issue – & now after a year and day Pltff. cannot take exn. without a Sci-fac – except where exn. has been suspended by writ of error & in some other cases

Whether lessor can maintain debt for rent against assignee of a part of the premises has not been decided at any rate a declaration should state the facts, if it arises on an assignment of the whole premises it is bad 27 L & L 563

# Debt

3 Ba 392. 62 Cro J 364 1 Roll. 899 6 Mod 288 Carth 283

It has been questioned in Engd whether debt on judgt lies within a year & day (1 Roll 601 that it lies after a year & a day) per 13 R 637. Said 2 Ba 14 that debt on judgt is allowed to punish Deftn for not paying - that Pff may not be put to the expense of levying by exn & to compel payment without exn - Semb therefore that the action will lie before a year & day - vide Carth 283 3 Bl 421 13 R 637

In Ex. no time limited for taking out exn - hence no necessity of bringing debt on judgt after a year & day as in Engd - & it seems to be generally agreed that debt on judgtn will not lie while exn can be taken out & the full benefit of judgt obtained by it - hence it would be expensive to sue. But where exn cannot be taken debt on judgtn will lie - Eg. Justice dr before whom dr dies or is removed before exn granted or satisfaction of judgtn - Pff may have debt on judgtn within 5 years - & if the debt does not exceed £35 - it may be brt before another Justice. St. 38

(Does he mean a Justice of the Peace?)

So when great length of time has elapsed - Court will not grant exn Debt or Sci. fa - will lie - So where full benefit of the judgtn cannot be obtained by taking exn - As if Deftn in the original action is an absconding debtor & Pff wishes to fastain (Bilg 311. 421) So if judgtn was rendered in another State where satisfaction cannot be obtained & Deftn has removed to this State - So Semb. where Pff wishes

# Debt

to obtain interest on his judgt. - Such case in Middlesex County decided in favor of the action Brily 177 -

An erroneous judgt will support this action - for such judgts. are available to all purposes till reversed. 2 Bac 211 7 Mr 458 3 Wils 345 8 Co 142 Root 176

By the Constitution of the U. S. full credence shall be given by Courts in one State to judgts. records &c in other States - Can there be any enquiry in this case into the original cause of action? qu - Cit 4 Sp. 1. Decided in N.Y. that there may be - Contra in Ct - So in Penn. 1 Coll. 188 2 19. 61 2 Ba 302 1 Cranch 460 Brily 126 1 Johns 426 - ) According to these decisions they are placed on the same footing as foreign judgts - they are not records according to the C.S. same only prima facie evidence of a legal demand - Contra 19 Johns 162

Formerly holden that debt would not lie upon a foreign judgt. - Stra 1090 - Seems now that they are treated as simple contracts only & examinable - The judgt itself however implies a suff. consideration till the contrary is shown by Deft. (Cong. 2 M & W 411) Pff in declaring need not shew the orig.l cause of action 5 East 475 Ct at Sup.

The judgt. of a foreign Court is examinable here only when he who claims the benefit of it applies to have it enforced - for it is thus voluntarily submitted to the jurisdiction of our Courts - Seems when pleaded in bar - 2 M & W 410

In declaring on a judgt of a Territ in a sister State the Statute giving the Territ jurisdiction cannot be pleaded a genl assumpt of jurisdiction is not suffit
7 Mand 435 3 do 267 6 do 458 10 do 76 6 Wh 103
2 do 34 8 do 99

8 Johns 178
12 " 232
2 do 1 Chitt 413
1 Mass 101
14 Johns 346
1 Dec 198

Courts will not take notice judicially of the laws of sister states at variance with the G.L but on a G.L. question the presumption is that their laws are like our own 10 Mand 75

In an action of debt for rent defdt under nil debet may shew an eviction by Pltff 1 Saunds 204 n 2 Lessee in Covt. 4 Mod 427 If lessee wrongfully enters into part of the demised premises tenant is dischd from payment of any part the whole rent, till he is restored to the whole premises Bac. 9 Co 135 8 Comm 728 11 Johns 499 4 Mod 427. & an eviction being shewn the presumption is that it continues

Nil habuit in tenementis is no plea in debt for use & occupation or in assumpsit or in Replevin on a distress for rent on a parol demise 27 E L 291

# Debt

1 Ray 473 1 Kein. 59

In debt on such judgt. nul tiel record is a void plea - yet declaring on the judgt. as a record does not vitiate the declarn. - Prout patet per recordam is surplusage Caug b

The laws of foreign countries are pleadable as matters of fact in such cases - as deed &c. Coup 174 1 Mod 105 2 Mod 410 3 Lev 224

Before the present Constitution our Courts allowed debt on judgts. rendered in other States & held that the creditor must be guardn. &c - yet they held that the original cause of action must be pursued in the declarn. (Brily 12 b) They treated such judgts. therefore less sacred than foreign judgts. at L.S. - there the judgt. alone was considered a sufficn. consideration Caug -

Indeb. lift. is consonant with debt on foreign judgts. Caug 4.5.6 - but interest is not allowed on such judgts. as on those rendered here - 1 Lev 213 b

Said in Caug b. that where Indeb. lift. will lie debt will lie also - not so in all cases - Ex. Money paid by mistake - Obtained by fraud. - by breach of trust - by sale of property converted by a person not the owner &c 2 Burr 1000

Should be construed in gen. & convenient of express promises to pay money & of those implied from an actual contract - Ex -

# Debt

Sale of goods without express promise to pay service rendered &c
Will debt lie? 1 Wil 350

On a void judgt. debt does not lie – So judgt. obtained by fraud in the proceedings – it is a nullity – Nun Sit. Cowell – So if irregularly obtained – Irregularity what? Non bringing of duty in Ct. Proceed. improperly filled up in Eng – 3 Wil 340 2 Ld 47. 2 Bl 445 485 Stra 509 993 Cro J 514 Is not a judgt. good [illegible]

In Ct. judgt. obtained by foreign attachment said debt does not lie against the absconding debtor – the object being to secure property out of garnishee's hands – qu – But debt on a common judgt. may be had by foreign attachment stating that satisfaction of the judgt. cannot be obtained by ex. Riley 311. 321

For money received by bond single bill or recognizance this action of debt is the only C.L remedy – & the most proper action on an assumpsit bill given for money – So it lies on a recognizance Sir fea – Esp 198 2 Ba 13. Cro E 494 187 608

A bond payable generally i.e. no time fixed at which to make payment is payable on the day of its date. 7 Bl 124

When the condition was that the bond be void if Deft. did not pay &c. C.B. held non payment a breach – clear mistake Doug 369.

The record of a judgt. of another State is conclusive here of the court had jurisdn & no matter what the original cause of action was debt may be sustained on such judgt. 11 Pick 390 6 do 247 9 Mass 462

If Judgt. be obtained against two joint debtors one of which only has notice of the first debt may be sustained upon such judgt. agst. both the the one having no notice of the first suit may set any defense in the 2d that he could in the first action. 6 Mass. 206 - & if required by the pleadings Offer must show an original cause of action in 2 Johns R 87 6 do 98 14 do 66

Held in 15 L.R 119 that debt may be sustained on a judgt. agst. one who was a resident of the country where the debt was contracted altho he was absent at the time such judgt. was rendered & had no notice of the proceedings - property having been attachd. on the first process -

If to debt on bond Def^t plead acceptance of specific articles in discharge of the bond it is ill – it should be in discharge of the sum contained in the condition Yelv^d 192.3 Croke 254 1 Brownl. 109. 1 Bulst 66. 8.4

Said in Yelv^d 193. that a debt payable on a contingency cannot be discharged
8

Failure of consid^n no defence to an action on a specialty
1 Conway 34.35 2 John. R. 177.179 in note 12 do 337 – L. 1215 n

# Debt

If a bond is given conditioned for performance of a collateral act there is sometimes a scintilla in Eq. it being viewed as evidence of an agreement to do the act - but the C. L. remedy is an action of debt for the penalty - In debt on bond damages may be given exceeding the penalty in certain cases - as if principal & interest exceed the penalty. 2 SR 388 Cowp 49 Burn 820 2228 3 B 1432 Powell 146 Burn 232 2 Saunds 106 3 Ba 691 6 T.R 303 1 Bart 436 - Contra 1 Cath. 75 3 Bro. C 489. 96 Bl.R 1190 3 Lev 604 Cowp 30

I should think it not competent for a Court of Law to give damages exceeding the penalty - Courts of Eq. in Ct. have determined where it appears that the sum due exceeds the penalty, interest may be allowed on the penalty - 1 Ms 308 White 434

On cont. to pay a sum certain debt lies. Stra 1089 1 Roll 591

If the condition of the bond is that obligor render a fair & just account of monies received - non payment of the sums received is a breach Cowp 367. 2 SR 388.

If there is a cont with a penalty obligee has his election to sue for damages in cont. below or in debt for the penalty unless it appear that obligor was to have his election to do the act or pay the penalty - in which case on non-performance of the act debt for the penalty only lies. 2 Powell 136 Burn 1345 2 Cath. 371 Stra 533 2 PW 193 2 Ves. 528 1 Bro C 418

# Debt

Debt lies against an officer who has collected for Pltff on exn. and refused or neglect to pay it over - for levying it implies a contract in law (2 Bac 14 Mod 206 Mar 886 2 Bac 11 Ch. 220 2 M & S 550) By the levy the property in debt is considered as transferred to the officer -

It is the usual appropriate action for rent reserved on lease tho cont. is in some cases convenient (Esp 188 1 Smit 872) But it does not lie against tenant at sufferance nor C.S. he being a wrong doer Esp 188.

Neither will it lie for collateral articles levied but not sold for want of purchasers - but should the officer return the collateral articles & estimate them in his return at a sum suffn. to pay the debt he & should neglect to sell them it would seem debt would lie against him - for his own return shows that Deft in exn. ought to be exonerated. 2 Bac 14 Mod 206 Cro J 516 Sedgw Dr R 1075 2 Saund 344 - Dyer 92. Esp 203 -

In debt on a fund for money the St. Limitation or a release may be given in evidence under "nil debet". Doe 298. 3 Bac 518 Dr R 566 Esp 262

Our St. Limitations. 460 limiting actions against Sheriffs for neglect or default to two years extends not to actions to recover of him what he has received on exn - not a neglect or default within the St.

LECTURES

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