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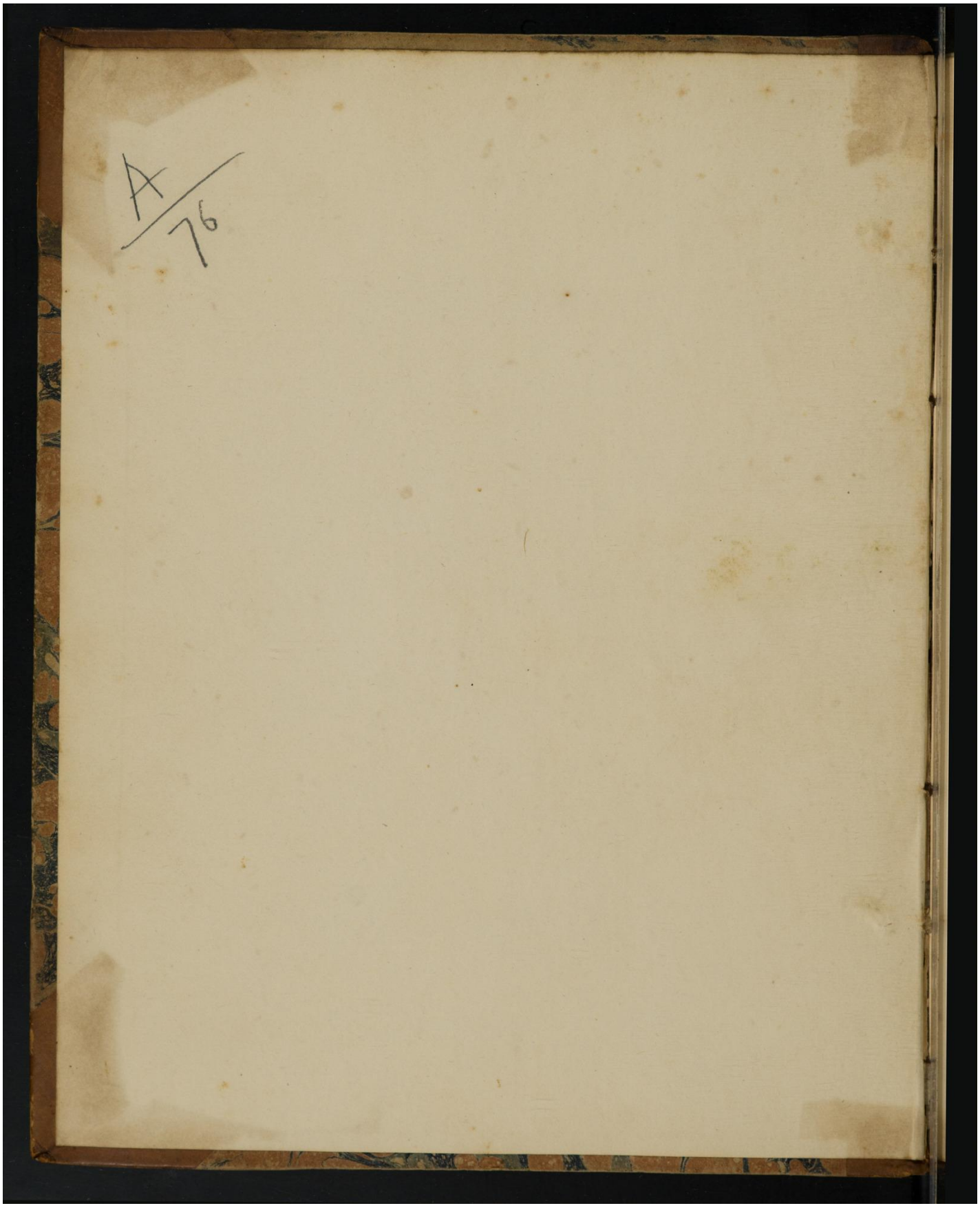


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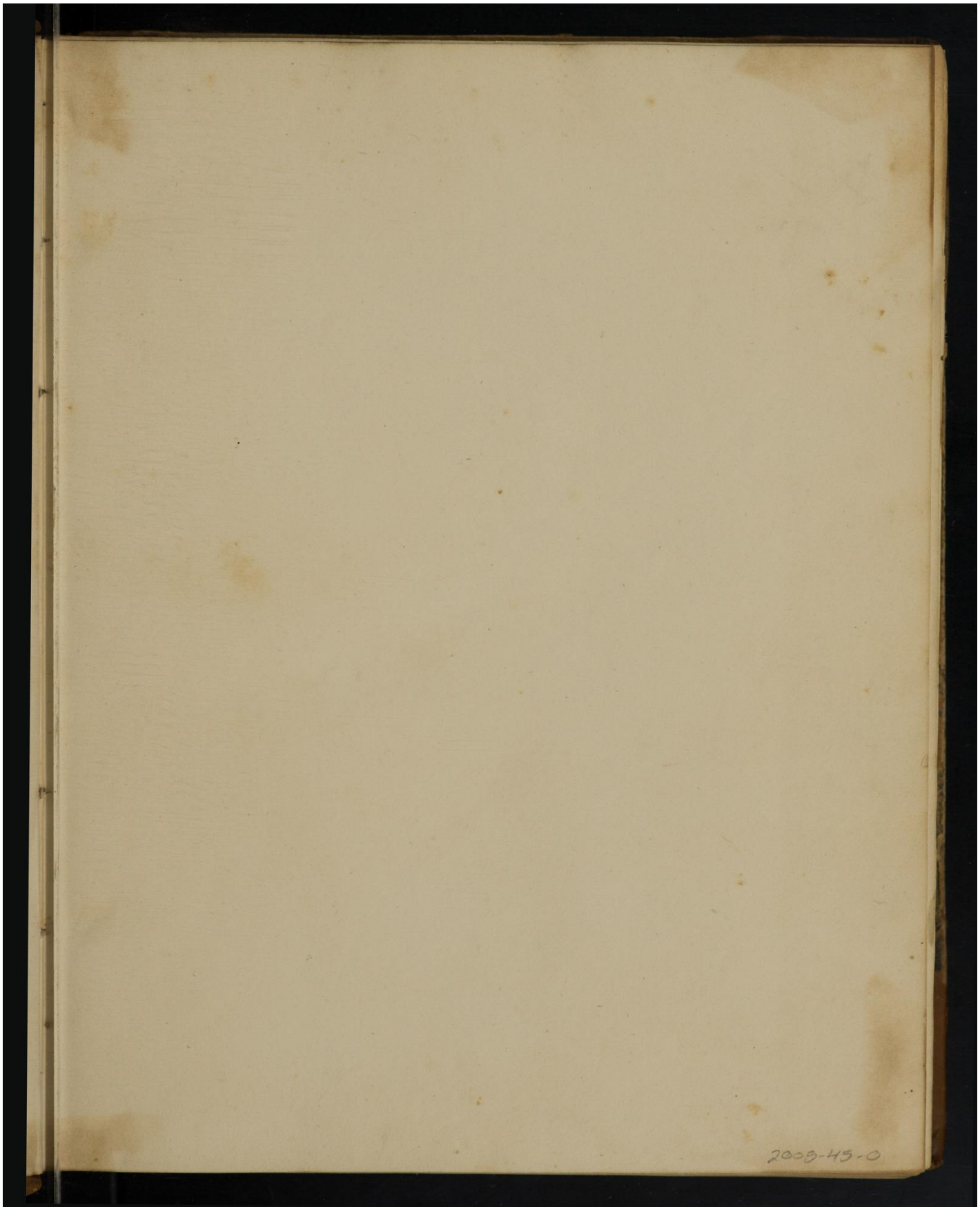


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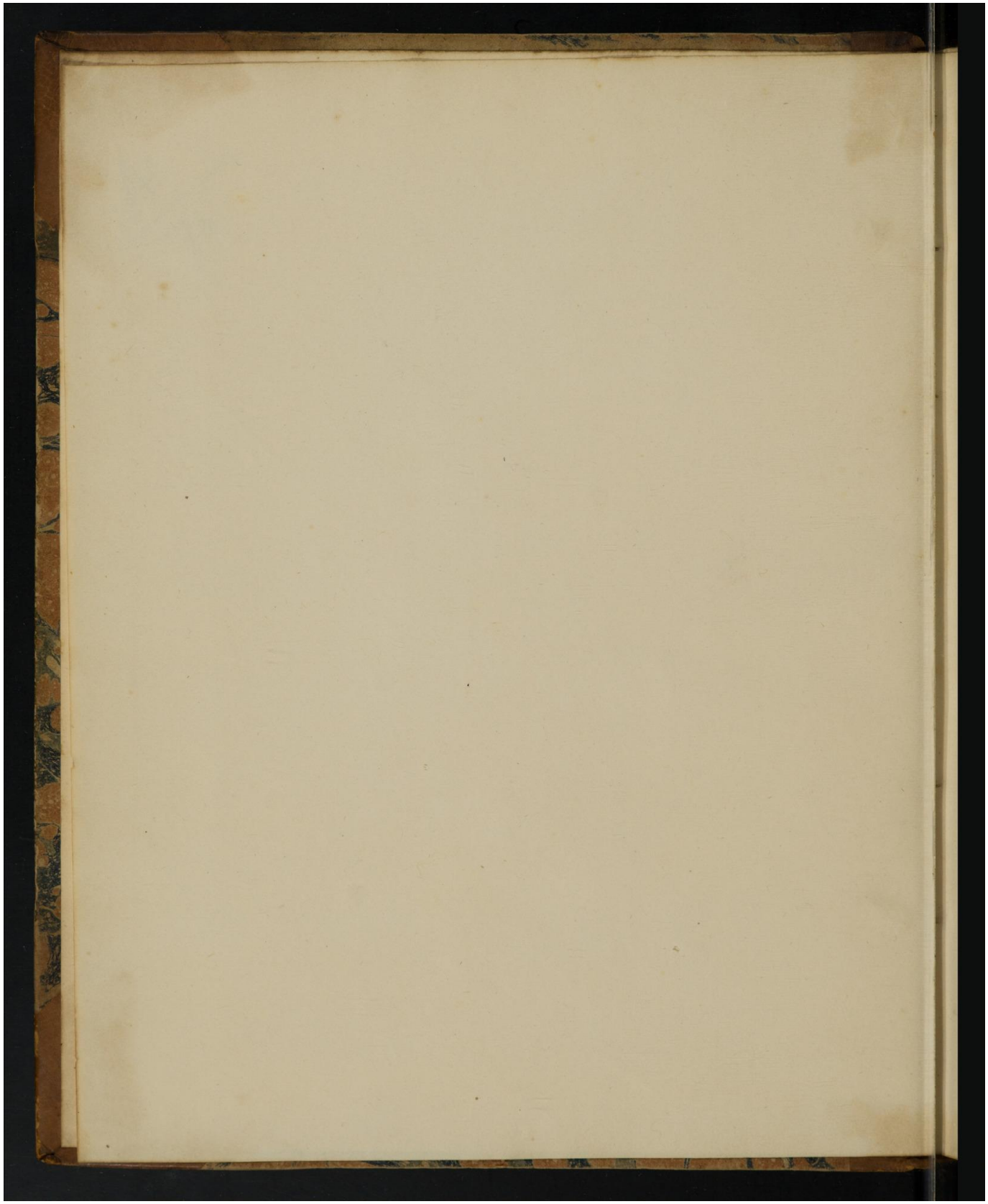


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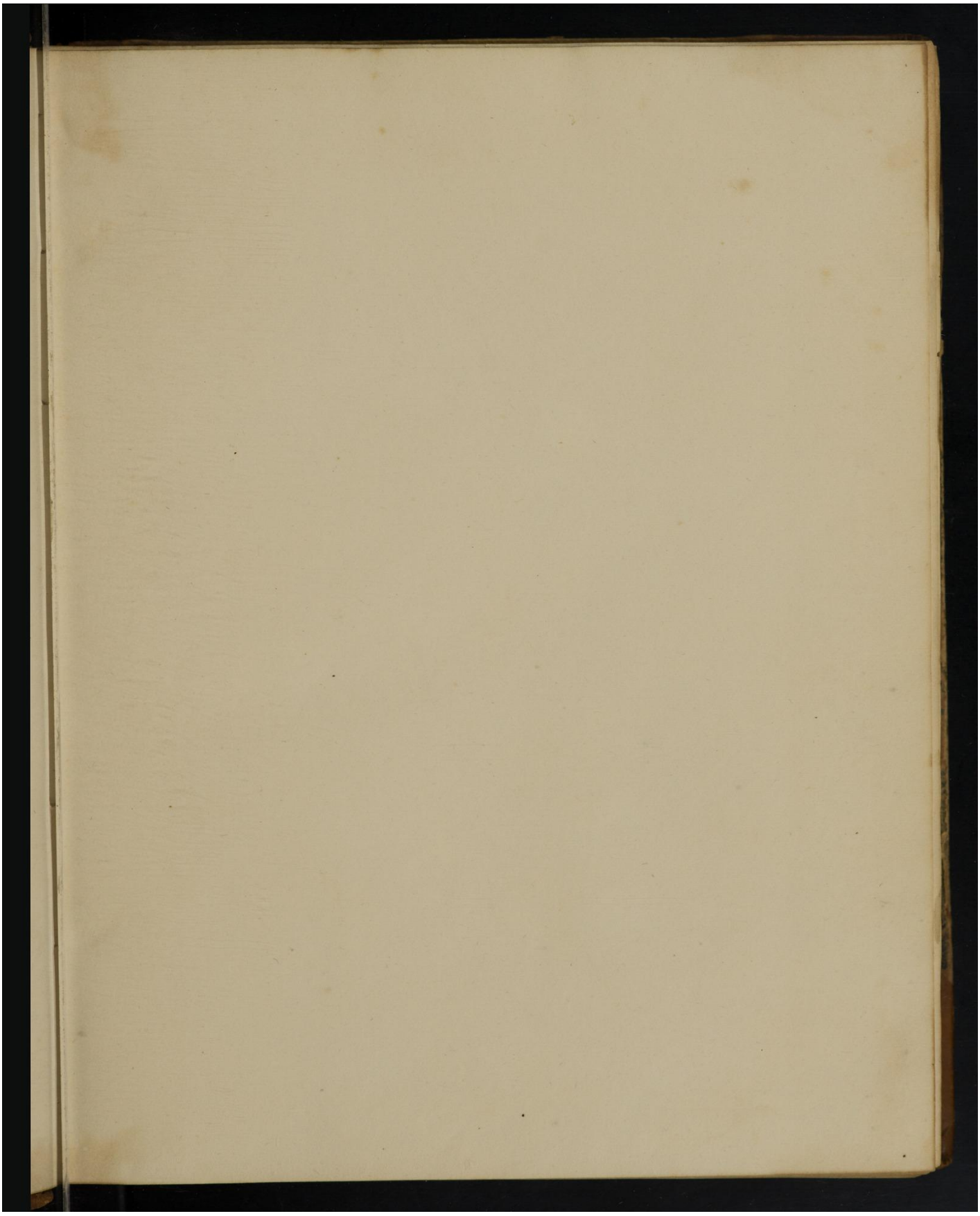


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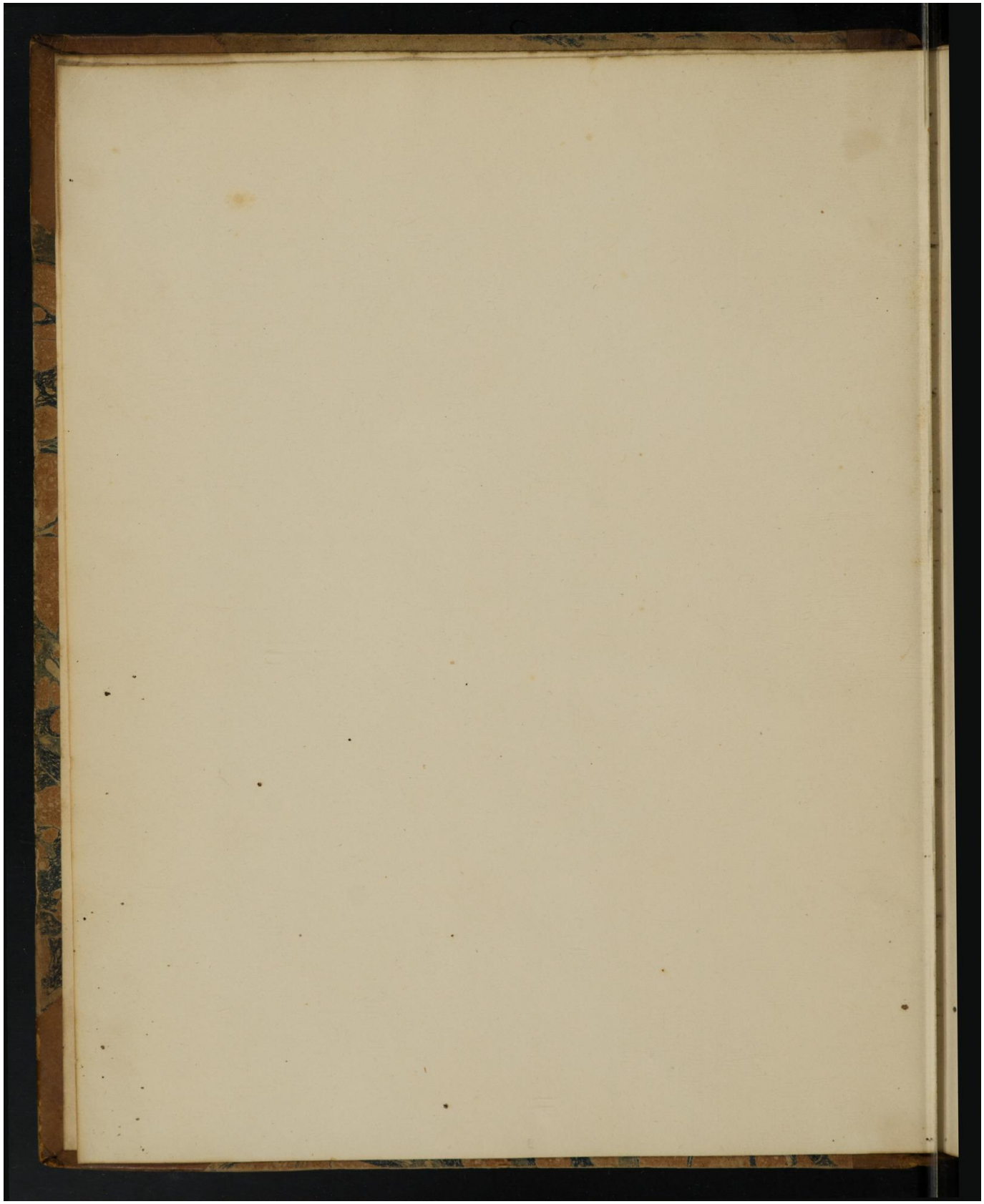


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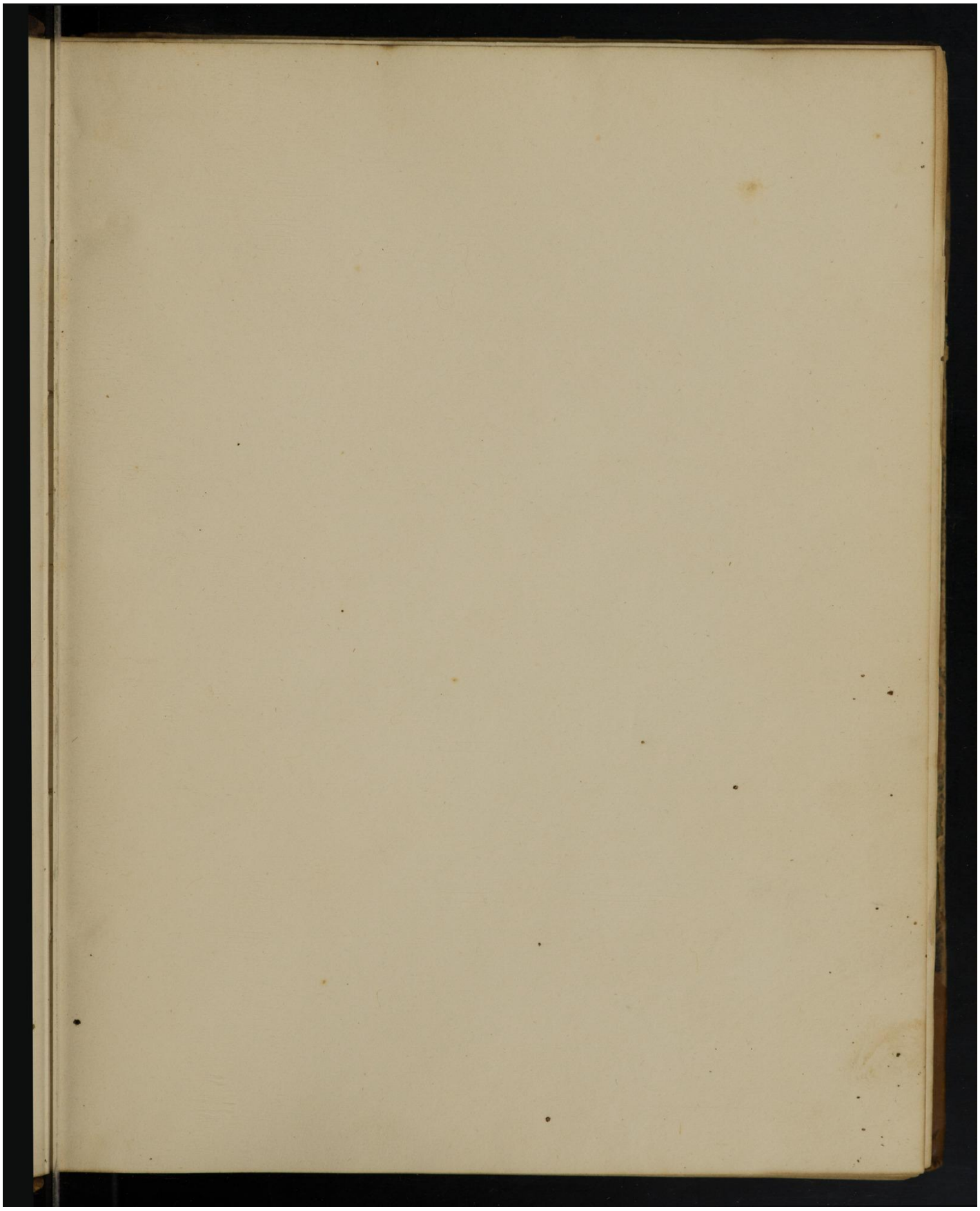


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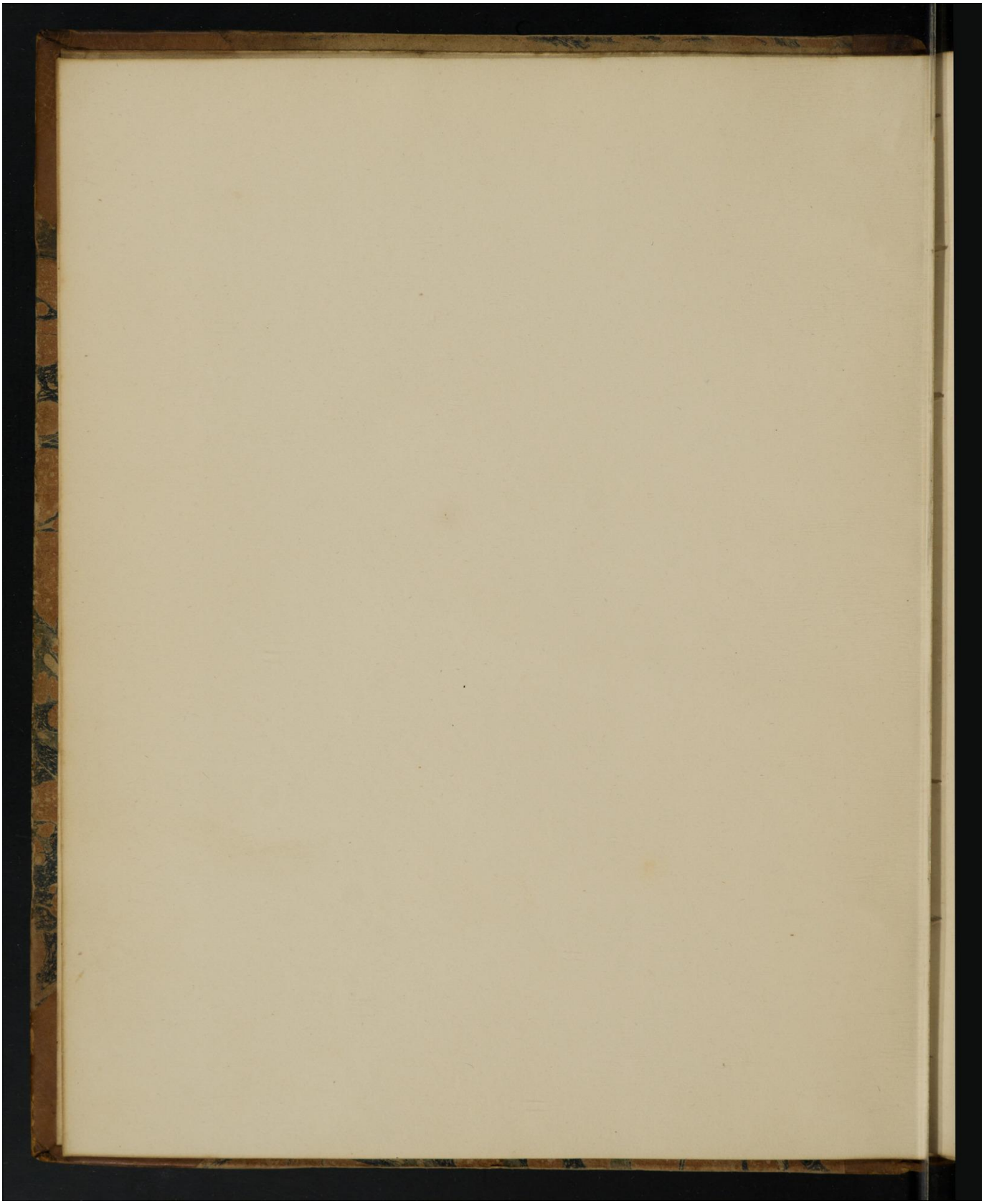


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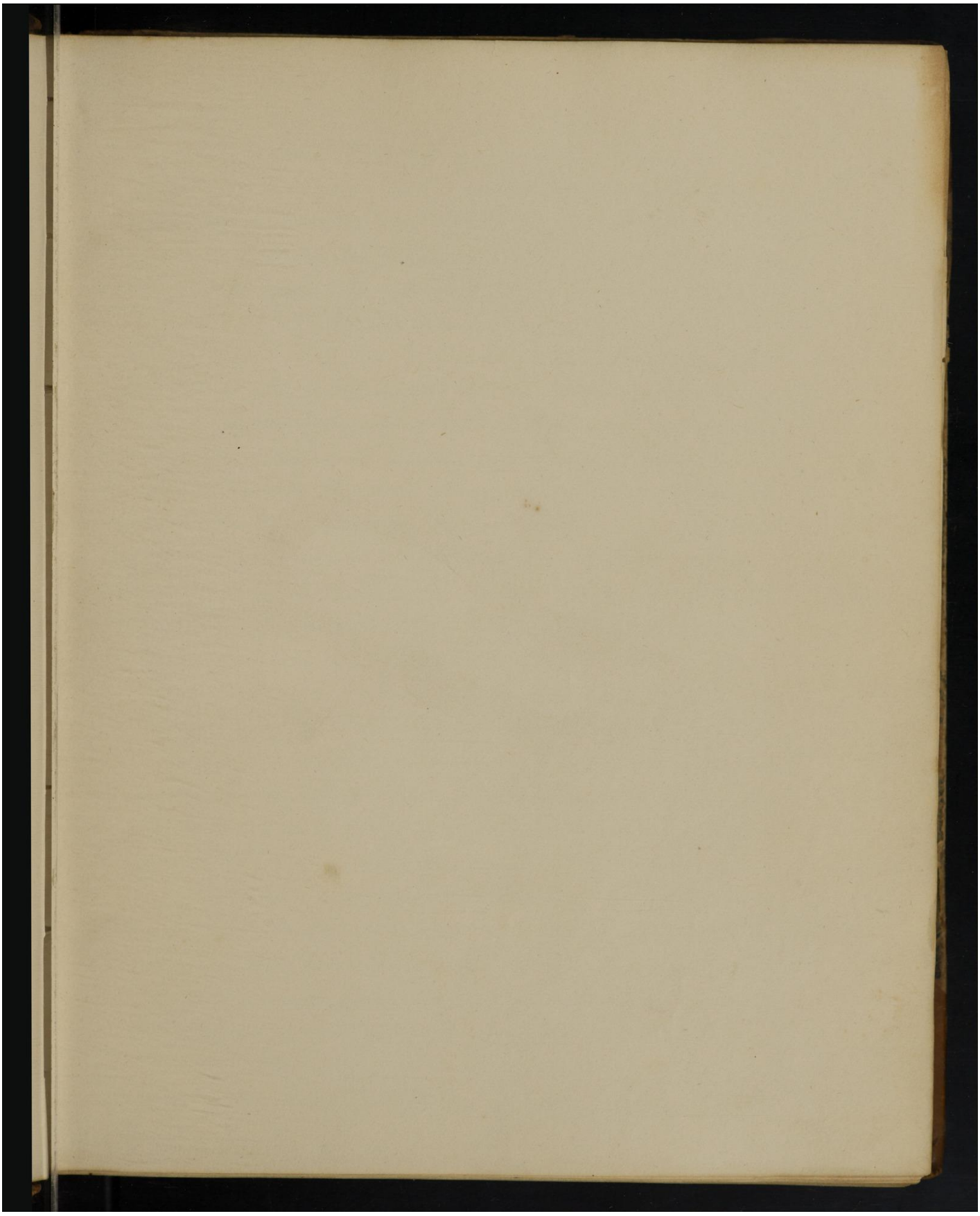


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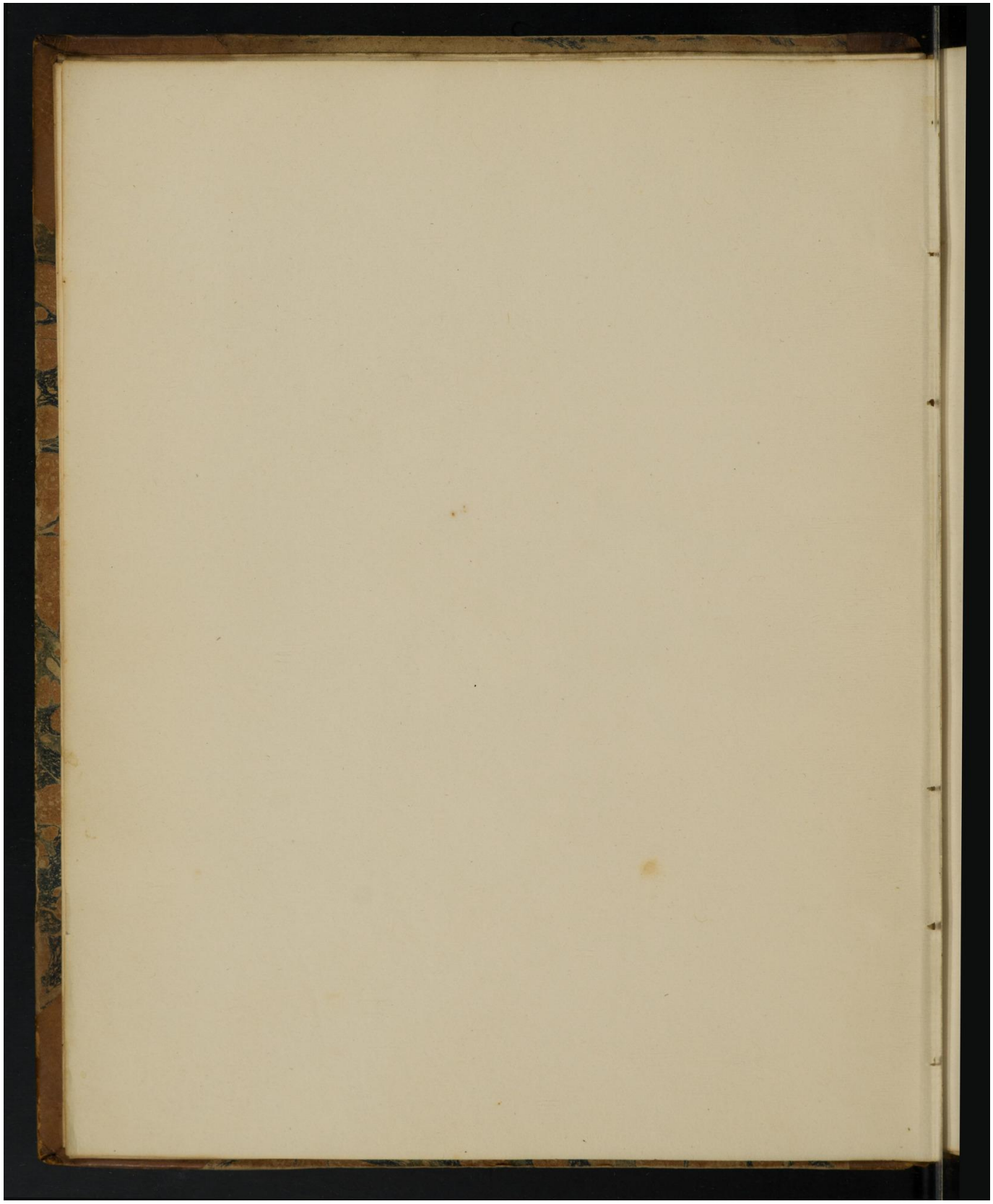


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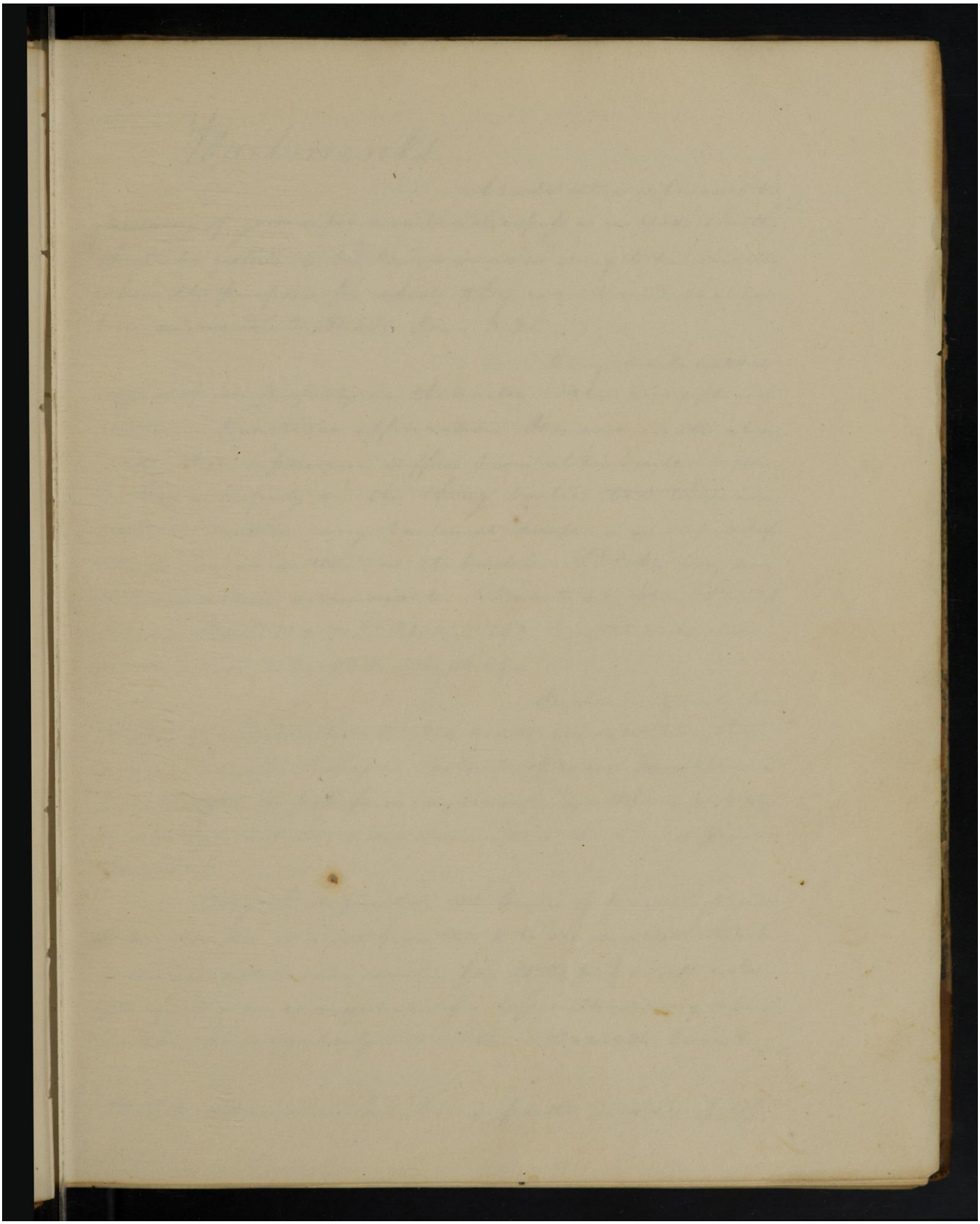


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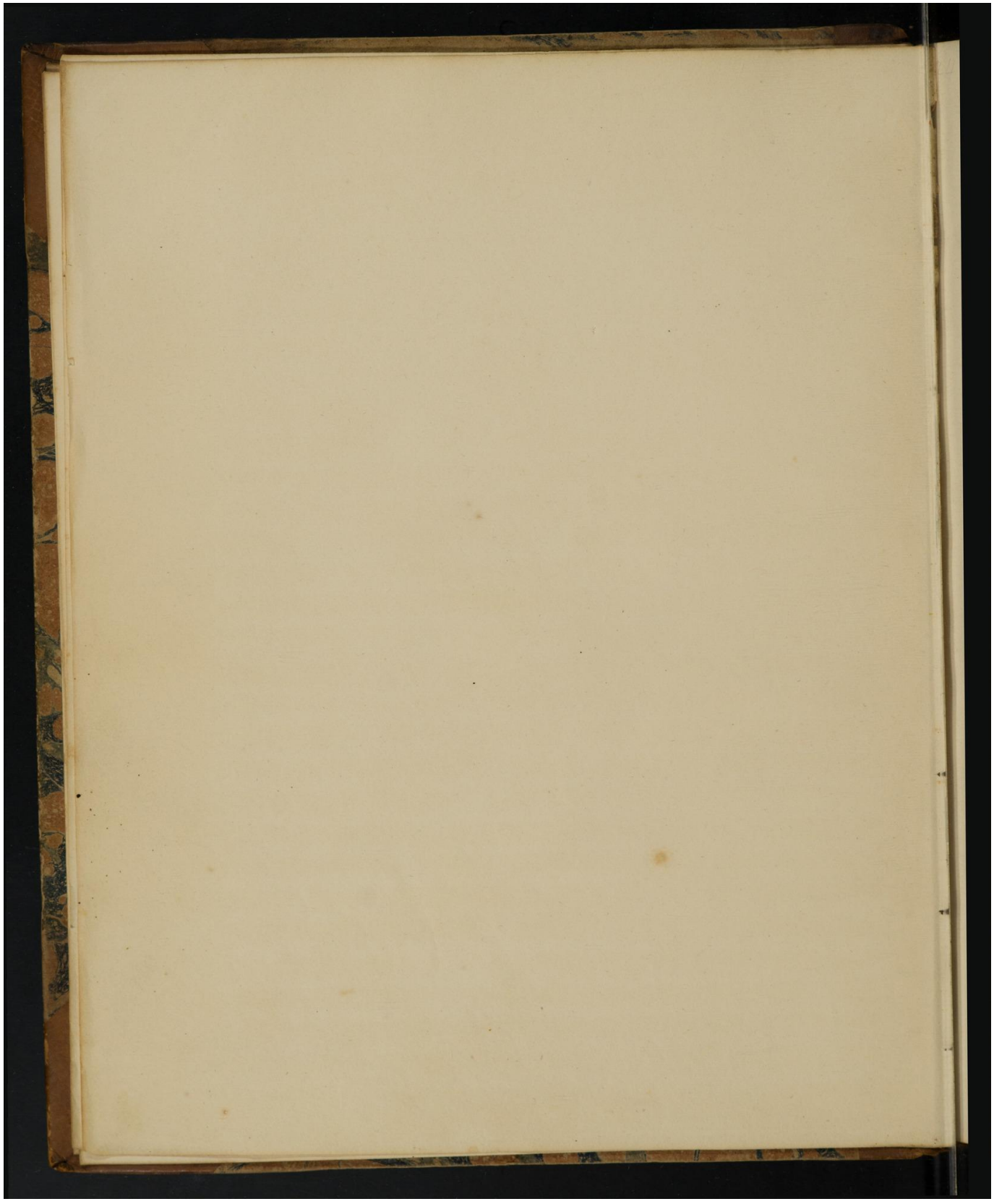


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Bailments.

A bailment is defined to be a delivery of goods upon a contract express or implied that they shall be restored to the bailor or according to his direction when the purpose for which they were bailed shall have been answered. 2 Bl. 451. Jones 3. 48.

Every bailment vests a qualified property in the bailee & this principle is of extensive practical application. It is said in the old books that a pawnee differs from other bailees, because he has a property in the thing bailed, but there is no such distinction every bailment confers a qualified property or special interest in the bailee. Ld. Coke has laid down the distinction alluded to. 1 Bac. Ab. 40. Doc. & Stu. 129 Jones on Bailt. 112. 7. T. Rep. 392. 397. for the distinction alluded to see 4 Co. 83. b. 1 Brownl. 89. a.

Indeed it may be stated as a proposition that admits no exception that a mere lawful possession which of course presupposes a present right of possession, includes a qualified property or special interest & so determined in the case of Pinder Stra. 505.

By the definition, the bailee is to restore to bailor or his order &c. it is not from this to be understood, that he is answerable in all events, for altho he fails to restore yet if it is in consequence of a loss without any default in him he is regularly not liable. 1 Bac. Ab. 236. Jones. 8.

But to determine when he is in fault in case of loss

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a damage sustained the nature of the bailment and the quality of the thing bailed as well as bailees own conduct are to be regarded.

Diff^t. bailments require different degrees of care for what would be extraordinary care in case of large bulky articles bailed might be gross neglect in property of a different species. Coms 8.

And the principal inquiry under this title is; to ascertain in all cases what degree of care & diligence is required of the different kinds of bailees for thus we learn in what cases the bailor is entitled to recover.

The most gen^l rule is, that when bailee by express or general acceptance he is bound to keep or use the case may be to use the goods with a degree of care proportioned to the nature of the bailment.

An acceptance is said to be gen^l when there is no special ag^t by bailee with respect to the degree of care or diligence that he shall use or the degree of responsibility that he shall incur. that is wherein is left for the law to determine what care and diligence it is his duty to use. and to be accountable for not using.

But on the other hand a special acceptance is one in which there is a special agreement either extending or qualifying the bailees legal liability he may thus enlarge or diminish his legal liability to any degree. "expressum facit cessare tacitum" when there is an express agreement

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the one implied by law is excluded.

And the different rules to be laid down in relation to degree of care required of a bailee are to be understood as having reference to cases of gratuitous acceptance only for when there is a special acceptance according to its definition that must determine the requisite care & diligence.

The law distinguishes the different degrees of diligence or neglect into three classes only. without noticing the minute degrees which may be found among men.

The standard from which these different degrees are measured is called ordinary care or diligence. by ordinary care is meant that which rational men in gen. use in their own affairs. this I repeat is the standard or middle term by which the others are measured. In other words ordinary diligence is is that which every rational man of common prudence uses in his own affairs. Dans 9.10.

The degrees of diligence on each side are not distinguished by any technical or appropriate denominations but are expressed by a periphrasis. What exceeds ordinary care is called more than ordinary diligence. what falls short is called less.

Now it is obvious that to every degree of care or diligence there is a corresponding degree of default or neglect. Neglect as here used consists in the want of exercise of care of some degree. Hence the omission of ordinary care is called ordinary neglect. The

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omission of that care which attentive and diligent men only use in their own affairs is less than ordinary neglect. But the omission of such care as inattentive, careless men use, is more than ordinary neglect. Jones. 11. 13. 30. 31.

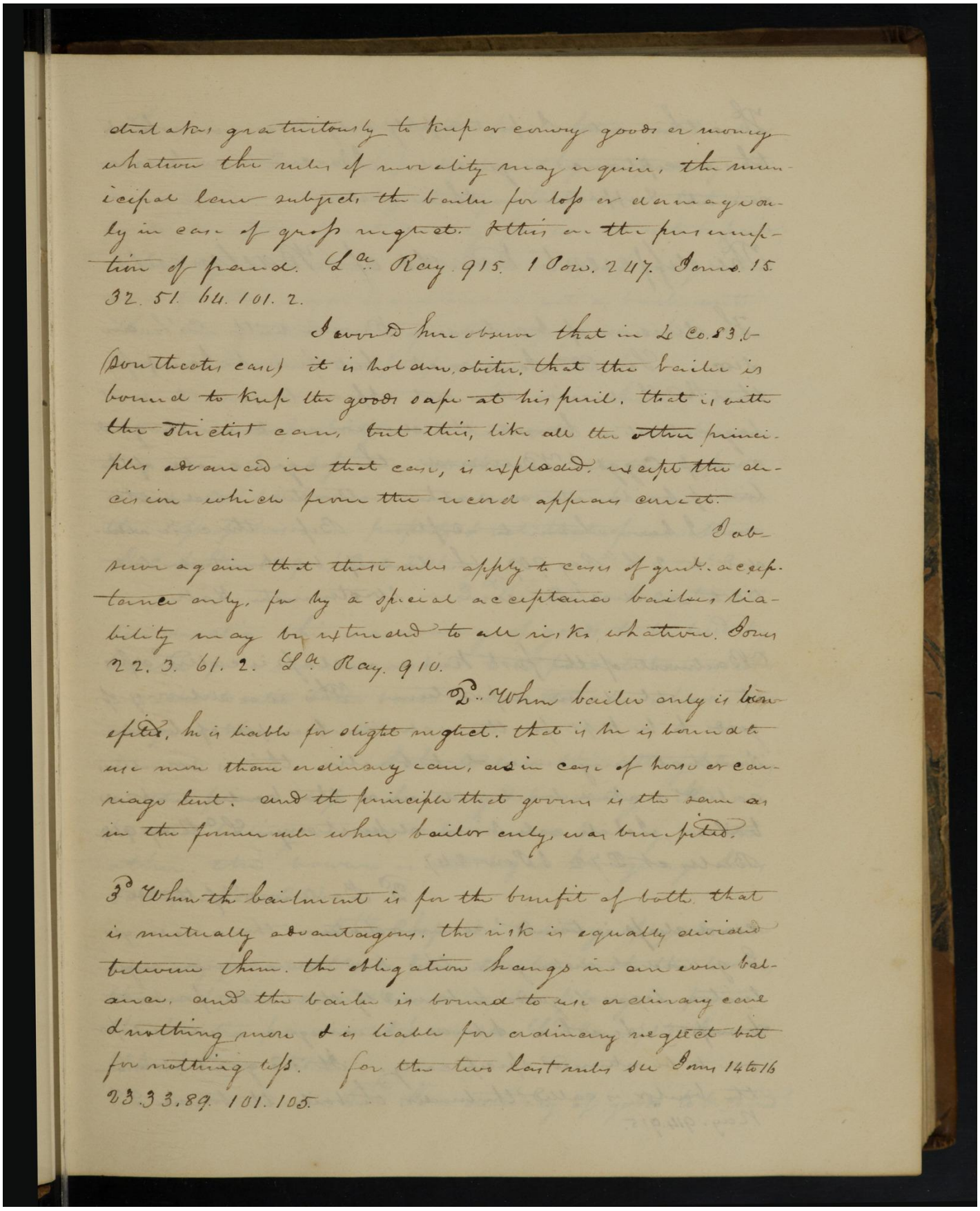
The omission of slight care or such as negligent men use is gen^l. called gross neglect. This is gen^l. regarded as evidence of fraud or want of good faith: but it is not decisive, for altho' when shown it is prima facie evidence of fraud. for if bailee has been guilty of same neglect with respect to his own goods. the presumption of fraud is rebutted altho' the neglect is still the same. that is gross L^d. Ray. 915. Jones 30. 55. 64.

The most gen^l. rule on this subject I observe is. that bailee under gen^l. acceptance is to use such a degree of care as the nature of the bailment requires.

Now to apply this gen^l. rule to particular cases it is necessary to observe three other rules. 1^st. When the bailment is exclusively for the benefit of the bailor. so that the bailee derives no advantage from it. the bailee is bound to nothing but good faith and is liable for nothing less than gross neglect.

This rule proceeds upon the equitable maxim, qui sentit commodum debet sentire onus. i.e. he who receives the benefit ought to have the risk. As when one em-

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dant acts gratuitously to keep or convey goods or money whatever the rules of morality may require, the municipal law subjects the bailee for loss or damage only in case of gross neglect. & this on the presumption of fraud. 2 Ld. Ray. 915. 1 Com. 247. Doms. 15. 32. 51. 64. 101. 2.

I would here observe that in 2 Co. 83. b (Southcote's case) it is holden, obiter, that the bailee is bound to keep the goods safe at his peril, that is with the strictest care, but this, like all the other principles advanced in that case, is exploded, except the decision in which point the record appears correct.

I observe again that these rules apply to cases of gratuitous acceptance only, for by a special acceptance bailee's liability may be extended to all risks whatever. Doms 22. 3. 61. 2. 2 Ld. Ray. 910.

2. When bailee only is benefited, he is liable for slight neglect. that is he is bound to use more than ordinary care, as in case of horse or carriage lent. and the principle that governs is the same as in the former rule when bailor only was benefited.

3. When the bailment is for the benefit of both, that is mutually advantageous, the risk is equally divided between them. the obligation hangs in an even balance, and the bailee is bound to use ordinary care & nothing more & is liable for ordinary neglect but for nothing less. for the two last rules see Doms 14 to 16 23. 33. 89. 101. 105.

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These three rules I shall apply only to cases in which the acceptance is general. I proceed now to enumerate & explain in their order.

The different kinds of Bailments.

The divisions of bailments known to the C. L. are six. Sir Wm. Jones makes but five & I confess that the C. L. division does not appear to me the most logical. it is however the division made in the great case of Coggs & Bernard, the magna carta of the law of bailments, and other authorities, and is the one I have chosen to adopt. Before the case alluded to 2 Ld. Ray 909. the law of bailment was but little understood even in Westminster Hall.

Bailment of the first kind or class is called depositum in the latin depositum. This is a delivery of goods to be kept for the exclusive benefit of bailor without any reward to bailee. this is sometimes called naked bailment, and the bailee naked bailee. I shall call him depositary. Ld Ray 912 Bull. N. P. 72. 1 Pow. 247.

2d Bailment of the second class is termed commodatum. there is no single Eng. word to distinguish this kind. it is however a gratuitous loan of goods to be used by the bailee for his own benefit. As when a horse or carriage or a utensil for use to be returned specifically. It is a gratuitous loan the bailor is called the lender. the bailee the borrower Ld Ray. 914. 915.

This species of bailment differs from what is called in law mutuum, tho in some particulars they are precisely alike a mutuum is a loan & gratuitous one, but it is for consumption & not merely for use. it is to be paid in property of the same but not to be specifically returned and for this reason a mutuum is not a bailment. Thus money loaned or any article of food, which are never intended to be specifically returned.

In a mutuum the absolute property vests instantly in the borrower & in case of a loss, even at the moment the property is received he bears it in all events because it is the loss of his own property & not that of another Doc. & Stu. 129. 1 Bac. 241.

3d Kind is locatio et conductio this is a delivery of goods to be used by bailee for a reward or hire to be paid to bailor who is called locator & the bailee conductor. as when a carriage or horse is hired.

I should call this letting & hiring as the former class is lending & borrowing. It is in fact a letting on one side and a hiring on the other. this however is not legal language Doms 50.119. 1 Pow. 251.

4th Class is a delivery of goods as a security for a debt due from the bailor to the bailee, this in latin is called vadium or pledge or pawn, the parties pawnor & pawnee. 2d Ray. 913. Doms 50 104. 1 Pow. 251.2.

5th Is a delivery of goods to be carried

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or some act to be done about them by bailee for a reward to be paid him. There is no technical appropriate denomination given to this class 2d. Ray 913. 917. Doms 50

This fifth class includes stablers not only to common carriers who act in the discharge of some public employment, but to private carriers or bailees, as to common boatman or master of a ship, or also to a tailor ibidem.

6th. Bailments of the sixth and last class are deliveries of goods for conveyance or for some work to be done about them gratis, without reward. a bailment of this kind is called mandatum and the bailee mandatary. 2d Ray 913. 918. Doms 73.

The first kind to be considered & explained is what is called deposit. being a delivery of goods to bailee to be kept without reward, advantageous to the bailor only and of course by the them only be performed the bailee is bound only to the observance of good faith & is liable at most for gross neglect only nothing short will subject him

And gross neglect subjects him only as being prima facie evidence of fraud or want of good faith & hence it follows that he is not liable in all cases for gross neglect. Doc. & Stud. 129. 2d Ray. 909. Str. 1099. 1 Pow. 247. Bull N. P. 72. Doms 32. 64. 5 And that it is the presumption of fraud only that subjects him you may see 2d Ray 915. 2 Bl. 452. Str. 581. Doms. 13. 30. 64

Now it is true that you will find it laid down that ordinary care in this case will excuse a bailee, which seems to imply that want of ordinary care, or ordinary neglect will subject him. but it will not. The truth is the expression was made use of before the term ordinary was precisely defined & L^d Holt uses it in this vague sense, & this he clearly supports the rule as I have laid it down. L^d Ray 913. 1 Salk. 247.

I say that a depositary is not liable in all cases for gross neglect, indeed it appears to me the correct way of thinking & speaking, that he is not liable at all for neglect as such, but only for the fraud presumed from the neglect, for it is a-grud that if there is no fraud he is not liable.

On this subject L^d Holt observes that if bailee is a negligent drunken fellow. it is bailors own fault if the goods are lost. he should not have trusted him, I think then that it is strictly true that a depositary is liable for fraud only 4 Burr. 2300. Str. 1099. L^d Ray 655. 914. Doug. 65. 6.

I would remark again for I cannot repeat it too often, that a depositary may by a special acceptance or agt. subject himself to any extent. even to answer for inevitable accidents. you will observe that I have been speaking of the law in relation to bailees under a gen^l. acceptance. L^d Ray. 655. 911. 913. 3 Reeves Hist. Eng. Law. 245. 6. 394.

Sir W. Jones introduces another exception, where a Sportsman wrongly becomes depositary by his own offer. he is bound to use ordinary Diligence & of course liable for ordinary neglect. But this distinction is too nice to become practical, and it is not recognised in any judicial decision. Jones 67.

The old opinions are very different from the rule now laid down. Southcote case was an act. of detinue agst. a depositary. Plff declaring a special acceptance. Deft. plead in bar that the goods were stolen, Issue on Detinet. Plff had judgt. The decision in that case as it appears of record is doubtless correct. but then is a principle laid down in that case which has not been decided to be law. and it is a little strange that and so much more justice should have been done the parties. 4 Co. 83. b. 1 Inst. 89. a & b. Deft. should have pleaded stolen without his assent But the doctrine advanced in that case, that a bailee undertaking acceptance is bound to keep safely at all events is not law. Cro Eliz. 815 2 Buc. 236. 241. contra. 2 Ld Ray. 655. 911. 913. 914. Str. 1099 Com Dig. 133. 135. Bull N.P. 72. Jones 89.

I observe by the way that that opinion of L.d Holt, "that Southcotes case is a hard one does not apply to the decision but to the doctrine contained in the case.

Again some have taken a distinction between a special agreement by depositary to keep safely and on valuable consideration & a spec. ag.t of such kind without cons.d and it is said that the former binds him but the latter

does not. This distinction is entirely exploded, the mere delivery is suffr. consd. to support his promise. And besides it is a solecism to say that a depositary accepts on consd. for the moment he receives reward he is a deposr. & ceases as of the 5th Class. so that the very suppn. involves a legal absurdity. I take the distinction to be bad on principle as well as ovrruled by authority. 1 Bac. 241. 2 Ray 909. 919. Doc & Stu. 124. 12 Mod. 487. 3 Rep. Kitt. Eng. Law. 245. b. 394

It was said in Southcotes case that if goods were left with a depositary in a chest of which bailee kept the Key, the bailee was liable for the chest only in any event and not for the goods, for it is said they are not trusted to him.

2 Holt denies this in case of Coggs v Bernard, for the bailee has as little authority over the goods as to any benefit he might have by them when they are out of a chest as when in. and as much right to defend them when in as when out of a chest.

But neither Coke or Holt notices the knowledge of the depositary as to the articles in the chest. and on equitable grounds that appears to me an important fact. for what in one case might be extraordinary care in another would be gross neglect. 2 Holt would have him liable if the goods were stolen.

If it were not known what was in the chest it might be doubtful how far the bailee ought to be liable unless his neglect were gross as to the

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chest itself. 4 Co. 83. 4 3 Atk. 47. 1 Inst. 89. a & b. 2 Ld. Ray. 914.

The question is not definitively settled by authority and I should not think that it could be laid down unconditionally that the bailee would be liable for the goods not knowing the contents of the chest. i.e when not guilty of gross neglect as to the chest.

I have observed that a depositary or any other bailee might indefinitely extend or qualify his liability. Still an unqualified undertaking to keep safely does not subject him in all events. for he is excused from loss occasioned by inevitable accident, or by armed doors who act by violence for case will not protect agt such losses. but in such case I take it that theft would not excuse as it might be prevented by vigilance 2 Ld Ray. 915. Doc & Stu. 130. 1 Pow. Con. 248. 9. Hob. 34. Cons 62. 75.

Indeed according to the current of authorities and the grounds on which they stand, it appears that when a depositary unqualifiedly engages to keep safely. he will not be subjected without some neglect. and that an engagement of that kind binds him to use ordinary care. He is not liable for the acts of armed doors

2d Species of Bailment is commodatum, in Eng. it may be termed lending & borrowing. It is a gratuitous loan of goods to be used by the bailee for his own benefit only. Vspecifically

restored. The bailee is of course bound to use more than ordinary diligence & is liable for less than ordinary neglect, that is for slight neglect.

The requisite degree of care must be various in the different cases. so that each case is to be determined by its particular circumstances One example has been given if a borrow a horse and place him in a stable without locking, the borrower is liable if he is stolen. but not if he had locked the stable. L^d Ray. 916. 1 Pow. 249. 250. Bull N.P. 72. 1 Bac. 244. Doug. 91.

And it seems that when loss is occasioned by bare theft, without more violence than in taking and carrying away goods, the presumption is against the borrower, that he is prima facie liable & will be subjected unless he proves that he used extraordinary care Doug. 61. note. 92. L^d Ray. 916.

But on the other hand he is generally not liable for loss occasioned by such force as he could not resist & hence a borrower is not liable prima facie, for loss occasioned by robbery as contradistinguished from theft, for care does not protect such loss any more than tenacity. Thus a borrower of a horse robbed on the highway, tho he might subject himself by wantonly & carelessly exposing the horse. it appears then that in case of robbery the borrower is prima facie not liable. which throws the onus on to the lender. 1 Pow. 251.

Sir Wm Jones

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state a case thus if a borrow should have the high road & travel when there was great danger, as it was known that robberies were frequently committed there, and ride on such road in the night if he were robbed he would be liable.

But a borrow is gen: not liable for those accidents called inevitable as lightnings, earthquakes, tempests immediation &c. But he would be liable if he had wantonly exposed the property to distruction by such inevitable accident, as by rashly putting a horse into a boat in tempestuous weather.

And a borrow might render himself liable for any loss, however occasioned, by a previous breach of trust, for from that time he is a possessor in his own wrong as if one borrow a horse to go to Hartford and go directly to Albany. he would be liable for all the consequences of his illegal conduct, as if the horse were struck with lightning.

So if one borrows a horse for a limited time as twenty four hours, or any other chattle indure & does not return it by the time, he is liable for all the consequences. And this rule applies to all the species of bailment. L'Ray 915. 917. 1 Salk. 249. 253. 1 Bac. 244. Jones. 96. Cro. Jac. 244

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3. Bailment of third kind is called locatio et conductio. In Eng. it may be called letting & hiring, it is a loan of goods to be used by the bailee for a reward to be paid by him.

By this contract the hirer gains a transient qualified property in the thing bailed. And the bailor an absolute right to the price or hire to be paid. L^d Ray. 913. Doug. 119. Esp. Dig. 625.

As the bailment bring mutually advantageous the risk on principle ought to be equally divided between. The bailee is bound to use ordinary diligence & answer for the other hand he is liable for ordinary neglect & nothing less.

This is what I take to be the true rule but in Coggs & Bernard L^d Holt says that the hirer is bound to the utmost diligence. if so he is liable for the slightest neglect. & so equally liable with a borrower, but this is contrary to analogy & to principle. The truth is L^d Holt used words in that case very loosely as I think he did in this instance,

There is no writer that considers hirer & borrower equally liable. & L^d Holts word would extend the hirers liability beyond all analogy, even beyond that of a borrower. I state he does not hesitate to treat it as less than that of a borrower. But the principle is so well established that there is no hazard in saying that a hirer is bound to use ordinary care only never to be subjected

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Ordinary neglect doubting Upf. Jones 31. 1 21. b. 123

Indeed Sir Wm. Jones traces this mistake of Holt's to a mistranslation of a latin expectation.

As this is no decided case than requiring more than ordinary care and as no analogy requires more, the bailee is of course excused in case of robbery, tho if it be proved that he wantonly exposed the property he would be liable.

It was formerly a question whether a bailee was not bound to keep in repair an instrument he had let for hire, but it is now settled that he is not. And if bailee wears out the instrument he must repair it for himself 1 Saund 321. 1 Bac. 531 Doug. 720.

A Pawn of the fourth class is "vadium", or pawn or pledge for the security of a debt due from bailor to bailee. Jones 50. 104. 2d Ray. 913

And on this subject it may be material to observe that in analogy to the law of mortgages, if goods are delivered to secure a debt due from bailor, accompanied with a right of redemption, whatever may be the terms of the contract, it is still a pawn as when the goods were conveyed by an absolute bill of sale, it appearing by another instrument that the pawnee had a right to sell the pawnor

had a right to redeem. it was decided to be a pawn for once a pawn always a pawn, 1 H. Bl. 114

This kind of bailment bring advantagous to both parties namely by procuring pawnee debt. and procuring. or prolonging credit of pawnor. the pawnee is bound to use ordinary care & liable for nothing less than ordinary neglect. this is agreable to principle & authority. L^d Ray. 917. 1 Pow. 252. Salk 523. Jones 105.

But in Southcotes case L^d Coke says that the pawnee is bound to keep the goods as his own and is liable like a depositary. for gross neglect only & the reason assigned is that he has a property in the goods. but every bailee has a property in the thing bailed. so that there is no foundation for the distinction & the rule founded on it is not law 4 Co. 83. (b) contra see Doc & Stu. 129. Yelv. 172. 1 Bac. 240. Jones 105. 112. 115. L^d Ray. 917. Salk. 523.

In this case then the authorities are abundant & directly harmonize with principle. It follows therefore that when the loss is occasioned by robbery, the pawnee is prima facie excusable. But he may subject himself for any loss by breach of trust or wanton exposure as in the former case. And when the degree of care required of any bailee does not exceed ordinary care. he is excused from loses by robbery. contra distinguishes from theft. Salk 522. L^d Ray

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L^d Ray 916. 917. Jones. 61. 107. 111.

In Southcote's case it is laid down that the pawnee is not liable for loss occasioned by bare theft. and the reason assigned is the same as that urged to shew that he is only liable for gross neglect. viz his having property in the goods and is of course only bound to keep them as his own.

Sir W^m Jones holds unconditionally that pawnee is liable in case of theft. this reason is as outrageous as that of L^d Coke. he says that the pawnee cannot be considered as having used ordinary diligence when he suffers the goods to be taken from him by theft. 4. Co. 83. b. contra. Jones 106. 7.

But Sir W^m flatly contradicts himself as well as all the analogies of law. It is not true in fact that ordinary care will protect ag^t. thieves and it is contrary to gen^l. experience to say that rational men of common prudence do not suffer by theft. It is a question of fact whether ordinary care was used or not & this must determine pawnees liability. L^d Holt places the case of loss by theft on this footing as a factor who is excused if he use reasonable i.e ordinary care.

Indeed Sir W^m himself says that in commodatum the borrower is liable for even theft unless he shews extraordinary care. thus admitting that there may be theft even where extraordinary care is used. L^d Ray. 917. 18 Vent. 121. 1 Pow. Con. 252. Jones 92.

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The pawnee gains like other bailees a qualified property in the thing bailed, but this interest is defeasible. By payment his interest is determined. or by tender which for every purpose of vesting the property in pawnor, is equivalent to actual payt. made & received. 1 Bac. 237. 8. Cro. Jr. 244. 4 Co. 83. b. Bull. N.P. 72. Yelv. 179. Jones 111. 2 T. Rep. 27.

If then after payt. or tender & demand of restitution made by pawnor. on the day appointed for payment. pawnee refuses to redeliver, he is guilty of a breach of trust, & is liable of course for every loss or injury the property may sustain while in his posst. however it may be occasioned as by lightening tempest &c. Salk 523. Ld Ray 917. Esp. Dig. 625. 4 Co. 83. b. 1 Vern. 253.

And on pawnees refusal to redeliver the goods on payt. or tender & demand of restitution, the pawnor may immediately maintain trover against him: & the rule is the same if the refusal be made by pawnees clerk, agent or servant acting regularly in the course of his employment. for this amounts to a conversion by the merchant himself agreable to the maxim. "qui facit per alium facit per se". Indeed if it were not the regular business of the agent to redeliver such articles the principal would not be made liable by his refusal, it would not make the master a wrong doer. Cro. Jr. 244. Salk 441 Moor 841. Jones 111. 126.

In this case however the pawnor may have his election between the two actions Trover & Aft.

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the breach of trust is the foundation of the action of trover. and the breach of an express or implied contract founds aft. for on bailmt. the pawnee either expressly or impliedly engages to redeliver on pay.t B. N. P. 72

But it seems that he cannot maintain either of these actions without tendering or paying all that is lawfully due the principal & legal interest, even when the bailment was made on an usurious consideration. for these actions on the case are founded in equitable principles. altho a lender can recover nothing on usurious contracts yet the party claiming must do equity as between the pawnor & pawnee. 1 T. Rep. 153.

A refusal to redeliver property pawned on pay.t or tender is an indictable offence at C. L. this rule is not grd. on the breach of trust merely, they being deemed civil injuries only & not offences. on this point the opinions differ but the law seems well settled. Salk 522. 3 id. 369. Carth. 277. 1 Bac. 240 2 Hawk. 2 10.

This rule is obviously a mere rule of policy for it is clear that a breach of trust between pawnor & pawnee is no more criminal than between any contracting parties. The object of the rule is to guard the pawnor from fraud & oppression, the danger of which is greater in this, than in any the species of bailment, in as much as the transaction is generally secret so that pawnee is enabled to conceal the facts. Besides pawns are delivered by persons who are incapitous & embar-

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raised who of course are the most oppressive. these I take to be the true grounds of the rule.—

It seems that in some instances the pawnee may use the pledge when the use may be profitable and in others he has not this right. This right when its existence is said to be founded on pawnor consent express or implied or presumed. now I doubt as to the foundation of this right in all cases.

Now the presumption of consent is said to exist or not in proportion as the thing is likely to be made better or worse or not to be affected at all by the use.

A case in which a pawn is made better by use can seldom occur. Sir Wm supposes the pawn of a setting dog which is confirmed in useful habits by exercise. And there might be a case where the chattel was pledged for a long time as a horse to be kept thro the winter or year, it might be beneficial to use him moderately, this however would be allowed on another principle Com 112. 13.

And it seems agreed that when the thing pledged is of such kind as not to be injured by use pawnee may use it, but at his own peril. for the use is for his own advantage exclusively and he is liable in all events. as if he should be robbed. et ampliùs given on casings, jewels &c. altho these will at length wear out. yet the injury done them when carefully used is so small that the law does not regard it. "de minimis non curat lex" Salk 522. 1 Bac. 237. B. N. P 72. 1 Roll. 338. 673. 1 Inst. 89. La Ray. 917.

And in the third place when the

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pawnee is at expense in keeping the pledge, he may reimburse himself by using it. as when horse or oxen are pawned. for he is at the expense of providing sustinance for them. not as I conceive that there is any profit by pawnor. but the law allows it a recompense that justice demands. 2d Ray. 916. 17. Esp. Dig. 625. & it. acc.

And I do not discern from the books that pawnee is liable to account for the use, by the Roman law he was thus bound. But the C.L. contains no such rule. Jones 115.

But when the pledge will be injured by the use & the keeping is not at expense the pawnee is not at liberty to use it. It is that there is no consent implied, wherein there is none, but I doubt whether the law goes to this reason. It is the duty of pawnee to keep & return when the debt is paid. As there is no expense or trouble incurred which the law with regard, there is nothing to recompense, so that there is no justice in his using it. he might injure the pawnor by something altogether foreign to the bailment. Thus cloths pawned are not to be used. 2d Ray 917. B.N.P. 72. Jones 113.

And as the pawnee has no right to use the pledge. I take it that if he does he is ipso facto guilty of conversion and liable to pawnor in an act. of trover immediately, for in the law of bailment unlawful use is per se conversion. 5 Bac. 257. 266.

If then the pawnee should use when the law does not allow of it. the pawnor need not redeem, nor wait until pay day arrives. he may

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commence his action immediately.

The law is said to be the same with respect to goods found by L^d Holt. and to the liability of the finder it is, very much the same, but the finder has no lien upon the goods as the bowee has. the same diligence however is required of each. as W^m Powel says the finder is bound to use ordinary diligence in keeping the property for the true owner L^d Ray. 917. 1 Pow. 252.

There is a case in Cro. Eliz. in which it is said that a finder of goods is not bound to keep them safely & is not liable at all for negligent keeping. this I think cannot be law nor is it tenable on principle. it is a mere dictum. the determination of the case is doubtless right. but the reasoning is erroneous. Cro. Eliz. 219. Esk Dig. 599. 2 Buls. 21. 1 Lion. 123. 1 Bac. 343. all these authorities agree that he is not bound to use any care and is not to be subjected for negligent keeping.

Now it would seem at first impression. that a finder ought not be subjected for any thing short of gross neglect. for the sole benefit of his possession accrues to the owner & the finder cannot compel the owner to pay him for his trouble. the finder here appears like a depositary.

But in case of a deposit. the bailor selects out the goods or not as he pleases selects his depositary. knows his man or ought to know him. this is not the case with goods found. which of course cannot be said in strictness to be bailed, and

it would seem that the finder ought to use ordinary care or leave the goods for some one to take who would be honest enough to do it.

Th. St. law of Con enables a finder to recover compensation, hence where the finding is clearly advantageous to both parties, the finder then is bound to use ordinary care from the first principles of bailments.- St Con. 335.6

Our statute then settles the question, & further it throws the risk on the owner provided the finder is faithful, which I think imports that he is to use ordinary care at least.

And as I take the C.L. rule to be the same, the reasoning in Cro. Eliz. is against it. That was an act. of trover ag.t the finder, which had been lost found & spoiled in the hands of finder by his negligence as it was alledged on Demr. it was held that the action would not lie. the decision was right for clearly trover will not lie for bare non feasance it must be a positive wrong. the gist of trover is conversion.- but the dicta of the court in that case is not law. Cro Eliz. 219— 8 Co. 146. 5 Burr. 2827. Hob. 251. Esp. Dig. 590.

It is well settled at C.L. that a finder has no lien upon the goods for his trouble & expense, but upon demand made by the true owner with evidence of ownership. he is bound to deliver & if he does not he is guilty of conversion & liable in trover. for as before observed he has no lien. 2 Bl. 1117. 2 H. Bl. 254. Stra. 651.

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Now the case of salvage is diff^t, when goods are wrecked or lost or abandoned at sea, the finder is entitled to reward, but this depends upon the public maritime law of nations & not upon any rule of the C.L. Lord Ray. 293. 2 H. Bl. 254. 5 Bac. 270.

But altho it is agd. that the finder has no lien on the goods, it has been made a most question whether at C.L. he could in any way recover a reward. If he can it must be by indebitat. ass^t for work &c. founded on an implication of request & promise. now the law will imply a promise but not a request for there is no privity between the parties. the finding act is founded in equity. Now I suppose that I do not discover room for a recovery. there is nothing in the nature of a contract either express or implied. 2 H. Bl. 258. As to voluntary equity see Hob. 106. Esp. Dig. 87. 95. I am strongly inclined to think that there is no remedy for the finder. If the owner has not honesty & honour enough to pay the finder must lose his reward.

But a refusal by the finder to return the goods on demand is not of course conversion, it is not, unless there is evidence of ownership exhibited for if it were he might be forced to deliver it to the first applicant. The rule is then that if on demand and reasonable evidence of ownership he refuses to deliver, he is to be subjected. As this is made the ground as to the evidence, & the question whether it was reasonable or not is included in the issue which goes to the jury. 2 Bulst. 312. Esp. Dig. 590.

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But thus is one case not decided in the books to my knowledge A finds goods which actually belong to B. C demands them and on refusal brings an action & by false testimony recovers the full value of A. then B. brings his action against A can he recover? (see Moot questions) there are however some analogies to the case which however do not relate to finders. 1st 3 T. Rep. 125. 2 Bac. 11. Doug. 161. 1 Am Bl. 669. 682. 2 ib. 408. 1 Root 445.

To return to the subject of pawns If on tender by pawnor & refusal by pawnee to deliver, the pawnor recovers in trover. the pawnee may still recover by action his own debt. notwithstanding his breach of trust. he must however first demand the money tendered. 1 Bull. 29. 31. 1 Bac. 238.

If perishable goods are pledged & they decay. pawnee does not for this reason lose his debt because the pawnor neglects to redeem. he may still sue and recover for the debt or duty remains tho the pledge is lost.

Indeed it would be gross injustice in most cases to make one answer the other. for the pawn is sometimes but of half the debt. is of double the value of the debt. and the law has given the parties mutual remedies. the pawn is never a satisfaction but a security for the debt.

However great may have been the misconduct of the pawnee he is still entitled to recover his debt & on the other hand pawnor may recover

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for the loss of his property. And thus complete justice is done, and pawny recovers what he ought ought to recover. 1 Inst 209. Salk 523. 4 Leo. 179. 1 Bac. 2.38.

And while the pledge remains unimpaired in the hands of the pawnee he may sue for his debt and recover it, unless he has qualified his right by an agt. that he would rely on the pledge alone. for the pledge alone does not satisfy the debt. Stra. 919. 4 Leo. 179. 2 Lev. 116 Esp. Dig. 86.

If the debt for which the goods were pledged is not paid by the day appointed, the property in the pledge becomes at law absolute in the pawnee. and is gone from pawnor. The principle is the same as that of mortgages. the condition is broken & the title absolute at law. In Eq. however the right of redemption is not gone in analogy to the law of mortgages. Shep. 106. 1 Inst. 205. 2 Vern. 691. 698. 3 Atk. 395.

It seems to me however that this equity of redemption can be exercised only when the property remains specifically in the pawnee. or is assigned by him as a pledge. for having absolute property he must have the right to sell & if sold I should think pawnee could not redeem.

A distinction is to be observed between a pawn & a mortgage of a personal chattel, how the mortgagee has a gen. property and then is no equity of redemption after the day of paym. i.e. after forfeiture. It does not create a medium as a pawn does. 8 Johns. 96. 98. 5 id. 258. 1 Vy. 378.

But in case of a pawn properly so called this right of redemption exists after forfeiture altho it might have been agreed at first that if the property was not redeemed at the time it should be considered as sold, in analogy to the law of mortgages. once a mortgage always a mortgage and the maxim applies equally to pawns. This maxim does not affect the principle, it means however, that if property is conveyed as a security with a right of redemption no collateral agreement made at the time shall cut off the right of redemption. This rule is intended to prevent oppression & to guard persons who are embarrassed and in distress from the hands and unreasonable conditions which money men might impose on them. 2 Vern. 698. 1 Bac. 238. 1 Hen. Bl. 114.

A factor cannot pawn his principals goods so as to give the pawnee any lien as against the principal. See Martin & Pawl. title agent.

The reason appears to be that the factor has but a lien & that is a personal right which cannot be transferred. the contract creating it is a fiduciary contract. the principal is willing to trust the factor & give him a lien until his accounts are settled but he does not give him a right to subject a new keeper And it is now settled that if a factor pledges his principals goods to secure his own debt, the principal may sustain trover against the holder after demand & without tendering to the factor the debt due him. The act of pawning is a breach of trust by which the factor forfeits all his own rights. Stra. 1178. 5 T. Rep. 604. 1 H. Bl. 362. 7 East. 5

On failure of payt. at the day, the pawnee is at liberty to sell the pledge for the title is absolutely vested in him at law 1 Inst. 205

And according to some opinions he may sell or assign a pledge before the day of payt. Owen 124. 1 Bulst. 29 31. 1 Bac. 239. But these opinions for numerous & decisive reasons cannot be correct. Every bailment implies a contract strictly fiduciary. and J. Buller observes that a lien is a personal right, i.e a right annexed to the person not transmissible. and La Ch. Cambourough expresses the same opinion and a doctrine of the same kind is plainly deducible from former cases. Cro. Jr. 244. Yelv. 178. 5 T. Rep. 606. 7 East. 6.

Now the decision of this point one way or the other is practically very important. for if an assignt. before the day of payt. is not legal, it follows that the pawnor need not tender to the assignee, but may claim immediately of the pawnee, and besides, the pawnee is ipso facto a wrong doer by guilty of conversion.

And further it appears contrary to the analogies of the law that a pawn should be thus assignable. It is clear that the pawn cannot be forfeited to the king or public by pawnees act as treason or felony. 1 Bac. 238. But a man may thus forfeit what he is capable of conveying in his own right. 1 Inst. 8. 12 Co. 12. Cro Ch. 556. 2 Bac. 376.

Hisalso laid down by Brooke (a good auth) that a pawn cannot be alienated meaning plainly assigned. vide cited in 1 Vy. 389 1 Bac. 238.

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Again it is settled that a pawn cannot be taken in Ex.ⁿ because the intent of pawn is of such a kind as to render it dangerous to the rights of pawnor to allow the pledge to be thus taken. 1 Bac. 238. 352. Dyer 76 b. Cro. 124.

I think it appears satisfactorily from this analogies & principles that a pawn cannot be assigned before the day of pay.ᵗ A pawn is in the nature of a personal trust and if the pawn could be assigned the pawnor would be in a dangerous situation. for if the assignee should become a bankrupt and the pawn be lost thro his fraud or misconduct the pawnor could not resort to the pawnee

And this is the principle that governs all fiduciary contracts as to property: the case is different from that of a mortgage. land cannot be embezzled and mortgagee insolvency or knavery cannot prevent redemption. But a chattel may be run away with destroyed or embezzled.

Pawn is a case in 2 Vern 691. 688 which seems to show that a pawnee may assign a pawn before the day of pay.ᵗ There was a pawned to B. who shortly after before day of pay.ᵗ pawned the same goods to C. A brot a bill to redeem & it was decreed that he should pay the sum due from B to C

It is to be observed that this bill was brot after the forfeiture when the equitable claim of the assignee was precisely the same as if the assignmt had been after forfeiture Wh. never raised the question under this exception. if the action was brot no

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late, it should have appeared that there had been a tender in time, or the action should have been brought immediately. So that the point is not determined in that case. 12

On the other hand the pawnor may forfeit his right to the pledge by treason or felony or any crime that works a forfeiture, but the king or public cannot take the pledge from pawnee without paying the debt, for the interest of pawnor is but the right of redemption which is forfeited. 1 Bac. 238. 1 Bulst. 29. Yelv. 179. About this that the fair construction is that pawnee cannot assign before forfeiture.

It was anciently deemed essential to a pawn, that it should be delivered at the time the debt accrued which was intended to be secured by it. And it was that that if delivered afterwards it was not a pledge, but a license to secure a trespass in taking it, to be retained during pawnor pleasure, which he could of course reclaim when he chose, but this is not law, for it is now settled that a pawn may be delivered as well after as at the time of debt contracted or accrued. 2 Leon. 30 1 Bac. 238. 9. Yelv. 164. 1 Vez. 350. 359. Bull. N. P. 35. 1 Bulst. 68.

It was formerly doubted when no day of payt was fixed whether payt or tender would revest the property unless made during the joint lives of the parties. It was settled however that it might be made at any time during the life of pawnor. 1 Bac. 239. 1 Bulst. 29. Yelv. 178. Contra Cro. Jac. 224. 5.

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And the question has been made whether, if in such case the pawnee had assigned the pawn for a good consideration to a stranger as J.S. during the pawnor life, the pawnor is to pay to or tender, on the death of pawnee to his Ex^tr or to J.S. the assignee,

This question depends entirely upon another one before mentioned. viz. whether the pawnor can legally assign a pawn before the day of pay^t. as the rule is that the pawnor in such case is at liberty to redeem at any time during his own life. if it is assignable before forfeiture pay^t should be made to J.S. if not to pawnees Ex^tr If my view of the subject before stated is correct pay^t is to be made to the Ex^tr not to J.S. Vyle. 178. 1 Bulst. 29.

But when no time of pay^t is fixed the pawn must be redeemed by pay^t or tender during pawnors life. otherwise it is forfeited. for his Ex^tr cannot claim the right of redemption at law. for after forfeiture no legal claim can be made by him or his representatives. 1 Bulst. 29 Cro. Jo. 244. Vyle. 178. 1 Bac. 239.

You will perceive that the rule which limits & fixes the time of redemption to the life of pawnor when none is fixed by the parties, is a positive one. But the establishment of pawnee precise time is not arbitrary. but convenience requires it. without it the contract would remain indeed never accomplished. & if pawnor had no other property pawnee might in effect be defrauded for he never could dispose of the pawn

But when the law thus limits redemption to pawnor's life. I must then is a right of redemption after his death in Eq^y. unless there an ag^t. to the contrary be clearly proved There is praise auth to this point. but it is laid down in a note in Bac. & I presume it is correct. an eq^y. of redemption remains after forfeiture when the time is fixed by the parties. and I see no reason why it should not be the case when fixed by law. 1 Bac. 239.

When a day is appointed for pay^t. by the parties, the pawnor intrust is not forfeited by his death before the day arrives, the right of redemption is transmitted to his E^x & T^s. 1 Bull. 29. 1 Bac. 239.

5. Bailment of the fifth class is a delivery of goods to be carried or some other act to be done about them for a reward to be paid to bailee. It includes a delivery to private carriers or other private persons on the one hand & on the other to persons who are in the exercise of some public employment as common carriers. Jones Bailments &c. 2^d Ray 917. Jones 132.

The consequences of these two kinds of bailments are so different that I shall treat of them separately:

1^st. Of delivery to a person not exercising a public employment. as taylors. factors common agents, clerks bailiffs &c Now a delivery to a private bailee, may be to one in a private professional character as a shoemaker, taylor &c or to one pursuing no particular employment or profession. 2^d Ray. 918. Jones 50. 128.9.

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Bailment of this kind includes a delivery to an agisting farmer, i.e. one who pastures the cattle of another. if he takes care of them he is a bailee of the 5th class.

This bailment is advantageous to both or intended to be so. It is so in the presumption of law, according to principle & authority it is well established that a bailee of this class is bound to use ordinary care only & is to be subjected for nothing less than ordinary neglect. 1 Roll. A. 4. 2d Rep. 918. 1 Pow. Con. 254 12 Mod. 487. 1 Vent. 121.

A private bailee of this class prima facie excused in case of robbery. i.e. the rule relating to him is the same and liable to the same exception as in the case of a pawnee & hirer. if he is in no fault he stands excused. Jones. 129. 30. 138.

And the rule is the same for all all private bailees of the 5th class as taylors shoemakers agisting farmers. factors. brokers auctioneers agents &c. they are prima facie excused in case of loss by open violence. 1 Inst. 89. a. 2d Rep. 918. Holt. 131. 4 Co. 84. a.

In case of a loss by bare theft he is liable or not as he omitted ordinary or reasonable care or not. prima facie he is liable I trust as in all cases of bailments that are mutually advantageous. and this leads me again to remark upon an observation of Sir Wm. Jones, that ordinary care will prevent or that thefts will not occur when ordinary care is required. In this case he says that if goods are locked up with

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reasonable care the bailee is bound, this in effect re-
futing or contradicting his own doctrine. It is
a question of fact in every case whether reasonable or
ordinary care was used or not. 1 Vent. 121. 2 Ld. R. 909.
Ray. 918. 1 Roll. A. Jones 138.

If property bailed is dis-
trained by bailee landlord for rent & sold as it may
be so that bailor loses it. the bailee is liable. for
it was want of ordinary care to suffer the property of
another to be taken for his own debt. Jones 141. 2. 3 Bl. R.

And this rule is equally common to every bailee of goods who
receives pay or compensation for keeping or doing any act
respecting them as taylors. carriers &c. and bailments which
are mutually advantagous.

If silver be delivered to a smith
to be made into an utensil or ornament. Sir W. Jones
considers the contract as a mutuum not a bailment
Never the property according to his opinion vests absolu-
tely in the smith & if lost by any event even inevi-
table the smith bears it Jones 89. 143.

And Mercer
also he holds that the smith may use it for another
and restore an equal quantity of the same standard.

Now if our proposition is correct, we contend the other is.
The reason on which he builds is, that the form of the
property by the terms of the contract, is to be so altered
by fusion, that it cannot be identified. if so it can-
not in legal contemplation be specifically restored &

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it could not have been the intention that it should be so. If this were so it cannot be a bailment but a mutuum being similar to a loan of bread or of grapes to be made wine or flour into bread. 2 Bl. 404. Pop. 38.

It seems difficult to deny the correctness of this artificial reasoning, yet I never could be satisfied with it. Clearly the parties intended the property should be altered. But if the fact can be ascertained that it is the same. I confess I do not see why bailee should not bear the loss if ordinary care were used. & if the property remained as it was entrusted for in the case would be still stronger. Sir W. Browne gives the same rights & liabilities immediately on delivery as after fusion founded on the intention of the parties

Such a rule of law would bear extremely hard on that class of men if it were followed thro' & the hardships of the case would I think strike a court so that the artificial technical reasoning must be very strong to induce them to follow it.

When the bailee is to do some act of skill in his profession or business or character for him, the law implies a two fold contract. that he keep & redeliver using ordinary care. but further he is to do the work skillfully. i.e. he is to use all necessary skill.

But if not in the line of his professional business the law implies no engagement that the act shall be done skilfully. in this case therefore he cannot be subjected unless there is a special agreement.

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If cloth be delivered to a blkmaker to be made into a garment & he ruins it. bailor has no remedy unless there was a special undertaking, it was the bailors own folly. & the case comes within the maxim that the law will not assist fools & buzzards. 1 H. Bl. 158. 11 Co. 54. 3 Bl. 165. b. 1 Saund 324 Esp. Dig. 601 Jones 128. 9. 137. to 140

If goods delivered to bailee of the 5th class are lost or destroyed thro want or omission of the requisite care, before the act he contracted to do about them was finished; it is an incidental question whether he can recover pay for what he has done.

I see no room to doubt. it is clear that he is liable for the loss of the property. the bailee is not benefited by the labour and it was the fault of the bailee that he is not. the objection grants him in limine and it is agt. the strictest of common justice that he should recover. Besides it would be nugatory for if he were to recover for the labour, the bailor in his action for the goods at their value, ought of course to be allowed the value of the goods as increased by the labour 3 Burr. 1592 to 5. Esp. Dig. 86.

2d Bailments of the fifth class include also a delivery to a person who exercises some public employment as a common carrier, innkeeper &c. of this I am now to treat. & first of a common carrier.

A common carrier is any person in gross who makes it his business to carry the goods of another for hire as a common porter. carman. waggoner

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hoymen, pinymen shipmasters &c L^d Ray. 918. Jones 149. 151. 4 Co. 84

It was formerly doubted whether any other than a land carrier was a common carrier, but it is now settled to be immaterial whether the transportation be by land or water. Hob. 17. 18. Cro J. 330. 12 Mod. 487

The law was first extended to common hoymen in 9 W. 1. to shipmasters in Ch. 2. Jones 149. 152.

Owners of ships employed in carrying goods for others are consid. as comm. carr. & in case of a loss an action may be brot. agt. either the master or the owners. Salk 440. 1 T. Rep. 18. 78. 3 Lev. 259. Cowp. 62. 1 Show. 29. 101. Esp. Dig. 123. Drivers of waggons are not liable unless they are also the owners. There is a stat. in Eng. 7 Geo. 2 limiting the liability of ship owners to the value of the ship & freight, when loss is occasioned by the navigators. this your honour is not a rule of C.L. & does not affect us. 1 T. Rep. 18. 78.

If a comm. carr. having the conveniences to carry goods offered him refuses to take them when the hire is tendered, he is liable in an act. of case to the party offering. For the law implies a contract on the part of comm. carr. to carry all goods offered them as the public calculate upon them and they cannot capriciously refuse, their duty is like that of an innkeeper who cannot refuse to receive a guest without sufficient cause. 1 Bac. 344. B.N.P. 70. 3 Bl. 166. 2 Shown 327.

But a common carr. is at liberty to make a special acceptance

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i.e. a conditional one. E.g. that he will not be answerable for specific articles as money, jewels &c. unless he is notified of their being contained in the parcel & is paid according to their value. And he is not liable as a common carr. unless the condition is complied with.

This is very reasonable. for he ought to know how to apportion his diligence; the greater the value the greater the risk,

A common carr. cannot however, in pose what terms he pleases, or such unreasonable ones as destroys his liability. as not to be liable for neglect or robbery or losses arising from ship being unseaworthy. — These conditions would but prepare a subterfuge for knavery. 4 Burr. 2298. Esp. Dig. 622

A recent case in which a stage owner refused for the carriage of the driver of the stage between N York & N. H. occasioned him to advertise that he would not be accountable for the negligence of his drivers, such a condition could not be enforced and the notice will not avail him. the effect is the same & no greater than if he had published that he would not be accountable for his own neglect or fraud.

This kind of bargain being disadvantagous to both, if there were nothing to impede the operation of the general rule, the common carr. would be bound to use ordinary care only & could be subjected for nothing less than ordinary neglect. & it was holden in the time of Hen 8th that robbery was no excuse. Dalton 144. But it was settled in the time of Ely. that

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robbery was no excuse. 4 Co. 84. a. 1 Roll. R. Jones 144. 5. 1 Bac. 345.

Since the rule now is that he is liable for loss occasioned in any way except by the act of God, inevitable accident, or the act of public enemies, or the act of the bailor himself. L^d Ray. 918. 3 Burr. 1593. Bull. N. P. 70. 71. 1 T. Rep. 27. 1 East. 609. 1 Pow. Con. 253. Salk. 18. 1 Wils. 281.

This was not the original rule of C. L. the true foundation of it is public policy that makes an exception, for by the three general rules advanced at the commencement of this title, when the bailment was mutually advantageous to both, the bailees liability was limited to ordinary neglects but public policy requires a more extended liability. For the exigencies of a commercial people require compensations to act as com. carriers and that the public should have confidence in them. As any person then may be a com. carr. the law ought to make the bailor safe against the fraud of such persons, and against their connivance with robbers & thieves. And the opportunities of absconding are so numerous, that the law imposes a higher liability than strict justice between man & man would require. L^d Ray. 918. 1 T. Rep. 34. Salk 143. Esp. Dig. 618.

In Southcote's case L^d Coke says that the ground of a com. carr.'s liability is that he has a reward. it is not so. for the reason is equally applicable to a private carrier or any bailee indeed when the bailment was mutually advantageous. it is true that if bailee receives no reward he is not liable

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for in such case he does not act as a com. carr. & of course cannot be subjected as such. Carth. 485. 1 East. 604. Esp. Dig 621.

You perceive then that a com. carr. is in the nature of an insurer against all events but the act of God & public enemies or of the bailor himself.

By the act of God according to L.d Mansfield is meant an act which cannot happen by the intervention of man. as earthquakes lightning inundations tempests &c. 1 T. Rep 33. Stra. 128

Fire occasioned otherwise than by lightning is not deemed the act of God. 1 T. Rep. 34. 2 Hen Bl. 113. Esp. Dig. 620

And it has been determined that a common carrier by water is not excused by a rat gnawing a hole thro the ship & occasioning loss or damage. Sir Wm says ordinary care will prevent such losses. this I should doubt. & tho it is not inevitable accident within the rule. 1 Wils. 281. Bull. N. P. 70. Doug. 147

A common carr. is not excused by the act of a man not in regiments or rebels for they are not public enemies within the rule But when a loss is occasioned by pirates he is excused for such are deemed the enemies of civil society 1 Vent 239. & it is not however excused by what are called fresh water pirates that infest rivers harbours &c. they not being regarded as public enemies. 1 T. Rep. 18. 1 Vent. 190. 1 Mod. 85. Esp. Dig. 620.

If it is made necessary by the

act of God. as by tempest to throw goods overboard, the com. car.ˢ is excus'd for doing it. for the necessity is inevitable the the immediate act is by the carrier. 1 Roll. 567. 1 Roll. Rep. 79. 2 Bulst. 280. Jones 151. Esp. Dig. 620

Thus is a case in Allyn 93. where a common carrier was made liable for throwing a box of jewels over. the case is badly reported and the probability is that there was no necessity for throwing it over. we should suppose a box of that kind to be very light. and this was probably the ground the jury went upon. The gen.ˡ rule is well settled.

When goods are thrown over necessarily; the master, owners, freighters & passengers must average the loss among them the mariners are not included. This is a rule of the law merchant & not a C. L rule. 3 Bac. 394. 5. 1 East 220. Beawes Lex Mer. 148. 2 T. Rep. 407.

But if a com. car.ʳ voluntarily & unnecessarily exposes the goods to danger from inevitable accident & doubtless from public enemies, he is not excused. as when a boy[illegible] voluntarily put to sea in tempestuous weather, when a loss was probable he would be liable altho the immediate proximate cause was inevitable accident, Dha. 128. This doctrine was recognized in a recent case before the court of errors. Williams & Grant.

A common carrier is excused according to the exception to the gen.ˡ rule when the loss is occasioned by the act of the bailor himself. Thus when an action was brot.ˡ for

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the loss of a pipe of wine occasioned by bursting. It appeared at the trial that the wine was in a state of fermentation when sent, this having occasioned the bursting, the carr was held not liable. it was the act of the bailor in sending it at an improper time. Bull. N. P. 69. 74 Es/c. Dig. 621.

And again when the waggon of a common carrier was full & the bailor forced the goods upon him. and a loss was occasioned by over loading. the bailor was nonsuit on the ground that it was the fault of the bailor. 2 Show. 127. 1 Bac. 344.

But in order to charge the comm. carr to the extent of the gent. rule the goods must have been lost while in his possession or under his immediate care & control. for if the owner sends a servant with the goods in a vessel to have the control of them & they are stolen the carrier is not liable i.e as a common carrier. for he does not act as such when the goods are under the control & guardianship of another.

Still however if the loss was occasioned by the actual default of bailee. altho the goods were committed to the immediate care of another, the bailee would be liable. as if they were lost by vessels not being seaworthy or the misconduct or negligence of the seamen. Bull. N. P. 70. 2 Show. 327. Stra. 690. 1 Bac. 344.

But where goods were delivered to a comm. carr & a passenger was requested to take the oversight of them. the carr was adjudged liable for a loss. for a man would not like that, to look after

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the goods does not deprive him of possession or controul over them
1 Roll. 2 Cro. Jac. 330. Mod. 17.

And it seems that a commoncar
rier tho ignorant of the contents of a box or parcel is liable
for the goods in case of loss unless he discharges himself
by a qualified acceptance or some condition ensuing
him. Bull. N.P. 70. 2 East. 128. Stra. 165. Carth. 485.
Lamy 148. 1 Bac. 345.

If such condition is prescribed & the
bailor does not comply with information the bailee is ei-
ther not liable at all or only to the value of what is
specifically accepted.

It will doubtless be remembered
that I questioned the propriety of the rule making a
depositary liable when he did not know the contents of
the parcel, unless he was grossly negligent as to the par-
cel. Still I take it that the rule just laid down
as to a comm. carrier liability in such case, is strictly
correct. for here the bailment is mutually advanta-
geous to both bailor & bailee. & the com. carr. lia-
bility does not depend upon the degree of care or
negligence that he may use, the nature of the goods
then cannot affect his liability. And if he is willing
to run the risk and to accept unconditionally, he ought
to be liable, so that the rule appears correct.

There are
two cases in which it was determined that the common
carr. was liable when he was misinformed as to the
contents of the parcel by the owner, unless the acceptance
were special, and in both the cases the owner intended

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to defraud the carrier which the Ch. Justice observed might go in mitigation of damages. Allyn. 93. 1 Vent. 238. 3 Bull. N.P. 70. 1 Bac. Ab. 345. 3 Keb. 135. Doc. & Stu. 130

You will observe that in both these cases the owner misrepresented for the purpose of diminishing the sum. Those decisions appear to me contrary to principle. They are pointedly disapproved of by L^ds^ King & Mansfield & may now be regarded I trust as overruled. Those judges say that a com. carr^r^ ought to be secured on the ground of fraud and perhaps the case would come within the third exception to the gen^l^ liability a loss occasioned by the act of the bailor. 2 Burr. 2300. 1 East. 610. Doug. 148. Stra. 145.

I would just observe that for the purpose of making a special acceptance, it is not necessary that there should have been a personal communication between the parties, a notice in a public newspaper of the terms on which the com^n^ carrier engages to transport may be sufficient. I say may be. for it may not. And when the carr^r^ defends on the ground of special acceptance & notice given but not complied with. the jury may infer from such circumstance that the owner had notice. it does not per se screen the carrier. but if it appears that the owner had notice the jury will so find. — the publication is more matter of evidence. 2 Burr. 2298. Carth. 485. Bull. N.P. 71. 1 Com. Dig. 298. 8 T. Rep. 531. Esp. Dig. 622.

You perceive from the rules already laid down, that under a gen^l^ acceptance or receipt in case of fraud, a common carrier is liable to the full

amount of the goods received, altho he may not know the value of them. but when he accepts specially he is liable for so much only as he undertakes to convey, or in other words for so much only as his reward extends to. Thus where a bag delivered to carrier was described as containing only £200 when it actually contained £1000. the carrier was held liable only for the two hundred. Cowtle. 485. Bull N.P. 70. 71. Esp. Dig. 121

And when a comn carrier publishes that he would not be answerable for certain valuable articles at all. such as money jewels &c except on certain condition & they were not complied with altho known to bailee the comn carr was adjudged not liable at all. as when the comr is of being informed of the value & he was misinformed. This case is different from the former. there the condition was that he would be liable only to the amount he was paid for. here the carr says he will not be liable at all unless informed &c. 1 Show. Bl. 298.

The master of a stage coach who receives hire for passengers but not for baggage is not liable as a common carrier. but if he carries goods for hire he is then liable. Comn. Rep. 25. Salk 282 Bull. N.P. 70. Esp. Dig. 622. 624. 3 Show. 128. 1 Bac. 344.

And a common carrier is liable according to the distinctions here taken. whether paid before hand or not. for whether there were any express promise to pay or not. he can recover on the implied promise on a quantum meruit. 1 Bac. 343. He is however never bound to

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receive goods unless pay^t or tender of the hire is made to him.

In change the carrier it is not necessary that the goods be lost in transitu i.e while passing & moving for if lost at the inn where he arrives he is in gen^l liable. He is clearly liable in this case if the custom is to deliver to the consignee. & if that is not the custom he is liable until the time of delivery. & that in either case he is prima facie liable and the onus is thrown upon him. 2 Bl. Rep. 916. 3 Wils. 429. Comm 57. Esp. Dig. 623.

But when the custom is not to deliver to the consignee in person. but for the comm^n carrier to keep the goods & to deliver them at a common warehouse. he ceases to be liable as a common carrier. tho if he is keeper he may be liable in another character. but the goods are not in his custody he ceases to be liable entirely at the delivery 4 T. Rep. 581. Esp. Dig. 623.

If the consignee directs by whom the goods are to be brot. he is regularly to bring the action in case of a loss & not the consignor. tho is the purchasor is to sue & not the seller as if I purchase goods or send an order for them. here I am the bailor. as between the seller & myself I must think the comm^n car^r is my serv^t. & if a right of action occurs I must improve it. 8 T. Rep. 330. Comp. 294 Bull N. P. 35. 1 Pow. Con 343. 353. Esp. Dig. 576.

But when the consignor selects his own carrier. the right of action for loss or damage in gen^l is in him. as if I order goods

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and the seller delivers them to which carrier he pleases is, in case of a loss he must bring the action. for there is no privity between me & the carrier. And even when I have designated the carrier if the seller makes himself liable by agreeing for the price of conveyance or takes the risk of conveyance, he may bring the action. for the agt makes him principal and creates a privity between him & the carrier. 5 Burr. 2680 1 T. Rep. 659. 8 it. 333.

As to joinder of parties and how to take advantage of non joinder see Pl & Pract. & also Salk 440. 5 T. Rep. 651. Esp. Dig. 673. 5 Burr. 2611 2614.

At C.L. a post master not being an officer appointed by the government was consid as a common carrier of the letters he committed to him & adjudged liable as such. But since the stat 12 Car. 2. established a genl post office & suppressed private posts, post masters are not held liable as common carriers. they are regarded as executive officers of the government, a post master makes no contract with the party who lodges letters, receives no compensation from him. he is paid by the government & tho his wages are in the nature of a poundage upon what he collects, still it is received from the government. therefore there is no privity between him and the party delivering letters at the office. Salk. 17. Ld Ray 646. Comyn 754. 764. Ld Holt's opinion is agt this rule but I take it to be well established.

And a post master is regularly not

liable for the actual defaults of his servants or under officers. tho he is for his own actual defaults like any other individual. But his servants and under officers are the servants of the government. and he acts as a servant of the government in appointing them. 3 Wils. 443. Comp 765. Salk. 18.

Comn carriers have been gent. said to be liable on the custom of the realm & the common method of declaring has been to count upon & recite the custom as if it were a special one of force in particular district only. But this is certainly no more necessary than it is for one him at law to count upon & recite the sources of descent. for a custom of the realm is no other than a part of the C.L. extending throughout the realm 1 Sid. 245. Hard. 485. b. Hob. 18. 1 T. Rep. 33. 3 Mod. 227. Jones 130

When property is stolen from a common carrier or otherwise lost or injured so as to subject him. when there is no fault in him when he is guilty of no misfeasance, the remedy is by a special action on the case, trover will not lie. But if he is guilty of an actual misfeasance or by breaking a bot trover will lie. & when one pierced a pipe of wine and drew out a little it was deemed a conversion of the whole. 8 Co. 146. 5 Burr. 2827. 5 Bac. 521. Salk 655. Hob. 251.

It is not then liable in trover for actual negligence because to subject him to this action he must have been guilty of some actual misfeasance. Salk. 655.

Another class of persons exercising a public employment consists of Inn keepers.

A delivery of goods or baggage to an innkeeper is a bailment of the 5th Class. This subject has been strongly classed by different authors. Espinasse places it with commodatum to which it has not the least affinity. Baller treats it as a mandate which is equally incorrect. the true place no doubt is in the 5th Class of bailments. Jons. 130 to 132. Esp. Dig. 625.6. Bull. N.P. 72.3.

It is not however very important when it is classed as the rules relating to it are so well defined. still it is very manifest that it belongs here. because it is a delivery to another to do some act about for a reward is given. altho there may be no nominal reward. the pay is included in the charge for room rent &c. storage. Jons 133.

In this place I shall consider Innkeepers as they are liable for the goods delivered them by their guests. i.e. as bailees which they quoad hoc. strictly are. Their other rights & duties will be the subject of a distinct title.

The bailment being mutually advantageous in these cases. according to gent. principles the innkeeper is bound only for ordinary care & liable for nothing less than ordinary neglect, but the policy of the law has extended the liability somewhat further. not so far however as that of a common carrier at least defined no rule extending it thus far. Jons. 133 to 135.

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In the first place then an innkeeper is clearly liable for any loss occasioned by the act or default of his servants in any way. for he is bound at all events to provide honest & careful servants. 8 Co. 32, 3. Bull. N.P. 73. 1 Bl. 430. Esp. Dig. 626.

You will doubtless recollect that master can in gen.l not liable at all for the wilful torts of his servant much less for his offences. But if an innkeepers servant steals or robs the master is liable civiliter for all the damage occasioned thereby.

So if goods are stolen by a stranger the innkeeper is liable by the gen.l rule whether he has been negligent or not. so that something more than ordinary care is required of an innkeeper. The rule is founded in policy for an innkeeper has a great opportunity to cheat & rob and to unite with knaves thieves &c for the purpose. the rule then is for the safety of the public. 8 Co. 33.a. Cro. Jac. 189. 224. 5 T. Rep. 276.

There is an exception to this gen.l rule however when the goods of a guest are stolen by his own serv.ts or companion or by any one who by his request lodges in the same room with him, for the law in such case imputes the loss to his own folly. for by travelling with the companion he gave him credit. and by requesting the stranger to lodge in the room he furnished the occasion of stealing. by shewing him where the effects were and affording him greater facility to steal them. Cro Eliz. 285. 8 Co. 33. 3 Bac. 183. Esp. Dig. 625.

wilful it amounts to a Breach of Contract between Master & Party injured

And an innkeeper is liable for a loss occasioned by an act of common robbery & on the same principle of policy. there is however nothing definite to be found on this subject. Plowden says that if the house is broken & goods taken he is not liable. I find however no rule that places him under the same liability with a common carrier. Jones says that a force truly irresistable such as the innkeeper. i.e if it were irresistable by the innkeeper & all the force he could command. in which the reason Plowden gives why robbery excuses. is that such violence cannot be resisted. Sir Wm. Jones rule appears to be the correct one, 8 Co. 32.a. Jones 135. a & b. Plow. 9. 3 Bac. 182.

The common inscription is that an innkeeper is liable to the same extent with a common carrier. & I confess I do not see why he should not be, his house is absolutely necessary for the accomodation of travellers his means of defence are in every conceivable greater than those of a common carrier. he is surrounded by his castle in the midst of his family and his means of colluding with robbers & thieves & affording them facilities to depredate. much greater than a common carrier. who on the other hand is travelling on the highway usually alone & unprotected.—

It is laid down by Coke that an innkeeper is not liable unless there is a default in him or his servants, thus reducing his liability below ordinary care, Bulle dumis this says that to subject an innkeeper it is never necessary to

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proov negligence. A common carrier you remember is liable for all loses. except those occasioned by the act of God. or a public enemy or of the bailor himself. The exception is now comprehensive in favour of an innkeeper who is vexed if the loss is occasioned by any inevitable force. 8 Co. 33. a. and to be law. 5 T. Rep. 276. Esp. has adopted Ld Coke rule & that since the decision in 5 T. Rep. he is apt to make mistakes. Esp. Dig. 626.7.

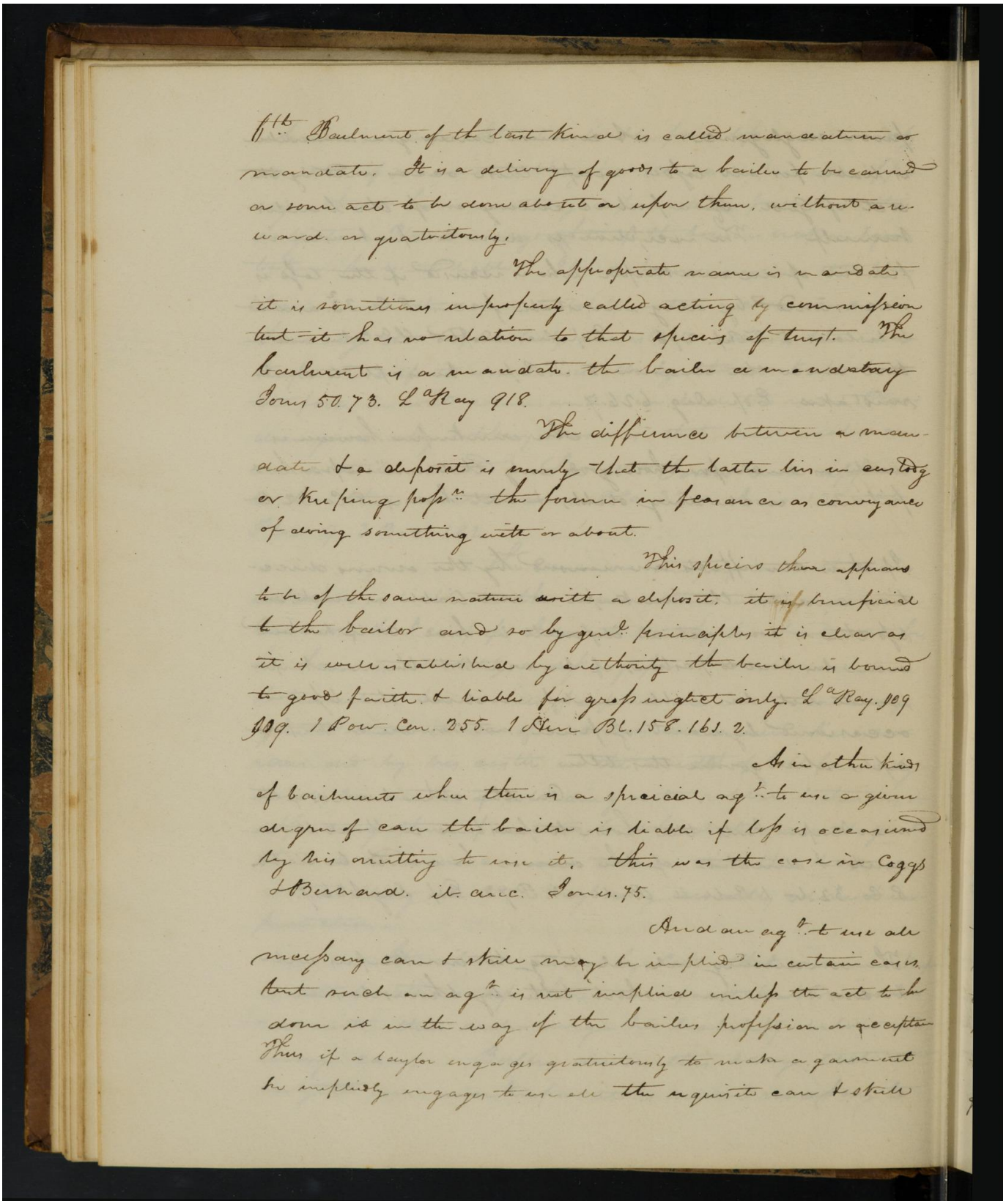
An innkeeper however is liable as such for those goods only that are "in ra hospitium. including stables & out houses. 8 Co. 32. b.

If then the effects are removed by the owners direction and lost the innkeeper is not liable as such. unless there is some actual default in him. as if he should order his horse to pasture. if he were lost the innkeeper would not be liable unless indeed the loss were occasioned by want of proper. not however on the principles which govern this title.

On the other hand if the innkeeper puts the horse to pasture without the consent & direction of the owner he would be liable. 8 Co. 32 b. 1 Roll. A. Bull. N. P. 73. Esp. Dig. 626.7.

The remaining rules relating to innkeepers will be considered in a short title by themselves. —

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ffth Bailment of the last kind is called mandatum or mandate. It is a delivery of goods to a bailee to be carried or some act to be done about or upon them, without reward or gratuitously.

The appropriate name is mandate it is sometimes improperly called acting by commission but it has no relation to that species of trust. The bailment is a mandate. the bailee a mandatary Jones 50. 73. L^d Ray 918.

The difference between a mandate & a deposit is merely that the latter lies in custody or keeping pos^n the former in performance or conveyance of doing something with or about.

This species then appears to be of the same nature with a deposit. it is beneficial to the bailor and so by gen^l principles it is clear as it is well established by authority the bailee is bound to good faith & liable for gross neglect only. L^d Ray. 909 909. 1 Pow. Con. 255. 1 Sum. Bl. 158. 161. 2.

As in other kinds of bailments when there is a special ag^t to use a given degree of care the bailee is liable if loss is occasioned by his omitting to use it. this was the case in Coggs & Bernard. it. acc. Jones. 75.

And an ag^t to use all necessary care & skill may be implied in certain cases but such an ag^t is not implied unless the act to be done is in the way of the bailees profession or occupation Thus if a taylor engages gratuitously to make a garment he impliedly engages to use all the requisite care & skill

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the agt. is presumed from the fact of its being in the line of his business. for if cloth were delivered to a blacksmith under such an engagt. it would not subject him not to work with skill. 3 Bl. 165. 6. 1 Hen. Bl. 158 11 Co. 54. 1 Saund 324. Doms 139.

Sir Wm Jones makes a distinction between the duty a mandatary when it consists in performance & custody; in other words between the duty of bailee when it lies in feasance & when keeping postm. When his duty consists in actual feasance he says a greater degree of diligence is requisite, to use his own expression "a degree of diligence adequate to the performance of the undertaking."

Now I confess that this is a distinction of which I can see the reason nor feel the propriety. it is arbitrary & not countenanced by any judicial determination. It is an unhappy peculiarity in this excellent little treatise. denied to be law 3 Bl. 165. 6. 1 Hen. Bl. 158

This is I trust a distinction unknown to the C.L. There is however a doctrine advanced in the case last quoted from Hen Bl. by Ld Loughborough which deserves attention as coming from such respectable authority. He says that when the engagt. by the bailee is to do the act skilfully the omission of the necessary skill is gross negligence, so too when the law implies such an undertaking. So that if a ship were occasioned by a mob. it is gross neglect in him not to perform his engagt. The amount is that when a bailee is subjected, but is of course guilty of gross neglect. Such a declaration confounds the

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different degrees of care & neglect — the whole argument in the case of Coggs & Bernard & all the other subsequent cases are unfounded & nugatory. for it makes all bailees to a level by subjecting them all when in any manner liable, on the ground of gross neglect, it changes the whole symetry of the system. with equal propriety it might be said that a common carrier who subjected at all was liable on the ground of gross neglect. as if he was robbed. L^d Loughborough appears to groun the ground that a bailee by his engag^t is subjected only for gross neglect. whereas a bailee may be subjected by slight or ordinary neglect.

When there is no engag^t express or implied to use skill or more care than he uses in his own affairs he is liable for gross neglect only Thus in the case in Ann. Bl. A & B having two consignments of goods. A agrees to enter them both at the custom house: but A having entered them by a wrong discription they were forfeited by the municipal laws, thereupon B. brot his action ag^t A. but he could not recover there was no special engag^t to use skill and the law implied none A being agen^t merchant, and altho he might in fact have been guilty of gross neglect yet as he lost his own goods it afforded no presumption of fraud 1 Ann Bl. 158. 1 Bow. Com. 255.

The true distinction then I take to be, that when one engages to do an act gratuitously in the line of his profession or occupation. the law implies an ag^t on his part to use all necessary care & skill. but when the act stipulated to be done is not within the line

of mandatary's profession, he is liable only for gross neglect

The agt. thus implied by law extends it seems only to the performance or the doing of the act stipulated to be done & does not provide agt. accidents from foreign causes. that is not connected with the stipulated acts.

Thus in the case of the taylor before mentioned. the law implies a contract to use the necessary care & skill in making the garment. but not to insure the garment or secure from robbery inevitable accident &c. he is not liable for losses thus occasioned unless he is guilty of gross neglect in exposing the goods As to the duty of keeping & restoring the law implies no greater liability on his part, than on the part of a person who is of no particular occupation. or a mere depositary.

Thus if the taylor agrees gratuitously to make a garment. if not well made he is liable, but if well made and stolen afterwards because he left his door open. the question of his liability must depend on the proof of gross neglect which is presumptive. if the goods of bailor only were exposed. but if he had entrusted the garment to a known thief he would be liable. This I take to be the extent of a mandatary liability when employed professionally, it appears consonant with the opinion of Ld Holt tho. he is not very perspicuous. Ld Raym 918. 1 Bow. Con. 255.

And thus in an express agrmt. by a mandatary to keep safely. he is not liable for losses occasioned by robbery or inevitable accident.

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and I think clearly that he is not liable and such an agreement without some degree of dispositt. Where one contracts thus to keep safely, he only means that he will use all necessary care for that purpose. he cannot be considered as insuring ag.st the act of God. or tempest or irresistable power. So that if he is in no default he will not be liable however unconditional the ag.t may be. La Ray. 910. 915. Toms. 62.

But I trust that a mandatary cannot screen himself by special ag.t from liability for fraud. it is contra bonos mores & so illegal by the principles of contracts. Toms 66. 75.

There has been some contrariety of opinion expressed as to how far an ag.t by a mandatary is binding as a contract, that is an ag.t to carry goods or to do some act about them gratis. according to some opinions the mandatary is not bound by his ag.t as a contract. because it is nudum pactum, but his liability is founded in tort or fraud in want of care,

According to others. & as I think, on principle, upon delivery his ag.t the voluntary binds him, as a contract. it is so far voluntary that he gets no benefit until the delivery is suff.t consid.n La Ray. 909. 10. 919. 20

The true distinction is that if one gratuitously engages to be the mandatary of another & afterwards refuses to become one, he is not bound. the contract is nudum pactum. but if the goods are actually delivered into his hands. he is liable & may be sued in ass.t which sounds

altogether in contract. it is true however that he may also sue in tort. 5 T. Rep. 143. Distinction then taken is that if A agrees gratuitously for B. if B does not deliver the materials A is not bound. but if he does A is liable.

L^d Holt says that a delivery on one side & an entry on the trust by the other is suffic^t consid^n L^d Ray. 920. 1 Bac. 241 Doc & Stu. 129. 12 Mod. 487. 5 T. Rep. 149. 150. 1 Powr. 364. Cro. Jac. 667 Contra. Yelv. 4. 128.

In that case in Yelverton it was holden that the ag^t did not bind as a contract & there are other opinions to that effect. But the case in Cro. Jac. is a very strong case precisely in point, and the case in Yelverton is there considered & overruled. In Croke A delivered money to B on a promise by B. to deliver it over to C without reward. B failed to perform. A then brought his action ag^t B on the express promise stating the delivery only a consideration & recovered. Now it is impossible for him to recover thus unless the ag^t were binding as a contract, It is true A might have recovered had he brought an action on implied ass^t for money had & received but this was an express contract & seems to have been brought on purpose to try the question. Cro. Jac. 667. 8. L^d Holt recognises & confirms this doctrine in the case of Coggs^t v Bernard.

Sir Wm Jones observes however that where special damage arises by bailee not performing his agreement by not becoming mandatary when he has agreed to an action will lie ag^t him. Jones 76. to 80.

He also says that the grounds of the action in these last cases

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is some special damage, but it is to be remembered that it is a breach of contract. the damage accrues from the breach of contract. it is difficult to suppose that there can be special damage in consequence of the breach of a contract that does not exist.

Thus A agrees gratuitously that he will carry a letter to M. H. from disappointment or even caprice if you please. he does not carry it, and B suffers a loss in consequence. Sir W. Jones says that an act^n. A would lie. I can see however that I know of no principle of C. L. to support him. Thus if there were an actual delivery. or cons^d. paid or promised or paid in the case A might sustain his action.

Sir W^m. agrees that the action cannot be sustained unless there is special damage. but if there is it can, now every civil action must sound in contract or tort. by the hypothesis there is no fraud or misfeasance so that A cannot be subjected on that ground, but can be subjected on the ground of contract Sir W. says yes. but how is it to support the action, the validity of a contract is in gen^l. to be determined from the fact existing at the time of contract made. it must be good ab initio. and altho special damage may increase damages in an act^n on the breach. yet special damage can never give validity to a nudum pactum. can never go to the question as to the right of action. a contract cannot be made binding by anything ex post facto. And if a contract has not virtue enough to support an action without special damage, it certainly cannot have with

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Sir W^m is certainly mistaken. that no special dam-
age is necessary you may see. L^d Ray. 909. 10. 919. 20
Jones. 76. 80.

Jones says further that when an act^n is brot.
ag^t a mandatary negligence is the ground of the action
not his express undertaking. I do not see how his sub-
jected by negligence. if contract is the foundation of the
action. neglect is out of the question. If negligence is
the ground of the action it must be on the ground merely
that the party has been guilty of a breach of contract & there-
fore the act^n may be brot on the promise.

Besides are not two
cases contradictory to this. where a mandatary undertakes
undertakes to use a given degree of care he is bound to the ex-
tent of that engag^t but how can he be subjected by his
express promise when that does not bind him. how can
it extend his liability beyond what the law would
require of him. a carrier undertakes to car-
ry goods & warrants ag^t robbers. books settle the ques-
tion that he is liable in case of loss. how? Jones
says in consequence of negligence. but responsible
and the utmost diligence. would he not be liable?
how is it that he is liable further than the law re-
quires. if the ag^t is a mechanic factors. It follows
then that the contract binds him. Sir W^m Jones
is enquired on this subject but his authority is too
respectable to be passed in silence.

The true dis-
tinction is that where one engages gratuitously to become the mandata-
ry of another & afterwards refuses he is not liable

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but if he does become bailee & makes any engagt. he is bound to the extent of it by virtue of the contract. 2 Roy. 910. 19. 5 East. 140. 169. 50. 3 East. 62

There are certain miscellaneous rules applying to bailments in genl. with which I would now present you. and under this genl. division, the first enquiry is, in what case the bailee is entitled to a lien against the bailor.

Now a lien is a direct claim or incumbrance upon some specific property of another by way of security for a debt or duty and is always accompanied with actual possession.

A special property & a lien are two distinct things. There can be no lien without special property but there may be a special property without a lien. A lien exists in favour of bailees of the fourth & fifth class Bailees of the 2d & 3d class you will recollect are pawnees. those of the fifth are those who are entitled to do some act with or about the goods for which they recieve a reward. a lien does not exist however in favour of all bailees of the fifth class.

All pawnees have a lien on the goods pawned it is created by delivery & the terms of the bailment without any thing done ex post facto by bailee. The precise object is to create a lien to secure a debt or duty & the security consists essentially in the existence of the lien and right of possession. The pawnee then has right as in all cases where the contract is lawful to hold the property untill the purpose of the bailment is accomplished

which is a discharge of the debt or duty. Cro Jac 244.5 Yelv. 178. Salk 522. Pr. Cha. 419. Esp. Dig. 583

Most bailees of the fifth class have a lien, i.e. a right to retain poss.n against the bailor by way of security for compensation but the lien is not created by the terms of the bailment as in the case of the pawnee. the object of b.t was that bailee should do something for which he is to have a reward & for the security of which he has a lien upon the goods but condition in law annexed to the Bailment. The law does not require that bailee should for his own safety demand pay.t before he has rea.d but enables him to retain the property until he is paid. 3 Bac. 185. Hob. 42.

It is not universally true that bailees of the fifth class have a lien as the gen.l they have I will distinguish as I proceed.

Tho certain bailees have a lien yet a third person who obtains possession wrongfully from the bailee cannot avail himself of it. the bailor may recover without tendering to anybody. as if A pawns goods to B & C gets wrongful possession, A may recover them without tender & C cannot retain ag.t either, 2 V. Rep 465. 3 East 585

In the 1.st place. A common Carr.r has this lien, a right to retain the goods against the owner until paid the reward or price of transportation. and he may keep the goods even private if he is not paid. 2.d Ray. 752. 867. 5 Barn. 2826. 5 Bac. 269. Salk 654. 2 N. Rep 64. contra 3 Powel. 1.st Ray. 867. not law

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And indeed if goods are stolen & delivered by a thief to a comr. & comm. he may retain them ag.t the true owner untile he is paid the price of transportation, for by law he is obliged to receive & convey all goods tendered. & the law does not oblige him to be so uncivil as to demand pay.t before the act done, but allows him to retain as security after. L.d Ray. 887.

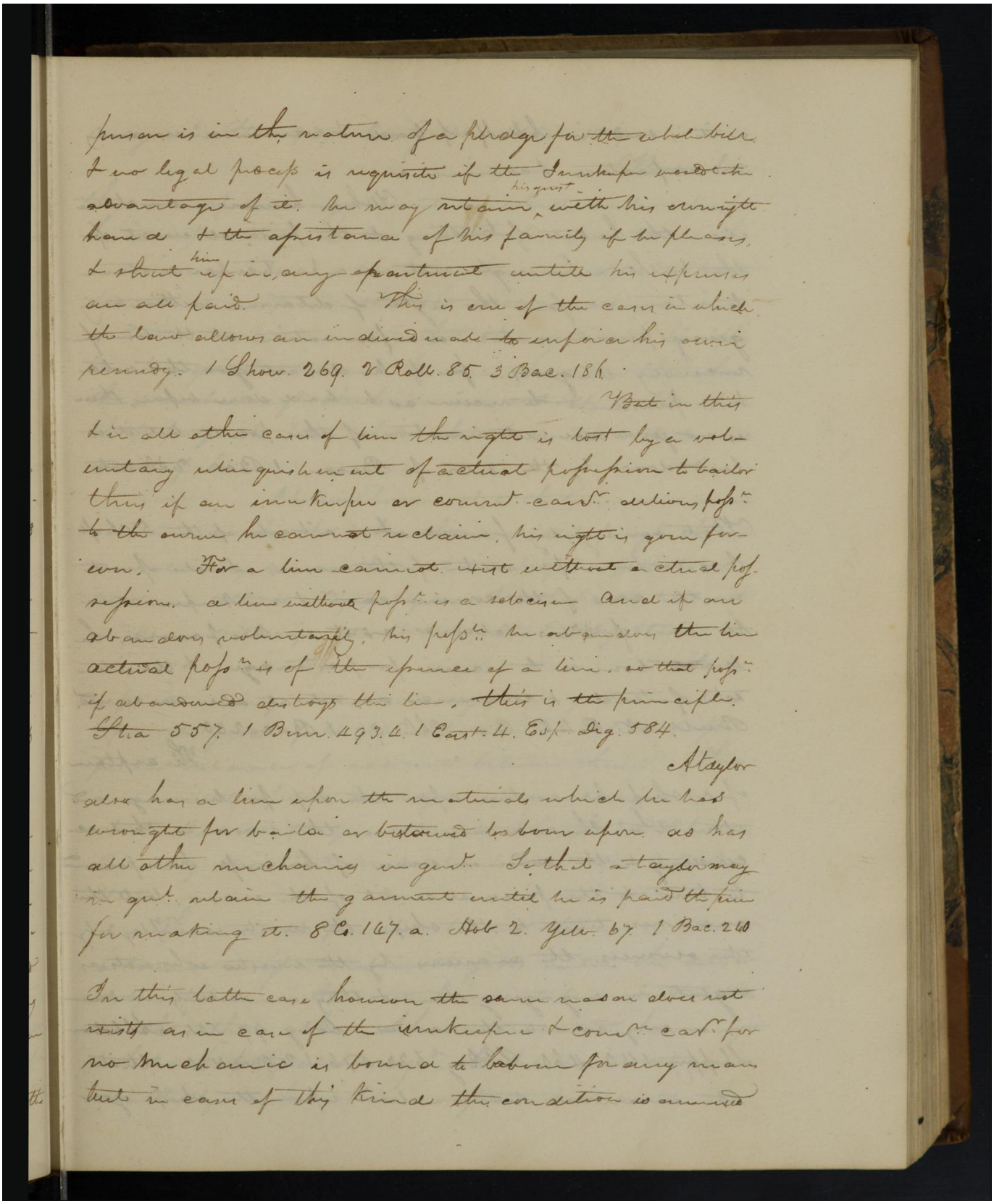
An. Innkeeper also & in the same principle has a right to retain the horse of his guest, untile the expence occasioned by the horse is paid. & so of other animals, for he is obliged to receive them when he has accomodations L.d Ray 868. Bull N.P. 245. 3 Buls. 268. Salk 388 8 Co. 147. 3 Bac. 185.

And tho the horse of A is taken to an Inn by a stranger who perhaps has no title to him & then pawned for, the innkeeper may retain him ag.t A the true owner untile the expence of the horse are paid. the case is parallel to indeed precisely like that of a comr. cont.d & founded on the same principle. Yelv. 87. Pop. 128. 179. Esp. Dig. 584.

An Innkeeper may also retain the person of his guest untile the whole bill is paid, for he is a pledge for the whole bill. the lien upon the horse being only for the expence of the horse for as to that Innkeeper is bailee and in case of bailment a lien exists only in the thing bailed & extends only to secure pay.t for the labour bestowed upon the subject of the bailment.

But the

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person is in the nature of a pledge for the whole bill & no legal proces is requisite if the Innkeeper would take advantage of it. he may retain, with his own right hand & the assistance of his family if he please, his guest & shut him up in any apartment until his expences are all paid. This is one of the cases in which the law allows an individual to enforce his own remedy. 1 Show. 269. 2 Roll. 85. 3 Bac. 186.

But in this & in all other cases of lien the right is lost by a voluntary relinquishment of actual possession to bailor this if an innkeeper or comm. carr. delivers poss. to the owner he cannot reclaim, his right is gone forever. For a lien cannot exist without actual possession. a lien without poss. is a solecism And if one abandons voluntarily, his poss. he abandons the lien actual poss. is of the essence of a lien, so that poss. if abandoned destroys the lien, this is the principle. Stra 557. 1 Burr. 493. 4. 1 East. 4. Esp. Dig. 584.

A taylor also has a lien upon the materials which he has brought for bailor or bestowed labour upon. as has all other mechanics in gen. So that a taylor may in gen. retain the garment until he is paid the price for making it. 8 Co. 147. a. Hob 2. Yelv. 67. 1 Bac. 240

In this latter case however the same reason does not exist as in case of the innkeeper & comm. carr. for no Mechanic is bound to labour for any man but in case of this kind the condition is annexed

as it is said in behalf of "trade & commerce" meaning manufactures & commerce

When however a mechanic is in the habits of trusting to the personal credit of the bailor. he ought not in a particular instance to retain or assert this right of detainer without having given previous notice or information at the time of receiving the goods. for if he does not give this notice he is presumed to act as he had done before, there is no judicial determination of this point. but it is laid down by the editor of Bacon. 1 Bac. 240. note.

But an agisting farmer who is a bailee of the 5 class has no lien. for neither of the reasons which operate in the case of the common carr. & innkeeper. or in the case of the mechanic exist in his favour. he is not bound to receive for pasturage. & the interest of trade & commerce are not at all concerned. Bull N. P. 45. Cro. Ch. 197. 1 Bac. 240.

The captain of a ship has no lien upon the ship for his wages and tho the mariners have, the reason is, that according to the common course of business. he is presumed to trust to the personal credit of the owners. but the mariners trust to the ship. the master is employed by the owners. the mariners by the master who acts as agent in engaging them & they are entirely unknown in many cases to the owners. Doug. 97. 101. Abbott Shipping. 140. 460. 2d Ray. 632. 576. 12 Mod 440 that the mariners have a lien upon the ship you

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may see Str. 937. Doug. 101. Abbot. 459.

But when there is a special agreement on which bailee relies for his compensation the law creates no lien in his favour, thus in the case of a farrier to whom a horse was delivered to be kept & cured it was proved that the owner was to pay a sum certain, and determined that that ag.t ousted him of his lien or right of detainer, the reason assigned is that when there is such an ag.t the bailee does not rely at all upon the property, the fact shews that he trusts to the personal credit of bailor

I believe however that the true reason is more artificial, it is this that when there is an express ag.t the law cannot imply one, on the maxim expressum facit tacem tacitum, altho it may imply one when the parties have not made one. 2 Roll. 92. Ylv. 66. 5 Bac. 371. Esp. Dig. 555. 6.

So also a factor or any commercial agent in gen.l has a lien upon the goods of his principal in his actual poss.n for the balance of accounts between them. There are a variety of rules relating to mercantile agents for which I would refer you to "Master & Serv.t" 3 T. Rep. 119. Com Dig. Merch. B. and 254. 1 Burr. 494. 2 Bl. Rep. 1154.

These are the principal bailees who are entitled to a lien or a right to retain the goods until the debt or duty is paid. It is not however to be understood, that no others than those I have mentioned have a right to hold property at all ag.t the bailor. most undoubtedly, a hirer has a right to hold until the

object is accomplished or the time expired for which the property was bailed 'till that time the bailor has no more right to take than a third person and the rule is the same in relation to a borrower. altho the bailment is gratuitous.

Tho if I engage gratuitously I am not bound by this w^d. contract. but if I give prof^e I cannot retake until the object is accomplished or time expired without subjecting myself. No doubt a bailee may retain for the stipulated time a purpose. but this is not a lien, he has a special property that is not to secure a debt or duty. which makes a lien a particular kind of special property. Ydl. 172. 1 Roll Ab. 128. 1 Bac. 240.

Thus far as to the right of retainer by bailee. the next subject to be considered and that by far of the most practical importance is

How far the rights of strangers may be affected by bailments.-

Disputes do not often arise between bailor & bailee but the rights of the creditors of the bailee & purchasers under him are often discussed.

Before we enter into the particular examination of this subject there are a few introductory rules to be laid down.

In the first place it is said. but I think incorrectly. that if one bails as his own the property of another. the bailee

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must restore it to the bailor and not to the true owner, i.e to the person of whom he received it without regard to the true owner, because it is said that the bailee cannot judge between the bailor & the true owner. But this rule as you will see goes further than the reason. 1 Roll. 606. 7. 1 Bac. 237. 242.

Suppose that this rule means nothing more, & if it does it means more than is law, than that the bailee will be justified if he redelivers to the bailor. and that he may thus discharge himself of the claims of the true owner. the reason assigned goes no further, it would be extremely hard to compel him to pledge at his peril for he might thus be subjected to a loss. when the rule was intended for his protection & the law will not subject him if he redelivers to the bailor. this ought to be the rule on principle.

It would be unjust to oust the owner of his property who shall it may reclaim at pleasure. Again how can the bailor confer a right a right which he has not to withhold the property from the owner & that too when the bailee knows the facts.

Besides it is said afterwards in Roll. from whence the orig. rule is taken, that if bailee delivers the property to the bailor before or pending an action brot. agt. himself by the true owner, it will bar the action. This protects the honest bailee & does not deprive the true owner of his right. it shows, that the owner may recover of the Holder. 1 Roll. 607. Fitz. 137. 1 Bac. 242.

In case of this sort where there is a dispute as to the title of property bailee if the owner does not exhibit sufft. evidence of ownership the bailee ought not on principle to be subjected. but if sufft. evidence was shewn I trust he would be liable unless he discharged himself as above by delivery to bailor. 2 Ld Ray. 867.

The rule laid down by Ld Holt is. that if goods owned by A are stolen by B & delivered to a common carrier. he may retain them against the true owner until paid for the transportation but no longer.

Now if the rule from Rolle is correct the one from Holt is entirely nugatory & the comm. carr. would be bound to deliver to deliver them to the thief altho he knew the fact Ld Ray. 867. Esp Dig. 599.

Again according to the text of Rolle if the bailee in a case of this kind dies & his Ex. comes into poss. of the goods. the Ex. must deliver to the true owner at his peril and not to the bailor. i.e he will not be discharged by delivering to him from whom his testator received them as ag. the claims of the true owner.

Because it is said. the Ex. having acquired poss. by law by transmission from testator. he must deliver to him who in law is the owner. This rule seems to presume a case somewhat stronger against the Ex. his testator might have delivered to the bailor

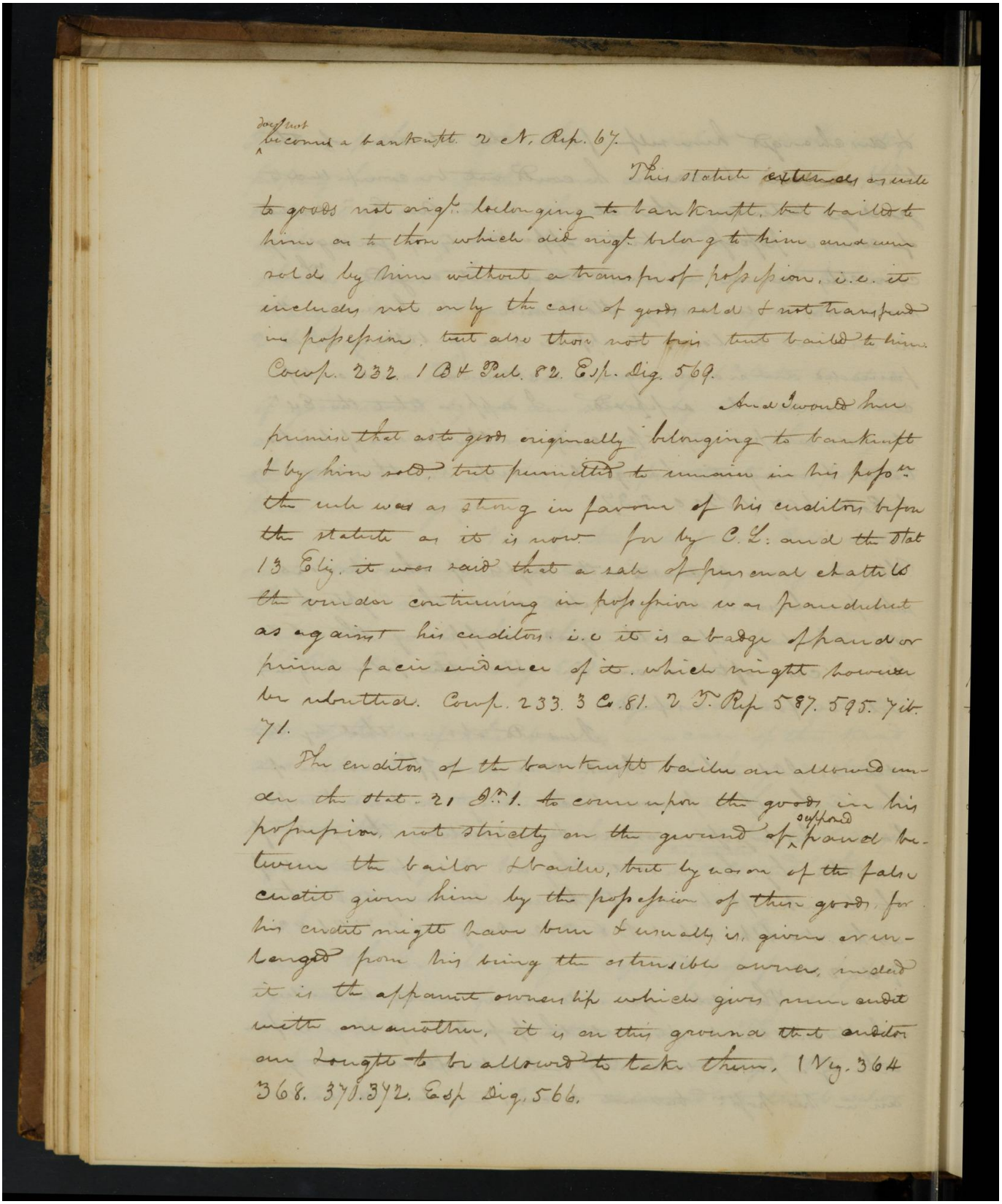
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& discharge himself from the claims of the true owner. because he could not be compelled to judge between the claimants. An Exr does not of course possess a better opportunity of judging correctly and in most cases not as good. There is no decision contradicting Holt's rule but I conceive that it cannot be law. it appears to be arbitrary and founded on reasoning as metaphysical and artificial as can be supposed. I suppose that the Exr stands on principle precisely in the place of his testator & may discharge himself in the same way 1 Roll. 607. 1 Bac. 237.

We are now to consider the rights of those persons who purchase under a bailee and the rights of creditors who levy upon the goods supposing them to be his. cases often occur in which the following rules will be found useful.

I would observe that by the stat. 21 Jac. 1 which stands to be in affirmance of the C.L. if a person becoming a bankrupt has in his possession order & disposition the goods of another by his consent. they are liable for the debts of the bankrupt bailee & the creditors may take them as his. 1 Salk 166. 1 B & P 82. Doug 303. 8 T Rep 82 7 ib. 228.

This statute you will observe relates to bailees who become bankrupts. or to the possession of the goods of another by a person becoming a bankrupt while the goods are in his poss[n] but not to cases in which the bailee



does not become a bankrupt. 2 Ch. Rep. 67.

This statute extends as well to goods not originally belonging to bankrupt, but bailed to him as to those which did originally belong to him and were sold by him without a transfer of possession, i.e. it includes not only the case of goods sold & not transferred in possession, but also those not his but bailed to him. Comyn. 232. 1 Bl. & Pul. 82. Esp. Dig. 569.

And I would here premise that as to goods originally belonging to bankrupt & by him sold but permitted to remain in his poss.n the rule was as strong in favour of his creditors before the statute as it is now for by C. L. and the Stat 13 Eliz. it was said that a sale of personal chattels the vendor continuing in possession was fraudulent as against his creditors. i.e it is a badge of fraud or prima facie evidence of it. which might however be rebutted. Comyn. 233. 3 Co. 81. 2 T. Rep 587. 595. 7 ib. 71.

The creditors of the bankrupt's bailee are allowed under the stat. 21 Jac. 1. to come upon the goods in his possession, not strictly on the ground of fraud between the bailor & bailee, but by reason of the false credit given him by the possession of these goods, for his credit might have been & usually is given or encouraged from his being the ostensible owner, indeed it is the apparent ownership which gives most credit with one another, it is on this ground that creditors are thought to be allowed to take them. 1 Vez. 364 368. 371. 372. Esp Dig. 566.

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The bailor's abutting any presumption of actual fraud between himself & bailee, is of no avail as between himself & the bailee's creditors, their claim is not founded on any presumption of fraud but upon this false credit which the ostensible ownership gave to the bailee. 1 Ves. 365.

This statute seems to be founded upon & in affirmance of the great principle of the C. L. that when one of two innocent persons must suffer by the act of a third, he who occasioned or enabled the third to cause the loss, shall suffer it rather than the other.

The bailor in this case by permitting the bailee to act as ostensible owner has given him apparent credit, the question whether the credit given in a particular instance was thus acquired was never made. it is sufficient that the possession deceived the public, and then the bailor enabled the bailee to occasion the loss. he must therefore be the loser. This is clearly the rule of the C. L. & of Equity. 2 J. Rep 70.

If the stat of 13 is in affirmance of the C. L. it follows that the stat and the construction it has received in Eng. are of as much importance here as there.

It is not to be understood that this stat extends to goods in the poss. of the bankrupt which he holds in the right of another. e.g. as guardian. or husband or executor for the law in such case gives him possession & the party in whom is the right of property cannot prevent it. It is not in consequence of any delegated right of possession

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that they hold, so it is not the fault or folly of the owner or bailee that occasions the loss. of course the case does not come within the statute. 1 Atk 159. 3 P. W. 187. note. 3 T. Rep. 618.

The statute however does extend as well to mortgages of goods as to absolute sales. when the creditor will hold to the exclusion of the mortgagor who is left in possession. Robt. Fr. Con. 549 to 557. 1 Atk. 165. 1 Vy. 348. 1 Wils. 260. Esp. Dig. 566.

You will observe however that the same rule does not hold in relation to mortgages of land. for the mortgagee being in the possession of land is no evidence of his legal title. The title of land may always be traced. and if the creditor does not choose to examine the title deeds it is his own fault the stat. of 13. extends only to mortgages of personal chattels.

Neither does this statute extend to the sale of a ship at sea. for in this case immediate possession cannot be given. Suppose a mortgage by a bill of sale a ship at sea to B. immediate possession by B is impossible. and as it is constructively in possession by his agents the master & mariners. still the statute does not reach the case and the mortgagee (B) will hold to the exclusion of the creditors of A the bankrupt because immediate poss. cannot be taken.

B must however, take poss. immediately on her arrival and if he does not. if he suffers her to remain in the vendor or mortgagors possession, it

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with continue his false credit & thus come within the spirit & operation of the statute. 1 Atk 160. 1 Vez. 354. 361. 366. 2 T. Rep 462. Doe 85. 491. Esp. Dig. 567.

And there are other cases too in which an actual manual delivery is dispensed with. i.e is not considered necessary to enable the vendee to hold against the vendors creditors. there are cases in which symbolical deliveries are held sufft.

Thus if a store of goods are sold by a bill of sale and the key delivered to the purchaser. it is sufficient as it gives him the controul over the subject, so that if the vendor afterwards become bankrupt. the vendee will hold to the exclusion of the vendors creditors. 7 T. Rep. 71. 2 Str. 955. Esp. Dig. 577.

So also to bring a case within the statute the goods must be possessed by the bankrupt having he as his own goods &c. i.e he must not only be in the possession but in the "order & disposition" of them. to use the language of the statute. That is he must use in some such way as to appear the visible owner to the world otherwise the possession would give him no false credit.

Thus a box deposited with a depositary shut up out of sight so as not to appear this or not to appear at all inducer. their would not be liable for the debts of the bankpt. depositary.

But if A purchase an assortment of goods & wishing to remain a

dormant owner, suffers B to take the poss. of the goods & to sell, manage trafic. & treat as his own, make contracts about in his own name, the case is different. The public supposes that the goods belong to B he does not call himself the clerk of A but contracts in his own name, these goods then give B a false credit & they are liable to his creditors.

But on the other hand if one lends another a horse to ride a mile or a journey, the creditors cannot take it. for the poss. for such purposes carries no evidence of ownership. and if the rule were otherwise it would be extremely inconvenient. a bankrupt could not go to mill. But the great decisive principle in this & similar cases is, that the bailee gets no false credit among prudent men by such possession. Comp. 233. 1 Atk. 185. 3 T. Rep. 316. Esp. Dig. 567. 570.

Nor is also a temporary possession by a person becoming bankrupt for a particular special and temporary purpose does not bring the case within the statute. Thus A lodges goods with B to keep until he shall have an opportunity to send for them, or if you please 'till a storm be over past. or 'till a ship or waggon arrives - and in mean time B becomes bankrupt his creditors cannot hold for these are plainly cases not contemplated by the statute. if they were so many would be safe unless his goods were in his own hands. 1 Atk. 185. 1 Selw. 197. 200. Esp. Dig. 567.

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And a bankrupt bailee must appear in all respects to be the owner, to bring the case within the statute, for if from the nature of his business the presumption of his ownership is excluded, the bailee will hold to the exclusion of the bailors creditors.

The C is a factor in the possession of Bs goods, so far as his acts go he appears to use them as his own & to have the whole control. yet as he is known to be a factor, if he afterwards become a bankrupt his creditors could not take the goods, the principal or bailor will hold, for the bailee being thus known, could acquire no false credit by the possession. 1 B & P. 82. 1 P.W. 318 3 it. 185. Esp. Dig. 570

Thus far I have treated of the rights of the creditors of the bailee. and I would further observe in relation to purchasers that

The purchaser under a bailee who supposes the goods to belong to him will hold against the bailor precisely like the creditors of bailee, i. e. according to the distinctions already taken 2 Bac. Abr. 3.

In case when goods have been sold & permitted by vendor to remain in possession of vendor who becomes insolvent, the Stat of 27 Eliz. provides that the subsequent purchaser shall hold in exclusion of the first purchaser. The stat 21st Jac. 1 affects the same purpose & extends also to cases in which the goods have not been sold.

The C L however would have attained all the ends

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of both these statutes. at any rate the stat of 2. has been considered declaratory of the C.L. in Com. & correctly I think that the st. of 13 Eliz is of the same character see. Comp. 434

In common case of bailment (when the bailee is not in the order & disposition of the goods & is not of course the ostensible owner. or when he does not become bankrupt) the general rule is, that the true owner, that is, the bailor may recover against the purchaser under the bailee or any subsequent purchaser: or a creditor who levies on them as bailee's unless the sale was in market overt, so against any person into whose hands they may otherwise have fallen however honestly he may have obtained them. the maxim being caveat emptor.

Where you perceive there is no false credit given, for although the goods are in the actual possession of the bailee. yet he has not the "order & disposition" of them, and for this reason the purchaser cannot hold as altho the bailee should treat the property in such a manner as to induce the belief that he was the real owner. In sale is a breach of trust & can convey no title.

Thus A lets a horse to B to ride 5 or 100 miles. B in breach of trust sells the horse to C. who on his journey. C cannot hold ag.st the bailor. for the circumstance of B's riding the horse is no evidence of ownership. the fact of letting & hiring horses & carriages is a fact of daily occurrences. And if C should sell to D & D to E. &c on. it is immaterial how numerous may have been the sales

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or honest the indiscreet purchasers, the rule is the same the purchaser must lose his money, unless he can recover it of the swindler, or the horse has been sold in market overt. for you observe that the bailee has not the order & disposition of the horse. 1 Wils. 8. 2 Stra. 1187. 3 Atk. 44 Salk 283. Esp. Dig. 579.

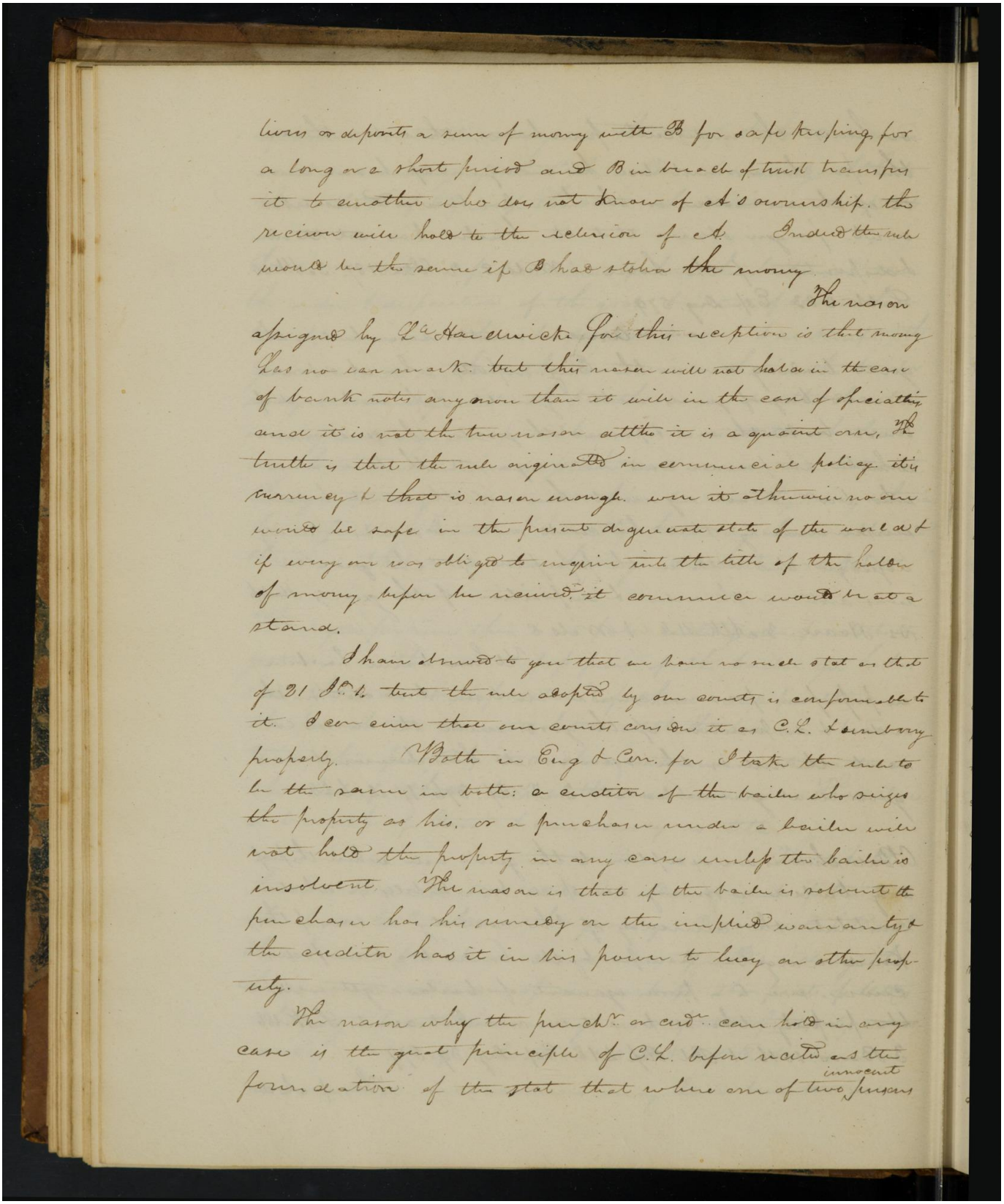
And in another case which is the great leading one in the Eng. reports. where a deposited a small bag of jewels with a jeweller & he in breach of trust broke the seal & pawned the jewels. the question arose whether the pawnee could hold against the true owner who brot. trover against him. & the court held unanimously that he could not & it was solemnly adjudged that altho in the possession yet the jeweller was not in the order & disposition of the jewels. Hartop vs Hoare. 3 Atk 44. 1 Wils. 8

When bailee has been in possession for some considerable time. but not in the order & disposition of the goods with the owners consent the rule is the same. it has however been a good deal grumbled at. 3 T. Rep. 376. 4 ib. 640.

But there is an exception to the genl. rule when the property bailed is money. i.e. specie bank bills or whatever constitutes the currency of the country. in cases of this kind a regular transfer by the bailee to a bona fide purchaser. i.e. to a person ignorant of bailees right will bind the property. tho it be not in market overt. Salk. 186. 3 Burr. 1516. 1 Bl. Rep 418. Esp. Dig. 39. 579.

Thus if A de-

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liers or deposits a sum of money with B for safe keeping for a long or a short period and B in breach of trust transfers it to another who does not know of A's ownership. the reciever will hold to the exclusion of A. Indeed the rule would be the same if B had stolen the money.

The reason assigned by L^d Hardwicke for this exception is that money has no certain mark. but this reason will not hold in the case of bank notes any more than it will in the case of specialty and it is not the true reason at the it is a general one, the truth is that the rule originated in commercial policy. its currency & that is reason enough. were it otherwise no one would be safe in the present degenerate state of the world if every one was obliged to enquire into the title of the holder of money before he received it commerce would be at a stand.

I have shewed to you that we have no such stat as that of 21 Jac. 1. but the rule adopted by our courts is conformable to it. I can give that our courts consider it as C.L. & somewhat properly. Both in Eng & Amer. for I take the rule to be the same in both: a creditor of the bailee who seizes the property as his. or a purchaser under a bailee will not hold the property in any case unless the bailee is insolvent. The reason is that if the bailee is solvent the purchaser has his remedy on the implied warranty & the creditor has it in his power to levy on the property.

The reason why the purch^r or cred^r. can hold in any case is the great principle of C.L. before recited as the foundation of the stat that where one of two innocent persons

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must suffer by the act of a third. the one who occasioned the thing to cause the loss must bear the loss. And unless the bailee is a bankrupt there is no false credit given. It is therefore indispensable under the stat and at C.L. that the bailee be insolvent to entitle his creditors or purchasers to hold. otherwise there is plainly no occasion to divest the bailor of his title. 3 Atk 44.

And even when the bailee is insolvent his purchasers or creditors will not hold against the bailor, unless the possession was clearly such as to give him a false credit. this rule is founded in the words of the statute. bailee must have been in the "order & disposition" of the property by which is meant that he must appear the ostensible owner of it. 1 B & P. 82. 88. 648. Doug. 396. 7 T. Rep. 67. 237. 1 Ves. 243. 1 Atk 185.

And further the creditor of an insolvent bailee will not hold against the bailor unless the terms of the bailment were such as to entitle the bailee to the possession or of his own. i.e he must appear the ostensible owner otherwise he has not the order & disposition of the goods by the consent of the bailor. the consent is indispensable. Thus in the case of Hartop & Hoare. the jeweller broke the sealed bag & thus became the apparent owner, but breaking the seal was a breach of trust. and the jeweller did not appear the ostensible owner nor had the order & disposition of the goods by the consent of the owner, he could not so appear by the terms of the bailment any more than a thief could. 3 Atk 44. 1 ib. 185.

The gen. principle governing the relative rights of a bailor on the one hand and of the creditors of the bailee or purchasers under him have been already explained yet as they are of frequent application I will state a few more examples.

To bring a case within the statute the bailee must not only be in possession but he must have the order & disposition of the goods. i.e. he must appear to the world the true owner of the goods & this is also the C.L. rule.

So if A purchase goods of B & leave them with him until he can remove them. if B becomes insolvent they will not go to his creds. So if a traveller leave his horse & leave him with a farrier to be shod or his carriage & leave it with a smith for repairs. and in the mean time the bailee become bankpt. there is no pretence that the creditors can hold against the bailor.

And it is a gen. rule that where there is given to the bailee a temporary possession for a particular, special reasonable or necessary purpose. the creditors of the bailee on his becoming bankrupt cannot hold against the bailor. Doug. 663. 1 Atk 185. to 187. Esp. Dig. 567.

Now the circumstances under which one man may be in the possession of the goods of another in the character of bailee are indefinitely varied and numerous. Thus are many cases in which a cautious man would trust to the evidence of ownership where a cautious prudent man would not. I have explained the criterion as far as I was able.

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Swift states another example which occured in this state. A merchant driving of beeves hired a driver to take his cattle to N. York. The driver left the main road & sold the cattle to some incautious purchasers whereupon the owner claimed the cattle & recovered them in an act. of trover. The mere fact of driving was no evidence of ownership. the truth is owners but seldom drive their cattle to markets. Many cases might be stated but it would be superfluous.

When goods are bailed for him to be used for a certain time by bailee it has been a moot question whether the bailees creditors could take his interest in the thing bailed on execution. Thus suppose A hires a yoke of oxen of B for 6 months. here A has a pecuniary interest for that time. Can his creditors take by Ex. his special interest? Lord Kenyon appears to assume this in his argument when he says that the creditors would be entitled to the beneficial use of the property during the time.

But I conceive that the creditors cannot take the goods I go upon the ground that the bailment of a personal chattel is always a fiduciary contract. I think that in my observations upon the subject of pawns I shewed clearly that a pawnee cannot assign the pawn until the property becomes absolute in him. can then a cred. of a hirer take his interest in the thing hired? if he can if one should hire a horse to go to Hartford to day his cred. might take him from him. and then to whom the hirer himself could not assign the chattel.

I reject the contract

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is founded in personal confidence & confers no right to the bailee to transfer. that was not the intention, If the bailee can lawfully assign he would not be answerable for subsequent bailee conduct and a stranger would become the arbitrary disposer of another interest.

It appears to be going too far then to say that a bailee can assign personal chattels. a fortiori then his creditors cannot take them for L^d Raym. citetur. 7 T. Rep 11. That a bailee cannot assign vide 5 T. Rep. 604. 7 East. 6.

The truth is however that the opinion of L^d Raym. taken secundum subjectam materiam is not at all repugnant to the principle I have laid down. The case was a question as to the furniture in a house. and as the time might be taken the goods might constructively be taken with it. but vide 2 Bac. 352. Com. Dig Ex^r C. 4. Salk 404. L^d Ray. 795. 913. 915. 16.

Thus far of the relative rights of the bailor or on hand and of the creditors & purchasers under the bailee on the other I am now to enquire.

To what actions the bailor & bailee may be respectively entitled.

It is a gen^l rule (& in the books laid down as universal) that the bailor as he has a gen^l property in the goods may recover in trespass or in trover or any proper action. against any stranger who takes away the goods or injures them while in bailee possession. Thus to shew that this rule is not universal 5 Bac. 164. 260 Latch. 214. 1 Roll. 4. 2 Buls. 268. 3 Revs Abr. 392.

Thus if A deposits goods with B & C injures or takes them away the bailor may maintain trover or trespass or any action the case may require ag^t. C. for although A the bailor has not the actual possession, yet in things personal gen^l property draws after it what is called a construction possession or a possession in law, which is as effectual in law to support trespass or trover as actual possession. 2 Roll. 569. 1 Sid. 238.

I would observe that a right of present possession in any one amounts to a constructive poss^n. or a poss^n. in law unless some other person is in actual poss^n. under colour of title i.e. adverse title, a constructive poss^n. & poss^n. in law bring the same thing.

Thus in the case above A has a right of present poss^n. he may countermand the delivery at any time. B is not in actual poss^n. under colour of adverse title A therefore has a constructive poss^n. and one or the other is indisputably entitled to an act^n. on injury done. This I take to be the true construction & on this principle the bailor may recover in the case stated.

So if a watch be lodged with a goldsmith to be repaired & it be taken away the bailor may maintain trespass or trover for he has a right to countermand the delivery.

Suppose goods bailed to be used 6 months by bailee & hire to be paid him. & further suppose within the 6 months they are taken away, can the bailor maintain trespass or trover for them ag^t. wrong doers 4 T. Rep 289. 7 T. Rep. 9. 1 T. Rep 480. Esp Dig. 383. 8 Johns. 332

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1 Bulst. 68. Esp. Dig. 576. See moot questions. -

That the bailee may maintain an immediate action there is no doubt. Whether bailor can maintain any & if any what? is the question. -

But if goods are wrongfully taken from a depositary or injured while in his possession, the bailor may doubtless maintain an action immediately for he has a constructive poss.n which is a right of present possession And this rule holds strictly in all cases in which the bailment is constructive and also at pleasure of bailor for here he of course has a right of present poss.n 5 Bac. 164. 260. Latch 214. 1 Roll. 4. 3 Revis. Hist. Eng. law. 392. 2 Bulst. 268.

It is said in the books that if a bailee gives goods to a stranger the bailor cannot maintain trespass against the stranger or alone nor in the first instance known, that is he cannot maintain either until demand made when a refusal amounts to conversion, the original taking having been lawful. 5 Bac. 164. 261 1 Roll. 606. 7. 1 Bac. 237.

But according to a late case this doctrine would appear questionable; for the delivery of the goods would itself be a breach of trust. In the case before cited of the factors pawning the goods of his principal, it was decided that the principal might maintain an act.n against either the factor or pawnee without tendering at all, for it was a breach of trust & misfeasance amounting to a conversion. 7 East. 5.

And yet it has been determined that if goods are given to a stranger by a bailee, and trover be brot. for them in the first instance it will not lie. and still I conceive that this is a more flagrant breach of trust than the pawning. These decisions cannot be reconciled & it would seem that this latter one relating to the gift is exploded.

At any rate after demand made & suffr. evidence of ownership prohibiting or refusal to deliver by bailee, some bailee may unquestionably maintain trover. 1 Bac. 242. 1 Roll. 606. Ld. Ray. 867. 1 Root 58.

So also it is agreed that most bailees & as I conceive all bailees without exception may maintain trespass or trover or any other proper action the case may require, against wrong doers for the full value of the goods. E.G. a common carrier, special carrier, agisting farmer, pawnee, hirer or borrower, these no doubt have the right. for the bailee in each case, as between himself & a stranger may be considered as the true owner & is to declare as such in his action, for he has a special interest or a right of possr. which entitles it & he may therefore maintain the action as well & as if he were the true owner. 5 Bac. 165. 262. Ld Ray. 276. Bull N. P. 33. Rylings 39. Salk 143. 1 Mod. 31.

On the same principles the finder of goods may maintain trespass or trover against a stranger who injures or wrongfully takes them. Thus in time of Ld King a boy

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having found a jewel went to a jeweller to know the value. who discovered the boy & purchased it for a small song. The boy then by his next friend brot. trover and it was sustained. because the boy came lawfully into possession by finding. and he who has the lawful possession has a right to retain the goods against all but the true owner Ball. N P 33. Str. 505. 1 Bac. 346. Esp. Dig. 575 577.

Can it then be said that a depositary or mandatary who holds by the express consent of the bailor. has a less interest than a finder who may recover merely because he has a right of possession. And have they a less interest or a more slender title to support an action?

Batt. is said that the ground of every bailey right to sue for the full value of the goods in any action is his own liability over to the bailor And therefore it is said that a depositary or mandatary under a gratuitous acceptance. who is liable only for fraud. cannot maintain any action. This appears to have been the opinion of L^d Coke & has been adopted since in most of the abridgements. Co. Lit. 89. Lid. 438. 13 Co. 69. 5 Bac. 164. 5. 762.

Now in the first place with regard to this reason, it is not true in point of principle. i.e. the actual or possible liability of the bailee over to the bailor is not the ground of his act^n. And if it were the ground of his right of action, still he would have a right to recover as any other bailee has.

For first every bailee has a special property in the

thing bailed. whom he is liable over to the bailor or not is not material. it is his special interest his rightful actual possession which gives him his right of action as can be shown by every analogy in the law. 7 T. Rep. 392. 398. Doms 112. 1 Bac 240 This authorities & many more which might be adduced shew that every bailee has a special interest: & that, that invested with the lawful possession give him the right of action. see again. 1 Bac. 326. 5 it. 262. 7 T. Rep. 396 to 398. Esp. Dig. 575. 577. Stra 505.

In the last cited viz. Armory is the case of the finder. there the language of King is emphatical. he there says that a finder has such a property as will enable him to keep the thing against all but the true owner & consequently he may maintain trover. This special interest which is the ground of his action is his only as he has the lawful possession

But there are the analogies which are very strong in favour of my opinion. By the statute of Winchester commonly called the statute of "hue & cry" it is settled that a master may maintain an action against the hundred in which he is robbed of his masters goods. yet the authorities are all agreed that the servt. is not liable over to his master. so that here the liability is entirely not the ground of his right of action. 2 Mod 28 2. Com. Dig. 607. Comb. 263. 12 Mod. 524.

It is also well settled that a man servant may have an appeal of robbery. this is a criminal proceeding

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appeal of felony. Yet he is not liable over to his master unless he is himself guilty of fraud. 1 3 Co. 69. 2 Saund. 380. Dom 129. 138.

So also it has very recently been settled in the C.P. that an uncertificated bankrupt having acquired goods since his bankruptcy may maintain an action of trover for the goods against a wrongdoer. For altho all his property belongd & would go to the assignees yet the lawful poss. which he had was sufficient formundation for the action. 1 B & Pul. & N.

Again when a house leased had been blown down by the tempest it was determined that the lessee could maintain trover for the timber or the component parts of the house after they were separated by the tempest the gen. property was in the reversioner. yet by the storm the house was converted into a chattel interest & the lessee into a bailee. Now this is a very strong case, the tenant or rather lessee was not liable for the loss occasioned by the tempest nor was he under any obligation to repair or keep the timber yet he sustained the action. Bull N. P. 33. Esp. Dig. 575. 577.

Indeed it is to be well settled that a special property or that property which is implied in lawful possession is sufficient to found the action of trover or trespass against wrongdoers. This rule is laid down in so many words. 7 T. Rep. 397.

It seems clear then that there is no necessity of resorting to the question of bailee liability over.

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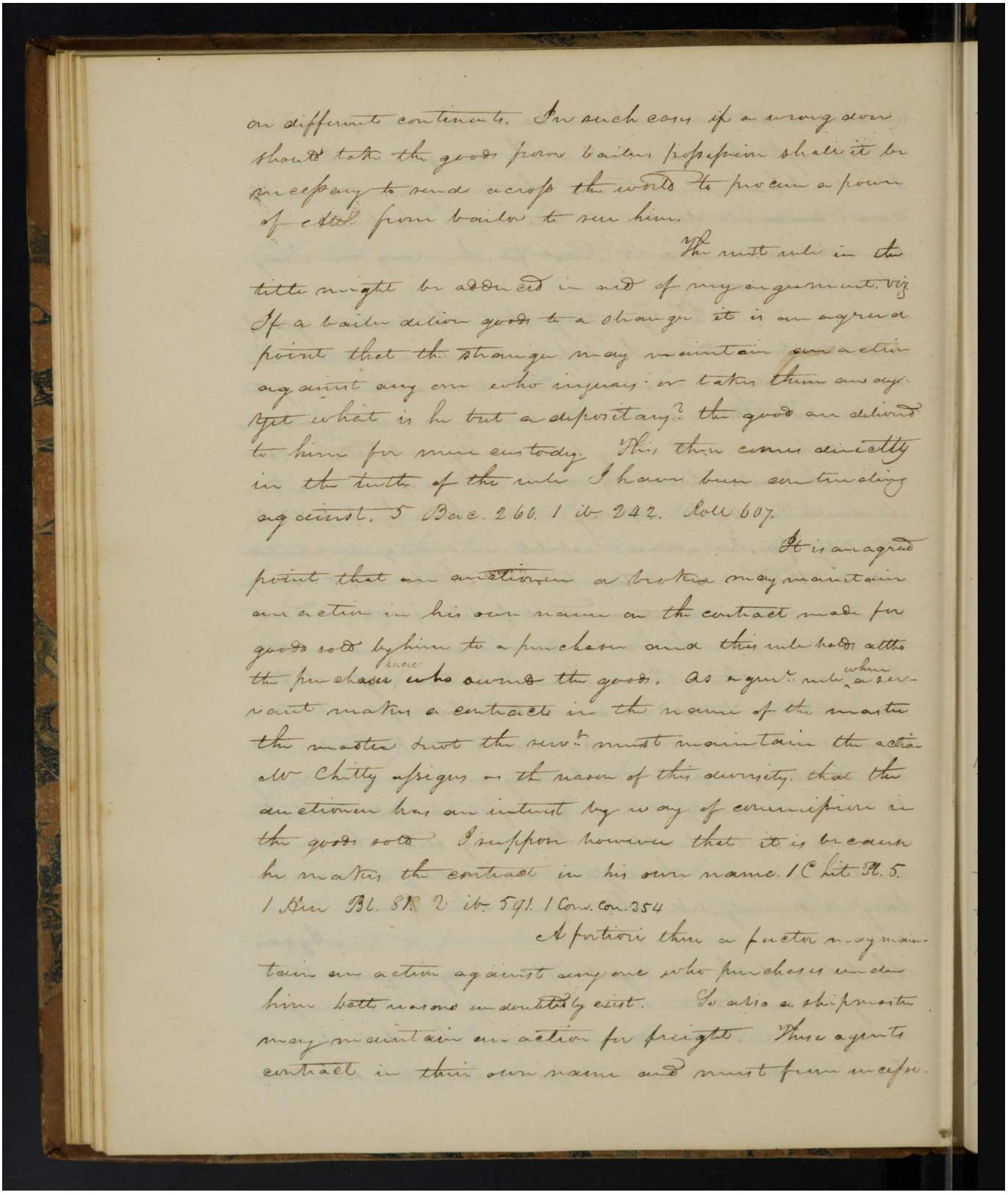
in order to determine whether he can recover in trover or trespass agst. the wrong doer. The true ground then is, as I think I have demonstrated that as against a wrong doer, besides all else but the true owner the bailee is in law the owner and it is not for the wrong doer to say that he is not.

2d. Granting that the bailees right of action is founded on his possible liability over to the bailor, still a depositary is as much entitled to an action as any other bailee notwithstanding. A depositary is certainly accountable to bailor and may be actually subjected. Now when the "bailees liability over" is spoken of we are to understand by it nothing more than his possible liability for his actual liability in any given case cannot be tried in an action between the bailee & wrong doer & if it could it would be futile for it would not be binding on the bailee in an event nor on the bailor in the other. their relative rights I repeat cannot be tried in an action brought by bailee against the wrong doer. All bailees or a particular class are not always liable. a depositary or a mandatary may be liable certainly. & it is equally certain that other bailees may not be liable. It is very clear therefore that on this ground the right of a depositary or mandatary is precisely like that of all other bailees.

Again

the policy of the law & gen. expediency require that every bailee whatever should have a right to sue a stranger or wrong doer. For it is not uncommon that the bailor and bailee reside at a distance from each other, sometimes

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or different continents. In such case if a wrong doer should take the goods from bailee possession shall it be necessary to send across the world to procure a power of attorney from bailee to sue him.

The next rule in the title might be adduced in aid of my argument. Viz. If a bailee deliver goods to a stranger it is an agreed point that the stranger may maintain an action against any one who injures or takes them away. But what is he but a depositary? the goods are delivered to him for mere custody. This then comes directly in the teeth of the rule I have been contending against. 5 Bac. 260. 1 ib. 242. Roll 607.

It is an agreed point that an auctioneer a broker may maintain an action in his own name on the contract made for goods sold by him to a purchaser and this rule holds altho the purchaser (since) who owns the goods. As a gen. rule, where a servant makes a contract in the name of the master the master (not) the serv. must maintain the action 1 Chitty assigns as the reason of this diversity that the auctioneer has an interest by way of commission in the goods sold. I suppose however that it is because he makes the contract in his own name. 1 Com. Dig. Pl. 5. 1 Burr Bl. 81. 2 ib. 591. 1 Com. Con. 354.

A fortiori then a factor may maintain an action against any one who purchases under him both reasons undoubtedly exist. So also a shipmaster may maintain an action for freight. These agents contract in their own name and must form no excep-

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ty be allowed to sue in their own name for their contracts & their purchases qua. ris. &c in foreign countries.
The rule is the same as to a bailee. the substantial reason in all these cases I take to be that the agent contracts in his own name. su" mast. & Swt" Buller N. P. 130. 1 Stra. Bl. 82.

Thus you perceive that under certain circumstances either bailor or bailee may maintain an action against the wrongdoer for the full value, that sometimes either bailor or bailee may bring such an action tho not both, yet it is not always that the bailor may have an action, and the rule thus qualified holds under whatever description the case may fall.

Tho' the bailor & bailee may both have a right to sue a stranger yet this can be mutually but one recovery for the full value. When thus the bailor brings his action in trespass or trover & recovers the whole value, the bailee cannot recover in either of those actions for the full value. But if the bailee has recovered the bailor cannot recover at all.

The rule you see is not precisely alike in both cases the difference is that after a recovery by bailor of the full value the bailee in a diff.t action may recover for his special damage but not the full value. 13 Co. 69. 5 Bac. 165. 263.

The rule laid down in Roll is that if both have an action pending at the same time he who first recovers ousts the other of his action. Now

I appr hend the more correct rule to be that he who first commences his action for the full value will oust the other of his action of the same nature, for by commencing the action the party attaches in himself a right of recovery which precludes the other party and this rule appears agreable to analogy. See however 2 Roll 569.

Thus when a servant is robbed the servant or the master may have an appeal "& he that begins "first shall recover & prevent the other of his action." 3 Bac. 559. Latch 127.

And if the bailor has recovered satisfaction of the wrong doer he clearly cannot have an action against the bailee even when the bailee has been in fault as by wantonly exposing the goods to injury or loss for the law allows but one satisfaction for the same thing. Equ. the C.L. allows of but one recovery in any case. L.d Ray 1217. Cro. Ch. 24. or 35. 3 Lev. 124. Salk 11. Ryl. 68. Esp. Dig. 319.

The rule just laid down is certainly correct but I think it might have been laid down more strongly & made more extensive. for if a bailor first commences an action against the stranger or wrong doer he ipso facto discharges the bailee or in other words waives his remedy against the bailee. I find no authority or absolute precedent for this, but if the bailor by commencing his suit can preclude the bailee from having one against the wrong doer, it certainly ought to be the rule. for it would be extremely

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unreasonable to expose the bailee to an action at the suit of the bailor when the bailor had himself deprived the bailee of his indemnity, or by commencing & discontinuing a suit against the wrong doer when perhaps too he has become a bankrupt.

Besides it is supported by analogy. Thus in a case of rescue. The Plff may sue either the Shff or the rescuer at his election, but if he commences an action against the rescuer the Shff is discharged. The situation of Shff in this case is very like that of bailee he is the keeper of a pledge viz. the Defts. body and the rule it would seem should be the same in relation to both. This rule is inferable from an expression by is laid down expressly by Espinasse Esp. Dig. 610-612. Stat. 98. Cro. Chr. 77. 109.

And there are many analogous cases in which the party having an election of two remedies must abide by the one he chooses & not abandon that for another for cases see 5 Bac. 179. Salk 248. 12 Mod. 663. 4.

On the other hand if the bailee first commences his action for the full value against the wrong doer, he makes himself liable to the bailor at all events. This rule however presupposes that he who first commences such an action ipso facto sues the other of his action of a similar nature, and follows clearly from it. for if the bailee takes the remedy from the bailor he ought at all events to be liable himself.

But altho the bailor first

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commences an action & even tho he has recovered yet the bailee may have a special action on the case for his special damage if he has sustained.

Now there are many cases in which a bailee can and many where a mandatary a depositary cannot maintain special damage he cannot sustain special damage, by the injury of the article bailed or by being dispossessed of it inasmuch as they receive no benefit from the possession.

But not only a pawnee but a hirer or borrower may sustain great special damage in that way and they may maintain an action for it distinct from the action by the bailor to recover the full value & as before observed this action by bailee is not prevented by a former recovery by the bailor of the full value. There is no precise case of the kind in the books. but the principle is very clear for it is well established that when one does a wrong act involving what is called damnum injuria to another the sufferer may have an action for it. i.e. for the special damage. 3 Dan. Rep. 65.

If the bailor himself takes the property wrongfully from the bailee, as before the time agreed upon has expired or the purpose accomplished, the bailee may have a special action on the case against him. for he sustains an injury in consequence of a wrongful act done in violation of the bailment.

I apprehend however that he cannot maintain trespass or trover against the bailor for there an action to recover the full value of the goods

tho the contrary is laid down by Coke and adopted by many writers since. 5 Bac. 185. 266. Esp. Dig. 401. 13 Co. 69.

Now the reason why he cannot maintain trespass or trover is that his special property is the ground of his action & his special loss the measure of his damages. It is true that this spec. property gives the bailee a right of action ag. third persons for the full value & against them only as I conceive. as to such he is the true owner & they can not be permitted to deny it. as to them he has the gen. property. but not as to the bailor. And there is certainly no propriety in allowing the bailee an action ag. the bailor to recover the full value. That this is the bailees relation to strangers see Stra. 595. Esp. Dig. 575. 1 Vez. 359. 361.

Now as between the bailor & bailee the latter has a special property entitling him to the custody & use and this is the extent of the bailees right ag. the bailor. but as against wrong doers he is the gen. owner & recovers the full value in behalf of the bailor.

According to Coke's rule the bailee may bring trespass or trover & the ownership of Defts bailor will go in mitigation of damages. But I conceive that in all cases in which the full value is sued for. the Plff is entitled, prima facie, to an action to recover the whole value.

So if goods taken are returned it will go in mitigation of damages & so in all cases where the damages are mitigated by any

thing ex post facto.

But in the present case the bailee has no such right originally or at the time of injury done & this it is which distinguishes it from those cases.

But there are still stronger reasons why bailee cannot bring trespass & trover viz. that in an action agt bailee agt bailee the real value of the property furnishes no rule of damages even presumptive. the special damage may be much greater than the value, why then should he bring an action in which the real value is prima facie the rule of damages (or measure)

Again the injury may be less than the full value of the goods in such case D Coke says the damages may be mitigated down to the actual injury. if so it is at any rate a very awkward & incongruous mode of recovery.

The reason why the bailee sues for the full value in any case is that he may recover for the benefit of bailor but in this case the bailee has secured himself by taking prop.r this also injures the bailee, so that in this case the bailee does not sue for the benefit of bailor. I make these observations because I think that L.d Coke's rule is not correct, still however it may be & I suppose now considered law tho I think it clearly opposed to principle

If a bailee delivers property to another in violation of bailors orders, he is ipso facto guilty of conversion. a misfeasance amounting to it Thorpe

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will lie without demand. Trover lies you will remember for an unlawful taking: user & detainer. this is a case of unlawful user. 4 T. Rep. 760. Esp. Dig. 581.

As a gen.l rule the bailor can maintain no other action against the bailee than detinue or an action on the case. He may bring the antient C.L remedy of detinue but that act. is now disused and has been superceded by a special action on the case for negligence or a misfeasance of duty required by law. From which is an action on the case for conversion or Assumt. founded in the promise expres or implied to keep with care & restitution. This in ordinary cases the only action that he can bring against the bailee. 1 Bac. 237. 8. Bull. N. P. 72. Cro. J.r 244. Cro. Eliz. 781

And when the goods are lost or injured by the neglect of the bailee the bailor may sue the bailee either in tort for the neglect or in assp.t on the agreement expres or implied, but not in trover, for mere negligence can never constitute conversion which consists altogether in misfeasance or a position tort & not in non feasance merely. 3 East. 62 1 Wils. 282. 2 ib. 319.

But in gen.l trespass never lies by bailor ag.t bailee altho trover does because the orig taking was lawful, so that the bailor has neither the actual nor constructive possession. But there is an exception to this rule in case the bailee shall wantonly destroy the goods he would be liable to the bailor

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bailor in trespass, for by that act he extinguishes the bailment. or as Ld Coke says he is presumed to have waived the goods for the purpose of destroying & not of keeping them. as an agisting farmer who killed the sheep bailed to him to pasture. (and I once heard a case cited to this effect that if bailee sold the goods, bailor could maintain trespass but I cannot find it). 8 Co. 146. Park. 191 5 Co. 13 b. 1 Inst. 57. 2 Rolr. 555. 2 T. Rep. 465. contra 5 Bac. 266 where it is held that bailor cannot maintain trespass even in this case. not law. however.

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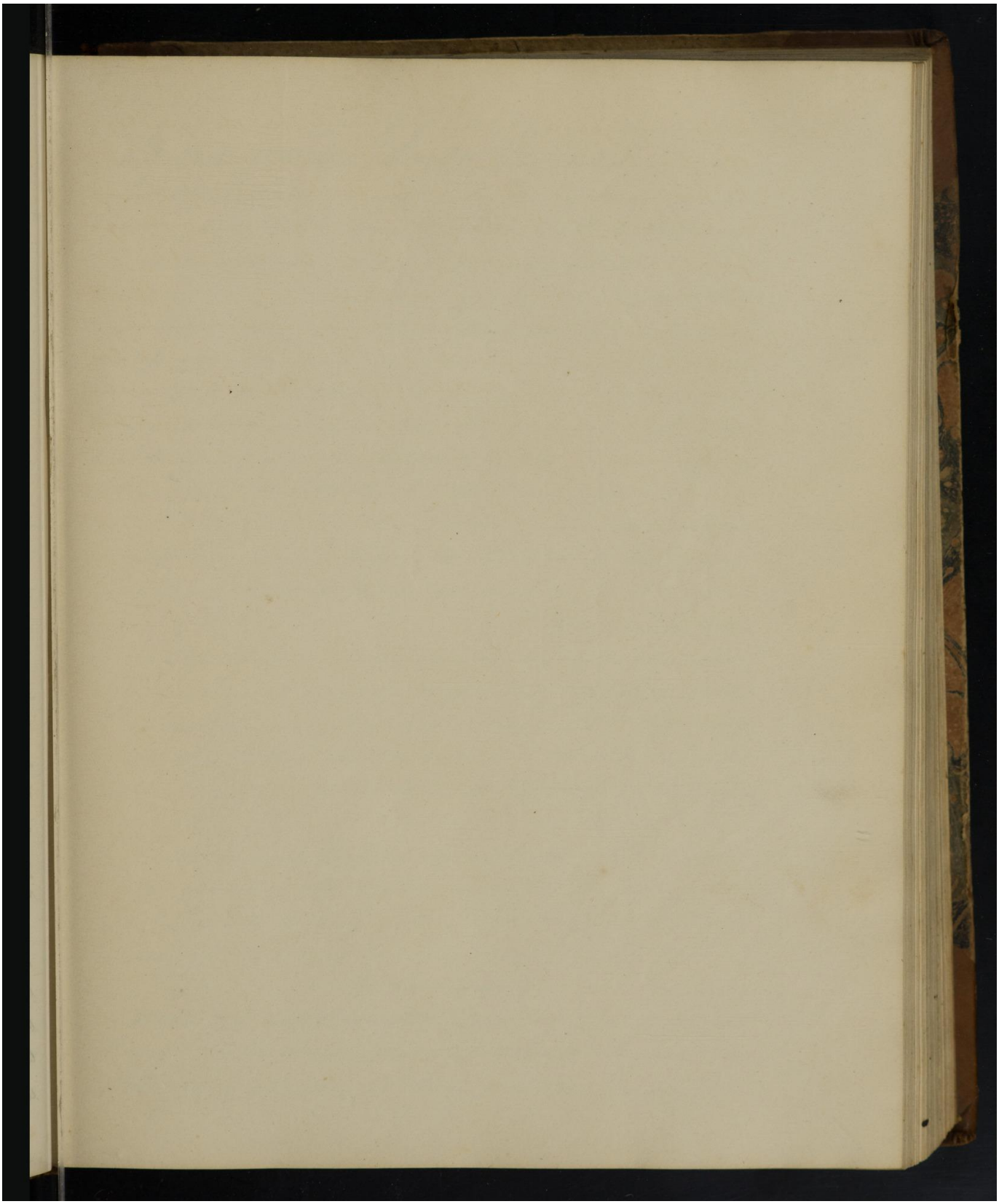


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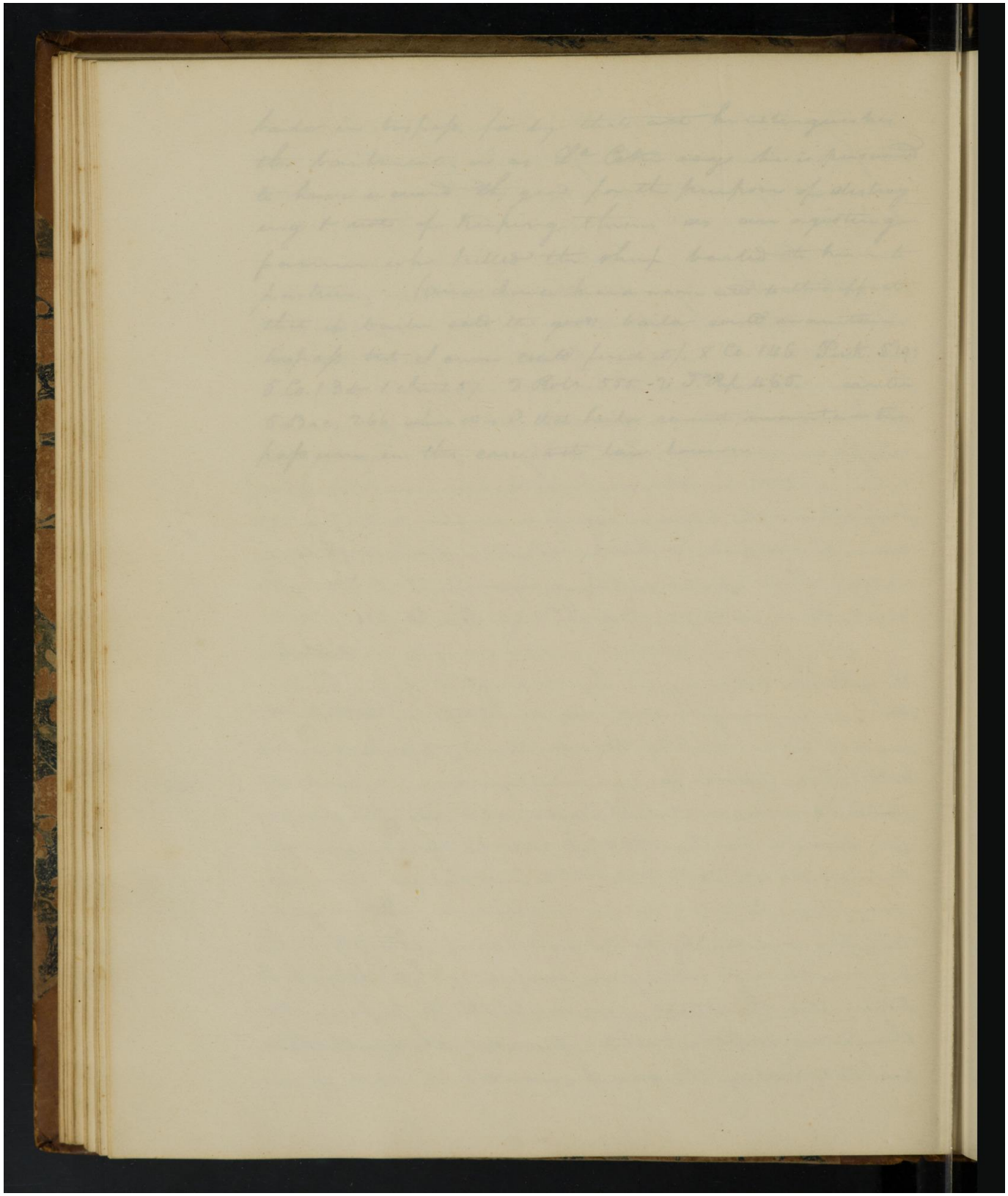


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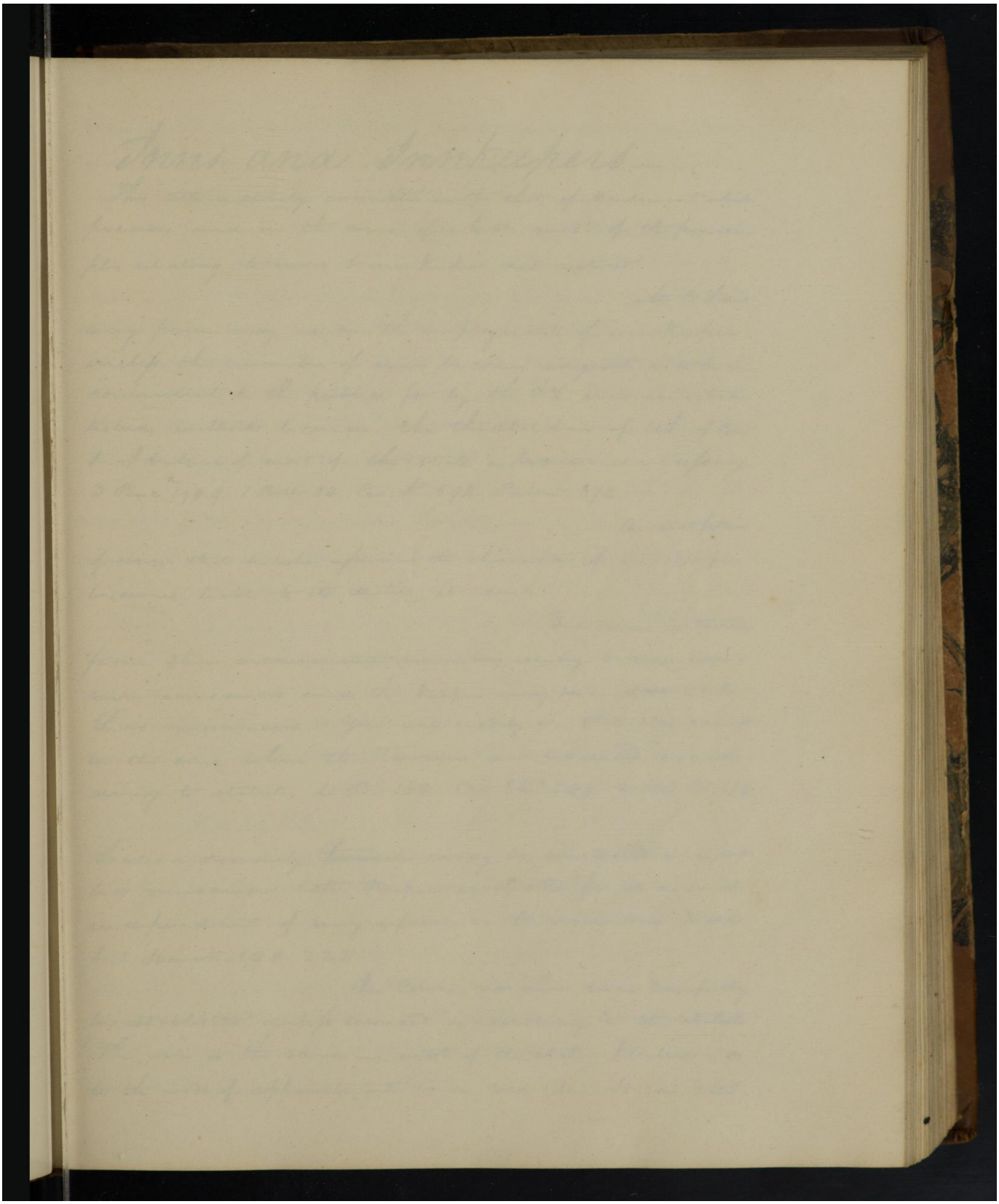


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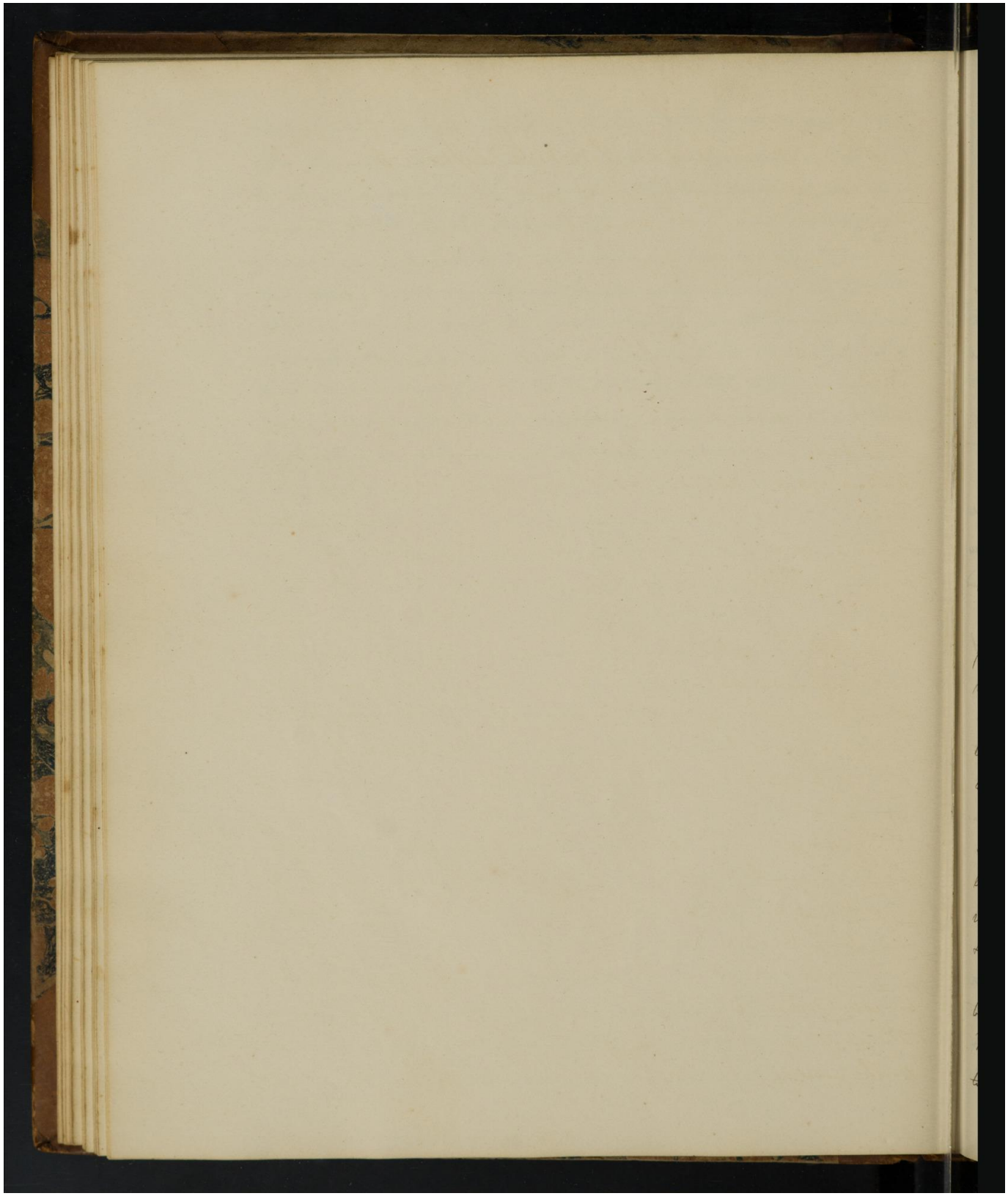


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Inns and Innkeepers.

This title is closely connected with that of Judgment which precedes and in the course of which most of the principles relating to inns & innkeepers are noticed.

At C. Law.

any person may exercise the employment of innkeeper unless the number of inns become so great as to be inconvenient to the public. for by the C.L. inns are established without license. tho the stat law of U.S. of Con & I believe of most of the state a license is necessary 3 Bac. 178.9. 1 Roll. 84. Cro. Jac. 594. Palm. 374.

And it follows of course that he who assumes the character of innkeeper becomes liable to its duties. ib. sec.

But inns or taverns from their inconvenient number, may become common nuisances and the keeper may be indicted at C. L. as nuisances. You will readily see that this cannot be the case where the taverns are licensed according to statute, 4 Bl. 168. Cro Car. 549. 2 Hal. P.C. 174

So also a disorderly tavern may be considered as a public nuisance & the keeper indicted for it as such independant of any reference to numbers. 1 Hawk. 198. 225.

In Conn. no inn can lawfully be established unless licensed according to the statute The rule is the same in most of the states I believe, as to the mode of appointment &c in Con. see 1 Con. 620

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And under our statute the keeper of an inn without license is punishable by a fine which is doubled or increased in geometrical progression for every repeated offence. St. Con. 646.

And there is now a temporary law of the U.S. requiring all inn keepers to obtain a license. it is not a law regulating the establishment of inns. that is left to the individual states. but being a law enforcing the employment of inn keepers. they must obtain a license. This indeed one of the sources of revenue by indirect taxation.

Our local statute laws provide that the civil authority & select men may suppress or otherwise punish inn keepers. &c. not necessary to be explained see St. Con. 643.

Such proceedings however do not destroy the C.L. process by indictment for keeping disorderly houses for there is no such express provision in our statute & such a C.L. right of this kind is not in gen.l to be ousted by implication

The duties of an inn keeper extend in gen.l only to the entertainment of travellers & keeping their goods & the animals they travel with. 3 Bac. 180. 9 Co. 87.

And if an inn keeper refuses without suff.t cause to keep a traveller or reasonable price tendered (for he is not compellable to trust his guest) he is not only liable liable to an action on the case in behalf of the person injured. but he

is also to an indictment "it being disorderly behaviour "com thus to pervert the ends of this institution". L. 31. 168. 1 Stanf. 225. 3 Bac. 181.

The care required of an innkeeper does not extend to the person of his guest but to his property only. that is he is not bound to protect him from the violence of others as innkeepers every individual is bound to prevent a breach of the peace. but if a guest is beaten at an inn the innkeeper as such is not liable, 8 Co. 32. 3 Bac 181

If an innkeeper by himself or servt. deals out to his guests unwholesome food or liquor he is liable to an action on the case 1 Roll 95. 3 Bac. 182.

The principal rules in relation to an innkeepers liability for the goods of his guest. have been pursued in the title of bailment. for as respects the goods he is strictly a bailee. There are however some additional rules which I have now to notice.

His liability in this respect is not discharged by absence sickness or even insanity. This strictness is founded in policy to guard guests from fraud. his absence might be on purpose to defraud or to avoid liability for intended mischief. his sickness or insanity might be affected. and at any rate he is bound to provide against such contingencies besides the opportunities he has to defraud and pilfer make strictness in this rule indispensable. Cro. Eliz. 622. 3 Bac. 182.

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An infant innkeeper is not chargeable like other innkeepers. i.e. as bailee. for he cannot make the contract express or implied on which all bailments are founded. He might however be subjected for fraud or violence or any positive torts. but not for omissions or mere negligence. for the law will not allow his privilege to be infringed on the ground of public policy. 1 Roll. r. 1 Bac. 182.

If an innkeeper has not the conveniences to accomodate. as that his house is full. and the traveller persists in staying taking his chance as the saying is. the innkeeper may be liable like other persons for positive torts or misfeasance. but in such case he is not liable as innkeeper, and if the goods are lost or injured. as in the case of a common carrier under such circumstances. the owner must bear the loss occasioned by his own folly. Dyer. 158. 3 Bac. c. 183.

It has been made a question whether. if when a host requests a guest to lock his apartment & his goods are lost because he did not. the host is liable for them. the opinions appear to be divided. 3 Bac. c. 183. Dyer 266. Moor 78. 158.

For myself I should think that he ought not to be liable. the request is certainly very reasonable I should be obeyed. there may be many in the house unknown to both. and if he does not lock the door the host ought not to be liable unless it be proved that he were privy.

Mostly delivering

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a key to the guest does not however discharge the host. it is merely giving the guest an opportunity to secure his goods. it being supposed that there is no intimation of danger or request to lock the door. But it is too much to say that an innkeeper ought to keep a guard over every apartment where he has requested the guests to lock their doors. 8 Co. 33. 3 Bac. 183.

And an innkeeper is liable as such altho ignorant of what his guests effects may consist. tho if he were deceived as to their value by misrepresentation. I should suppose his case would be like that of the carrier which I have before considered. ib. anc. 5 T. Rep 273. Mon. 158.

As a guest such innkeepers are liable as such only to travellers and such as stay at his house in the character of guests. and at the price usually charged to travellers. He is not liable to his neighbours. even tho they should lodge in the house, as in case he let his stable or his cane. Nor to boarders properly so called who live with him at the price charged at private houses, for there is no reason why a boarder should have a higher claim against him. than against any other man in whose family he may board. the host in this case is not in the character of innkeeper & cannot be liable as such. 8 Co. 32. b. 1 Roll. 3. Skinn. 276. 3 Bac. 183

Besides the policy of the law does not extend to him. for one who lives in the house himself as a boarder can judge for himself of the character of the inn

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keeper.

An innkeeper is not chargable in the absence of the owner for any goods for the keeping of which he receives no profit. By the owners absence he is meant such an one as diverts him of the character of a guest, for the innkeeper is liable as such only in consequence of the relation of innkeeper & guest, 1 Roll. 3. 338. Cro. Jac. 188. Salk 388. 5 T. Rep. 273. Noy. 126. Pop. 179. 3 Bac. 663.

But for goods for the keeping of which he receives a profit he is liable, altho the owner has left the inn & is not a guest as to himself personally, for as to the goods the relation does continue, as if a traveller should leave a horse which it is not stable for the host to keep, for the purpose of changing his manner of travelling perhaps. Cro. Jac. 188. Salk 388. 1 Roll. 3. Noy. 126. Mon 877.

And when the goods of a man are in the possession of his servant & taken by him to an inn, the innkeeper is chargable to the master precisely as if the owner or master himself were the guest. Cro. Jac. 224. Yelv. 162 Dyer 158. 5 T. Rep 273.

As to the remedies an innkeeper has against his guest I have already stated the rules partly to you. — An Innkeeper may detain the person of his guest until the whole bill is paid. and if the guest leaves the inn without paying his bill & without provision, the innkeeper may pursue & retake him And as I have no doubt

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he has the same remedy attho the guest flies into a neighbouring state. For it has been determined in Conn & in N. York that bail may retake the principal with a bail piece in a neighbouring state, As to the C L rule see 2 Roll. 85. 3 Bac. 665. 6. Salk 388 Carth. 150.

He may detain the horse for the expence incurred in keeping the horse but not for any other part of the guests bill. this is according to the gen. rule in relation to lien on personal chattels. ib. anc.

But altho he may detain the horse of his guest. yet he cannot use him. for he is in the custody of the law. is like an istrey. distrs for rent, damage feasant &c and if he use the horse or other animal at all the very act will make him a trespasser ab initio and he is liable to an action at the suit of the guest. for the detainer is a process in invitos & compulsory, for which the law gives the innkeeper a license. and when the law gives license if the party abuses it he is a trespasser ab initio & may be sued in the same manner as if the originl taking had been unlawfully by force. 3 Bac. 665. Sta. 556. Mor. 877.

He cannot sell the horse. ib. anc

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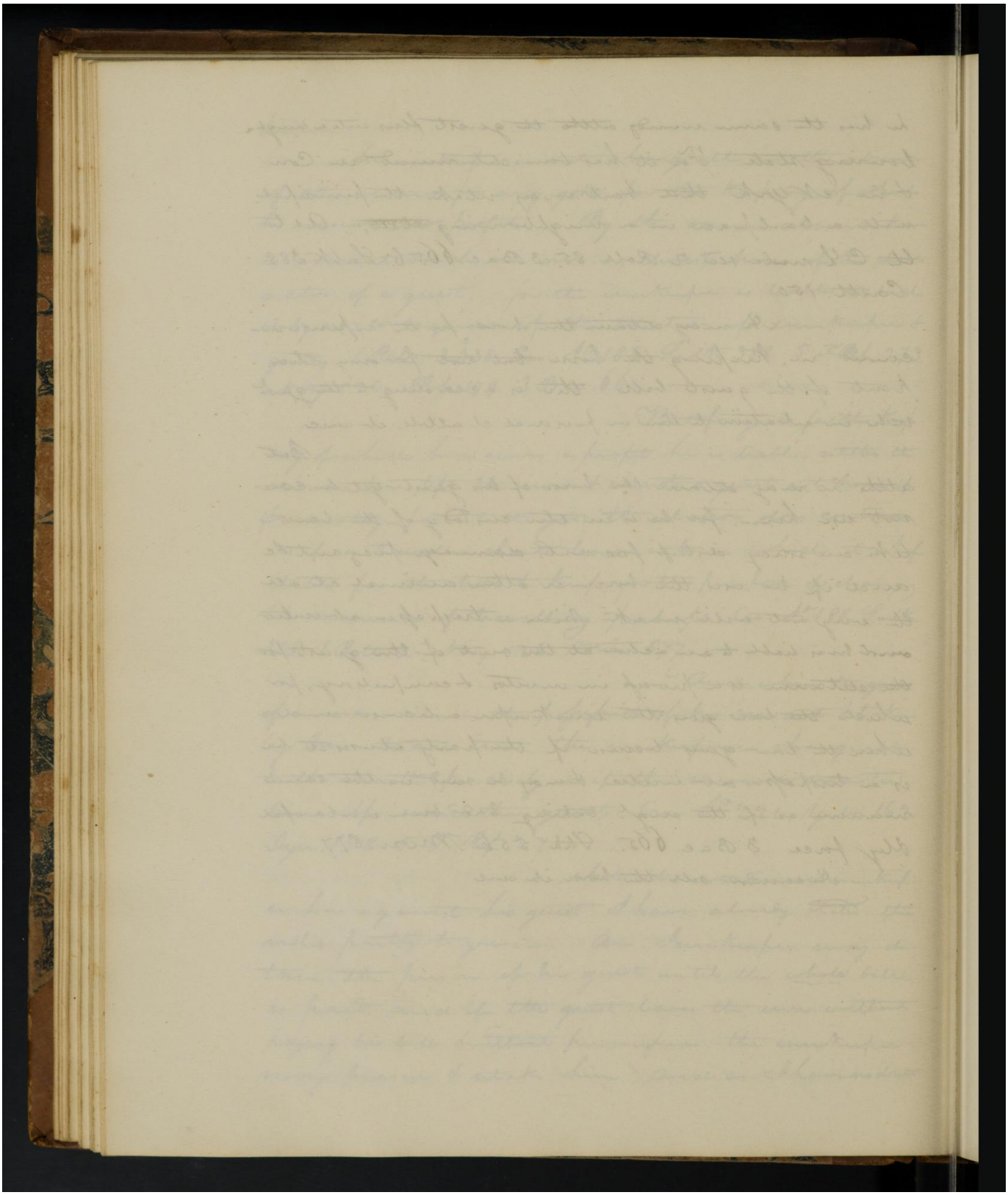


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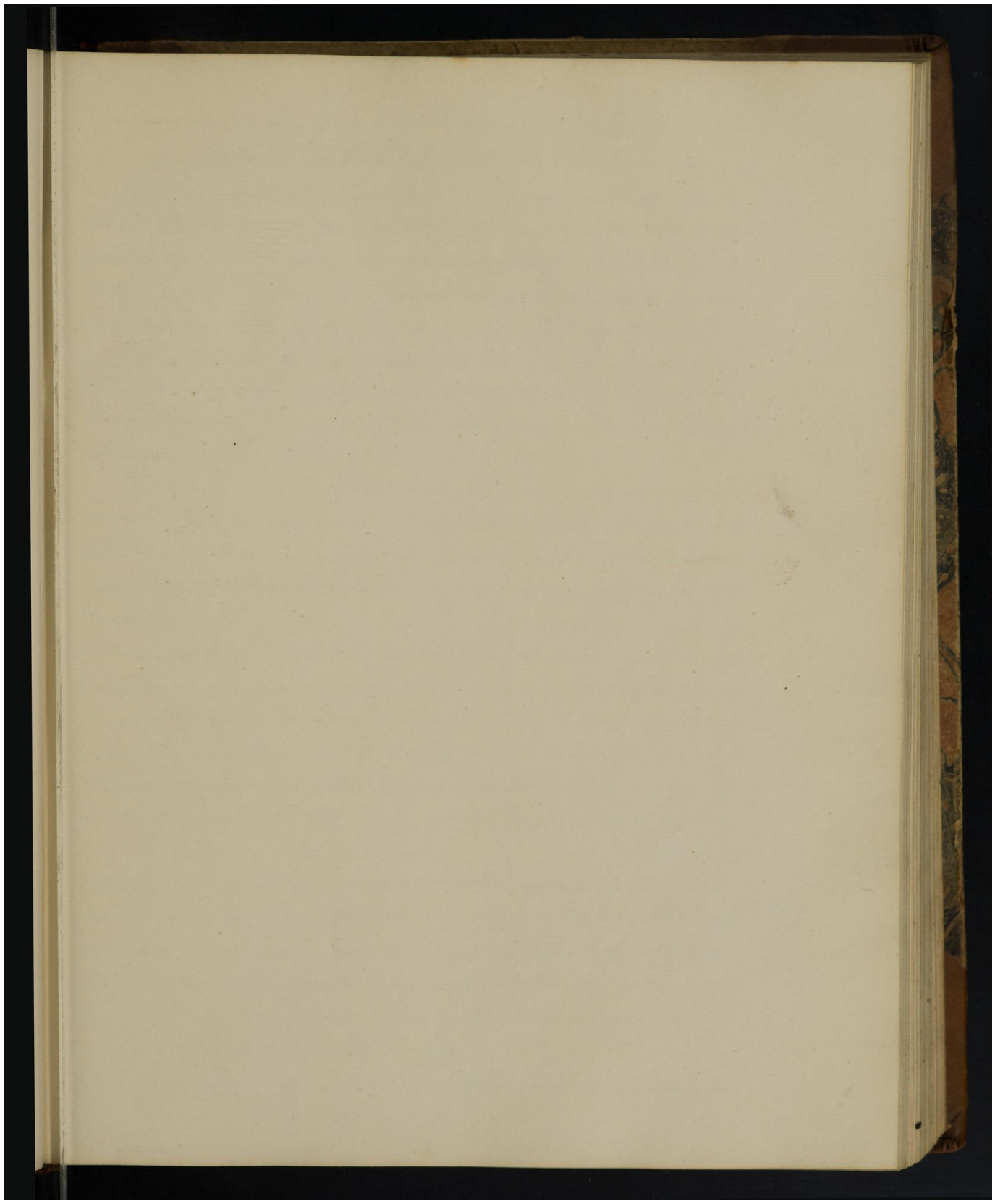


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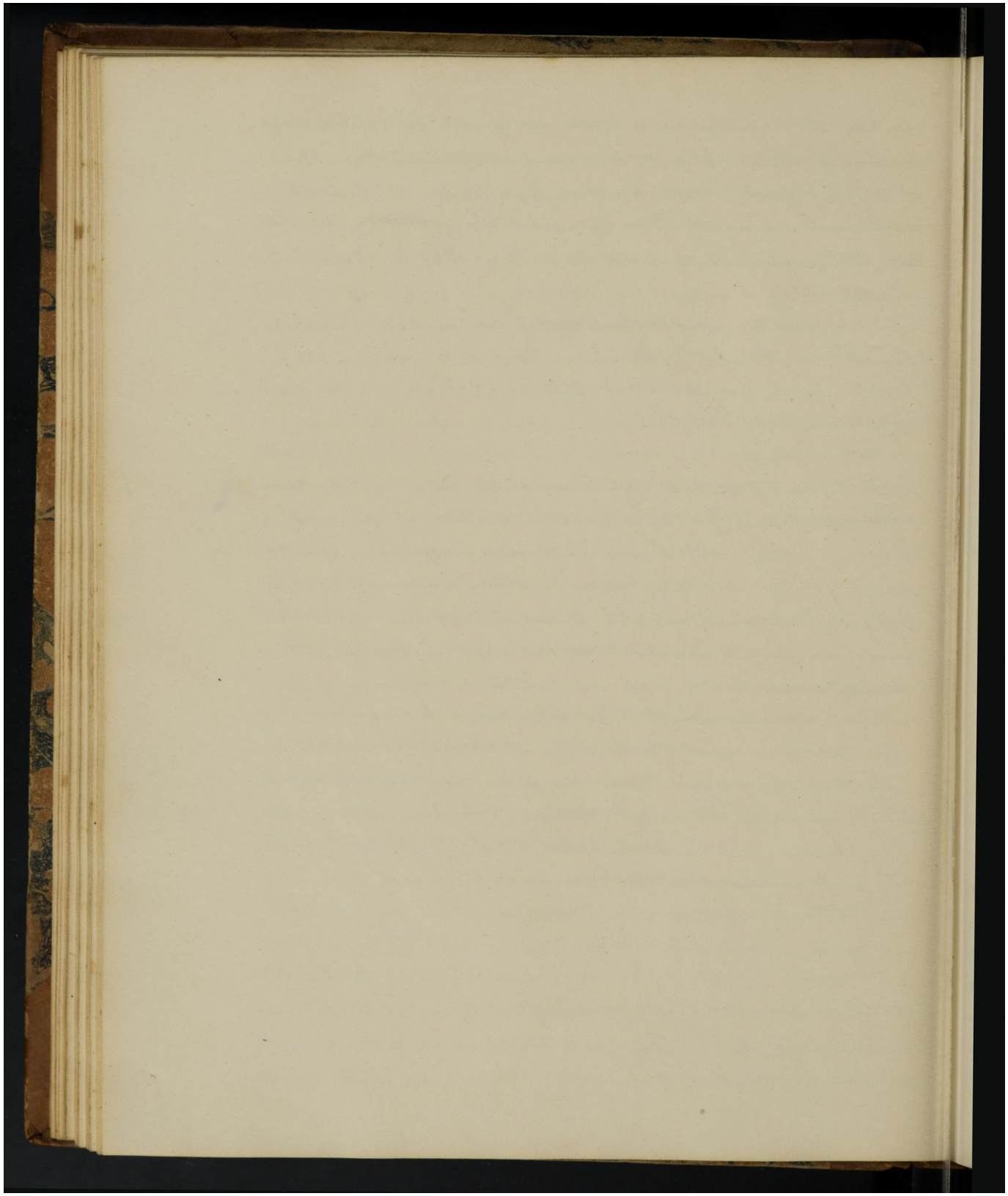


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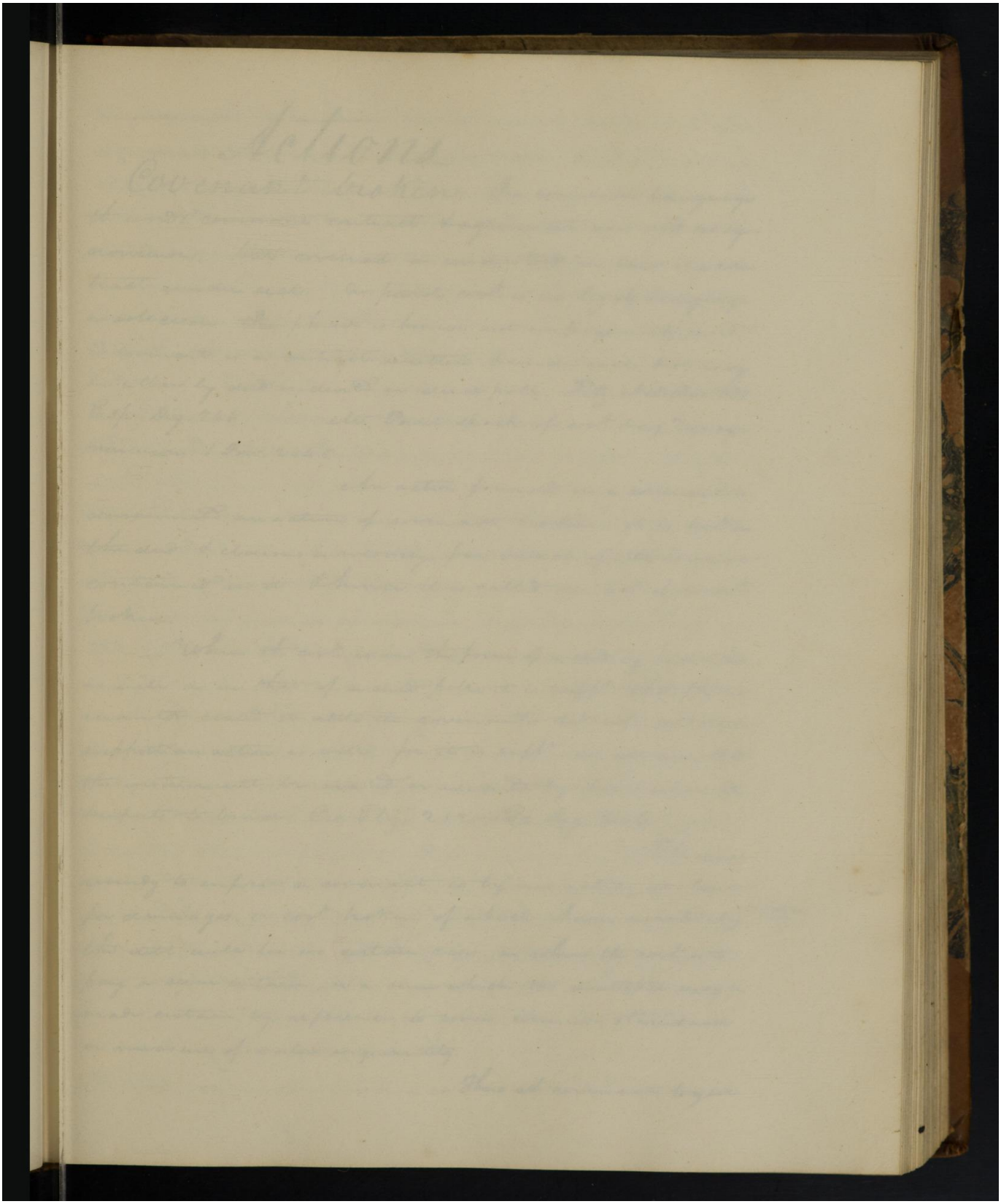
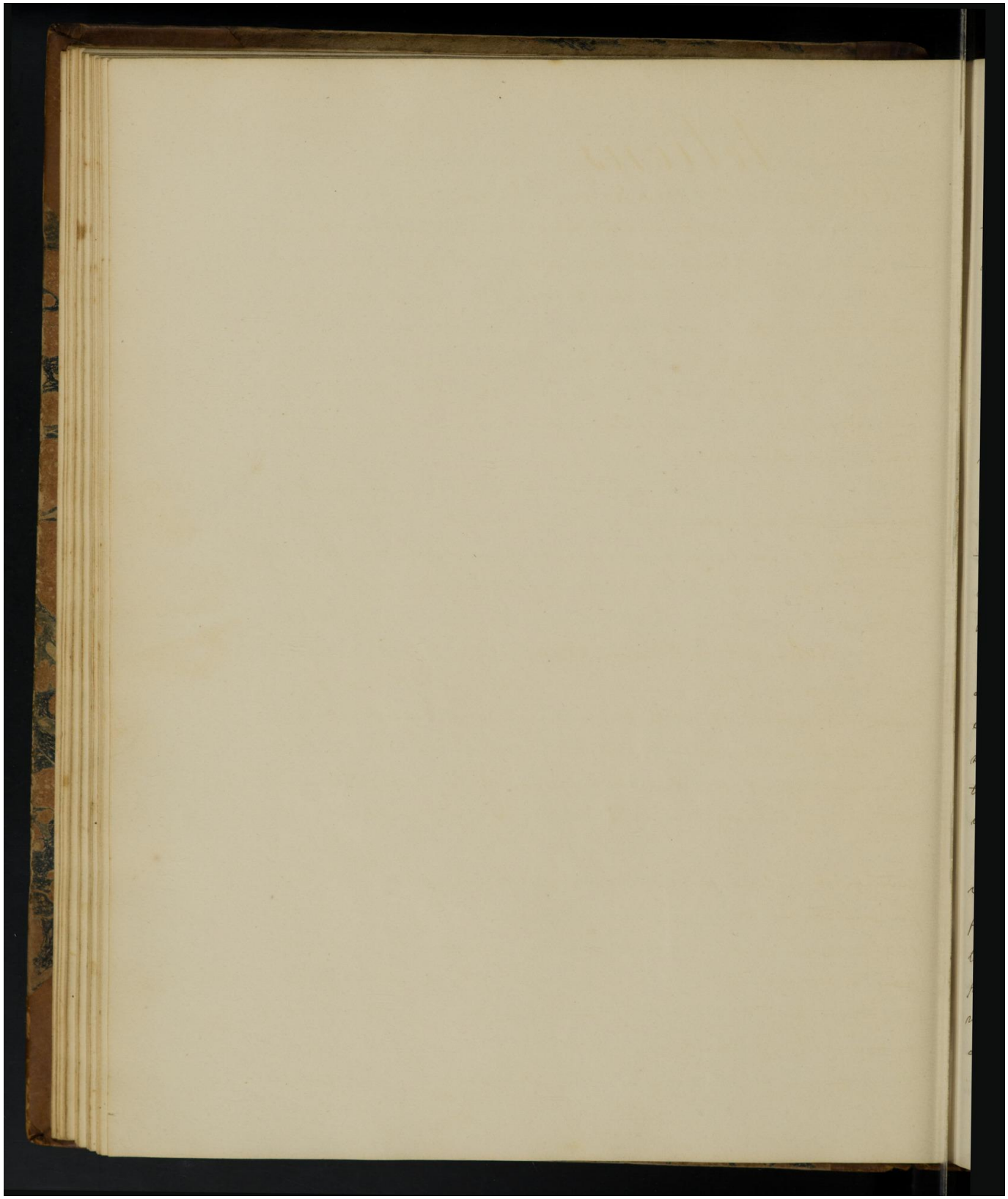


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Actions

Covenant broken. In common language the words covenant contract & agreement are used as synonimous, but covenant as understood in law is a contract under seal. A parol covt. is in legal language a solecism the phrase is however not unfrequently used. A covenant is a contract written & under seal & it may be either by deed indented or deed poll. Fitz. Nat. Brev. 340. Esp. Dig. 266 Mr Powell speaks of covt. & agt. as synonimous. 1 Pow. 244.5

An action founded on a covenant is denominated an action of covenant broken. it is brot. on the deed & claims a recovery for breach of the covenant contained in it & hence it is called an act. of covt. broken.

When the covt. is in the form of a deed by indenture as well as in that of a deed poll, it is suffi. that the covenantor sealed it as the covenantee did not. and it will support an action as well, for it is suffi. in all cases that the instrument be sealed or executed by him whom it imports to bind. Cro Eliz. 212. Esp. Dig. 266.

The usual remedy to enforce a covenant is by an action at law for damages, a covt. broken of which I am now treating. the debt will lie in certain cases, as when the covt. is to pay a sum certain, or a sum which the doubtful may be made certain by reference to some common standard or measure of value or quantity.

Thus a covenants to give

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B $2 pr. bush. for all the wheat he shall have delivered by the T. and I. state will lie as well as cov.t broken for the proportion is given and it is only necessary to ascertain the quantity delivered. so too if a cov.t were to pay so much as an article is worth in market. id certum est quod certum reddi potest.

But if covenant to deliver so many loads of wood or wheat. &c. debt will not lie here is no reference to a common standard and debt will not lie to recover damages so nomine. Cov.t broken however will always lie. Tha. 1089. Bull N.P. 167. 3 Lev. 429.

But when the cov.t is to do some specific act or something in specie, distinct from the payment of money the most usual & effectual remedy is by bill in Ch.y for a specific performance as where cov.t to convey land &c. see "Powers of Ch.y" 1 Fonb. 2 y. 139. 156. 1 Bac. 526.

But as a gen.l rule when the compensation for a breach of covenant lies in damages only, or in other words, when damages will be an adequate compensation a bill in Eq.y will not lie to enforce the cov.t

For in the first place when this is the case relief may be had at law as well as in Eq.y and it is a rule both in Eng.d this country that when an adequate remedy can be obtained at law a bill in Ch.y will not lie.

And again. as a gen.l rule a court of Eq.y cannot ascertain damages. both these

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reason even to confine such a case to the jurisdiction of a court of Law. 1 P. Wms. 570. 2 Bro Cha 341. 1 Pomb 27. 139.

This rule however is not universal for when the damages are the adequate & only remedy, or if the remedy sought is merely consequential or collateral to a ground of relief properly cognisable in a court of Eq. the court may be thus induced.

Thus when in the language of this rule, matter of fraud is mixed with the damages. i.e. when a question of fraud is introduced with the damages. the court may be induced in Eq. tho nothing can be there recovered but damages in such a case. A sues B in court of Law. B files a bill in Ch. alleging that the covenant was obtained by fraud & prays an injunction. A may then file a cross bill alleging the fraud & praying relief. Then if the fraud is not proved. Ch. will enforce the cov. against B. for A has been compelled by B to stay his proceedings in a court of law by a false suggestion and it is but reasonable & equitable that the business should here be completed & Defr. should not be permitted thus to turn the Pltff round before he can be relieved. Even in this case however neither the Ch. nor his officers can ascertain the damages. but an issue at law is directed, quantum damnificatus. & the Ch. deems damages according to the verdict. 1 Eq. Cas 17. 1 Bac. Eq. 526. 2 Pow. Con. 216.

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Of the different kinds of covt. and how created.

It is to be observed that under this head there are several coordinate divisions and 1st All covenants are divisible into two kinds. covenants in deed and covenants in law.

A covenant in deed is one expressly mentioned & treated in the deed or instrument itself, between the parties. It would be more proper I think to call this an express covenant, 4 Co. 80. Esp. Dig. 266.

A covenant in law is one that is raised or implied by law. and for this reason it is called a covt. in law. This may be properly called as it often is an implied covenant as contradistinguished from express covenants. Thus A lease to B for a term of years & from the very fact of a lease being made the law implies a covenant on the part of A that B shall quietly enjoy during the term. it being supposed that there is nothing expressed in the lease limiting this responsibility. 1 Inst. 384. Esp. Dig. 266.

The specific difference between a covt. in deed & covt. in law. is this a covt. in deed is formed upon the words used in the instrument as amounting to an express covenant. tho the words used may not be the most correct apt or explicit.

Thus "I demise &c. to A.S. &c. rendering rent." or "paying", "yielding," or "rendering rent," these words or any of them amount to an express covt. on the part of A.S. to pay rent. These words are not the most apt to express such a covt. still the covt. plainly rises out of the language of the parties

But on the other hand a covt. in law or implied covt. is not all raised from the language or phraseology of the instrument, but from the nature of the contract or agreement which is reciprocal. As in the case just mentioned. A lease with these words. "give grant demise & to farm let." these words import a covenant in law that the lessor has a good title, and that lessee shall quietly enjoy during the term. And any one of these words of grant have the same effect.

And yet it is very obvious that nothing can be more remote or foreign from the the language of the act. Suppose that an implied covenant is not raised from the terms or phraseology of the agreement, but from the nature of the contract or covt. & if the lessor proves not to have title whether the lessee is evicted or not, the lessor is liable on this covenant of seizin. 2 Co. 80. b. 5 ib. 17. Cartt. 98. 1 Roll 519. 2 ellwd. 92. Palm. 388.

All covenants again are susceptible of another division as being either personal or real. a covt. real is one by which one binds himself to pass or assure things real as lands tenements or hereditaments. Thus if A make a conveyance to B in fee & covenants that he is well seized, or to warrant & defend: these are covenants real.

A personal covt. on the other hand is one which is annexed to the person or which concerns personal property merely. Thus if one covenants to do an act of service for another, here the covt. is annexed to the person — or if one covenants to

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pay a sum of money. hus it concerns the personalty. the covenant is in both cases personal. 1 Inst. 139. Esp. Dig. 266. 294. 5 Co. 16. 17. Fitz. 145. 343.

This division of covt. into real & personal is derived your practice from the subject of the contract. the former division into expres & implied from a reference to the natures of the covenant or agreement.

With regard to the structure of covenants. I would observe that no set form of words. no technical language is necessary in any case to the formation of a covenant. any words shewing a concurrence of the parties in an agreemt. are sufficient to create a covt. any words in short importing an agreement. 1 Burr. 290. 1 Roll. 518. 1 Lev. 47. 1 Vent. 10. 1 Bac. 527.

Thus in the case I mentioned A leases to B. reserving yielding or rendering such a rent. hus the the words are the language of the lessor. yet they amount to an express covt. to pay the rent. & the lessee by accepting the lease makes them his own. Here are no strict words of covt. as that B covenants or agrees to pay rent. yet as the intention of the parties is manifest. B will be liable on covt. broken if he does not pay. Cro. Eliz. 202. 1 Pow. Con. 241. 2. 1 Fonb. 375.

I am aware that Mr Powel calls the covenant in the example just mentioned a constructive covt. but I trust that I have fully shewn in my title of

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contracts. that there is no difference between what Ld
Powell terms "construction" & express contracts or covts

Mr Williams the editor of Saunders Rep. calls this an
implied covenant, but this is demonstrably incorrect
for the covt to pay rent is clearly not raised from the
nature of the contract. thus if the lease were in these
words merely "demise, lease &c" the lessee would not be
bound to pay rent. The whole obligation arises out
of the words "rendering reserving &c" which shew plain-
ly the intention of the parties, and is as plain a case
of express covt as can be supposed. 1 Saund. 241. b.

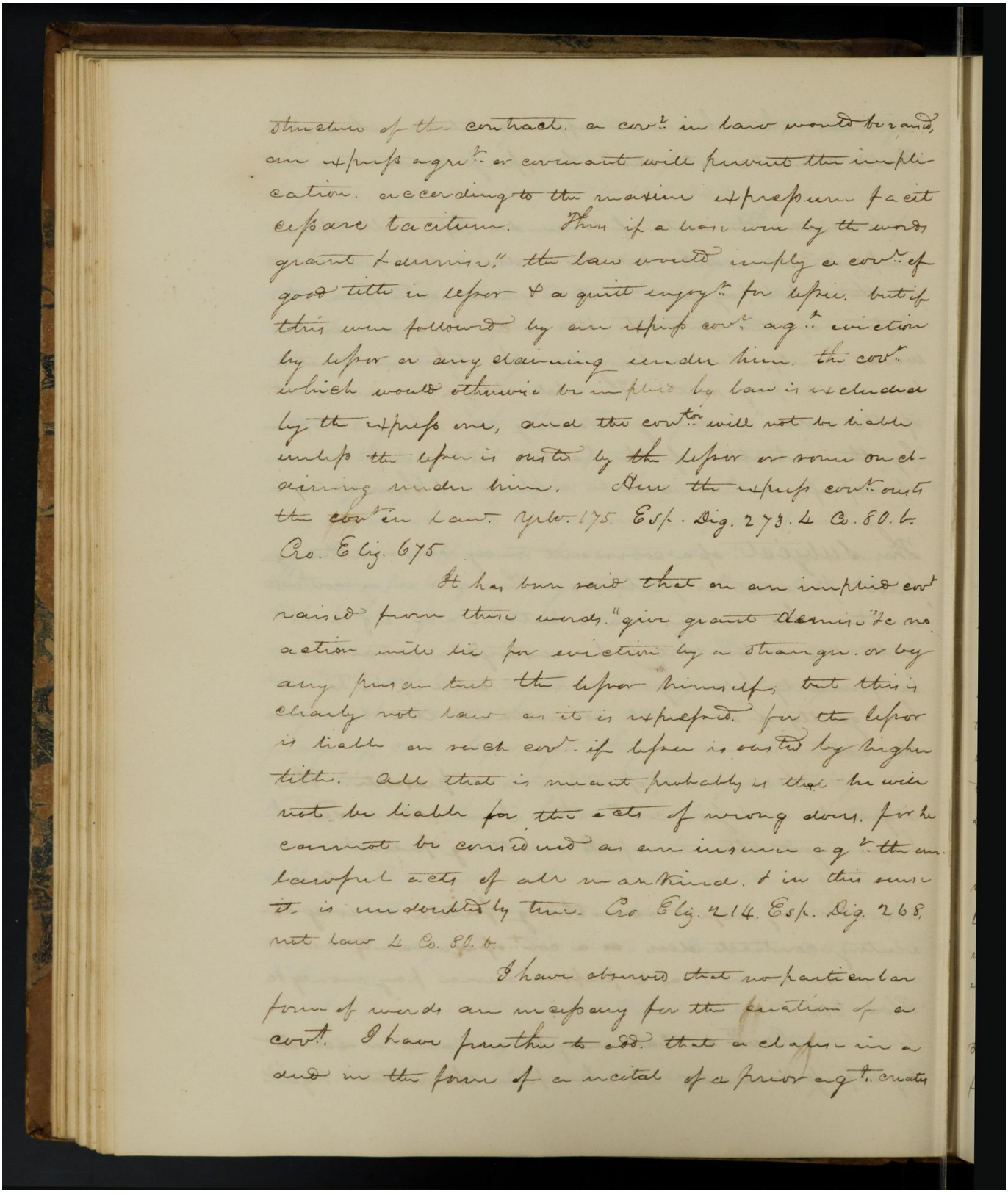
The Subject of a covenant may be something
past, present or future. Thus one may covt with
another that he has done a certain act. e.g. a covt
with his debtor that he has destroyed a certain instr.
he formerly held against him. and if he has not
he is guilty of a breach so instanti that he makes
the covt.

A covenant of seisin is de presenti. Thus
a grantor or lessor covts thus "I am well seised" &
hence a good title. it respects something present.

And
a covt may respect something future as every ex-
ecutory contract does. as a covt of warranty & almost
all personal covts as to perform service pay money &c.
Plow. 308.

Covts in law may be restrained or excluded
by express covenants. i.e when from the nature & gen.

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structure of the contract. a covt. in law would be raised, an expss agrt. or covenant will prevent the implication. according to the maxim expressum facit cessare tacitum. Thus if a lease were by the words grant & demise" the law would imply a covt. of good title in lessor & a quiet enjoyt. for lessee. but if this were followed by an expss covt. agt. eviction by lessor or any claiming under him. the covt. which would otherwise be implied by law is excluded by the expss one, and the covtor will not be liable unless the lessee is ousted by the lessor or some one claiming under him. Does the expss covt. oust the covt in law. Ryb. 175. Esp. Dig. 273. 4 Co. 80. b. Cro. Eliz. 675

It has been said that on an implied covt raised from these words. "give grant demise" &c no action will lie for eviction by a stranger. or by any person but the lessor himself; but this is clearly not law as it is expressed. for the lessor is liable on such covt. if lessee is ousted by higher title. All that is meant probably is that he will not be liable for the acts of wrong doers. for he cannot be considered as an insurer agt. the unlawful acts of all mankind. & in this sense it is undoubtedly true. Cro Eliz. 214. Esp. Dig. 268. not law 4 Co. 80. b.

I have observed that no particular form of words are necessary for the creation of a covt. I have further to add. that a clause in a deed in the form of a recital of a prior agt. creates

in itself a covt. on which an action may be supported, Thus "Whereas it has been agd. that A should pay B. £100 & B agree to serve A one year", the deed then confirms the parol agt. & makes it a covenant on the part of A. 3 Keb. 465. 1 Show. 122. Esp. D. 268.

But as to covenants in deed, if the word covenant is not used, there must be some words used that do import an agreement otherwise no covt. can be created, there must be some words which can be construed into words of compact. Thus if the language were "lessee covt. to repair provided lessor furnishes timber", it does not amount to a covt. on part of lessor to furnish timber, so if it were "on condn. lessor &c" there are no words of compact. & it amounts to no more than a condition upon the lessees covt.

But on the other hand, if the agt. were that lessee shall repair provided & it is agreed that the lessor shall furnish the timber", it is a covt. that binds the lessor, for the superadded words "it is agreed" transforms the condn. into a covt. 1 Roll. 518. 1 Sid. 68.

And when a clause in a deed is in the nature of a mere stipulation, it can never amount to a covt. at law. Thus "A covt. to repair, but if the lessor does not furnish timber this covt. is to be void." here the lessor evidently is not bound to furnish the timber,

If a lessor executes a collateral bond conditioned for the performance of the covts. in a lease or deed

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of other kinds. the obligation extends as well to implies as to the expres covts. Thus a lease is made in these words "give grant demise &c". here I observe the covts are two fold. that lessee has good title. and that lessee shall quietly enjoy. At the same time lessor executes a bond conditioned for the performance of the covenants in the lease. Now if lessor has not good title. he is liable on the bond precisely as he would have been had he expressly covenanted that he had title. and if lessee is evicted the lessor is as much liable on the bond as if he had expressly covenanted that the lessee should enjoy quietly. 4. Co. 80. b.

Construction of covts on this subject the rule is that covts are to be expounded liberally. By this is meant merely that the meaning & intention of the parties is to be sought without such strict adherence to position & artificial rules as in the case of deeds or grants executed conveying present interest. 1 Inst. 45. b. Plow. 140. 1 Roll. 419.

Hence in many instances a literal performance will not avail the covenantor. there must be a performance substantially according to the spirit of the instrument or the intention of the parties which is the same thing. Thus when A covenanted to deliver to B within a certain time a bond which he held against him, and A before the time sued upon the bond & then delivered it as he had agreed. the covt was held to be broken, altho it was literally performed for it was a plain evasion of the intention of the parties. for the ob-

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vious intent was that the bond should be delivered up to be cancelled, that the obligation should be extinguished. Cro Eliz. 7. 1 Sid. 48. Esp. Dig. 270 1 Bac. 539.

So where a lessee covenanted to leave all the timber upon the land at the end of the term, cut the timber down & left it, it was held to be a breach. Th. Ray. 464. 1 Ab. 246 Esp. Dig. 271

So if one covenants to deliver a piece of cloth by such a time, & in the meantime so impairs it as by cutting it into fragments that it is unfit for use, it is a breach. So too when one cov. to deliver all the grapes thrown out of his brewery and before delivery mixed ashes with them so that they were useless, it was. Skin. 39. 40. 1 Bac. 429. 242.

But on the other hand a substantial performance is sufficient altho it is not literal. Thus A & B. covenanted that A's son should marry B's daughter, the son being under the age consent married agreeable to the cov. but on coming of age he disagreed to the marriage, the performance was held good. for a marriage in such age was obviously intended, & it was impossible that such a marriage should not be voidable. the cov. was therefore construed as performed agreeable to the intent of the parties. 1 Sim. 52. Esp. Dig. 270

When in the construction of cov. words are uncertain so that the intention of the parties cannot be precisely ascertained they are in gen. to be taken most strongly against

the covenantor & of course most favourably for the covenantee. This you will remember is the rule in the construction of all contracts & it is not at all confined to covenants. Thus in a marriage settlement agt. a covenants to pay the intended husband £20 per annum & no time being fixed as to when the pay.t should cease it was construed to be for the life of the husband. And it is a gen.l rule that if one covenants to pay an annuity without limiting its continuance, it shall be payable during the life of the grantee, that being considered the most advantagous for him. (This rule evidently does not apply to case where the grant is to one & his heirs or in fee) 1 Lev. 102. 1 Sid. 151. Esp. Dig. 271. 1 Bac. 539.

If one covenants to convey land to another by such a day & before the day arrives conveys it to another the cov.t is ipso facto broken and the covenantor is liable immediately altho the time stipulated for performance has not arrived. For it is a gen.l rule that if a party once disables himself to perform, he is to be considered as having broken the cov.t altho perhaps he may be afterwards able to perform it. 5 Co. 21. a. 7 Co. 10. More. 313. 323. 1 Johns. 522. 6 ib. 110.

So if one covenant to day to convey his house to B three years hence. and then should voluntarily destroy it tomorrow. So if the cov.t was to deliver one horse or any other chattel & the party should thus disable himself to perform

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he is liable immediately from the very moment. &c. &c.

There are some cases in which a clause in the form of an exception in a lease amounts to a covt. on the part of the lessee & others in which it does not. The distinction is this viz.

(Rule) When the lease is of a given subject with the exception of a certain part the exception is not a covt. on the part of the lessee that he will not occupy the part excepted or disturb lessor in the occupation of it. he is a mere stranger to it, and if he does occupy or disturb the lessor in his occupation he is liable as a trespasser, but not on the covenant.

Thus when A has a manor to B. excepting a certain enclosure the exception does not amount to a covt. on the part of B that he will not occupy &c. But it does amount to a covt. by him that the enclosure shall not pass by the lease, and it operates as an estoppel to him to lay claim to it.

But on the other hand, when the exception is of some thing or profit to issue out of or be derived from the thing demised. it does amount to a covt. on the part of lessee that he will not disturb the lessor in the occupation & enjoyment of it.

Thus A makes a grant of a manor to B excepting a right of way or of a house reserving a right of passing thro it to his out houses

This amounts to a covt. on the part of the lessee that the lessor shall enjoy this right of easement. for it is a right or profit issuing out of the subject of the lease. beneficial to the lessor.

This construction is consistent and even necessary for the security of the lessor. for the lessee has an interest in the right of way a thing issuing out of the property demised so that he cannot be liable merely as a stranger for a trespass if he disturb the lessor in the enjoyment of it, it is very correct therefore to consider the lessee as insuring it to the lessor. —

But in the case above there is no necessity of this for the lessee having no interest in the close is liable as a trespasser if he occupy it. for this rule. see Cro. Eliz. 687. 690. Com. Dig. Waste E. 2. 1 Rol. 431 Cantle 232. Salk 196. 1 Pow. Con. 238. 1 Bac. 531

(Semble this rule holds whether the est. were to an indenture or deed poll. vid. 1 Pow. con. 238. Cro. Eliz. 690 in anc)

Thus is said to be a difference between express & implied covts. in regard to this construction: in this respect that the former are construed more strictly than the latter. When treating of contracts I gave you an example illustrating one branch of this rule. When one covenanted to perform a voyage to the port of Bengasi in So. Car. within a certain time. the contract being in its own nature possible and the covt. being unconditional. altho the covenantor was prevented by inevitable accident as tempests, yet he

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was held liable on the covt. for the intention of the parties manifestly appeard to be that the covenantor should be considered as an insurer agt. tempests &c. 3 Bacon 1637. 8 T. Rep. 259. 3 East. 233. 2 N Rep 258.

So also when there is an unqualified & absolute covt. to pay a certain rent for a given time, for a building and the building, is burnt down during the time with the it is by lightning, yet the covtor. is bound to pay the rent. This is presumed to have been the intention of the parties if it were not the lessee should have qualified his engagement. Sta. 763. 1 T. Rep. 310. 708. La Ray. 1477. 1 Fonb. 366. Esp. Dig. 270

Whether a court of Eqy would under such circumstances relieve the covenantor has been a question considerable mooted. It has not been decided except in one instance and you will the opinion divided. 1 Cha. Ca 83. Amb. 619 In Amb. there is an opinion in favour of the lessee. And La Apsley once decreed relief in such a case that however is not the best authority. 1 Chan. Ca. 83. Such subject discussed 1 Fonb. 366 to 371 note.

Now I conceive that I think a court of Eqy. cannot on principle interpose in such cases. In the first place a court of Eqy. cannot control the law even in hard cases, it can merely administer relief from its capacity to attend to circumstances that cannot be adverted to in a court of law, but there is no such thing in this case. Eqy. proceeds on the ground that the rule of law was not framed for such a case in consequence of its universality it is oppressive

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But as I observed there is no fact to which a court of Law may not advert as well as a court of Eq^y. indeed it is the very case supposed in the rule of law. Now the construction of a construction of a contract is in Eq^y as at Law. What then was the intention of the parties? At the first view it may seem hard at first view to say that covenantor shall be liable in all events yet I trust it will appear correct on reflection.

Suppose now that A should make an absolute conveyance of a house to B in fee. and tomorrow it should be burnt by lightning. then is no pretence that B is entitled to relief. Suppose ag^t. that A had leased the house for 50 years to B. whose is the house for the 50 yrs? B's who property is destroyed when it is burnt? B. Where then is the difference between the two cases. The truth is A sustains his proportion of the loss in losing the reversion. Natural justice is ag^t. the claim of B the robbin did in his hand as the saying. He must bear the loss. Where the Eq^y is equal the rule of law must prevail. but in this case the equity is more than equal in favour of the lessor. If the lessor had covenanted to rebuild in case of such an accident Eq^y would doubtless oblige him to perform as when the intention of the parties is clear that the lessor should insure the lessee would not be bound to answer the rent after destruction Selleys N. P. 472.

In the case of implied covenants such accidents will excuse the covenantor. Thus there is no pretence that a lessor would be liable on the

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implied covt. for quiet enjoyment if the subject was destroyed by inevitable accident. and indeed as I conceive he would not be liable on an express covt. to that amount in such a case. this example however illustrates the rule. 3 Burr. 1639. 1 Fesn. 366. Doug. 259.

many examples have occured in the title of bailment where an implied engagement is not construed so strict. by ag.st the covenantor as an express unconditional engagement would be.

It is a gen.l rule that an express covt. is not discharged in the language of the rule by any collateral matter, i.e. by any collateral accident as in the example already given when an unconditional covt. was made to pay a certain rent for a certain period and the house which was the subject of the lease was soon after burnt. the burning of the house was a collateral accident and tho deprives the covenantee of his expected benefit but it does not discharge the express covt. on his part to pay the rent.

There are several exceptions to this rule one at first. If one covt. to do an act which at the time is lawful. but which an intervening subsequent statute makes unlawful, the covt. is annulled. as the stat. is a collateral matter as to perform a voyage which an embargo or declr. of war makes unlawful. Here the covt. cannot be performed without a breach of the law. and the law will never oblige one to do an act for the doing of which

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it would punish him. Esp. Dig. 270. Salk. 198.

And this rule is not at all inconsistent with the constitutional provision which forbids the passing of statutes impairing the validity of contracts, for that refers to such acts as are made for the very purpose of dissolving contracts. but in this case the dissolution of the contract is merely the accidental effect of a statute prescribed by public policy.

Secondly If one covenants not to do a thing and the statute which is afterwards enacted makes it his duty or compels him to do it the covenant is annulled. Thus a covt. by A to one B. from this time one year without intermption and a subsequent statute should compel him to have B to support an insurrection or repel an invasion the covt. will not bind i.e. hinder him to make it. As the rule is gent. said above the word "lawful" is inserted after "thing" but it is immaterial whether it were lawful or unlawful in cases where this rule will apply.

If however one covt. not to do an act at the time unlawful a subsequent statute merely making the act lawful does not annul the covt. for the stat & the covt. are not at all inconsistent & one may be performed without violating the other. 1 Salk. 198

It is a gent. rule that covts. respecting any particular subject matter are to be confined in their operation to that which is in being at the time

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of the covt. made. Thus if one covts. to pay all the taxes it extends only to those taxes now existing, or at the ext. of the covt. & not to those of a new kind afterwards imposed. As if the existing taxes were an hearth. the covenantor must pay all those but if during the time a new kind should be levied as a window he would not be bound to pay them. 1 Lev. 68. 1 Vent. 223. 3 T. Rep. 377. Str. 1191.

If a person to whom an obligation is given assign it by deed to another this assignment contains an implied covt. on the part of the assignor that the assignee shall have all the benefit of the obligation. that he is at liberty to collect it in the name of the assignor and without interruption by him and also that the assignee shall enjoy the avails of it when collected.

The C. L. rule that a chose in act. cannot be assigned means merely that the assignor shall not sue in his own name. Still however the assignt. remains good as between the parties & if it were made without deed it would be a simple contract of the same effect. If then I had a bond ag. A. B. and should assign it to you. if I collect it. or prevent you from collecting it or release it. I am liable on my covt. and the gen. words of grant or assignt. amount to a covt. of this kind. i. e the law will imply such an one from them. 1 Pow. 317. Salk 125. Chit. Bills 109. 2 Str. Rep. 683. 1242. 3 Keble 304. 2 Vern. 540.

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In Comm. the usual remedy for the assignee on such covt. has been to sue the obligor in an action on the case for fraud for paying the original creditor or receiving a release from him after notice of the assmt. for he is liable as well as the assignor. In Eng as agt. the original debtor the only remedy is in Eqty. for the assignee can no more sue him for fraud than he can on the bond. This I presume is the course in those states where they have courts of Chy. But in Eng or in those states where resort to an assumpsit for fraud agt. the assignor will not lie, the remedy agt. him must be by covt. broken or an action on his undertaking when the assignment was by parol.

A covt. in one deed cannot be pleaded in bar of an action on a covt. in another deed unless the former is in the nature of a defeazance or condition. 2 Vent. 217. Esp. Dig. 305. Thus if the covenantee in one deed give a deed binding himself not to sue covenantor for one month on the former, the latter cannot be pleaded in bar to an action on the former tho the party suing may be afterwards liable in covt. broken on the latter deed.

But a defeazance is a separate deed may be so pleaded. Thus if after a covt. in one deed by A to pay a certain sum of money to B. B executes a separate covt. in a distinct deed conditioned that on the happening

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of a certain event the former covt. to pay shall be void. then on the occurrence of that event should B sue A. A may plead the latter clause in bar. Salk 573. 575. Cro. Car. 426. Cro Jac. 300. 623. 3 Salk 298

Answer also to meet to the exception first given a covt. by an endr. not to sue a debtor for a limited time is no bar to an actn. brot. for the recovery of the debt: but the covenantor by suing within the time makes himself liable on the covt. The reason is that if the covt. could be pleaded in bar of the action for the debt, it must be in effect & so far forth a release of the debt: but if a personal right or a right of action be only suspended it is gone forever & a release therefor of the debt during the time is a release of it forever & this is evidently contrary to the intention of the parties. Hob. 10. 2 Hen Bl. 10 note. Cowth. 63. Salk 573. Roy. 187. 393. 413. 2 Pow. Con. 255. 1 Show. 466. 1 Rolle. 939. 3 Lev. 41. 4 Bac. 265 1 B & P. 663.

But if such a covt. make a part of the instrument (as by a memorandum indorsed or a clause in the written) it may be so pleaded & does prevent a right of action to recover the debt until the time expires. this on the face of the instrument the debt is payable on demand. For the covt. is in this case part of the same deed that creates the oblign. & the whole is to be consid. together. and these different parcels of the same instrument when taken in conjunction are considered as a covt. to pay the debt at the expiration of

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of the time appointed. 8 T. Rep. 483. Esp. Dig. 306. 6 T. Rep. 737. La Ray. 690. 1 Lev. 152.

But I observe again that is a gen.l rule that an covenant may be pleaded in bar to an action on another cov.t in the same deed tho' there are no words of defeazance in the case: for the sense of the instrument or the intention of the parties is to be collected from the whole deed (as I before observed) with all its parts. Bac. Abr. Mon 679.

Thus Lessee cov.ts to pay $100 per an. rent. & then follows another cov.t on part of Lessee that Lessee may pay $50 of the $100 for repairs. Lessee has actually paid $50 & Lessee sues him on the former cov.t for remaining $50. Lessee may plead the latter cov.t in bar.

The rule above stated "that a cov.t not to sue for a limited period is no bar (does not operate as a release)" does not apply to any other than personal actions. For a cov.t not to assert a real right for a limited time may be pleaded in bar. for it may be treated as a release for such time and still not amount to an extinguishment of the right. as a temporary suspension of a personal right would. 2 H. Bl. 4.

But a cov.t never to sue at all is a bar to a real or personal action and may be pleaded as a release, Bac. Elig 352. 1 T. Rep. 446. 8 ib. 170. 486. 1 Roll. 239.

This rule is designed to prevent a multiplicity of suits to produce one & the same effect. for if the cov.t never to

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sue was to be treated merely as a covt. it would not bar the action. the covenantee might sue & recover. but then the covenantor might afterwards sue the covenantee & compel him to refund. which would leave the parties in statu quo except the cost & trouble which they will have been put to for no purpose. And this is one of those cases in which an instrument in one form operates as an instrument in another. it is in form a covt. but it is construed & takes effect as a release. 1 Ves. Rep. 446.

But a covt. not to sue at all is more to sue one of two joint & several debtors. is no bar to an action against the other debtor. & it seems not to be to an action against the covenantee himself 2 Ld Ray 690 Nott. 178. 8 T. Rep. 168. 171. 11 Mod. 254. 1 Mod. 551

Now the reason of the rule is that it was evidently not the intention of the creditor to relinquish the whole debt if it had been he would have released both. The covt. amounts merely to this that he will not sue one of them a suit may be brot. on such a contract with or without joining the obligors. & if the covenantee sues both he will recover of them but the covenantee may recover back his proportion in covt. broken.

But if the oblig.s were joint and not joint & several a covt. never to sue one of the obligors would I conceive be a release of both. for he cannot in this case sue without joining both parties. and all remedy appears to be intentionally abandoned This

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case however is not settled in the books.

Altho a covenant not to sue within a limited time is no bar to an action. yet if an ind.re covt. with his debtor not to sue within a given time ends, that if he does the D.r bond or obligation shall be void. this covt. may be plead in bar to an action of the D.r bond or obligation. for here are proper words of defeasance and the covt. operates as a release to extinguish the debt if the suit is brot. within the limited time. Cro Eliz. 64. 210. Comb. 123. 1 Salk. Show. 46. 330. 350. Holt. 619.

A covt. not to sue one in a foreign country is good bar to a suit in a foreign country yet the reason is merely local & not total. Thus the seamen of a Dutch ship covenanted not to sue the Capt. in a foreign country & this was held a good bar to an action brot. before the C. P. in Eng. altho by the rules of C. L. it would not bar an action in Holland. 2 Atk. Bl. 603. 171. 1 Ld Ray. 690. Com. Rep. 139. 3 Salk 298.

Now such a covt. as this is allowed by law because it is in itself reasonable & consistent with good policy. Suppose two individuals about from this county to travel over Europe. having occasion on a covt. of this kind would be very convenient. for it must be extremely perplexing to be sued in a foreign country at distances from friends & resources

But a covt. by which one stipulates to exclude himself from

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the benefits of resorting to the courts of justice in his own county is void. 2 Inst. 231. 606. For such a covt. is opposed to good policy. it is nothing less than an agt. to renounce the protection of the laws. & the covenantor has no more right to bind himself thus than he has to bind another to such a renunciation.

Indeed it is a consequence of this rule that a mutual, amicable submission of a civil claim to arbitrament is revocable not however void. for the award is binding when this made. but it may be revoked. This however does not go the whole extent of the rule & it ought not. for such submission ought to be encouraged still however the law will not compel a man to abide by such an agt. the courts of justice on the principle

Of those covenants which are ordinarily used in deeds of Conveyance.

In all deeds of conveyance except what are called in this country "quit claims" but more usually "releases," there are regularly two covenants either express or implied viz.

1st Covenant of seisin. 2 Covt. of warranty. or as they are termed when speaking of bases of good titles lesser and of quiet enjoyment or that the lessee shall quietly enjoy. The first is nothing more or less than a covt. of title. the second a covt. to defend that title 2 Co. 80. b.

I observed that there were these two covenants

either express or implied in all conveyances except quit claims. and if they are not expressed by they usually are the law will imply them from the words "dedi concessi" &c unless there is something else in the deed to exclude or rebut the implication. 1 Rall. 519 520. Dyer 257. 2 Mod. 92 Esp. Dig. 266. to 268.

A cov^t of seisin or good title is a cov^t in praesenti i.e. an assurance by covenantor that he is well seized has the necessary title to make a valid conveyance, thus if the title be not sufficient to make the conveyance the covenant is broken immediately on the making of it.

Therefore on a cov^t of seisin grantee may sustain eviction by the person having good or better title & in order to maintain the action it is suff^t for grantee to shew that grantor was not lawfully seized: it is not necessary that grantee should allege eviction or that he has sustained special damage, but merely that covenantor had not the title which he professed to have. Cro. Jac. 170 369. 9 Co. 60. Esp. Dig. 299.

In an action on cov^t of seisin it is suff^t to allege that the Def^t was not well seized without stating who was. It was some years since determined in Con to the contrary. but the rule is now well settled that in declaring on the cov^t "that I am well seized" it is suff^t to negative it by averring that Def^t was not well seized. It then becomes incumbent on Def^t to shew that he was

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seizd and if he proves that he was seizd prima facie. it throws the onus on Plff to shew who was seizd or a higher title in another. And if no title at all is shewn by Defts or if Plff shews a higher title in another the suit must prevail. ibi auc.

A covenant of seizin is broken not only by a total defect of title but by an existing incumbrance, as by mortgage unless that incumbrance is excepted in the covt. Thus a mortgagor covenants that he is well seizd of the subject of the mortgage. This covt is broken by the existing incumbrance. whereas if mortgagor had covenants that he was well seizd excepting such incumbrance he would have been safe. 3 East. 491. 4 Johns. 10.

In this case however where the breach of covt consists in a mere incumbrance, that incumbrance must be specially alleged in the declr by shewing the nature of the incumbrance & the ground or cause of the interruption. It is not as in the former case (where there was a total defect of title) sufficient for covenantee to aver merely that covenantor was not well seizd for him the covenantee takes the affirmative & onus probandi, and therefore should so allege that covenantor should have precise notice of the facts or grounds of action and an opportunity to traverse them precisely. 2 Wheat. Rep. 433. 437.

A covt of warranty or quiet enjoyment is on the other hand is a covt de futuro. announcing to

this that the covenantor will defend the title or that the covenantee shall quietly enjoy. On this covenant then the lessee cannot sue until eviction. and it must not only appear in the Decl: that the victor was under title but also that it was under good & elder title. 4 Co. 80. b. 1 Mod. 292. 4 T. Rep 617 Cro El: 315. 1 H. Bl. 3. 6 277. Esp. Dig. 301

Alleging in the Decl: that covenantee was evicted by one who was having lawful right & title is not sufficient. for this right & title may have existed and have been derived from the Plff himself in such case he certainly could not recover. 1 Sid. 466. 2 Saund 177.

It must appear then in the decl: that the victor had elder & better title than the covenantee enjoyed to the covenantor. Never also to aver that the eviction was by suit is not sufficient and indeed much less so than the former averment. for it does not even any title in the victor, the recovery might have been had without defence, by collusion by false testimony or even mistake. Cro Eliz. 917. 4 Co. 80. b. 1 Pow. Con. 379. 403. 4. 388. 9

There is however no technical form of words necessary in alleging this elder title in the evictor. but if it appears in the declaration that the covenantee was evicted by a person claiming under elder title it is sufft: the words "elder" or title are not technically indispensable. 2 Lev. 37. 4 T. Rep. 617. 8 ibn 278. Esp. Dig 302.

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Nor is it even necessary to state under what title the evictor was: i.e. the covenantee is not bound to deduce the title of the evictor in his decl^n as that he was the heir or devisee of P.S. or that he was a prior grantee of the same subject from the covenantor. He need not in short, shew how or from whom the evictor derived his title. it is enough to state generally that he had one & the title. 2 Lev. 37. 4 Ter. Rep. 614.

See however 2 Saund. 177. 1 Sid. 466 where the court is made to say, in the language of the reporter, that the Plff must shew under what title the evictor entered. which is in terms a plain contradiction of the rule I have just laid down.

If however this language is refered to the words in the decl^n it will be obvious that it means nothing more than that the Plff must allege elder & better title in the evictor which is precisely the rule before laid down. The words in the decl^n were legale jus et titulum. the court held these not sufficient as they clearly were not by the former rules. for the evictor might have had title under the Plff.

This I take to be the true construction of the language of the court in that case altho it would apparently imply something. if however it means anything more it is not law.

The reason why it is necessary to allege title at all is because the cov^t. of warranty does not extend to the tortious act of others. Thus if one

"covenants to warrant & defend against all claims "& demands whatsoever" he does not become an insurer against the torts & crimes of all mankind that a felon shall burn the house &c. it extends only to the title. and is a covt. merely to warrant & defend that. And it is not broken unless the covenantee is evicted by one having higher and older title than grantor had. In other case of injury the covenantee must take his remedy agt. the wrong doer. Stra. 400. 3 T. Rep. 584. 2 ib. 619. Hob. 34. Esp. Dig. 273 301.

A grantee may indeed recover by covt. agt. the tortious acts of third persons, for any one by his own voluntary act may for a sufficient consideration subject himself to any degree of responsibility even for inevitable accidents. And in such cases an averment of older & better or indeed of any title at all is not necessary. Esp. Dig. 273. 4

And it has been determined that a covt. to warrant & defend agt. the claims & demands of a particular person, extends to tortious evictions by that person. and this rule is founded on the supposed intention of the parties. Hob. 95. Cro. Eliz. 212. 1 Roll. 413. Stra. 404

In that this rule is founded on the supposed intention of the parties. and it has been extended to demands done without question. But I confess that this construction of the intention appears

to me questionable. and I should doubt whether the intention of the parties were effected by it. Such a covt. appears to me rather a qualification of the gent. covt. than an exception of it. that the warrantor covts. agt. the claims of J.S. & that the grantee takes the risk as to all others. And at any rate if he is to be considered as warranting against the claims & demands of all persons as well as agt. those of J.S. yet it seems to me to be straining the construction to say that he warrants agt. the torts of J.S.

But if the covenantor himself disturbs the covenantee even by a tortious act under a claim of title he is liable on his covt. and Duff might state that Duff has any title, if the act stated in the decl. appears to have been an assertion of right, which is what is meant by a tortious act under claim of title. it is sufficient.

And this rule holds as the covt. by the very terms of it, is purely confined to lawful victions. for if the covenantor were to evict the covenantee by an act clearly unlawful under claim of title he is liable. as "locking up a pew" which had been demised with such a covt. & stating the fact of locking was held sufft. assertion as it amounted to an assertion of right. And the reason why the last rule holds is that the covenantor cannot defend himself by alleging that his act was unlawful. big in fact (tho not technically) stopped by his covt.
1 T. Rp. 671. 1 Roll. Rep. 21. 2 Show 425. Es. Dig. 273 300. 302.

And the rule is the same as to all persons included in the covt. i.e. the representatives of grantee both real & personal, as his Heirs Exrs. & Admrs. So that if he dies and his heir at law were to evict the covenantee or disturb him, altho without title, yet if it were under claim of title, he is liable on the covts. it. sunc.

Again in the case of lease an eviction by lessor himself suspends the rent. but a mere trespassing act does not. for an eviction by lessor is a breach of the covt. that will prevent his claiming performance on the part of the lessee, a mere entry or trespass however does not amount to a breach. Comyn. 242

And this rule again is the same when the eviction is by any person included in the covt. as heirs, exrs. &c. Dyer 257. b. 1 Roll. Rep. 21. Esp. Dig. 302 And the rule is the same tho the heirs exrs. &c are not named in the covt. as appears by the same authority.

A covt. by one Exrs. as such, for quiet enjoyment against all persons whatever is restained to themselves & persons claiming under them. Hence to subject them on such a covenant the breach must happen by or in consequence of some act of the Exrs. themselves. i.e it must be directly or indirectly their own act.

Thus A tenant for years dies the term being a chattel goes to his Exrs. Suppose they make an under lease covenanting as Exrs. for quiet enjoyment agt. all persons. this covenant cannot be

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broken except in consequence of some act of the lessor themselves, i.e. not by the act of any other person or persons. Shep. Touch. 163. 1 Atm. 33 b. 34.

It is a little difficult to be satisfied that this construction of a covt., so broad, is according to the intention of the parties. Than is however a technical name for it which I do not find in the books. viz. That the Extr. who covenanting as such acts as representative & can be made liable only in his representative capacity. He in that capacity he can be considered only as passing the testators rights. if he assumes to do more he acts in his private capacity, when therefore he covts. as Extr. against the the claims of all persons, it must be considd. as a covt. to assure nothing more than the testators rights after all however it is not certain that that was the intention of the parties.

I have now explained to you the difference between a covenant of seisin, or of good title and a covt. of warranty or of quiet enjoyment: & the different actions maintainable on them & on what ground.

The rule of damages in an action on a covt. of seisin & that in an action on a covt. of warranty are different And our rule as to the latter (i.e. in case an action on warranty) is different from the Eng rule.

In an actn on a covt. seisin when Plff prevails he recovers the consideration money & the interest. The interest I suppose is to be computed from the time of payt. if the money was paid

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if it had been paid down, or from the time that it drew interest from the execution. 2 Mass. Rep. 433. 4 4 5 4 ib. 108. 1 Selw. N. P. 551. note. 1 Root. 108. 2 ib. 294 4 Johns. 1. 3. 6. 5 ib. 49. 4 Dallas. 115. Kirb. 3.

Now you perceive that the Plff recovers, in common presumption, the price of the land at the time the cov.t was made & broken which was co instante. And the rule of damages in an act.n on the cov.t of seisin is the same here as it is in Eng.

In an action on the cov.t of warranty in Eng. the Plff recovers all his cons.d.n money with interest and the costs of the suit in which he was victed, but nothing for improvements or the rise of the land this is the C.L. rule obtaining in Eng and N.York 3 Cains. 111. 4 Johns. 1. 3.

In Con.t Vermont and Massachusetts. the Plff, in an action on the cov.t of warranty recovers the value of the land at the time of eviction and the damages sustained by the eviction. i.e the costs of the suit in which the property was recov.d from him. Kirb. 3. 2 Mass. Rep. 440. 3 ib. 543. 546.

I confess that I am inclined to think our rule the correct one according to principle. Now in an action on the cov.t of seisin Plff recovers the value of the property at the time the cov.t was broken that is at the time it was made. in other words the cons.d.n money which is the damage he suffered in consequence of the breach of that cov.t. It would seem then from analogy that in an action on the

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cov^t^ of warranty ~~the Plff~~ should also recover the value ~~at the time of~~ the breach. i.e ~~at the time~~ of eviction.

But in a country like this I think ours to be the only rule that can do justice between the parties. In Eng it is not so material as to the time at which the value of the land is made the rule of damages, for there the value does not fluctuate as it does here. the same rent is now paid as was paid centuries ago. at best, the alterations, arising from accidental circumstances are very slight.

But in such a country as ours especially in the new parts of it, justice requires that the grantee should be paid for his trouble & expense & making improvements, and for the rise in the value of the land in consequence of the settlement which he has contributed to rear up. Thus damages the Dft ought to be subjected for, as they were suffered in consequence of his breach of cov^t^

On a cov^t^ of seisin the assignee of the grantee i.e a subsequent purchaser cannot maintain an act^n^ agt the original covenantor. Thus A conveys to B with covenant of seisin. & then B to C. now C cannot maintain an action agt A for, the cov^t^ was broken ~~at the moment~~ it was made, and of course the right of action accrued on it before the assignment. but a chose in action by C.L. cannot be assigned. therefore C. cannot bring the action. in other words if C can maintain the action, it must be by virtue of the assignment of a chose in action which would make a chose in action negotiable, which is

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plainly contrary to the rule of C.L. 2 Mass Rep 439 Bull et. P. 158. 9. Esp. Dig. 295. 2 Johns. 1. Same point has been determined in Conn in the case of Tyler not reported.

But in the case of a cov. of warranty to take the last example. C might maintain his action against A (as he obviously might agt. B if he had conveyed with warranty) for in this case the cov. is broken in the time of the assignee, there was no right of action untill the stat. came into his hands, so that here is no assignment of a chose in action. C is the person injured. 5 Co. 15. b. 17. a. Chitty Pl. 3. 11. 1 Just. 384. b. Shep. 198. Bull. et. P. 158. 9. 3 Johns. 471. 5 ib. 120.

But an intermediate assignee who has not been damnified either by eviction or being subjected or sued by subsequent assignee cannot sue the ancestor grantor. for if he could grantor might be subjected to an indefinite number of actions for if one intermediate assignee not damnified might maintain it another might. 1 Conn. Rep 244.

In all cases however the original covenantee might I suppose on principle recover at least nominal damages in an act. on the cov. of seisin agt the original covenantor. for a right of action is perfected when it was broken which was the moment it was made. & this right has not been nor can it be transfered. But not so on the cov. of warranty for that has gone out of his hands & was not broken in his hands. The last covenantee or any subsequent

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purchaser cannot maintain his act. ag.t covenantor of seisin for reasons already given, but it is to that the first covenantee may attribute his damages would be nominal as he has received no actual damage. This however no such case.

In an action on the cov.t of seisin the Deft having acquired title after action brot is no defence. Thus A having no title conveys to B with cov.t of seisin, he then purchases title which will enure to the benefit of B. by way of estoppel. "it is agreed upon the old stock"

It is however no defence for altho the cov.t was broken the moment it was made & the law always presumes damage. B then had a consumated right of action at the moment the cov.t was made, and it cannot be divested by the subsequent act of the covenantor, the time of commencing the suit can make no difference, if it be after cov.t made, the damages however would be mitigated by this subsequent acquisition of title, for as it enures to the benefit of Plff he can suffer no actual damage 5 Johns. 49. 4 Cart. 507. 3 T. Rep. 186. 2 Saund. 171.

If an action of ejectment is brot against grantee by one claiming under higher title, the covenantee or grantee ought for his own security to notify the covenantor, that the latter may appear & defend if he please. This notification is called, when the entire suit in question is a freehold, "vouching in the grantor or covenantor" and when they vouched if he

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does not appear the covenantee must defend as such as he can. 3 Bl. 300. His vouching in you observe makes the warrantor a party to the record which enables him to defend if he chooses. 2 Roll. 396. Gilb. Ev. 28.

I observed that the covenantee might for his own security to vouch in the grantor, he is however under no obligation to do it and he is at expence of defending the title as his grantor. But if the covenantor is not vouched in, his not concluded by the judgt given against the deft. For the question of title is still open & he might prove it in himself notwithstanding the recovery. but if he is vouched in, whether he appears or not he will be concluded by the judgt. Gilb. Ev. 28. Ryle. 22. 1 Bac. 532. 1 Roll. 396. Peakes Ev. 39.

In Com. this proceeding of notification or vouching in as used as well in ejectment a deplevin as well when the interest in question is a chattel as a freehold & I see no reason why the rule should be limited to freehold as in Eng. 1 Inst. 101. 365. a. 1 Bac. 523. Peakes Ev. 39.

The particular form of giving notice in Eng. practice I am not acquainted with. but ours. which I suppose is substantially like it, is by a species of summons issuing from the court called a writ of voucher giving notice of the existence of the suit and notifying the covenantor to appear if ever he defend.

Quit claims deeds or as they are more usually called releases contain neither of those covenants of which I have been treating. For if a deed contain either of them, expressly or impliedly it is not a quit claim.

It has been said & determined in Con. that the quit claimant might be made liable in an action of deceit for fraudulent representation of his title or the quality of the land. but in that case. (Salmon v Sherwood in C. of Errors) it was determined that it would not lie except in case of a conspiracy for the purpose of defrauding. 2 Day. 128.

And in Eng. the rule is the same in effect, i.e. it is said that a purchaser of land or other realty must protect himself by cov.ts for it is said every purchaser must resort to the title deeds, for on them he should only rely. or if he wishes insurance as to title or quality he must react in covenants. & not rely on an action of deceit for fraudulent representation as in the case of personal chattels. Salk. 211. 2 Ld Ray. 118. Co. Lit. 196 380. 3 T. Rep. 51

It seems however that the rule is not fully settled in Eng. for by Hargrave the contrary doctrine is holden. i.e. that action will lie for a fraudulent misrepresentation. (which the warranty or cov.ts does not not reach as it were does in quit claims) where the seller conceals the instrument or fact which occasions the defect. or conceals the incumbrance to which the estate is subject. 1 Inst. 384. a. note so in Com. Dig. tit. 38. Chap. 5. Sec. 5. 1 Fonb. 366. so obiter in Cairns 393. These authorities

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go to show that an action on the case in nature of an action of deceit may be maintained in such case.

During the rage for land speculation in our country some years since there was a great deal of fraud practised. Sellers would own title when they had none & to induce purchasers to take deeds would make many fraudulent misrepresentations as to the value & situation of the land, & draw maps of lands, streams &c that never were in existence. carefully however avoiding covenants which would subject them.

Now admitting that the Eng rule is correct. I am inclined to think that such an action ought to be maintainable here. In Eng a man need not be deceived unless he chose it. But the recesses of our forests cannot be explored by any purchaser, the means of information are so few & the opportunities to expand so numerous that in my opinion good policy requires that such actions should be supported. wild uncultivated lands are continually in market. and it seems to me that such sales should lay the foundation of action for fraud as well as the sale of any other property. The situation of Eng is obviously different in this respect & the rule may reasonably be different.

There is another species of covenants that requires distinct consideration viz. Cov.ts to pay money by installments.

On a bond conditioned for the pay.t

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of an aggregate sum of money by installments debt lies upon a breach in non payment of the first installment & the Plff recovers the whole penalty. 1 Salk. 118. 1 Wils. 80 Stra. 515. 814. Cro. Jac. 558. Esp. Dig. 205

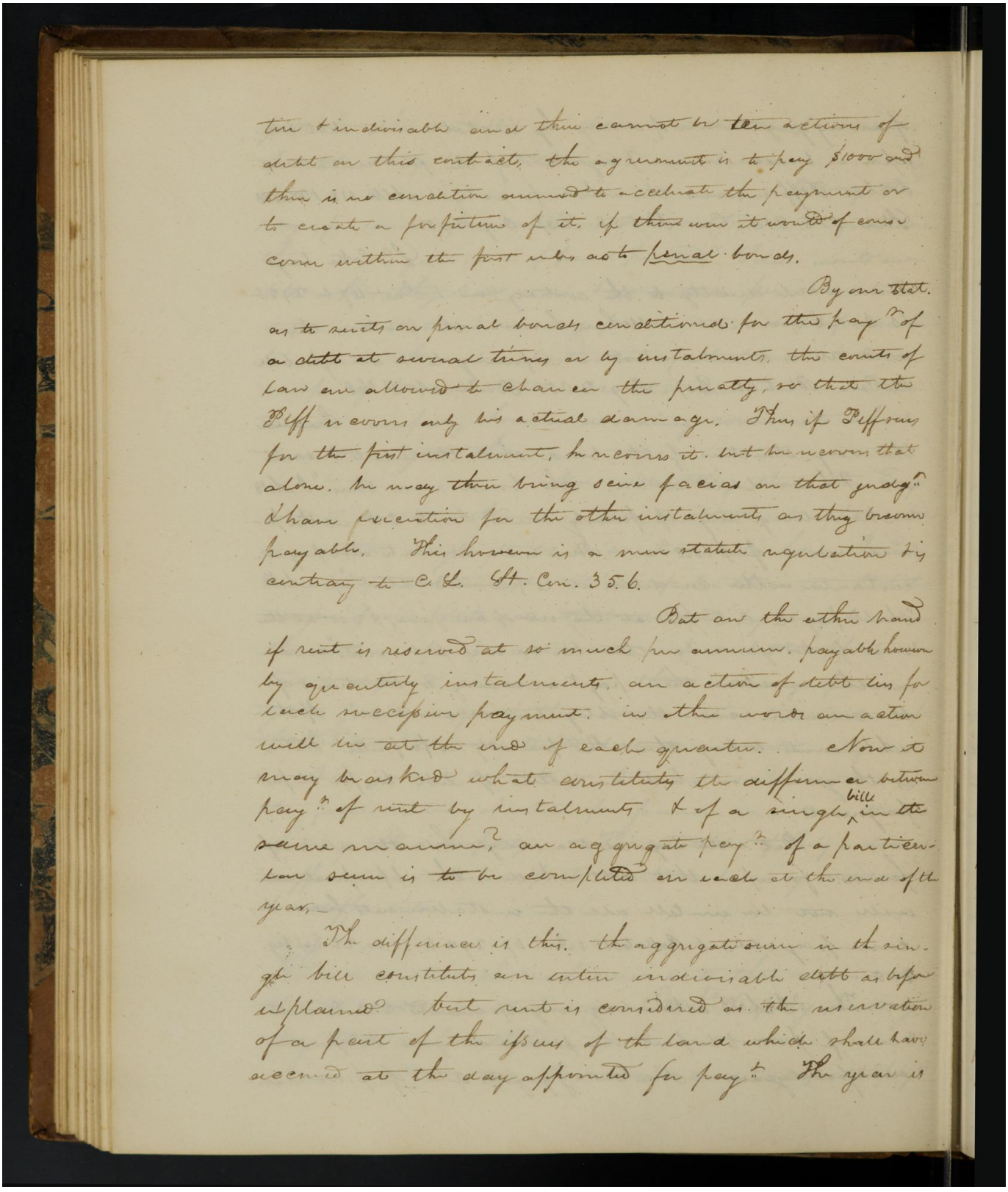
Ld Coke lays down a rule directly to the contrary in 1 Inst. 47. b. 292. b. 10 Co. 28. b. or 128. b. Where however the word is then used it is to be understood as referring to a single bill 1 Ann. Bl. 548. Esp. Dig. 205. Bull. N. P. 168.

Indeed the very structure of the bond shews the rule to be exactly as I have laid down. the bond runs thus. "I A.B. "acknowledge myself firmly bound &c to C.D. in the penal sum of $1000 &c Now is an absolute debt payable instantly. in the condition it is provided that "if A.B. "shall pay to C.D. $100 at the end of one year, $200 at the "end of two years &c. then the bond is to be void." under no other condition than pay.t according to the terms of the condition can the obligation be avoided. If then A.B omits to pay then. the penalty is forfeited. & this is the ground on which an action of debt lies, for the first payment.

But with regard to a single bill the rule is different. for upon that debt which is the appropriate action will not lie un till all the installments have become payable. 1 Roll. 601. 1 Inst. 47. 292. b. 10 Co. 28. Esp. Dig. 205.

Thus "I A.B. acknowledge myself indebted to C.D. in the "sum of $1000. to be paid thus $100 in one year. &c" for ten successive years. Now the aggregate debt of $1000 is en-

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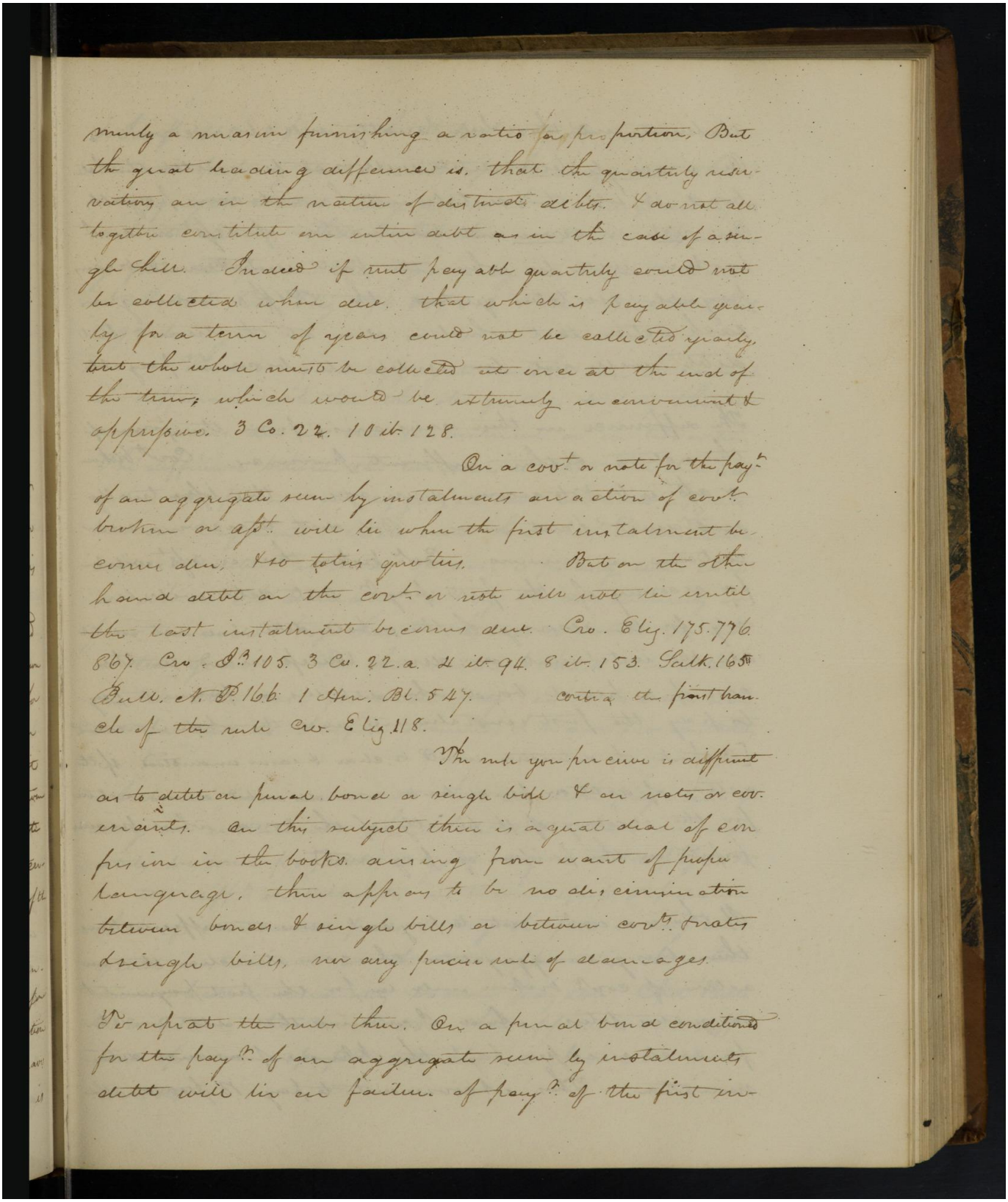
tive & indivisable and thus cannot be ten actions of debt on this contract, the agreement is to pay $1000 and there is no condition annexed to accelerate the payment or to create a forfeiture of it, if there were it would of course come within the first rule as to penal bonds.

By our stat. as to suits on penal bonds conditioned for the pay^t of a debt at several times or by instalments, the courts of law are allowed to chancer the penalty, so that the Pff recovers only his actual damage. Thus if Pff sues for the first instalment, he recovers it. but he recovers that alone. he may then bring scire facias on that judg^t & have execution for the other instalments as they become payable. This however is a new statute regulation & is contrary to C. L. St. Con. 356.

But on the other hand if rent is reserved at so much per annum. payable however by quarterly instalments an action of debt lies for each successive payment. in other words an action will lie at the end of each quarter. Now it may be asked what constitutes the difference between pay^t of rent by instalments & of a single bill in the same manner? an aggregate pay^t of a particular sum is to be compleated in each at the end of the year.

The difference is this. the aggregate sum in the single bill constitutes an entire indivisable debt as before explained but rent is considered as the reservation of a part of the issues of the land which shall have accrued at the day appointed for pay^t The year is

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merely a measure furnishing a ratio or proportion. But the great leading difference is. that the quarterly reservations are in the nature of distinct debts. & do not all together constitute one entire debt as in the case of a single bill. Indeed if rent payable quarterly could not be collected when due. that which is payable yearly for a term of years could not be collected yearly, but the whole must be collected at once at the end of the term; which would be extremely inconvenient & oppressive. 3 Co. 22. 10 it. 128.

On a covt or note for the payt of an aggregate sum by instalments an action of covt broken or aspt will lie when the first instalment becomes due. & so totis quotiis. But on the other hand debt on the covt or note will not lie until the last instalment becomes due. Cro. Eliz. 175. 776. 867. Cro. Jac. 105. 3 Co. 22. a. 2 it. 94. 8 it. 153. Salk. 165. Bull. N. P. 166. 1 Hen. Bl. 547. contra the first branch of the rule Cro. Eliz. 118.

The rule you perceive is different as to debt on penal bond or single bill & on note or covenants. On this subject there is a great deal of confusion in the books arising from want of proper language. there appears to be no discrimination between bonds & single bills or between covts & notes & single bills, nor any precise rule of damages.

To repeat the rule then. On a penal bond conditioned for the payt of an aggregate sum by instalments debt will lie on failure of payt of the first in-

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stalment and the whole penalty will be recovered.
On a single bill debt will not lie until the whole
bond or all the instalments have become payable.
On note or covenant an action of Ass.t or cov.t
broken will lie when the first instalment become
payable & so toties quoties the Plff recovering in
each action that which is due at the time. but
debt will not lie until all become payable.

The difference in these cases arises from the form of
the actions & their different provinces. Cov.t broken
or ass.t is brot. to recover damages for the loss actually
sustained & not more. But debt to recover a sum
certain in numero. Cov.t broken then or ass.t will lie
for recovery of the first pay.t but debt will lie
only for the recovery of the whole debt. i.e not until
all the instalments are due. Unless indeed in the
case of a penal bond when debt lies on failure to pay
to pay the first instalment, and the whole is recovered.
[B. thinks the distinction would be clear & easily understood, if the
action of debt on penal bond were described as an action
for the recovery of the penalty of the bond which became
forfeited on the failure of payment].

If there is a cov.t or note to pay several sums at different times
then being no aggregate in the case it is clear that an
action of cov.t broken will lie for the first payment &
so quoties toties. And I can conceive that debt would lie
for each succession pay.t tho I know of no such determination. Thus. if A covenants to pay B. $100. on the

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1 Jan.y 1818. & $100 on the 1st Jan.y 1819 &c. Now these are not properly instalments of the same debt. there is no aggregate stated. they are in the nature of & are in fact distinct debts. That Cov.t broken would be appears clearly from the former rule you may see however Ball N.P. 168. Cro. Eliz. 776. 807. 118. 1 Ken. Bl. 550. 1 Inst. 292. b.

When being no aggregate in the case it can make no difference whether the obligations to pay these several sums are in one instrument, or in two or ten. The difference between the two cases is that here there is not as in the former an aggregate debt divided up into several payments. each sum here & infact constitutes a distinct debt. in deed the case is precisely like that in which A covenants to pay B. one annuity or $100 on each 1st of Jan.y that is to follow for two or ten years. For this reason I think that debt lies in this case for each pay.t as it becomes due. tho for this, as I before observed. I have no authority.

A clause in a covenant that on non payment of any one instalment the whole debt shall immediately become payable, is good. e.g. a cov.t to pay $1000 in ten diff.t instalments, with an express stipulation that if covenantor fails to pay the first or any subsequent instalment at the time appointed. the whole sum shall immediately become payable. Chit. Bills. 212. 213. In Cro. J.r 505. there appears to be a different opinion expressed. but the rule I can give to be correct,

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Of the rights & liabilities of the Representatives of the original parties in the covenants.

In the language of the C.L. the personal representative of cov^r as his Ex^rs Adm^rs &c are implied in himself the meaning of the rule is that they are bound as matter of course & without being named by those covenants by which he himself is bound. This rule however is not universal. 1 Roll. 519 Dy. 14. a. 2 P. W^ms 197. 1 Pow. Con. 128.

Fiduciary contracts are exceptions to this gen^l rule i.e. when there is a personal confidence reposed in the covenantor or party contracting. as in case of an indenture of apprenticeship the master covenants to instruct the app^ce If the master dies his Ex^rs is not bound to instruct the app^ce for he may not be capable of doing it & the personal confidence was reposed in the master as to his capability which is not transmissible. Cro. Eliz. 553. 1 Sid. 216. Com. Dig. Cov. C. 1. 2 Mod. 269.

But the personal representative of cov^r is liable even in case of fiduciary contracts if the cov^t was broken in the life time of covenantor for immediately upon the breach of the cov^t a right of action accrued ag^t the cov^r & this claims is ag^t the personal funds. thus as this passes into the hands of the pers^l representative. (as Ex^r or Ad^r) this representative is liable as was if cov^t be broken after even after assets. Com. Dig. C. 1

An ancestor seised in fee may bind his hrs at law by a covt. Thus if A covenants to convey lands to B at a given time & dies before that time. Ch. will compel the hrs to perform the covenant. In gent. the consn money will go to the Exrs Dyer 338. 2 Vern 213.

Indeed it is a gent rule that covt real binds the hrs of covr. But on the other hand descend to the hrs of covenantee. as in the last case if covenantee should dies before the time of performance, his hrs could enforce the covt Bull. N.P. 158. 1 Roll 520 Fitz 243 Esp. Dig. 294

And the hrs of the covenantee may sue upon a covt real tho not named in the covt if the covt runs with the lands & was intended to continue after his actually broken after covenantee's death. Thus if a lessee covenants with lessor that he will have the lands & tenements in repair & before the expiration of the term the lessor dies. now if at the expiration of the time the premises are out of repair the hrs of lessor may maintain an act. on the covt ag.t lessee. for as the breach happens after lessor's death the hrs is the person injured 2 Lev 92. Skin. 305. Salk 141. Esp. Dig. 294.5.

Again. if A covt with "B & his hrs &c" for quiet enjoyment even in a covt real as of an inheritance & the covt is broken in the life time of B. tho Exr dies the hrs of B. has the act.n on the covt — and this is the case even tho the Exr was not named in the covt — The difference

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Between the two cases last stated is this. In the former the covt was not broken until after the death of covr: so that the hir alone was injured. but in the latter case the lessee B became entitled to damages during his life. which damages if recovered would have gone to the personal funds to increase that & this fund goes to the Extr & therefore the action does not accrue to him. and this distinction is gen. 2 Saw 26. 1 Vent. 176. 347. Bull N.P. 158. Esp Dig. 295

Again if upon a covt of warranty the hir at law of covee is evicted after the death of the covee the right of action belongs to him for the covt runs with the land. &c. &c.

The Extr of covr tho not named is always liable for a breach of the covt during the life time of the covr & the rule holds even tho the covt is a real one as contradistinguished from a personal covt. Thus suppose A conveys to B with covt of seisin. A dies & afterwards it is discovered that he had no title. now here the breach of covt happens during A's life for it is broken so instantly it is made, & his Extr is liable or may be liable for the claim of damages accrued ag.t the covr (A) which was ag.t his personal funds & had the claim been enforced it would have diminished the personal funds which by the death of A comes into the hands of his Extr the action on the covt should therefore lie ag.t the Extr. In some cases this action may be brot ag.t the hir at law.

Thus the action will also

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lies ag^t the Ex^r or Ad^r altho the cov^t is real & tho it is not broken till after cov^ts death if the cov^t is repug. but not otherwise. — for by the first gen^l rule the pers^l representative of cov^r are implied in himself & this is on the principle of privity of cov^t the cov^t being repug. 1 Rolle 519. Com. Dig. Cov. B.1. Ca. Eliz. 553.

But on the other hand on a cov^t in law. i.e. an implied cov^t the Ex^r is not liable if broken after the covenantors death. e.g. for a breach of the cov^t implied from the words "give grant demise &c" he is not liable tho on an express cov^t he would be liable. for in this last case there is a privity of contract extending to the rep^r arising in the former or implied cov^t. The right of recovery is founded on a privity of estate. but the rep^r has none the reversion descends to the heir at law. It follows then that the Ex^r is not liable for the liability follows the estate into the hands of the heir. Cro. Eliz. 157. 1 Bac 533. Dyer 257.

If an Ex^r or Ad^r comes into poss^n of a lease a term for years in his rep^l capacity. he may be considered as an assignee of the term & may be sued as such & so described in the decl^n for he is virtually assigned by operation of law and is liable for breaches occurring during his continuance in poss^n on the ground of privity of estate. 1 Wms 4. 1 Salk 309. Esp. Dig. 296

Of the liability of the heir of the covenantor. It is a gen^l rule that if the heir is named in the cov^t & has not assets by descent he is is liable for breaches of cov^t either before or after cov^r death to the extent

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of those assets but no further. 1 Fonb 357. 1 Swat 365. 370 373. 384. 2 Bl. 378. Esp Dig. 294.

I would here observe, that it is a rule of practice only that to an action ag[t] the heir at law for a breach of cov[t] of his ancestor, infancy is no bar. for the heir is not sued upon any contract of his own, but upon that of his ancestor who was sui juris & he cannot be made personally liable but only as to the property which has descended to him & on that account. 4 T. Rep. 77.

In Conn the st. makes a peculiarity as to the liability of these repts and it has ever been determined many years since, that the heir at law as such is liable at law on his ancestors cov[t] of seisin if named in the cov[t] & has assets by descent. — The principle of this seems to me questionable. It is a good Eng rule, the heir is certainly bound at C. L. & cov[t] may run him or the rept at his election. But it is contrary to the genius of our statute law. As the cov[t] of seisin is broken during the life of the ancestor I should not think the heir could be liable. for it is the duty, the exclusive duty of the personal rept to satisfy all outstanding claims against the deceased & the law points out the quo modo. it is to be done under the order of the courts of Probate. If the heir is made liable it changes the whole system. I admit that at C. L. the heir is liable & that it makes no difference whether the breach happened before or after the death of cov[r]. But how the st. makes it the duty of pers[l] rept. It appears to me that

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for that this decision cannot be correct.

As to breaches of the covt. of warranty when the breach happens after the death of covr. there can be no doubt but the heir at law is as much liable in Con as at C. L. for here the st. does not interfere, but leaves it as at C. L.

Of covts. which run with the land & of collateral covts.

A covt. is said to run with the land, as I understand it, when the oblign. created by it passes upon the assn. of the interest so as to devolve upon & bind the assignee or in other words it passes with the title.

On the other hand those covts. which do not run with the land i.e. do not pass with the interest are called collateral.

Out of this distinction there arises a diversity as to the liability of the assignees upon covts. usd. in conveyances.

The first genl. rule is that the assignee of a lease &c &c is liable for the breaches happening during his own poss. or time even tho not named provided the covt. runs with the land. But if the covt. is collateral the assignee if not named is not bound. 1 Fonb. 345.

The enquiry then arises in what cases does the oblig. pass with the interest & in what not. & this it is essential should be understood.

It is first to

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be observed that when the thing covenanted to be done or concerning which something is covenanted to be done was in esse at the time of making the cov^t or issues out of the subject covenanted about the cov^t runs with the land. Thus A leases a house to B. who covenants to repair this cov^t runs with the land or house. for it relates to something in esse at the time of making the lease viz. the house. And if B should assign to C. C would be liable for all breaches accruing during his time & the rule holds tho the assigns be not named in the cov^t 1 Roll. 521. Cro. Eliz. 457. 5 Co. 16 b. 2 Ja. b. 4 Co. 80.

So also a cov^t to pay rent is said to run with the land. for altho in fact it is not in esse at the time of making the lease, still in legal language it is potentially in esse - for the land out of which the rent is to issue is actually in esse. So that assignee is liable for what rent accrues during his time Cro. Eliz. 383. Moor 357. Bull. N. P. 159.

But on the other hand if the thing covenanted to be done or concerning which something is to be done was not in esse at the time of making the lease or was not parcel of the subject land. the cov^t is collateral & of course according to the distinctions above. the assignee is not bound by such cov^t unless named nor in some cases if named. Thus suppose B the lessee covenants to build a house de novo by a certain time & in the mean time he assigns to C. C is not

liable unless named. For the covt. is collateral, it relating to a thing not in esse at the time of the lease but to be created afterwards. 5 Co. 16. 2 Burr. 1271 3 T. Rep. 393 Cro. Eliz. 552. 1 Bac. 534

On the other hand a covt. which goes to the support or preservation of the thing demised runs with the land & the assignee is bound tho not named. Of this discription is the covt. to repair, but not a covt. to raise a new building.

So if lessee should covenant to have yearly so many acres of land untilled. the covt. would run with the land. for it goes to its preservation. So that should assignee plough a greater quantity than was stipulated he would be liable. 3 Lev. 233. 5 Co. 17. 18. 2 Ld. R. Cro. Jac. 125. Ray. 303. 2 Vent. 228. 232.

In laying down the two first gen. rules on this subject. I observed 1st that the assignee of a lease is liable for breaches accruing during his poss. whether named or not provided the covt. runs with the land. 2d But if the covenant is collateral i.e does not run with the land if the assignee is not named he is not bound for such breaches.

3 When assignees are named they are obliged in gen. to perform all the covenants whether they run with the land or not. 5 Co. 16. b. 1 Bac. 534 Thus A lease to B. B covenanting for himself & assigns that he will build a wall within 10 years. and B assigns

to C. If C holds before the time fixed for performance he expires he is liable for a breach of the cov^t. The assignee who accepts a lease in which he is named & he is bound by the cov^t respecting the thing demised.

But a cov^t to be binding on the assignee in these cases must be to do a thing which relates to the thing demised or subject matter of the lease, otherwise he is not bound altho he is named. in other words he is not bound to do an act foreign to the demise as to build a house or wall, to plant an orchard dig a stone &c upon other ground than that demised. The rule is the same in case the original lessee covenants to pay a sum in gross or a collateral sum different & distinct from the rent. Cro. Jac. 438. 1 Vent. 352.

The reason why the assignee is not bound is that there is privity between him and lessor except that of estate and it is only on the ground of that privity that the assignee is ever bound at all. he is not bound by privity of contract. And hence as in all cases where the cov^t is to do an act foreign to the thing demised there is no privity of estate the assignee has no interest at all in the thing covenanted about. such a cov^t then is precisely in the situation of any other separate contract between lessor & lessee.

But when the assignee is bound by the covenants according to the distinctions taken above. he is liable for

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such breachs only as accrue during his own poss^n. or continuance of his title. If the breach happend before he is in no case liable altho he be named but resort must be had to the assignor, the assignee not having had at the time of the breach any title or interest. 2 East 575. Hott. ba. 177. Salk 199. 3 Burr. 1271. L^d Ray 388. 1 Term. 358. Doug. 663.

The obligation of the assignee is founded in privity of estate and he is bound because he takes the interest to which the covenants are attached of course his liability can be coextensive only with his interest & cannot commence before nor continue after that interest.

Thus if lessee covt. to build a house within 10 years. the time having elapsed and the covt. not performed. if he assigns, the assignee is not liable altho named for the breach had occured & the right of action was complete before the assignees interest commenced ibi auc.

Again an assignee is not liable at law for breachs which accrue after he has assigned or transferred his interest to a subsequent assignee. and so far is this rule carried that if he assign the very day before the rent becomes due he is liable for no part of the rent. Cro Eliz 177. Doug. 735. 3 Co. 22. 1 Salk 81. 31. Dow. Mont 90. 4 Bull N. P. 159. 4 Mod. 71.

The reason is that no part of the rent is due until the pay day arrives, the whole aggregate reservation accrues on that day & not the

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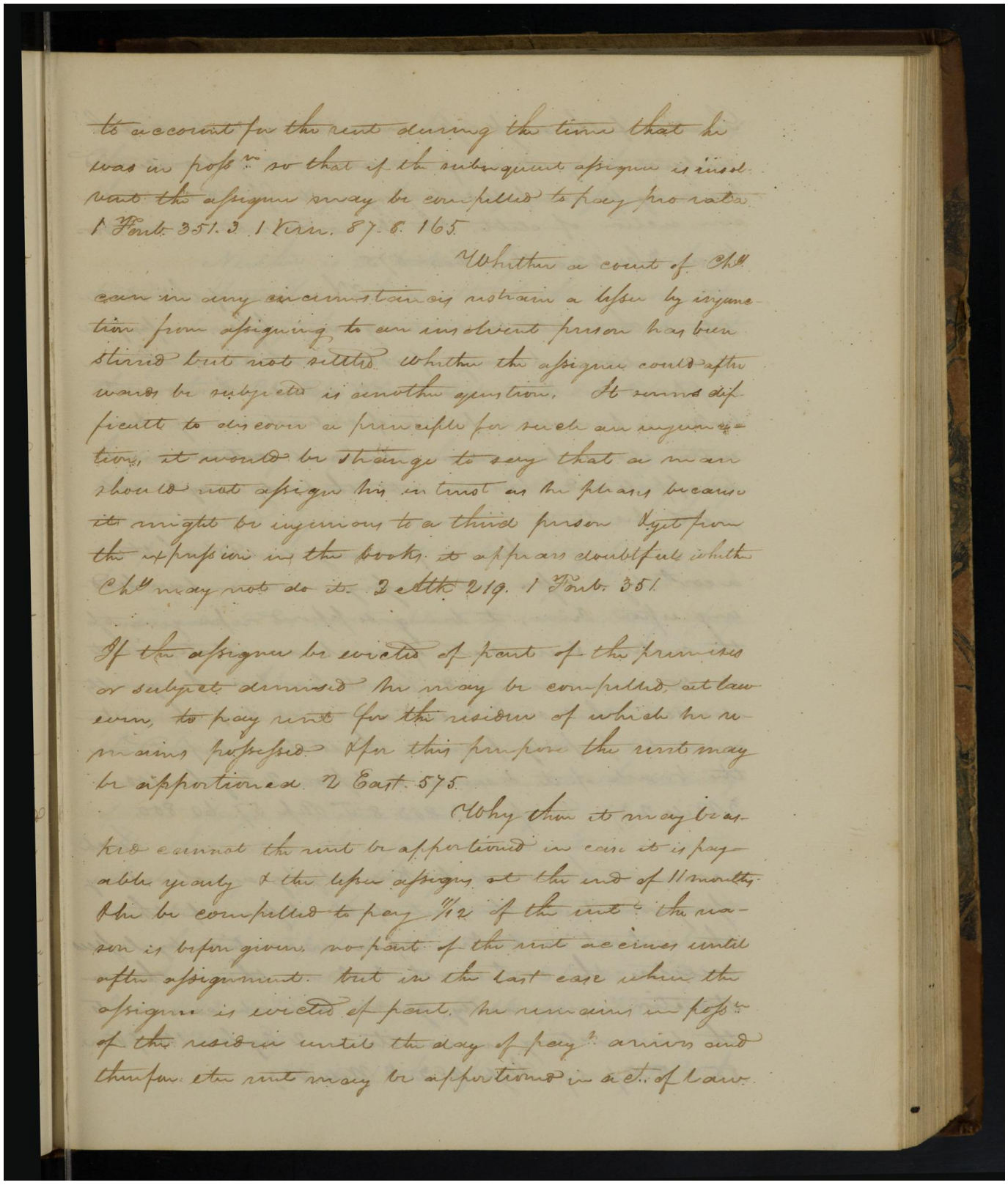
minutest fraction is due before. This rule however does not affect the lessee. For he is liable on his express covenant to pay rent. if it is not paid by the assignee at any distance of time.

The rule that the assignee is not liable for any part of the rent accruing after an assignt. to a subsequent assignee is so strict that has been so rigidly construed that he is not liable at law attho' the assignee are insolvent. & according to some opinions attho' even for the very purpose of defrauding the assignor. tho' in principle it appears to me undoubted that if he assigns to a beggar by a sham conveyance, he would still be considered as the tenant & subjected at law the weight of authority however I think is the other way. Sumb. 485. Stra 1221. Hob. 72. 166. 1 B & Pul. 22 — Se contra that an assignt. by fraud will not protect assignee 1 Vent 329. 331. by the auth. fraud may be replied & the replication would be good. It seems however to be questionable Law unless include this under a continuance of poss.n after a sham conveyance.

And if assignee should assign to a Feme covert who cannot bind herself to the payt. of rent the rule is precisely the same Doug. 435. 485. — The reason is that the assignee is liable on the ground of priority of state only & not privity of contract and this principle is of general application attho' it sometimes produces a hard case.

It seems however that a court of Chy. will compel the assignee

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to account for the rent during the time that he was in poss.n so that if the subsequent assignee is insolvent the assignor may be compelled to pay pro rata. 1 Vern. 87. 2. 165.

Whether a court of Ch.d can in any circumstances restrain a lessee by injunction from assigning to an insolvent person has been stirred but not settled. Whether the assignee could afterwards be subjected is another question. It seems difficult to discover a principle for such an injunction, it would be strange to say that a man should not assign his interest as he pleases because it might be injurious to a third person. Vide post the next section in the books. it appears doubtful whether Ch.d may not do it. 2 Atk. 219. 1 Vern. 351.

If the assignee be evicted of part of the premises or subject demised he may be compelled at law even, to pay rent for the residue of which he remains possessed. For this purpose the rent may be apportioned. 2 East. 575.

Why then it may be asked cannot the rent be apportioned in case it is payable yearly & the lessee assigns at the end of 11 months & he be compelled to pay 1/12 of the rent & the reason is before given. no part of the rent accrues until after assignment. but in the last case when the assignee is evicted of part. he remains in poss.n of the residue until the day of pay.t arrives and therefore the rent may be apportioned in a C. of law.

So also if the orig.l lessee be evicted of a part of the subject demised as of 50 acres out of 100 demised he may be compelled to pay rent for 50 acres in an action of debt, tho he could not in cov.t bro-ken. 3 Co. 22 a Pl. 2 East 575.

The reason of this diversity is that debt for rent against lessee or assignee is founded in privity of estate which in the case supposed continues as to 50 acres. whereas cov.t broken is founded on privity of contract merely & an entire claim founded on a personal contract cannot be apportioned, but in debt the party may be subjected pro tanto.

It was formerly doubted whether a cov.t by a lessee not to assign was in law binding upon him, it being supposed repugnant to the nature & incidents of such an estate. That doubt is now removed for it has been frequently decided that such a cov.t is binding & if the instrument be properly framed the estate is forfeited on the breach of it & vests to lessor. 2 Eq. Ca. 100. 3 Wils. 237. Comyns. 133. 803. 8 T. Rep. 57. 60. 800.

Such a covenant however is broken only by a voluntary assignment on the part of the lessee. if there the intent is taken upon execution by lessees creditors the cov.t is not broken. this is the construction universally given to such covenants. the law acting in invitum. 2 Eq Ca. 100. 7 Vin. 85. 8 T. Rep. 57. Style 483. 3 Wils. 237.

Nor is such a covt. broken by an under lease of part of the term. i.e. of the unexpired residue of the term for that is not in legal language an assignment. ib. anct.

Neither is it broken by a devise of the term to take effect from the death of the devisor. altho it is voluntary. for it must necessarily go to the exct. or legatee. therefore such devise is no violation of the covt. 2. Bc. Rep. 766. 3 Wils. 234. 8 T. Rep 59.

Indeed it may safely be laid down as a gnd. rule that such covenants are not broken by any assignment effected by mere operation of law. as where the party commits an act of bankruptcy felony or treason. or becomes an alien enemy. for the covt. is considered as contemplating voluntary assignments only.

I have considered the cases in which an assignee is liable to lessr. & I have further to observe that the lessee continues always liable on his express covenants even after an assignment. the liability of the assignee notwithstanding. You perceive then that altho the lessee can create a relation which may subject the assignee, yet he cannot exempt himself from his own express covenants as when he stipulates that rent shall be paid or repairs made at all events. 3 Co. 22. 3. Pop. 120. Doug. 443. 4 T. Rep. 98. 100. Salk 199. 1 Fonb. 353. 4 1 Saun. 234. 439.

But if the lessee has accepted the

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assignee as his tenant as he may do as by accepting rent of him &c. he cannot afterwards maintain debt for rent agt. the orig. Lessee because debt for rent is founded upon privity of estate & the his act has concurred with that of the lessee to determine the privity of estate between themselves. Cro J. 334 3 Co 23.a St. 1 H. Bl. 439. 444.

But when there is an express covt. by lessee for payt. of rent. he is liable in covt. broken for rent altho the lessor has accepted the assignee for his tenant: for here the covt. being express the privity of contract remains altho the privity of estate is determined by the acceptance Cro. Jac. 309. 522. Cro Ch. 188. 1 Sid. 402. 407. 1 Saund 237. Bull N.P. 159. 1 Vent. 354.

But when there is no express covt. the lessor can maintain no action agt. the orig. lessee for any claim or failure whatever after he has accepted the assignee as his tenant. If then he has accepted him he cannot subject the orig. lessee in any form of action whatever, either covt. broken, or debt. on the implied covt. For this covt. is founded in privity of estate which the lessor joined with the lessee to determine. In speaking here you will observe with reference to subsequent breaches as to those which accrued before the assn. he must remain as he was liable. Cro J. 522. 1 Sid. 447. 1 Show. 131. 437. 439 notis. 3 Co. 22.a 1 Vent. 354. 1 Saund 241.b.

I should here observe by way of explanation of terms that the lessor may accept the assignee as a tenant not only by receiving rent of him, but by expressly assenting to accept him or by any act which wives such an assent. 1 Inst. Bk. 408.9. 438.9.

When the covt. for rent is express so that the lessees liability continues after assignment the lessor may pursue his remedy on the covt. agt. the lessee & the assignee at the same the same time in dippt. actions. i.e he may sue either or both. but he can enforce only one execution or both so as to recover more than one satisfaction to the amount of the rent. & the costs of both suits. And if after satisfaction on an execution he pursues the other except for costs. the party may be relieved by an audita querela & discharged on payt. or tender of costs only. Co. Lac. 523.

I would further observe that by stat. 32 Hen. 8 which is an antient statute & prima facie binding here, the grantee of the lessor or of the reversion as now usually called. has the same remedy on covenants running with the land as the origl. lessor himself had according to the distinctions above taken, he being placed precisely in the lessors situation. tho' L. C. it was supposed he had not this right.

And by the same stat the lessee shall have the same remedy agt. the grantee of lessor as he had agt. the lessor himself according to the distinctions above taken. i.e precisely the same

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as he had at C. L. agt. orig.l lessor. 1 Inst. 215
Co. Lac. 523. 3 Co. 22. 4 Bac. 279.

In explaining the liability of the assignee of a lease I observed that the rule subjecting him did not extend to a derivative lessee or subtenant. the difference between them I did not explain.

An under tenant or a derivative lessee is one who takes a conveyance of only a part of the unexpired residue of a term. He is never considered as an assignee. Thus suppose A lease to B for 20 years. at the end of 10 years B assigns the whole residuum to C. here C comes in the place of B & is an assignee. But if after 10 years he had made a lease to C for 5 years or any other time short of the whole residuum he would have been a derivative lessee & not an assignee — and a derivative lessee may take the whole residuum of the term & still retain the character of derivative lessee. provided he takes as tenant to lessee & not to lessor. So that the definition of a derivative lessee should be. one who takes a conveyance of only a part of the unexpired residue of a term or who takes the whole residue as tenant to lessee. Doug. 174. 3 Wils. 234. 2 Bl. Rep. 766.

I again observe that such a derivative lessee or under tenant is not bound by the covts in the orig.l lease as an assignee would be according to the rule above laid down.

The reason is that as between him & the lessor there is no privity: none of contract because he was not a party to the orig.l covenant; none of estate because he holds under lessee who is his reversioner & landlord. it. and. 1 Vent. 347. 1. Doug. 438.

The rule was formerly holden to be the same as to the mortgagee of the whole residuum of the term unless he took poss.n i.e. that he was not liable upon the covenants of lessee who was his mortgagor because he took only as an incumbrancer not as a purchaser. But it has since been decided that the mortgagee of the whole residuum is liable on the covenants precisely as a purchaser is whether he be in poss.n or not. for the old rule see Doug. 438. 1 Atk. Bl. 114. 1 East 502. contra. 1 Vg. Sen.r 235. as the diff.t opinions in 3 Bro. Cha. 166. 1 Vg. 12. 3 Atk 512. 7 Ves. Rep. 306.

From what I have observed you will perceive that the difference between an assignment properly so called & one under lease is that an ass.t is a sale of the whole of lessees interest. but an under lease is the creation of a tenancy under the lessee. the assignee is a tenant of lessor & there is a privity of estate between them. but the under has no such such privity with the lessor. of course he is not bound by the covts. in his favour. as the lessee might be. Stra 405 3 Wils. 234. 2 Bl. 766.

Assignees properly so called are liable according to the distinctions already taken

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whether the assn. be by deed, devise, sale under Exr. or as it would seem by any other mode of transfer by operation of law. thus if lessee becomes a bankrupt his lease is ipso facto transferred, so if he dies it is assigned by law to the Exr. or admr. & it seems to make no difference whether the transfer be by operation of law or the act of the parties. Doug. 177.

It has been made a question whether an assignee of part of the subject of a lease (not of the term) is liable for rent or any part of it. or in other words whether the rent can be thus apportioned? thus A leases B 100 acres. B assigns to C 50 acres. Can A come upon C. for part of the rent? Co. Eliz. 633. 766. From analogy to a recent decision it would seem that it might be thus apportioned. for it has been decided that when an assignee is evicted of part of the premises he may be compelled to pay rent pro tanto in this way the rent may be apportioned. (2 East 577) The analogy between the two cases is so strict that I should think the rent might be apportioned in both.

If lessee covts. for himself & assigns - as long as they shall be in possn. he or his assigns continues in possn. after the expiration of term he is liable on the covts. altho at that time not strictly lessee or assignee yet being so de facto he is liable as such on the covenants bought to be subjected. for might not to be allowed to assume the character of

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lessee or assignee to receive all the benefit & them reserved
to avoid the liability. Stile 207. 2 Com Dig 564.

Thus far of those covts which do & those which do
not run with the land.

There is another species of covts
which require a distinct consid^n viz. Covenants or bonds
(for they differently in form) to save harmless.

A covt
to save harmless may, I trust, be defined to be one
by which the covt. covenants to secure or indemnify
the covenantee against some loss, damage or
charge to which the covenantee may be exposed.
as a covt by a principal debtor with his surety or in
a bond of indemnity or counter covt.

I would observe
first that these covts are not broken by the tortious
acts of another, they appear to be somewhat in the
nature of a covt for quiet enjoyment which you
will recollect are not broken by tortious entries and
trespasses.

So if the cred^r should falsely imprison the
surety & covenantee. the covt is not of course broken
tho a lawful enforcement of the claim against
the surety would be a breach.

So if an assignee
covts to save the lessee harmless from any claim for
rent & the lessor illegally distrain it is not a breach
1 Roll. 434. 4 Co. 80. Cro. Ch^s 443 1 Mod. 219.

On a
covt to save harmless the covenantee may in

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some case maintain an action agt. covt. on the ground of his own liability to a suit, because the covt. has suffered him to become liable, and this is usually the case when the contee liability accrues after the covt. of indemnity was executed. Thus a Shff takes a bond or covt. to save himself harmless agt. the escape of a prisoner having the liberty of the gaol yard. If the prisoner escapes the Shff may bring his action immediately altho he has not yet been subjected. for he was immediately liable over to the credr. whether actually damnified or not. & on this ground he may sue. the liability being deemed in construction a breach of the covt. Cro. Eliz. 53. 1 Roll. Abr. 510. 11.

So also if a surety for a debt to be paid in future takes a covt. or bond of indemnity from the princl. debtor & the debtor fails to discharge the debt at the time appointed the surety may sue on the bond immediately, because this liability is a breach. Thus A as debtor & B as surety give an obl. to C. to be paid 1 year hence. at same time A executes a bond of indemnity or to save harmless to B. now if A does pay the obl. at the end of the year according to the terms of it. B may immediately bring his action upon the bond altho he has not been compelled or called on to pay the debt. 2 Bulst. 234. Salk 196. 5 Co. 24. a. 1 Roll Abr 607. 2 T. Rep. 100.

This subject occasioned a deal of confusion in Conn. some years since

But suppose that after the surety has recovered of the principal the creditor also collects the debt of the principal so that the surety is not called on at all. the principals only remedy is by bill in Eqy. stating the two judgments & attendant circumstances & that the surety ought not in conscience to retain the money. The court of Eqy. will consider him as a trustee of the money & decree it's repayment.

It has been made a question whether indebitatus assumpsit would not lie for this money agt. the surety. I am clearly of opinion that it would not. For by the principles of the C. L. there is no case in which such action will lie when the object & necessary effect of a recovery will be to impeach a former judgment. The case of Allen and al. v. Farland 2 Burr 1005 does not apply. that case has been questioned. see 7 T. Rep. 269. — (I. Burr thinks diff. cruelty I believe see most question) The supposition on which that case in Burrow proceeded is correct. tho' the authority of the decision has been much questioned. see 2 Hen. Bl. 414. 416. where it is flatly denied. 7 T. Rep. 269. 1 Doug. 130. 1 Burr. 665. 4 T. Rep 182. this case you on the implied concession that it is not law. (vid. 3 Burr. 1354.)

If one having obligated himself as surety, takes a bond of indemnity after his liability as surety has attached, he has no right of action on the covt. until he has been actually damnified. Thus in former case (on opposite page) if A had executed the bond of indemnity to B after the sing. obl. had become due. So too if the obl. were by single bills payable instanter or by promissory

note payable on demand, the surety must have been actually damnified before he brings his action, otherwise there is an evident absurdity in the law. the object of the bond clearly being to insure against damages that are to arise in future by some act of the principal. for if the covenantee in this case could recover on the ground of mere liability, the cov.t must be considered as broken at the instant that it is made & the covenantor immediately liable which is not the intention of the parties. Co Elg. 53. 123. the distinction is clearly laid down in 1 Salk 196. 5 Co 22. 2 Bulst 234. Roat. 570

If the surety having no bond of indemnity is obliged to pay the debt immediately he may maintain Indeb. Ass.t against the principal as for money paid laid out & expended for his use

But if he has taken a bond the implied contract of indemnity is merged in it & to this he must resort as his higher remedy. Comp 525, 7 2 T. Rep 100. 1 T. Rep. 599. 3 Wils 13. 262. 346.

When there is no specialty taken by way of indemnity the remedy of the surety ag.t the principal is upon the implied promise of indemnity arising out of the transaction & a right of act.n arises in his favour out of pay.t of the debt or what is equivalent to it being taken in Eq.t 1 Wils. 13.

The same remedy upon an implied contract exists between co-sureties for contribution when one has paid

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the whole or more than his proportion he may bring indeb. ass.t for when two or more become coseurties the law raises a mutual reciprocal implied engagement that if one is compelled to pay the whole the others will contribute, & thus he may recover of each his aliquot part. 2 B & Pul. 268. 270. B. Ev. 338. 2 Day 492. 1 Vern 456

If however there are more than two coseurties the only remedy between them is in Eq.y because the action would be so complicated & innumerable that the concern could never be adjusted at Law. 2 B. & Pul 268. note.

There are two rules in regard to releasing of cosur.t that require mentioning. In the case of choses in action gen.y a release after assignment is in some cases good & effectual and in others it is not. i.e. in some cases it will operate as a discharge, in others not.

On this subject the gen.l rule of discrimination is, that if the instrument creating a duty is not assignable at Law a release the made after assignment will be effectual to discharge it.

But when it is assignable or strictly negociable a release after assign.t will not discharge it Thus if A gives B a note not assignable. B assigns it & then gives A a release the note is discharged. because not being assignable the action upon it must be in B's name of course a release from him must bar the action.

If however the note was negociable such a

release could have no effect. For the legal title is transfred to B the assignee or indorsee before the release is given. so that B had no interest at the time the which is in B. who is to bring the action in his own name.

In pursuance of this principal if lessee after an assignment of his reversion release to lessee all the covts in the lease still the assignee of the reversion can recover for all the breaches accruing after the ass^{t} notwithstanding the release. For the reversion is assignable so that the assignee has the legal title & the action is to brot in his name. 2 Lev. 206. Cro. Ch. 503 1 Vent. 345.

It has however been determined that a lessee can deprive his assignee of all benefit in the covenants in the lease by a release to the lessor the given after ass^{t} provided it be given before action brot by assignee. but note if given after action brot for by commencing suit a right of recovery is attached.

Why such a release should ever be effectual I never could discover. it is contrary to principle & analogy that it should. the case respecting a covt running with the land. the case is precisely that of a negociable note. the legal title under the covt passes with the property to the assignee & yet it is said that if assignee give a release before action brot it shall discharge lessee. however the rule is well established. Cro. Ch. 361. 503. 2 Roll. 411. Esp. Dig. 308.

It is a gen.l rule in relation to covt.s in gen.l that a release from covenantee to covenantor either in the most gen.l terms as of all claims demands suits actions &c given before the covt. is broken, is no bar to an action on the covt. because at the time of the release there is no demand existing. Thus before such a release given from a lessee to lessor who has entered a covenant of warranty. the lessee is afterwards evicted.

So too if A covenants to build a house for B within 12 mos. from month after B executes to A release of all demands. it does not affect the covt.

But a release of all demands &c in terms equally gen.l after it is actually broken, discharges all damages for the breach. and if one deed contain a variety of covt.s some of which at the time are broken and some not. the discharge will be effectual as to the former only. Bull. N.P. 166. 1 Saund 292. b. Co. Lac. 99. Salk 171. Allyn 38. 2 Show 90

But the gen.l rule before laid down viz. that a release of all claims, demands &c before covt. broken does not affect the covt. cannot as I conceive extend to absolute covenants for the future payt. of money, because they create a debitum in presenti and then actually is something to be released something in the nature of a demand. there is no diffrence in this respect between single bills penal bills & covts. Whereon debt will lie I think the rule does not hold and a release of all demands will clearly release all inconditional engagements

or absolute instruments to pay money in future.

A release of all covts. the recites before a breach accrues will discharge a covt. of Warranty. to do all acts in specie or any other covts. & bar all actions upon them.

You will perceive that there is a manifest difference between a release of this kind viz. of all covts and a release of all demands. according to the terms of this release it must act directly on the covts. "I release to you all covts" such a release utterly destroys the covts and of course takes away all liability that was could accrue upon them. L.d Ray. 518. Dy. 57. Esp. Dig. 317.

Of Pleading in Covt. broken. Under this head I shall recite to you the rules that are exclusively applicable or at least appropriate to this action.

The declaration in the action of covt. broken must always state that the Defts. covenanted by deed & this is an indispensable averment because at C.L. a covt. cannot exist except by deed or a writing under seal: of course without such an averment the declaration would be ills.

And there is this distinction to be observed that when the instrument is under seal. covt. broken lies & is the appropriate action. but case or assumpsit will not lie. On the other hand on a contract in writing without seal. case or assumpsit will lie but

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covt. broken will not. because covt. broken lies only on a covt. & there can be no covt. without deed. Cro. Eliz. 517. Cro. Car. 108. 209. Stra. 814.

In an action of covt. broken every decln. after setting out the terms of the covt. must allege a breach for without a breach there is no cause of action. Most of the rules in this part of our subject relate to the assignment of breaches

The first rule is, that where the covt. is gent. a gent. assignment of a breach is suffn. or the assignment of a breach may be gent., this rule will not hold e converso as to pleading performance. Thus if grantee covenants that he was well seised. it is suffn. for covenantor to allege by way of breach that covt. at the time was not well seised. in the words of the covenant, with a negation.

So if an covt. not to buy or sell certain articles within a certain place & time, simply averring that Defts. had sold to divers persons at divers times within the period stipulated is suffn. without specifying to whom. Hob. 176 La Ray 278. Salk. 139. Esp. Dig. 298.

The most gent. aft. of a breach is in the words of the covt. & this in gent. is the most easy & better manner of aft. as in the case of a covt. of seisin, the most gent. aft. is that covt. was not well seised. purely negativing the covt. Cro Jac. 369. 9 Co. 66. Esp. Dig. 299.

The breach must always

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be so assigned as to appear upon the face of the record to be clearly & manifestly within the covt. Thus where Lessee covenants with Lessor not to cut more timber than was necessary for repairs. an avert. that Defr. had cut to the value of £100 was held not suffr. the law knows nothing of the quantity necessary for repairs. that is a question of fact. the value of timber necessary for repairs might have been £1000. so it does not appear on the face of the record that the covt. was broken. thus is no cause of action apparent. the averment should have been that Defr. cut timber of a greater value than was necessary for repairs viz. £100. Co. Eliz. 348. Stiles. Doug. 203. Esp. Dig. 299.

If the Plff after assigning a gent. breach narrows or qualifies it by subsequent words. he is confined to it as thus qualified & must so confine his proofs. Thus where an covt. to use the land in an husbandlike manner. the declr. for a breach averred that "covr. had not used the land in an husband like manner but had committed waste" If the words after "but" in the avert. had been left out & so no qualification. leaving the assignt. gent. Plff might have proved & shown any misconduct or neglect which amounted to a breach. but by that qualification he is considered as limiting the breach to that particular mode of using land in an unhusbandlike manner. and Plff must prove waste or lose his action. for to this the issue is confined & for this only is Defr. supposed prepared. the avert. would have

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assumed Pltffs purpose much better if it had been
"Defts has not &c for he has committed waste."
3 T. Rep. 307.

When there is a proviso in a deed defeating a covt in a certain event, the Pltff need not set out that proviso & negative it, for it is in the nature of a defeazance of which the Deft may avail himself by way of defence. Thus Defts covenanted that he would deliver certain goods by a certain time such a place, provided he were not prevented by the dangers of the sea. it was determined that a simple averl of non delivery at the time & place without more was suffic & that the omission of the proviso was no variance. On oyer the Deft may plead that the covt contains a certain proviso &c & aver that he has been prevented by the dangers of the sea. for as regards the rule of pleading this proviso is precisely like the condition of a penal. it is a defeazance which the Pltff need not notice in his declr Ray. 65. Esp. Dig. 300

But the rule is diffr as to an exception in the body of a covt. for the exception must be set out & negatived. A proviso annexed to a covt is properly a defeazance intended as a defence for the Deft. But an exception is a part of the covt itself entering into the description of the subject matter & if omitted the declr would be ill on demurr. Thus A covts to convey to B. excepting the interest of C.: this is not a covt to convey a good title, without more. A did not intend to convey the interest of C. the exception then is clearly a constituent part of the covt an omission of it therefore would work a variance & the declr might be demurred to
Esp. Dig. 300.

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If a covt. is in the alternative as to do one of two things the breach must be assigned as to both. otherwise the declr. will be ill. Thus where a lessee covd. not to cut wood without the assent or assigt. of lessor. an averment in a declr. by lessor that the lessee cut wood without his assigt. was holden insuffit. for the Defdt. might have cut with his assent & tho there was no assigt. & proof of cutting without assignt. is perfectly consistent with cutting by lessors assent. Nor is no breach upon the record. 1 Leon. 250. Esp. Dig. 300.

But covenants which virtually bind terms are in the alternative are not always so in legal effect & in such case the last rule would not apply. Thus when one covt. to pay or to cause to be paid. it is suffit. to aver that that covr. has not paid without saying nor caused to be paid. for causing to be paid is in effect paying & may be supplied in accordance with the maxim "qui facit de" and evidence that Defdt. had caused to be paid would support a plea that he himself had paid. 1 Str. 229 Esp. Dig. 300. 301.

Again when one covt. to pay on one of two contingencies whichever shall first happen. an averr. that one of them has happened is suffit. without averring it to be the first. Thus A covt. to pay B $100 on the death or marriage of C. whichever shall first happen such an averr. would be suffit. because whether it were the first or not is immaterial as the first must have happened. 2 Wms. 132. Esp. 2301.

On a covt. that an act shall be done by covr. or his assigns, if an action be brot. against assignee the breach must be laid in the disjunctive. thus. that it has not been done by the covr. nor by his assigns for the covr. might have done it altho the assignee had not.

But if the actn. was brot. agst. the covr. it would be suffn. to allege that he had not done it without more for when the actn. is thus brot. it is presumed that there has been no assn. but when the actn. is agt. the assignee there is no such presumption. Salk 139. Stra. 228.

The first rule then that the breach must be laid in the disjunctive is confined to actions agt. the assignee Thus a upon covt. that he or his assigns will build a house within 10 yrs. upon certain premises if the land is assigned & after 10 yrs. action brot. agt. assignee the averr. must be in the disjunctive. but if against person merely averring that he has not done it is enough. The gnl. rule that a party ought not to be obliged to shew anything more than a prima facie right to recover. he need not anticipate every possible ground of defence. there could be no pleading if he were bound to make it certain "to every intent in every particular" in the words of Coke

So if one covt. to do an act to a man & his assigns as to make a conveyance. it is suffn. for covenantee to aver that covr. has not made the conveyance to himself. an assn. is not presumed & it does not appear.

But on the other hand if the action were brot. by an assignee. it would be necessary to aver that the convey. were has not been made to covenantee nor to his assignee. The decl. states the assn. of course an allegation would be consistent with performance.
1 Salk. 139. 3 Keb. 440. 5 Mod. 133

In a covt. for the payt. of a sum certain there can be no apportionment of demand & the breach must be for a sum certain Thus when the freighter of a ship covenanted to pay £10 p. ton. the Plff alleged non payt. for carrying 10 Tons & 1 Hhd. or 10 p. tons. now the covt. contains no stipulation to pay for a fraction of a ton and the above allegation is perfectly consistent with the fact that Deft. has paid for every ton. & there can be no recovery without obliging him to pay for the freight of a fraction of a ton. But if the covt. had been to pay after the rate of so much per ton the allegation would have been good as the covt. would have covered the fraction. 2 Lev 124. 1 Salk 19. Esp. Dig. 303.

This assn. of a breach would be ill on demurrer. yet if Deft. pleaded to issue instead of demurring & verified per Plff. if he would enter a remittitur or remit the value of a fraction he might in this particular instance take judgt. for the sum as the amount or rate & quantity appears in the decl. Salk 658. 1 Roat. 66. Esp. Dig. 303.

Yesterday explained to you the gen. rules in relation to the pleadings on the part of the Plff something remains to be said as to the pleadings on the part of Deft.

The most usual plea to an action of covt. broken is that of performance. It has been customary in Eng but unusual in this Eng practice for Deft. to plead that he has not broken his covt. & this is intended as a plea of performance or what is equivalent to it that he has kept his covt.

I think however that such a plea cannot be good in any case whatever for it opens to the jury any point of law which may be involved in the question of performance. And if it were competent for Deft. thus to plead. Plff might reply that the Deft. has broken it & then no direct issue would be found. it appears to me to be an irregular & inadmissible mode of pleading performance 2 Vent. 156. 2 Mod. 33. 2 Bl. 1312.

The particular facts on which Deft. relies should appear if there are any if none there can be no performance. It seems to have been made a question by eminent counsel in Eng. if by way of concluding his plea of breach Plff says "& Deft. has broken his covt." & Deft. pleads that he has not broken his covt. it is said that it is a good plea because it is a direct negation of the declr. & forms a complete issue. 8 T. Rep. 278. 281. But this pleading is certainly bad as the averment is not issuable it being a mere conclusion from the spect. facts alleged. 2 Bl. Rep. 1312.

It is laid down as a rule that when the covts. in a deed are in the affirmative it is competent for Defts to plead performance generally i.e. when the covts are positive stipulations to do an act or acts. and not negative as to abstain from doing them. 1 Inst 303a. Esp. Dig. 305. 2 Bac. 91.

This rule however must relate to cases in which the things covenanted to be done are in some measure indefinite or multifarious as a covt. by a Shff to return all writs. or by a D. Shff to discharge all the duties of his office. the plain such case should be that as Shff he has returned all writs or as D. Shff that he has well and duly executed all the duties of his office. but such genl pleading is only allowed and allowed in such cases only. Covp 575. 2 Bac. 91.

But on the other hand, Defts has covenanted affirmatively to do certain specific acts. if he pleads performance he must do it by alleging specially performance of each specific act. As if I had covd to infeoff A. of all the lands of which I was seized on that day. If A. sues on that covt it is not sufft for me to say that I have enfeoffed him of all the lands I possessed or was seized of at that time. nor that I have kept my covt but I must plead that I have enfeoffed him of such and such lands & then aver that they are all of which I was then seized.

So an Ex. when sued on his bond or covt cannot plead that he has kept his covt. nor that he has paid all the legacies. but

that he has paid such a legacy to B. such an other to C & so other over that these are all that the will contains. Cro Eliz. 749. 1 Saund 117. note. 1 T. Rep. 752. Cro Jac. 359. 360. 1 Lev. 303. Salk 298. 1 Sid. 215.

The gen. rule then really is that when covts. are affirmative performance must be plead specially & this other rule first laid down that Defts may plead performance gen. is but an exception to it. gen. pleading being allowed for the purpose of avoiding prolixity or in the words of Sir E. Coke of "avoiding impertinence" and unnecessarily burdening the record.

Thus it is obvious that, after a Dep. Sheff has served 7 years it would be requiring of him a moral impossibility to say that he shall allege specially all the official acts which he has done in the performance of his duty.

And there are other cases which are similar. thus when a brewer covt. to deliver all the grain thrown out of his brewery. he was allowed to plead gen. from necessity in such case that kind of pleading is allowed. Comyns. 575. 1 T. Rep. 753. Cro. Eliz. 749. 916. 1 B & P. 643. Esp. Dig. 305.

And a plea of performance whether gen. or special; otherwise than in the words of the covt. i.e. not corresponding with the words of a covt. is ill on gen. Demr. The reason of this rule is that if the plea does not conform to this rule it of course discloses no sufficient defence. 1 B & Pul. 455.

Thus suppose an acte brot. agt. Exr. on a covt. to pay all the legacies in a will & he pleads that he had paid such a legacy to B. such a one to b. sev. without more it would be ill. for altho in fact there may be all the legacies given yet it does not so appear he should aver that those specified were all the will contained. which would be encluding in the words of the covt.

I have thus far spoken of affirmative covenants. Now on the other hand. some of the covts. in a deed are negative. Defr. cannot plead performance specially as to them. Hohn all are negative he cannot plead performance specially as to any of them. But when some are affirmative & some negative. he must plead as to the negative covts. that he has not done the acts covenanted against. As to the affirmative he must plead according to the rules above laid down. for this is a solecism in saying that one has performed a negative covt. performance presupposing an act.

If however Defr. should plead that he has performed it doubtless means that he has kept his covenant. and as the plea is defective only in form. not in substance advantage can be taken of it only by special demurrer. Co. Eliz. 233. 691. 1 Inst 303. b. Comyn 576. Com. Dig. Pl. E. 25. 6. Esp. Dig. 305.

If however where some covts. in a deed are negative & some affirmative & the negative ones are void. Defr. may plead as if they did not

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exist i.e. without noticing them must plead performance properly as to the affirmative ones. As if a Deft. Iff among other stipulations were to covt. not to execute a particular kind of process by the rule laid down in Iffs & Gaolers you will recollect such a covt. is illegal & void as it is a covt. not to do ones duty. 1 Saund. 83. 117 note 5. Mor. 856. Hob. 13.

Where one covt. is in the disjunctive Deft. must shew in his plea which of the two things he has performed. as if he had covenanted to convey a certain tract of land or to pay a certain sum of money he must allege in his plea whether of the two he has performed. 1 Inst 303. b. Co. Lac. 659. 8 Co 133. 1 Saund 117.

And it is said that if he plead performance without this specific allegation the plea is ill on genl. Demt. and so the rule is established Co. Elig. 333. Comb. Dig. Pl. C. 25. 4. 1 Lev. 301.

This rule does not appear to me correct on principle. For the deft is not in the substance of the plea. if either is performed the covt. is performed the plea then should be ill only on spec. Demurrer. & so says Bacon who however is not of the best authority. 4 Bac. 91.

Where one covt. to do an act which consists of what is termed matter of law as to make a conveyance or execute a discharge. Deft. must plead quo modo. i.e. not only that he has made or executed the conveyance or discharge but also in what manner. that the court may know whether it is sufficient in law. For the construction of such covts

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a conveyance or discharge is understood to mean a legal & valid conveyance &c. & when it is so should appear of record. Dyer 229. Jo. 25. Hob. 67. 107.

On the same principle if one covenants to do an act which must appear of record as to levy a fine or suffer a common recovery, he must allege performance & the quo modo. For this is matter of law. Bro. Dac. 560. Co. Lit. 303. b.

There are some rules of pleading which apply exclusively to bonds or covts. of indemnity at the suit of Defts.

On such covts. or bonds the Defts. may sometimes plead non damnificatus by way of performance — that is that Plff has not been damnified. In other cases this mode of pleading the covt. is not correct. For Dft. must plead not only that the Plff has not been damnified but also the quo modo in which he has prevented it. On this subject the first

Gen.l rule is, if the covt. is to discharge or acquit the covenantee from any particular thing ascertained in the instrument or deed as of a debt or bond or duty &c. non damnificatus is not a good plea. he must plead that he has acquitted or discharged the Plff according to the terms of the covt. and allege the quo modo as by payt., tender &c. Cro Eliz. 374. 2 Co. 4. a. Lev. Eliz. 433. 4 Bac. 92. 1 Saund. 117. a. 1 Bulst. 63.

The reason is that as the Defts. has covenanted to do a certain special act he pleads performance specially according to the rules already given & if they do not consist of matter of

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law he must plead the general one. but when the covt. is gen.l to save harmless, or to indemnify the Plff of such a statute or obligation or duty, non dam. is a good plea, because no special act is covenanted to be done. Def.t merely covts to bring about a certain result. merely to save the Plff harmless, the manner is not stipulated it may be done in various ways. by cancelling the ob.n or bond, pay.t discharge &c. 1 Saund. 117. note. 6 vin Abr. 363. 4. 2 Co. 4. 1 Leon. 194 2 Wils. 126. 5 T. Rep. 309. 10.

But whether the covt is gen.l as to save harmless or acquit. or particular as to discharge or acquit covenantee of any thing not ascertained in the instrument, not specific, as of the damages costs & charges that may accrue in such a suit non damnificatus is a good plea. The distinction depends on the circumstance of the thing not being ascertained in the instrument 6 vin. Ely. 916. Cath. 374. 3 Mad. 252. 1 B & P. 639. note 5 Ellcod. 224

The reason why non dam. is a good plea in both these cases is that as the damages costs & charges from which the covenantee is to be discharged are not ascertained in the instrument. it is in both cases virtually agst. covt. to save harmless or of indemnity, because non constat that any damages costs or charges have ever accrued in such a suit Now here note a plain diversity between this & the former case of a covt. to acquit or discharge of a bond or debt as contained in the deed. in which it is clear that I am to acquit you of a certain writing obligatory but I covt. to acquit you of all damages that may accrue, it does not appear that any damages have ac-

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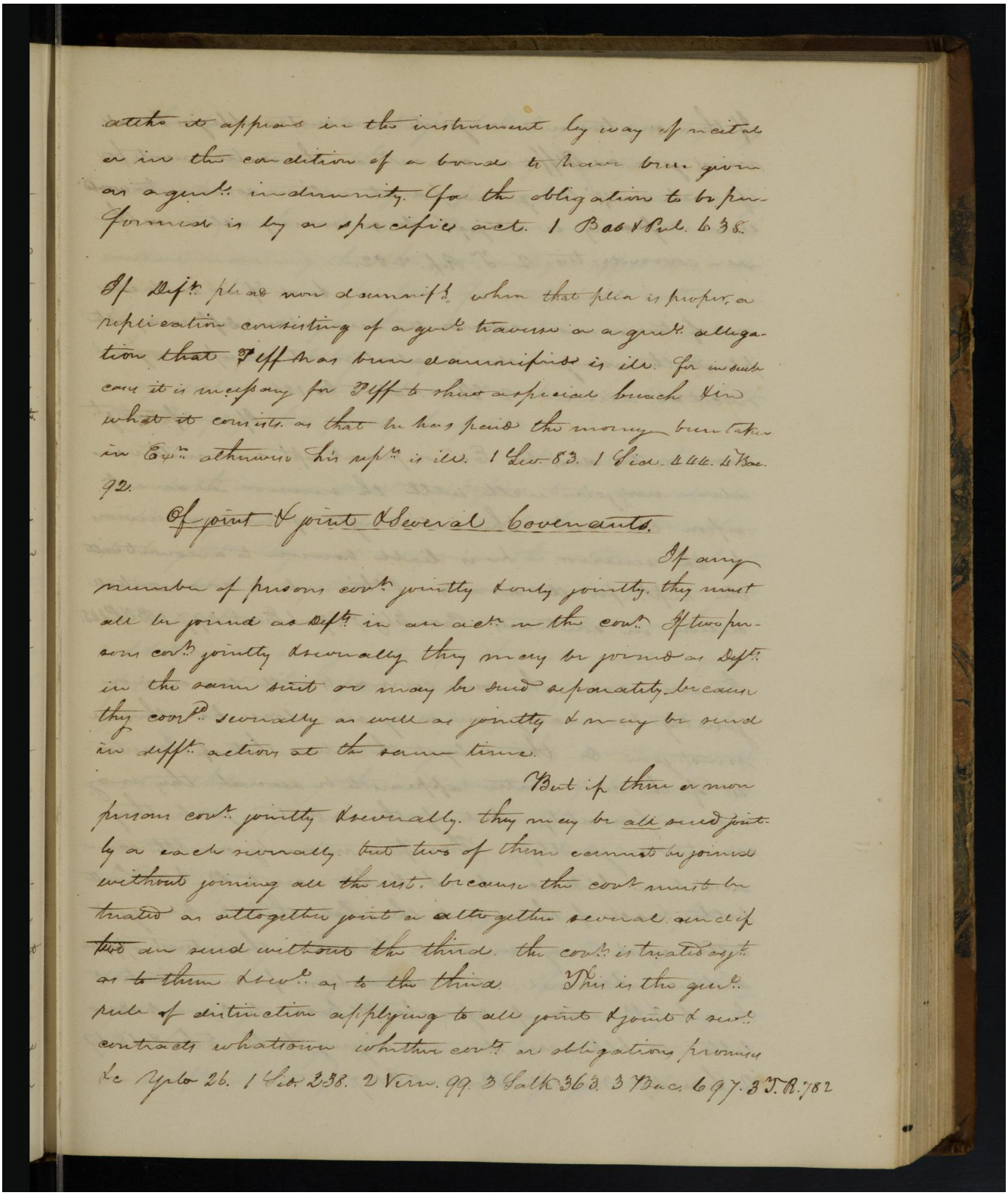
cumd. & then can be no acquittance of that which has
no existence. I cannot therefore plead performance quo
modo or specially alleging that I have perfectly fulfilled my
covt. & I should be entrapped by the rules of pleading
if they required it. Non damnificat. is therefore a good
plea for it is in effect saying no more than that
the Plff has not been damnified by that which
I engaged should not injure him, and then
if any damage has in fact accrued it may be
alleged in the replication. 1 Saund. 117. note 1. Carth.
375. Cro. Jac. 363. 4. Vi Co. 4. Vi Wils. 126

When non
damt. is a good plea if Defr. will plead affirma-
tively as that he has acquitted & discharged Plff he
must do it specially. i.e. point out the act by which
he has done it. because his affirmation alleg-
tion implies that he has done some specific act
& he must then show what it is. So that it will
not do to plead that he has saved Plff harmless
without more, tho it would do to say less viz. that
Plff has not been damnified. Vi Co. 3. 4. Cro. Jac.
363. & 634. Cro. Eliz. 916.

If however Deft. plead in the
affirmative generally. that he has saved Plff harm-
less without showing how the plea is ill only on
special demt. for it is defective in form only not
in substance. 1 Chit. 194. 1 Saund. 117. note.

Non
damnif. is not a good plea to an action on a bond
or covt. for the payt. of money at a day certain

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ateho it appears in the instrument by way of recital or in the condition of a bond to have been given as a gen.l indemnity. For the obligation to be performed is by a specific act. 1 Bac & Pul. 638.

If Def.t plead non damnif.t when that plea is proper, a replication consisting of a gen.l traverse or a gen.l allegation that Pl.ff has been damnified is ill. For in such case it is necessary for Pl.ff to shew a special breach viz. what it consists in that he has paid the money been taken in Ex.on otherwise his rep.t is ill. 1 Lev. 63. 1 Sid. 446. 4 Bac. 92.

Of joint & joint & Several Covenants.

If any number of persons cov.t jointly & only jointly, they must all be joined as Def.ts in an act.n on the cov.t If two persons cov.t jointly & severally they may be joined as Def.ts in the same suit or may be sued separately, because they cov.t severally as well as jointly & may be sued in diff.t actions at the same time.

But if three or more persons cov.t jointly & severally, they may be all sued jointly & each severally, but two of them cannot be joined without joining all the rest, because the cov.t must be treated as altogether joint or altogether several, and if two are sued without the third, the cov.t is treated as joint as to them & sev.l as to the third. This is the gen.l rule of distinction applying to all joint & joint & sev.l contracts whatsoever whether cov.ts or obligations, promissory &c Ypto 26. 1 Sid. 338. 2 Vern. 99 3 Salk 363. 3 Bac. 697. 3 T.R. 782

If there are two or more joint covenantees obligee &c, all must join as Plffs in an act.n on the instrument for if each could bring a separate action covenantor would unnecessarily be subjected to as many actions as there are covenantees. 2 T. Rep. 282.

And if in such case one of two or more covenantees sues alone Defft may alledge & plead the non joinder in abatement or upon oyer & recital. Semble. 2 Stra 1146. 5 Co. 18.b.

If one of two j.t covenantees dies, his Ex.r or pers.l rep.t can neither sue alone nor join with with the survivor in an act.n upon the cov.t the entire right of recovery survives to the survivor. he is liable however to account with the rep.t for the assets. This rule is common to all actions on contracts. Cro. Eliz. 729. 1 East. 497. 1 B & P. 445.

In some cases where one covenants with two or more jointly & severally one may sue alone & in others all must join. On this subject the rule is that if the interest of the covenantees appears to be several they may sue separately. but if the interest is joint they must sue jointly. Thus if a man by one deed and lease blk acre to A & white acre to B. & cov.t with both each of them as to the whole that he has good title. each may sue alone. because the interest appears distinct & several. it is not a breach of cov.t to A & B. and if lessor should prove to have had no title to blk acre it is no injury to B. 5 Co. 8. 18. 19. 2 Lev. 47. 3 Lib. 160. Bull N.P. 157.

So also on a covt to pay A & B. $100 to be equally
divided between them each may maintain a sepa-
rate action. i.e each may sue for his $50. And each may
declare upon the covt as having been made to himself
without naming the other for in legal effect it is a dis-
tinct covt to each for $50. For altho both covts are in
the same deed yet the subsequent words make
them several & they may be so declared on. or each
may declare on the covt as it is to recover his proportion.
Cro Elz. 729. Stra. 76. 819. Comp. 832.

But altho the covts
are both in one deed & supposed to be several as
well as joint, still if the interest of the coventees appear
to be joint they must all join in the action. as if Covt
with A & B to pay to them or to each or either of them $100
without the words "to be equally divided between them".
A & B must sue jointly. for they take jointly in judgt
of law. So then if one binds himself to two coventees
jointly & severally in one deed if their interest appear
in the instrument to be joint they must sue jointly
notwithstanding the introduction of the word of
severalty. You observe the rule is diffr as it relates to
Coventees & covenantors. 5 Co. 18. 19. Dyer 262. 1 Bac. 532
1 East. 497.

From the rules already laid down it follows
as a corollary that the co obligors & covrs may bind
themselves severally & be so sued. For the same thing
yet co obligors or covtees cannot have several rights of actn
for the same thing. For altho two persons may be sued
in diffr actions for the same thing yet the policy of

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of the law will not suffer, as it ought not, and person to be sued twice for the same thing. 5 Co. 19. a.

If two or more persons covenant jointly & severally each may be sued alone for the default or neglect of the other, altho the one sued has not been in fault. because each is in the nature of a surety for the other. Thus if two Exrs bind themselves jointly & severally to pay all the legacies given in a will if A should receive all the assets & pay nothing. B the other Exr may be subjected on the bond. So if A should covt that B should do a certain act. he may be subjected by B's default Stra. 553.

And in this case where one of two persons jointly & severally bound is sued & judgt recovered agst him. it is no bar to an actn agst the other. for both continue liable until the covt is performed or paymt made & even tho his body is taken on Exn & committed. for each is responsible at all events that paymt shall be made & all proceedings not terminating in paymt or satisfaction are no bar to future proceedings. 6 Co 46. Cro. Jac. 73. 4 T East. 251. 5 Co. 86. Chit. Bills. 124. 182.

I have already observed that if one of two jt obligees or covtees dies the Exr or rept of the deceased cannot bring an action nor join with the survivor. So too if one of two jt obligors or covtors dies the other surviving the liability remains agt the survivor. the rept of the deceased is not at all liable for as before he had no right so now he has no liability. but if he is sued

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& compelled to pay the whole. he may oblige the rep^ts. to contribute.

On the other hand if the cov^t. be joint & several as to those bound by it & one dies. the other surviving the rep^ts. of the deceased are liable at law. not jointly but as upon a sev^l. cov^t. or contract. because when sev^d. it is precisely in the character of two separate contracts. 1 East. 404.

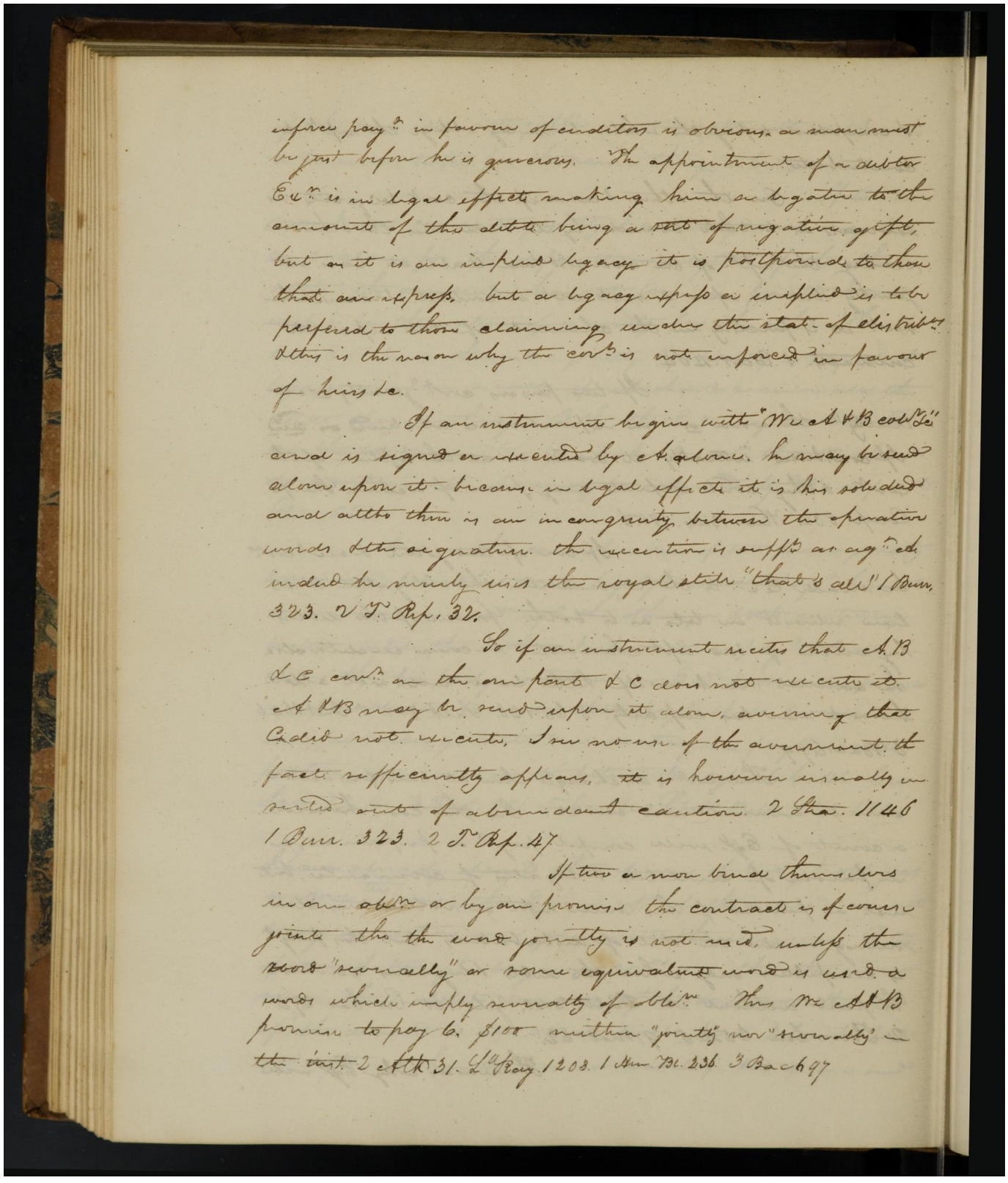
If two persons cov^t. "jointly & severally" the word "or" in exposition is construed as "and" If construed literally it would be at the option of the cov^t. & they could defeat any form of action. Sta. 76 Comp. 832. Hise. Bills. 185. 6.

If one of two joint & sev^l. cov^ts. be made Ex^r. to the covenantee, the obligation is at law vested in toto as to both. For one of the debtors by virtue of his rep^t. character becomes creditor also. he cannot sue himself & the law will not allow him to sue his coparty. 8 Co. 136. Salk 300. 1 Inst. 164. b. 3 Bac. 699.

That cov^t. is discharged thus at law & no action can be maintained on it. In this case however a court of Eq^y. will compel pay^t. or performance in favour of creditors & legatees of covenantee, but not in favour of his own rep^t. or volunteers claiming under the stat. of distributions. but this pay^t. is compelled only when the debts & legacies cannot be paid without it. Dalt. 240. Yelv. 160. Cro Car. 373. 2 Pow. Con. 254. 5. 9 Mod. 62.

The reason why Eq^y. will

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inforce payt in favour of creditors is obvious. a man must be just before he is gracious. The appointment of a debtor Extr is in legal effect making him a legatee to the amount of the debt being a sort of negative gift, but as it is an implied legacy it is postponed to those that are express. but a legacy express or implied is to be preferred to those claiming under the stat. of distribts & this is the reason why the covt is not inforced in favour of heirs &c.

If an instrument begins with "We A & B covt &c" and is signed or executed by A. alone. he may be sued alone upon it. because in legal effects it is his sole deed and altho there is an incongruity between the operative words & the signature. the execution is sufft as any ct. indeed he merely uses the royal stile "that is all" 1 Burr. 323. 2 T. Rep. 32.

So if an instrument recites that A. B & C covt on the one part & C does not execute it. A & B may be sued upon it alone, averring that C did not execute, & as soon as the agreement the fact sufficiently appears, it is however usually recited out of abundant caution. 2 Stra. 1146 1 Burr. 323. 2 T. Rep. 47

If two or more bind themselves in one obln or by one promise the contract is of course joint tho the word jointly is not used. unless the word "severally" or some equivalent word is used. a words which imply severalty of obln. Thus We A & B promise to pay C. £100 mention "jointly nor "severally" in the inst. 2 Atk 31. 2 Wms 1203. 1 Ves Jr. 236 3 Bac 697

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But if a covt or other instrument begin thus. I covt or promise & is signed by two, it is covt as well as joint, whereas if it began with "We" without words of severalty it was joint only. When I is used it must be taken distributively. indeed it is impossible to consider it joint merely. Comyn. 832. Peake's Ca. 130. Ch. Bl. 175. Stra. 76. 809. Ld Ray. 1544. 5 Burr. 2611.

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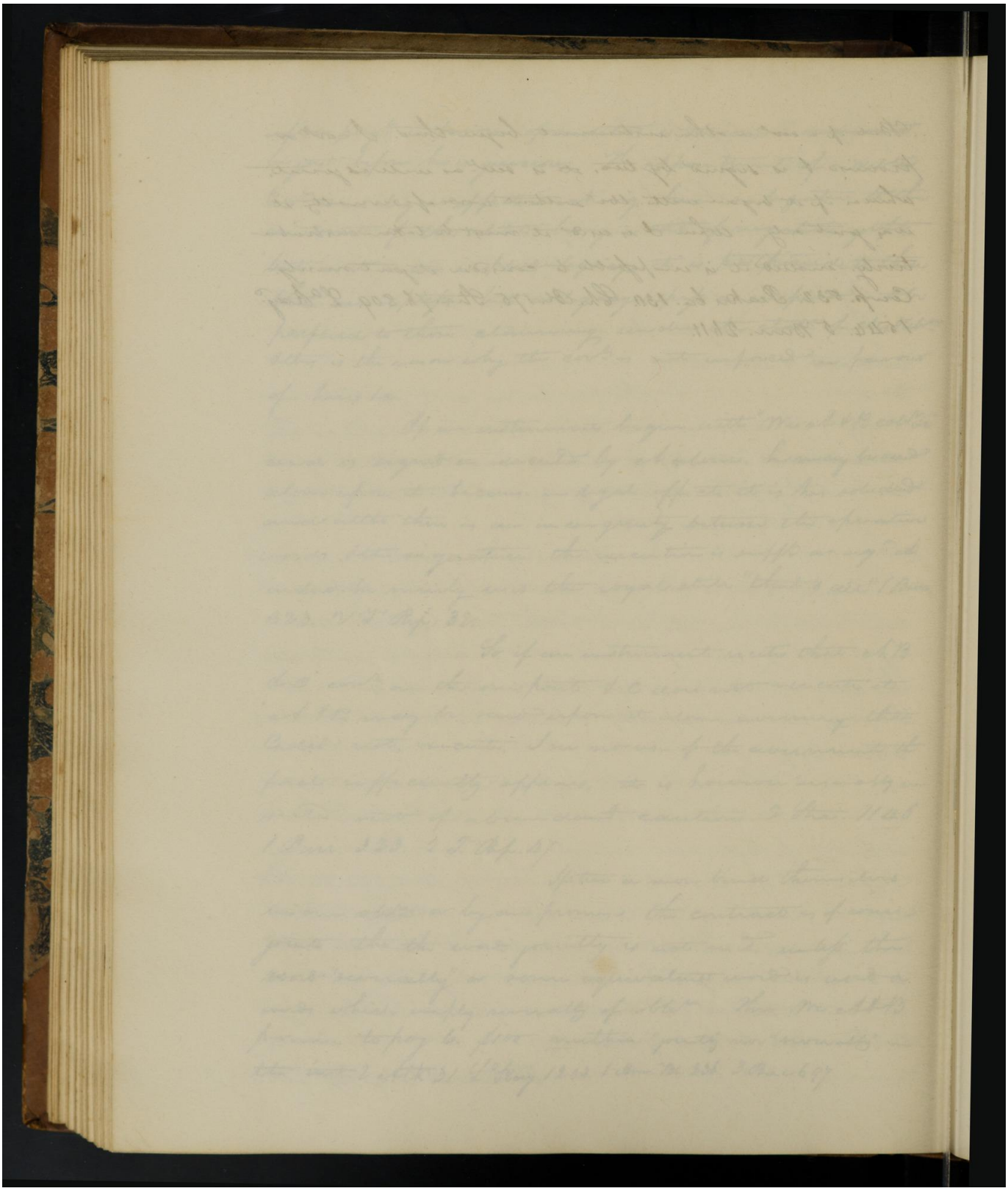


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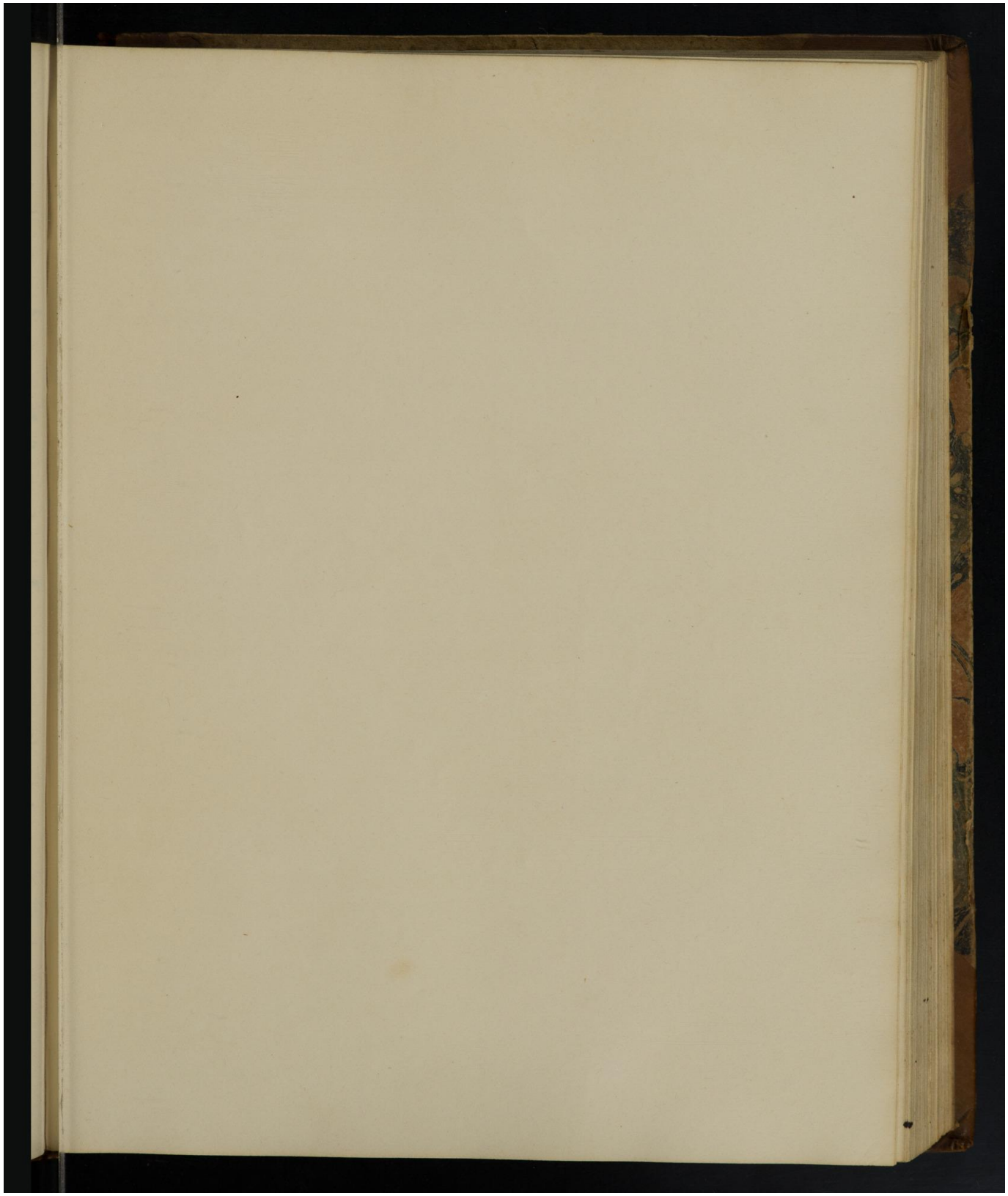


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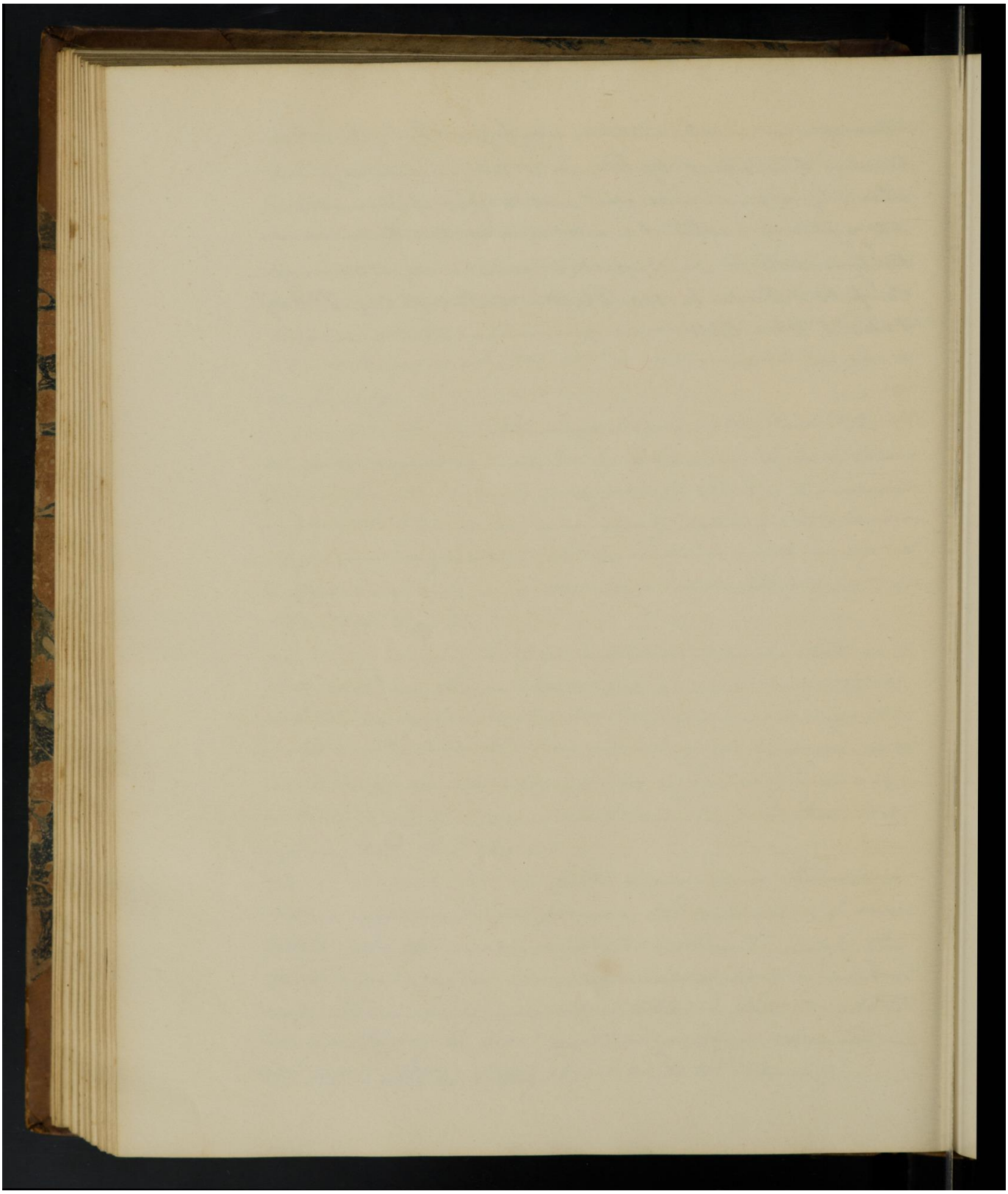


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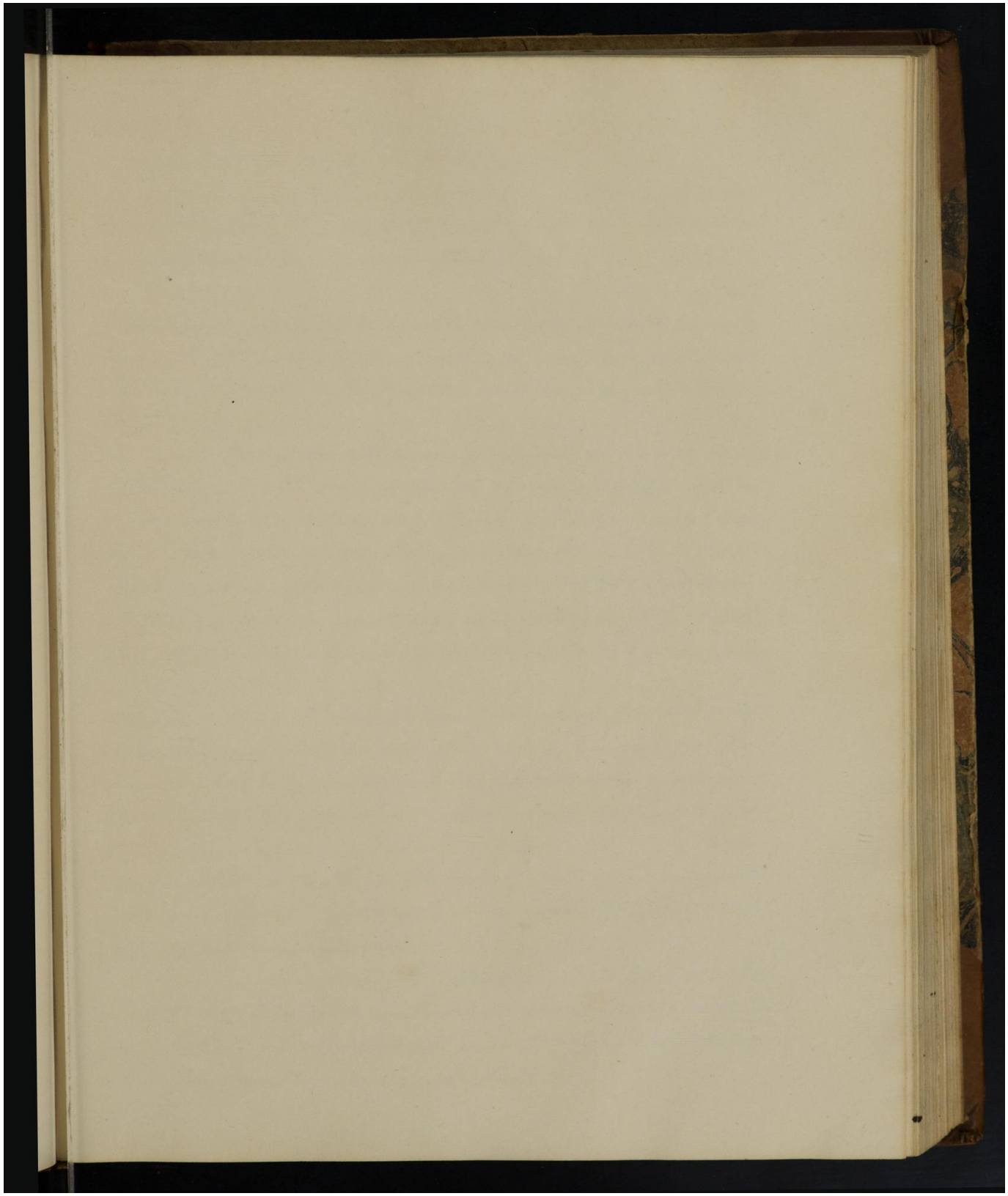


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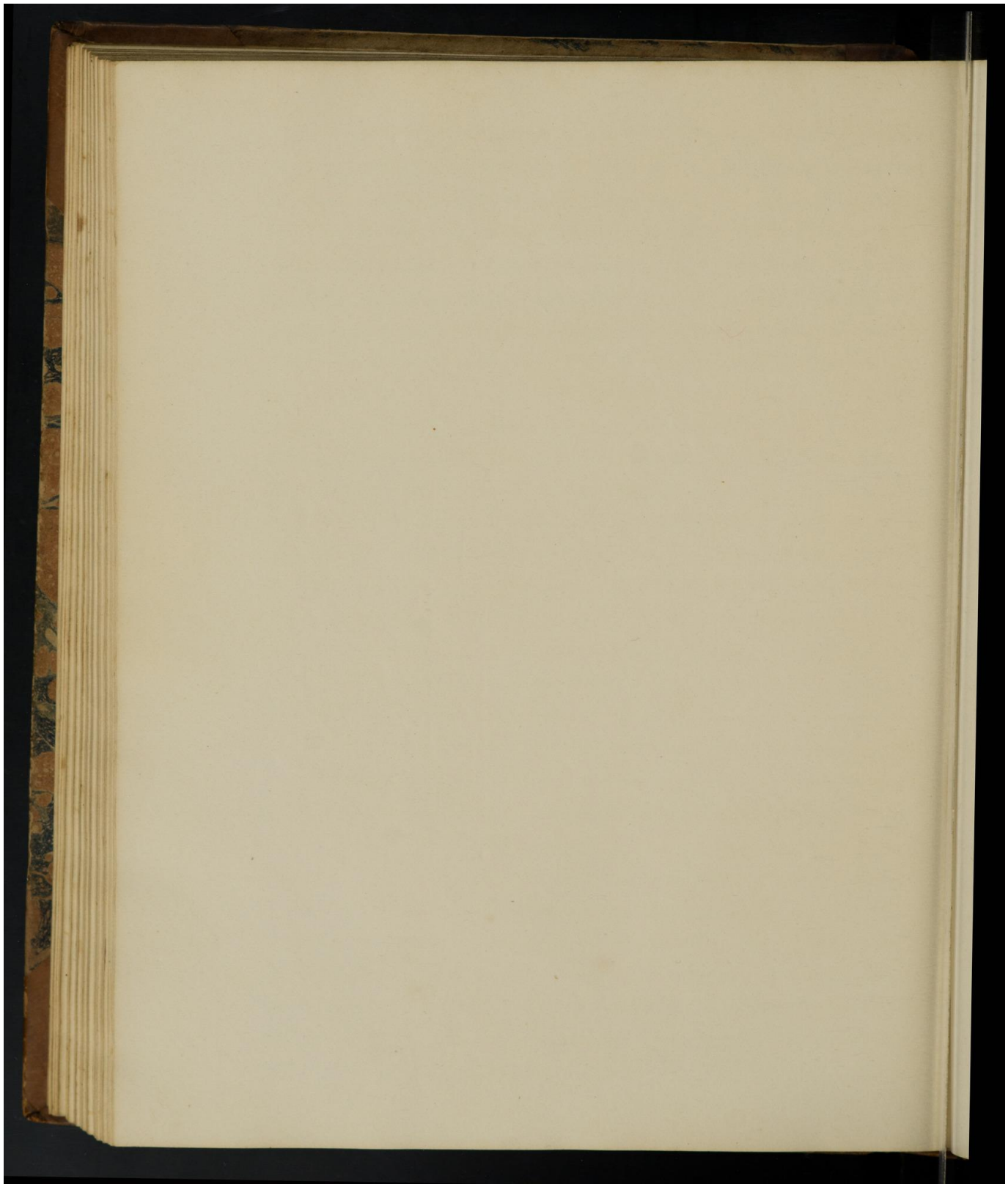


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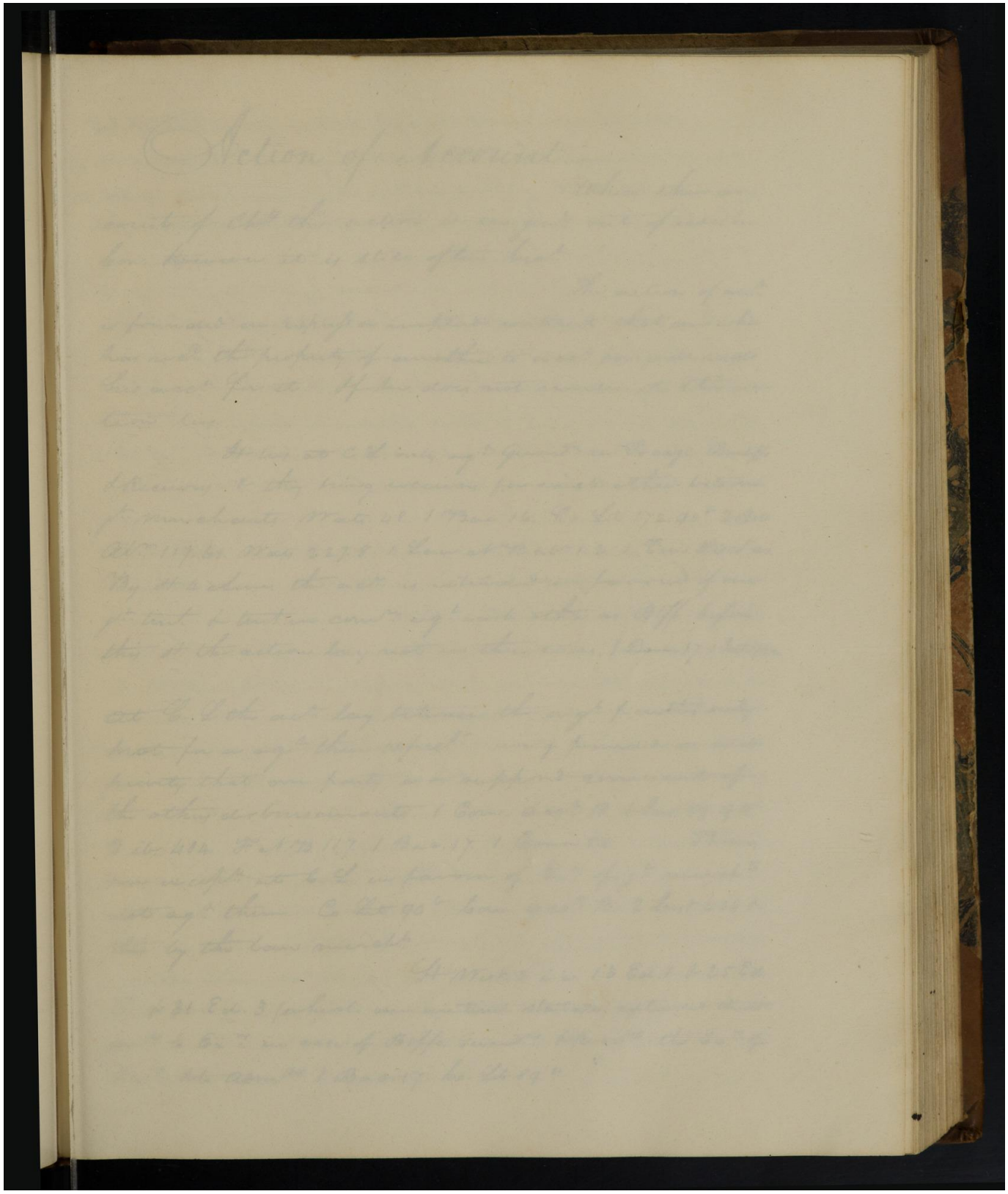
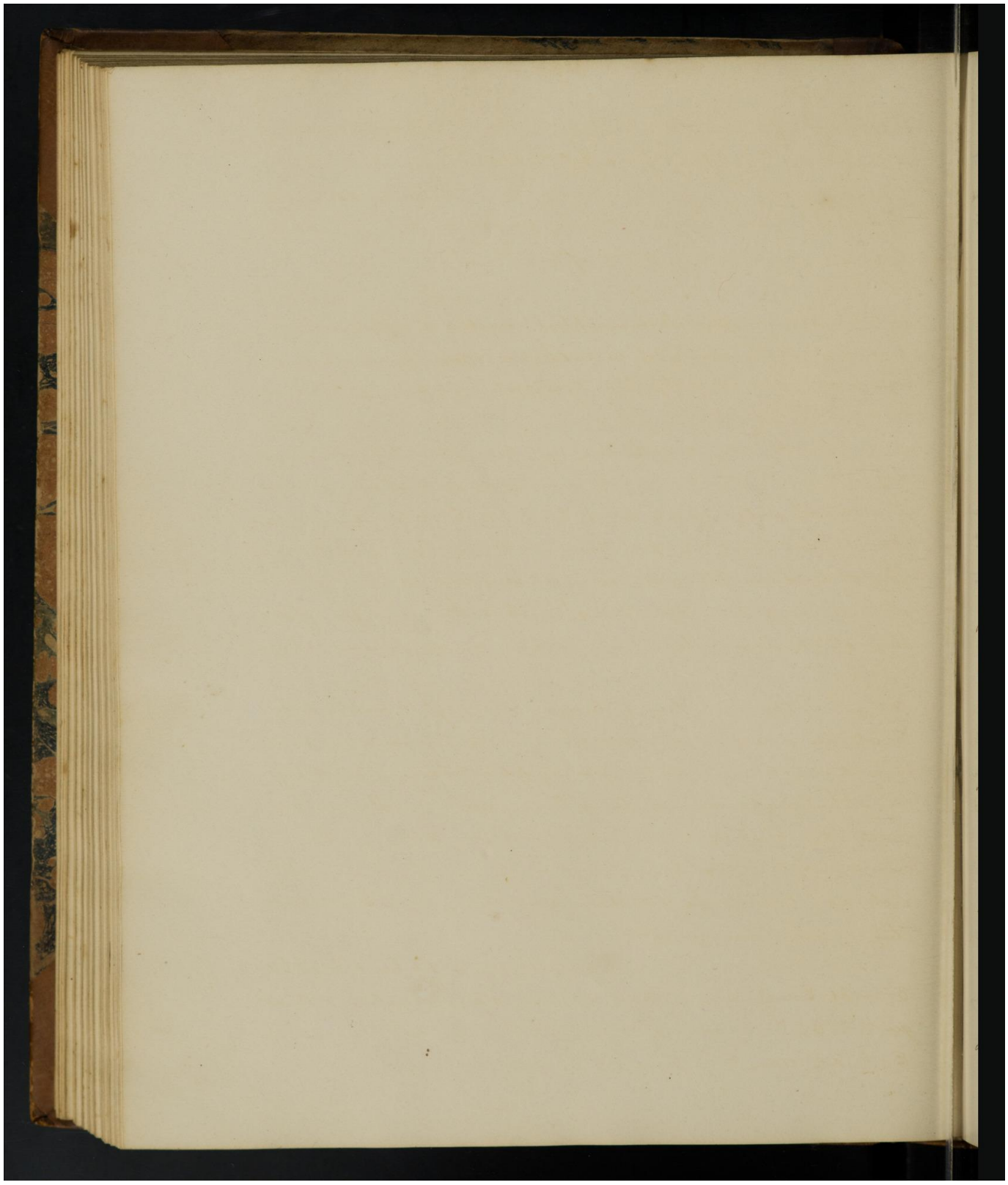


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Action of Account.

When there are
courts of Chy this action is in gen. out of use: in
Com. however it is still often brot.

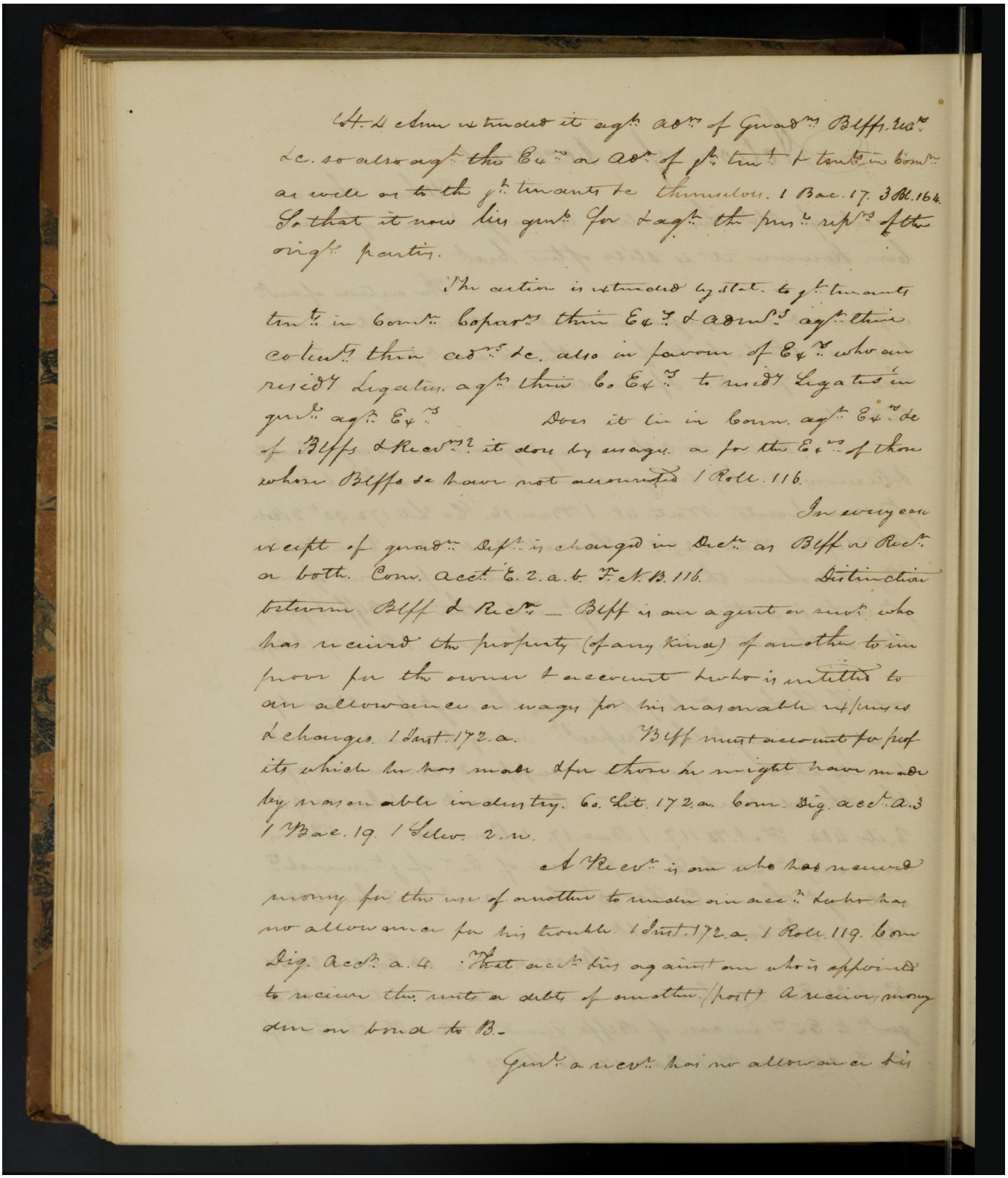
The action of acct.
is founded on reqst or implied contract that one who
has recd the property of another to account for will render
his acct for it. If he does not render it this ac-
tion lies.

It lies at C. L. only ag. Guard. in Socage. Bailiffs
& Receivers & they being receivers for each other between
ptrs. Merchants. Watk. 48. 1 Bac. 16. Co Lit. 172. 90b. 2 Roll
Abr. 117. 61. Watk 227. 8. 1 Leon 47. Abr. 1. 2. 1 Com. Dig. Acct. A.
By St. 4 Anne the act. is extended in favour of one
ptr. tent. & tent. in com. ag. each other as Bailiffs before
this st. the action lay not in these cases. 1 Bac. 17. 1 Inst. 172a.

at C. L. the act. lay between the orig. parties only
not for or ag. their repres. being founded on such
privity that one party was supposed cognizant of
the others disbursements. 1 Com. Acct. B. 1 Inst. 89. 90
2 ib. 404. F. N. B. 117. 1 Bac. 17. 1 Com. 88. There
can except at C. L. in favour of Exr of ptr. merch.
not ag. them. Co Lit. 90b Com. Acct. B. 2 Inst 404 &
this by the law merch.

By West. 2 i. c. 13 Ed. 1 & 25 Ed.
3 & 31 Ed. 3 (which are antient statutes) extended the act.
gen. to Exrs in case of Bailiffs. Guards & Recrs the Exrs of
Exrs & to Admrs 1 Bac. 17. Co. Lit 89.b

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H. & Chan. extended it agst. admr. of Grad. Bliss. Exor. &c. so also agst. the Exs. or admr. of pt. tent. & tents. in com. as well as to the jt. tenants &c themselves. 1 Bac. 17. 3 Bl. 164. So that it now lies gent. for & agst. the pers. reps. of the orig. parties.

The action is extended by stat. to jt. tenants tents. in com. coparc. thin Exs. & admrs. agst. their coterts. thin adms. &c. also in favour of Exs. who are resid. Legatees agst. thin Exs. to resid. Legatees in gent. agst. Exs. Does it lie in Chan. agst. Exs. &c of Bliss & Recrs. it does by usage. a for the Exs. of those whose Bliss &c have not accounted 1 Roll. 116.

In every one except of grad. Defr. is charged in Dect. as Bliff or Rect. or both. Com. acct. E. 2. a. b. F. N. B. 116. Distinction betwn Bliff & Rect. — Bliff is an agent or servt. who has received the property (of any kind) of another to improve for the owner & account to who is entitled to an allowance or wages for his reasonable expenses & charges. 1 Inst. 172. a. Bliff must account for profits which he has made & for those he might have made by reasonable industry. Co. Litt. 172. a. Com. Dig. acct. A. 3 1 Bac. 19. 1 Selw. 2. n.

A Rect. is one who has received money for the use of another to render an acct. & who has no allowance for his trouble 1 Inst. 172. a. 1 Roll. 119. Com Dig. Accts. a. 4. That acct. lies against one who is appointed to receive the rents & debts of another (post) A receiver, money due on bond to B.

Gent. a rect. has no allowance &c

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not bound to acct. for profits. - Ev. as between ptf. Merchts. Def. has allowance & acct. for profits. Co. Lit. 172 a. 1 Bac. 19. 21. 1 Com. 93. 1 Com Dig. acct. E. 1 B. Therefor Bill cannot be charged as Rect. if he were he would lose his allowance Co. Lit. 172 a. 1 Roll. Ab. 119. 1 Bac. 19.

This act. being founded on privity lies not in case of tort. 1 Com. acct. D. 1 except in favour of the King in Eng. (1 Inst. 172 a. 90 b. 1 Co. 89 a.) & of Infants. 1 Vern. 436. 2 ib. 295 342. 1 Atk. 489. 1 Com act. a. 2. Fitz. N. B. 118. Co. Lit. 229. Co. 2. 89

If two or three or more partners in trade one acct. does not lie at law to adjust their accts. the remedy must be in Eq. to prevent multiplicity of suits. Boardman & Lynam L. Ca. Pasch. 1808. 2 Bos & Pul. 269. 2 Day 492.

In declaring agst. Bill or Rect. Bill states that he delivered certain property to Def. as Bill's. that Def. refuses to render his reckonings & acct. which he claims together with his damages & costs. In case of Partnership & Suppose of 3 Partners &c Bill states that Def. has rec. more than his part &c.

It is said that q. acct. lies not for a sum certain. as if one delivers £100. to A. to trade with. the former shall not have acct. for £100. but for the profits. (But in Ch. all would be settled at once.) Should not the rule be that for a sum certain one should not be charged as Bill? Com acct. A. 3. ante For an acct. lies agst. a Bill for a sum certain rec. or Ev. (Hob. 206.) do for money rec. by A. on bond for B. - So when one receives money for the use of another to render an acct. or acct.

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of acct. will lie it seems for the money rec.d Co. Lit. 172a
1 Bac. 201. 2 Mod. 101. 1 Com. acct. a. 4. Pet. B. 116. 1 Roll. 14. 22. 116.

So if money is delivered to be returned on a certain event
1 Com acct. a. 4. Pet. B. 116. 8. 1 Roll. 116. 10. 42. 22. Decided by
L. C.J. Com. that acct. will lie for a sum certain. Vide. 163
If money has been rec.d by B to the use of A acct. lies by A.
then B. ff must declare of whom the money was rec.d
1 Inst. 172a 1 Roll. 120. Pet. B. 118. 1 Com acct. a. 4. Still
if I deliver money to A to deliver to B for my use & A
delivers it. I cannot have acct. agst. B. for he is not privy
to the use. 1 Com. acct. D. 1 Roll 118. 5

If Bailee of goods waste
or refuse to deliver them acct. will not lie but trover or
detinue. 1 Com. acct. D. 1 Bac. 19. 1 Roll. ab. 116. for he has
not rec.d them to improve or acct. for. So it lies not
agst. disseisor for the profits (case of King & in point excepted
see ante) but trespass which is here in the nature of acct.
1 Com. Dig. acct. D. 3 Lev. 24

If A. B. ff make a Dep.t a cant.
have the act. agst. the Dep.t for want of privity - but the
B. ff may. 1 Com acct. D. 1 Roll. 118. 20. Pet. B. 119

Tho Dep.t
may be Ex.r liable for torts yet if made B. ff he is not
liable to acct. for he cannot contract & is supposed in-
capable of accounting. 1 Com. Dig. 1 Bac. 17. 1 Roll. 117.
Pet. B. 118. Co. Lit. 172a

If he who receives property of another
to acct. make an express promise to acct. this act. or a spec.
ass.t on the promise will lie. 1 Bac. 21. 1 Salk. 9 Carth. 89. 1 Salk

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Vin. Ab. 164. 354. Com. Dig. Esp. 96-7. "Contracts". But in aff. by L^d Mott, Pff shall not travel into the particulars of the acc^t but confine himself to the damages he has sustained by Def^t not accounting. Esp. 97. Sal. 9. Carth. 89. Com. Dig. (2 w. 1 Bac. Ab.) Bull N. P. 148

If one by deed acknowledge that he has rec^d money to acc^t - Pff has his election to bring act^n of acc^t or on the deed. 1 Bac. Ab. 19. 1 Rolle. 118.

If one finds the property of another acc^t lies not ag^t him for the act^n is founded on privity &c Com. Dig. acc^t B.

Mode of Proceeding in this action.

In action of acc^t if Pff prevails there are two judg^ts - The first is quod computet - auditors are then appointed before whom the accounting is had. 1 Wils. 99. 1 Bac. Ab. 21. 1 Mod. 42. 1 Com. Dig. 92. 1 Com. Dig. acc^t E. 15.

The auditors then make their award & final judg^t (quod recuperet) is entered upon it as upon a verdict (post) 3 T. R. 164. 1 Selw. N. P. 11 Co. 40^a Com. Dig. acc^t E. 15

Before aud^rs in Com. the parties are of common right entitled to testify - They may also by stat. be required to testify & on refusal may be imprisoned by aud^rs till they answer. St. Com. 28.

If Def^t refuse to attend before aud^rs or produce his acc^t the aud^rs must award to Pff his whole demand (post) Stat 28. In Eng. the 6^t ds it. Com. Dig. acc^t E. 15 Ro. Elg. 806. 3 Wils. 117

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If Aud^{rs} find a balance in favour of Def^{t} in Com. they may award Judg^{t} pro for him to recover damages as well as costs. 2 Lev. 150. Not so in Eng. except in Ch^{y}. 1 Bac. 16. Imt.

As to what Def^{t} may plead in bar, there has been much contradiction 3 Wils. 113. It is competent for Def^{t} to plead in bar to the act^{n} any thing which shews that he is not bound to acc^{t}. It is a good plea therefore that he never was Bff. 1 Com. acct. E.4. 1 Bac. 20. 1 Roll. ab. 121. This is the gen^{l} issue. So a release of all actions is a good plea in bar. 1 Roll. 125. 4 Bac. 85. 1 Bac. 20

So an award of debt^{s} that Def^{t} should be acquitted is a good bar. Cro. Eliz. 82. it operates as a release. Plea that Def^{t} ten^{d} the money to deliver to P^{l}. & that he delivered it. is held to be good. (2 w.) Com. Dig. acct. E.5. 1 Roll. 122. 10. 30. 126. 7 Cro Eliz. 830. 3 Wils. 114. 5. this shews that he was not liable to acc^{t}. These pleas all go to shew Def^{t} is not liable to acc^{t} & therefore go in bar to the action.

But plea that Def^{t} has made payt or satisfaction. or nothing in arrear. of the money is not good in bar. 1 Bac. 20. 1 Roll. 123. 4. For he was bound to acc^{t} dis this plea were true his liability is not released. But such a plea is good before an Aud^{rs} Dy. 22. 165 4 Bac. 85. 6 Co. 7. it is accounting.

On the plea in bar. Def^{t} cannot go into the acc^{t} but must prove the fact. 1 Roll. 625. But if Def^{t} shews that he has been once liable to acc^{t} no spec^{l} plea in bar of the action is good except fully accounted & a release or something equivalent to it. as an award of

a release in discharge &c 1 Com. 91. 2. 3 Wils. 73. 113. 4. other things must be pleaded before and^{ts}

"Fully accounted" release &c must be specially pleaded & cannot be given in evidence under the gen^{l} issue. 3 Wils. 113 4. 2 Lev. 149. 150.

Before the and^{ts} Parties may plead & join issue in law or fact. the issue is then to be carried back to the court & then tried. 1 Com. 93. 1 Com. acc^{t} D. E. 11. 3 Wils. 99. 117. Ac. Elz. 84. 806. 1 Bac. 21. This rule as to issues in fact not adopted in Com.

What can be pleaded in bar to the action must be so pleaded first before and^{ts} Lev. 219. 1 Bac. 21. 1 Com. 93. 3 Wils. 93. 101. 13. Cro Elz. 82. 116. This is to avoid trouble & charge to the parties. Stil. 411. 3 Wils. 113. Com Dig. acc^{t} E. 11. And nothing can be pleaded before and^{ts} contrary to what has been pleaded in 6^{ts} & found. 3 Wils. 114. & nothing which impings the judg^{t} "good computet."

Thus for the pleas even "Bff." release - fully accounted & award in discharge are not good before the and^{ts} Cro. Elz. 82. 3 Wils. 113. 2 Day. 116. They are contradictory to the judg^{t} good computet. for they deny Dff^{ts} liability to acc^{t}

But it is a good discharge for Dff^{ts} (or as it is sometimes expressed, good accounting) before the and^{ts} to shew anything which could not be pleaded in bar to the act^{n}. but which discovers that he ought not to be contractually liable. E. g. that the property was lost at sea, cast overboard from necessity &c. 1 Roll. 124. 1 Bac. 21.

Co. Litt. 89. So that the goods were taken by robbers without his fault or by the enemy. 1 Com. 91. Stra. 680. Com. Dig. Accpt. E. 11 & 12 4 Co. 84a. & auth.s sup. Dew. It was not the plea that the goods were taken by the enemy in Stra. 680. a plea in bar ~~to the action~~. 1 Com. 91.

That the property was perishable &c in danger &c - & that he therefore sold it 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

Def.t in accounting is allowed all losses occasioned by inevitable accident / Enemies Robbery &c / without his fault. Com. Dig. Accpt. E. 12. 1 Inst. 89a

Bailiff is allowed his reasonable expences. Com Dig. Accpt. E. 12. 6 Litt. 89a Secus of Bailiff in his own wrong: as Disseisor of Inf.t 1 Leon. 129. Com. Accpt. E. 13. ante. to a Receiver. 1 Inst. 172a

When the award is returned to the court final judg.t is rendered for the sum awarded & in Com. the fees of the Arb.rs are a part of the bill of costs - but are to be paid at the time of rendering the award. by the successful party. St. Com 37. 2 Geo. 150. ante

Arbitors are not appointed in Com. in actions before single ministers of the Laws. he takes the Accpt. himself. St. does not authorize him to appoint auxiliars. Auth.s supra.

In actions of book debt for more than $17 the Ct. in Com. may appoint Arb.rs & proceed as in actions of Accpt. St. Com. 37. No appeal from

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judgt. given in S. C. on the award of Audrs. in Com. St. 37.

In Eng the act. of acct. is not in much use. The common remedy is in Chy. For in Cts. of law in Eng. Pltff is not entitled to discovery of book, papers &c. - nor to Dfts. oath. 1 Bac 16. 3 Bl. 437. 381. 2. Leg. Wats. 228.

The Con. st. has virtually given Audrs. all the powers of Chy. in this respect. If either party is dissatisfied with the award he may apply for relief to the Court. 1 Bac. 21.

An award may be set aside if Audrs. exceed their commissn. or mistake in their own principles (Root. 261. 213) or if they mistake the law or given facts. 2 Day 116. So in case of corrupt. or misbehaviour.

In Com. objections to the award are made by way of remonstrance in writing. The court will not however grant enquiry into the facts - but for mistakes in law (not supd appearing on the face of the award or from the examination of the Audrs. in Ct. the award may be set aside. Kirb. 353. Root. 137. 261. 8. 2 Day. 116.

But as to mistakes, the court will enquire of the Audrs. only not of other persons, accus in case of misbehaviour or corruption in auditors. -

In a writ of account the first judgment is quod computet, and on such account all articles of account, though incurred since the writ shall be included & the whole brought down to the time when the auditors make an end of their account. 2 Bur. 1086. So in the antient writ of annuity - because a new action cannot be brought for them. -

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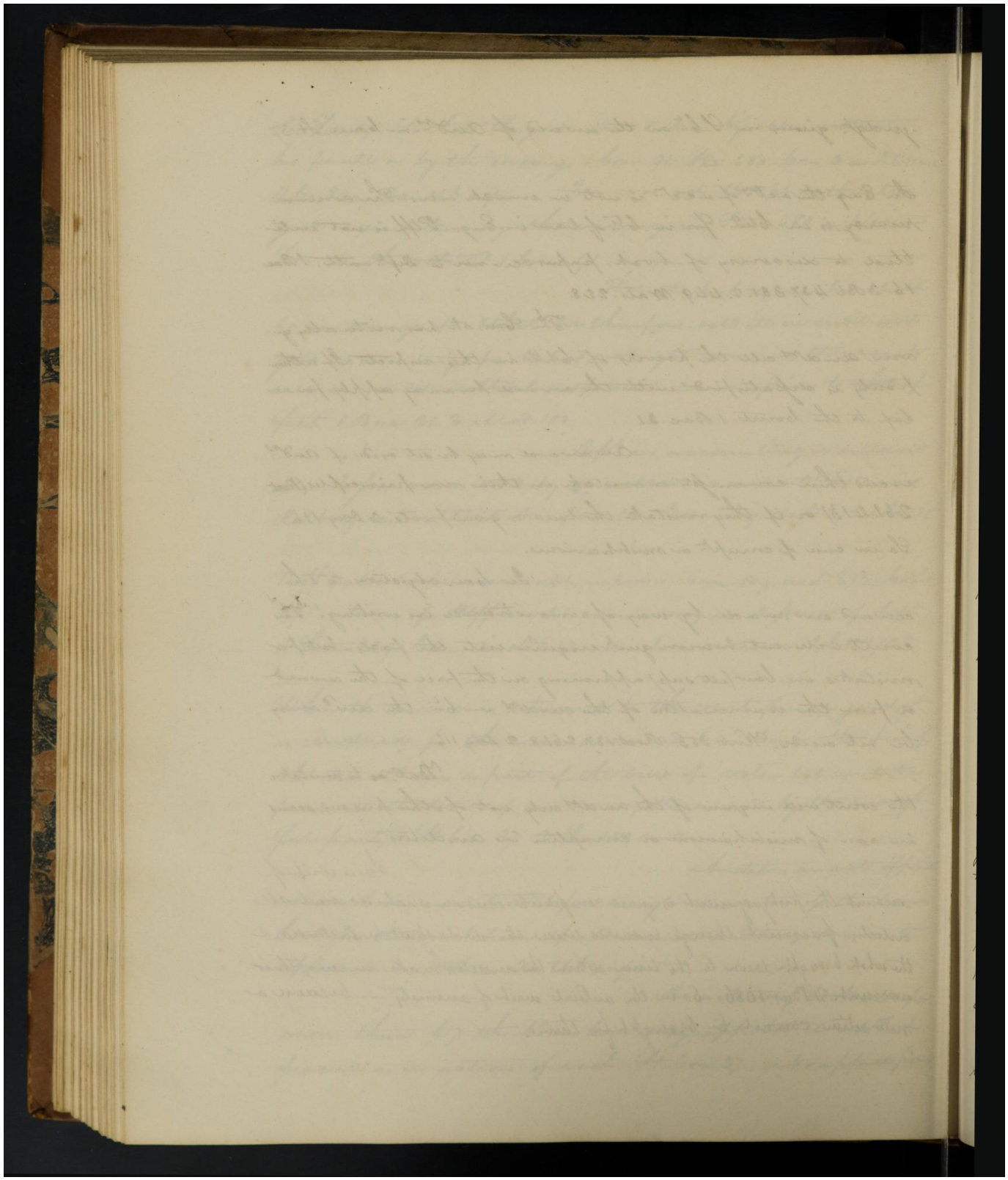


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Action of Debt.

The legal acceptation of the word "debt" is a sum of money due by certain contract. Eg. by a bond for a determinate sum. note, spec.t bargn &c. 2 Bl. 154. Ed.t 172.

Debt lies for a sum capable of being ascertained by averment gen.t (Doug.6. 1 H. Bl. 550) Secus in some cases on implied contracts: post. 2 Bac. 13.

Debt lies in some cases on contracts implied, but not it is said, on cont.s implied to pay an uncertain sum. Ex. If A sells goods & agrees by parol for a fixed price. debt lies. 9 Co. 94 a.tt but if no fixed price debt lies not. (2 Ex-post) 3 Bl. 155. 1 Hen. Bl. 550. S. Rep. says it will lie, in such case, the standard being the market price. "ex certum de"

That debt lies upon an implied promise to pay an uncertain sum. post. this seems to be so because lately one has been allowed to recover a less sum than he sued for.

Debt on simple cont. discuss in Eng. by reason 1.st of the wager of law 3 Bl. 155. Ch 219. Wager of law, what? Co Lit 155. 3 Bl. 341. &c. Deft. swearing that he owes nothing & compurgators swearing that they believe him, Wager of law equivalent to verdict for Def.t 3 Bl. 343. 2.d Because the whole sum demanded must be recovered if any according to the old rule 3 Bl. 115. Dy. 219. 2 Roll. 706. 2 Bl. Rep. 1321. Doug. 6. 713 n 1 H. Bl. 249. 550. Lately revived. Ch B 219. i.e. Debt on simple contract. but there was no necessity for it.

In some cases debt lies note on express simple cont.s Ex. agst an Ex.r or Ad.r Blow. 182.

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1 Lev. 200. Ch 219. no indebitatus's on his part. act.n stands by case – for Def.t might have waged his law. but E.v. cont. Esp. 172. 9 Co. 87. Cro. car. 187. 35. (this reason has ceased to exist)

debt lies on promiss.y note (agt. maker) semb. Ch. 221. 10 Mod. 38. 2n. agt. endorser Ch 221. 8 Mod. 375. Bayl. 94 n.c. Sal. 173. It seems to be in nature of insimul of the debt. Esp. 173. On principle it will not lie agt. him. no privity.

If one promises to pay a sum certain for property delivered to his own use. or for service rendered to himself, debt lies. seen if he promised for another. case of Acc.t Esp. 173. promise, on lien relinquished by Pfff. 3 Burr. 1856. Ch. R. 220. Dy. 21. Cro Eliz. 880. 2 Bac. 20. promise to pay another's debt. here there must be a spec.l act.n on the case Esp. 173. Cro. Eliz. 107. 240. 93. It will lie when the person for whose use &c. is now liable semb. L.d Ray. 842. So debt lies not for payee agt. acceptor of a bill of Ex. It is rather in nature of a surety or guarantee. Drawer is the debtor liable in debt Esp. 173. Sal. 23. Ch. R. 220. 1 Roll. 597. Dyer 21.a 1 Vent. 152. 12 Mod 345. 2n. Ch. 220. J. Buller says, that an endorser may sue his endorser in debt but no one else. & that the payee & only the payee can sue the drawer in debt. privity is the principle.

Note in C.t. that Pfff must recover the precise sum declared for in debt or nothing. F. N. B. 119. Dy. 219. 3 Roll. 155. This rule is not now observed in case of debt on simple contract 2 Bl. R 1221 Case of motion for new trial Doug. 6. 703. 4 n. 1 Str. Bl. 249. 89. 2 Bl. 155.

Debt lies in some cases on implied cont.t E.g agt. Sheff who has collected money. Hob. 288. 2 Bac. 14. Ch. R. 220 (post)

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And sometimes when there is nothing like a bond &c. or cont. or other commercial transaction from which to imply a contract Ex. on a penal St. when the penalty is certain. (there being no specific mode of recovering the penalty prescribed.) 2 Bac. 14. 1 Roll. 598. This is the comn. practice in Eng. & 6l. it is a civil action. 4 T. Rp. 756. 7 ib. 257. q. 2 ib. 203. 3 ib. 448 comp. 882. Hob. 179. To debt on penal St. "not guilty" is a good plea. Carth. 361. 1 T. Rp. 462. sublata semb. - not good on specify. 2 Ld Ray. 1500.

The debt lies not to recover damages. yet after damages are recovered debt lies on judgt.; for the demand is by judgt. made certain. 2 Bac. 14. 1 Roll. 600. 1. 2 Bl. 465. Hob. 206. So upon an and. of Arbs. to pay a sum certain. 12 Sta. q. 23. is in nature of a judgt.

When Defts. in a judgt. is in custody on the Exn. debt on judgt. lies not. 4 Burr. 2482. Esp. 196. 1 T. Rep. 557. 6 ib. 557 7 ib. 420. 8 ib. 123. So if having been in custody he is discharged with Plffs consent. Taking in Exn. is satisfaction in law. 3 Mod. 13. 7 T. Rp. 421. 3 Burr. 2482.

So if goods to the amt. of the Exn. are taken. Sal. 323. 2 Mod. 214. 2 Bac. 355. 1 Keb. 551. But it lies if only part of the amt. has been levied. Esp. 196. 1 Sug. 92

As to the proper time of bringing debt on judgt. in Eng. & Comn. In Eng. gent. Exn. cannot issue after a year & a day. 2 Bac. 361. 2 Carth. 30. 1 Sid. 351. and in this case Plff only remedy at C.L. was by debt on judgt. by orig. writ (after such a time pay. was presumed.

But H. VIII. gave sci. fa. in this case to shew cause why exn. should not issue. Now after a year & a

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day. Plff cannot take ex. without a sci. fa. except where rec. has been suspended by some other cause. 3 Bac. 362. 6 Bac. 364. 1 Roll. 599. 6 Mod. 288. Carth. 283.

It has been questioned in Eng whether debt will not lie within a year & a day. (1 Roll. 601. that it lies after a year) 2 Ld. Ray. 637. 8° in 2 Bac 12 that Debt is allowed on judg. to punish Defr for not paying (as he ought to without ex.) - that Plff may not be put to the expence of levying by ex. & therefore that the act. will lie within a year & a day. vid. Carth. 30. 3 Bl. 421. 1 Ld. Ray 637. judg. in Mich. ter. & debt on that judg. in the next East. ter. i.e. the next term within a year.

In Con. no time is limited for taking Ex. & therefore no necessity from lapse of time to bring debt on judg. after a year &c as in Eng. And it seems to be generally agreed that in Con. debt on judg. will not lie while ex. can be taken & the full benefit of judg. be attained by it. Aliter (in 6 Mass.) it would be vexatious to sue.

But on the other hand when ex. cannot be taken out, debt on judg. will lie. Ex. Justice &c. before whom &c. dies or is removed before ex. granted or satisfaction of judg. - Plff may have act. on judg. within 5 years. If debt does not exceed $35 it may be before another justice, aliter before County Ct. St. Con. 38.

So when great length of time has elapsed, court will not grant ex. debt or sci. fa. will lie. So when full benefit of the judg. cannot be obtained by taking ex. Ex. If Defr in orig. act. is an absconding debtor & Plff wishes to sue. Kirb. 311. 421.

So if judg. was rendered in another State when satisfaction

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cannot be obtained & Defts has removed into this State. Virb. 177.

So semble when Plff wishes to obtain intt on his judgt Lat can decided in favour of the action - But if no time is fixed, at ante, what means this rule?

An erroneous judgt will support this actn for such judgt is available to all purposes until reversed. 2 Bac Abl. 75. Rep. 458. 3 Wils. 345. Root 176. 8 Co. 142 a.b.

By the constitution of the U.S. full credit shall be given by courts in one state to judgts records &c in the other states. Can there be an enquiry in this case into the origl cause of action? art 4. Sec. 1. J. Rawle thinks that the very nature of our government should determine us in the negative. & the constitution he conceives to be clearly & explicitly so. It has been decided in N.Y. that there may be such enquiry. Contra in Connt. & Judge Rawle says 5 States out of 8 have decided with Connt. Pennsylvania is with N.Y. 1 Dal. 188. 261. 2 ib. 302. Cains. 460. Virb. 126. 1 Johns. 426.

According to the decisions in N.York &c they are placed upon the same footing as foreign judgts. They are not records according to E.L & they are only prima facie evidence of an legal demand. N.Y. thinks as well as J. Rawle that the article in the constitution must mean to place them judgts on a diffn footing from what foreign judgts are at E.L. 8 Johns 173. 86. 5 ib. 37. 9 Co. 192 Co. 475.

Formerly holden that debt will not lie on a foreign judgt Stra. 1090. Now however settled that debt will lie, but they are treated as simple contracts so far forth as they are examinable. The judgt however itself implies a suffn consideration till the contrary is shewn by Defts Doug. 1. 2 H. Bl. 410.

Plff in declaring must not shew the orig.: cause of action. 5 East. 475 n.

The judg.: of a foreign court is examinable here only when he who claims the benefit of it applies to have it inforced. 2 Bl. 4 H. 2 Show. 232. Ray. 473. 1 Kin. 59. For it is then voluntarily submitted to the jurisd.: of our courts. Secus when pleaded in bar.

To debt on such a record "nul tiel record" is a void plea yet declaring on judg.: as a record does not vitiate the declr.: prout patet per recordiam. is surplusage. Doug. 6. The laws of foreign countries are pleadable as matters of fact. Comp. 174. 5. 6 Mod. 195 2 Dan. Ab. 410 For such cases like ours. 3 East. 221.

Before the present constitution the C. Cts. allowed debt on judg.: rendred in other states & held that the evidence was to be given but they held that the orig.: cause of action must appear in the declr.: Kirb. 126. They treated such judgts. thereon as less sacred than foreign judgts. at C. L. Doug. 1. Shewing the orig.: cause of action was not necessary on principle. The judg.: alone was suffic.: consid.: (cente)

In debt. Asp.: concurrent with debt on foreign Judgt. Doug. 4. 5. 6. Int.: not allowed on such judgts. as on a judg.: rendred here. 1 East. 436.

Said (Doug. 6) that where in debt. Asp.: his debt will also lie — not so in all cases. Ex. money paid by mistake — obtained by breach of trust — by fraud. by sale of property converted by a person not the owner. 3 Bac. Abr. 35. The rule is to be understood in gen.: (I conceive) of express promises to pay money. Or those implied from an actual contract. Ex. Sale of goods without an express promise. Services

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rendred with. upon promise. Ex. will debt lie? ante. 1 Ld. Bl. 550
I. Rawl. I should think debt will lie.

Or a void judgt debt lies not - Ex. on a judgt obtained by fraud no action lies. (i.e. fraud in the proceedings) it is a nullity. Vin. Ab. Tit. Vacat Ex. if the service is forged by Plff. Defts. not having had notice. If one personates another & confesses judgt in his name Pas. Ex. 76. 8. Sand. 76?.

So if irregularly obtained. Irregularity what? non payt. of duty in Exr. Process improperly filled up in Exr. 3 Wils. 341. 2 Bl. Rep. 845. Stra. 509. 993. 2 Wils. 47. Process not returnable on a day certain. Exr. Pl. 514 not returnable to next court - So want of juris. over the subject matter - (Vide. Fals. imprisot)

In Exr. on judgt obtained by foreign attachment debt it is said lies not agt. the absconding debtor himself. the object being to draw property out of the hands of the garnishee - Qu - But debt on common judgt may be brot. by foreign attachment. stating that satisfaction of the judgt cannot be obtained by Ex. Vide 311. 421. ante.

For money secured by bond. single bill or recognisance. the action of debt is the only L.R. remedy. Ed. 198. 2 Bac. 13. Exr. Elj. 494. 187. 608. It is the most proper action in our law usually given for money. So it also lies on a recognisance. Esp. Dig. 198. Sometimes sci. fa. will also lie on it by St.

A bond to pay able quod sæpe non times of payt. being fixed is payable on the day of the date. 7 T. Rep. 124. Where the condn. was that the bond be void if Defts. did not pay. - Exr. held non

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payt a breach, clear mistake. Doug. 369. If a bond is given conditioned for the performance of a collateral act, there is sometimes a remedy in Chy, it being received as evidence of an agreement to do the act. But the L.L. remedy is an act of debt for the penalty.

In debt on bond damages may be given exceeding the penalty in certain cases. Ex. principal & Intt. surmount the penalty. 2 T. Rep. 388. Doug. 49. Barn. 820. 2228. 3 Wil. 432. Pow. Mort. 146. Bunb. 232. 2 Saund 102. 3 Bac. 691. 6 T. Rep. 303. 1 East 432 con. 1 Atk. 75. 3 Bro. Ch. 489. 96. 2 Bl. Rep. 1190. 3 East 602. 4 Dav. 30.

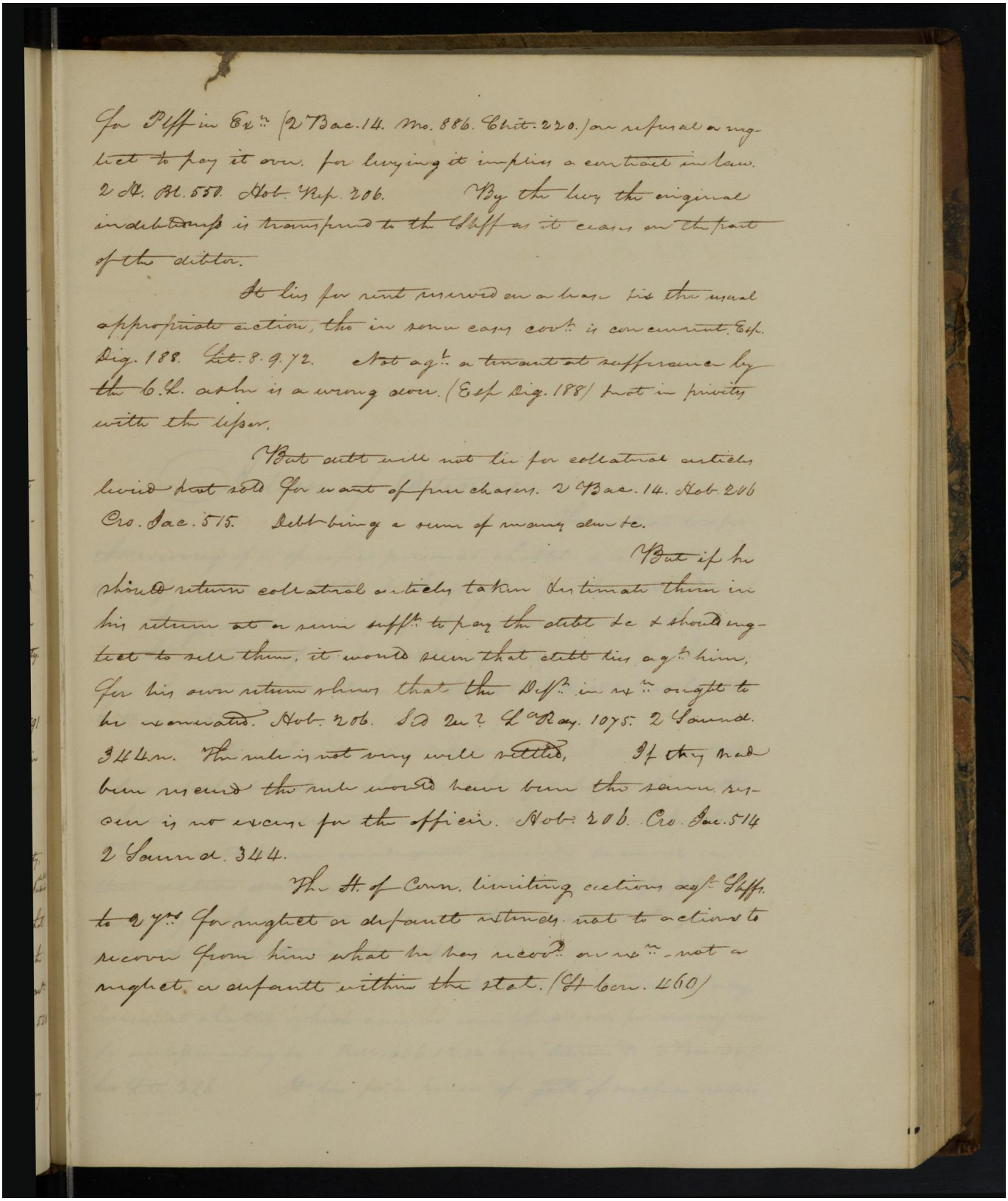
I should think it not competent for a court of law to give damages exceeding the penalty according to the principles of the old L.L. but it is otherwise now that penalties may be chancered. Courts of L. in Gen. have determined when it appears that the remedy exceeds the penalty, interest may be allowed on the penalty.

On covt to pay a sum certain debt lies. Stra 1087. 1 Roll. 591 If the condition of the bond is that obligor render a just & fair acct of money received – non payt of the sum received is a breach. Doug. 367. 2 T. Rep. 388.

If there is a covt with a penalty, Obligee has his election to sue for damages on covt broken, or debt for the penalty. Pow Con. 136. 3 Burn. 1345. Unless it appears that covenantee was to have his election to do the act or pay the penalty – In such case on non performance of the act, debt lies for the penalty only. 3 Atk. 371. Stra. 533. 2 P. Wms. 193. 2 Vy 528. 1 Bro Cha. 418.

Debt lies agst an officer who has collected money

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For Plff in Ex^on (2 Bac. 14. No. 886. Chit. 220.) on refusal & neglect to pay it over. for levying it implies a contract in law. 2 H. Bl. 550. Hob. Rep. 206. By the levy the original indebtedness is transferred to the Sheff as it ceases on the part of the debtor.

So lies for rent reserved on a lease tis the usual appropriate action, tho in some cases cov^on is concurrent. Esp. Dig. 188. Stat. 8. 9. 72. Not ag^t a tenant at sufferance by the C.L. as he is a wrong doer. (Esp Dig. 188) not in privity with the lessor.

But debt will not lie for collateral articles levied but not sold for want of purchasers. 2 Bac. 14. Hob 206 Cro. Jac. 515. Debt being a sum of money due &c.

But if he should return collateral articles taken & estimate them in his return at a sum suff^t to pay the debt &c & should neglect to sell them, it would seem that debt lies ag^t him, for his own return shews that the Def^t in ex^on ought to be executed. Hob. 206. Sid 2 vol 2 Ld Ray. 1075. 2 Saund. 344 n. The rule is not very well settled. If they had been recd the rule would have been the same reason is no excuse for the officer. Hob. 206. Cro. Jac. 514 2 Saund. 344.

The St. of Conn. limiting actions ag^t Sheffs. to 2 yrs for neglect or default extends not to actions to recover from him what he has recov^d on ex^on - not a neglect or default within the stat. (St Conn. 460)

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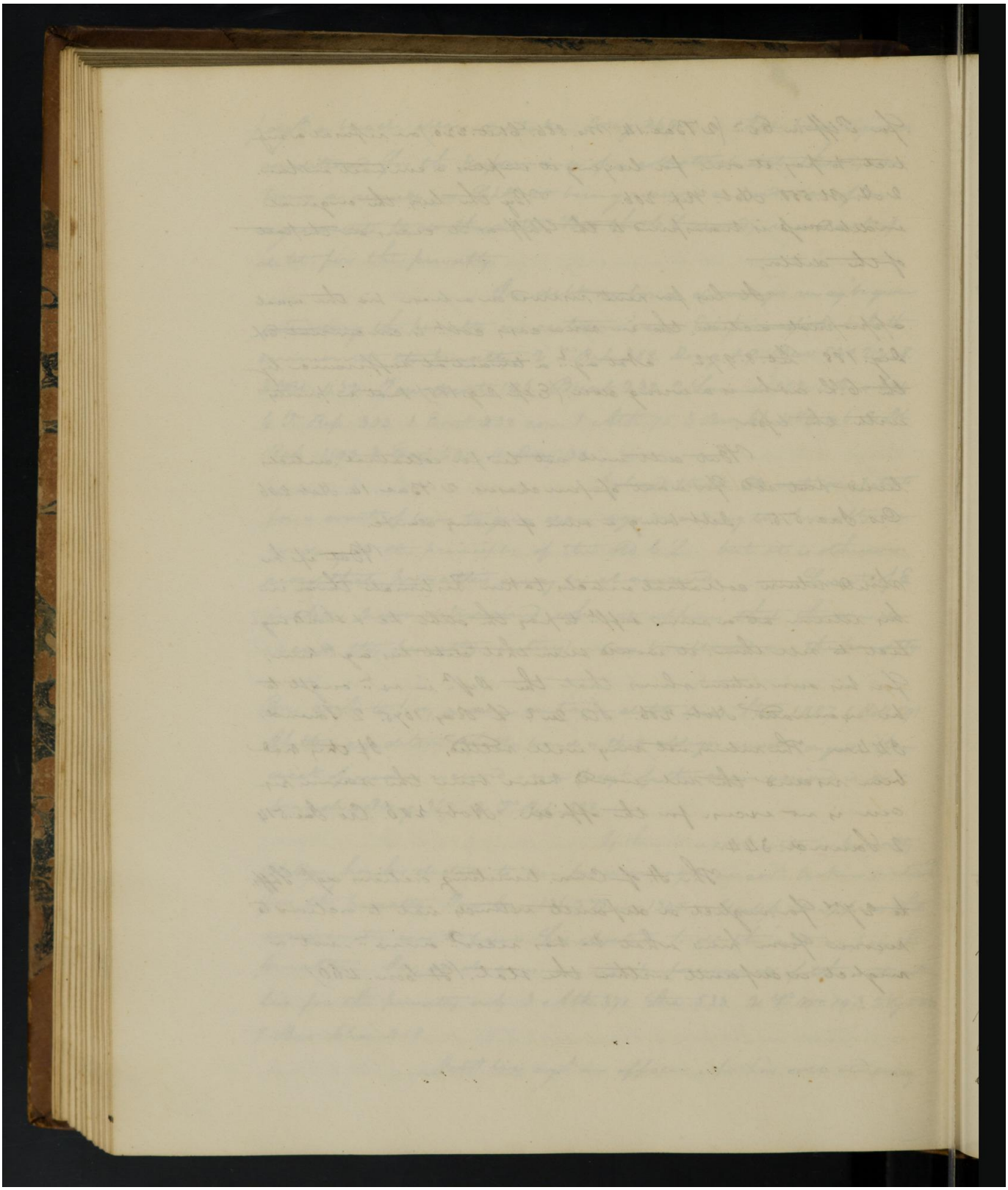


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Action of Detinue.

This action lies for the recovery of a specific personal chattel. & is in the nature of a bill in Eq^y. & the judg^t is for the restitution of the thing detained & pay^t of a certain sum (which is in the nature of a penalty says Judge Rowe) for the damages of detention & value. 6o Lit. 286. 3 Bl. 152. 6 Ra. Jac. 361. 2 Bac. Ab. 5.

It is the only action at law in which one gets specific relief & is of use when another gets poss^n of something which money will not replace as a family picture. Trover would be an inadequate remedy because in that action damages are sued for & they are assessed according to the market value of the article. & the judg^t vests the property in the Def^t.

Detinue lies to recover any personal chattel which can be identified nor for money can be unless in a bag &c / Roll. 606. 12. 16 Com^n Detinue B. 2 Bac. Ab. 7. 6o Lit. 286. It lies for a piece of gold of such a value

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a 20£ in money. Com. "Det." B. not for 20/ in money Bro Ely 457
Co Litt. 286.

It lies in those cases only in which Defts obtained
posn lawfully as by delivery or finding. Com. "Det" D. 2 Bac
45. 1 Roll. 607 2 Sw 20 The action seems to be founded
on contract & debt & detinue may be joined in one dect
1 Rawes. A.E.L. 67. 4 Bac. 11. 1 Bac. 28. 2 Sw 40 cor. Gent
nature of the action same as debt. 3 Wh. 156. Debt to recover
goods in detinue. Detinue lies not for money but the
under must sue on the contract. 2 Bac. 47. 6 Roll 600

Trover
lies in all cases when detinue lies — Rule but not converse
for trover lies when the taking was tortious. Esp. Dig.

Reason why detinue lies not when the taking was tortious
seems to be that as a tortious taking was considered as divesting
the owner of his property. arose in detinue Deft must have
the property of thing demanded. Com. "Det." D. So that detinue
is no remedy in such case. (But as that reason is done
away I think this action would now lie altho the taking was
tortious says S. Rawes) Better reason says S. Gould, is that
this action is founded in contract & prop is implied.
(See qu? is there any contract in the case of finding? 2 Vin. 20

This action is disused by reason of the wager of law & the certainty
required in describing the things demanded. Trover has
taken the place of it under the Eq. of the stat. of West 2d
2 Bac. 45. 10 Co 57. a. Mod. 481. Cro Jac 244. Yelv. 178.

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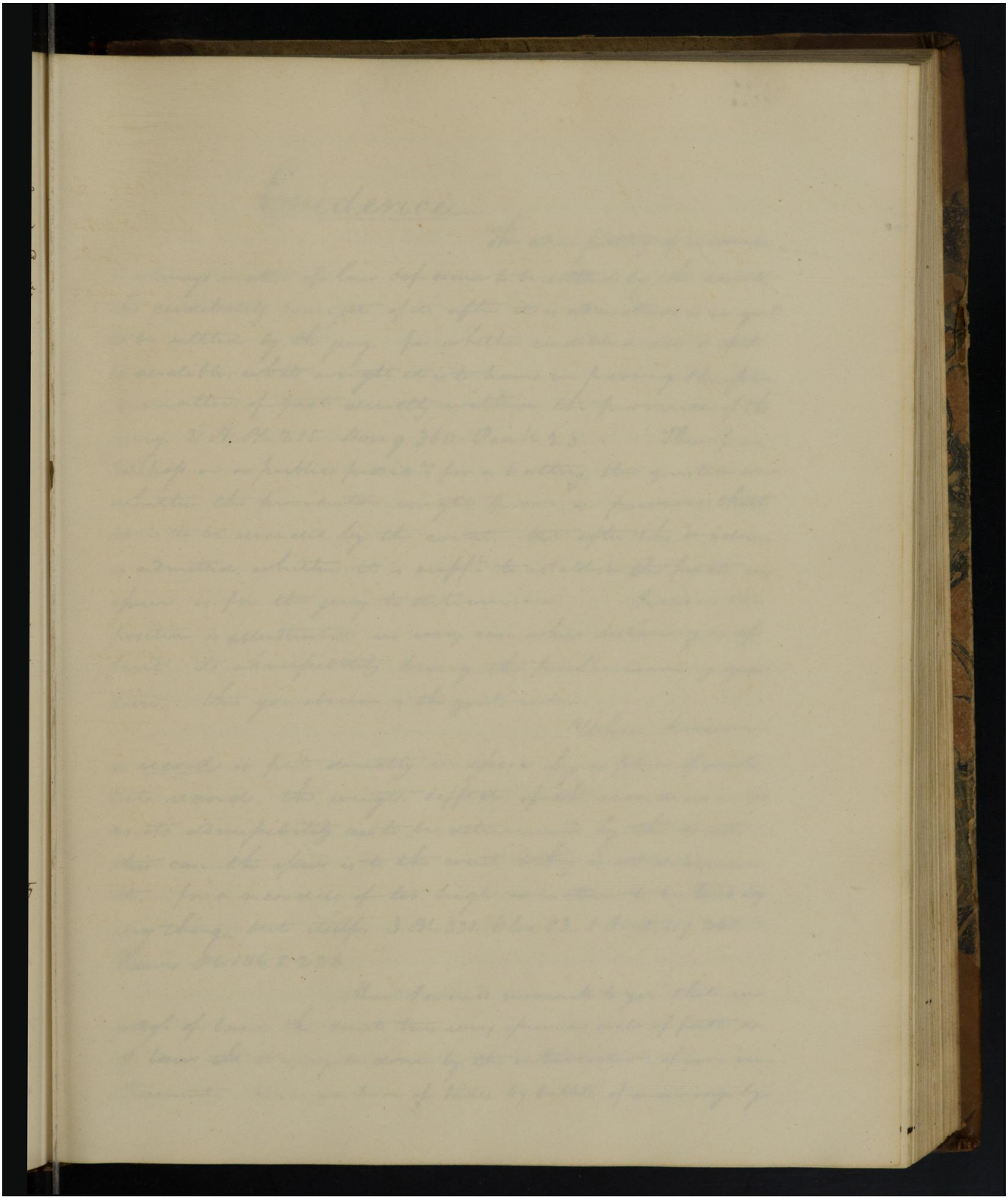


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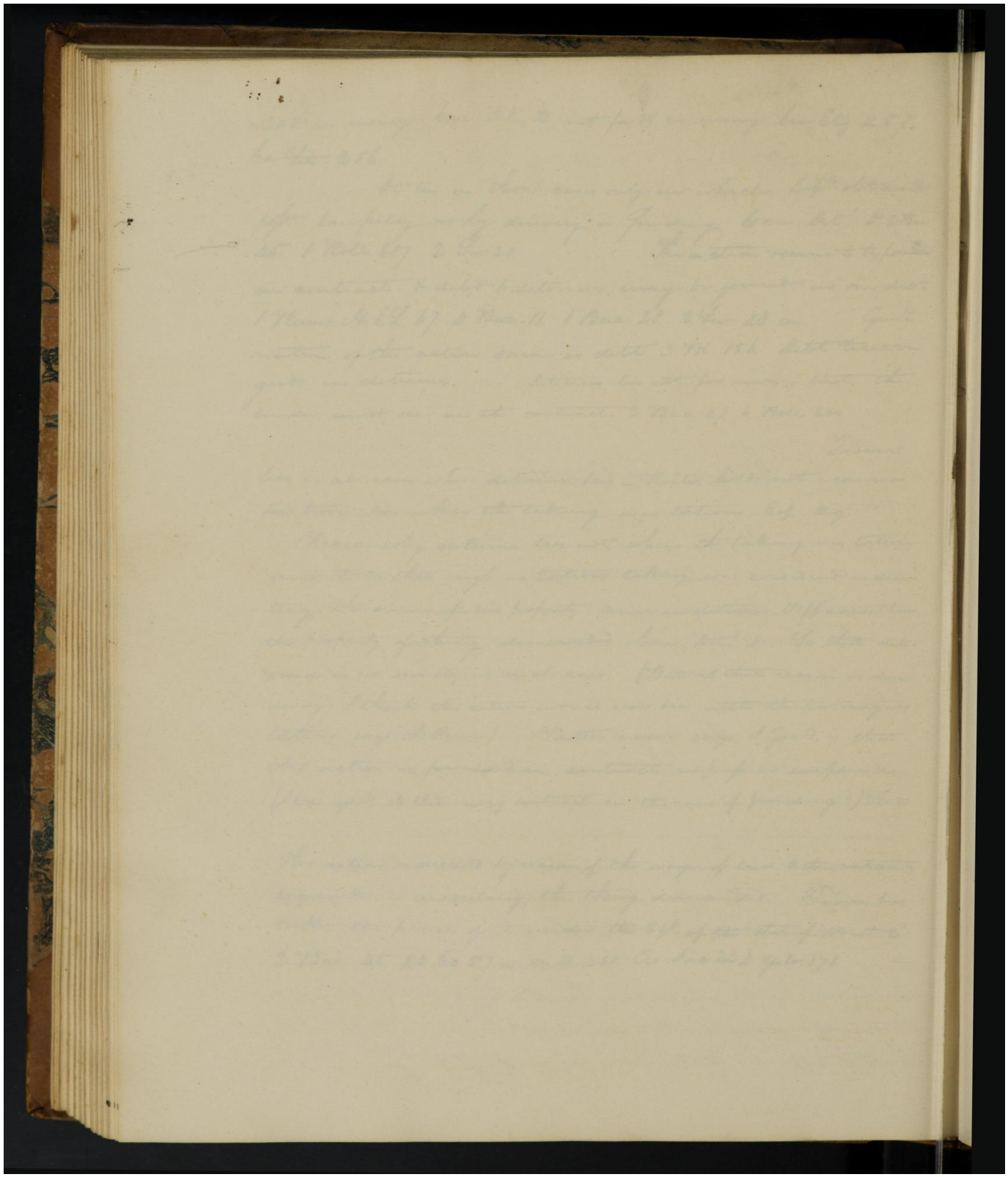


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Evidence

The admissibility of evidence is always matter of law & of course to be settled by the court. the credibility & weight of it. after it is admitted. is in gen. to be settled by the jury. for whether credible or not & if it is credible. what weight it is to have in proving the issue is matter of fact directly within the province of the jury. 2 St. Tr. 205. Doug. 360. Peake. 2. 3. Thus if in trespass or a public prosecn for a battery, the question was whether the prosecutor might have a privacy that it is to be decided by the court. but after the evidence is admitted. whether it is sufft. to establish the fact in issue is for the jury to determine. In each this position is illustrated in every case where testimony is offered. its admissibility being the preliminary question. this you observe is the gen. rule.

When however a record is put directly in issue by a plea of nul tiel record. the weight effect of the record as well as its admissibility are to be determined by the court. in this case the issue is to the court & they must determine it. for a record is of too high a nature to be tried by any thing but itself. 3 Bl. 330. 6 Co. 53. 1 Inst. 117. 260. Laws Pl. 146. 8. 226.

Here I would remark to you that in proof of laws. the court tries every issue as well of fact as of law. tho it may be done by the intervention of an instrument. hence we hear of trials by battel. of marriage by

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cutificate infancy by inspection — by wager of law. by record. by jury &c. for by C.L. the jury are merely the instruments of the court. thus the rule that a record is only to be tried by itself becomes intelligible.

When on the other hand a record is introduced incidentally or collaterally or an issue to the jury, it is to be read to them in evidence tho it may be conclusive of the facts which it imports to establish. as if Plff in ejectment should produce a judgt & execution (levied) as evidence of his title. after general issue pleaded. The question then whether the record is to be tried by the C. or jury is to be determined by the form of the issue. i.e whether the record is put directly in issue or incidentally. Peak. 243.

Either party is bound to prove those facts in the case which are not denied by the other party. for such are of course admitted to be true. Thus if a declr. states any indefinite number of facts. & Defdt. selects one & traverses it alone, he admits the rest. agreable to a rule of pleading extending to all traversable allegations. 4 Bac. 2. 73. Dy. 182. B.N.P. 298.

And an admission in record by any party of any allegation by the other, precludes the party making the admission from denying the allegation on trial. a party on trial cannot deny that which he has admitted on the record in his pleadings. So as one is not obliged to prove what is admitted. the other is not permitted to retract his admission or deny the allegation, in evidence. Laws Pl. 48. B.N.P. 289. 2 Mod. 5. 4 Bac. 2.

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The burden of proof lies regularly i.e. gen^l upon that party who takes the affirmative of the issue, because in gen^l a mere negative is not susceptible of direct & positive proofs it may be in some cases. but in common presumption it is not. Peak. 5. B.C.P. 297. 8. 1 T. Rep. 144. 649. 4 ib. 33. 35. Phil. 150.

There is an exception to this rule where one is prosecuted for not doing an act which by law he is bound to do. Then the party prosecuting & alledging a negative. i.e. an omission. takes the burden of proof. for to presume the negative would be to presume guilt which the law never does & this exception holds as well in civil as criminal cases. Thus suppose a turnpike Co. whose duty it is to repair a bridge or highway is indicted for not doing it. the Def^t is not bound to prove that repairs have been made, prosecutor must prove that they have not. The negative is here easily proved. but the facility of proof in this case makes no odds. and it is true in all cases that where one is charged with the omission of a legal duty. the prosecutor is bound to prove it. Gilb. Evi. 148. 3 East. 192. Comb. 57. 10 East. 216. 2 Bl. R. 851. 2 Bacon. 654. Phil. 151.

You will perceive a manifest difference between the last case, & one in which there is a charge of a positive wrong as of trespass or theft, here the party taking the affirmative, takes also the onus the party charged is not bound to prove himself innocent. & that the gen^l rule applies.

If issue is taken on the life or death of a party one existing, the onus lies on the party alleging his death, & the rule I trust does not

depend on the mere form of the issue. but upon the substance of it. for being an exception. the law presumes him to be so until direct & presumptive evidence of the contrary appears. Thus in ejectment by the bar. Defr. need not shew the ancestor to be alive, it is for the bar to prove him dead. This being the reason of the rule, it can make no difference what form the issue is in, i.e. whether affirmative thus "J.S. is dead." or negative as "JS is not now living." This issue is after joined, & I think the rule as laid down is universal. Peak. 313. 2 Roll. Rep. 461. 2 East. 312. Phil. 152.

When however an person once existing, has been absent, unheard of, for 7 yrs the law presumes him to be dead. This was introduced as a positive rule by the stat relating to bigamy. but it has been extended by analogy to all cases to which it was applicable. So that the fact that J.S. was once alive and that he has been absent 7 yrs in search of being found, it throws the onus on the other party who wishes to prove him living. the presumption of death being once raised remains conclusive unless rebutted. 6 East. 80. 85. 2 Campb. 113. Phil. 152.

So also when an legal marriage is proved between two parties, the issue of the mother born during wedlock or within a competent time afterwards, are deemed to be legitimate & this presumption is conclusive unless rebutted. those two facts appearing. the onus is thrown upon the party who contests the legitimacy, who is on the negative of the question. Phil. 112. 152.

No other evidence can be received upon the trial of an issue than such as is pertinent to the issue or matter of fact in dispute. any other evidence than this is called in law, irrelevant. i.e inapplicable & therefore inadmissible, for it does not conduce to prove or disprove the matter in dispute. Peak. b. 2 H. Bl. 205.

Hence the character of either party in a civil action cannot be called in question unless it be put in issue by the proceeding itself. The books do not tell us what is meant by putting the character in issue. leaving that to be inferred from the examples, I presume the meaning of the rule to be, that the character cannot be called in question unless the proof of it would conduce to prove or disprove some matter of fact involved in the issue, and when such evidence would thus conduce to it is admissible. the character thus being in issue. B.N.P. 206. 8. Phil. 139. Peak. b.

Thus in an act. for slander. Plff is not at liberty to prove that Defts is reputed a knave - nor in an act. for slander that he is addicted to defamation, because these facts if proved would be perfectly immaterial as they would not conduce to prove the particular fact in issue. - the evidence is irrelevant ibi. anc.

Nor is the Deft in such cases allowed to support his character by proving the contrary. Thus if A sues B in battery. B cannot prove that he is peaceably disposed. nor if sued in slander, could he prove that he is not addicted to slandering, for altho he might be able to prove that, still he might have spoken the words charged

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The evidence then does not in any degree which the law regards, conduce to prove the matter of fact in issue. Bul. N.P. 296. Sw. Ev. 140. Peak. 6. Phil. 139. 2 Bos. & P. 532. n. 3 Cains Rep. 20.

But there are civil cases in which the character of a person may be put in question because the suit itself puts it in issue. Thus in an act. of crim. con. Deft. is permitted in mitigation of damages, to impeach the gent. character of the wife & also to prove particular instances of her incontinency with other persons (at the she is not party to the record) The reason of this diversity is that the Plff. by charging the Defts. with seduction, puts the wifes reputation for chastity as well as her gent. character in issue. & it would be an abuse of language to say that one had reduced a prostitute. 1 Bul. N.P. 296. 1 Selw. N.P. 30. 31. 4 T.R. 657. Gilb. Ev. 113. Phil. 139. Peak. 7. 2 Esp. Ca. 562.

But in the case last mentioned Deft. is not admitted to prove instances of the wifes misconduct subsequent to her incontinency with himself - it would be taking advantage of his own wrong inasmuch as his own previous misconduct might & probably did induce it. 2 Esp. Ca. 562. 1 Selw. 31. Phil. 139.

So also in an action for the breach of marriage promise, Deft. is allowed to impeach the gent. character of Plff for chastity & to prove instances of her lewd & licentious conduct, for the Plff is considered as putting her character & conduct in issue by instituting the action.

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and the evidence is admitted on the same ground that it is in the case of crim. con. 1 Selw. 31. n. 3 Mass. R. 189. 3 Esp. Ca. 236 1 John. Ca. 116.

Indeed in a recent case before our Supr. court in Ken. it was determined that Dfts in an act. for breach &c. was at liberty to impeach the moral character of Plff in any respect, for an abandonment of character not before known might operate in a well regulated, delicate mind to break off the engagement. Welch & Robbins not reported. The Eng rule relates only to the character for chastity, in Ken it extends also to the character for truth &c.

In this class of cases it has been holden when Dft. reduced the Plff. that evidence agst. her gent. character cannot be admitted in reference to the time between the making of the promise & the breach of it. 3 Mass. Rep. 189. also they decided that particular instances of misconduct in delicacy or prostitution might be. In 1 Johns. Ca. 116 this distinction appears to have been overlooked

So also in an act. by a parent or master for seducing his daughter or female servt. per quod servitium amisit, the Dft. may in mitigation of damages impeach the gent. character of the daughter or servt. for chastity or prove her enticed to have been licentious. 1 Root. 472. 3 Wils. 19.

But how it may be entitled can this affect the issue. the gist of the action is the loss of service, to this I answer that altho the loss of service is the gist of the action, still it is not the rule nor the principal

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ground of damages, a loss of service (no matter how small) is truly indispensible, but the real ground of damages is the wounded reputation & affections of the Plff. and the most aggravated damages are often given when the loss of service is merely nominal. Esp. D. 645. 3 Wils. 19. Laws Pl. 67. 8. 11 East. 235. 2 Selw. 1087. 2 Sw. 63. see "Parent & Child"

In an action of slander it is constant practice in Con. to permit Defts in mitigation to impeach the gent character of Plff as to the existence of the fact or species of crime charged by the words laid. as when the charge was of perjury. evidence respecting the Plffs gent character was admitted for Plff set up his character to be good. & the evidence goes to the point of damages. 1 Root. 354 So if the charge were of theft Defts may prove Plffs gent reputation to be that of a thief under gent issue. So on charge of bankruptcy that Plff was generally reputed to be a bankrupt. This question arose in N. York & the court (11 Judges) were equally divided 1 Johns. 46. the question being as to admission of evidence on gent issue as to Plffs gent character. So rule in Eng. like that in Con.

There is a particular instance in the Eng. books, which is a case sui generis, where Plff having laid special damage by loss of friends Defts is at liberty to show that his gent reputation was such that his friends left him, & they show that it was not in consequence of the slander that the desertion took place. — 2 Camp. 251. Phil. 140.

In actions of slander the Plff may give in evidence his rank & condition in life

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for the purpose of aggravating the damages tho I am not apprized of the adoption of this rule in terms in Eng. yet it appears to me to be obviously correct. 3 Mass. R. 551. Phil. 140. n.

And on the other hand Defts may exhibit evidence of the same kind for the purpose of mitigating damages when such proof will tend to mitigate them ibi. auc.

In an act. for malicious prosecution Defts may show Plffs gent. character to be bad by way of shewing probable cause, this action lies if in the origl action there was malice & want of probable cause. and in this particular species of action probable cause is a justification, the gent. reputation of Plff if bad rebuts the presumption of malice & goes in a high degree to prove probable cause. Nor the character is put directly in issue in that respect in which it is attacked. 2 Esp. Ca. 720. Phil. 139.

In criminal cases also when Defts character is put in issue by the prosecution. the prosecutor may attack his character (gen.ly) by proof of particular facts. for otherwise it would be impossible to prove the charge or support the prosecn. Bull N. P. 296. 1 McNy. 324. Peo. 4.

But which, it may be asked are those cases in which Defts character is put in issue, there is no definition or description given in the books by which this question can be answered, from the examples I should think, that a criminal prosecution puts Defts character in issue within the meaning of the rule, when it charges a habit or course of

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criminal conduct as contradistinguished from individual or specific acts. In such cases the prosecutor may attack the gen. character by proof of particular facts not alleged in dect. As where one is indicted under a gen. charge of keeping a bawdy house, not of particular acts of bawdry. it is a charge of a course of criminal conduct which puts the gen. character in issue. So also if one is indicted as being a common barrator, his gen. character is put in issue within the meaning of the rule to support the indictment which is a gen. charge particular instances may be proved. So of the b.L. offence of being a common seold. (an instance of which occurred in Boston a year or two ago.)

But on the other hand an indict. for forgery, theft or swindling does not put the gen. character of Defr. in issue & the prosecutor cannot prove any other instance of theft &c than that alleged or that Defts gen. reputation is that of a thief &c. (the charge being of a specific act,) unless indeed Defr. has first introduced evidence of his gen. reputation (see post)

But there are case of this sort, in which the prosecr. is not allowed to examine as to particular facts, without giving previous notice of them. viz when one is indicted for being a common Barrator. This rule is founded in the presumed difficulty of defending without such notice, as the indictment is most usually aga. lawyers whose legal business it is to carry on suits. B. & P. 296. 1 McNy. 324. Peak. 7.

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But in other criminal cases (i.e. cases in which character of Deft. is not put in issue) the prosecutor cannot examine into Deft's character either in relation to particular acts or his gen'l reputation. unless the Deft. himself commences the enquiry. as when one is charged with theft, forgery &c — this charge does not put the character in issue. B.C.P. 296. 1 McCly. 324. a particular fact merely is put in issue & not the gen'l character, course of conduct or habit of Deft.

And even if Deft has opened the enquiry on his part by exhibiting evidence in favour & support of his character, the prosecutor cannot examine as to particular facts not alleged, but as to the gen'l character only. because it is not to be presumed that Deft. is prepared to meet particular charges not put in issue, without notice. thus if is indicted for theft, to influence the verdict he produces evidence of his character, the prosec'r may then adduce evidence to prove that he has the gen'l reputation of being a thief. but not that he has stolen on any other occasion. and when his character is not put in issue, there is in judg't of law no notice. 1 McCly. 324 B.C.P. 296. Peak. 7. 8. Sw. 101.

And in criminal cases when the Deft's gen'l character is not put in issue by the prosec'r he is indulged in proving his gen'l character good. It is obvious that such evidence no more conduces to prove the issue, than that which is offered in the first instance by the prosecutor to prove Deft's character bad. Upon the strict principles of evidence there is clearly no difference. This indulgence

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this is not founded in principle. but in the benignity of the law to persons charged with crimes. 1 McAry. 320. 322. Phil. 140. Peak. 8. Sw. 141

Thus if one is indicted of theft the prosecutor cannot in the first instance prove that Defts character is that of a dishonest man. but Defts may establish his character for integrity &c. so in indict.ts for forgery. perjury &c

This indulgence was formerly allowed only in favorem vitae but it is now extended to cases not capital or misdemeanors provided the direct object of the prosecution is to punish an offence & not barely to collect a penalty. 1 McAry. 320. 2 B & P. 532. n. Peake 8. Phil. 139

But Defts is not thus indulged in actions for mere penalties inflicted by penal statutes. these actions & informations not being regarded as purely crim.l procedings or direct prosec.ns for crimes. but as suits to collect a sum of money. If the one is prosecuted for a penalty he cannot in gen.l be permitted to prove his gen.l character good but if he were indicted at C.L. for the purpose of punishment. for a similar offence he would receive that indulgence.

M.r Peake says indeed. that this indulgence is extended to prosecutions for those offences only which incur corporal punishment his authority however (2 B & P. 232) does not support him. and I conceive it to be immaterial whether the punishm.t be corporal or not; if the prosec.n is commenced directly for the purpose of punishing the offence. 1 McAry. 320. 1. 2. Phil. 140.

So also on an indictment for a rape, the prisoner may give in evidence that the woman's character for chastity was notoriously bad, and that he had previous illicit intercourse with her. for these facts go to diminish the probability of violence. But he cannot prove her intercourse with other persons particularly, because this would not have the same bearing on the issue. Phil. 140.

Evidence in support of the Deft's character in a crim: prosecution may be particular as well as gen: i.e a witness may not only testify in favour of Deft's gen: character, but he may also assign reasons in the life and conduct of the Deft: for his good opinion, as particular instances of honesty and integrity that have occured within his own knowledge.

But the evidence ag:t the character of Deft: must be gen: only. particular facts cannot be adduced for the reason before given viz. that he is not supposed to be prepared to answer any specific charges of which the prosecution does not give him notice. 1 McNy. 322 to 5. B.N.P. 296.

It may be observed however, that when the evidence of guilt is weak or merely presumptive, such evidence of Deft's character may be very important, yet in opposition to the direct evidence of a credible witness it can have but little effect. It might be of consequence also when the evidence was nearly or quite in equilibrio. Phil. 140. Peak 8. 2 Mass. Rp. 317.

We have now considered the gen. rules relating to the relevancy of evidence.

It is a gen. rule & applicable to all cases that the best evidence which the nature of the case admits must regularly be produced. with holding this & exhibiting evidence of an inferior or secondary sort of fraud presumption that the former would operate agst. the party producing or offering the latter. secondary evidence is therefore not to be admitted when it appears that there is better evidence within the power of the party. 1 McNy. 342. Peak 8. 102. Sw. 157.

Thus if a party wishes to prove the contents of a written instrument in existence & in his custody, the instrument itself must be produced, and it is not competent for him to prove the contents of it either by parol evidence or by copy. he must produce it or fail in his suit. 10 Co. 92. 1 McNy. 356, 360 2 id. 468. Peak. 9. (as to instruments lost or in poss. of adverse party see post)

So also if a deed or other written instrument is attested by a subscribing witness the execution of it can regularly be proved by no other evidence than his, for being selected by the parties his considered the best witness. this comes within the gen. rule requiring the best possible evidence in all cases, (for exceptions see post.) Esp 257. 8. Doug. 205 a 216. 4 East. 53. 2 id. 183. 1 Esp. Ca. 89. Sw. 256. Leach. 6 Ed. 284. 2 East. 183.

But the law does not require that all the evidence which might be obtained should be produced.

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Where the evidence of one of two or more subscribing witnesses may be suffic. to prove the execution of an instrument. Peak. 9. Sw. 27. 8.

In gen. no precise number of witness is necessary at C. L. to establish a fact. the gen. rule is that such evidence as satisfies the trier is suffic. to support any issue. of course an credible witness is in gen. all that the law requires to prove any fact, this rule however is not universal. 1 Inst. 6. Carth. 144. 1 Show. 158. 1 McCly. 16. Phil 107. Sw. 142.

Thus in a prosecution for perjury two witnesses are necessary to a conviction. for if there is but one witness there will be only the oath of one person agt. that of another & at the time of taking the oath in question the person indicted was as competent to testify as this witness and he continues so until convicted. the case is precisely the same as if both had appeared upon the trial of the same cause & contradicted each other so that we have only oath agt. oath. And altho the oath of one witness might be suffic. to satisfy the trier still the law from the danger which might ensue is precautory in requiring two. 4 Bl. 358. 10 Mod. 194. 1 McCly. 37. Phil. 107.

This rule however does not absolutely require that there shall be two witnesses testifying to precisely the same fact. but it means as now understood that there shall be some independant evidence in addition to the testimony of one witness. Phil. 108.

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In high treason also & petit treason & misprision of treason two witnesses are required by sev[l] Eng statutes the first of which is that of 6 Ed. 6. Those statutes however do not extend to every species of treason as debasing the current coin, counterfeiting the Kings signet &c. 4 Bl. 356.7. Fost. Cr. Ca. 240. 244. 1 McNy. 15 to 21. Phil. 84. n. 108. That such was not the rule of the C.L. see 2 Hawk. Pl. C. ch. 25 sec. 129 3 Keb. 68. 1 McNy. 16.31. Phil. 108. L[d] Coke says it is a rule of C.L. 3 Inst. 26. but the weight of auth[y] is ag[t] him. This may be a question of moment in some of the states.

And in case of Treason it is required by Stat 7 W[m] 3. that both witnesses testify to the same overt act or one of them testify to one overt act & the other to another. i.e. that each testify to an overt act, otherwise the prisoner cannot be convicted or put upon emprisonment in open court. 4 Bl. 357. 1 McNy. 21. 34.

Confession by a prisoner of the commission of an overt act proved by two witnesses will warrant a conviction 1 Phil. 845.

But by the constitution of the U States not only two witnesses are required, but both must testify to the same overt act. or there can be no conviction except on confession in open court. Con. art. 3 S. 3.

The rule requiring two witnesses in cases of treason extends only to overtacts of treason. collateral facts i.e. facts not constituting nor tending to prove the acts may be established by one witness like any other fact. thus that the def[t] is a natural born subject. when he lived &c. Fost. C. Ca. 240. 5 St. Tr. 634. 1 McNy. 34. 5. 268.

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and a similar distinction obtains as to the rule of evidence in the case of perjury. collateral facts that do not constitute the perjury we go to prove it may be established by one witness. as the taking of the oath under which the crime is alleged to have been committed. 1 McCry. 27.

It is also a rule in Md. founded on the same principle as that which governs in the case of perjury. that if Defts answer is contradicted by one witness only, the Plff cannot have a decree for the answer being under oath, there is only oath agst. oath. 1 Vern 161. 1 Vez. 66. 95. Pr. Cha. 19. 2 Pow. Con. 216. B. N. P. 285. 3 Atk. 646. 2 Vez. Jun. 243. 9th 282. 3. 7 T. Rep. 667.

But as in our Md. practice the answer is not under oath the rule cannot hold in Md. on principle. I have never known it applied.

And by the stat of Con. no person can be convicted of any capital crime but upon "the testimony of two or three witnesses or that which is equivalent." St. Con. 685. Sec. 142. The last expression "or that which is" is very vague, it is however established in construction, that under this stat. it is not necessary that two witnesses should testify to the same fact or facts, one may testify to one part of the transaction & another to another part, or the testimony of one may be direct & that of the other circumstantial or presumptive, or all may testify to facts immediately by circumstantial and in either of these cases if the testimony be satisfactory & the witnesses credible the

Jury may convict under the statute. —

All testimony in a court of justice is regularly given under oath. & the declarations of a stranger, i.e. one not party to the suit are regularly no evidence unless they are made in court and under oath. Hence even if a Judge or Juror is acquainted with any of the facts in issue, he cannot act from this knowledge unless he is sworn & testifies like any other witness. 1 P. Wms. 146. 2 Mod. 99. Peak. 10.

It follows also from the same gent. principle that hearsay evidence is in gent. inadmissible. By hearsay evidence is meant testimony by one person of what he has heard another say. This is inadmissible for two reasons. 1st. the witness does not testify respecting the fact in question, but to the declarations of another person respecting that fact, not made in court nor under the sanction of an oath. 2° There can be no cross examination as to the fact in issue. the witness has no knowledge of that, it is only the declt. that he testifies to. and this impossibility of cross exam. is objection suffl. to reject evidence generally. Gilb. Ev. 107. Peak. 10-11. Phil. 173. Bul. N. P. 294. 3 T. Rep. 721. 2 East. 27. 54. Sw. 121. Esp. 784. 1 Mod. 283.

The gent. rule as to hearsay evidence admits of exceptions where the fact in question is in its nature or in common presumption incapable of positive & direct proof. as in questions of customs, prescription & pedigree. the exception is matter of necessity. for these facts cannot be expected to be proved otherwise than by common

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reputation. Bul. N.P. 233. 1 McNy. 303. Esp. D. 738. Pea. 11 Sw. 121. 2. Libanee.

Thus on a question of custom or prescription which can be proved only by usage, gen. reputation may be proved by hearsay evidence. E.g. a witness may state he has heard from dead persons respecting the reputation of the right or what was the common belief or opinion respecting it. But not what such persons have said relative to facts shewing the exercise of that right. they may state that they always supposed there was such a right. but what deceased persons have said concerning the existence of it. but not what they have said as to the exercise of it. Peak. 13. 1 T. Rep. 466. 5 ib. 26. 31. 2 Vy. 512 12 East. 62. 14 ib. 327 331.

Hence on a question respecting antient limits or boundaries, a witness may testify what was formerly reputed the limits of the farm or town &c. & what deceased persons have said respecting them But not what such persons said relative to the former existence of a monument, building or wall in such a place for this would be evidence of a particular fact not of gen. reputation. 2 T. Rep. 53. 14 East. 331 n. Phil. 182. 3. Peak. app. 69.

Evidence of reputation is upon the same principle admissible in questions respecting a right of way. Peak. 12. Bul. 295. As are the decls. of deceased strangers. i.e. in relation to the reputed existence of the right but not of any specific exercise of that right such as are cognizable by the senses. Bul. 295.

So also on a question

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whether such a piece of land was formerly part of such an estate, the decl.ns of a dec.d tenant are evidence or to the generally rec.d opinion. 2 Ld Ray. 734. 2 Phil. 182. 2 T. Rep. 53. Pa. 13.

So also the decl.ns of dec.d parishioners, made when no dispute existed may be proved to shew what were reputed to be the parish limits. Peak 13. appx. 33

And it is a rule of daily practice that the decl.ns of dec.d owners of land ascertaining those limits claimed by persons holding under him may always be given in evidence. Decl.ns extending such limits cannot. This rule is founded in the principle that a man's conceptions may be improved against him. it extends to grantors & ancestors in poss.n or while owners. 5 T. Rep. 123.

On questions of pedigree the gen.l rule that hearsay evidence is not admissible is more relaxed than upon any subject whatever. In this case the decl.ns of deceased persons who from their situations would be likely to know the fact in question, may be given in evidence; as facts of this kind can frequently be proved in no other way. Ex. Decl.ns of dec.d parents upon a question of legitimacy, whether a child was born before or during wedlock, i.e whether it was or was not legitimate. Coop. 591. 3 T. Rep. 719. 6 id. 330. Th. Ray. 84. 10 East. 120. B. N. P. 112. 294. Esp. D. 784. 5. Sw. 122. Peak. 11. 12. 182. 3.

But the decl.ns of dec.d relations are admissible in those cases only where they are supposed to have been made without any interest or bias in the person who made them. for if

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he has made a decl^n respecting the pedigree of another, when there was a suit pending or in contemplation of which he is or is expected to be a party, the decl^n cannot be proved. On this subject however there is contrariety of opinion, some saying that such a circumstance would only go to the credibility of the decl^n: the better opinion seems to be that it goes to its competency & will exclude it. Phil. 176 to 179. Vin. ab. "Ev." T. b. 14 East. 331. Comp. 594. 1 Selw. N. P. 684. 3 Campb. 444.

But the decl^ns of parents are not admitted to prove non-access during wedlock, this is forbidden by considerations of morality, decency & policy. by b. L. parents cannot thus bastardize issue born after marriage. Comp. 591. 2. Bul. N. P. 112. Phil. 180 Esp. D. 485. Sev. 123. 8 East. 203. 11 it. 133. "Pan & Ch."

Decl^ns of mere strangers, as of dec^d neighbours, are not admissible in questions of pedigree, for they are not supposed to have the best means of knowledge on the subject. 3 T. Rep. 723. 1 McCly. 312. 13 Vy. Jun^r 147. 514. 14 East. 330.

But it seems that the decl^n of a deceased surgeon as to the time of a birth which he attended in his professional character, may be given in evidence, as may any memorandum made by him, and this evidence may be of great consequence, Phil. 181. 10 East 120. Vin. ab. "ev" T. b. 91.

All the decl^ns of a stranger are not admissible in evidence upon a question of pedigree, yet the general reputation of the neighbourhood or place to which one belongs is ad-

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missible. à fortiori the gen.l reputation of a family (as to the legitimacy of a child) is admissible. Peak. 11.

In all these cases however the decl.ns of a relation cannot be admitted if the party who made the decl.n is living & can be produced in court, he should appear personally. So that in the above exceptions to the gen.l rule relating to hearsay evidence, the decl.ns tho' said to be admissible were presupposed to be dead or in a situation not to be produced in court. 2 Stra. 924. B. & P. 113. 3 Campb. 457 Phil. 176.

But to prove the state of a family as to marriages births & deaths, the question of legitimacy not being involved, the decl.ns of any deceased person likely to know the facts, & the gen.l belief of the family is good evidence, as to the question whom A married, what children he had, whether one died abroad &c. Bul. N.P. 294.5 Esp. D. 738. 785. Peak. 12

As indicia for this purpose a recital in a deed, a special verdict between members of the family stating pedigree, monumental inscriptions, heralds books, family bibles, & entries in other books, as will make an ancestor & cancelled covenants in a bill in Ch.y engravings on rings stinkats & all permanent family memorials are good evidence to prove pedigree. B. & P. 294.5 Esp. D. 738. Phil. 175.6. 11 East 505. 13 Vy. Jun.r 144.

But although hearsay may be good evidence of pedigree it is never evidence of the place of one's births, for that does not present a question of pedigree, but a simple point of locality to be proved of course like any other ordinary fact. 8 East 539. 3 T. Rep. 707. Phil. 180

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1 East. 373. 2 ib. 27. 52. 63.

In some cases a memorandum in writing made at the time of the transaction in question by a disd. person in the ordinary course of his business is with other circumstances admitted in evidence. This is not strictly hearsay evidence as it is drawn from the act rather than the decl.ⁿ of the person making it. Thus a mem. by a clk or agent of goods sold by the principal is good evidence to prove the delivery. Peak 14. Salk 285. 690. Stra. 1129.

But cases of this kind turn so much on their own peculiar circumstances that it is diffᵗ to lay down any gen.ˡ rule respecting them. for examples you may see further. B N.P. 282. 3. Salk. 285. 280.

I would observe by the way that such a mem. is never admitted in evidence of itself unless the person who made it is dead altho he may be abroad & out of the reach of process or sick Phil. 194.5. 1 Esp. Ca. 1. Peak. 15.

But a mem. or book entry made by a party himself is never in itself evidence tho it may be so in connexion with concurring evidence, thus such an entry was admitted to confirm the testimony of a witness who swore he saw the delivery & that he had seen the entry. the mem. here was not evidence of the fact in question but to corroborate the the testimony of the witness. If the entry had not been found his testimony would have been shaken 1 Esp. Ca. 328. Peak. 14. 15.

Shop books are admitted in many of the states as evidence of goods sold & delivered

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or of work & labour, how far they are competent evidence
see Phil. (Dunlaps ed.) 199. note. 2 Mass. Rep. 217. 569.
4 id. 455. Sw. Ev. 81. 2. 1 Day. 164. 1 Dal. 238. 272. 85. 4 id. 153.
1 Binny. 234. 1 Bay. 40. 2 id. 172. 8 Johns. 212. 11 Johns. Rep
246. 12 id. 461.

In criminal cases the rule excluding hearsay evidence appears to be somewhat more strict than in civil, but it may be admitted by way of inducement where it is termed for the purpose of explaining or illustrating that which in itself is proper evidence as well in the former cases as in the latter. As when a prisoner had made some declarations as to the truth of certain reports respecting his guilt a witness in relating his conversation with the prisoner may state what the report was that his testimony may be intelligible to the Jury. 1 McNy. 360. 282. 297. 299. 301. B. N. P. 294.

But there is an important exception to the rule relating to hearsay evidence, in prosecutions for murder or as I presume, for any species of homicide. viz. that the declarations of the deceased made under the apprehension of death in relation to the commission of the offence, as accusing or exculpating some one, are admissible evidence, for this situation is considered as creating a sanction equal to that of an oath. Leach. Cr. Ca. 563. 567. Stra. 499. 1 East P. C. 353. 1 McNy. 381. Sw. 124. Peak. 15. 16.

But declarations thus made by a person legally infamous, as an attainted felon, are not admissible. So did declarations made by a party in extremis are never to be admitted, even tho his oath if he were in a condition to take one, would be rec. in a court of justice, the same

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tion arising from the consciousness of approaching death being only equal to an oath. Leach. 6e. Ca. 308. or 378. 1 Mc Nally. 387. Peak. 16. Sw. 125.

The decl^n of a person mortally wounded but not at the time under the apprehension of death are not admissible, for here the sanction is wanting. Leach. Ca. 6e. 364-97. 563. 1 McNy. 383. 5.

It is not necessary however for the purpose of making such decl^n admissible, that the party making the decl^n should actually have expressed any apprehension of approaching death. If it can be implied or collected from the circumstances of the case, that he was under such an apprehension, they are evidence. 1 East. P. C. 353. Leach. C.C. 563. 1 McNy. 383-5. Sw. 124.

It seems then that the question whether such apprehension did exist or not must in the first instance be decided by the court, for the purpose of deciding whether the decl^n are admissible. If they are not admitted this decision is conclusive, but if they are, the question is still open to the jury notwithstanding the opinion of the court & if they are finally of opinion that the party was not under the apprehension of death they are not to regard the evidence at all. Lea. C.C. 563. 364. 397. 1 McNy. 383. 6. Sw. 125.

This is analogous to the case of one declaring upon an inst. lost or destroyed. he cannot prove by secondary evidence the contents of the instrument until he has satisfied the court that the inst. is actually lost or destroyed. & after the secondary evidence is admitted if the jury are satisfied that the inst. is not lost or destroyed they must not regard this

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secondary evidence at all. It seems then that in these cases the competency as well as the credibility of the evidence is to be determined by the Jury in the usual.

The dying decl^ns of a person decd. are under the same limitations admitted in civil cases. Thus upon a question as to the genuineness of a mans last will, the decl^n of a witness made on his death bed, that the testator had made a former will but that he had destroyed it & purged the one in question, were admitted. 3 Burr. 1244. & 1255. 6 East. 188 1 McCly. 386. Sw. 125.

So also what a decd. person has sworn before on a trial between the same parties may always be proved. (seem if the parties are diff^t.) so if the present parties claim under the orig^l parties. whether the cause of act^n is the same or diff^t is immaterial. The evidence in this case is under oath & the parties came cross examine. 1 McCly. 283. 5 T. Rep. 373. Sw. 125. Fost. C.C. 337. 2 Hawk 605. Peak 60. Kirb. 259. see Phil. 199.

And what an absconding witness has sworn in a court of enquiry may be proved ag^t the prisoner if it appear that he procured the witness to abscond for it is the prisoners own fault that the witness is not then in person. 2 Hawk. 605. 1 McCly. 285. 6 Kirb. 55. 1 East. 353. 1 Root. 76

What one of the parties to a suit has said in relation to the matter in issue may always be proved ag^st him by the other, a persons confession being always good evidence ag^st himself 7 T. Rep. 663. Peak 16. Phil. 71.

Such confession by a party however

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is not conclusion agst. him. for he may prove that the statement he made was incorrect, whether it was made so by design or mistake, it does not operate like a record between the parties for I presume, it may be disproved like any other evidence, 1 Bos & Pul. 49. 10 Mass. Rep. 39. Phil. 74. 78 to 80. 7 Mass. R. 297.

But when the conduct of a party is thus to be proved, all that he said on the subject at the same time is to be given in evidence that the same conduct by itself. But he is not entitled to the benefit of any qualifying decln. he may have made at a diffr. time for this would be making evidence for himself. 1 East 462. 3 Campb. 215. 1 ib. 439. Phil. 79. 80. Vin. ab. "ev." a. b. 23.

And a party is never allowed to introduce his own declns as evidence for himself except when they constitute a part of the res gesta, or matter of fact or transaction in issue. or when they accompany an act of his own. Thus the terms of a parol contract, may be explained & better understood from the various declns used at the time by the parties, which enter into the very essence of the contract.

Suppose the question is on which oblign. a tender was made. the debtor may prove that he said at the time, that he intended the money to apply on obn. No 1. but if he made no such decln. at the time, a subsequt. decln. that he intended it should apply on that obn. will not avail him.

So when one said with sword or cane in hand, if it were not assize time I would strike, so in action for battery. Defr. may give in evidence to mitigate damages that he said at the time, it was

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an accident, when this dect accompanied the act. but not if it were subsequent. 6 East. 188. 1 Johns. 59. 1 Mod. 3. Esp. D. 312. 1 McNy. 373. 5. 7. 1 Bank. 133.

The same rule applies as well to criminal as to civil cases. The dect accompanying the act may be proved, but will not always avail. Thus a man may commit robbery & use only the language of a beggar. To this language he is at liberty to prove on the trial but the acts of violence accompanying the language may prevent the jury from considering in his sincerity, as pursuing a weapon which occasions fear.

And there is a case in which what a party or his wife has sworn in a former trial may be proved in his own favour. Thus in an act for a malicious prosect Defd may prove what he or his wife swore on the orgl trial i.e of the criml prosect instituted by him. This rule is founded in public policy & private justice. most prosecutions are commenced on the information of an individual. there might be no other witness. If this evidence were not admitted the present Defd would be wholly unprotected. the prosecr must of course appear groundless to be sure, because the jury did not believe him. His deposition is now admitted & the credibility of it is submitted to the jury with the other evidence 6 Mod. 216. Ball. N. P. 14. Esp. D. 534. 536.

So also the conversation out of court of the party really interested. tho not a party on record, may be given in evidence agst the party who represents him. Thus if a suit is brot on a bond executed to pay money to B. the conversation of B out of court that the money had been paid to him is as good as if it were made by A who is the nom

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conduct pipe. instrument or agent of B. 11 East 578. 589. 1 Wils. 257. 3 Campb. 465. 10 East 395.

And what has been asserted by a stranger in a party's presence agt. his interest but contradicted by him is evidence for it may construed, as the case may be, into a silent confession. this is not a confession but it is good evidence to go to the jury who can make what use of it they please. Peak. 16. Ser 127. 129.

But the decl.ns of a stranger or even of the partys servt. child or wife in the partys absence are regularly not evidence agt. him as in case of a contract or tort. the wife should confess in her husbands absence that he was guilty or indebted. V Stra. 1094. 6 T. Rep. 680 as of a wifes acknowledgement of having rec.d wages earned by herself. V Stra. 1090. Willes 577.

So in an act.n by husb.d & wife in behalf of the wife as Ex.x her confession after marriage will not be admitted for during the coverture her right to act as ex.x is suspended 6 T. Rep. 688

So in crim. cas. no decl.n of the wife will affect the husband. the injury is his other action is for his benefit & she cannot throw away his right by her confessions. Willes 577. So says Mr. G. Ser however Phil. 203. 4. when it is said. decl.n of wife at time of elopem.t as to the reason of her eloping. as that she fled from immediate fear of pers.l violence would be admissible. the decl.n respecting a collateral matter that happened at another time would not be. And in a case where defence was Plffs connivance. evidence was rec.d. on part of plff of the wifes decl.n as to her intention & purpose in going. the question being in effect whether the husb.d knew she was about to elope or whether he believed her in-

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tuition was as she supposed. 6 East. 193. 3 Esp. N.P. C. 276. Selw. N.P. 29.

So in an action to which an aggregate corporation is a party the confession of an individual member of the corporation is no evidence & cannot be proved, for an individual in such case are not regarded at all, the corporation is the only object of the law. Phil. Ed. n. 3 Day. 493 not bring made in the course of any corporate duty.

But in transactions usually regulated by usage, if the wife make a contract with the husband's authority, her declarations may be proved as evidence against him. Thus when an act. was brot. for nursing a child evidence of the wife's declarations that a contract was made to pay a certain weekly sum was admitted. The words of this rule appear to be quite general and rather too much so for I know of no other instances of the kind. Stra. 527. 1 Esp. Ca. 142 Esp. Dig. 721.

The declarations or admissions of a servt. or agent, if made at the time of transacting his principal's business & in relation to it are evidence agst. him. they are regarded as part of the res gestæ. Thus the delivery of a deed to a third person by a servt. as an escrow. the declarations of the servt. at the time of delivery are good evidence. So if a servt. sell goods & speak of the defects of an article at the time of purchase his declarations might be evidence agst. the master in an act. for damages. 3 T. Rep. 455. 2 Mc Cly. 620. 626. Phil. 71-4 10 Veg. Jun. 127.

But the acknowledgments of a servant or agent made after the transaction to which it relates is no evidence agst. the principal, for they do not form part

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of the res gestæ. but stand. like all other hearsay evidence
3 T. Rep. 665. 668. Phil. 75. 77. 8 Esp. Ca. 74. 135. 2 id. 511. 2 Campb.
555. 10 Vy. Jun. 127. Sw. 127

The same distinction obtains as to the decl. of an interpreter between two parties and for the same reason.
11 Gt. Tr. 171. Phil. 77. he is the accredited agent of the parties.

The decl. of a bankrupt as to his motive for absconding. if made at the time of absconding. are evidence in an act. brot. by the assignees, to prove the act of bankruptcy. for they are a part of the res gestæ. 5 T. Rep. 512.

But to the gen. rule that the decl. of third persons are not evidence unless made at the time; there is one exception, viz in case of an insurance effected by the husb. on the life of his wife. how the subsq. decl. of the wife as to the ill state of health at the time of the policy effected is evidence agst. the husband. this is a case sui generis standing on its own peculiar reasons. for frequently the existence & even the nature of bodily complaints cannot be known but by the decl. of the subject of them. 6 East. 188. Skin. 402. Phil. 181.

Upon the same principle in prosec. either civil or crimt. for an battery or personal violence of any kind. the decl. of the party injured respecting the bodily pain occasioned by it. whether made at the time of the act or not. if made during the suffering are admissible evidence. & this even in an action brot. by the party himself. for it ascertains what the most skilful surgeon. not so the rule appears indispensable. and if it be proved that they were made for the purpose of being given in evidence

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on the trial they are admissible – the jury are to judge of their credibility. 1 Root. 80 Sw. 130

When a party to a suit represents or stands in the place of another person, the confession of the latter are evidence agst. such repr. Ex. confessions of Testator are evidence agst. Ex. – So are ancestor agst. his heir, when coming in and as heir Sw. 128. For are the confessions of Testator &c would have been evidence agst. himself, if living, they ought to be such agst. his representatives.

So also in an action agst. a Shff. for an escape on mesne process the confession of the escapee that he owed the Plff such a debt is evidence agst. the Shff, (this can ordinarily be no kind of such evidence in case of final process) For you will observe that in an act. agst. Shff. Plff must prove that the escapee owed him, & he should not be deprived of his evidence for this purpose by the wrong act of the Shff. 4 T Rep. 436. Peak. Ca. 65

The rule is the same when an action is brot. agst. Shff. by Plff in a process for a false return. Thus Adams vs in act. Shff returns non est inventus, by which Plff is defeated of his action, an act. lies agst. the Shff, & the question is has Plff sustained any damage – to prove insolvency Defts confessions are admitted altho he is no party to the suit Peak. Ca. 65. 1 Esp. Dig. 169. 4 T. Rep 436.

And if in the case of escape above stated, the escape were suffered by an under Shff, his confession of the fact of escape would be evidence agst. the Shff. 2 Ca. Kay. 190. Peak. 17. 18. Sw. 128. The reason is that as to breaches of official duty the under Shff stands

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in his place, and so far as respects civil liability may be said to represent him. By the latest authorities however the evidence in this case is limited to confessions made at the time of the escape & not extended to those made after.
1 Campb. 391. n. 389. Peak. 60. 65. 10 Johns. 478. Phil. 76.

In an action by the assignees of a bankrupt. his acknowledgt. (upon the act of bankruptcy) that he was indebted to the petitioning creditor, is good evidence in support of the commission, since his confession would have been good evidence to obtain the commission, & the assignees represent him. 1 Esp. Ca. 168 Peak. R. 65.

Upon the same principle, in a scire facias ag.t a garnishee, he may prove a declr. of the absconding debtor that garnishee owed him nothing. Foreign attachment is regulated in Eng. by custom & in the various US. by Stat. Sw. 128.

So where a party to a suit claims a prior lien by virtue of another title, the declr. of the latter, as to the title are evidence ag.t the party on record. for by his declr. he is his repr. Sw. 129.

It is a gen.l rule that where there are several defts. to a suit the declr. of one will be evidence ag.t himself only, & not ag.t his co.defts, for one man cannot confess the rights of another Keyl. 18. B. N. P. 243. 1 McNy. 40. 269.

Hence in an action ag.t one of two joint & several obligors, the confession of the other is not admissible to prove the execution of the contract or instrument his confession will not prove the transaction out of which the liability arises. Kirb. 62. 174. 203.

But there is an exception to this rule in the case of partners in trade, if one is sued alone for a company debt & he does not stop the action by a plea of non joinder in abatement, but suffers the action to go down to trial on the merits. the confession of the other partner tho not a party on record may be given in evidence the partnership having previously been proved. for each copartner is the agent for both & the act of either is the act of both of course the acknowledgt. of either operates agt. both. Peak. Ca. 16. 203. Chit. B. 209. Gilb. ev. 57. Phil. 72.3. 11 East. 589. 1 Esp. Ca. 169. n.

And this rule has been carried so far as to allow the acknowledgt. of one partner, tho not sued himself, to be given in evidence agt. the other, tho it was made after the dissolution of the partnership. Phil. 73. 1 Taunton. 104. Contra 3 Johns 536.

This I think is carrying the rule very far. the ground I take to be that, even after the dissolution of the joint partnership, as to all previous contracts the partnership still remains.

Tho the confession of one of two joint & several obligors, not being partners, is not evidence in an action agt. the other to prove the contract, yet the contract being established. such confession may be proved agt. the other to take the case out of the stat. or for any other purpose except to prove the execution of the note &c. For in this case, they are quoad hoc partners besides in legal effect that confession is not strictly a declt., but a fact or act that has the effect of a new promise or a ratification of the old one, this I take to be the principle. 3 Day. 309. Doug. 629. & 652. Whitcomb & Whiting Peak. Ca. 15. 203. Phil. 72.3. 6 Johns. 267.

This rule however does not hold of prosecutions for crimes or torts & it is not in terms predicable of either. The confession of one does not prove the other guilty, if it were admitted it would be permitting one to subject another for his own wrong. & therefore it is wholly inadmissible.

But how it is to be particularly noted, that in the case of an illegal combination. the combination being proved, the decls of one made at the time of doing the illegal act. as to the motive of doing it, are evidence agst himself & the others also. as in case of a riot, where the combin.n is established an union or concert of plan is established & a decl.n made at the time is part of the res gesta. it is the voice of all the declarers by one & will be evidence agst all unless the others oppose it at the time. But a decl.n made afterwards is not evidence agst any except the maker. 6 T. Rep. 527. Phil. 734

If one of two Defts in an act.n suffers a default & the other pleads to issue, the decl.n of the former may be proved on the trial of the issue for the purpose of shewing the amount of damages, for the verdict ascertains the damages agst both, the default is a mere confession of guilt. If both are subjected there can be but one assessment of damages. so that this is the only way in which Plff can avail himself of the confession even agst the confessor himself. Phil. 18. 2 Hawk 604. 1 McCay. 42. 361. Phil. 71. 81. Peak. 19. 2 Sw. 390.

And it now seems to be settled, that proof of Defts confession uncorroborated by any other evidence whatever, may warrant the jury in finding him guilty even of a capital offence. Alias cases. 1 McCay. 51. 273.

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Fost. C. L. 243. Leach. C. C. 319. Sec. 131.

But a confession out of court elicited by torture or violence of any kind, or by threats or inducement by promises of pardon or favour is not admissible in any case. for this would be putting the prisoner at the mercy of the wicked, designing & artful. 2 Hale. P. C. 280. 2 Hawk. 204. 211. 1 Mc Nally. 42-4 Leach. 122. 126 248. (Kyk. (contra) 18. overruled)

And hence a confession made by a prisoner out of court in expectation of being admitted as a witness for the King or public is not admissible evidence. To allow such evidence would be exposing prisrs to extreme temptation. they might lie to avoid the danger of a trial. Indeed the humanity of the law will not allow evidence to be admitted in such cases, which has been procured by promises flattering or violence. Leach. 636.

On the other hand. the discovery of a material fact resulting from a confession thus made is good evidence. altho the confession & discovery were obtained by fraud flattery or violence so that the confession itself could not be admitted. Thus if one charged with theft is induced by fear or flattery to confess his guilt & tell where the stolen goods are. if they should be found there, the discovery & consequent finding would be good and admissible evidence agt him. 1 Mc Nally. 47. 8. Peak 20 Leach. C. C. 299. 301.

I have observed to you that the confessions of a party may always be proved agt himself. but there is a distinction to be observed between the confession of a party

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and an offer of a compromise made by him. for this cannot
be given in evidence agst. him. for if a man is threatened with
a suit for $100. he perhaps would prefer paying $20. than costs
& expence even if he was certain of recovering. he would offer
it to avoid the hazard & trouble of a suit. L^d Mansfield says
"a man must be permitted to buy his peace without prejudice
"to his cause." such offer is no evidence of liability. it is irrele-
vant. 1 Esp. Ca. 143. Ch. Bldy. 208. B.N.P. 236. Phil. 78. 9. Peak
18. Sw. 126.

But the confession of a material fact during a treaty for
a compromise is evidence agst. the party making it. Peak.
19. 1 Esp. Ca. 143. 2 ib. 475. 3 ib. 113. Peak. Ca. 5 Bull. N.P. 236

In some cases the acts of a party amount to an admission
which is conclusive upon him, which he cannot retract nor contra-
dict. Thus if one acts as an innkeeper & is sued as proceeding as such
he cannot deny that he was lawfully an innkeeper; for as he
holds himself out in that character: to avail himself of the
benefit of it, he cannot avoid its duties. otherwise individ-
uals might be defrauded. So whatever character or manner may
appear. 3 T. Rep. 635. or if. Peak. 20. Sw. 129.

So if a man lives
with a woman as his wife, when she is not so. she may bind
him by contracts as a lawful wife may do. his acts amount-
ing to an admission that she is his lawful wife. Peak. 20
2 Esp. Ca. 637. Sw. 129. "Husb & Wife."

So also in some cases if one per-
son treats with another as holding a particular situation
& they arrives a benefit to himself, he is not permitted after-
wards to deny the fact. E.g. A. rents glebe lands of B the in-

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cumbent. In an action for use & occupation, he was not allowed to dispute B's title by proof of Livery. Peak. 21. 5 T. Rep. 4. 3 ch. 632. 1 ibs. 761. n. 2 ch. Rep. 260.

All evidence may be considered as direct or presumptive. Direct evidence goes immediately to prove the point in issue.

Presumption in law, is an inference from certain facts proved or admitted, of the existence of some other fact or facts. presumptive evidence then is that which considers to prove consequentially, the particular facts by directly proving some other.

Thus if one a charge of theft one says he saw A clandestinely take the goods of B. this is direct evidence, but if that he saw A in poss.n of the goods that were stolen it is presumptive strong the answers A. but does not decide the issue. i.e it may be submitted. 1 Mass. Rep. 6. Pea. 156. Prak. 21. Any presumption of fact is always liable to be disproved. Peak. 21.

Long undisputed enjoyment or poss.n of any right a prop.r affords a presumption that it had a legal foundation, and in such case even the existence of records may be presumed. The facts to be presumed is submitted under the direction of the court to the Jury. This rule of evidence is of great consequence. L.d Mansfield says that the court will direct the Jury to presume any thing & every thing for quieting the title enjoyed for a great length of time, even tho the cannot believe that there really was any legal commencement of poss.n Thus in a question as to the right to collect port duties

a charter for the crown was presumed by direction of the b.. & affirmed in B.R. We have had very strong cases in Ken. In this county, a deed & record was presumed to have existed & been lost. tho the records before & after the time were in existence. In et. H.Co the whole course of proceedings are an interstate, state in a court of probate was presumed. 12 Co. 5. Coup. 103. 216. 217. 1 T. Rep. 399 Esp. D. 636 3 Mass. Rep 399. Peak. 212. Bush & Bradley et. H. Co. Churchil & Warren Middx. Co.

This rule is founded in principle & has for its object the quieting of titles under poss.. of long standing. Thus is a case where the court directed the Jury to presume a convt. deed to have been exec.. by a tenant in tail. 3 T. Rep. 159. 2 Burr. 1065. So when one joint tenant had been in exclusive poss.. for 36 yrs. the court directed the jury to presume an actual ouster that the stat. might run. Coup. 217.

And not only ordinary facts, but deeds, wears, rebuilds, advertisements in newspapers or any other species of facts that can be mentioned which is necessary to consummate a titling be presumed. 3 T. Rep. Mass. 399.

And it seems that an undisturbed poss.. & enjoyment for 20 yrs. in Eng. or 15 in Ken. may in analogy to the Stat of Limt. be left to the jury as a ground of presumption. to hold dum (abiter) in case for obstructing lights of 20 yrs. enjoyment. Esp. 636.

On the same principle when a bond has lain dormant for 20 yrs. without pay.. of princ.. or int. & without suit. the court will direct the

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the Law to presume payt. unless indeed the obligee can acct. for the delay by absence disability. or theft. previous insolvency or by proof of a recognition of the debt within the time.

And now the rule is laid down in more indefinite language for 18 or 20 yrs. In Eqr. the rule cannot apply for we have a Stat. of Limn. applying to Eqy. 1 Bl. Rep. 532 3 P. Wms. 395-7. 8 Mod. 278. Bun. 434. 1963. 1 T. Rep. 270. Peak 24. Ld. 138. Comp. 216. This lapse of time throws the onus on Plff. Stra. 826. L.d Ray 1370.

And an indor. semble by the obligee if made before the time when the presumption might have arisen. is good evidence such payt. Although good evidence to rebut the presumption of full payt. Peak. 24.n 2 Stra. 826. L.d Ray. 1370. 3 Bro P. C. 535. Seems if made after that time. Peak 25.n Stra. 827.

If a Credr. entitled to a debt payable by instalments, gives a Nott. for one instalment, it furnishes strong presumption that the preceding instalments have been paid. — So is the rule as to payt. of rent. Peak 24. 3 Bl. 371. Comp. 103. 1 T. Rep. 399.

And mere length of time short of the period prescribed by the Stat. of limitations (in cases to wh. the Stat. extends) is not a sufft. ground for presuming the extinguishment of a right. Comp. 214. Peak 24.n.

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Evidence is of two kinds. I. Written. II. Unwritten or parol.

Written evidence is divided into three kinds. 1st Records. 2d Public writings a documents which are not records. 3d Private writings. Pea. 26. Sw. Ev. 1.

A Record is a written memorial of the laws of the State or Nation, or a precident of justice according to the laws & customs of the State. Hence the written memorials of the acts of the Legislature & of judgts. & judicial procedings of courts of record are denominated RECORDS. as the Parliament Rolls &c. Gilb. 7. 48. Bull. N.P. 235. 221. Peak. 52. Sw. 2.

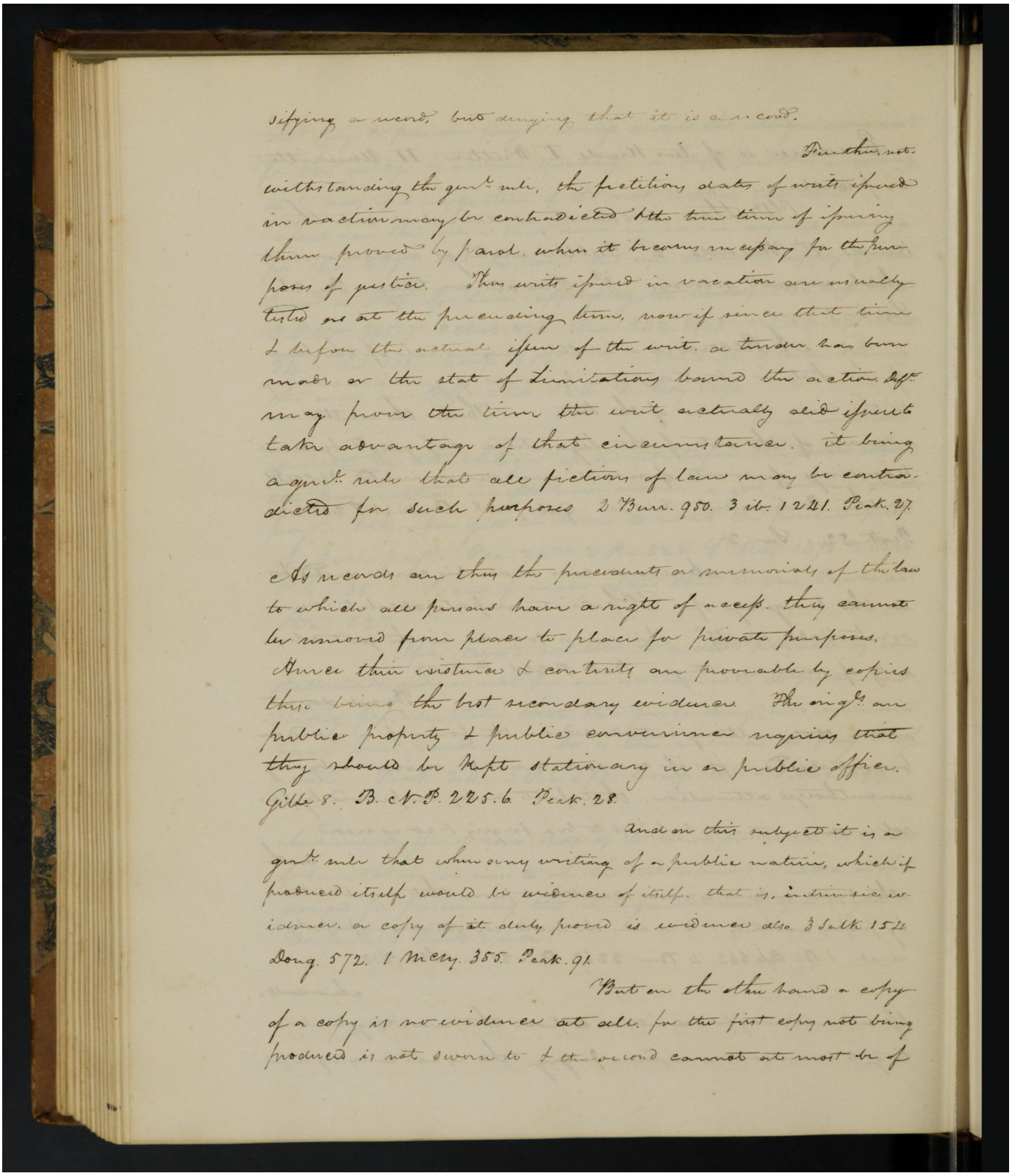
A record can never be contradicted. for in the language of L.d Coke "it imports absolute & uncontrollable verity." This rule is founded in the great solemnity of such writings. Bul. N.P. 221. Peak. 27.

The rule does not mean that nothing introduced in the form of a record can be contradicted. for if a record is made erroneous by any unauthorized alteration. that fact may be proved by parol evidence. it may be proved to be a forgery & so no record.

On the other hand evidence is never admitted to prove that an alteration by proper authority & to make the record correct was improperly made. 1 Bl. Rep. 662. 2 Burr. 2667. Pea. 38. n. 1 Stra. 210

And doubtless evidence may be admitted to prove that a writing importing to be a record is a mere forgery. this is not denying or fal-

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sifying a record, but denying that it is a record.

Further not-
withstanding the gen.l rule, the petition, date of writs issued
in vacation may be contradicted & the true time of issuing
them proved by parol, when it becomes necessary for the pur-
poses of justice. The writs issued in vacation are usually
tested as of the preceding term, now if since that time
& before the actual issue of the writ, a treason has been
made or the statute of limitations barred the action, def.t
may prove the time the writ actually did issue & to
take advantage of that circumstance. it being
a gen.l rule that all fictions of law may be contra-
dicted for such purposes 2 Burr. 950. 3 ib. 1241. Peak. 27.

As records are then the precedents or memorials of the law
to which all persons have a right of access. they cannot
be removed from place to place for private purposes.
Hence their existence & contents are provable by copies
these being the best secondary evidence. The orig.ls are
public property & public convenience requires that
they should be kept stationary in a public office.
Gilb. 8. B. N. P. 225. b. Peak. 28.

And on this subject it is a
gen.l rule that when any writing of a public nature, which if
produced itself would be evidence of itself, that is, intrinsic ev-
idence, a copy of it duly proved is evidence also. 3 Salk. 154.
Doug. 572. 1 McNy. 355. Peak. 91.

But on the other hand a copy
of a copy is no evidence at all. for the first copy not being
produced is not sworn to & the second cannot at most be of

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higher credit than the first. 2 La Ray. 154. 1 McCay. 356. 3 Salk. 154.

The public acts of the Legislature require no proof of any kind for being the laws of the land they are supposed to be known by all persons in the community & especially by the judges who are bound to notice them ex officio. The printed statute book is not evidence, but is used merely to aid the memory of those who read & those who hear. As to the acts of foreign Legislatures the rule is diff.t Gilb. 10. B. & P. 222. 5. Pea. 267.n Sw. 2.

But private stats. not being a branch of the gen.l law of the land are not supposed to be known to the public nor even to the courts. hence they are to be proved as facts like other records which relate to private rights i.e. by copy. They are to be proved as wills & deeds or wills. Gilb. 12. 13. Dy. 239. 10 Mod. 126. B. & P. 222. Peak. 27.

And the printed stat. book is no evidence of private stats. printed in it. (one holden contra by Lt. J. Parker. Gilb. 13. 2 La Ray 472 since deemed to be law) for it is no more than a private unauthenticated copy. not verified by oath or any official sanction. Peak. 27. B. & P. 225.

But if the Legislature declares that a statute in its nature private, shall be deemed public, the stat book is suff.t evidence of it: or rather there is no need of proof. the judges being bound to notice it officially as a gen.l law. Peak. 27. n.

I would repeat that as records are not removable, they must be proved by copies. Pea. 28. 96. Sw. 2. The copies of the records of the Legislature are to be certified by the Sec.y of State. as in case of a private stat. The records of the courts of justice. by the

proper officer of those courts. as by the Clerk or Prothonotary if there is one. if not by the Judge himself. In both cases the copy is to be authenticated by the seal of the court if there be one. (as justices of peace having no clk. nor seal, sign the the certificate or record themselves. without seal) And courts are presumed to know the seals of the Legislatures: & of the sev.l courts of all the states in the Union. however the fact may be. Sw. Ev. 7. 7 H. U. S. 153. For analogous rules in Eng. Gilb. 19. 1 Sid. 146 7 Pea. 30. 31.

Copies of records under seal are called exemplifications. and it is a rule of L.L. that seals of public credit are full evidence in & of themselves without oath or other authentication. If they were not courts would have to resort to a lower species of evidence. A Ct. of justice speaks only by its record & the genuineness of that record can appear only by the seal. which is the established organ or symbol by which our courts certify to another. 10 Mod. 125. b. Gilb. 19. 7 Low. 411. a. Hard. 118. 19. 1 Sid. 146

As to the manner of certifying records from one of the U.S. states to another, the Stat of the U.S. directs. that if an exemplification be attested by a clerk of a court, it must be evidence in another state, be accompanied with a certificate of the Chief or presiding justice. the gov.r sec.d. of state or Chancellor. that the attestation is in due form and made by the proper off.rs 7 St. U.S. 153

By the same law copies of records or office books as they are called. kept in an office not appertaining to a court of justice. as Town or County records of lands &c. are to be attested by the keeper of the office. under seal of office if

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thus be one and certified by the presiding judge of the court of the County, or by the Governor, Chancr or Secy of State, that the attestation is in due form & by the proper offr.

Copies of the records of courts of justice are of four kinds. (usually divided into three) 1st Exemplifications under the great seal. (Kept by the Ld Chr in Engd) Under our laws copies are not exemplified by the great seal. 2d Exemplifications under the seal of the court to which the record belongs. 3d Officer copies. i.e. copies certified by the attestation of an offr appointed for that purpose, but not under seal & 4th Sworn copies. that are copies compared with the originl by a witness sworn to in court by him. Gilb. 21. 2. Peak. 28. 9. B. N. P. 228

Copies under the great seal are themselves deemed records, not copies, from their great solemnity. and thus in Engd are the only admissible evidence of the existence of a record upon plea of nul tiel record pleaded in a court of equal or inferior jurisdiction to the one whose record is in question. if of superior jurisdiction the record & proceedings may be removed by certiorari. for other purposes other copies may be suppld 2 Show. 411. a. Gilb. 14. 19. Yard. 118. Peak. 28. 9. Sw. 2.

Exemplifications under the great seal, as to records of courts, being unknown here, those certified by the seal of the courts are the highest evidence in our courts. and are regularly the only admissible evidence on an issue of nul tiel record. This rule applies however, you will perceive only to those cases in which the existence of a record is in question in another court than that to which the record belongs. Sw. 2. B. N. P. 226. Pla. 29. 30.

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For if a record of the same court in which the issue of nul tiel record is joined, is denied, the court will inspect the origl. so there is no need of a copy: the existence is in the hands of the court. Hence the replication affirming the existence of the record makes no profert of exemplification, but prays the court to inspect the record. Peak. 29.

An issue of nul tiel record always concludes to the court, for it involves matter of law which the jury are incapable to determine. Lawes. Pl. Appx.

But when a record is only matter of inducement to an action or defence, nul tiel &c. cannot be pleaded to it. for matter of inducement is not issuable. B. N. P. 230. Gilb. 26. 1 Sid. 145. 6. Laws 46. Sec. 2. 4 Bac. 68. 81.

In such cases the issue being tried by the Jury, the existence of the existence of the record is to be submitted to them, & a sworn copy as well as an exemplification is admissible. Bull. 230 Peak. 29. Sec. 2. Gilb. 26. 2 East. 473.

In debt on judgt. nul tiel &c is the genl. issue & it puts the existence of the record directly in question & no evidence is admitted but an exemplification under the great seal in Eng. or the record itself produced for inspection, or an exemplx. under the seal of that court whose record is in question: in U.S.

Suppose defdt. in detinue pleads genl. issue, which in Eng is "not guilty" in Con. "no wrong nor disseisin" and claims under a judgt. of court. Now the record is mere matter of inducement for the matter is the gist of the action, and a sworn copy is here

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good evidence.

But a copy of a sworn copy is no evidence at all either to the Jury or Court. however it may be authenticated. for the reasons before given. Peak. 29.

Office copies are grantable only by an officer appointed by law for that purpose. A copy thus granted is in itself evidence, & is, of course, rec'd without any collateral proof. as by a Town Clk. no proof that he certified it, rec'd. Gilb. 23. Plow. 110 B.N.P. 229. Peak. 31 to 3.

But a copy certified by an off.r not entrusted by the law to certify it, is of no credit. that is it does not prove itself. Of course is no evidence unless examined & sworn to when it be come a sworn copy Gilb. 23. 4. 6. B.N.P. 229.

But tho a record is in gen.l provable only by a copy of some kind, yet if it can be clearly proved that a record once existing has been destroyed or lost and that without the fault of the party claiming under it, inferior evidence of its contents is admissible especially when the record is only inducement. for to produce a copy is impossible thereon parol evidence is admissible. Gilb. 22. 1 Vent. 257. 1 Mod. 117. Salk 285. B.N.P. 328. Peak. 29. 4 and. 323.

And in such cases a copy if there be one tho not exemplified nor sworn to be true is admissible. it being proved by some kind of evidence to be substantially a copy of the contents of a record. This is allowed from the necessity of the case. ib. anc. Phil. 291

But this inferior species of evidence is regularly admitted in those cases only in which antient records or

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thon of long standing are lost. Peak. 30. Gil. 22.3. 1 Mod. 117.

For if a recent record is lost & its contents can be ascertained, the court will permit one to be made de novo. 2 Burr. 722. 1 Mod. 117. Gilb. 22.3. Peak. 30. Phil. 292. Cairns 496.

Generally, an exemplification or copy of a record must, to be admissible evidence be of the whole & not of any part exclusively - For a detached part may have a construction different quite diffr. from the genl. import of the whole. (Gilb. 17. 23.) and the rule is the same as to copies of other instruments as deeds, wills &c. 3 Inst. 173. B. N. P. 227. 8. Phil. 290.

For & agt. whom a Record in a civil suit is evidence.

In genl. a verdict or judgt. in a civil suit is evidence only as between the parties to it & their privies. thus a verdict between A & B is no evidence between B & C. Peak. 36. 864. B. N. P. 232. Carth. 225. 7 T. R. 112. 1 McNy. 624. Ray. 730. Hard. 462. Phil. 222.

Privity as recognised by the law exists in four cases, 1st. Privity in blood. as between ancestor & heir at law. 1 Inst. 352. 2 East. 353. 2d Privity in estate as between feoffor & feoffee. lessor & lessee. jt tenants. - coparceners. (1 Inst. 169a) diffr. remainder men by the same deed. - Particular tent & remainder man &c. 1 Inst. 352. B. N. P. 232. Gilb. 81. 10 Co. 92 3 Co. 23. Peak. 29. 30. 1 Inst. 267.

3d. Privity in law as between Lr & Tenant (sometimes called privity in tenure) 4 Co. 24a. Wife & Tent by the curtesy - Husband & tent in dower. 1 Inst. 352.

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3 East. 353.

2dly. Privity in representation or between Testator & Exr. – Intestate & admr. 2 Co. 123. 2.

Thus if there were a record between A & B containing title. B should sell to C. this record would be good evidence in a dispute between A & C respecting the land. So if B had leased to C. or C held as heir to B. – or as tent. in dower or by the curtesy. &c. In all these cases the record has the same use & effect as it would have had in a subsequent action between the orig. parties.

The next inquiry is as to the effect of such record when so admitted as evidence.

It is an established rule, that a judgt. of a court having competent jurisdiction, directly on the question, is conclusive evidence for and against the parties and their privies. Thus if A sues B in debt on bond & B defeats him – and afterwards A sues again B may plead the former judgt. in bar. So if A's Exr. sues the second time. 6. Co. 7. 2 Bl. R. 827. Cro. E. 668. 2 Vent. 169. 1 Lev. 235. Amb. 761. Peak. 34 to 6. 4 Burr. 116. Sw. 9. Phil. 223.

Hence if final judgt. has been given in a suit, it can be impeached or called in question only "in due course of law" as by writ of error, appeal, bill in Ch. directly praying relief or in Com. by a petition for a new trial which is a manner unknown to C.L. for by C.L. no new trial is granted after final judgt. A final judgt. then cannot be impeached in any collateral way. i.e. by any orig. action. Peak. 36. Sw. 9. 10. 1 Day. 170.

The reason of this latter rule is, that a final judgt. deciding any

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legal right must determine the controversy or litigation would be endless.

The rule is the same as to decrees in Eq^t. and awards of arbitrators, for they are conclusive until set aside in due course of law. 1 Day. 130. 3 ib. 30. Peak. 68. 70.

If there judg^t has been given for Def^t on a dem^r or a plea to the action or in any way so that the right in question is decided, the Pl^ff cannot while that judg^t remains in force, maintain any similar or concurrent action for the same cause. Thus if pers^l chattels are forcibly taken, trespass & trover are concurrent actions, & if they are sold indeb. ass^t for the amount sold, is concurrent with them. now if final judg^t determining Pl^ffs right be rendered on either of these actions it is an absolute bar to his maintaining another action of the same kind or either of the other actions for the same thing. 3 Wils. 304. 2 Ld. Raym. 827. 3 East. 346. 352. 3. 6 Mod. 7. 6 Mod. 29. Peak. 34. 6. Sw. 11. 2 Bac. 116.

But this rule does not hold if the first action was misconceived or failed for the want of an essential allegation supplied in the second, for in such case the right claimed in the second neither was nor could be decided in the first, the grounds disclosed in the two being diff^t. Of course the Pl^ff may traverse the averment (which Def^t in pleading the record of the former judg^t must make) that the cause of action in the second suit is the same as was alleged in the first. as if Pl^ff should omit to allege conversion in trover, or malice in slander. 2 Vent. 169. 2 Bac. 116. 17. Cro. E. 667. 8. Ray^d. 472. 2 Mod. 318. 3 ib. 1. 2. Peak. 37. Sw. 11.

And on the other hand a judgt. for Plff for the recovery of a debt or other demand is conclusive of the existence of that debt or demand as agt. Deft & his repts. And the rule holds whether the recovery is by verdict, upon confession or demurrer, or by default Prak 34.5. Sw. 9. 7 T. Rep. 269. B. N. P. 232. 1 Doug. 170.

Hence the Deft cannot recover back the money levied under the judgt tho he can shew by the clearest evidence that he paid it before judgt or that it was never due. And this is not all he cannot in such a case maintain an action for money agt the Plff. in obtaining the first judgt. for this would be collaterally impeaching that judgt 1 Doug. 130. 3 ib. 30. Prak. 35 68. 75. 2 St. Bl. 414. 7 T. Rep. 269. Sw. 9. 10. Phil. 226. 9 John. 232.

The same rule holds of decrees in Chy & awards of arbitrators. Pra. 68. 75. 1 Doug. 130. 3 ib. 30.

There is one case (Morris & McFarland. 2 Burr. 1009.) that seems to impugn this rule, but I do not think it does that action was brot to recover back money paid under the judgt of a court of conscience & maintained, on the ground that that court could not take cognisance of a suffl. legal defence pleaded by Plff: so that Plff (in that action) could not conscientiously retain the money paid. The case is however much shaken. Phil. 225.

And it has been determined that if a party on being sued pays the money or demand, tho denying it to be due, he cannot afterwards recover it back, because it is said the payt was made in a course of legal proceedings. 1 Esp. Ca. 84. 279. Prak. 35.

Lastly we are introduced

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this rule on the ground that Defr is estopped by his own act: but there is no judgt in the case and I doubt the correctness of the rule for it is not founded in principle

On the other hand a Plff having recovered judgt for a part of his demand when he attempted to prove & recover the whole, he is precluded from maintaining another action to recover the residue for it is substantially a judgt in favour of Defr as to that part which Plff failed to recover.

If however he did not attempt to prove but part as one item, altho his demand (which by the way is immaterial as to amt.) was large enough to cover the whole, he may bring another action to recover the remainder or other item for the question as to that has never been raised. it was now in issue. 6 T. R. 607. Peak. 35. 6. Phil. 235.

I observed yesterday that a final judgt in an action is conclusive so as to bar another similar or concurrent action for the same cause.

But in the application of this rule there is this diversity to be noted between real & personal actions. All pers. actions are of equal degree of course a bar in an pers. action is a bar by way of estoppel to any other personal action for the same cause or thing. Thus if husb. & wife be concurrent & A brings trespass. agt B & is defeated. this brings trover for the same thing the former judgt plead in bar by Defr estops him. 6. Co. 7. Phil. 235

In real actions on the other hand there are various degrees, some being of a higher nature or rank than others. Hence a judgt

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in a pers.l action is no bar to a real one tho relating to the same subject. Thus if A sue B in tresp. quare clausum fregit & B recovers judg.t this is no bar to a subsq.t real action to recover the same land. for the rights in question in the two actions are not the same.

Nor is a judg.t in one real action a bar to another real act.n of a higher nature for the same cause for the same reason. Suppose A defeated in ejectment. it is no bar to his bringing a subsq.t real action for his recov.t in this action is perfectly consistent with his recov.t in the former action. 3 East. 258. 9

But in every species of action the final judg.t so far as it respects the immediate subject matter in issue is conclusive by way of bar to any future litigation. 3 East. 357

Hence if any precise fact is directly put in issue & found as that J. S died seized. in a pers.l action as trespass. it is conclusive as to that fact so as to prevent its being disputed afterwards between the same parties even in a real action. 3 East. 346. 354. 5. 8. 366. Ev. 12.

As this distinction is intricate to those who are not acquainted with the rules of evidence I will recapitulate. A final judg.t in a pers.l action as tresp. is no bar to a real action between the same parties respecting the same land. because one relates to the poss.n the other to the freehold.

But if any precise fact is directly put in issue in the pers.l action, the record is conclusive evidence in any subsq.t action as to that fact. Phil. 236. 7.

To make a record in a former suit

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conclusive upon any matter of right or point in dispute it must appear from the record. that that point or right was directly put in issue in the former suit. Thus where a Pff having been barred in a suit upon a contract or for a trespass it does appear that the same point was in issue & decided the first judgt. is conclusive by way of estoppel. But I repeat this must appear of record. for other evidence cannot be admitted to shew that a particular matter not in issue upon the record, came in question or was taken into consd. by the Jury. Phil. 236. 1 Esp. R. 43. 2 Johns. R. 24.

It is always however admissible to shew by extraneous proof that the subject in Controversy was the same or different. Thus if Actⁿ B in trespass for taking his horse & is defeated, if he afterwards sues him in trover for taking a horse. it competent for Dft. to prove that the horse is the same one for which the former action of trespass was brot. or for Pff to prove that it is not the same horse. this must necessarily be so proved for it cannot appear upon the record, one description may answer for twenty horses.

It must appear then from the record whether a given point or question of right was in issue, but whether it related to the same or a diffᵗ subject or article must appear aliunde or by extrinsic evidence.

To revert then to the case of the horse if it is admitted or proved that it is the same horse, the former judgt. is a conclusive bar to the latter action. the record of it shewing the question disputed (the title) to be the same.

I observed that to make a record conclusive it must appear, from the face of it, that the same point or right came directly in issue in the former suit. But in a suit for performing work unskilfully, the record of a former action in which Defts had recovered of Plff. a compensation for the labour done, is not merely not conclusive it is no evidence at all. The reason is that the gent. issue having been the plea, it does not appear that the unskilfulness of performance was used as a defence in the former action. altho it might have been so used. Sw. 12. 1 Esp. 43. 2 Johns. 24

A former judgt between the same parties is conclusive as well when the point decided by it comes afterwards incidentally in question, as when it forms the ground of action or defence in a subsequt suit.

Thus in an action on a policy of insurance with warranty of neutrality, a sentence of the court of admiralty condemning the vessel &c as enemys propty is conclusive that she was not neutral, tho the question of neutrality arose incidentally on the trial of the actn on the policy. B. & P. 244. 8 T. Rep. 196. 4 34. 2 East 268. 473. 7 T. Rep. 523. Doug. 554. Phil. 250. 3 B & P. 201.

In Eng the sentence of Ec. cts on the subject of marriage & legitimacy is evidence against third persons in those cases where those courts have exclusive power of determination. tho the question of marriage or legitimacy comes incidentally in question, as when Plff in ejectt claims by descent. Peak. 77. Sm. 13.

But on the other hand a prior judgt is no evidence of any matter that

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came in question collaterally in the prior action, to make it evidence it must have come directly in issue. Rob. 53. B. N. P. 233. 244.

Thus in a suit between A & B. B produces C as a witness. A proves him to be legally infamous & his testimony is rejected so that B is defeated. This judgt is no evidence of the fact that C is legally infamous; that point arose collaterally & does not appear upon the record.

And the judgts of a court upon a point only incidentally cognisable by it, is no evidence in another action between the same parties. Thus when a question of admiralty jurisdn arises in a C. L. Court as of contraband or neutrality in an action on a policy of insurance, the judgt is no evidence in a subsequt action. It does not appear upon the record, the genl issue being supposed to be the plea, & the question arose incidentally. If however it was specially pleaded & distinctly found it would come under the former rule.

The rule is the same as to any matter merely inferable by argument from the former judgt Thus A sues B on contract. B gives infancy in evidence under the genl issue. It is not competent for A to shew a former recovy agt B on a similar contract to rebut his evidence.

And a prior judgt given upon the genl issue is, in no case whatever conclusive between the parties, unless the cause of action is the same in both cases even tho the title out of which the cause of action arises is the same.

Thus A sues B for a given nuisance, if A has actually recovered agt B in a former action for the same nuisance, the very

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continuance of the nusance is a repetition of the injury. the former judg^t is not evidence. The reason is that the cause of act^n is not the same, the title which is the foundation of it may be, so in a second action for the disturbance of the same right or franchise. Peak. 37. 8. B. N. P. 232. 3 East. 365.

The same rule holds in relation to the Eng action of ejectment the law & courts bring fictitious. the identity of the parties & cause of action cannot appear upon the record. Rum. Ej. 12. Peak 37. 8.

But in these three latter cases as well as all similar ones the verdict in the first action is evidence in the second. tho not conclusive. B. N. P. 232. Gilb. 29. 30. 35. Stra. 308. 1151. Carth. 79. 181.

The judg^t there is not conclusive unless the cause of action is the same as well as the title. but the verdict may be given in evidence when the cause of action is diff^t. tho it would not be conclusive.

If however the title or any fact or question of the right had been distinctly put in issue & found in the former suit the verdict might be pleaded by way of estoppel & would be conclusive. 3 East. 346. 352. 5. 358. 366.

You perceive then that a verdict may sometimes be evidence tho not conclusive when the judg^t would have evidence at all. And this is a great difference between judg^t & verdict, as to their nature effect & effect. By neglecting to observe this difference a deal of confusion has been introduced into this part of the law of evidence.

A prior judg^t upon a point or title afterwards brot in question is a sentence of law deciding the right

A verdict is mere evidence of a matter of fact. tho when pleadable & pleaded by way of estoppel it will be conclusive.

A judgt when evidence at all is conclusive, a verdict is not necessarily so.

The office of a verdict whether pleaded or given in evidence under the gen. issue is to prove some matter of fact. But the office of a judgt is not to ascertain facts, but to shew the right determined by it upon the facts as ascertained by verdict or otherwise. Peak 37. 3 East. 358. to 365.

Thus A brings trover agst B for a watch and is defeated. he then brings a second act. for a watch. it being proved & admitted to be the same watch, the former judgt is conclusive of the right & therefore conclusive agst the present action.

On the other hand if in an act. of trespass B. Defs pleads a specific fact, as that J.S did sign in fee & devised to him, by which that fact is put directly in issue & it is found, the verdict is conclusive as to that fact in any subsequent action. Even stop a party from trying it over again. but what right follows as a consequence of this fact is left for the decision of the court. & prior judgt thus when evidence at all is conclusive between the parties & their privies as to the point or title decided & it whereas a verdict may be prima facie evidence only it being conclusive of the fact but not of the rights of the parties. Ante. 756. 761. 1 Chr. 235. 1 Doug. 170. Peak. 34. 5. 7.

Hence a prior judgt ante- cept in a few exempt cases can never be made use of in any way except the cause of action is in both suits the same. for as the prior judgt if it is to have any effect is to be conclusive it ought

ought to be no evidence except when the cause of action is the same.

But a verdict tho conclusive when pleaded by way of estoppel, may in many cases be given in evidence when not conclusive. tho this cannot be done unless the points in question came directly in issue in the former suit. B.N.P. 292. 3 East. 365. Gilb. Ev. 35. Peak 37.

In the cases however to which this rule applies, i.e. where a verdict may be evidence tho not conclusive, are those in which the cause of act. or right or demand in question is not the same in the two cases, tho depending on the same title & same state of facts. for if the cause were the same the judgt would be conclusive & there would be no need of the verdict as evidence.

Thus if two pieces of land are held by one & the same title as by deed or devise, a verdict in ejectment or dispossession as to one piece may be given in evidence in a subsequent action between the parties for the other piece, for the title is the same tho the subject matter is diffr. If the subject matter or cause of act. were the same the verdict would be useless for the judgt would be conclusive. Gilb. Ev. 30. B.N.P. 232 Stra. 308. 1151. Barnes. 79. 181. 2 Mod. 142. 5 ib. 386.

A prior verdict in a suit for a nuisance or disturbance may be given in evidence in another suit for the continuance of the same nuisance or a repetition of the same disturbance. It is prima facie evidence for the cause of act. is diffr. tho the right or title out of which Plffs claim arises is the same 3 East. 365. Peak. 37. 8.

I observed yesterday that a verdict in one act. might be given in evidence in another between the same parties & their privies. On this subject I have further to

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observe that a verdict in a prior action of ejectment for a given piece of land, may be given in evidence in a subsq.t action of ejt. for the same land between the same parties As if A sues B in the name of a fictitious person as C. and is defeated & then sues B in the name of D another fictitious person the verdict in the first case is evidence in the present action. The judg.t in that case is not conclusive but not evidence, because the identity of the nominal parties & the causes of action do not appear upon the record which is necessary to constitute an estoppel. But the court will take notice of the real parties for the purpose of admitting the verdict as evidence. Gilb. 35. B. & R. 232. Peak. 40.

It is stated in Swifts evidence p.p. 18. that verdicts can only be given in evidence as to those facts that are specially found. i.e. as to those facts only wh. are found on a special issue. This cannot be true for in the cases before mentioned of ejectment, nuisance & disturbance the verdict was supposed to be on the gen.l issue. The true rule is that a verdict cannot be plead in bar by way of estoppel unless found upon a special issue, but a verdict on the gen.l issue may be evidence between the same parties tho it is not conclusive.

I have thus far treated of the effects of judg.ts & verdicts when admitted in evidence. We are next to consider.

For & against whom a record is evidence.

In gen.l the record in a former civil suit is no evidence in a subsq.t one as to the facts or rights which it imports to es-

tablish, except as between those who are parties to it & their privies. Thus a record of a suit between A & B is no evidence as between B & C.

The principle is that third persons are not in gen.l to be bound or in any way affected by a judg.t between other persons, altho the cause of act.n in the two cases arise out of the same act. because the latter had no opportunity to cross examine witnesses. to control agt. the judg.t to bring a writ for an intervening error. nor to set it aside for motion for any irregularity. bring a stranger to the record. Gilb. 29. 32. 33. Dr. & Stu. 212. Ld Ray. 1292. 3 Mod. 142. B. & P. 232. 3. 242. Phil. 222. 228.

And as the benefits of the rule ought to be mutual, third persons cannot in gen.l take advantage of the record of a suit between other parties even as against one of those parties. Or as laid down by Ch. Bar. Gilb. "no body can "take benefit by a verdict, who had not been prejudiced by it, had "it gone contrary." It is therefore a suffi.t objection when a verdict or judg.t is offered in evidence either for or agt. the former party that the transactions in the former suit are as to third persons res inter alios acta. Gilb. 34. 5. B. & P. 232. 3 Mod. 131. Yelv. 172. Phil. 230. 1. 3

There is indeed an exception or two to the generality of the rule that the benefits to be derived from the record as evidence must be mutual. but the state of facts on which they are founded is so complex that I must refer you to the books. Peak. 38. 9. Gilb. 33. 5. Ld Ray. 730. B. & P. 232.

But the former rule that a record is no evidence except as between the parties & their privies is not universal. Thus where one uses for his own

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benefit the name of another as party to a suit, the verdict will be evidence for or agst the former or the party uses the other name tho not conclusive. as in ejectt brot by one lessee in the name of several lessees as I. Doe & Richd Roe, the first record agst I. D will not estop R.R. because the parties are diffr as well as the action. but these parties being fictitious the court will notice the real Plff - so as to admit the verdict in evidence. B. N. P. 232. Gilb. 35. Peak 40. and in this case whatever the first verdict might be either party may adduce it in the second action.

So again if trespass be brot agst A who justifies as the servant of I.S. the verdict in this case is evidence, tho not conclusive in a subsq. action brot by same Plff agst B who also justifies as the servt of I.S. either for or against him. for I.S. is virtually, tho not nominally the party on record, & because he is not nominally on record the evidence is not conclusive, it would not be even if it were on a spect issue Peak 40. Doug. 517.

Thus is one exception to the gent rule when the point in dispute is a question of public right. in such cases a verdict finding or negating the right in one given action between certain parties will be evidence in a subsq. action between diffr parties.

Thus A sues B in trespass who defends on the ground of a public right of way & verdict is found agst B. he afterwards sues C. who defends in the same manner. the former verdict will be evidence agst C. as it might have been agst A if it had been given agst him in the first action. But also it is not conclusive. Peak. R. 156 219. Carth. 181. 1 East - 355.

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Suppose a city or other corpor. brings an act. agt. & claiming a certain toll by virtue of a custom or prescription, the verdict found in this case will be evidence in a subsequt. action agt. C. The probable ground of this rule is, that the right in question is public & every individual in community is interested in it on acct. of the possible benefit or prejudice that may accrue to him from it.

The sentences of courts where proceedings are in rem as the courts of admiralty are in gen. conclusive agt. & for all persons whatever whether nominally parties or not. Proceedings are said to be in rem when the sentence acts immediately on the subject if condemned as a ship libelled if she is condemned the law takes posst. of & disposes of her.

Suppose a in posst. of a ship in a foreign port. she is libelled & condemned. now if B belonging to another continent appears & claims her. the former judgt. concludes him & all mankind.

The reason is that all mankind may become parties to such proceedg after that reason are regarded as potentially parties. It is not a suit agt. the posst. or any other person. the notice given to appear is to all mankind. These proceedings are therefore not considered as res inter alios acta. 8 T. Rep. 196. 434. 7 ib. 523. 681 5 ib 255. 2 East. 268. 2 Bl. R. 977. 1174.

Whenever therefore any matter determined by such a court afterwards comes incidentally in question, (as if at all it must) that sentence is conclusive as if in an action upon a policy, a question of neutrality shd arise, a sentence of the admlty. court condemning the ship is conclusive as to the judgt. was between other parties in the case.

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The rule is the same as to sentences of courts having jurisdiction of the probate of wills, & admon. & for the same reason viz. that all persons may be parties. 1 Chr. 235. 3 T. Rep. 125 Rick. 78. n. 1 Day. 170. 2 ib. 312. and even where one was indicted for forging a will, he was acquitted at once on producing a probate of the will under the seal of the ordinary. Stra. 481. 703.

So also if A brings an act. as Ex. to B & deft. pleads that A never was Ex. to B. the probate of a will in which A is named as Ex. is conclusive & B cannot prove that the will was forged. it was declared good by competent authority. 1 Chr. 235.

The humble proceedings in case is to bring him to ask the court, any one may appear & claim as heir at law if willing to pay the costs of failure. the proceedings are not in the nature of a suit between A & B. appl. being made for probate. any one may declare himself adverse in interest under a latter will & dispute the appl.

You will find a case in Leach. C.C. & Mchy that on the first impression would seem to impeach the case above of forgery in Str. But that case stands good the probate in such case is conclusive bar & evidence of the fact of forgery cannot be admitted. The case in Leach was diff. the forgery was indicted before the pretended testator was dead. in this case a probate was produced but it had no effect because the Ecc. acted without authority. & the proceedings as coram non judice & of course void. 2. C. C. 103. 2 Mchy. 429. That that case turned upon this distinction see 3 T. Rep 125.

There is another case in 2 Mchy. 230 but there the probate was obtained by fraud in the proceedings which rendered it void 2 Mchy. 438. 458. 461.

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In gnl also the sentence of judgt of an ecclesiastical court in matrimonial causes as of divorces, a marriage &c conclusive of the fact of marriage &c. when it afterwards is incidentally questioned in another court & agt all persons. Thus if a claims at law a sentence or judgt of such a court declaring him illegitimate is conclusive of that fact. Amb. 756. 762. 3. & 6o. 29. 7 ib. 41. Carth. 225. Stra 961.

Again in an act for crimt conversation with Plffs wife a prior judgt of an Ecc. Ct annulling his marriage with his reputed wife is conclusive evidence for the Deft Stra. 960. Peak. 77. n Amb. 756. 763.

So also if an action is brot against a man as husband to recover a debt due from his wife while sole, a prior sentence of an Ecc. Ct declaring the marriage null & void is conclusive agt the Plff. as it shews the Deft was never married to this woman & as the debt was contracted before marriage he could not be subjected in consequence of giving the credit as his wife. 11 St. Tr. 235. Peak. 78. n.

You perceive that how the record is conclusive agt a person who is not a party to it the reason of the rule as to third persons I take to be that the sentence is in the nature of a proceeding in rem & therefore should conclude all persons altho they are not nor could have been parties. A proceeding in rem is for this purpose to be considered in the nature of a common appearance, which is evidence as a deed is between other parties.

Such a sentence however is not conclusive upon an indictment for bigamy. thus if A is indicted for bigamy for having married B. living his

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former wife B. a sentence of the Ecc. Ct. declaring his marriage with C good & lawful or his marriage with B void is no evidence. in other words he may be convicted notwithstanding such sentence 11 H. Tr. 261. Pa. 78.

It is difficult to reconcile this with the decision in the case of forgery above alluded to. In support of the last rule the marriage it is said that the Ecc. Ct. has not cognizance of crimes. But in the case of forgery the King could have made himself a party. but the K. could not in the case of the marriage question.

And in those cases individuals who were strangers to the proceedings may show that the sentence establishing the marriage or annulling it was obtained by fraud & collusion between the parties. these being extrinsic facts which vitiate the most solemn proceedings. bring a fraud upon the court. a stranger may aver that it is fraudulent because being a stranger to the record he could not come in & traverse it. when there is collusion there is no case in which one of the parties can avoid the sentence if one of them was dispensed & the court like wise the other party can vacate the sentence only by appl. to same court that rendered it or one of equal jurisdn. Amb. 762. 3. 2 Vez. 246. 11 H. Tr. 262.

you will observe that I am now treating of the exceptions to the gent. rule that a record is not evidence except between those who are parties & their privies

Further, when one person has been compelled by suit to pay money for another, in an action for a reimbursement he may give in evidence the record of the former suit agt. himself

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not for the purpose of proving the allegations that were made & proved in the former trial, or that Defr justly owes him for the money advanced. or that that money was really due from him But that such a recovery was actually had agt him to such an amt & as the case may be that he pd it on an exn which he produces indorsed "satisfied." The record thus far is a part of the res gesta. the fact of payt must be proved. Sith Deft may deny that he owed the debt that Plff was his security &c. & Plff is compelled to prove by other testimony all other facts necessary in his case except that he has paid.

So also when a Shff has been subjected for the official acts & defaults of his Under Shff. when he sues the U Shff. he may show the former record for the purpose of proving that he has been subjected & to such an amount as for the misconduct of his Deputy but not to prove Defr guilty or that Defr is his Dep or that was acted as such. That the Shff was subjected is part of the res gesta & must be proved.

So when a master has been subjected by the misconduct of the Servt In an action by the master agt the servt the former record is evidence of precisely the same facts.

Again in an actn by an indorsee of a Bill who has been subjected agt the acceptor. Plff may give the record of the former suit to show that he has been obliged to pay so much. but that Defr accepted the bill & is liable to Plff must appear from other testimony. Peak. 238

In an actn on a covenant of warranty in a deed of conveyance the Plff may give in evidence the record of a prior suit by which he was

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evicted, not for the purpose that the victor had higher title. this must be made out by other evidence. but to shew that he has been evicted for without actual eviction he can never recover on the cov^t of warranty. Gilb. 28. Yelv. 22. 1 Roll. 396.

And if the warrantor was vouched in in the prior suit the record is conclusive ag^t him of the whole case. This is when the Def^t in the first suit the covenantee on being sued. gives notice to his grantor by writ of vouchee of the pendency of the suit & gives him an opportunity to appear & defend the title he conveyed. In such case whether he appears or not the record is conclusive ag^t him "Cov^t Broken".

So in an act^n upon the warranty of title to a chattel or a horse, the P^ltff may give in evidence the record of the suit ag^t himself in which the value of the horse was recovered of him, for the purpose of shewing that he has lost the horse. for without proving that he proves no damage. But not to prove that the seller had no title or that the person who recovered of P^ltff had. 1 Johns. 517. Sw. 15.

So also a record of a former recovery & satisfaction obtained by the P^ltff ag^t a stranger for the thing or matter demanded is evidence for the Def^t to prove the fact that such prior recovery & satisf^n has been had. as if an endorsee should sue his endorser after he had recovered of the acceptor. the Def^t may plead in bar the former recov^y & satisfaction or give it in evidence as the case may be.

So if A & B were bound jointly & severally in a bond & b the obligee sues A alone & recovers of him & then sues B. B might give

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the record of the suit agt. A & satisfaction under it in evidence to show that Plff has been paid.

So also if a trespass had been committed by A & B the verdict & judgt. ag. A is evidence in favour of B. & in this case you will observe that it is sufft. to show that judgt. has been recovered without proving satisfaction whereas in contracts it is no bar unless there has been satisfaction. "Covt. Brokers" Cro. Jac. 73. Pitt. 32.

In those cases also in which the party to a suit derives his title from a judgt. in a former action between himself & a stranger, he may give the prior record in evidence. As in ejectment between A & B either party may show a title by judgt. & give in evidence a record of the writ by which it was set off to him. Sw. 14.

Here again the record is of res inter alios acta but the ground on which it is introduced is merely to show that the Plff &c has all the title that J.S. had, and is evidence as a deed is or a common conveyance, it is in the nature of a conveyance. The record is by no means evidence that the title was in J.S. but that the Plff has all J.S's title. — Thus far as to verdicts in civil cases

Whether a verdict in a prior crimt. case can be used as evidence of the facts proved by it in a subsequent civil suit is a question not settled even at the present day.

One example will explain the whole subject. thus. A committed a battery upon B. was indicted & convicted. B now sues him in a civil action for the injury & offers the record of the former prosecution & conviction as evidence of Dfts. guilt.

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this question remains unsettled as you may see. Peak. Ev. 41 to 48. 146. 8 vo Phil. 87. 8. 4 Bur. 2225. 4 East. 577 n. 581. 1 Campb. 9. 151. Salk. 283. 1 Sid. 325. Gilb. 30 to 32. B. & P. 245. 1 Taunt. 520.—

If doubts had not existed in the minds of some eminent lawyers I confess I could hardly consider it a question. it appears to me extremely clear that such evidence cannot be admitted. Why should a verdict & judg.t in a criminal case be evidence any more than a record of a civil suit. The case comes precisely within the gen.l rule the record is strictly of res inter alios acta. and no man ever dreamed of admitting the record of a prior civil action for a tort as evidence in a subs.t action for the same tort. Ins of contracts. The exceptions to this rule are founded in sound common sense & when a record is allowed to be evidence between other parties, it goes to prove the fact of a former recovery only & not to establish those facts which are found by the verdict & judg.t But in this case the record is offered to show not merely that the def.t has been once convicted, but that he is actually guilty of the trespass charged. I think it cannot be admitted & I think the weight of authority inclines to this opinion.

But the record of a prior civil or criminal case is admissible to show that such a suit has existed. the between diff.t parties. As on an indict.t for perjury. the record of the case in which the perjury is said to have been committed not only may but must be given in evidence or produced to show that the suit laid in the indict.t was tried. but not to prove the facts found by the verdict & judg.t B. & P. 243. Peak. 48.

But a verdict in a former suit is in no case evidence of the facts found by it

until final judg^t has been entred upon it. If then when it is proper to give the verdict in evidence the party produces only the formal part of the record without the judg^t it is not admissible. the judg^t being indispensible to shew that the verdict stands good & has not been set aside by motion in arrest for a new trial or in some other way. Stra 161. B.N.P. 243. Phil. 292.

"No evidence of the facts formed by it" is an emphatical part of the rule, for there is no necessity for a record of the judg^t if the only object for which a verdict is introduced is to shew that such a suit has been agitated, for the verdict is evidence of that fact whether it remains or is nullified. To prove then that such an issue has been tried, the poster i.e. that part of the record which precedes the judg^t alone is suff^t evidence. B.N.P. 223. Peak 50.

And a verdict upon an issue out of C.C. with a decree in C.C. in pursuance of it may be also evidence of the facts found by it, but not without the decree is produced, because the decree of such a court is substantially the same thing as a judg^t in a court of law & the same reasoning will apply to both. B.N.P. 234. Phil. 292. Peak 50.

There are some rules of evidence necessary for us to attend to which are not to be found in the books of C.L. I mean to the manner of proving the records of one State in the courts of Justice in another.

Here I would observe that the acts and proceedings of Congress and the records of the U.S. courts, are provable in one state precisely as domestic acts &c are, of course the rules already laid down apply to them. Dev. 6.7.

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Go also know the Constitn of U.S. according to the construction given to it in the Cir. courts, a judgt in one state is of the same solemnity in another as a domestic judgt and there have been decisions to this effect in Penn. both in the state & U.S. D. court In N.Y. such judgts were formerly holden to be only prima facie evidence of what they were offered to prove or establish. the courts were then obliged to try the whole case over again. The later decisions however agree with those of Conn. & Penn. Con. U.S. art. 4. sec. 1. Sov. 6. 7 Dall. 302. See ante. contra. Mss Mass. Rep. 401. 1 Cains. 460. 1 Johns. Rep 426. 5 id. 37. 1 Dall. 188. 219. 261. For recent decisions in N.Y. 8 Johns 86. 173. These observations do not apply to the mode of proving but to the effect of such judgt when proved.

An exemplification attested by the Clk of a court in one state must to be evidence in another state, be accompanied with a certificate of the Clk. or presiding justice of the court, the Govr. Secty. of State or Chancr that the attestation is in due form & by the proper offr (vide cases) 7 H. & S. 153.

As to the mode of proving legislative acts of other states. By Stat in Con it is enacted that the printed state books transmitted by the legislatures & executives of other states to the Govt & deposited by him with the Secty. of State may be exemplified by him duly with the evidence. St. Con. 457. 8 Sov. 6. 7. There is I think a corresponding provision in most of the neighboring States. This course is adopted to avoid the inconvenience of sending to the remotest of the Union for certified copies of a whole statute, for of a part will not answer. The method is for the executives to interchange authenticated copies of the statute & when the Secty receives the book he exemplifies the whole statute at once.

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Of Public writings not Records. These are the next to be considered as a species of written evidence.

Public writings not records partake of the nature of records in as much as they are kept in a fixed place as documents & memorials, by public authority for the use of the public. B.N.P. 234. Peak. 51. Gilb. 47.

These public writings are also evidence in themselves & are regularly in point of solemnity the highest species of evidence records only excepted. Gilb. 47.

They are in gen. proved as records sometimes are viz. by copies examined & sworn to as true. B.N.P. 234.5. Gilb. 47. 567. Comp. 17. 590. 2 Burr. 1189. Peak 51.3.5.

These rules relate to the manner of proving the documents of a state within that state. as to the mode of proving the acts &c of a neighbouring (see last page ante)

These documents cannot be called records because they are not memorials of the law nor precedents of justice according to the Laws & usages of the State. tho' the evidence of high authority they do not come strictly within the denomination of records B.N.P. 295. Gilb. 48.

Of this sort of public writings there are several kinds, 1st Journals of the Legislature as contradistinguished from their acts which are strictly records: these are merely the history of the proceedings of that body and may be proved by copy examined & sworn to by a witness. Peak 53.

But a mere resolution passed by either house of the legislature, as a foundation for other proceedings is no evidence of

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the fact counted upon or resolved as that a reasonable conclusion exists, or that such publication is libellous & ordering a prosecution is no evidence that such combination does exist or that such writing is libellous. 4 Ct. St. Tr. 39. Peak 53.

2dly. The memorials of proceedings in a court of Eqty. the writings of a public nature are not records: and that is an & a sufficient reason why a writ of error does not lie from the decree of that Court to an appeal lies to the House of Lords. But why are they not records? the answer is that they are not precedents of justice according to the strict laws & usages of the State, but memorials of determinations secundum æquum et bonum, it was formerly supposed that a Court of Eqty. was bound to the rigor of no law or precedent, but this was never correct. Gilb. 48 Peak 51. B. & N. P. 235.

But a bill in Chy. is evidence only for the purpose of proving the fact that such a bill was filed or such other facts as may be proved by mere reputation or hearsay as of pedigree &c. to this then they are on a par with monumental inscriptions family bibles &c. So that what is may been alleged in a bill is not evidence agt. him in a subsequent suit, being regarded merely as the statement of counsel to obtain an answer. 7 T. R. 2 & 3. 159. Peak 12. 54. Formerly it was supposed that the facts alleged in a bill were evidence agt. the party making them, without qualification. but it is not so now. 1 Sid. 220. B. & N. P. 235.

But an answer in Chy. is evidence agt. the party making it of the facts alleged in it as well as of the fact of such an answer having been made, this is evidence of a solemn kind being made under oath, whereas the allega-

tions in a bill are not under oath which constitutes the difference between them. 2 Vent. 194. 288. Gilb. 50. B. N. P. 237.

Transcription as evidence is regarded however as nothing more than a confession & of course is admissible only when a confession by the same party in a diff. form would be. Hence a confession by a guardian for an infant will no evidence ag.st the infant in a subsequent suit. a rebel confession of the guardian could not be proved. neither can his answer for he has no power to confess away the rights of the infant. So of the answer of a trustee &c. 2 Vent. 72. 3 Mod. 259. Carth. 79. Bull 237. Peak. 54. 3 P. W. 235.

But an answer by one of two partners in a suit in Eq.r ag.st himself by A. is evidence ag.st the other partner in a suit ag.st him by B. as such. The reason I suppose to be that the acknowledgments like the acts of one partner bind the whole. Thus when one partner plead the Stat of Limitations. P. off was admitted to prove a confession by another partner that took the case out of the statute. Whitcomb & White Doug. 629. Peak. Ca. 16. 203. Peak. Ev. 55. Ch. R. 209.

So also a voluntary affidavit by one person jointly interested with another, has been admitted in an action against them both: it being a confession by a party in interest in the action. - Gilb. 51. 56. 7. Peak 55.

But in regard to an answer it is to be observed as a gen.l rule that a copy of the whole answer & not of any particular part only is to be exhibited. for the whole for obvious reasons must be taken together. So of a pl.dg ag.st law the whole must be exemplified or in some way proved. The rule is the same as to all written evidence whatever. the whole or a copy of the whole must be produced. as if a fact is to be proved by a deed.

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the whole and must be produced, however prolix or however immaterial the fact may be. 5 Mod. 10. Peak 55. Bull 227. 237. 2 Vent 192. 288.

As the party agt whom the answer is introduced as evidence in a subsequent suit is concluded by the admissions in it agt himself, so on the other hand the averments in it in his own favour are evidence for him. and this affords a decisive reason why the whole of the answer must be produced. So in proving any acknowledgment all that was said at the time must appear, whether it qualifies or extends and the whole must go to the Jury for them to examine, - it and. Gilb. 50. That the partys allegation in his own favour are not conclusive Peak 56.7. he may however have them read to the Jury. & the other party may falsify them if he can.

There is however one instance in which an extract or a part of an answer may be read in evidence without the residue. that is when you wish to shew that a person who is offered as a witness is interested in the event of this subsequent suit. - for otherwise his testimony might be introduced when the other party did not wish it & no man can in the first instance introduce his own declarations in his own favour. but if an attempt to prove the confessions of an other the other is entitled to have the whole proved. Bull. N.P. 288. Peak ev. 57.

An affidavit made by one of the parties in a former suit is evidence in a subsequ. suit is similar evidence to an answer in Ch. & is provable like it Peak 57, 8. by copy. -

But a voluntary affidavit cannot be thus proved not being a writing of a public nature. By a voluntary affidavit is meant one made extrajudicially

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as if the vendor of a chattel stated under oath that he has the title or that it was unincumbered: this constitutes no part of the proceedings in a court of justice - is not upon the record, and it must be proved like any other private agreement. Gilb. 51. 5. 6. 1 Vin 58. 413. La Ray. 311. 734. 893. 936. Bul. N.P. 238.

A deposition used in a former suit is always evidence in a subsequent suit between the same parties, provided the deponent is dead or out of the reach of process & not to be found, for if the witness might be produced his deposition given before is not the best evidence, an affidavit is in writing taken by the party a deposition is given by a witness in writing. Gilb. 60. 61 Peak. 58. 9. Barnd. K. B. (not 64) 348. Salk 278. 281. 286. 1 Atk 445. B. N. P. 239. 1 Mod. 14. 283. 285. 7.

It has been said in some that a deposition in a former suit between the same parties is evidence when the deponent being duly subpoenaed falls sick by the way. but this is questionable & I think not law, it might be a substantial reason to postpone the trial until he recovers, but not for the introduction of secondary evidence unless it were agreed to by the other party 1 Mod. 283. 4. B. N. P. 239. Stra. 920. Gilb. 60. Peak 59 n.

But the deposition of a witness like any other declaration of his either written or verbal may be introduced to invalidate the evidence he may give in court viva voce at the he is adverse present. It is not evidence in chief of the party who relies on it. but bears upon his credibility. Peak. 58. 9.

Whether the deposition

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of a witness, who at the time of giving it is disinterested. but who afterwards by operation of law becomes interested / a party can be read in evidence, is a question wh. has divided the opinions of eminent men. Thus a subscribing witness to a bond testifies to the exn of it. the obligor dies leaving apparently the witness his Extr who now brings an action on the bond. Peak. 58. 9. Stra. 101. Eq. ca. ab. 80 Croft v Smith. 224. Phil. 268. Pre Chan. 123. Bul. NP. 286. Esp. D. 756 Salk. 286. 2 Vern. 699. 2 Vy L. 2. 2 Atk 615. 1 P. W. 288. 9. 1 Mods.- 2 Stra. 920.- Bul. NP. 242.- 242.-

It has been sometime since I examined these cases, but from my present recollection of them they do apparently, tho not really, contradict each other. The Chs decisions have regularly been in favour of the depositions / according to my understanding of the cases the rule is the same at law. The depositions which were excluded in the cases reported by Strange 101. / Salk 286 were on interrogatories de bene esse which cannot be read in evidence unless the contingency on which they were taken has happened; / as this contingency was in both cases the death of the witness (as I conceive), they could not be admitted while the party who made them was living.- The depositions offered in the Chs cases, on the other hand, were for the most part taken pendente lite / admitted to support a bill of revivor.— On principle, this affords no gn. The only objection offered is interest. Now the rule of L, is that to exclude a witness he must be proved interested at the time of examination; and there is an abundance of cases in which witnesses interested in the event of the suit are restored to competency by a deprivation of interest. Ex. dfd's bail restored by substitution; for he then loses his liability / may give testimony for dfds. Now invert the circumstances of this case / it is precisely the same with that of the depositions. In the one he witness is interested before he testifies - in the other he becomes interested after. Sed vide. Pea. Ev. 166. Phil. 47. n 48.-

Depositions de bene esse, that is such as are taken provisionally to perpetuate the testimony of witness are admissible evidence when taken under the direction of a Ct. of Eq. They are not taken pending any particular suit. but by way way of caution in three cases. 1st. When the witness is about leaving the county 2° when they ride abroad or 3° when they are in apparent danger of death from old age or infirmity. These are obtained by filing a bill in Eq. agt. the other party interested. They are not evidence however unless the contingency in contemplation of wh. they were taken has happened. or perhaps if the party who was absent has returned. B.N.P. 240. Hard. 315. 381. 383. Salk. 691. Hinder. Eq. 32.

But depositions like verdicts are only evidence as between the parties to the prior suit or controversy in wh. they were taken or their privies, as they had no opportunity to cross examine. B.N.P. 239. Gilb. Ev. 61. 1 Atk. 445. 3 ib. 415. 501. 2. 524. 3 Bac. 314.

For the purpose of introducing any interlocutory proceeding in a Court of Eq. proof of the prior stages of the suit in that court is necessary, thus to introduce an answer a bill must be proved for an answer without a bill to authorize or compel it would be void in law. Gilb. 55. 6 Peak Ev. 66.

If however the bill has been lost or destroyed by time or accident, it may be proved by secondary evidence. even by parol & this rule applies to all written instruments records. — 5 Mod. 211. Peak 29. 67. 1 Vent. 257. B.N.P. 228. Gilb. 22. 2 Vern. 31.

A decree in Eq. is evidence whenever a judgt. of law would be under similar circumstances, for it is the same thing in

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in effect is governed by the same rules. (Stuarts) it is evidence of the facts it recites that it imports to establish. Peak 38. 210. 62. 68. B N.P. 232 Gilb. 29. 32. 36 Doug. 222.

The proceedings in courts of Admiralty and in Eng in the Ecclesiastical courts are evidence of the same nature & authority as those in the Courts of Law. as the probate of a will, sentence in a matrimonial cause or prize case in their respective courts, these are public writings of a solemnity next to that of records. Gilb 67. 3 T.R. 125. Lib. 258. Ray. 405. 1 Sid. 359

For these cases the sentence or decree is as conclusive as a judg. at L. L. tho it is not called a record. It is allowed however to shew that the seal of the court, or other proceedings are forged for this does not contradict the sentence or decree but shews that none exists. Peak 69. 1 Sid. 359. Ray. 405. These proceedings also are provable by copies as all other public writings are. Gilb 71. 2. 3 Salk 154. Doug. 572.

The Judg. of a foreign court is also evidence here of the right it imports to establish or the fact that it professes to find. Peak 70. as that A is indebted to B.

But as to the Judg. of foreign municipal courts there is this distinction to be observed? that if the party claiming the benefit of it applies to our court to enforce it, it is but prima facie evidence of his claim, the other party may therefore deny it, and the court can inquire what are the laws of the country where the judg. was rendered & whether it was rendered according to them. for the party voluntarily submits it to the jurisdiction and judg. of our courts. But if it is used by way of defence to an act. brot. here for the same cause, it is as conclusive as a judg.

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of our own court for the proceedings how acts are to be [illegible] as in matters to be brought proved to appear the Judgt. 2 H. Bl. 410. Doug. 1. Peak. 70. Grisworld vs Pittsburgh. 2 Com. Rep.

A foreign Judgt may be proved, first by an exemplification under the great seal of the state or Kingdom in wh. it was rendered which is supposed to be known to the courts of all nations. 9 Mod. 66. Pea. 73 Ld. Ev. 8.

2d By a sworn copy i.e by a copy compared to the original & sworn to by a witness in Court. 2 branch. 187. Phil. 301 Ld. 5 East. 473.

3d By the attestation of the proper offr of the court with the seal of the court annexed, but this seal you will observe is not supposed to be known to the courts of all other states as the national seal is it must therefore be proved like any other fact. 3 East. 221. Phil. 301. Gilb. 20. Peak 72. 3. The great seal being the common medium of proof established among nations. Of the genuineness of a seal affixed as a seal of state the Ct. judges ex officio it is not like the seal of B. R to be left to the Jury.

Foreign statutes may also be proved by exemplifn under the great seal or by sworn copies. 2 branch. 187. Ld. Ev. 9. as to proving the statutes of neighboring states. see ante. 4 H. Com. 457. 8.

Unwritten foreign laws or customs cannot be proved by common, ordinary parol evidence nor by copy under exemplification. for they are supposed to be unwritten, but by the testimony of "respectable intelligent persons". wh. must include only lawyers & judges i.e professional men, tho it may comprehend others. civilians in some cases evidence ut. 1 Johns 385. 394. 10 M. 431. Pea 73.

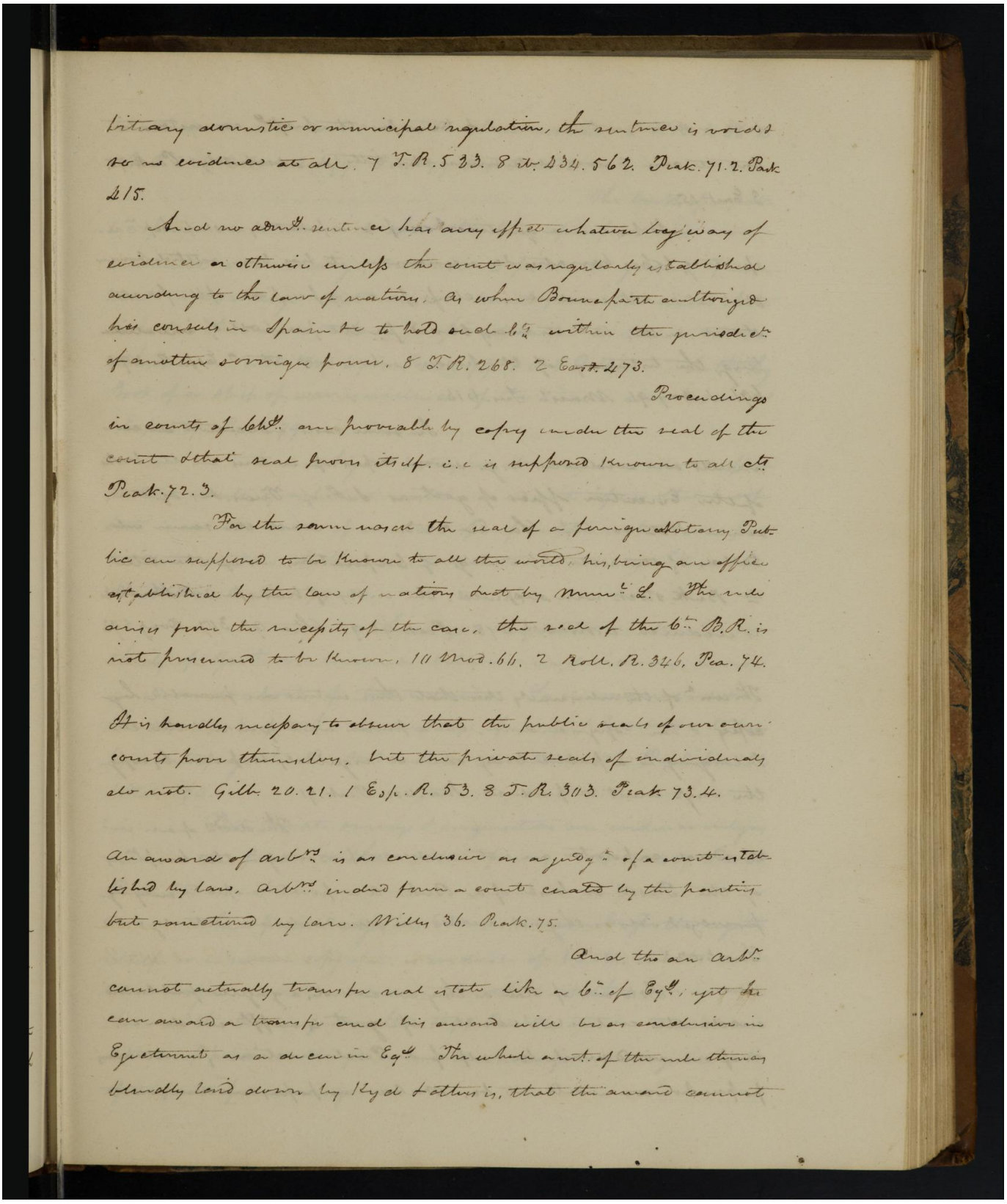
In this country the usual practice of proving the common or unwritten laws of other states is by the depositions of professional men. I suppose the unsworn certificate of such men wd. be evidence. Thus in an Act. agt. Sheff of Law. Co. in Penn. I sent an certificate of lawyers to prove that counsel in 6th. Pet. collect their fees by 6. L. this not being Eng. 6. L.

But the sentence of a foreign court of admiralty (as contra distinguished from the Ct. of 6. L.) as to all subjects of their jurisdiction, are conclusive upon all persons, of the rights or facts wh. they import to establish whether they are used to establish a right or a defence. The reason is that they decide from the law of nations, which is a part of the law of every civilized community, recognized here as well as there. Park. Ins. 353. 8 T. R. 192. 230

And if a foreign court of admty. states the evidence on wh. it found agreeing facts, no Ct. can enquire here whether that evidence was sufft. to establish that facts. the finding is conclusive. in this case however it is conclusive evidence only of the fact found by way of conclusion, as. that the prop. belonged to an enemy & not of the fact stated by way of evidence as the absence of a certain document. "Insurance" Peak. 71.

And if a foreign court of admiralty passes sentence without assigning any cause, it is conclusive. E.G. an Eng. or Fr. Ct. of admty. condemns a ship as lawful prize it is conclusive that she is not neutral tho not so stated. Park. 417. Pa. 71.

But if it appears from the facts & the conclusions founded on them by the foreign Ct. that the condemnation was not for a breach of the laws of nations but for a non compliance with some ar-



bitrary domestic or municipal regulation, the sentence is void & so no evidence at all. 7 T.R. 533. 8 D. 334. 562. Peak. 71. 2. Park 215.

And no adm^d. sentence has any effect whatever by way of evidence or otherwise unless the court was regularly established according to the law of nations. As when Bonaparte authorized his consuls in Spain &c to hold courts within the jurisdict. of another sovereign power. 8 T.R. 268. 2 East. 273.

Proceedings in courts of Eq^y. are provable by copy under the seal of the court & that seal proves itself. i.e. is supposed known to all &c Peak. 72. 3.

For the same reason the seal of a foreign & notary Public are supposed to be known to all the world, his being an office established by the law of nations & not by municipal L. The rule arises from the necessity of the case, the seal of the K^s B.R. is not presumed to be known. 10 Mod. 66. 2 Roll. R. 346. Pea. 74.

It is hardly necessary to observe that the public seals of our own courts prove themselves, but the private seals of individuals do not. Gilb. 20. 21. 1 Esp. R. 53. 8 T.R. 303. Peak 73. 4.

An award of arb^rs is as conclusive as a judg^t of a court established by law, arb^rs indeed form a court created by the parties but sanctioned by law. Willy 36. Peak. 75.

And tho an arb^r cannot actually transfer real estate like a K^s of Eq^y, yet he can award a transfer and his award will be as conclusive in Ejectment as a decree in Eq^y. The whole amt. of the rule thereby blindly laid down by Lord Hatton is, that the award cannot

like a deed, act in rem & transfer the propᵗʸ ex instanti but it can & does determine the title as absolutely. Peak. 75. 3 East. 15.

It has been a question how far a protest by a ship capᵗⁿ respecting losses barratry &c is evidence, it has been settled known that it is not evidence in chief for any purpose, of the facts stated in it, but it may be read for the purpose of invalidating the testimony of the person who made it. 2 Esp R. 490. 691. 1 Doug. 91. Marsh Ins. 616.

In some cases executive documents are evidence. e.g. sworn copies of entries in the books of the Executive offices of govt as Sec. of Treas. &c. of the seven State or U.S. Sw. Ev. 22. 3. and the same rule holds of the votes & proceedings of corporations, as if the title to Bank stock were disputed, the entry of transfer in the book, is evidence. 2 McNel. 475. Peak 90. 91. Stra. 93. 307. Doug. 593

The com. rule is only this that these entries are provable by copy & the copy is evidence, but a private writing as a letter, that belonging to a public body cannot regularly be proved by copy the orig. must be produced. Stra. 401. Peak. 91.

The declⁿ of an individual corporator are not evidence for or agᵗ the corpᵗⁿ. as of the Presdt. or Cashr. of a Bank. A corporation speaks only by journals & votes as they are recorded, individuals are not regarded Sw. Ev. 23.

As to acts of State as they are called, a gazette published under the authority & sanction of govt is sufft evidence. as if one would avail himself of a Proclamation, private news papers however would not be. We have no papers under court

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controul or such controul as the law notices. 5 T.R. 436. B N.P. 226. 2 Mer. 479. Peak 79. 5 T.R. 436.

The books of a public prison are evidence to shew the time of a prisoners commitment or discharge, but not to prove the ground of commit.t or discharge, that must be learnt from the record of the court. they are not facts for jurors to record. tho they are. 2 McArth. 475. Peak 79. 3 B & P. 188. So the Log Book of a ship of war is evidence of the time a convoy sailed 1 Esp. 427. Peak 79.

Agen.t history (as Hume) is evidence of such facts & events of a public nature as admit of no other proof but is no evidence of matters of a private nature, as a particular custom. Salk 281. 12 Mod. 85. 1 Vent. 149. Skin. 14. B.N.P. 248. Peak. 79-83.

Surveys & inquisitions taken by authority of Govt. are evidence between individuals, as now is Doomsday book of boundaries. So surveys recorded by Surveyor Gen.l of U.S. so surveys of ports & harbours taken by order of govt. Peak. 84. Bull. 188. 1 Burr. 146. Peak. Ca. 182 1 Wils. 170.

But private surveys & inquisitions are evidence only as between the parties to them & their privies. 2 St. Bl. 437. Tha. 68 Peak. 85.

Where parish registers are kept as in Engl. the register itself or a sworn copy of it, is evidence of births, deaths and marriages. as one town records in Ct. would be if they were recorded there as the Stat. requires. Tha. 1073. Peak. 86. And the certificate of persons authorized by law to solemnize marriages are evidence of the fact of marriage

Antient maps, tho made without public authority, are evidence, when they accompany proofs & agree with the boundaries as adjusted in antient purchases. Gilb. 78. 1 Ld. Raym. 734. Stra. 95. Peak Ca. 18.

We are next to inquire in what cases an inspection of public writings may be admitted in favour of a party or suitor. Records &c of justice are open to the inspection of all persons interested in them & their proper officer is bound as of course right to submit them to the inspection of all persons claiming interest enabling to prove anything under them. 1 Wils. 297. 2 Stra. 1262. Sandk. 228.

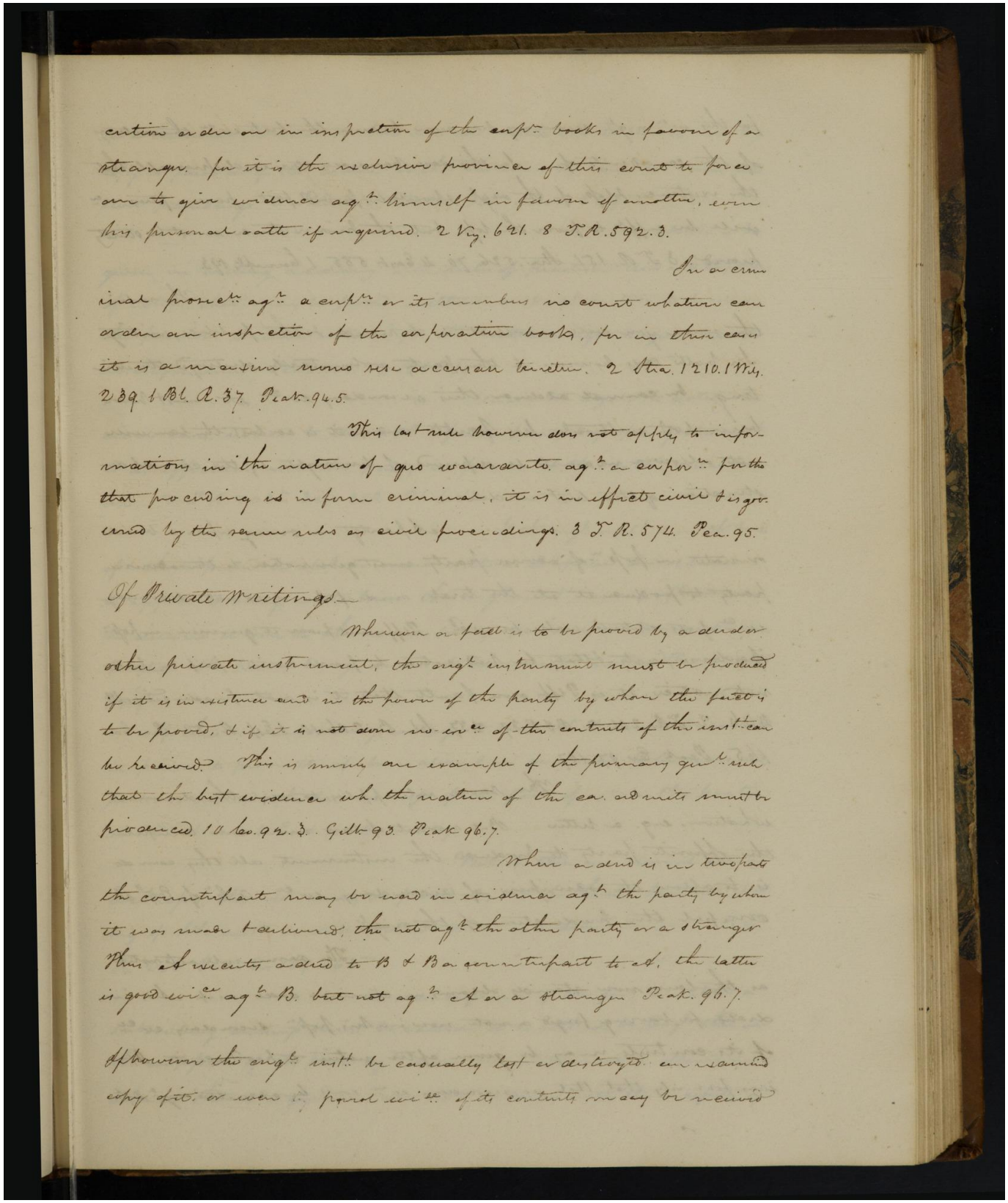
Copies from the books of public offices (as State Trials &c) are demandable by all persons interested, unless the govt. shd. think that public policy requires their contents to be kept secret. 1 Stra. 304. 2 T.R. 616. Peak. 92.

If inspection is refused the court will by rule grant leave to inspect or in other words order the officer refusing to permit an inspection. Stra. 304. 1005. 1223. 1242. 2 T.R. 616.

The books and papers of a corpn. are also open to the inspection of its members for they are interested in what they contain. & in a suit between the corpn. & an individual or a corpn. or two numbers of corpn. an inspection may be procured by rule of Ct. But this cannot be done in a Ct. of Law in favour of a stranger, in a suit between himself & the corpn. this wd. be to oblige a party to furnish evidence against himself to which the other party has no title for these books are not public property like records &c. 1 T.R. 689. 3 id. 303. 578. id. 590. 1 H. Bl. 211. 3 Wils. 398. 2 Vez. 621. this it has been done as you will see by case.

A court of Eqy. may in its dis-

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curtius order an inspection of the corp.n books in favour of a stranger. for it is the exclusive province of this court to force one to give evidence ag.t himself in favour of another, even his personal oath if required. 2 Vez. 621. 8 T.R. 592. 3.

In a criminal prosec.n ag.t a corp.n or its members no court whatever can order an inspection of the corporation books, for in this case it is a maxim more sacred than even. 2 Stra. 1210. 1 Wils. 289. 1 Bl. R. 37. Peak. 94. 5.

This last rule however does not apply to informations in the nature of quo warranto ag.t a corp.n for tho that proceeding is in form criminal, it is in effect civil & is governed by the same rules as civil proceedings. 3 T.R. 574. Peak. 95.

If Private Writings—

Whenever a fact is to be proved by a deed or other private instrument, the orig.l instrument must be produced if it is in existence and in the power of the party by whom the fact is to be proved, & if it is not done no evid.ce of the contents of the inst.t can be received. This is merely one example of the primary gen.l rule that the best evidence wh. the nature of the case admits must be produced. 10 Co. 92. 3. Gilb. 93. Peak. 96. 7.

When a deed is in two parts the counterpart may be used in evidence ag.t the party by whom it was made & entered, tho not ag.t the other party or a stranger. Thus if A executes a deed to B & B a counterpart to A, the latter is good evid.ce ag.t B. but not ag.t A or a stranger. Peak. 96. 7.

If however the orig.l inst.t be casually lost or destroyed an examined copy of it, or even a proved evid.ce of its contents may be received

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for this w^ch^ might secondary has now become the best w^ch^ the nature of the case admits of. In this case however it is indispensable that the existence & loss of the orig^l^ should be proved first. presumptive w^ch^ will be suff^t^ to prove the loss, but the prior existence must be strictly proved. 3 T. R. 151. Stra. 526. 70. 4 East. 585. 1 Campb. 193.

The rule in the same you will recollect as to words in other public writings. In both cases however if the party voluntarily destroyed the writing he cannot adduce this secondary ev^ce^ as it must have been lost without his fault and if it is so lost the law will not allow a man to be deprived of his rights by the casual destruction of the best evidence.

A party in suing upon a bond or note in poss^n^ of adverse party must give notice to the adverse party to produce it at the trial, and if he does not secondary ev^ce^ of its contents will be rec^d^. Pl^ff^ must prove it genuine - in poss^n^ of adverse party & that he had notice to produce it, for if he had not notice it is Pl^ff^ own fault that it is not produced. 1 Atk. 446. 2 T. R. 201. 2 B & P. 39. 237. Ch. B. 206. 10. 1 Esp. R. 511. Pea. Ca. 165. Peak Ev. 97. 107.

The same rule applies to every other document whatever, e.g. a letter. But a court of law never can compel the opposite party to produce the instrument. all they can do is to allow the admission of secondary ev^ce^ a C^t^ of Eq^y^ will compel the production of the orig^l^

The same rule as to notice as the law now stands obtains in criminal cases. as if A is indicted for having forged a note now in his poss^n^ secondary ev^ce^ of its contents may be given after notice to produce it. It was formerly that that no secondary ev^ce^ could be admitted agt. Def^t.

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in a criminal prosecution. but it is now settled that it can be. vide to a copy or parol evi. of the contents. so that the rule is the same in crim. and civil proceedings. 2 T.R. 201. 1 McCly. 346. Leach. C.C. 272.

Notice is to be given in writing according to the rules of practice. And as to the fact of notice, that may be proved without subpoena notice to produce the previous written notice. for this notice might require notice ad infinitum. Peak. 108. 2 B & P. 39.

And with regard to notice in civil cases, notice to the att. of the party postponing the inst. is as effectual, as to the party in person. & this is the usual practice. 2 T.R. 203. 3 id. 308. Phil. 12.

If the orig. inst. is in the hands of a third person. he shd be served with a subpoena duces tecum, to appear & bring with him the orig. inst. and if after service he delivers it over to the adverse party secondary evi. may be exhibited the party being deemed to have suff. notice. Peak. 97. affd. 38.9.

If there is a subscribing witness to an inst. he must be called in person to prove it if he is alive & in condition to be examined, for he is deemed the best witness of the fact of exn. as the parties selected him. 5 East. 16. 2 id. 239.

But if there are several attesting witnesses, the exn. may be proved by one of them. I am now speaking of bd. inst. as under cont. bonds &c. as to deeds see post. 7 T. R. 266. Phil. Ev. 169. 364.

As a consequence of the gen. rule that a subscribing witness must be called, it is settled in Engd. that even the confession of the party ag. whom any instrument is offered in evidence that it is genuine, does not dispense with the necessity of

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of calling the subscribing witness. i.e. it will not be read to the Jury on such evce Doug. 216. Esp. D. 257. 2 B & P. 85. 7 T.R. 267. 1 Esp. Ca. 89. 2 ib. 239.

This rule however has been relaxed both in N. York and Connt. for in those states the confession of Deft is consd as good & even better evce of the exn than the testimony of the subscribing witness Sw. Ev. 289. 2 Johns. 451.

The Eng. rule is adhered to in the Eng. courts, even tho the orig. instt is lost or cancelled for secondary evce is not admitted. if a subscribing witness is known & is within the reach of process Peak 98. appx. 39. Peak Ca. 30.

And in Engd a confession by Deft in his answer in Chy is not sufft evidence of the exn when there is a subscribing witness unless sufft reason is shewn for not producing the witness. this appears to me to be carrying the rule very far. Peak 98. 2 East. 53.

But when Deft produced a deed before Commissrs of Bankrupt and admitted the exn of it in his examination under oath before them it afforded sufft evidence of the exn without the subscribing witness how was not only confession but production by a party. 5 T.R. 366.

So also when a party pending a suit confesses & agrees to admit the exn on trial. it is sufft tho the confession alone would not be. for he is bound by his agreement. 2 B & P. 85. 5 Esp. Ca. 16.

If there is no subscribing witness, inferior evidence, as of the hand writing, is admitted. & is sufft to prove exn 1 Sw. 25 Com. Dig. "Fait" B 2. 5 Esp. 16.

So if the person whose name is subscribed

as a witness denies that he saw it executed, other witnesses may be called to prove it, as a by-stander or the hand writing may be proved. wh. will be suffic. Peak. Ca. 146 Doug. 216. 3 Esp. 172. 2 Camps. 365. 636. 10 Vy. Jun. 474. contra 1 Campb. 212 denied)

I wd observe by the bye that it is not necessary that the attesting witness shd have actually seen the execution of the instrt. it is suffic. that the party at the time confessed it & requested the witness to subscribe as a witness. 2 B & P. 217. Pea. 98.

If it appears that the name of a fictitious person has been subscribed as a witness by the executing party, the exn may be proved from the hand writing of the party for it is in legal effect unattested. Peak Ca. 23. 5 Esp. 16. Phil. 363

The rule is the same when the witness is interested at the time of exn & continues so at the time of trial, the witness being incompetent, the case is the same as if the instrt did not purport to be attested. 1 P.W. 289. Stra. 34. Peak. R. 147. 5 T.R. 371. 2 East. 183. thus suppose the witness had given collateral security to obligee at the time of exn wh. is in force at the time of trial.

Rule is the same when the person subscribed as a witness without the knowledge & consent of the parties, for he is a mere volunteer not a subscribing witness within the meaning of the law. 3 Campb. 232. 2 Taunt. 220 Phil. 363.

Same rule holds if after diligent enquiry nothing can be heard of the subscribing witness (who is supposed to be competent) so that the party can neither produce him nor prove his hand writing. Phil. 364. 1 Haywood. 238. 3 Binney 192.

The rule is the same if the subscribing witness was at the time of Ex. legally infamous, for his oath could not received & therefore his handwriting cannot be proved, so the inst. is unattested. Phil. 364.

Here I would make an gen. remark which is plainly deducible by way of criterion, from the foregoing rules. that whenever the inst. is in fact or in law unattested, the execution may be proved by secondary evidence, as confession. the testimony of bystanders, or proof of the parties hand writing. this being in this ca. the best evidence. Com. Dig. "Ev" B. 3. Pea. Ca. 145. 10 Vy. Jun. 274. 4 East 53. 5 Esp. 16.

On the other hand if the instrument is properly attested but the witness becomes incompetent by some supervenient cause or cannot be produced. his hand writing may be proved thus

If a subscribing witness becomes interested after the ex. by act of law as becoming Ex., or of the party by whom the instrument is to be proved proof of the witness hand writing is to be produced for he was competent at the time of attestation. 2 East. 183. 1 P. W. 289. Stra. 34. 5 T.R. 371. 2 Phil. 362.

(I omitted to mention in its place that proof of the parties hand writing when that is proper evidence, is prima facie evi. of the sealing & delivery. from wh. th. Jury may presume the instrument what it purports to be. Peak. Ca. 145. 10 Vy. Jun. 474 Phil. 364.)

So also if the subscribing witness is dead or presumed to be so, proof of his hand writing is suffl. 12 Mod. 667. Pea. 100. 1 B & P. 360. 7 T.R. 265. 1 Johns. 230. 1 Johns. Ca. 280. 2 Atk. 46.

So also if a subscribing witness after execution becomes blind so that it is impossible for him to identify, or if he becomes insane proof of his hand writing is suffit. prima facie evidence of the execution 1 Ld. Ray. 734. 5 Esp. 16. 2 Vez. Jun. 381. Phil. 362.

The rule is the same when the witness becomes legally infamous after the execution of the Instrt. 2 Stra. 833. Esp. D. 258. Phil. 362. 5 Esp. 16.

So also if the attesting witness is at the time of trial in a foreign state or abroad whether domiciled abroad or not, evidence of his hand writing is sufficient. 2 East. 250. Esp. Dig. 258. Peak. Ca. 99. 1 Esp. Ca. 1. Pea. Ev. 100. 7 T.R. 266. Doug. 93. 1 B & P. 361.

Rule is the same if after diligent search the subscribing witness cannot be found, tho he is not proved to have gone abroad. since he himself cannot be produced. Doug. 89 or 93. 2 East. 183. 7 T. Rep. 266. 2 Campb. 282. 1 B & P. 360. 11 Johns. 64.

Now in all the above cases when the subscribing witness is not in a situation to be examined, proof of his hand writing is deemed the best possible evidence. & if there are several attesting witnesses neither of whom can be examined, evidence of the hand writing of one of them will be suffit. Phil. 169. 364.

and proof of the hand writing of the witness has been adjudged suffit. without any proof whatever of the partys hand. and the weight of authority is that it is not necessary to prove the hand writing of the party in this case, tho it is usual to do so. & I confess that I do not see why proof of the partys hand is not the best evidence. for proof of that of the witness does not show that he would testify if produced that

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the instrument was legally executed in his presence. Pea. 99. 100. Phil. 169. 362. 3. 3 Cart. 183. 250. 1 B & P. 360. 4 Johns. 461. 7 S. Rep. 266. according to most opinions the party's hand in this case must be proved. 7 S. Rep. 266. n. c. 2 Haywood. 27. 3 Bin. 192. 2 Bay. 187. 1 ib. 255.

And in these cases proof of the handwriting of a witness is evidence of every thing appearing on the face of the instrument. the signing sealing & delivery will be presumed. from the form of the attestation. 1 Camp. pl. 375. Phil. 363.

In Cont. when the testimony of a subscribing witness cannot be had, for the reasons above mentioned. the practice is & always has been to prove the handwriting of the party. not only when the inst. is in law or fact unattested. but where it is legally attd. & this is regarded as the best evidence under the circumstances of the case.

And when the law does not require a subscribing witness as to a bond. note of hand or cont. proof of party's hand alone is suffi. Sec. Ev. 27. 8.

When there were three co-obligors. two attesting witness. one of them being sued alone. the other was admitted to testify to the exn. by Defts. Stra. 35. Phil. 364. this always appeared to me questionable from the interest of the party. the confession of one joint obligor binds the other it is true. but will it prove that A is co obligor.

When in any of the preceding cases, the secondary evi is said to be suffi. the meaning is merely, that it is sufficient to render the inst. admissible evidence to go to the Jury. that it authorizes the Ct. to let it in to the Jury.

If there two subscribing witnesses of whom only one is in a condition to be sworn & is sworn, he must

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regularly be produced. Peak. 101. 2. But if both are in a condition not to be examined, proof of the hand. of one of them is suffi. tho it is clearly advisable to prove that of both. 1 B & P. 360. 1 McN. 310 2 East. 250.

In all the preceding cases when the subscribing witness cannot be examined if the instrument purport to be sealed & delivered it is strong evidence to the Jury that all the formalities, as reading &c have been complied with. Pea. 99. contra. Gilb. 101. B. & P. 254.

In proving deeds, to the validity of wh. three subscribing witnesses are essential by stat. if any one is in a condition to be examined he must appear. proof of his hand is not suffi. Peak. 101. 2. 372. Thus far the rule is the same as in proving L. instruments.

If however they are all dead, you must prove the hand writing of all of them & also that of the testator, here the rule is diff. from rule of wills in L. instts for in proving them the hand of one witness is not sufficient to be proved, & it is in no case necessary to prove the hand of the party executing. Com Dig. 538. Stra. 1109. Pea. 101. 372.

And in such a case, such evidence being produced, unless strong circumstances appear to the contrary, a compliance with all the formalities & requisites of the stat will be presumed. 1 Ld. Raym. 265.

If the witnesses are all living the evidence of one will be suffi. if he testifies to all the requisites, unless the deed is disputed, when all the witnesses in condition to be examined must be called. 1 P. W. 741. 1 Bl. R. 365. 2 Burr 2224. B. & P. 264. Peak. 101.

But a court of Eq. will

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decree a divise proved unless all the witnesses capable of testifying are examined, even tho one is beyond sea & the divise is not disputed. The reason is that a decree of the Ct. of Chy. is conclusive upon all the world, whereas a judgt. at law in ejectment for instance in which any party claimed title under the will is not thus conclusive. Powr. Dev. 718 1 Wils. 216. 1 Vez. 171.

Our courts of probate will declare a will proved on the testimony of one witness if he swears to all the requisites. There is however an appeal from the decisions of this Ct. to the Supr. Ct. Sw. Ev. 27.

Tho all the attesting witnesses to a will sd. deny the execn. of it, yet it may still be proved by the testimony of other witnesses, tho they are first to be called, their testimony may be disproved for it is not conclusive. 1 Bl. Rep. 365. Bull. N. P. 264. 2 Stra. 1096. Skin. 79. 413.

When a devise of real estate in widower was executed under Power of Atty. the power itself must be produced & proved like any other instrument (i.e. deed) the execn. of both must be proved by the party claiming under them. Sugd. Pows. 262. 1 Esp. 90. 2 Atk. 239. Sw. Ev. 28.

I have observed to you that proof of the execn. of the instt. might be made out by proof of the hand writing. The question then arises in what manner is the handwriting to be proved? The simplest mode of this wd. be the testimony of one who saw it subscribed by the person; if such cannot be had.

It is & must be a rule that the belief of the witness must be rejd. both in civil & crimal. cas. 1 Burr. 642. Peak. 102.

But to render this belief availing at all, it must be founded on a

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familiar acquaintance with the hand writing of the party. for without this he cannot be admitted to testify at all. and this acquaintance must be derived from having actually seen him write, or rec'd letters from him in the course of a correspondence, it is not suff't to have seen writing purporting to be his. 1 Burr. 644. 1 Bl. R. 384. B. N. P. 235. 6. Peak. Ev. 102 Ph. _ app't 112 12.

and the witness' having seen the party write his name pending the suit to show the witness his mode of signing is not suff't to let in his ev'ce. this wd be to permit a party to make ev'ce for himself. 1 Esp. R. 14. 15. 6 B. 207. McNally 421. 4 Esp. 273. 6th

And a witness in testifying his opinion must speak solely from the appearance of the writing, without taking into consid'n any extrinsic fact whatever, as that he did not suppose Defd't would give such a bond. Pea. Ev. 142. Pea. Ev. 102. 3.

And in proving the hand writing of a witness evidence that other instruments attested by him were forged is not admissible to counteract any presumption arising from proof of his hand writing. — it is irrelevant. Pea. 103th

In the proof of hand writing there is an species of evidence about which there is much dispute i.e evidence from comparison of hands, and on this subject the gen'l rule is that comparison of hands is no evidence at all in any case either civil or criminal. 1 Burr. 644. B. N. P. 236 4 Bl. 358. 4 T. Rep. 497 1 Esp. 351. 4 ib. 273 & 6. Pa. Ev. 102.

Now in most of the rules applying to this subject there has been no definition given of "comparison of hands". if there had been much misapprehension would have been avoided. It means

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sent a comparison to be made by the Jury between the writing in question & other writing proved or admitted to be the parties, or a similar comparison to be made by a witness. who is to testify his opinion from the similarity or dissimilarity of the two writings. 4 Esp. 273. a.b.c.d.e. Peake. 104.

Ex. action on bond. the question is, did Defts sign it? to prove it Plff offers in evidence other instruments wh. are admitted or proved to have been signed by Defts that the Jury may take & compare with the bond. this is not admissible.

agst question the same & other writings introduced as before. but Plff offers a witness who is unacquainted with Defts hand, to testify his opinion after comparison. this is also inadmissible.

So that comparison of hands is no evidence & the rule holds equally in civil & criminal cases, altho it was formerly held to be admissible in civil cases. Since much fault has been found with the conviction of A. Sidney, as the papers were proved to be his (or supposed to be) from comparison of hands, His conviction however as far as it relates to evidence was clearly legal both according to the law now is & then was — see Hume. Bl. Com. 4 Tr. Phil Ev. 366 That this rule is now gen. see anc. Dupl & Gilb 53. Mich. 394.

In 6th comparison of hands by the Jury has been allowed. but I trust it would not now be consid as law. it is not any where so. Ev. Ev. 30. 1 Root. 107. The decision went upon the ground doubtless that our Juries were composed of men who could read & write & therefore they could judge from comparison But the fact is, it is a matter of the most skill to judge of

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imitation, & I doubt whether there ever was anyone upon earth capable of doing it. and no evidence should ever be submitted to a Jury which even an expert could not comprehend.

But when the antiquity of writings renders a personal knowledge of the parties hand impossible, as the old entries in a parish register. a witness who has made himself acquainted with the characters there used by often inspecting them may be admissible w.c. is recapitulated for this seems not to apply to the gen.l rule. B.N.P. 236. Pea. 104

And it seems that persons technically skilled in detecting forgeries have been admitted to prove that the signature in question appears to be written in a feigned, disguised hand, but the rule was never carried so far in Eng.d as to allow such persons to testify from comparison. I think however that according to principle such skilful persons as bank. Clks & inspectors of franks &c. who from use are acquainted with party's hand. might be permitted to give their opinion from comparison. & there has been a decision of this kind lately at Hertford. 2 T.R 249. 2 Esp. 145. Peak Ev. 105. 6 app.x 11 & 12.

L.d Kenyon is appl. to the Evig. rule last stated but it appears to be law.

Thus an case in ch. instrument may be read in evidence without any direct proof of their ex.n as if it were in poss.n of adverse party, & after notice he produces it at the trial, it may be read without proof of ex.n because the party himself produces it as genuine. Pea. 108. 9. 2 T.R. 43. 4. 5 Esp. 17.

And the rule was ever determined to be the same when the adverse party who produced the inst.t was not himself a party to the

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inst.t But that determination has been & I think very properly ex-
pulsed for either he may have an interest in it. yet not being a party
he cannot be presumed to know whether it is genuine or not.
8 East. 548.

It is an established rule also that a deed of 30 yrs. standg
may be read in evce without proof of execn provided the possn has
followed the terms of the deed. and there is no reason or attend-
ation apparent. Bull. 255. Gilb. 100. 1 Esp. 278 2 Bl. R. 532. 2 T.
R. 266. 5 D. 259. Esp. D. 774.

This rule however being founded in
presumption does not hold. when there are circumstances from wh.
a contrary presumption arises. as if the deed appear altered or era-
sed. or the land & deed have changed possessors. here there must
be direct proof of the execn Bull. 255. Gilb. 100. Peak 110.

The recit-
al of one deed in another has been considered as sufficient evce
of the execn of the recited deed as against the party to the reciting
deed. as a recital of a former deed by grantor in a subsequt
one. Salk 286. Peak. 111.

This species of evce however is now re-
garded as only secondary & transfers admissible only when the
recited deed is shown to be lost. or some other sufficient reason given
for not producing it. Hardres. 120. 2 Lev. 108. 6 Mod. 45.

Formerly
if there was any reason interlineation or apparent alteration
in a deed. the Judges determined on proper whether it was
good or not. i.e. whether it is the instr.t that was delivered or
not. But in modern practice that is left to the Jury under
the issue of non est factum. 10. Co. 92 Gilb. 104.

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We are not to inquire how far written instruments may be explained by wider evidence,

a deed or other instt. when proved is conclusive upon the parties to it. Hence neither of them can contradict it by parol evidence, the deed being higher in our scheme, this is a familiar rule of the C. L. 56 Co. 68. 8 Co. 155. 3 Wils. 275. 1 Bro. Ch. 92.

The meaning of the rule is that neither party can contradict the terms, statements or stipulations in the deed. Thus if a bond is payable immediately it is incompetent for Dft. to prove it payable a year hence. — grants to me and his heirs forever &c

But a latent ambiguity arising in the construction of a deed or other instrument as a devise may be explained by other evidence as parol. 1 T. R. 703. 7 Co. 138. 1 Bro. Cha. 472. Pow. 112.

By a latent ambiguity is meant an uncertainty arising not upon the face of the instt. but from some extrinsic facts provable by parol, this kind of uncertainty may be explained away by parol. thus a devise is made to A. B & it appears there are two persons of that name. or the devise is of Blk acre when testator had two farms of that name, here it is competent for the parties to show which of the two was meant. there is no ambiguity in the instt. & as it is proved by extrinsic evidence, it may be removed by it. 1 Bl. R. 60 5 Co. 68. 8 Co. 155. 1 P. W. 420. 2 Co. 35. 2 Vy. 216

The rule is the same when the devisees name is mistaken or wrongly written in the devise, the party may prove that it is the familiar nickname by wh. testator used to call him.

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2 P. Wms 141. 1 Day. 11.

But when there is such a mistake the decl.ns of Test.r made long before the time of making the will are not admissible w.ch this would be going too far from the inst.r it would be going beyond the proof of existing facts merely. 6 T.R.671. Pla. 114.

If however the name of the intended devisee is entirely omitted, nothing extrinsic can explain it the ambiguity is patent to explain it would be to make a devise for the testator. 2 Atk 240. Pla. 117.

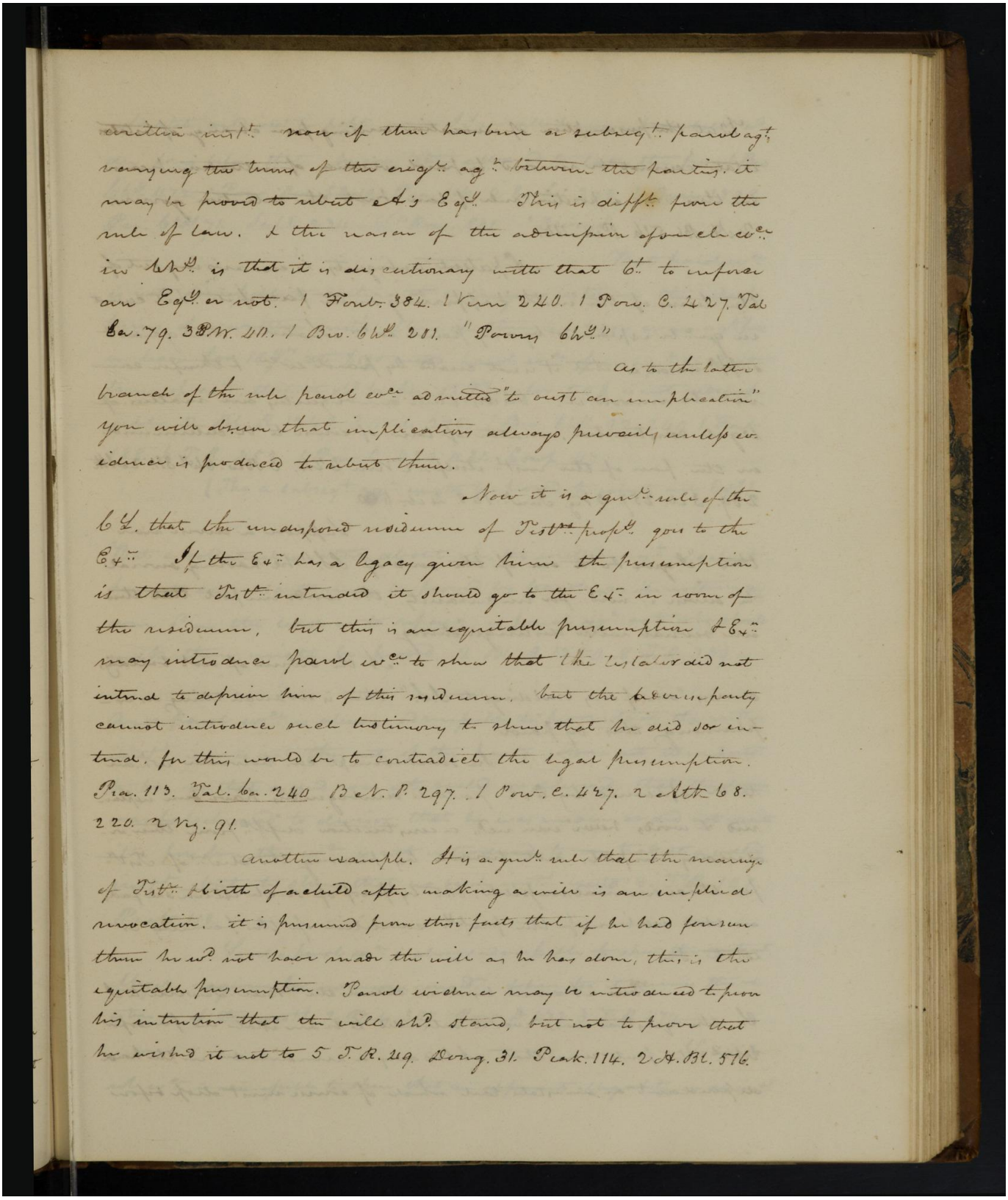
But where the ambiguity is latent, any circumstances which tend to prove the Test.r intent is admissible w.ch 1 Roll. 676.

When there is a right name & a wrong description given to the devisee, the devise may still be carried into effect by parol testimony, if there is no other person to whom the description applies, if there are parol evidence to explain would contradict any part of the devise there a devise to A.B. the eldest son of C. the devise might be good if C had no eldest son. A.B. bring in esse.

And the rule holds e converso if the name is wrong & the description right, as a devise to A.B. Bishop of London when there was no such person as A.B. 1 Bro. C.C. 30. 1 Vez. Sen.r 266. 6 id. 42. 6 T. R. 671.

So also parol w.ch is admissible to rebut an equity or to rest an implication arising upon the face of the inst.r As to the first branch of the rule "to rebut an eq.ty" suppose A brings a bill in C.t ag.t B on a

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evidence inst. now if there has been a subsequt. parol agt. varying the terms of the original agt. between the parties. it may be proved to rebut A's Eqy. This is diffr. from the rule of law. & the reason of the admission of such evce. in Eqy. is that it is discretionary with that Ct. to enforce an Eqy. or not. 1 Fonb. 384. 1 Vern 240. 1 Pow. C. 427. Tal Ca. 79. 3 P.W. 40. 1 Bro. C.C. 281. "Powys Eqy."

As to the latter branch of the rule parol evce. admitted "to oust an implication" you will observe that implications always prevail unless evidence is produced to rebut them.

Now it is a gnl. rule of the C.L. that the undisposed residuum of Tstrs. propy. goes to the Extr. If the Extr. has a legacy given him the presumption is that Tstr. intended it should go to the Extr. in room of the residuum, but this is an equitable presumption & Extr. may introduce parol evce. to shew that the Testator did not intend to deprive him of this residuum. but the adverse party cannot introduce such testimony to shew that he did so intend. for this would be to contradict the legal presumption. Pra. 113. Tal. Ca. 240 B & P. 297. 1 Pow. C. 427. 2 Atk. 68. 220. 2 Vez. 91.

Another example. It is a gnl. rule that the marriage of Tstr. & birth of a child after making a will is an implied revocation. it is presumed from these facts that if he had foreseen them he wd. not have made the will as he has done, this is the equitable presumption. Parol evidence may be introduced to prove his intention that the will shd. stand, but not to prove that he wished it not to 5 T.R. 49. Doug. 31. Peak. 114. 2 H. Bl. 576.

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That the presumption of revocation arising from change of testator's estate cannot be removed by parol evidence of intention, because in this case a positive rule of law treats the intention governs. 2 Atk. Bl. 516. Pla. 114.

A patent ambiguity is one arising out of the terms of the instr. & appearing on the face of it. & it cannot in gen. be explained by any parol evce. whatever. One great & suffn. reason is that it is not created by parol evce. & therefore cannot be removed it. Besides these ambiguities are matters of legal construction, matter of law of course to be determined on the face of the instr. itself. 2 Vern 624. 3 Bro. 61. 311. 2 Atk 239. 3 ib. 257. 3 Vez. Junr. 148. 4 ib. 610.

Suppose a devise run thus "I give &c to one of the sons of J.S." he having several the devise is void for uncertainty. the words import that there are several with distinguishing.

& the case of revr. building, devise "one of my buildings to J.S." there is no such thing as explaining this by parol.

In some instances however wh. are to be explained by C & L patent ambiguities have been explained & words have even rec. a construction diffr. from their ordinary import, not however by proving the declrs. of Testr. for those are inadmissible, but by proof of such extrinsic facts as the value of the propty. condition of the family or estate &c.

Thus A devised his house called the Bell Tavern to J. S. the question was, was it intended to be an estate in fee or for life? the facts were that A had only a remainder in the house dependant on an estate tail which of course must drop before

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d's estate could vest in poss.n and I s in all human probability wd. die long before that. he was then allowed to take the fee. 1 Bro Ch.d. 472. Pow. Dev. 50-19. Pca. 116. 2 Eq. Ca. 298. 3 Burn. 1898. Pr. Ch.d. 71. Salk. 234. L.d Ray. 831. "Devise"

But parol ev.ce is not admissible to contradict enlarge or restrain the express terms of a written inst.t thus if there is a lease or an ag.t for a lease for 10 y.rs at $100 rent. parol ev.ce of an ag.t made at time of ex.n, that it shd be for 15 y.rs or for 50 $ is not admissible. 2 Bl. R. 1249. 3 Wils 275. 1 Bro. Ch.d 92. 249. 1 Vern. 188. 6 T. R. 452. 1 Pow. C. 429. 431. Comp. 47.

(Tho a subseq.t ag.t might be proved to rebut an Eq.y)

But a collateral matter about wh. the written ag.t is silent & is not conversant may be proved by parol as if nothing were s.d in the lease as to repairs. a parol ag.t as to who should make them might be proved. 2 Bl. R 1250. 8 T. R. 739.

And parol ev.ce is always admissible to prove that the written inst.t is or is not the act of the party whom act it imports to be. as that a deed was not sealed or delivered. that the devisor was falsely read to devisor, that he was insane or did not assent it. for here the ev.ce is not introduced to contradict a valid inst.t but to shew that no such inst.t exists 8. T. R. 147. Peak. 118.

So also parol ev.ce is always admissible to shew the contract illegal. as given for usurious cons.n & then too to dismiss the existence of the inst.t 2 Wils. 347. Pow. D. 477. 3 T. R. 474.

So also parol ev.ce is admissible to shew that an apparent illegality in an inst.

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was occasioned by mistake of the scrivener. as if the bond made
it for more usurious. Bro. Ch. 501

If an ambiguity arises in
an antient instrument, uniform usage under it, wh. is in the
nature of a practical construction may be proved to explain it.
3 Atk 576 3 T.R. 779. 288. 2 ib. 810. 6 ib. 388. Cowp 248. 4 East 327.

But you observe the evidence is not to shew what
the parties meant by the term used. but to shew a constant usage
under the deed. it is like a prescription.

But the usage of a few
years under a deed cannot be admitted thus. 16 Cowp 819. Amb.
3 Veg. 298. 6 ib. 237. 2 N.R. 449

Having constantly used the
term written instt. you will understand that I mean a writ-
ten instt. under seal. And a written instrument not under seal
is regarded at C.L. as of no higher solemnity than a parol
agt. (except in case of a will) and it may be contradicted or
explained by parol testimony. Thus a not. reading "in full
of all demands" & not under seal may be proved not to in-
clude all demands. viens if sealed. 2 T.R. 366. 5 Veg. 987.
1 Johns. Ca. 145. 2 Johns Rep. 378. 3 ib. 319. 5 ib. 68. 8 ib. 389. 9 ib.
310. 12 ib. 531. Phil. 74.

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Parol Evidence — Under this head the first enquiry is who are competent witnesses & who are not. & Here it is necessary to premise that a witness is not to be competent who may legally be admitted to testify at all & this competency of a witness is a question of Law to be determined by the Court & is preliminary to his ex^m in chief.

The credibility of a witness is the credit to wh. his testimony is entitled, this is a matter of fact to be left to the Jury. 1 Burr. 417.

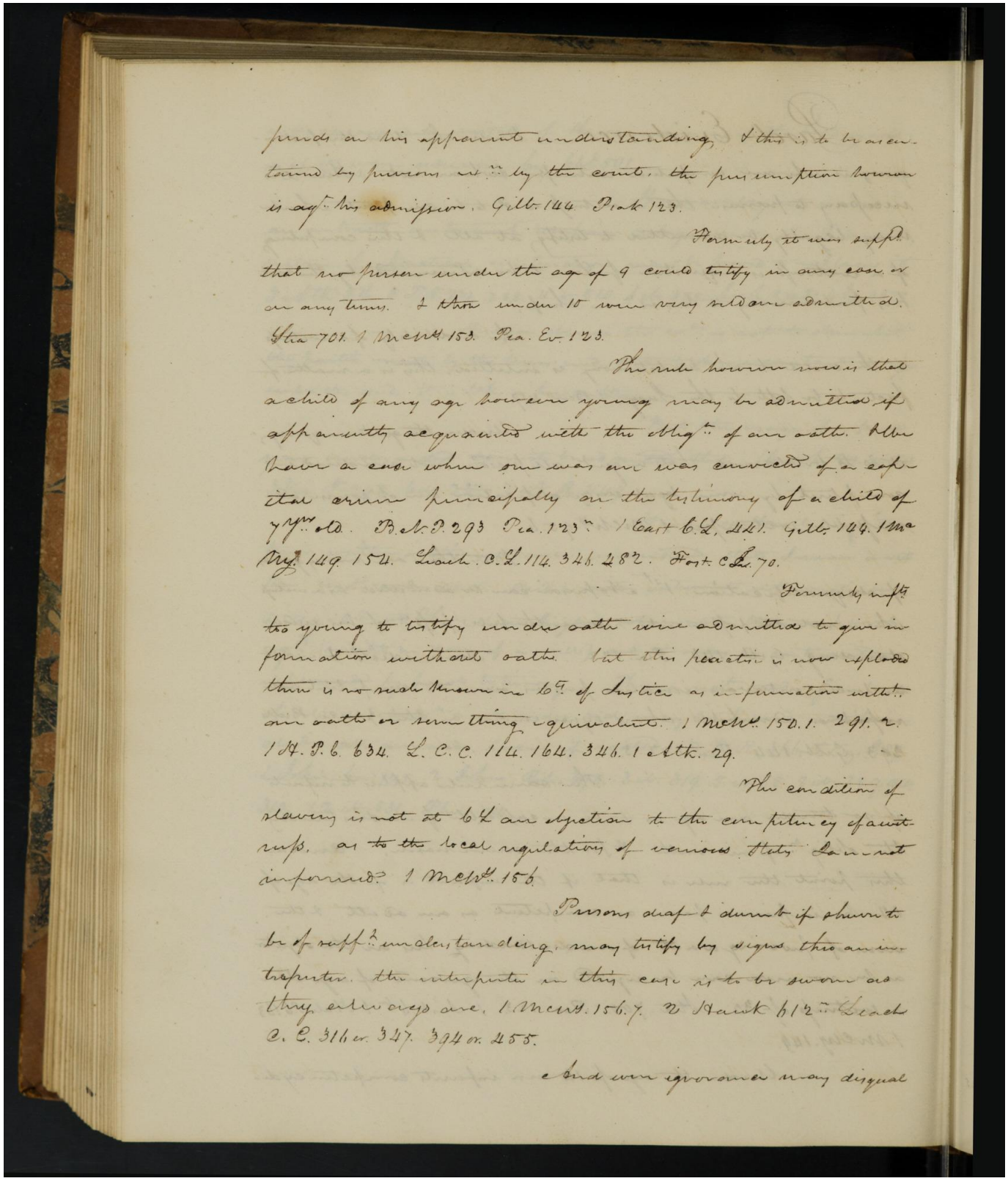
Under the gen^l enquiry it is to be observed that in gen^l all persons not rendered incompetent by some legal disqualification are of course admissible witnesses. 1 McN^a 95. 6.

But there are many grounds of disqualification. 1^st No person can be admitted as a witness who is not compos mentis. not in the full poss^n of his understanding. Gilb. 144. Pea. 122. Such idiots & except in lucid intervals insane persons are not competent witnesses or admissible wh. is synonimous in this place. Bull 293. Gilb. 144 Pea. 122. 3.

The same rule applies to infants of so tender an age as to be incapable of understanding the oblig^n of an oath & for the same reason. And on this point the rule is that if the infant is of the age of 14 he is prima facie as competent as an adult & the onus of proving want of understanding lies on the objector as he no more can be rejected on the ground of age than a witness of 30. Stra. 700. Pea. 123. 1 Inst. 6^b 1 Hale. P.C. 163 1 McCly. 149.

Under the age of 14 are infants competency de-

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funds on his apparent understanding, & this is to be ascertained by previous exn. by the court. the presumption however is agst. his admission. Gilb. 144. Peak 123.

Formerly it was supposed that no person under the age of 9 could testify in any case or on any terms. & those under 10 were very seldom admitted. Stra 701. 1 McNally 153. Pea. Ev. 123.

The rule however now is that a child of any age however young may be admitted if apparently acquainted with the obligation of an oath. Where have a case where one was & was convicted of a capital crime principally on the testimony of a child of 7 yrs. old. B. & P. 293 Pea. 123. 1 East P.C. 441. Gilb. 144. 1 Mass. 149. 154. Leach. C.C. 114. 346. 482. Foster C.L. 70.

Formerly infants too young to testify under oath were admitted to give information without oath. but this practice is now exploded there is no such known in the Courts of Justice as information without an oath or something equivalent. 1 McNally 150. 1. 291. 2. 1 H. P.C. 634. L. C. C. 114. 164. 346. 1 Atk. 29.

The condition of slavery is not at C.L. an objection to the competency of witnesses. as to the local regulations of various states I am not informed? 1 McNally 156.

Persons deaf & dumb if shown to be of sufficient understanding may testify by signs thro an interpreter. the interpreter in this case is to be sworn as they enter ways are. 1 McNally 156. 7. 2 Hawk 612. Leach C. C. 316 or 347. 394 or 455.

And were ignorance may disqual

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ify a person to be a witness is when it appears upon a previous examination that he is altogether ignorant of the obligation of an oath or of a future state. Leach. 482.

One of our native indians in the previous examination was asked "are you a christian?" "No. I am a presbyterian." -

A person may be incompetent to testify from the infamy of his character. The rule is that a person legally infamous is regularly an incompetent witness in any case. Pa. Ev. 124. Gilb. 139. 1 Inst. 6b. 156a. 158a. Stra. 833. 1148.

By a person legally infamous is meant one who has been convicted of some infamous crime as treason felony or crimen falsi as perjury or forgery and any thing wh. impeaches his integrity as barratry or conspiracy. 2 Wils. 18. Cowp. 3. 5 Mod. 75. McNally 206 &c. 463. Salk 690. Stra. 1148. Gilb. 139

The rule formerly was that a conviction of a crime wh incurred an infamous punishment as the pillory was a disqualification, no matter what may have been the offence. But now the infamy depends upon the crime without regard to the punishment. 1 Inst. 6b. 2 H. P. C. 277. 8. 1 McNy. 140. 206-208. 2 Wils. 18. Salk 689. 690.

Hence the conviction of an infamous offence a Barratry renders a witness incompetent to testify even tho the punishment shd be but a fine wh. is not infamous. Salk 40. 2 Wils. 18. Gilb. 160 Pa. 127.

On the other hand a conviction of an offence not infamous as a libel tho followed by an infamous punishment

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as the pillory does not destroy ones competency. 3 Lev. 426. 1 Mc Nal. 207. Gilb. 141

When legal infamy is merely a consequence of conviction the party is restored to his competency by a pardon from the Execution. as of perjury or of any infamous crime at C.L. & is pardoned by the King. 1 Vent. 349. 2 Ld Ray. 257. 8. 1 McClel 213-17. Salk 689. Bish D. 7 24.

But when the incompetency, is by St. made a substantive part of the punishment, a pardon by the Exve does not restore the party to his competency. as a conviction of perjury under the Stat of Eliz. for a pardon only dispenses with the legal consequences of the Judgt it does not destroy the judgt itself nor a constituent part of it. 1 McClel 235. Salk 514. 690. 3 Lev. 426.

In the latter case when incompetency is a part of the Judgt nothing short of a reversal of the Judgt or a stat. pardon will restore the competency of the party. Salk. 689. Com. Dig. "Testimoin" A. 5.

If one is convicted of a clergyable felony & is burned in the hand the burning restores his competency for it amounts to a pardon by stat. being a substitute for ct Ray. 380. Keyl. 37. 8 Leach. 115. Pa. 128.

But a conviction for an infamous crime without a judgt in pursuance of it does not disqualify a party to be a witness. for you will recollect that a verdict without judgt is no evidence whatever of the fact found by it in any case. B. N. P. 243. Stra. 161. Peak. 49. Com. D. "Ev." a. 6. "Test." a. 5.

But proof of the infliction of the punishment award by Judgt is now necessary to the disqualification of a witness, the infamy incurred does not depend upon the punishment. If the conviction is had & judgt is rendered the infamy is complete. 1 Wils. 18. 5 Mod. 75. Com Dig. ibid

And it seems now to be settled on principle & by numerous & weighty authorities, after a series of contradictory decisions, that the proof of a witness legal infamy can be made out no other way than by producing the record of his conviction. 8 East. 77. 3 St. R. 792. Com Dig. ibid. 1 McNally 256. Salk. 653. 12 Mod. 584.

It was formerly the practice to inquire of the witness upon his voir dire whether he had not been convicted of an infamous crime, & it may be doubted whether this is not still the rule by some, see. 4 T. R. 440. 1 McNally 210-13. 258. 3 East. 452.

It does not appear settled whether a witness is bound to answer such a question. I think on principle that he is not. If a question is asked a witness, the answer to which would disgrace or expose him to punishment by the L. he is not bound to answer. And a party cannot insist on the rejection of a witness on the ground of infamy unless he produces the best evce viz. the record of his conviction. 3 Campb. 210. 518. 13 East. 58. 2 Phil. 206 to 208. Salk. 153.

Whether a witness is bound to give evce that might subject him to a civil action appears not settled at C.L. But by Stat. 46 Geo 3. a witness in such case is compellable. 2 Phil. 208

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The rule that a person legally infamous is disabled to testify relates principally to suits between other parties. & he may make an affidavit to defend himself from charges advanced on a motion for information or attachment, otherwise he wd be deprived of the means of defence Salk 461. 1 McNl. 211.

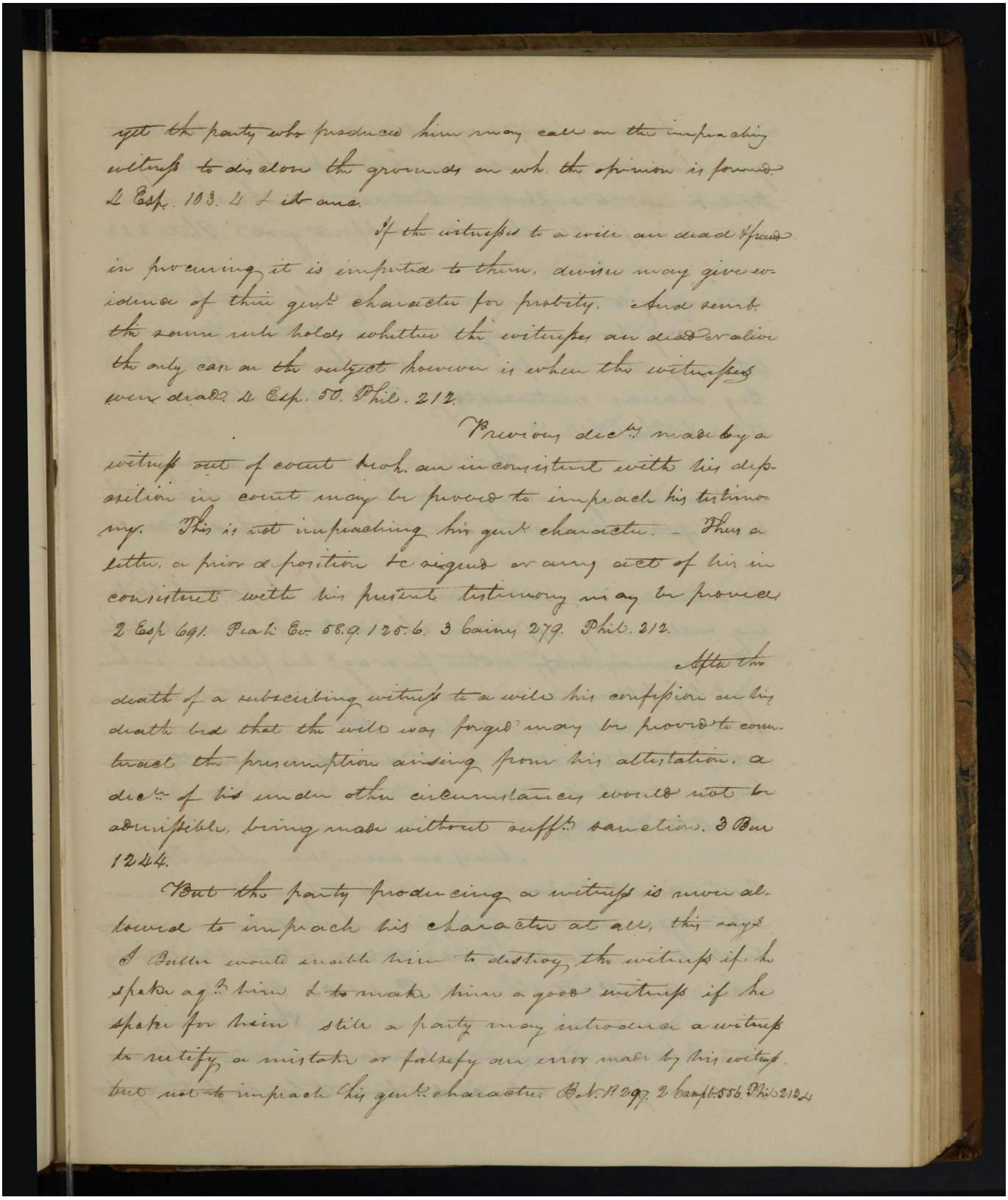
The gent. character of a witness not legally infamous may be proved not in order to exclude him but to detract from his credibility. no one is incompetent from disgrace unless it amounts to legal infamy. & the evidence which the law admits thus to impeach his credit is confined to his gent. character, for that the party is presumed ready to defend himself from that he was formerly addicted to lying. or that he told a lie in a particular instance. Bull. 296. 4 Esp. 102. 1 Phil 212 Peak ev. 125.

And this evidence relating to the witness character can be given by those only who are acquainted with his gent. character. and the appropriate question in the Eng. practice is whether in the opinion of the impeaching witness he ought to be believed under oath or whether he would believe him under oath. Peak Ev. 11. 4 Esp. 103. 4. Phil. 212. Peak 125.

In contr. on the other hand as our practice has always been, a witness called to impeach another is never allowed to testify his opinion of the credibility of the witness, the question being, what is his gent. reputation for truth & veracity among those who know him.

But the gent. evidence only can be given in the first instance to impeach the witness

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upon the party who produced him may call on the impeaching witness to disclose the grounds on wh. the opinion is formed. 2 Esp. 103. 4 ℔ it does.

If the witness to a will on deed fraud in procuring it is imputed to him, evidence may give evidence of this gen. character for probity. And semb. the same rule holds whether the witnesses are dead or alive the only case on the subject however is when the witnesses were dead. 2 Esp. 50. Phil. 212.

Previous decl. made by a witness out of court both. are inconsistent with his deposition in court may be proved to impeach his testimony. This is not impeaching his gen. character. - Thus a letter, a prior deposition to signed or any act of his inconsistent with his present testimony may be proved. 2 Esp 691. Peak Ev. 58.9. 125.6. 3 Cains 279. Phil. 212.

After the death of a subscribing witness to a will his confession on his death bed that the will was forged may be proved to contradict the presumption arising from his attestation. A decl. of his under other circumstances would not be admissible, being made without sufficient sanction. 3 Bur 1244.

But the party producing a witness is never allowed to impeach his character at all, this says 1 Buller would enable him to destroy the witness if he spoke ag. him & to make him a good witness if he spoke for him still a party may introduce a witness to rectify a mistake or falsify an error made by his witness but not to impeach his gen. character. Bak. N.P. 297. 2 Camp. 556. Phil. 213.4

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And as one party may introduce wcs to impeach the gen: character of his adversarys witness, the other may introduce wcs to support it, but not till the character is attacked. for 'till then it is supposed good. Phil. 212.

according to our practice a party who witness is attacked may prove by way of answer to the impeaching testimony that he before has made the same statement. Eng. decisions contradictory. B.N.P. 294. Gilb. 135. 1 Mood 182. & Phil. 212. 13.

The testimony of a witness may also be discredited by proving that he was intoxicated at the time of the transaction about wh. he has testified. 2 Day. 201.

an accomplice or a particeps criminis, tho the fact of his being such may affect his character & invalidate his testimony, may testify either for or ag:t his fellow, when ag:t his fellow in civil cases he is interested & this will go to his credit as in trespass. still as the record will not prove the fact, he is not deemed sufficiently interested to exclude him. Hard. 163. 2 Hawk. 608. 9. Sta 426 B.N.P. 286. Esp. D. 725.

And if an accomplice whom Plff or Pros:r wishes to improve as a witness is by inadvertence or otherways made a party, by leave of court his name may be stricken out or a nol. pros as to him entered & his testimony taken. B.N.P. 285. 1 Vid. 441. Peak. 138. 9. Phil. 63.

That an accomplice has rec:d promise of reward or pardon on condition of giving evidence goes only to his credit & not to his competency. that

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is if the condition of the promise is to "give wisdom" only, if to
woo to testify in a particular manner it would render
him incompetent. 1 McNl. 140. 200. 1 Ry. 18. 2 Hawk. 288.

It has been formerly supposed that infidels were incom-
petent witnesses, as having no regard to the obligation
of an oath. 1 Inst. 6. 7 Co. 17. Peak. 139. 140. Sabata was
much attached to this rule, for he supposed no one but a Chris-
tian could take truth except by mistake.

The gen'l. rule on
this subject now is, that no persons are to be excluded
for want of faith except Athiests, i.e. if they believe
in the being of a God, the obligation of an oath and
a future state of retribution, a person disbelieving ei-
ther of these is incompetent. Willy. 538. 1 Atk. 21. 1 Wils.
282. Stra 1104. 1 McNl. 64. 95. 6. 261.

The consequence is that
infidels believing all these are permitted to testify when
sworn according to their own notions of a binding sanc-
tion. a Mahommedan upon the Koran &c. It is wholly
improper then to ask whether a witness believes in the Chris-
tian religion. — it once. 1 Atk. 21. 1 McNy. 95. Peak. Ca. 11.
1 McNy. 261.

The question whether he believes these doctrines is
usually decided by warning him without oath before
he testifies in chief. 1 McNl. 261. Peak 11.

The inquiry has some-
times been made after he has testified by way of cross exam-
ination, but this is preposterous the objection goes to his taking
the oath. 1 McNy. 259. 2 Day. 56. 7.

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And our courts have in an instance at last admitted proof of the previous decl.ns of a witness to show his disbelief in these doctrines. 4 Day. 57 This is certainly incorrect, the party may be deprived of the benefit of his testimony without subjecting him to the penalties of perjury.

Quakers are admitted to testify under affirmation without oath by certain Eng. Statt. in civil cases but not in crim.l pros.ns Statt. 7 & 8. Wm. 3. 1 Geo. 1. 8 Geo. 1. 22 Geo. 2. Burr. 1117. Str. 854 872. 946.

But in crim.l cases a Quakers affirmation in form of an affidavit may be rec.d to exculpate himself as on motion for an information or attachment. 2 Burr 1117. Pea. 143.

By our Stat. & I presume throughout the U.S. Quakers are permitted to testify on affirmation in all cases civil as well as criminal. 4 Con. 559.

Another & the most usual ground of incompetency in a witness is Interest.

Formerly an interest in the question at trial in many cases rendered it incompetent. Salk. 283. Str. 1043. 1 T.R. 300. Prak Ev. 144. 5.

This being the most usual objection & the rule intricate it is important that you understand the distinction between interest in the question & interest in the event.

By interest in the question is meant the influence a witness is under from being in the same situation with the party by whom he is offered in relation to the facts

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to be tried, or from having or being exposed to some claim wh. may arise out of the facts in question, tho his rights w.d not not be affected by the verdict or judg.t in the case on trial. Phil. 35.7. Pea. 124.5.

Thus if an action is brot. ag.t an underwriter & another is called as a witness he is interested in the question, he being exposed to a claim arising out of those facts wh. would subject the present Def.t

So if there be two several indictments ag.t A & B for swearing to the same facts. If A calls B to testify concerning them B is said is said to have an interest in the question, for an acquittal or conviction of the pris.r (A) should not affect him

Again suppose a master brings an action per quod for beating his servant offers the serv.t as a witness. according to L.d Mansfield he is interested in the question only, for tho his right of recovery depends on the same facts, yet this record would be no evid.ce of them in his action. Pea. 166. Stra 595. 944. 1054. 3 Wils. 18. 1 Root 472.

But it is now settled since the case of Bent & Baker that this species of interest or influence does not exclude the witness the objection not going to his competency but to his credibility & as such may be made the subject of observation. 3 T.R. 36. 4 Burr. 2255. 2 T.R. 496. 1 ib. 163. 302. 3 ib. 36. 5 ib. 603. 7 ib. 60. 603. 2 ib. 20. 589. 1 H.B. 303.

And the gen.l rule now is that a witness is not disqualified on the ground of interest unless he is in a situation to be

immediately benefitted or prejudiced by the event of the suit. 1 Dane. Dig. 144. Phil. 36. 1 McKey. 176. Leach, 151.

Where in crimⁿ. prosecutions the person injured by the offence charged is regularly a competent witness for the prosecution altho he has or may have a claim on the party accused for the civil injury involved in the crime. 4 Burr. 2255. 7 T. R. 60. Phil. 86. 90.

The rule is indeed sometimes thus qualified he is competent unless the verdict on the public prosecution can be given in evᵉ. in the civil suit. This is wholly unnecessary for there is no conceivable case in C. L. upon wh. the verdict can be given in evᵉ. in the civil suit. The qualification applies then only to cases arising under the Stat. Law. Dig. 146. 45. b.

Thus on an indictment agᵗ. A for stealing the goods of B or beating B. B is a competent witness, yet B may have an action agᵗ. A, but the record cannot be given in evᵉ. nor can the crimⁿ. prosecⁿ. at all affect the civil suit. 1 Vid. 211. 1 McN. 53. Hard 331. 1 Roll. 403. 2 ib. 685.

And upon an indictment for robbery, tho by Eng. law the party robbed is entitled to restitution on conviction yet he is a competent witness. If the goods are his he is entitled to them when he can find them, — and in Mass. it has been decided that the party may testify altho the stat. gave him treble damages. 1 Mc. & N. 50. 61. 116. 144. L. C. C. 290. 9 Mass. R. 30.

So if one is indicted as a cheat the individual swindled &c. 1 Vent. 49.

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Salk. 286. Raid. 388. (contra Salk 283. Stra 1043. not law)

So on an indictment for perjury the individual injured is a competent witness for the crown. 4 Burn. 2255. 4 East 581. Stra 1230. Pea. 104. (con. Stra 1104. 1042. Sandys 331. Salk. 283. not law.)

And in case of perjury it is not material whether the witness has satisfied the judge who was recommended by him. tho it was formerly thought to make a difference 4 Burn 2255. 4 East 577. 4 Dall. 412. (con. 1 Esp 97. Pea. Ca 12 would)

And it is said that on a prosecution for perjury under 5th Eliz the party injured is a competent witness altho he has half the forfeiture, because it is said in his act the record of the conviction on the indictment would not be evidence. I conceive it would be evidence as constituting a part of the register of the foundation of his claim to the forfeiture. Phil. thinks the rule the true one tho numb is the weight of authority. Phil 86. Gilb. 124. 2 Rall. 685. B.N.P. 289 2 Lord Ray. 1229. 2 Hawk 433

And even persons to whom bounties are given for apprehending & prosecuting offenders to conviction are competent witnesses against them. Willes 422. Peak. 152. 2 Str 171. 1 Mod 58. 61. 116. 144. 179. 3 East. 455 4 ib. 180.

The question certainly will occur to you. are not these persons interested for the event? they are immediately interested in it. But there is a strong reception to the general rule the reason of it is that without it the objects of the Statute would be completely defeated. The

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that thus make them competent. when by b & L. they plainly were not so. —

So too on an indictment against a debtor for issuing up a note or bond the creditor is a competent witness. Stra 595.

So also on a public pros[r] on the Stat of Usury, the borrower or debtor is a competent witness to prove the whole case whether he has paid up the loan or not (i.e the usurious debt) formerly thought otherwise unless he had paid up the debt. 4 Burr 2251 2 T. R. 496. 7 in 60. 601. 1 Cains 68. 5 Mass. R. 53. Phil. 34 n.a 39. 40 n.a

But a pros[r] on a penal stat. who is intitled to part of the penalty, is not competent to testify in support of the prosecution, having an immediate interest in the event the avails of the prosy[n] to be recovd. 1 Esp. 95. Pea. 152 n. Com. Gilb. 132. 3 Mod. 114.

In the single case of a public prosecution for forgery it has been uniformly holden that the party by whom the instrument purports to have been made is incompetent to testify for the public provided the instrument if genuine would subject him to a suit or deprive him of a right or claim.

This rule has prevailed since the earliest period of judicial history. 3 Salk. 172. Stra. 728. L. C. C. 10. 29. 255. 2 East. Pl. C. 995. 2 A. R. 87. Pea. 147. 8. 1689. Phil. 88. to 90. Sanders. 331. Watts case

and his incompetency extends to every fact wh. might conduce to prove the forgery & is not confined to mere proof of handwriting

Thus in the celebrated case of Dr. Dodd. La Chesterfield was not admitted to testify until he had a release. However as to a mere collateral fact not conducive to prove the offence he may be a witness as that he is the person in whose name the instrument was made. 2 East. P.C. 996. 7. 1 McNy. 143. L. C. C. 487. Phil. 89.

Upon what principle this rule in the case of forgery was established no one has yet been able to discover. for in case of theft batt. forgery. robt. usury &c. the injured party is a competent witness & the interest only goes to the credibility. It appears to be an anomaly in the laws supported by precedent but no judge in Eng. has yet had the hardihood to overturn it. It is said not to prevail generally in this country. Phil. 91 & n.a.

The rule however does not hold when the party whose name is forged would not be personally affected by the instrument supposing it to be genuine, as the cashier of a Bank in case of forging bank note. L. C. C. 350. 1 McNy. 120. 143. Phil. 89. Pa. 169.

So also when a banker had paid a forged draft he was admitted after having struck the charge from his book thus abandoning all claim to recover it back. Bull. 289 2 East P. C. 1000. L. C. C. 57. Pa. 169.

But when the person would be at all affected by the inst. if genuine he is incompetent & the rule has been extended to all persons interested in the question. thus is not law thus on an indictment for forging a will the Ex. name

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in the genuine will has been declared incompetent & the rule has been extended to legatees. But this last rule seems is not now regarded as law L^d Mansfield has repeatedly both the cases. Peak. 169. Andr. 331. 3 Salk 172. 4 Burr. 2254.

But the person whose name has been forged to an instrument of any kind may be rendered competent by a release from him in whose favour it purports to have been made. L. C. C. 184. Phil. 98. Peak. 169^m

But in Penn^a this gen^l rule has been exploded & the party in whose name the inst^t is forged may be a witness without a release, altho the inst^t if genuine would subject him. So that the rule is precisely the same in cases of forgery as of usury, robb^y &c. The law is the same in Penn. Mass. & I think virtually the not precisely in N. York 1 Mass. R. 7. 3 ib. 82. 1 Dall. 110 2 ib. 239. 2 Ab. Rep. Day 96^m 4 Johnson R. 296. 302. 3.

Interest in the event. The rule is that a person interested in the event of the suit in wh. he is offered as a witness is regularly incompetent to testify.

(I have noticed the exception of prosecutions for perjury under the St. of Eliz. & of bounties for prosecuting offenders to conviction.) 3 T. R. 36. 7 ib. 60. 603. 4 Burr 2257. 2255. 2 T. R. 496. Peake. 144. 146. 164. 170. Phil. 43. 49. 50.

An interest in the event means an immediate & certain benefit or disadvantage to accrue to the witness from

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the result of the suit. In other words a person is said to be interested in the event of a suit only when on the one hand he will acquire some certain immediate right or exemption from liability or loss by a determination in favour of the party by whom he is offered, or when on the other hand, he will incur some certain immediate loss or liability to loss in consequence of a determination in favour of the opposite party. 3 T.R. 32. 4 ib. 20. 2 Johns. Ca. 236. 4 Johns. R. 302. 5 ib. 527.

And generally the not universally the question whether a witness is or is not interested in the event of the suit is determined by another viz. whether the record of the suit in which he is offered can afterwards be given in evidence for or against him in a case in which he is a party.

This has in many instances been considered the only criterion. but it is not so. Tho it is true that he may be interested when the record cannot be given in evidence 3 T.R. 32. 3. 6. 7 ib. 62. 4 East. 58. 4 Johns 230. 5 ib. 144. (2 Johns. Ca. 236. that this is not the only criterion see) 4 T.R. 19. 5 ib. 667. 2 East. 561. Phil. 512.

In a suit where A claims a right of common by custom B claiming under the same custom is not a competent witness for A. for you will recollect that a verdict finding a custom is evidence against third persons 1 T. 302. 2 ib. 32. La Ray. 731. Bac. R. 283. 2 Johns 170. Phil 244.

So also if the person offered as a witness would be liable for the costs on either side he is incompetent to testify in favour of

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that ride, Ex. Guardian or next friend cannot testify in favour of the infant. Stra. 548. 1026. Gilb. 107. 1 Eq. Ca. 72. 1 T.R. 491. 1 Wils. 130

The same rule holds as to any one who has agreed to indemnify the party ag.t costs he cannot testify for that party for the record is evidence. So it is with one who has given security to answer the costs that may be recovered ag.t Plff. he cannot be a witness, the record would reject him. Stra 575. 11 Johns. 57. Stra. 129.

For the same reason Deft.s bail cannot testify for Deft. he being responsible for whatever may be recovered ag.t Deft. for the witness cannot be rejected without the record. The bail however may be restored to competency by substitution. 1 T.R. 164. 8 Johns. 407.

So in an action ag.t Sheriff for breach or neglect of duty by Dep.t The Dep.t cannot testify unless he has a release from the Sheff. for the record will shew that the Sheff has been subjected to what amount. 2 La Ray. 1211. Stra. 650 3 Campb. 523. Peak. 165.

So also in act.n ag.t Master for the misconduct of his Asst. Asst. not competent without a release, — for the record would be an essential part of the evid.ce in the subsq.t act.n 4 T.R 589. La Ray 1007. 1 Campb. 251. 3 ib. 516. Peak. Ca. 53. 84. 1 Esp. 339

A release will restore his competency. Stra. 1083. 1 Esp. 339. Pea. Ca 53. 83.

Again in an act.n on a policy for loss by Bar.t of Master. The Master is incompetent to testify for underwriters, unless released by them. for if they are subjected for

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his bar[t]. he is immediately liable liable over to them & the record is evidence 1 Esp. Dig. 339. Peak 160. Phil 47. 1 H. Bl. 306. 1 Camp. 408. Stra 575.

So on the other hand if a witness for Plff would by subjecting Defts. to execute himself from any liability, he is incompetent, 6 Guard[s] not competent witness for his ward because a recov[y] by ward would prevent Guard[s] liability for costs. Pea. Ca. 84. Stanh 202. Stra. 506. 1026. 2 Mass R. 444. 2 ib. 658.

On the same principle a grantor who has conveyed land with cov[t]. of seisin or warranty is inadmissible to prove grantors title in question. For by establishing grantors title he warranty himself from liability on his own covenants. & a contrary ifsue would subject him. 2 Rol. 685. 3 Day 433. 2 Johns 394. 6 ib. 523. Peak. 170.

The same rule holds as to a lessor with covenants when quest. is brot. against lessee for the same reason. he is incompetent whether the cov[t]. is express for quiet enjoyment or implied from the word "demise" Esp. 164. Phil 74[n].

So a vendor of a chattel is incompetent to testify for his vendee in a suit against the latter calling his title in question, for there is an implied or express warranty of title in all cases of sales of chattels 6 Johns 5. Phil 74[n].

But a grantor lessor or vendor without covenant of title or warr[t]. express or implied is admissible to testify for or ag[t]. vendee, not being interested. Stra. 845. Pea. 170.

So also when the vendor has covenanted or warranted

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title as agt. them only, claiming under himself he is a competent witness agt. all but those thus claiming as in case of release & quit claim deed, for if purchaser is evicted by others he has no claim over upon the vendor. 4 Mass. R. 441. 2 Binney 90. 108. 500.

So the inhabitants of a town or parish liable to be rated for the poor if not actually rated are competent witnesses for the town or parish in Engd in a question of settlement, for this interest is contingent, seem if actually rated. 4 T. R. 17. bil. 157. 2 East. 561. Pea. 163. 4.

In Connt. the inhabitants of located corporations or towns are always allowed to testify when the corpn. is a party in case of settlement of paupers, from the supposed necessity of the case, & this tho they are actually rated.

And by the Eng rule as well as ours the inhabitants of a parish or town are allowed to testify in support of a qui tam actn. or a prosecution for a penalty altho the penalty when recovered would go to the support of their poor, the interest in this case is too minute and contingent to exclude them. Phil 48m

It is a rule that a third person not a party to the suit in ejectment is not competent to testify that he himself not Deftn. is in possn. (this would appear to be their ground). the witness has an immediate interest. the rule proceeds on the very supposition that witness is in possn. & would be ousted should Plff prevail. 1 Johns. Ca. 275. 1 2 Johns R. 244. — Phil 28m 52.

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" State ly as a gen'l rule can a party to a suit testify for himself or his co-party by reason of his immediate pecuniary interest Pea 149. Phil 57. Gilb 116 1 Vin 234. 1 P W. 596. 1 Day 106. 10 Johns 128. 4 Day. 388 (See exceptions post)

So tho he is a mere trustee having no beneficial interest in the subject. For he is interested in the event being liable for the costs. this liability is certain, & his ultimate indemnity contingent. Peak 149 3 East 7 Pea Ca. 153 7 T R. 668. Phil 57. 2 Day 404.

So of an Ex^r whether Pff or Def^t. tho when Pff he is not liable (in Engd) to costs Phil 57 n.a. 1 Binn 444. 6 id 16. 1 P W. 289 2 Vy. 42. 2 Vern 699. Stra 342 East. 183.

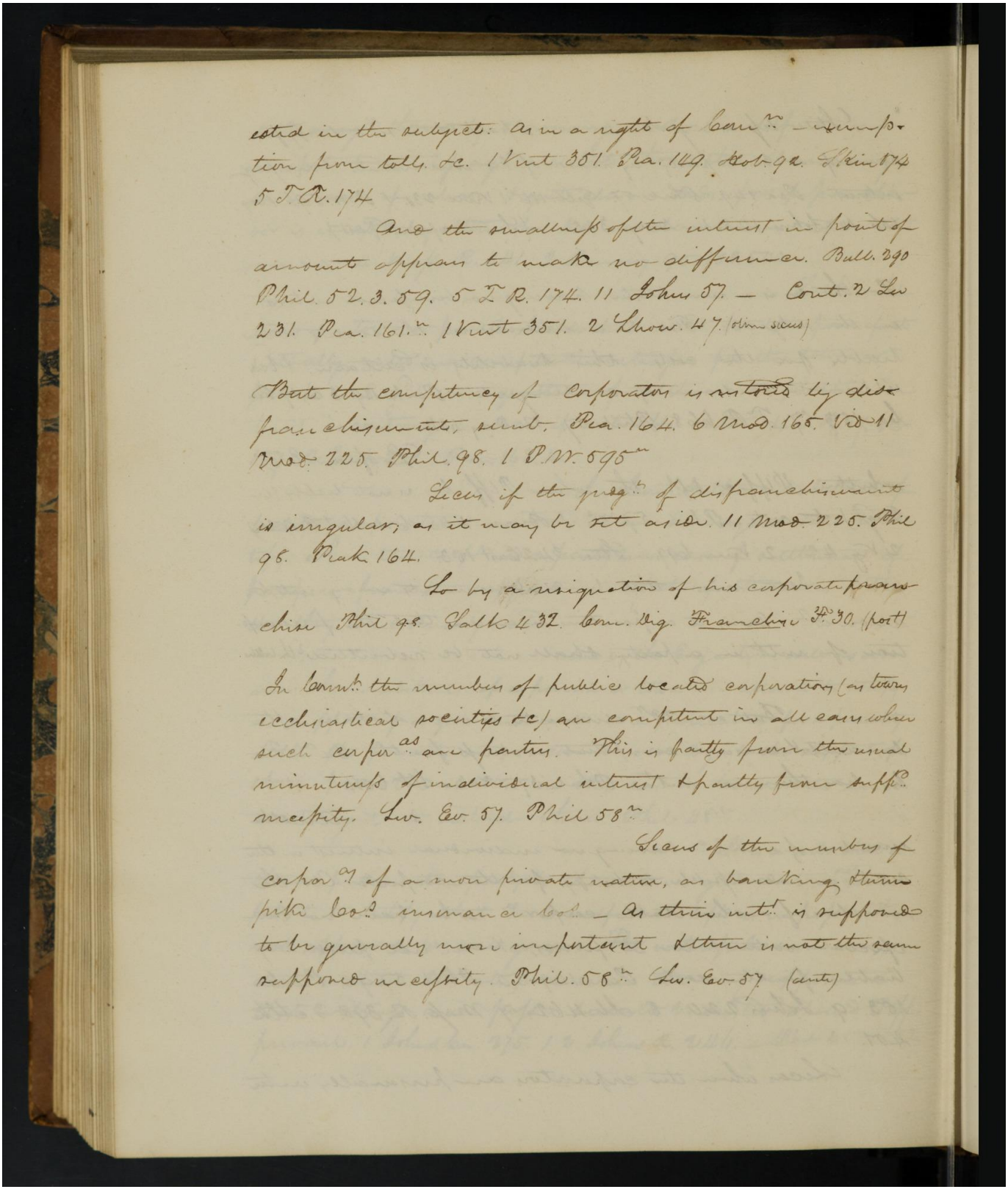
Is the reason that his disbursements may not be allowed? Or is it a positive maxim that the presumption of int^t in a party shall not be rebutted? the latter

But an Ad^r durante minore state. is. after his auth^y ceases a competent witness for the Ex^r For he has then, no int^t Phil 57 n.a. 3 d Atk 604

Another members of a corp^n having no individual interest in the suits, are admissible to testify for the corp^n As the members of a charitable corp^n who have no beneficial interest in its funds, & are not personally liable for the costs Pea 149-50 Phil 57. 98 Pea Ca 153. 9 Johns 220 8 St. 462. 7 Mass. R. 398. 3 d Atk 401.

Except when the corporators are personally inte-

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cated in the subject: as in a right of Comⁿ — exemption from tolls &c. 1 Vent 351. Pea. 149. Hob. 92. 1 Kin 174 5 T.R. 174

And the smallness of the interest in point of amount appears to make no difference. Bull. 290 Phil. 52. 3. 59. 5 T R. 174. 11 Johns 57. — Cont. 2 Lev 231. Pea. 161.ⁿ 1 Vent 351. 2 Show. 47. (dim. secus)

But the competency of corporators is restored by disfranchisement, remb. Pea. 164. 6 Mod. 165. Vid 11 Mod. 225. Phil. 98. 1 P.W. 595.ⁿ

Secus if the proc.ᵍˢ of disfranchisement is irregular, as it may be set aside. 11 Mod. 225. Phil 98. Peak 164.

So by a resignation of his corporate franchise Phil 98. Salk 432. Com. Dig. Franchise D. 30. (post)

In Comⁿ the members of public located corporations (as towns ecclesiastical societies &c) are competent in all cases when such corpⁿ as are parties. This is partly from the usual minuteness of individual interest & partly from supposed necessity. Lw. Ev. 57. Phil 58.ⁿ

Secus of the members of corporⁿˢ of a more private nature, as banking & turnpike Coˢ insurance Coˢ — As their int.ᵗ is supposed to be generally more important & there is not the same supposed necessity. Phil. 58.ⁿ Lw. Ev. 57 (ante)

Gen'l a Deft cannot testify for his co-deft. For his ev'ce will go to prove at last that they were not jointly liable as charged (ante)

But if in an act'n sounding in tort no ev'ce whatever is given agt. any of the Defts he is intitled, upon the close of Plffs ev'ce, to be discharged - & may then testify for the other Phil 61. 1 Leo. 237. Gill. 117. Bull. 285. 1 East. 312. 2 Bawk c. 46. S. 98. 3 P.W. 288 1 Root. 134. Pea. 152. 1 McLy. 204.

But if there is any ev'ce agt. him, the whole ca. must go together to the Jury. Phil. 61. Gill. 117. Bull. 285. 3 Esp. 25.

In Trespass agt. A charging the wrong to have been committed by himself & B. - if it appears that B. was concerned in the trespass & that process had issued agt. him & an attempt made to arrest him at the process stat; he is not admissible for Deft. Pea. 153. Phil. 61. Bull. 286. Harlow. 264. 123.

Qu? on what principle, not merely upon that of interest in the event - & he is not actually a party to the suit - Cook. 10 Johns. 21. Phil. 62.

Secus if none of these facts appear. Phil. 61. Sty. 401. 1 Atk. 452 6 Binn. 316.

On an indict't agt. several on having submitted Dft his plea, is competent to testify for the others the ca. as to him being at an end. Phil. 62. Stra. 633.

But merely suffering judg't by default does not restore his competency either for or agt. the others. For he is a party to the record, & the case even as to him is not ended. Phil. 62. 5 Esp. 155. Bull. 286. 2 Campb. 333. 10 Johns. 95.

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So when one of Defts on a joint contract has obtained his discharge under the bankrpt laws. For he is a party to the record Phil 62. 2 Esp. 25. 4 State trials.

So in an act. on a j. contract ag. two. if one suffers judg. by defaults he is not admissible for the other. For if the action fails as to one, it fails as to both. (Phil 62): nor for the Plff for if the action prevails, the party defaulted will be entitled to a contribution from his co-defts. But if not the balance of interest in this ca. clearly ag. the Plff. & Def. so why may he not testify for the Plff. Phil 62. 4 Taunt. 752.

It has been holden that one of two Defts in trover having suffd a default (tho inadmissible for the Plff 2 Campb. 333 n) is admissible for the other Defts. For he is subpœd at all events; & is not liable to be D. for the costs of the issue. Phil. 62. 2 Esp. 553. Pa. 152. 3. Ld Raym. 1562 3 Esp. 25. & 2 Campb. 333. Contra 6 Binn 319 for the jury may assess j. damages ag. all the Defts. Exec 1 Day 33.

Is not the rule as first laid down a departure from principle? Wd not the party defd be liable for the costs of the issue? If not still there can be but one aspt. of damages & the co-ds may go to mitigate them — Suppose he were called to prove profl. in the other Def.

If one of two Defts in ejectment commits a verdict ag. himself, for so much as he is in poss. of he is a competent witness for the other. Semble Phil 62. 3. Bull. 285. For a finding in favour of the other can-

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not benefit him. The damages recoverable being but nominal.

But a person, jointly liable with Defts in a suit or liable solely in his stead (tho not himself a party) is an incompetent witness to defeat the suit (Pea 155. 170) tho he may testify in support of it sometimes. Stra. 35. Phil 362. (ante)

Thus a partner of Defts is not admissible to prove that he is solely liable, that Defts acted as his agent. For the witness would be liable for half the costs recovered by the Plff. Pea. 155. 170. Str. 620. 174. So 5 Burr. 2727.

But a release from Defts would restore his competency. Pea. 155. 170. 1. 1 Esp R. 103.

In Eqy., one of several Defts having no interest may be examined on either side. Phil. 63. 3 Atk 161. Ambl. 393. 2 Ch. Ca. 214. Herein the rule in Chy. differs from that of C. L.

A Bankpt is not competent, in an action by his assignees, to prove property in himself or a debt due to himself: as an increase of his prop. would augment his allowance Pea 167. Phil. 51. 98. Bull. 43. (post.)

Nor of his creditors. For by increasing the bankpts divisible fund the creditors dividend is increased. Pea. 167. Phil. 51. Stra. 507. 5 Johns 427. 258. 2 Dall. 20. 1 Mass. R. 239. 2 Day. 466. So Stra 650) Indeed the suit is brot for the benefit of the creditors.

And the petitioning creditor is not competent to support

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the commission by proving it regularly sued out: as he is obligated by a bond to establish the bankruptcy. Phil 52. 2 Campb. 411. Le 4 Mass. Rep. 237 Phil 52 n (a)

But a cred who has not proved his debt, under the commission is competent to support it tho not so to increase the fund. Phil. 52. 2 Campb 301. 2 Bl. R. 1273.

Le cus such of other creditors as they being parties to the proceedings are interested to support the commission, Pra. 167. (3) Ves. Ex. 19. But their competency may be vitiated by a release to the assignees. Ibid.

The Bankpt himself is not competent to prove any fact necessary to establish the commission. For he is interested in supporting it, as the means of obtaining a discharge from his debts, Pra. 168. Phil. 51. Str 829 2 H. Bl. 279. 5 Esp. 22.

So tho he has obtained his certificate releasing his surplus & allowance: For if the commission not supported, the proceedings under it are void, & he will remain liable for his debts. (Ibid.) But in y. case he is competent to increase the fund, as he has no interest in it. Pra. 168. (5.) Cowp. 370. 1 Brod. 269

But he is competent to explain an equivocal act. proved on the part of the assignees by other witnesses — & thus to shew that it was not an act of Bankptcy. Prac 168. (2) 2 Esp. 287.

So to diminish his estate — as to disprove a debt claimed by his assignees as due to him: For his

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evidence is agt. his int. Peak. 168. 6 Comp. 70

In gnl. the records being admissible wn. for or agt. the witness in a future suit is the criterion of int. in the event. Phil. 48. 9 T. R. 32. 7 ib. 62. 2 Johns Ca. 236 5 ib. Rep. 257. 4 ib. 302.

But it is not universally so. For there are cases in which a witness is deemed thus interested tho the record would not be wn. for or agt. him, but such cases are few. Phil 49. 50 Gilb. 106. 7. Bull 284. 4 T. R. 19.

Thus in Trespass agt. a sheriff by Ds. for taking his goods on an ex. agt. B B— B is not competent to prove the prop. of the goods in himself. For tho the verdict wd. not be wn. for, or agt. him in any suit relating to the title; yet his ex. duties wd. be discharged if the plff. prevailed (Phil 47. 52. 2 Ch. R. 331.) Hence an immediate interest in the event

A debtor is not competent to prove the testator's sanity in order by another debtor in the same with Phil. 51. 2nd. Why not independently of the objection arising out of the St. of frauds Phil. 374-7. Record clearly could not be wn. & W. has no interest whatever.

For other cases of interest in the event, when the record wd. not be ev. vn. et supra. See Phil. 50-3.

When the witness has an interest wh. is balanced so that he stands in point of interest indifferent, he is competent to testify for either party. Phil. 53. Peak 164 Gilb. 129.

Thus on an indictment agt a county for not repairing a bridge. The inhabitants of Cty are competent on either side as to the necessity of repairs: They being interested as well to have repd bridge, as to avoid the expence of repairs. (Sid. 1 Vent. 351. 6 Mod. 307.

So acceptor of a bill is competent, in an action agt drawer, to prove no effects & then dispense with notice. Pra. 154. 1 Esp. 382.

So endorser of a note, having rcd money from maker, to take it up, is competent in a suit by endorsee agt maker to prove the note satisfied. For he wd be liable in one event to the Plff (the endorsee) & in the other to Defts. Phil 55. 2 East. 456. Lunch. & Tourt. 264.

And the comparative difficulty of a witness enforcing a remedy agt one or the other party (when he has a claim accruing in either event) seems not to affect his competency. Phil. 55. 6. Leo vide. 3 T. R. 579. 2 Dey 399.

In Aps for money paid to the use of ship owners, the Capt is competent to prove that he rcd the money from the Plff for the use of Defts. His liability being no greater in the one event than in the other (Phil 58. 102. 7 T. R. 481. n (a) 1 Campb. 407. 2 Cains 77. Peak. 165)

For if he has rcd the money & not paid it over he must be liable to one party or the other in any event & if he has pd it over he is not liable to either.

So in Covt for rent when both parties claim under I. S. he is competent to prove

to whom he made the first loan. Phil 54. 3 T.R. 308. 2 Roll. 685 Gilb. 109.

So in an action by payee agst the acceptor of a bill, drawn by one of two partners, for his private debt, in the name of the firm — either partner is competent to prove, that the former one had no auth^y to draw the bill. Phil. 54. 13 East. 175

So in agst between A & B. — S.S. who had rec^d from Deft money due to the Plff was held competent to prove, that he rec^d it as agent for the Plff. Phil. 54. 5 T.R. 482. Peak 165.

Seems if the witness would be liable to a greater extent, in one court than in the other. E.g. agst acceptor of a bill, for the accomodation of drawer, the latter is incompetent to prove the transaction usurious — For the liable in either court for the debt; he is also bound fully to indemnify the acceptor & of course liable to him for all damages. Phil. 55. 4 Taunt. 464

There are certain exempt cases in which even a party to a suit is allowed to testify — from a supposed necessity. Pea 150-1. Phil 57.

Thus on the H. of Winton. 13 Edw. 1. the Plff. (the party robbed) is competent to prove the robbery & the amount lost — "on default of other proof". Lid. 2 Rol. 685 Bull. 197.

Seems as to other facts wh. in common presumption, are provable by other evidence as that the place where is within the hundred &c. Pea. 150-1. Phil 55. Harden. 83

Or that he delivered money &c to his servt. who was robbed
Pca. 150 Vs. Lib Evr. – see Pca. 151 Vs Bull. 197.

And in an action for malicious prosecution the oath given by Defts on the orig. prosecution, may be proved by Plff in his defence. Sent. (Pca. 151 Vs Phil 58-9. 6 Mod. 216 Bull 14) This rule is also founded upon supposed necessity – for the protection of prosecutors.

These appear to be the only cases of this description at Com. Law. Pca. 151 Vs

But one or both the parties to a suit are in some cases allowed by stat law to testify for themselves. Thus by St. in Bon. both parties are allowed to testify in book debt – account & in act. by receivers of counterfeit money or bills. So the Plff in cases of recit absentt – bastardy & qui tam prosecutions for theft – as to the loss & identity of the property & so the Defts is in sci. fa. on a judg. by foreign attachment, on prosecution upon the stat relating to trespass in the night season &c Sw. Evr. 81-8. St C. 99. 101. 526. 194. 660. 2 Day. 116

Upon a similar principle of necessity & "for the sake of trade & com. usage of business" agents or servants becoming interested in the ordinary or regular course of their employment are competent witness for their principals or masters Pca. 151. Phil 945 Pca. 164. 167. 171.

Ex. gr. a factor may prove a sale of goods for his principal to charge the vendee; tho entitled to a commission on the avails, Phil. 94. 3 Wils 20 1 Atk. 228. 2 A. Bl. 590. Bull 289. 1 Johns Ca. 208. 2 ib. 60. 2 St. Rep. 109 Peak. 165

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And in gen^l any one who contracts for another is an agent within the rule Phil 94. 2 St. Bk. 591

So of the steward of a manor when intrusted to support a claim by the Lord. Phil. 94. 3 Feb. 90 Hardw. 360

So an agent is competent to prove in favour of his principal, a pay^t of money delivery of goods &c: tho he ever goes to discharge his own liability to the principal. Pea. 157. 2 164. 5. Ib. ca. 129. Bull. 289. Phil. 94. 11 Mod. 262. 4 T. Rep. 589. 592. 2. Esp. 509. 3 ib 48. Sal. 289. Stra 647.

So if the agent has over p^d money or p^d by mistake. he is competent to prove it in an act^n by master to recover it back. Phil 95. Stra 647. 3 Camp. 144. Pea. 164. 2 Johns ca. 270.

So as to the acts of Serv^ts not done in the ord^y or regular course of his employment & claimed to be violations of trust or duty These are not within the principle or reason of the rule Phil 95. 6. Bull 289

Ex gr. In an act^n to recover back money p^d out for illegal purposes or squandered by Serv^t (Phil. 95. 6. Pea 164^m Camp. 199) Serv^t not competent to support the action without a release. For the act is not in the regular course of his employment & if no recov^y is had he is liable to the master.

So in an action ag^t a master for an injury done by the negligence of his serv^t the latter is not a competent evidence for his master Pea. 165-6^m Stra 650. Lo Ray. 1411. 4 T. R 589. 1 Esp 339. 6 ib 73 1 Camp. 251. For he is liable to indemnify his master if

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Pltff prevails. Competency restored by release. Pea 166.
Stra 1083. Pea. Ca 53. post.

So in an act. for sinking Pltf's goods on ship board, the master is not a witness for Pltff without a release from the Pltff. For his evidence would not be to prove an act of his own in the ordinary course of his employment Pea. 166. H. Ca 84.

So in an action upon a policy of insurance for barrt. of the master, he is not admissible for Pltff unless released by them. Pea. 166. 1 Esp. Ca. 339.

An agent when competent to testify, is so, to prove his own authority. Phil. 96. n (a) 2 Dall 300.

But he cannot prove the contents of a written authority without producing it. contr. Phil. 96 n. 2 Dall. 236. 1 Esp. 406. n (1) 1 Ellis & B 483.

Nor can one who has purchased goods in his own name, testify, (for vendor), that he purchased them as agent for deft. Phil. 95. 3 Campb. 317. See Note the analogy to the case of a dormant partner.

It was once holden that if a witness supposed himself under an honorary obligation not a legal one to indemnify a party, he was incompetent to testify for that party. Pea. 157. Stra. 129. Phil. 41-2. 1 Mc. Nis. 1110. Esp. 707.

But this rule has since been denied & now not to be law (see Wisn. 5 Mass R. 513. 8 Johns 426. 1 Dall 62. 2 ib. 60.) (Phil. 141-2. 1 Campb. 165. 9 Johns. 219.) but it may go to his credit. Phil. 42.

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The interest which excludes a witness must have existed it is said at the time when the act or fact in qu. took place - or have accrued afterwards by operation of law or by the act of the party who offers him as a witness. Pea. 187. 185. Phil 100.

An interest acquired by W's own act thus, with the concurrence of that party does not as has been said disqualify him. otherwise a witness might in every case deprive the party of his testimony: & the opposite party might sometimes do it. Pea. 158. 185. Skin 586. 3 T. Rep 27 33-4 37 3 Johns Ca 237. Phil 100. Stra 206.

Thus if a witness to a bond or other contract makes a bet, that the party claiming will recover in the sd action formed upon it. he is still a competent witness for plff & compellable to testify. Pea. 158. Bull. 290. Phil. 100. Skin 586.

So if a prosecutor, or other person, privy to the commission of a crime by another, lays a wager that he will be convicted, the person is competent & compellable to testify in support of the prosecution. Sid. Stra 652. 1 McCly 125. 3 Lev. 152.

So where A a broker having procured B to underwrite a policy, afterwards became an underwriter himself, it was holden by D Kenyon & Ashhurst J. upon B could not be thus deprived of his testimony, even if the bet. two had become interested in the event. 3 T.R. 27 Phil 100 (3 Camp. 381 contra semb.)

Qu. whether the rule is not laid down too generally & whether the opinion in the last ca. is law. Qu. whether the rule extends to any other case

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than those in wh. yt act creating the int. is either prohibt.
i.e. intended to deprive a party of testimony, or merely gratuitous; as in the above cases of wagers. Phil 101. 2.
1 Maul & Sel 9. 3 Campb. 380.

Nor if a person acquainted with a transaction in wh. others are interested, afterwards in the regular course of business & bona fide becomes interested in the event of the suit arising out of it; he is according to the latest determinations in computent. Thus where an underwriter who had paid the loss upon an ag. yt yt insured should refund if his action ag. another underwriter failed - was called as a witness to prove the policy void - yt court held him incomputent. Phil 101-2
1 Maul & Sel 9. 3 Campb. 380.

But where a person having given a deposition, while uninterested, afterwards becomes interested by operation of law his depo. is admissible, his deposition is admissible (2 Vy. 22)

So if he afterwards becomes a party, as heir or ex. to the orig. party (2 Vern 699. 1 P.W. 289. 2 Atk 615 [contra if he becomes a party (Sal 284. Stra. 101. Esp 706.) But in the last cases yt depos. were in perpetuam rei memoriam, to be read only after his death & he was alive Bull. 240-86
2 Vy. 22. Peak. 58.9

And on the other hand - in those cases in wh a w. commit by acquiring an interest subsq. deprive a party of his testimony, he cannot by voluntarily acquiring an opposite interest privilege himself from testifying. Ex. gr. If a subscribing witness to an obligation

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becomes bail for the debtor or party bounds he is still competent to testify, to its va. Pea. 185.

But when a person who becomes interested by giving bail for a party afterwards comes to the knowledge of facts, advantageous to the other party, he is not compellable to testify to such facts, as this wd. tend to subject him on his bond. Phil. 101. 2 Root 406. This interest was antecedent to his knowledge of the facts in question.

But when a subsequent interest in the event is cast upon a witness by operation of law, he is incompetent to testify in support of his interest — & not compellable to testify agst. it. Ex. gr. an heir apparent, who being conversant of facts, relating to his ancestors title, obtains and succeeds to the inheritance — an attesting witness to a bond who afterwards is appointed Adr. or Ex. to obligor - or obligor. Phil. 362. 3. 1 P.W. 289 2 Vern 699. Stra 34. 5 T.R. 372. Esp. 259. 2 East 183. 3 East 7

So if the int. accrues by the act or concurrence of the party offering the witness. Ex. gr. wits. to usurious bond becomes bail for obligor — cannot testify for him — or a subscribing witness becomes husband or wife of one of the parties Pea. 157. 185. 3 Johns. Ca. 237. 2 East 183. (ante)

As a gen. rule the interest wh. goes to competency must also continue to the time of trial: Hence, a removal of it before that time regularly restores the competency of witness. Pea. 158. Doug. 139. Ph. 97. 8. 1 Johns Ca 270 8 John R. 377. 1 Mass. 73. Ex. gr. a will attested

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by legatee - who attests it. - he is competent to prove the will
Peak. 169. 7th Ph. 97. 8 Vin abg. 7th Ev. 14. pl. 58) 1 Bur. 423. 427
- 2 Burns E. L. 97. Stra. 1253. Pow. Dev.

Opinions contra, by Ld Hardwicke Ch Js Ph. 97 bot Stra
1253. Pow. Dev. 124-134 1 Day. 41-88 7th — upon the con-
struction of the Stat. of frauds. But the weight
of authy is in support of the rule. Ph. 99.

And now by
Stat. 25 Geo. 2 ch. 6. the legacy or devise to a subscribing
wn is declared void & the wn competent to prove the
will, as to the residue. (Pow. Dev. 122-3. Peak. 160 7th)
This stat being declaratory (Pow. Dev. 129) is in affirm-
ance of the rule. The stat makes the same provision
as to legatees who have been pd - or have released - or re-
funded pay to on the dev. Pow. Dev. 123.

By same st. cred rs
to testator being subscribing wns are declared competent
the their debts are charged by the will on lands. Pow
Dev. 122. 3. 133. 4.

We have a similar stat. as to devises & leg-
acies in wills executed after Jan 1 1808. - provided the inst.
is not otherwise sufficiently attested, (in wh. case yt dev or
legacy will be good.) & provided also the legacy or devise
is not given to an heir at law of the testor. If given to
an heir, he cannot testify in support of the will at all; &
of course all the dispositions of real estate in the will are
void - unless it is sufficiently attested without his name
4. L. 683.

By the Eng Stat. (supra.) a subscribing wn being

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a legatee, who dies before testator — or before receiving or releasing yt. legacy, is a legal attesting witness. Pea. 160 n.

It follows from the last gent. rule that a release, to or from, one intrusted with (as the nature of the case may require) — or any other means, by wh. he is divested of intrust at the time of examin[a]. will restore his competency. Phil. 97. — 8. Peak 158 Doug 139. (post.)

Thus in the case of forgery. if the person whom the instrument purports to bind has been released by the party who wd. be entitled to recover upon or enforce it, if genuine; he is competent to prove the forgery Phil. 98. 1 Leach 178. 184. 255. Pea. 169 n (11)

So if the latter party has, before, set aside the forged instrument by yt. judgt. of a court. Pea. 169. Bull. 289. (ante)

So in an act[n]. by indorsee of a note ag[t]. the maker, an indorser being released is a competent witness for plff. (1 c Mass. Rep. 73. Phil. 97.

So a servt. for whose neglect his master is sued, may on being released by the latter testify for him. Pea. 166. 1 Ld. Ca. 53. Stra 183. Phil 95. 6. (ante)

So a bankrupt who has obtained his certificate & given a release to his assignees may testify for them to prove proft. in himself & them to increase the fund. Ph. 97. 98 Pea. 167 Bull. 283. 2 T.R. 247. (ante) But not to support the commission. (ante).

As to members of corpn. being witnesses see (Ante). —

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And when a release pay.t be to or from a W. w.d if accepted, upon his competency a tender of it on the one side the refusal on the other, will have the same effect. Pea. 158. 2 Phil. 99. Doug. 139. 3 T.R. 35.

Thus if a legatee or devisee being a subscribing witness to a will tenders a release wh. is refused, he is competent to prove the will. — But if pay.t of the legacy has been tendered to him & he has refused it he is competent & compellable to testify. Phil. 99. Pea. 158. 9th Doug. 139. 3 T.R. 35. 1 Burr. 447.

So doubtless a servt. for a bon[illegible] negligence the master is sued is compellable to testify upon a release tendered by master; tho refused. Pea. 158.

So of a bondsman for prosecution, if a release is tendered him by Defts.

But if a person gives a deposition while interested in the suit & his interest is afterwards removed the depn. is not admissible. For at the time of testifying, he is under the bias of int.t Phil. 97. & 1 Cains R. 14. 3 Binny 311. Ex. gra. Defts. bail gives a depn. in his favour & the bail is afterwards changed ante. —

A person is always competent to testify agt. his interest. tho not in gen.l compellable to do so. Pea. 160-1. 184. Sal. 691. (ante) Ld R. 1008. Stra 406. Doug. 572. 7 T.R. 178. 2nd as to latter branch Phil. 208 Nalls L.J. 223

Persons

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Persons are in some cases incompetent witnesses by reason of the relation in wh. they stand to one of the parties, with regard to interest.

Thus husd & wife are according to the gen. rule respectively incompetent to testify for or ag. each other Pea. 172. 3. Phil. 63. 4 Co. L. 6. Bull. 286. Gilb. 119. 2 Bank c. 46. § 70. 1 Bl. C. 443. 4 T. R. 678.

For the particular rules & distinctions under this head see Husd & wife Parent & child (Ante)

Persons living as husd & wife may upon questions as to the legitimacy of the issue be admitted as witnesses but with respect to the facts wh. they are competent to prove see references sup. & Pea. 182. Phil. 180. 6 T. R. 330. Sandw. 79. Bull. 113. Comyns 592 8 East. 203. 11. St. 133.

Counsel, Attorneys & Solicitors are neither compellable nor permitted to swear to confidential communications made by clients in relation to suits pending or in contemplation. Pea. 176. 7 Phil. 104 4, 10 Mod 40. 1 Brod. 197 Bull. 284. 4 T. R. 432. 753. Nor is either of them compellable to produce a paper committed to him by a client in any other cause. Phil. 103 (n) 8 Mass. R. 370. 3 Day. 299.

So the suit or controversy, to wh. the communication relates, is at an end — or the the Counsellor &c has been dismissed Pea. 178. Phil. 103. 4 T. R. 759-60 2 Campb. 578. 1 Esp. 695.

Nor can he testify to facts thus disclosed in a suit between third persons. (Ibid)

These rules are founded not upon the privilege of the counsel &c. but

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of the client – & the oblg.a of secrecy never ceases. Phil. 103. 1 Esp. 295. 2 T. Rep. 759. (Cas. Pow. Mort not law)

The same rule holds as to an interpreter between the parties & his counsel Att.y &c. He being the organ of communication between them, is under the same oblig.n of secrecy. Pea. 178. Phil 103. Pea. Ca. 77-8. 4 T. Rep. 756.

But this privilege of the client is confined to such communic.ns as are made respecting professional business & during the rel.n of Att.y &c. & client 3 Johns. Ca. 198. 1 McCly. 241. 1 Cains. 157

Where an Att.y &c by profession, but not retained as such is not within the rule: tho he may have been consulted confidentially. Phil. 103. Pea. 169-70. 4 T.R. 753. 760. For in such a case the relation does not exist.

If the client waives his privilege the att.y &c is allowed & compellable to testify. Phil. 103. 8 Mass. 370.

But a person who was confidentially consulted, upon the supposition of his being an att.y when he was not, has been holden compellable to testify to the disclosures made to him. Phil. 103. 6 Esp. 113. Lord. Ejr. – this is going very far.

And propositions made by an authorized Att.y to the adverse party, may be proved by a third person who heard them tho not by the Att.y himself. Phil. 103-4. 2 Campb. 10. The privilege extends only to the three cases of Counsels solicitor & Attorney – Not to students or clerk in a law office by Mr. Gould.

Where physicians & surgeons are compellable to disclose information acquired in their professional character. Phil. 104. 4 T.R. 759. Pea. Ca. 77. Pea. 180.

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So of a Romish priest to whom confession has been made according to the practice of the Rom. Cath. church. Pea. 180. Ib. ca. 77. Phil. 105. a / McNy. 253.

So a fortiori of a private confidential friend to whom disclosures have been made, under an injunction of secrecy. Pea. 180. Pea. ca. 77. Phil. 104 Sc Bull. 284.

And it has been held that the Clk to Commissrs. of a tax who had taken an oath of office not to disclose what he should learn as clk, was compellable to disclose - on the ground that in such an oath there is an implied exception as to wt. required in courts of justice. Or in other words that it extends only to vol. or extrajudicial disclosures. Phil. 104. 3 Camph. 337.

And an Att. &c to a party in the cause may be examined ag. his client, as to facts known to him before he was retained or addressed as such. Phil. 105. 7 Vin. 197. 10 Mod 40. Bull. 284. 4 T. R. 759. Pow. Ev. 279. 1 Vy. 63. 2 ib. 185.

For as he does not acquire his knowledge by the relation of his client, the disclosure violates no professional confidence. & seems, no party might suppress the other of his wt.

So where he has attested an inst. to wh. his client is a party he may be examined as to the exn. of it. Phil. 105. Pea. 178. Pea. ca. 108. 5 Esp. 52. Camp. 825. 6. 4 Esp. 235. For the act of attestation is not done by him as Att. but as a witness selected by the parties.

So if he was present when his client sworn to an answer in Ch. he may be examined as to the fact of the latter swearing, on an indictment for perjury. Pea. 178. Phill 105 Bull. 284. Camp. 826. Contra. Stra 1122. For the fact is

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not on communicated to him in confidence, but publicly

So in gnl. as to any collateral fact, wh. he knew or might have known, without any instruction from his client. Phill. 105. Bull 284. 11 G. Tr. 253.

As in relation to the fact of an erasure in a deed or will in wh. his client is interested (when his knowledge is not derived from any disclosure by his client. Phil. 105. 1 Vent 197 Bull. 284. as whether the deed were in this present plight

So as to the contents of a written notice recd. from the adverse party. Phil. 105. 7 East. 357.

So in debt on bond Plffs attd. has been admitted to prove from his own knowledge that the bond was usurious. Phil. 105. Peake Ca. 108.

So when after an action on a promissory note had been compromised the Plff informed his attd. that the note had been given without any consn. B. R. held that the attd. was compellable to disclose the fact. Phil. 105. b. 4 T. R. 432. Pea. 179. being disclosed after the war finished.-

And an attd. is compellable to disclose whether a note put into his hands for collection was indorsed or not. Phil. 105 n (a). 1 Cains Rep. 258.

If an attd. interrogates a witness on a trial other witness in a subsequt. cause varies from his answers given to such interrogations. the adverse party in the latter suit, may call on the attd. to discredit the w. by testifying to his former answers. Pea. 179. 11 G. Tr. 253.

So in this & in all the preceding cases of exceptions to the gnl. rule. the

Attr. does not gain his knowledge from the relation of the client & therefore violates no professional confidence. Peak 178. 9.

It has been resolved that a person who has put his name to an instrument to give a sanction to it, is not admissible, as a witness to invalidate it: being considd as precluded by a species of estoppel Watton v Shelly 1 T. R. 296.

The rule appears to have been first adopted in the ca. cited. Phil. 33 Ld Peak 181. 3 Burr 1244. 1 Bl. R. 365.

Soon after the same rule was recognized in a limited extent; viz. as applying to negociable instrts only 3 T. R. 34. Pra ba. 6. 20. 62 Phil 34 (6th) 1 Esp. 298 Egr. transaction by indorsee agt acceptor of a bill. that indorser was below incompetent to invalidate the instr. as by proving usury &c. Accordy even to those cases however he is competent to prove subsequt facts wh. do not render it originally void: as payt Phil 34 (6th) Pra. Ba. 6. 52. 3 Mass Rep 27. 11 Johns 128. Chit. B. 284. 7 Mass. R. 470.

But in the case of Soundains v Lashbrooke the rule was denied & the former cases overruled. 7 T. Rp. 601. acc. Pra. Ba 117. 1 Esp. 176. Ld Sw. Ev. 96. 105.

In several of the U.S. the rule as limited above to negociable instrts has been recognized. 2 Dall. 194. 1 Day 17. 311. 1 Cains 258. 267. 3 Mass. R. 27. 565. 2 Johns. 165. 4 Mass. R. 156. 516 6 Pet. 449. 7 Pet. 199.

In Cont. the rule in Soundains v Lashbrooke has been finally adopted by the Ct. of Errors. 1 Con R. 260. tho I conceive very correctly: as the objections to it go rather to the

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proof of the fact at all than to the incompetency of the witness.

Objection to the competency of a Wit. may be taken by examining him, before he is sworn in chief, upon the voir dire — by the testimony of other witnesses swearing to the fact wh. renders him incompetent — or upon his own examination when sworn in chief. Pea. 186. Phill 96. 56 Law. Ev. 109. 10 Mod. 193. 1 T. R. 719

Formerly the objection could be taken only in one of the two first modes: after he was sworn in chief the objection was too late (Sid.

But as the practice now is the objection may be taken after he has been sworn & examined in chief indeed when it is discovered at any time, during the trial, that he is incompetent, he may be rejected Pea. 186. 7. Phil. 96. 1 T. Rep. 719. 1 Esp. 37. Phil. 204. 5. Com Dig. 2 Vern. 463. 6 Johns 523. Phil. 204.

The mere fact that a witness is discovered after the trial, to have been incompetent, is not suff. ground for a new trial; tho it may have some weight in connexion with other facts. Pea. 187. 1 T. Rep. 719.

Upon the voir dire, no qu. is proper except such as go to the competency of the witness. Such as relate merely to his credit are inadmissible under that

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oath. — the sole object of examining a witness under it being to exclude him. 1 Atk. Chy. 147. 200

Upon his examⁿ under the voire dire, a witness may be interrogated concerning instruments executed by him or other papers which create an interest in him without producing them: For the party objecting is supposed not to know what witnesses will be called agᵗ him & of course not to be prepared with wᵗ of his incompetency. Pea. 187. Sw. 110.

An objection arising from wᵗ answers, on the voire dire, may be removed by other answers under the same oath. Phil. 96. And the last rule holds as well in the latter case as in the former.

Hence if on the voire dire, a wᵗ confesses himself to have been interested; he may restore his competency, by his own testimony under the same oath without producing the deed or instrument by which his interest has been extinguished. Eg. that he has become a bankrpt. & has obtained his certificate — that the formerly a member of a corporⁿ which is a party, he has been disfranchised &c. Pea. 187. 1 Root. 226. 7 Phil. 97. Pea. 60. 218. 1 Esp. 162. 4. 15 East. 57. ante. For as the party objecting makes the wᵗ his own for this purpose; he cannot object to such answers as operate agᵗ himself.

Seems if the orig. int. is proved by other witnesses, in this ca. the certificate &c must be produced to restore his competency, for y. party objecting does not make the wᵗ his own. Pea. 187.

If a release is given to a witness for the purpose

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of vitiating his competency, it must be produced. Pea. 187

The declar.ⁿ of the w. himself, before trial, that he is interested, is not w.ᵗ to prove him so. If it were, he might by a falsehood without oath wrongfully deprive a party of his testimony. Phil. 96. vid. 5 Mass. 261.

But proof of such declar.ⁿ by the party offering his testimony will exclude him Phil. 96 & 8 Mass. R. 487.

If the party objecting to a witness examine him upon the voire dire, he is bound by his election & cannot afterwards call other witnesses to prove his incompetency. (for he has elected his witness & cannot impeach him so as to exclude him) Rule the same where ye w. has been sworn & asks his interest under the gen.ˡ oath. It applies also to depᵗˢ taken before a magistrate. 3 Day. 214. & And the rule holds e converso. Phil. Ev. vid. 1 Dall. 272. 1 Mass. 219. Pea. 186. 10 Mod 193.

In the former ca. however the party may introduce other w.ᵉˢ to prove the fact of his interest & thus to discredit the w.ᵗ not to exclude him, Pea. 186.

A w.ˢ own declarations may be admitted to contradict himself 8 Mass. 487.

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The ordinary mode of compelling the attendance of wits in civil cases is by the writ of subpœna ad testificandum. Pea 191. Phill. 2

And if the wit is in poss^n of any deed or writing wh is thought necessary at the trial, he may be compelled by a special clause in y^e writ called a duces tecum, to bring it into court. Peak. 191. Phil 12. The writ is then called a subpœna duces tecum.

But tho the witness is bound unconditionally to bring the writing into Ct.; the question whether y^e party is entitled to produce it in ev^ce) have it produced in ev^ce may still be submitted to the Judge. Phil. 12. 9 East. 2485.

And the wit is never compellable to show any writing, wh. is ev^ce of his own title, or wh. wd subject himself to any claim: for no one is bound to furnish ev^ce ag^t himself. Peak 191. 97. St. Ap p^a 389. 1 Esp. Ca. 405. 4 St. 43. (ante) Con. last claus 3 Phil. 336.

As to the mode of serving the subpœna in Eng^d see Pea. 192. Phil 4. Cro. C 512. 540. 5 Mod. 355.

In Canada it is served either by reading or a certified copy, left with the wit or at his usual residence.

It must be served in reasonable time, tho no precise period is fixed. Pea. 192. Stra. 510.

In Eng^d the writ issues from that Ct before wh. the witness is required to appear. In Canada it may be issued either by the Ct in wh. &c. or by a magistrate; as a justice of peace or aft. Dur 105. St. C. 684. Sheriff at Ct.

As wit the subpœnaed is not bound to attend in civil

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case unless a reasonable sum, to defray his expences in going to remaining at & returning from the place of trial is tendered to him, or unless he waives it. Pea. 192. Stra. 1150. Phil. 8

If after due service & tender of a reasonable sum for his expences, the wit. neglects to appear, he is liable either to an action on the case for damages. (Doug 540) — to an attach.t or to an action on the Stat. 5 Eliz. in Eng.d (& in Connt. on a similar Stat.) for a penalty, & also for a "further recompence" given by these statys. both to be recov.d by the party grieved. Pea. 192. Doug. 535 or. 556. Phil. 4. 1 Stra. 518. 2 Id. 810. 1054. 1150. Cowp. 846. Stat. C. 685. 3 Burr. 1329. Cro. C. 522. Comb. 449.

In Engd. however the action for "further recompence" under the St. of Eliz. will not lie, unless the amount has been previously ascertained, by the Ct. out of wh. the process issued. The Stat. of Eliz. expressly refers y.t assessmt. to the discretion of the Ct. out of wh. the process issues. Phil. 2. Doug. 535. Tho' this is construed to mean the Court out of wh. not the Judge. Doug. 535. 540. But the assessment being made, debt will lie for it. Phil. 2. Doug. 535. 601. See the Stat Eliz. Doug 535.

This rule I trust does not obtain in Connt. The provisions of our stat as to the "further recompence" being very different from that of the Engh. — providing for a recovt. by "action, bill plaint or information" 2c St. C. 685.

But the more usual mode of proceeding in Eng. is by attachment. Phil. 5. Stra. 1054. Doc. 108 under wh. the witness may be fined for contempt & imprisoned till he pays not only the fine but the damages sustained

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by the party. Law. Ev. 108. Doug. 540.

In Comm.ts if a witness after due service & tender [of his fees for travel & one days attendance, it is said. Law. Ev. 105. Are the sums to be paid sufficient? See Stat. C. 685. S. 6. "such reasonable sum &c for costs & charges &c" See also Eng. rule Phil. 3. Pea. 192.] neglects to appear, a capias may issue, to bring him before the Ct. to testify. But this proceeding is not made like the Eng.h attach.t the means of pecuniary recompense to the party. The C. L. proceeding by attachment has not been in use here, tho there is no legal impediment, I trust to its being introduced

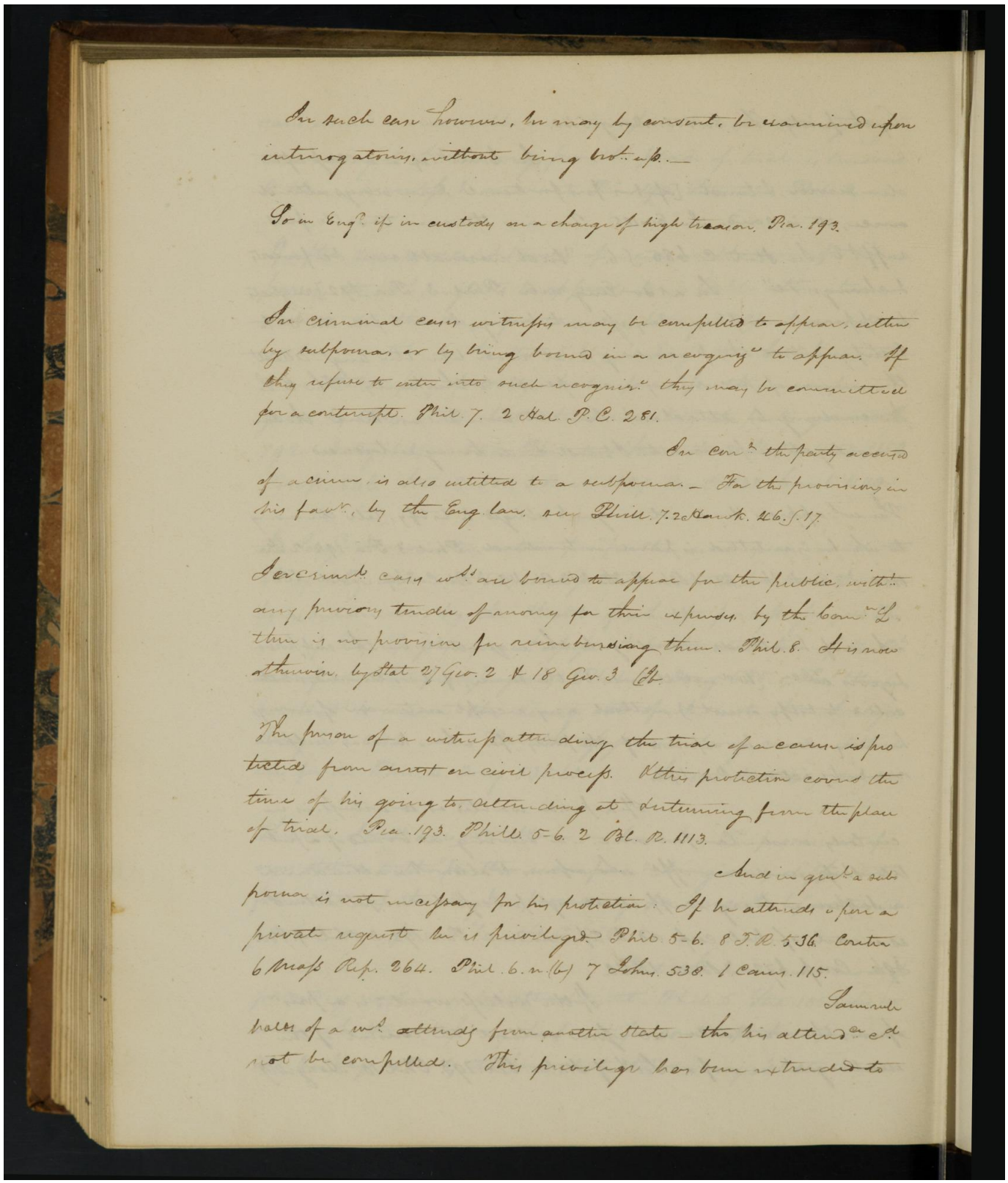
The wit. appears he is not in gen.l obliged to testify, till the money to wh. he is entitled is paid or tendered, Phil. 3. Pea. 192. 2 Stra. 1150. 13 East. 16 n.(a). 1 Bl. R. 36. 1 H. Bl. 29. 3 Bl. C. 369. Tidd. 805.

And if he attends according to the enquisitions in the subpoena & gives evidence (& not the rule be the same, if he attended, whether called to testify or not?) without any receipt or tender of money, he may recover his expences of the party for whom he was subpoenaed, by action Pea. 192.

If a person wanted as a witness, is in custody under Capias &c. - or serving on board of a public ship under an officer who refuses to allow his attendance a subpoena being ineffectual, a process to compel attendance is a writ of hab. corp ad testificandum. Pea. 192. 3 Phil. 9. Fent 396. Comyns. 672 3 Burr. 1420.

If the witness wanted is a prisoner of war, the writ will not issue without the consent of the executive govt. - i.e. of a Sec.y of State. Pea. 193. Phil 10. Doug. 419.

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In such case however, he may by consent, be examined upon interrogatories, without being brot. up. —

So in Engd. if in custody on a charge of high treason. Pla. 193.

In criminal cases witnesses may be compelled to appear, either by subpoena, or by being bound in a recognizc. to appear. If they refuse to enter into such recognizc. they may be committed for a contempt. Phil. 7. 2 Hal. P. C. 281.

In cases the party accused of a crime, is also entitled to a subpoena. — For the provision in his favr., by the Eng. law, see Phill. 7. 2 Hawk. 46. s. 17.

In criminl. cases wh. are bound to appear for the public, without any previous tender of money for their expences, by the Com. L. there is no provision for reimbursing them. Phil. 8. It is now otherwise by Stat 27 Geo. 2 & 18 Geo. 3 Ch.

The person of a witness attending the trial of a cause is protected from arrest on civil process. Other protection covers the time of his going to, attending at, & returning from the place of trial. Pla. 193. Phill. 5-6. 2 Bl. R. 1113.

And in genl. a subpoena is not necessary for his protection: If he attends upon a private request he is privileged. Phil. 5-6. 8 T. R. 536. Contra 6 Mass Rep. 264. Phil. 6. n (b) 7 Johns. 538. 1 Cains. 115.

Same rule holds of a wh. attends from another state — tho his attendce. cd. not be compelled. This privilege has been extended to

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a party, attendg an arbitration under an order of N.P. Pea. 193. Phil. 6.) 2 Johns. 294. Phil. 6. n(a) Assimilated to arbts with the order of N.P.

A reasonable time is allowed him for going to the place of trial & returning — In determining what is a reasonable time the practice of the Ct. is liberal. Pea 193. Phil. 6. 2 Bl. R. 1113. Stra. 986. 13 East 11 n(a) 4 Dall. 329

If arrested in viol.n of his privilge the Ct. on wh. he is attendg will on motion discharge him Pea. 193. by hab. corp.

The usual practice in Ct. is to obtain a written protection from the Ct. But this is unnecessary. the convenience in furnishing wc of yt. privilge to officers.

When a material wr. resides abroad he may under an order of Ct. (in vacation of a Judge) be examined de bene esse upon interrogatories before Commissioners: but this it seems is not done without the consent of both parties. Phil 10. 172. 3. Pea. 60. 2 Tidd 812. (for Cts. under seal)

So if such wr is about to leave the country (Id.

And if at the time of trial the wr. has left the country, or is not fit; the depos. so taken may be read in wc Phil. 272. Sal. 691. 1 Camp. 172. 6 Esp. 92. 1 Johns. Ca. 103. 147. Secus if he is in the country at the time of trial. Phil 172.

If the opposite party will not consent to the examn, the Ct. will put off the trial. (that yt. party applying may file a bill in Eq. as before mentioned) until consent is obtained, or the wr. comes into the country Phil. 10. Dorg. 419. Comp. 174. 1 Bos & c. 211

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But this will not be done to enable the party to set up an idious defence: as that the P'ff is his slave, or an alien enemy &c. Phil Ev. 1 Bos &c. 252.

Dep. gen. depos. are not, by the C.L. as matter of right, admitted as ev. in Ct. of law, save in Ch.

But by the stat. law of Conn. whenever a person whose testimony is needed in a cause depending, is bound on a voyage to sea - or about to depart from the state - or resides more than 20 miles from the place of trial, or is confined in goal on any legal process - or by age or sickness or bodily infirmity is unable to attend the trial. his depo. may be taken out of Ct. by any assistant or justice of the peace - notice being first given to the adverse party, as the stat. directs. (The depo. of a woman residing within 20 miles of the Ct., but having a child sick & in a condition not to be left by her, has been adjudged admissible 1 Root. 76) St. C. 684 S. 1. 685 S. 6. By U.S. law. notice must be given if party is within 90 miles.

And perjury is assignable upon a depo. thus taken, as upon testimony given viva voce, in Ct. St. Con 528.

As to the mode of notice & authenticating the depo. see St. Con 684. Sw Ev. 112-3.

If a depo. is written by the party for whom it is taken, or his Atty. it is inadmissible ibi enc.

And tho' copied by a third person, the copy is admissible. Sw. Ev 113

Subscribing witnesses to a wills may be sworn before an assis. or justice of peace - & their oath entered on the back of the will, is ev. as ev. St. C. 680 S. 8. Sw. 113.

A wit. in Con. is compellable, by subpoena, to appear & depose under our stat. And if after tender of money — he neglects to obey the subpoena he is liable to the same penalty &c as for neg. leaving to appear at the trial of a cause. Stat. c. 685 § 6. Sw. E. 113.

A depo. is not inadmissible merely because it was sworn before a partys Attorney. Sw. E. 114.

A depo. given in a particular case by a person who afterwards dies or cannot be found or brot. before the ct. may be used to the same point in a diff. cr. between the same parties. Sev. Ev. 114

Depos. are not admissible under our stat. in cases merely criminal; but, by the construction given to the act, they are admitted in qui tam prosecutions in wh. no capl. punishmt. can be inflicted. viz. prosecutions upon the stat. of bastardy. Sw. E. 114. 1 Sw. Syst. 211. See Par. & Ch. 1 Root. 307. 154.

Depos. taken before justices of peace in other states, in the manner prescribed by our stat., are admissible here — even tho by the laws of such other state, justices are not authorized to take depos. at all. Sw. Ev. 114 And depos. taken in a foreign state, according to the laws of such state have been holden admissible here. Sw. 114. Id. Ev.

Our Supr. & Co. Cts are respectively empowered to issue commissions for taking depos. abroad in a cause depending before them respectively: & in vac. the same power may be exercised by either Judge of the Supr. Cts. Myth Judge." (& Justices) of the Co Cts. 2 State Con. 49. Sw. Ev. 115. (contra)

Before a depo. is taken, notice must be given to the adverse party or to his known agents or attys to attend if he think fit, if either of them reside within 20 miles of the place of caption. 1 H. C. 684. Law. E. 112. 1 Root. 346. 480. 574.

The notification is a writing (usually signed by a magistrate) & must be delivered to the party his agents &c. or a copy left at the place of his usual abode 1 H. C. 684 Law. Ev. 112.

Same rule of notice holds, as to depos. taken out of the state. & also as to those taken in the state, for a party living out of it — In either ca. (as well as where both parties reside in the state) — if the adverse party tho residing more than 20 miles from the place of caption, has a known agent or atty residing within 20 miles, the latter must be served with notice. Law. E. 113. 1 Kirb. 1

Vouchers in ejectment and disseisins are entitled to the same notice as the orig. parties in other actions. 2 Root. 25.

In gen. the distance contemplated in the rule, is between the residence of the deponent & that of the adverse party. But tho that distance is less than 20 miles, yet if the depo is taken, when the deponent is absent from home, more than 20 miles distant from the adverse party — for a reasonable cause & no unfairness appears, the notice has been dispensed with. 1 Kirb. 219. 283.

If several are joined in a suit, a depo. can be read only as to such of them as have been notified when notice is necessary according to the foregoing rules. Law. Ev. 113. Kirb. 100.

When a depo. is taken during the

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term of the Ct. in wh. the cause is depending, it is usual to give notice in Ct. But this does not dispense with notice in ye usual mode. Rev. E. 113.

Depot. of subscribing witness to bond to the written instrument — or to "accts. or instruments, relating to persons out of this State, or to be sent beyond sea" may by a spec. exception in the Stat, be taken without such notice. Stat E. 684 s. 5. Is this exception ever regarded in practice?

Every depo. is to be addressed to the Ct. in wh. ye cause is depending — & unless delivered to the Ct. by the magistrate himself who takes it, must be sealed by him. St. E. 684. Rev E. 113.

The certificate of the magistrate, who takes the depo. as to the fact of notice given — the distance of the place of caption from the Ct. — ye of the adverse party's residence from the place of caption — & as to the reason of taking a depo. within 20 miles of the place of trial — is prima facie evidence of those facts. but not conclusive. The opposite party may thereon deny the facts; & upon his disproving them the depo. may be rejected. Rev. E. 114.

If there is no such certificate, the party offering the depo. may make them out by proof. Rev. Ev. 114.

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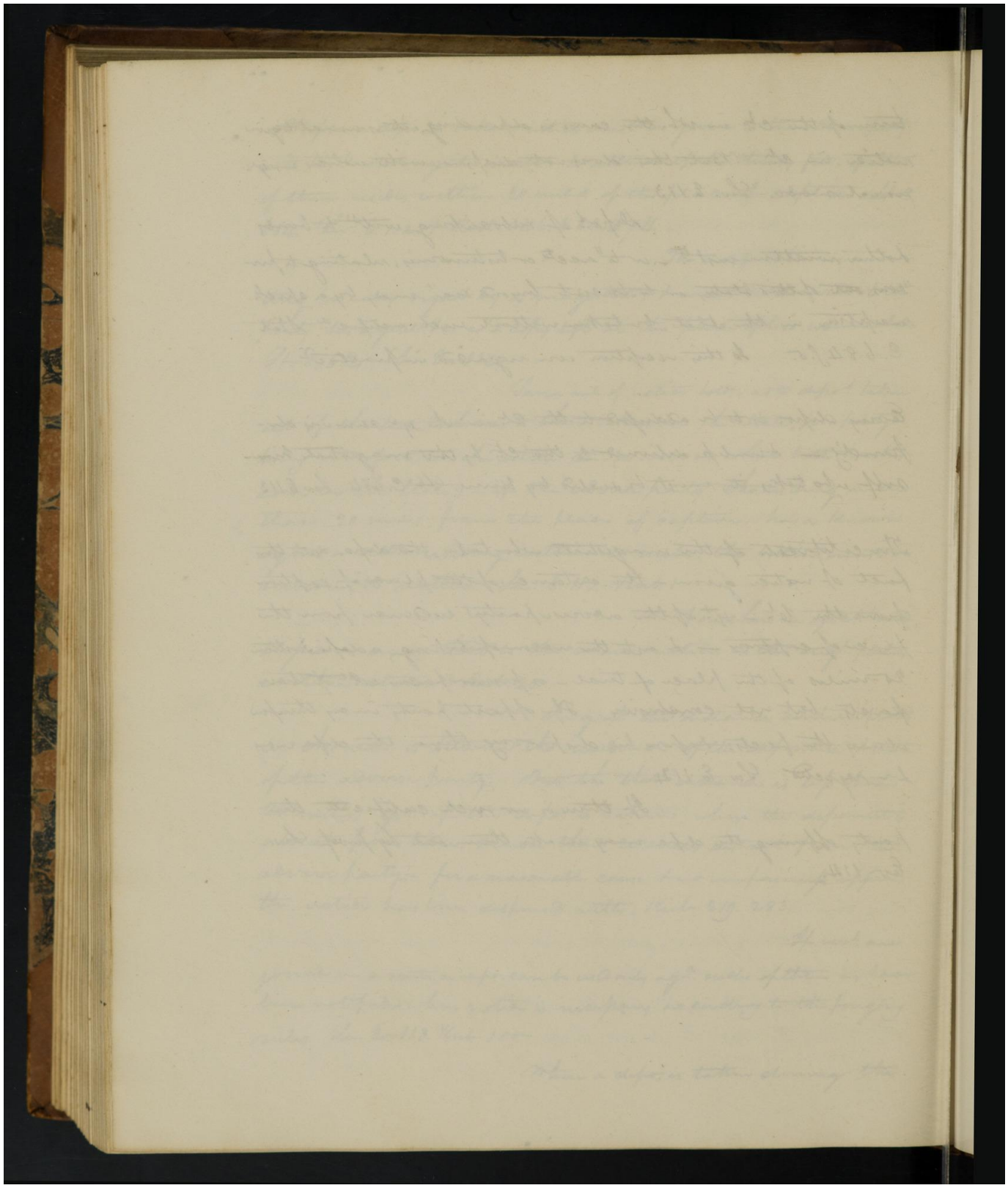


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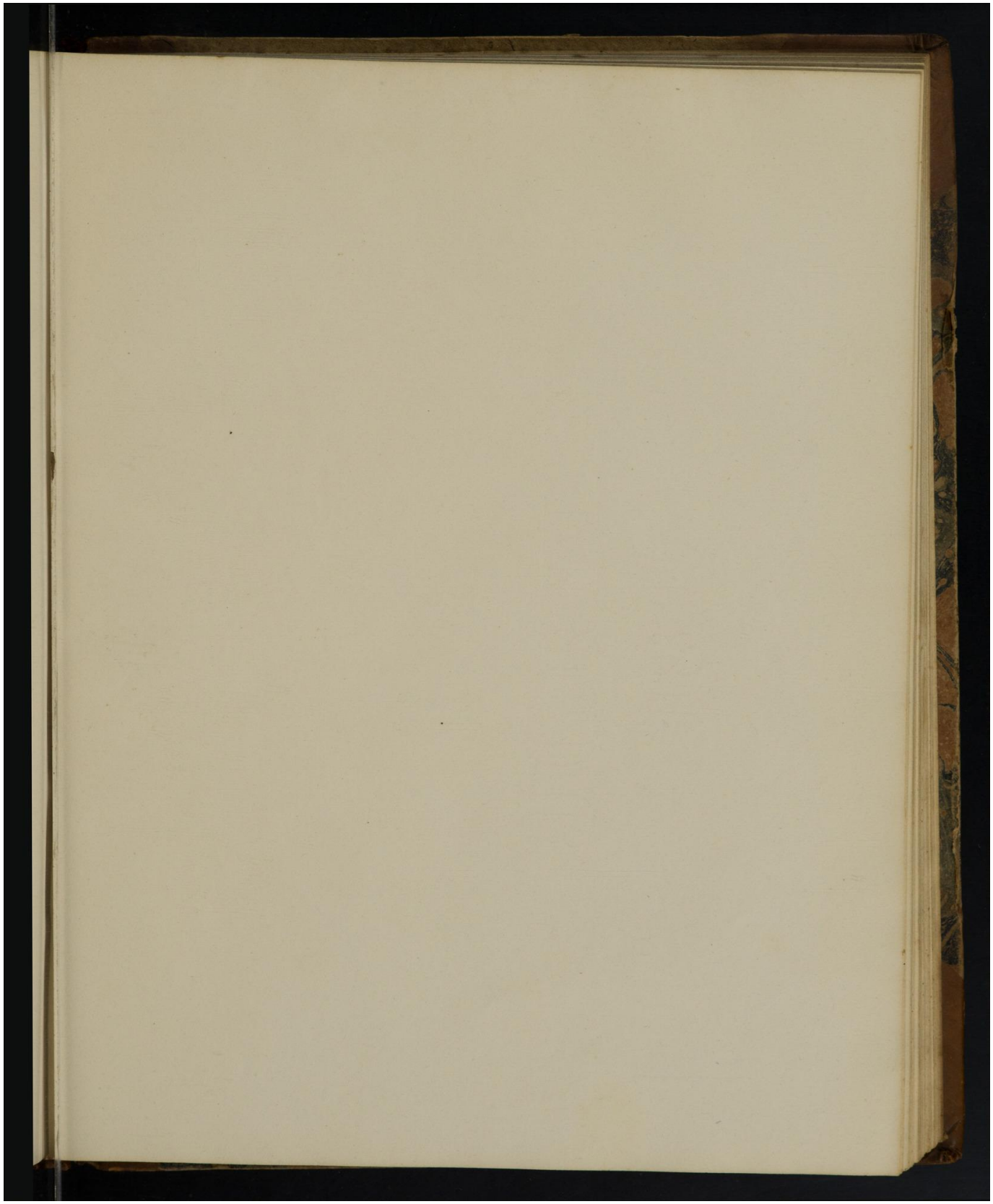


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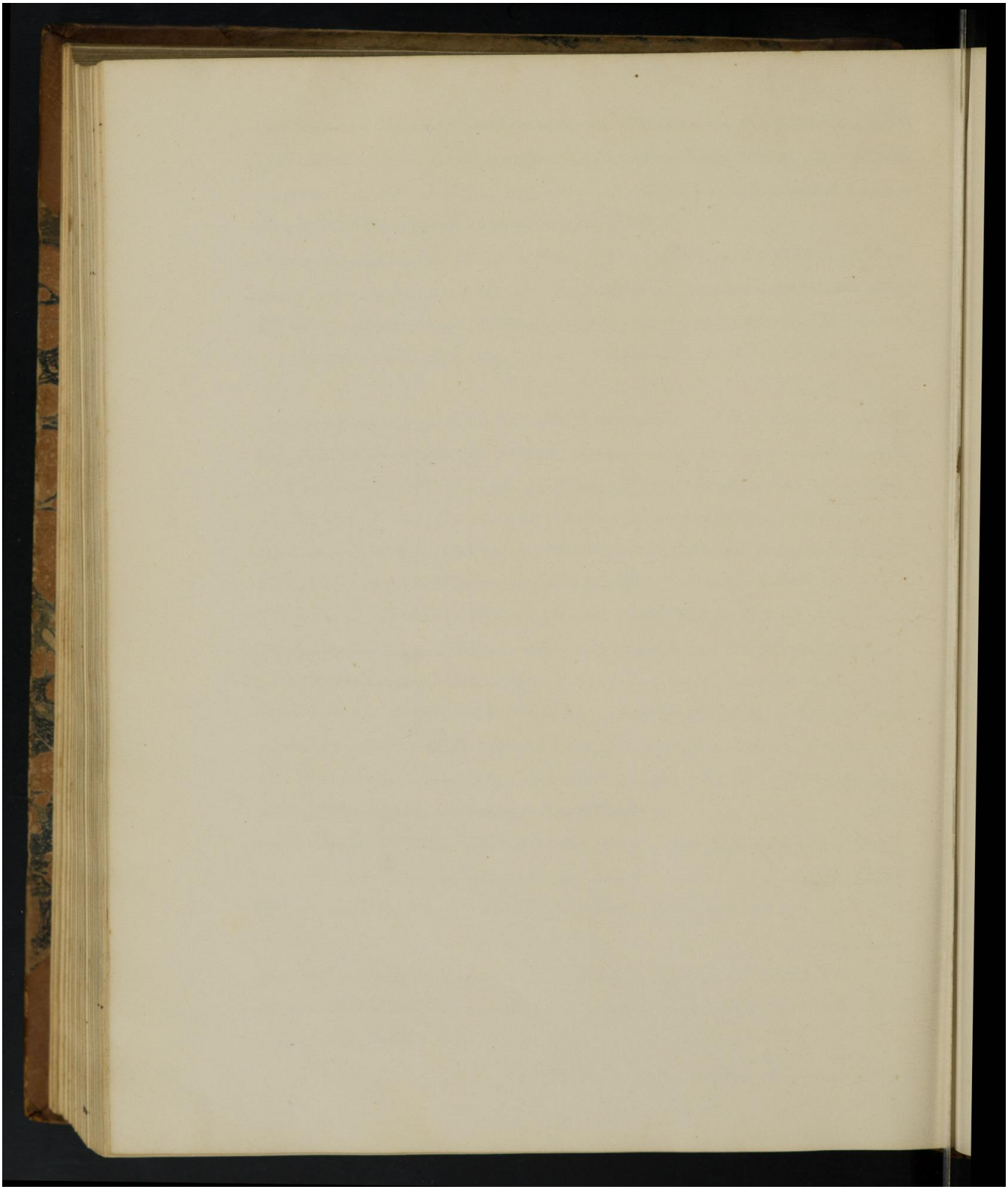


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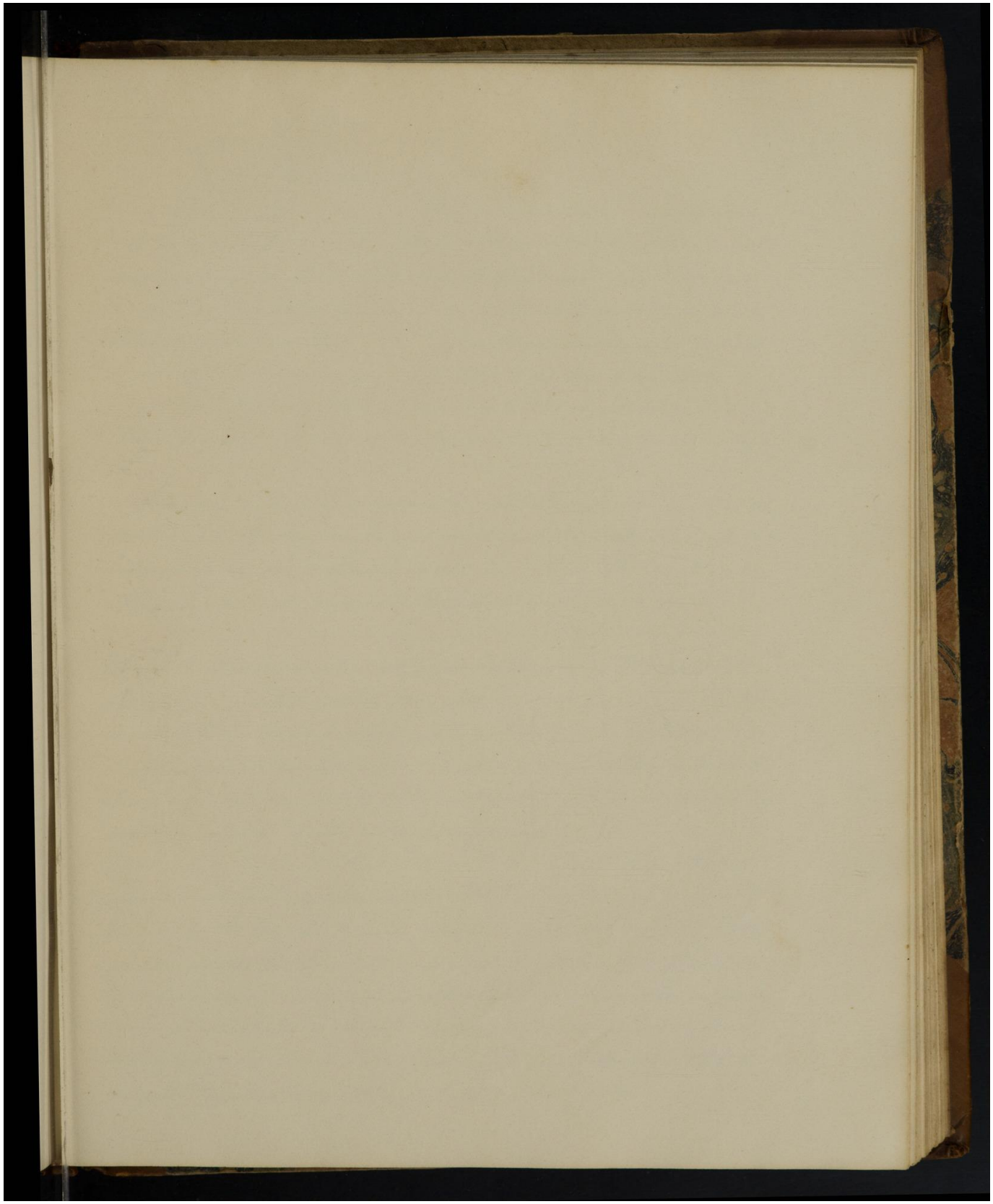


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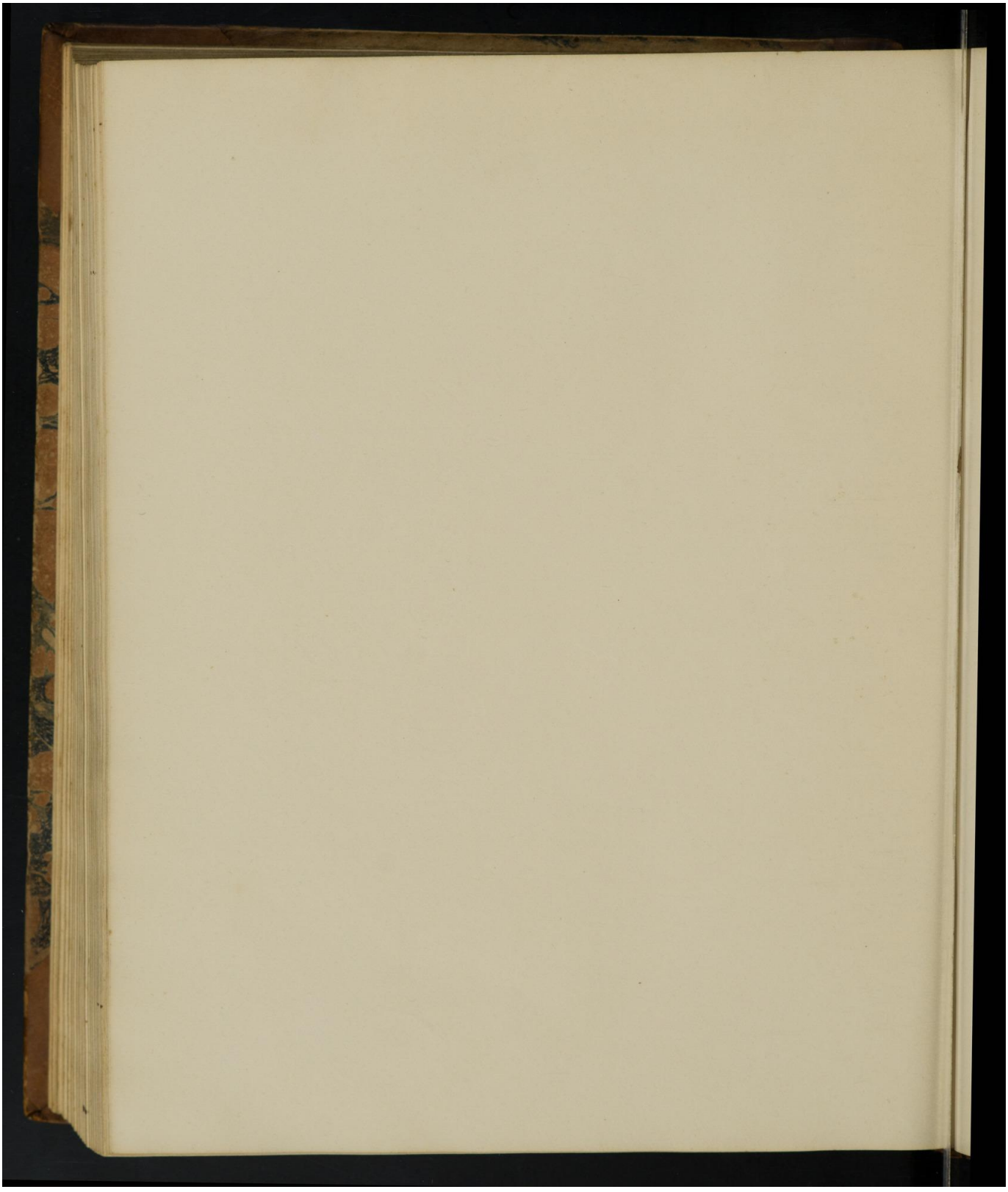


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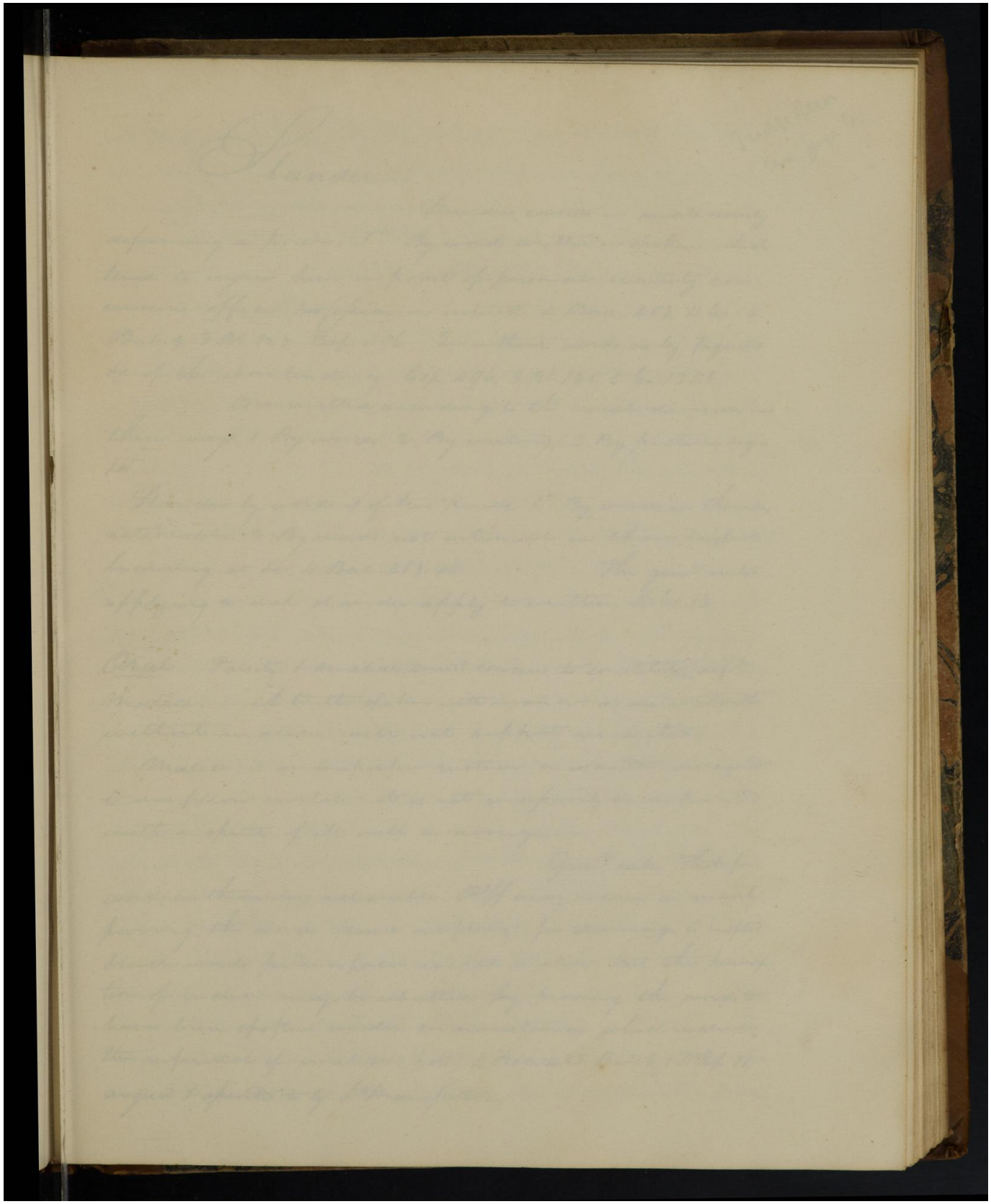


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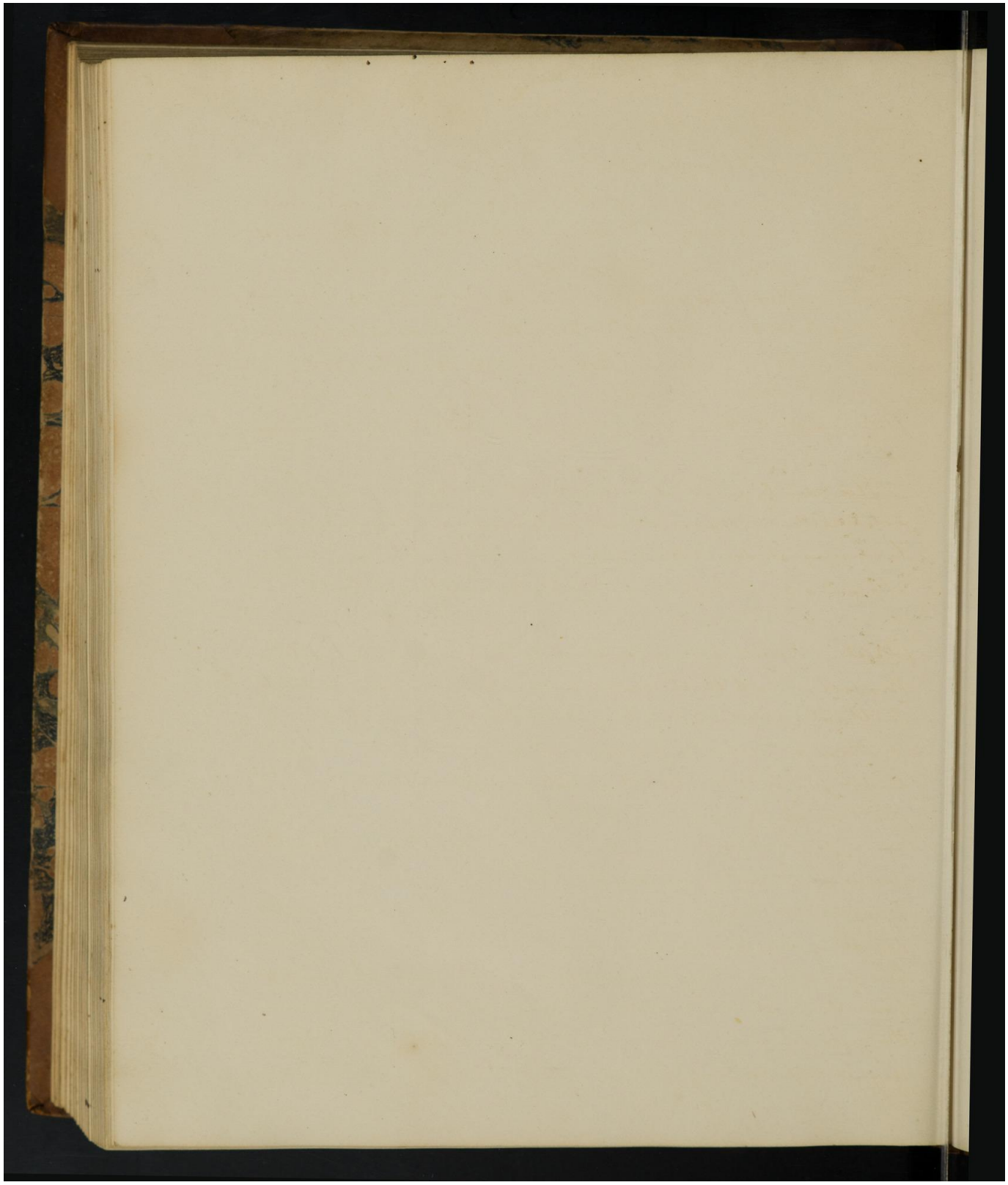


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Slander.—

Judge Reeve see page 7.

Slander consists in maliciously defaming a person, 1st By words written or spoken, which tend to injure him in point of personal security comforts, office profession or interest. 4 Bac. 483. 4 Co. 14 Bul. 9. 3 Bl. 123. Esp. 496. 2dly without words as by figures &c of the above tendency. Esp. 496. 3 Bl. 125. 5 Co. 125. b.

Committed according to the usual division in three ways, 1 By words. 2 By writing, 3 By picture, signs &c.

Slander by words is of two kinds. 1st By words in themselves actionable. 2 By words not actionable in themselves but becoming so &c. 4 Bac. 483. 94. The gen.l rules applying to oral slander apply to written. 4 Co. 14.

Oral. Falsity & malice must concur to constitute offence. Malice. A truth spoken with malice, or an untruth without malice, will not support an action.

Malice is an improper motive, or wanton disregard to our fellow mortals; it is not necessarily accompanied with a spirit of ill will or revenge.—

Gen.l rule. That for words in themselves actionable. Plff may recover on merely proving the words (some excepting) for damage is implied such words prima facie import malice: but this presumption of malice may be rebutted by proving the words to have been spoken under circumstances which exclude the inference of malice (post) 4 Bac. 483. Bul. 6. 1 T. Rep. 11. argued & opinion by L.d Mansfield.—

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Classes of actionable words: 1st Those which bring the person of whom they were spoken into danger of legal punishment. Finch. 185. 2d Tending to exclude from society. 3 Injuring to one in his trade or profession. 4th Tending to injure one in his office. 3 Bl. 123. 4 Bac. 483. 93.

1st Bringing into danger of legal punishment. If the false words charge with a fact which wd incur corporal punishment, they are clearly actionable. Ex. charging Treason, felony, perjury &c. 4 Co. 15. 20. 4 Bac. 483. Cro E. 602. q. 38. Cro. Jac. 114 1 Roll. 63. 5. b. 49. 77. 1 Wils. 177. 86.

According to this classification words may be actionable per se tho they do not injure one's reputation. Or they may injure his reputation without being actionable. Words charging a person with what wd subject him to transportation - actionable. 4 Bac. 486. So to cutting. 4 Bac. 486. pl. 45. 1 Roll. 36. Words charging what wd subject to imprisonment are actionable - except pun-ishment. 1 Com. 179. 1 Roll. 46. l. 15. 38. Salk 694. 2 Vent. 266. 4 Bac. 486. 7. Comb. 137. Cro. Car. 315. Finch 185. 1 Freeman 46. Salk. 696. (4 Bac. 487. 3 Wils. 186 contra.

The stat. 18 Eliz. mentioned in Salk subjects to imprisonment if the Bastard is chargable to the Parish. - Words charging what wd subject to a fine are actionable or not as the fact charged is infamous or not. So decided by L. C. of Com. Qu. is there any such rule in Eng. 2 Bl. 168. case of Bandy horn 4 Bac. 487. 8. pl. 50. 60. To charge one with any crime which makes the person spoken of liable to prosecution is actionable. Esp. 497 cites Finch L. 186. Qu. case of mere trespass.

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4 Bac. 485. pl. 27. Sid. 114. Cro. Jac. 39.

Words charging what
wd subject to punishment must be a actionable charge a
criminal fact committed - charging evil intention not
suffic. Sid. 373. 1 Roll. 23. 51. 1 Com. 191. Esp. 496. Ex. "he
"gave I.S. counsel to kill me &c" not actionable 4 Co. 16. b.
So "I expect to see him indicted for stealing" not suffic.
Hutt. 18. "So he is in gaol for stealing a horse" not suffic.
Hutt. 2. Esp. 497. In - For words of a similar import
holden suffic. after verdict. 2 Wils. 306. 300.

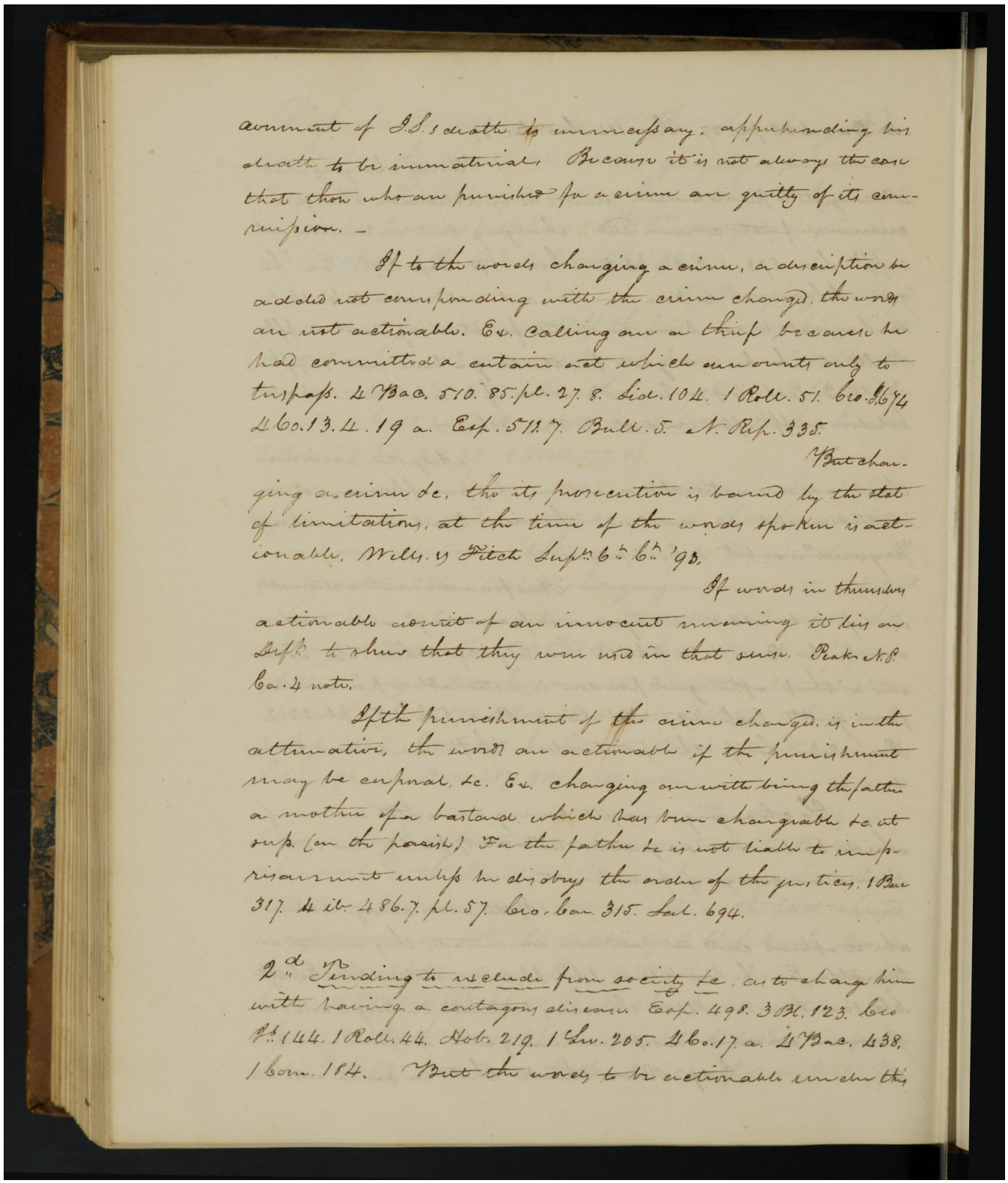
Adjection words made
this head an actionable or not as they presuppose an act com-
mitted or not. Ex. "seditious" "thievish" traitorous &c. not suffic.
"perjured" is suffic. 4 Co. 18. b. 19. a.

"His forsworn" not actionable
unless it be added "in a judicial proceeding" or "in such a
court" 4 Bac. 484. 4 Co. 15. Cro. Eliz. 609. 2 Lev. 166. To call
one a "thief" after gen. pardon is actionable - pardon clear
from guilt. Esp. 497. Hob. 84. 4 Bac. 516. 487. pl. 52. 3.
Ray. 23. So if the particular theft had been par-
doned.

So charging one with having committed a crime of
which he has been acquitted. 4 Bac. 487. pl. 52. Cro. 156.
Here is no danger of punishment.

If the words charge a crime
wh. it appears could not have been committed, they are not ac-
tionable. Ex. "he has killed I.S." I.S. being still alive. Esp. 498
4 Co. 16. a. Bul. 5. But this may be pleaded in Eng - could be
given in evidence except in mitigation of damages, Bul.
5. Judge Rives thinks that in such case an

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account of J.S.'s death to unnecessary, apprehending his death to be immaterial. Because it is not always the case that those who are punished for a crime are guilty of its commission. –

If to the words charging a crime, a discription be added not corresponding with the crime charged, the words are not actionable. Ex. Calling one a thief because he had committed a certain act which amounts only to trespass. 4 Bac. 510. 85. pl. 27. 8. Lid. 104. 1 Roll. 51. Cro. 676 4 Co. 13. 4. 19 a. Esp. 511. 7. Bull. 5. N. Rip. 335.

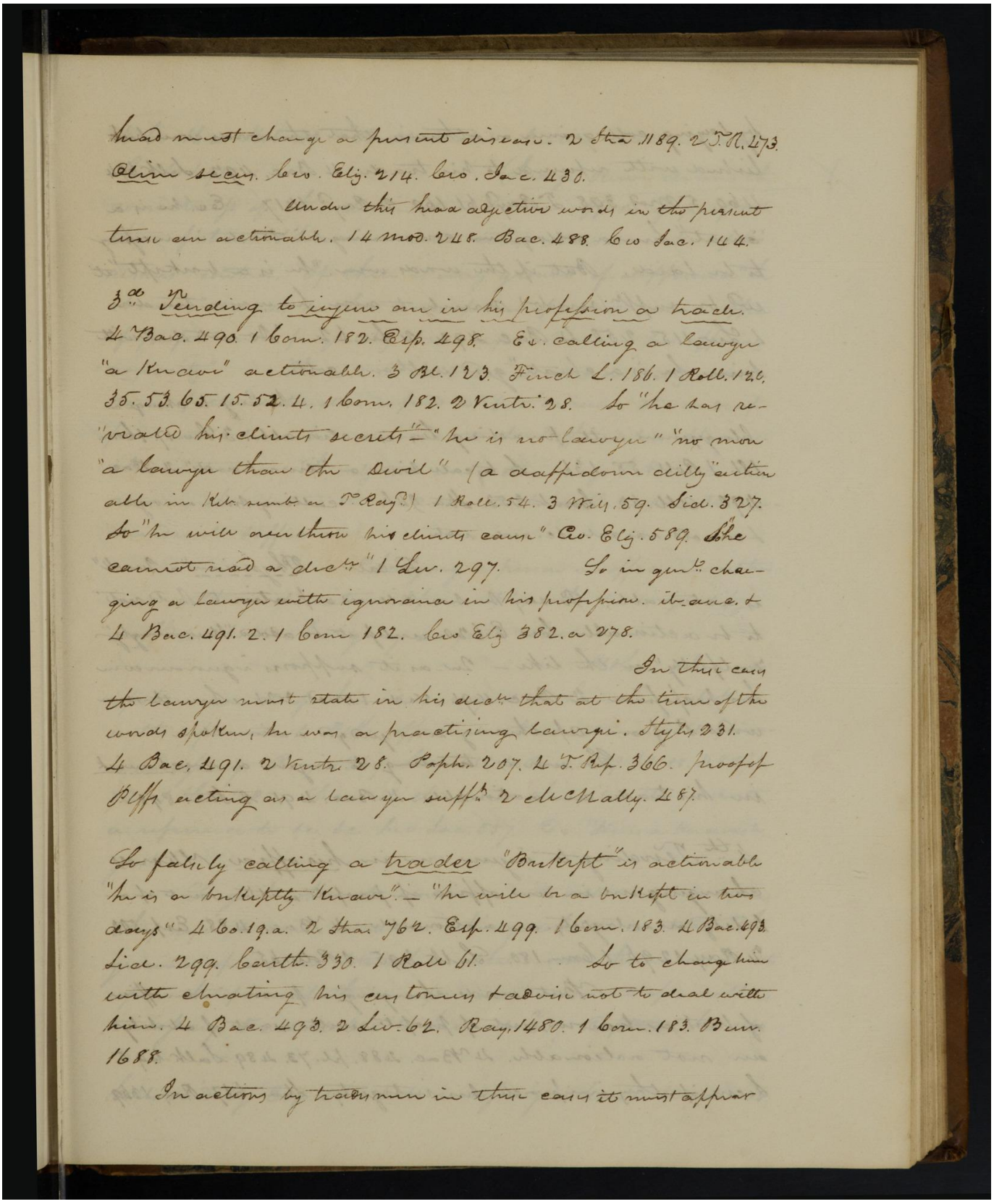
But charging a crime &c, tho its prosecution is barred by the stat of limitations, at the time of the words spoken is actionable. Wells. v Fitch Supr. C. C. '93.

If words in themselves actionable consist of an innocent meaning it lies on Defr to shew that they were used in that sense. Peake N.P. Ca. 4 note.

If the punishment of the crime charged, is in the alternative, the words are actionable if the punishment may be capital. &c. Ex. charging one with being the father a mother of a bastard which has been chargable &c at sup. (on the parish) For the father &c is not liable to imprisonment unless he disobeys the order of the justices. 1 Bac 317. 4 ib. 486. 7. pl. 57. Cro. Car. 315. Sal. 694.

2d Finding to weaken from society &c, as to charge him with having a contagious disease. Esp. 498. 3 Bl. 123. Cro Eliz. 144. 1 Roll. 44. Hob. 219. 1 Lev. 205. 4 Co. 17 a. 4 Bac. 438. 1 Com. 184. But the words to be actionable under this

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head must charge a present disease. 2 Stra 1189. 2 T.R. 473.
Slime secus. Cro. Eliz. 214. Cro. Jac. 430.

Under this head adjective words in the present time are actionable. 14 Mod. 248. Bac. 488. Cro Jac. 144.

3dly Tending to injure one in his profession or trade. 4 Bac. 490. 1 Com. 182. Esp. 498. Ex. calling a lawyer "a knave" actionable. 3 Bl. 123. Finch L. 186. 1 Roll. 120. 35. 53. 65. 15. 52. 4. 1 Com. 182. 2 Ventr. 28. So "he has revealed his clients secrets" — "he is no lawyer" "no more "a lawyer than the devil" (a daffidown dilly" actionable in Kb. numb. a T. Ray. 1 Roll. 54. 3 Wils. 59. Sid. 327. So "he will betray his clients cause" Cro. Eliz. 589. "She cannot read a deed" 1 Lev. 297. So in gen. charging a lawyer with ignorance in his profession. ib. anc. & 4 Bac. 491. 2. 1 Com 182. Cro Eliz 382. a 278.

In this case the lawyer must state in his decl. that at the time of the words spoken, he was a practising lawyer. Styles 231. 4 Bac. 491. 2 Ventr. 28. Peph. 207. 4 T. Rep. 366. proof of Plff acting as a lawyer suffl. 2 McNally. 487.

So falsely calling a trader "Bankrupt" is actionable "he is a bankrupty knave". — "he will be a bankrupt in two days" 4 Co. 19. a. 2 Stra 762. Esp. 499. 1 Com. 183. 4 Bac. 493. Sid. 299. Carth. 330. 1 Roll 61. So to charge him with cheating his customers & advise not to deal with him. 4 Bac. 493. 2 Lev. 62. Ray. 1480. 1 Com. 183. Burr. 1688.

In actions by tradesmen in this case it must appear

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by laying colloquium or otherwise, that the words were published with reference to his trade. 4 Bac. 492. Salk 694 1169. 5 Mod. 398. 3 Ray. 61. 169. 2 Ray. 1417. Ex. "he is a 'cheat" him a colloquium concerning his trade is necessary to be laid. But if the words were. "he is a bankrupt" it will be sufficient (comb.) merely to aver he was a trader, 1 Lev. 115. 250. 4 Bac. 492. 2 Lev. 62. "Do not deal with him he is a cheat" good without coll.

In Eng. to charge a Clergyman with preaching lies is actionable. 3 Lev. 17. 1 Com. 181. 1 Roll. 58. 136. So to call him a "drunkard" 4 Bac 490. All. 63. Comb. 253. Stra. 946. calling him a rogue & an old rascal &c. vide note

To call a Physician "a Quack" is actionable. To say he has killed a patient held not to be actionable. Cro E. 620. unless it be added "knowingly" "wilfully" or the like — Lev. as it supposes ignorance in his profession 4 Bac. 491. Vid. 1 Mod. 221. where the same words &c of an apothecary were judged actionable —

So words tending to injure a mechanick in his trade are actionable. 4 Bac. 491. 2 Stra. 898.

4th Tending to injure one in his office. Words charging one in an office of profit with want of ability or integrity are actionable. 4 Bac. 488. Esp. 500 2 Ray. 1296. 1 Com. 180. Salk 695. 1 Roll. 65.

But words charging a person in an office of trust or honour, not of profit with want of ability are not actionable. 4 Bac. 488. pl. 73. 489. Salk 695. Lucas if they impeach his integrity. Stra. 617. Ray. 1369.

4 Co. 16. a. Hob. 40 "Butterhead Justice" not actionable
Salk 695. (Judge Rives denies the
correctness of this distinction between offices of profit
those of trust & honour. and cites Hardwicke's aphorisms contra. "If there is any ground of difference" he observes "it must be that words spoken of a man in an office "of profit may frequently bear upon him in his official "capacity" The case in Salk was decided correctly not because of the distinction referred to. but because the words appear not to have been directed at the Pltff in his official character. The only true distinction says J. Rives. in these cases, is the relation the words have to the Pltff's capacities individual & official.)

Charging a person in office in either case with inclinations & principles which disqualify suffs. without charging any act. Bul. 5.

When the words spoken do not of themselves import to have been spoken with reference to Pltff's official character a colloquium is necessary. Roy. 1369. Stra. 618. 2 Bac. 489. pl. 88. 488. pl. 74. 1 Lev. 288. Secus if the words themselves do import a reference to &c. &c. Cro. Jac. 557. Ex. "He is a knavish justice"

So gen. when the words are not actionable except as they refer to some collateral thing which constitutes the ground of action & to which the words themselves do not upon the face of them refer. an averment of a coll. is necessary 5 Mod. 398. 2 Saund. 307. Esp. 501. Stra. 1169

Coll. said by Esp. 514 to be necessary when a trader is

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called a Bankrpt. 2w. many cited by Esp Dig 1 Lw. 280 when the words were "he is a forsworn justice" & coll. holden immaterial. 4 Bac. 515. pl. 55. 1 Roll 54. bro bar. 270. 193 calling a physician "no scholar" 2 Lw. 62. saying of a tradesman "He is a cheat do not deal with him" Raym. 1480. He is a knave comprehended in Dig 2w.—

3 the words do not themselves shew their own application by designating in what sense the subject matter or the person innuendoes are meant Ex. "He" meaning the Pltf. 4 Co. 17. b. Rule. Nothing which was otherwise remain uncertain can be reduced to certainty by an innuendo. 4 Bac. 516. 4 Co. 17. b More accurately anything which taken in connexion with all that passed before between the parties as to the conversation still remains uncertain cannot be made certain by an innuendo. It can only be made certain by a reference to something said before which is certain 4 Co. 17 b. 1 Roll 73. Comyn 684.

4 An innuendo therefore can never extend the meaning of the words beyond their proper import Ex. "I burnt my barn" meaning a barn full of corn, innuendo not good. But if it had been averred that Defts had a barn full of corn & that in discourse about that barn Defts had spoken the above words — innuendo good. Comyn. 684. 275. Esp. 511. 4 Co. 20. a. bro Elig. 834. So "He stole half an acre of my corn" Innuendo "the corn which grew on half an acre after it was reaped" bad. bro 228. 1 Roll. 82. pl. 1. Comyn 684.

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When an innuendo is unnecessary a bad one is surplusage Ex. "He was pryvie" innuendo "in a certain bill exhibited in such a court. innuendo bad - but dict. is good. 4 Bac. 516. 1 Roll. 83. Cro. Car. 609.

So if the person is uncertain from the words published an innuendo cannot make it certain. Ex." One of the serv.ts of J.S. is a thief." innuendo the Plff not good. Esp 511. 4 Co. 17. b. 1 Sid. 52. Cro. Elj. 497. Hob. 2. 45.

When an act.n is brought for &c. "tending to injure in trade profession office &c" it must appear in the dec.n that the Plff was at the time of the words spoken of such a trade &c. Esp. 514 Mutt. 49. That "Plff has been a merch.t trader for many years past" not suffic.t Cro Elj. 794. no judg.t Cro Jac. 205. Cont. 4 Bac. 513. Cro. Elj. 273. Cro Jac. 222 Cro Ch.r 282. Yelv. 159. 1 Sid. 425 & that he shall be presumed to have been at the time a trader.

So in case of a trader that "he gained his living by buying & selling" necessary Esp. 515. 1 Sid. 299.

Esp 520. when words of heat & passion said not to be actionable. sic vide 4 Bac 522. 1 Lev. 29. 3 Bl. 125. Rule. when they import no definite charge - as "Rogue rascal &c" & perhaps when wantonly provoked by Plff seems if Deft. in a paroxism of unprovoked rage utter actionable words. 2 N. Rep 335. actions of slander anciently rare - afterwards frequent Smith's rule adopted H. 21 Jac. accordingly.

Rule of construing words in mitiori sensu now exploded - They are to be taken in that sense in wh. they

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would naturally be understood by many. Esp. 511. 4 Bac. 497. Coup. 688. 275. 4 Bac. 505. Bul. 4. 10 Mod. 198. Vin. 12. Peak. 4. P.C. 4. n. 2 Mod. 159. 5 East. 263. Selw. N.P. 161

When words in themselves actionable admit of an innocent meaning: it is on Pl. to shew they were used in that sense Peak. 4 N.R. 335. 1 Vez. 507. 1 Johns. 279. 3 Lev. 180 Aliter in such case inquiry of "how he understood them" sent.

Slanderous words in a foreign language actionable if understood by any of the hearers. Secus not. 4 Bac. 498. 1 Roll 74. Bro. 6 865 Hob. 126.

All the sense is to be taken together. Esp. 511. For the subsequent words may explain the former so as to fall short of slander (as in case of description recited) ut supra. 4 Co. 19. a. Bul. 4. 2 Mod. 159.

Courts will not do violence to language to find an innocent meaning Esp. 512 Ex "your husband died of a wound you gave him" suffr. tho the wound might have been given by accident. Gilb. R. 243. Bul. 4

So a forced construction will not be given to make words actionable which bear an innocent meaning. Esp. 512. "He is a common maintainer of suits" of a lawyer. Hob. 117.

Gen. Rule. The words must, to be actionable, import a direct charge of a slanderous nature: not by inference. Esp. 512. Ex. "He got his means by swearing & forswearing. 4 Co. 15. a.

Qu. when the intent to charge a crime

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for any thing else of wh. the charge is actionable) is clear, the words are actionable tho somewhat indirect. Esp. 512. Bul. 4 1 Com. 85. Ex. I will make you an example for a pyramid Kneeler." Roll 49. l. 45. Sylv. 160. "I will prove that he poisoned P's" 1 Com. 185. 1 Roll 50. 61. 5. Co. E. 569. 1 Lid. 381. 1 Vent 276. "When will you return the sheep you have stolen" actionable. 1 Com. 186. 1 Roll 48. 2 it. 165. 12 Co. 134.

In declaring it is usual to state falsely & maliciously &c maliciously seems not necessary. 1 Com. 196. 4 Bac. 512. pl. 8 1 Keb. 273. Noy. 35. Cro. 51. Qu If the words are not in themselves actionable? for malice is prima facie implied. a direct averment that the words are false not necessary falsely published suffic. Esp. 516. Bull. 8

Dec^n usually states that Pff is of good fame &c. 1 Com. 195 not necessary - alleging the words were spoken "openly & publicly" suffic. without saying "in the hearing &c" to "in the presence of divers persons" suffic. 4 Bac. 512, Co. E. 861. 486. Noy. 87.

Tho gen^l actionable words prima facie imply malice the presumption may by circumstances be rebutted - Ex. case of confidential communication which excludes the probability of malice. - as character of a serv^t given by a former master on reasonable enquiry - the false, malice must be proved. 4 Bac. 2422. 1 T. Rep. 100. Bul. 8. Co. Jac. 91. 4 Co. 91. Esp. D. 512. 3 Esp. 110. n. 3 B & Ald. 587. 7 East. 493.

So when are confidentially by way of warning P of a trader "He will be a bankrupt soon" not actionable tho special damages were

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stated. Esp. 503. Bul. 8. 3 T. Rep. 60. 1. esp.

So if the words were used in a course of legal proceeding Ex. alleging in articles of the peace to bind Deft. to his good behaviour Esp. 503. seem if the court applied to has no jurisdict of the matters charged. 4 Co. 14. Co. E. 230 case of witness.

The relating of slander fabricated by another gent. actionable. Esp. 517 Bul. 10 Seems if he truly names his author at the time. 12 Co. 133. 2. Co E. 400. 3 Bulst 225. 7 T. Rep. 17 2 East 426

But circumstances are carefully to be regarded, as to the intent 2 Bac. 498. Ex. where one in the spirit of concern said "I have heard that S.S. was hanged for stealing" action lies not. 1 Lev. 182. 4 Co. 14. Bul. 9. 10.

Deft's suspicion no justification Esp 518. Co. Car. 38.

Words uttered by inquiring or provoking questions by Plff himself not actionable. 2 Bac. 498 Ev. Car. 297 Ex. Dare you say I am forsworn. "yes if you will have it."

The gent. issue is in Eng. either a denial that Deft. spoke the words or that they are actionable, for want of malice, as in case of confidential communication (vt supra) 6 T. Rep. 110. Bul. 8. Esp. 503. 17. 1 Lev. 82.

The gent. character of Plff as to the crime charged by the words may be proved in mitigation of damages 1 Root 354. 450. But other particular acts of

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the same kind as those charged cannot where the charge is of particular acts. Attwood vs Atw. S. B. Augt 1807. Bul. 296. Peake Ev. 2. 6. Even when the charge is gen.

In Eng a special justifie. cannot be given in evidence under the gen. issue: it may in Com. Esp. 510. Ex that the words are true. 4 Co. 16. Stra. 1200. Doug 373. In Eng the truth of the words cannot be given in evidence even in mitigation of damages Esp. 518. Bul. 8. 9 con. cetis contra. The truth of the words is always a good justification. 4 Bac. 516. 1 Roll. 87.

So sometimes Deft. may justify, tho the words are in themselves actionable if false as when false words are published in a court of justice in a declr. or court brot. by Deft. or Plff. 4 Bac. 699. 518. 1 Com. 196. Esp 503. 460 14 E. 6 c. 6 E. 230. 48. Hob. 82. Hutt. 113. 1 Roll. 43.

But if Plff charges crimes not cognizable by the juris dict. to wh. &c. a declr. lies agt him. not justified. Esp. 503. 2 Co. 14 E. Hob. 206. 67. 1 Roll. 34. 1 Com. 194.

So the person charged in such declr. or articles of complaint (tho they were exhibited under oath) may justify saying. they are all false - tho they are true, for this is his defence in a declr. of justice. 4 Bac. 499. 518. 1 Roll. 87. So he may say a writ is prayed by way of objection to his admission. 1 Com. 194. 1 Roll. 33.

Slanderous words in a complaint to a grand juror or proper magistrate or in an in-

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dictment. not actionable. 4 Bac 499. Cro Car. 247. 3 Lev. 138
4 Co. 14. Hob. 82.

Tho if one falsely & maliciously & without prob
able cause exhibits a complaint &c. action for malicious
prosecution will lie. 4 Bac. 500.

So in gen^l in the above cases of
complaint if the cause of justice is made a mere
cloak for malice action for malicious prosec^n lies.
4 Bac. 500. 3 Bl. 126. Fitch L. 905. 5 Co. 73. 116. Qu. as ag^t
grand juries?

So slanderous words spoken by a witness in a
b^r gen^l not actionable. 4 Bac. 499. 513. Cro E. 230. But he is
liable as the case may be for perjury. Secus if he goes beyond
the issue slanders a third person. Esp. 504. 4 Co. 14.
Suppose that he so slanders a party? no remedy?

So if one witness in testifying charges another with having ty-
tified falsely — an action lies. Esp. 505. 16. 1 Saund. 131. 4 Bac. 518
1 Com. 194. 7 Com. 807.

"That the words were spoken by def^t as
counsel in a cause" is in some cases a good defence, a justif^n
in others not. 4 Bac. 518. 498. 4 Bul. 10. Rule when the
words (tho false &c) are pertinent to the cause (suggested
by his client) he is not liable. Esp. 517. 1 Com. 194. Cro. J. 90.)
But if the words are impertinent (tho suggested by client) or if
being pertinent they were not suggested &c. action lies 3. Bl. 29.

Most of the books however make a difference between this
being suggested. 7 Bul. 10. Esp. 517. 1 Roll. 87. l. 25. 1 Com. 194. 1 Roll. 33.

It has been decided that for the purpose of mitigating damages

in favour of a client an advocate may use slanderous words, not pertinent. 2 Bac. 498. Hob. 328. 1 Roll. 87. l. 10. 33. l. 20. 2a. In a subsequ^t case (Hty. 62.) holden an advocate is never for slanderous words in defending his client's cause, - his duty - presumed he was influenced by his client &c. 2a. - late writers do not mention the two last cases. -

When there are two counts one charging actionable words, the other words not actionable for a plea to the whole entire damages are given & judg^t will be arrested and a venire de novo awarded. 8 T. Rep 564. Seem if the words are all in one count. 10 Co. 130. 3 Wils. 177. Cro. E. 320. 788. Stra 1094. 1 T. Rep. 508. 92. i.e. laid to have been spoken at one time. But. 8. 2 Bac. Abr. Root 346. 433. 10 Co. 131. Vid. 4 Co. 17. 1 Roll. 39. 51. 65. 71. 1 Lev. 156. Cro. Jac. 622. Stra. 142. Cro Eliz. 268. J. Rep. 8. "Crisps I do not see the reason of this distinction tho it appears "to be well established. Words which are not actionable are introduced for the purpose of shewing the occasion with "which the others were spoken. It is said the court will not "for arrest of judg^t when the actionable words & those not ac- "tionable are laid in different counts, because the court "cannot discern upon which of the charges damages are "assessed by the jury. Now how can they discern this more "easily when the words are all laid in the same count?"

In actions for words not in themselves actionable special damages must be stated. This is the gist. Esp. 520. 8 T. Rep. 136. Bull. 6. 7.

So when the words are actionable the Pl^ff may state & prove special damages, but in this case

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he can prove no other spec. damages than what is stated specially. Bul. 7. Tho he may prove gen. damages as loss of customers in gen. such gen. damages being laid. 2 Ld. Bul. 7. Kirb. 65. 290. 8 T. Rep. 130. Esp. 520. 1 Roll 58.

What amounts to an allegation of spec. damages. Sta. 666. Kirb. 290. Bul. 7. 8 T. Rep. 133. 1 Roll. 58. Sid. 396. 1 Vent. 4 Co. 99. 499.

But when the words are not in themselves actionable holden that the spec. damages may be proved under an averment of gen. damages. Sta. 666. 1 Com. 198. 2 Ld. Bul. 7. Kirb. 290. Esp. 520.

Immaterial what the false words are if they are malicious & occasion special damages. Ex. calling a single woman incontinent - with child a slut &c. by wh. she loses a match. 4 Bac. 496. 4 Co. 17.

In case of slandering a title (as it is called) as calling one heir apparent a bastard - it is suff. to shew some a possible damage - No action lies if Deft. claimed the title (4 Co. 17) as heir. Esp. 501. 6 Co. Dac. 213. 4 Bac. 494. 1 Roll. 38. Ex. Plff's father had signified a design to disinherit - suff. also, that the words tend to disinherit. 4 Co. 17. a. Esp. 501. So decided in favour of youngest son.

One recovery of damages is a bar to another action for the same words, whether the words are actionable per se or not. Esp. 519. Bul. 7. Nec. necessary to prove the words precisely as laid now suff. to prove the substance. Bul. 5. 2 Roll. 718. Esp. 521. But the sense & manner must be the same. 4 T. Rep. 217. 8 id. 150

In actions of slander in gen.l Pff after proving the words stated may give evidence of other words of a similar kind spoken at another time & even after the action brot. - & to be in aggravation of damages Esp. 518. Bul. 10. Cases cited. But this cannot be the principle - for

1 Words not actionable may thus be proved. 2.d Words actionable (which may be thus proved) are a foundation for a distinct action. 3 Words spoken after action brot may be thus proved - the true object is to shew malice. Bul. 7 Esp. 520. Stra. 691.

But when words spoken at another time are given in evidence under this rule - Defl. may prove them true to rebut the inference Esp. 518. Bul. 10

When words not stated & spoken at different times are proved they must be similar to those charged Esp. 520 & the "same words only". Bul. 10. words similar Esp 518.

Qu. Ch. has decided against proving like words spoken at diff.t times - to shew malice. Kirb. 181. Decided many times pro & con.

Eng. stat Limit.ns as to slander. 2 Yrs from the time of uttering - It extends only to actionable words. Esp 519. 1 Sid. 95. In Com.s 3 Yrs.

Often necessary to prove the words precisely as laid. Suff.t now to prove the substance. The manner must be the same. The persons of pronouns must not be changed. 2 Roll. 98. Bul. 5. Esp. 521. 4 T. Rep. 217.

Joint act of slander by or ag.st two will not lie 2 Burr. 984. Esp. 504. Bul. 5. 1 Com. 195. Dy. 19. a. 2 Bac. 511. Yelv. 120. 1 Not a test wh. supposes an act

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III. Slander by writing: A Libel.

As to the nature of slander by writing. 1 Whatever words would be actionable if spoken are clearly so if written. Esp. 504. 3 Bl. 126. But written slander is a more aggravated injury - as having a more extensive circulation & being always deliberately committed. 3 Bac. 490. 3 Bl. 126.

The rule does not always hold e converso (post) yet Esp. 504. says it differs from slander by words in this only, that it is actionable in writing or printing. Quaere 3 Bl. 126. Perhaps his meaning is - that words which if spoken would not be slander are not slander when written, tho they may be actionable as being libellous.

Defin.ⁿ of Libel. any malicious defamation of a person (living or dead) made public by writing & tending to excite resentment or to expose the object of it to odium contempt, or ridicule 2 T. Rep. 128. 1 Hawk. 193. 352. 4 Bl. 150. 3 Bac. 490. Defⁿ seems to have been chiefly framed with reference to libels cons.d as a public offence Ex. dead person. exciting resentment.

For libels in gen.l there are two remedies. By indictment & by case 3 Bl. 125. 3 Bac. 492, 5.

Gen.l the rules applying to oral slander apply to cases of Libels as civil injuries.

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2d - Do the negation rule, as to oral slanders apply; Ex. No charge written crimy &c, Esp. 504. 3 Wils. 403. Stra. 898. 3 Bl. 126.

But nothing is construed a libel wh. is necessary in the regular course of legal proceedings Ex. In a declt complaint affidavit &c. Esp. 505. 2 Burr. 807.

action lies not for publishing a true account of a trial in a court of justice. - the Pltff character is injured by it. 1 B & P. 525.

In a civil action the truth of a Libel as of words not written is a Justification. 1 T. Rep. 748. 4 Bl. 150. Hob. 253. 2 Mod. 166. 11 it. 99. 3 Bl. 125.6. But 89 ace Holden contra 2 Bac. 516. 5 it. 495.

Seems in crimt. prosecn (3 Bl. 125.6. 4 it. 150. Stra. 498. 5 Co. 125) the falsity aggravates the guilt (2 McNy 648.) Nor is the bad reputation of the person libelled any justification 2. McNy. 649.

It is essential to the constitution of a libel. that it be published. But writing it originally seems to be suffd the dictates by a third person. Esp. 510. Carth. 405. 5 Mod. 163. 2 McNy 632.

But merely transcribing it without shewing it to any one is not a publication. Esp. 510. 9 Co 59. b. But it is evidence of a publication if the libel be made public 2d - as to the Pltf rule Sal. 419.

But composing it - procuring it to be composed reading it after he knew the contents - delivering to other after he knows &c. amounts to a publication in Law. For to be wilfully & wrongfully instrumental in making it public is to incur the guilt of actual publication. Esp. 510.

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9 Co. 59.b 5 Co. 125.b 3 Bac. 497 1 Hawk. 195.

The sale of a libel by a Bookseller or other is prima facie evidence of a wilful publication, even on the seller. 2 McCry. 644. So of printing. i.e. prima facie evidence. 2 McCry. 643. 2 Bl. R. 1048.

So sending it to the press for publn is a publication in law & the person sending is guilty of publn when it is printed. Foster 201. Esp. 510.

Signing it in the presence of others is a publn. Esp. 510. 5 Co. 125.b 5 Burr. 2666.

But repeating part of a libel in ignorance without malice has been holden no publn. Esp. 510. Mo. 627. 813. 1 Hawk. 196. 2 McCry. 643.

Writing it to the person who is the object of it is suffn publn for a public prosecn 2 Bl. 150. Hawk. 195. 3 Bac. 497. Esp. 506. 10. Pop. 139. Not for a civil action Hob. 62. 215. 12 Co. 35. 1 Mod. 58.

If the letter were a friendly expostulation it is suffn for a public prosecution — (publication wanting) Esp. 506. 2 Ld. clearly not actionable (ibn) an old libel wch supports a public prosecution actionable. 3 Bl. 125. 3 Bac. 492.

Words written are often actionable when if but spoken they would not be, 2 H. Bl. 532. arg. 1 B & P. 331. 1 Saund. 120. 2 Show. 313. 1 Mod. 58. 1 T. Rep. 754. arg. Stra. 899. 3 Bac. 492.

Writing & publishing anything falsely which makes a man odious or ridiculous actionable. 3 Bac. 492. 2 Wils. 403. 1 B & Pul. 331. So by Gould J. "Rogue Rascal" suffn 2 Wils. 404.

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So disturbing domestic peace &c. p^d by Esp. 506.
Writing a printing of one that "he is a swindler" is actionable 1 T. Rep. 748. Laws if spoken, 2 Hen Bl. 531.

The offence
lies in the of a libel are consid^d as repeated in every stage of its circulation — Thus for Printer not changed in Engl. 1 Wils. 178. 1 T. Rep. 571. 647.

Tho the printing represents only the initials or one or two letters of the name of the person against whom it is intended. - or feigned names it is a libel. - the manner being such that it must indubitably refer to the person. 3 Bac. 493. 1 Hawk 194. Esp. 506. 2 atk. 470.

III. Slander without words. or Libels without writing. Esc. raising a gallows before one's door. hanging him in effigy. Esp. 511. 5 Co. 125. Representing an ignominious by painting &c 3 Bac. 491. How the application of the slander must be always made by innuendos & averments. Also special damages must be always shewn. This kind not actionable in itself. Esp. 511. 3 Bl. 125. 6. Otherwise not understood to be levelled at the Pff.

By our stat. bounds slander is not punishable as a public offence. R. L. 405. H. Com 141. Fine not exceeding $34 to the Co. treasury - never inflicted. for defaming &c. magistrates &c. - fine - imprisonment disenfranchisement or banishment. —

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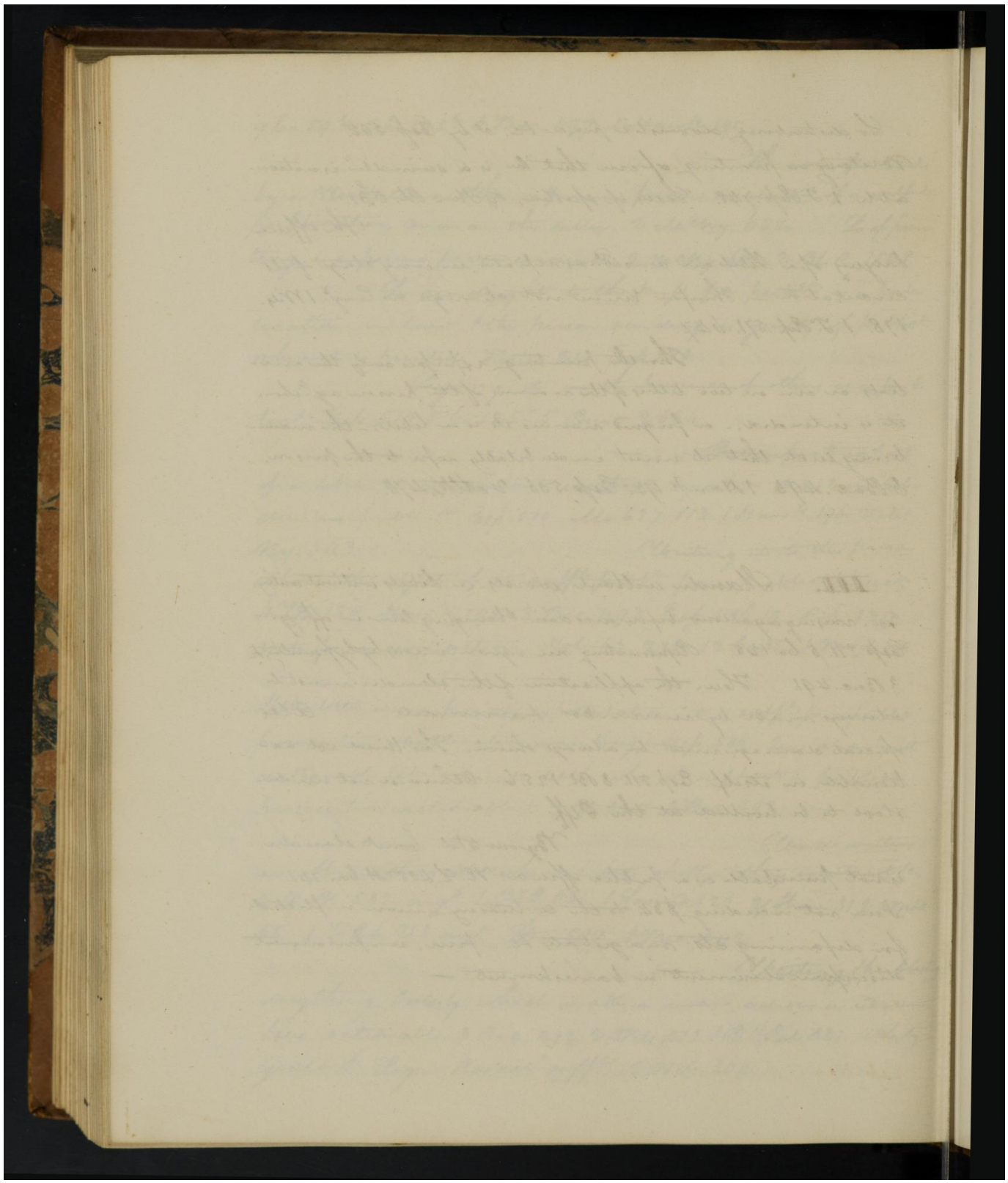


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Action on the case for Malicious Prosecution.

This action is brt to recover damages agst one who has prefer'd an indictment or other prosect.n or brt an action agst Plff from a corrupt motive, i.e malice without any ground or probable cause. Fitz. N.B. 116. Esp. 525. 7. 8. 1 Bac. 61.

Analogous to the old action of conspiracy which is now much out of use — Conspiracy lies only agt two or more for having falsely & maliciously prosecuted for treason or felony & thus endanger'd his life. 1 Saund. 230. Finch L. 305. 3 Bl. 126. 2 Buls. 271. Esp. 530. 1 Com. 158. Ray. 179.

Another analogous action is the action on the case in nature of a conspiracy — Act.n on the case in nature of de lies when two or more conspire to prosecute another maliciously & without cause — or otherwise conspire to injure him in person fame or property. Finch L. 305. Salk. 14. Esp. 530 1 Bac. 61. 1 Saund. 230. a.

The gravamen for action of malicious prosecution resembles in some measure that of slander. It is not necessarily or generally the danger to which Plff has been exposed, but the vexation, expence & scandal. 3 Bl. 127. 10 Mod. 219. 20 Stra. 691. Sal. 13. 4.

Act.n for conspiracy lies not unless Plff has been actually prosecuted (Esp 527. 8). & acquitted (12 Co. 23. 6 Co Jac. 8. 1 Roll. 112.) for so are the words of the writ. Fitz N.B. 1. 15. 6. 4 260. 1 Wils. 211. Esp. 530. 1 Com. 161.) Indict.t for conspiracy lies when there has been an unlawful conspiracy as above tho nothing is executed. 2 Lev. 51. 9 Co. 56 b. Esp. 530. So action on the case in nature of a conspiracy

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lies tho no indictmt &c. has been actually exhibited. 1 Bac. 61 1 Roll. 112. 1 Com. 158. 225. i.e. I suppose for charging a crime by conspiracy - Injury to reputation.

Differnce between conspiracy action of. 2 actions in the case in nature of &c. - In the former if all but one are acquitted, Judgt cannot go agst him - In the latter it may go agst one only. Esp. 530 Ray. 379. 3 Rep. 176. 1 Com. 159. Bul. 14. 1 Wils. 210. 2 Lev. 52. 1 Roll. 111. 2. pl. 5. 5 Mod. 408. 6 ib. 169. Bro. Con 239. The first is a formed writ in the registr - The latter a spl. action on the case - In the former, the damage to wh. the conspiracy upon the Plff is the gist - In the latter it is the consequent damage, scandal &c. Carth. 416. 3 Wil. 126. 7 Bul. 14. 10 Mod. 219. Stra. 691. 1 Saund. 230a So in case for Malicious pros.

The latter. i.e. in the case for nature &c. is substantially an act. for Mal. pros. with this difference - that the latter may be brot agst one, no other being concerned. The former must be brot agst two or more or agst one charging that he with another or with others had conspired &c. 1 Com. 159. The grounds of the two actions are therefor the same. Esp. 531. 2 Lev. 52. Bro. Con. 173. 239. 1 Wils. 210. 1 Saund 230a Ray. 176. 5 Mod 408. Bul. 14. Tho two are sued, judgt may be agst one only -

It is essential to the support of this act. for mal. pros. that malice & want of probable cause in the former pros. sh. have concurred. Malice what. falsity alone not suffr Bul. 14. Esp. 529. Burr. 1971. 1 T.R. 5445 It lies therefor agst one who maliciously promotes a false prosecution agst another knowing the charge to be false, & having no reasonable ground to believe them true. But it is always suffr for Deft to shew probable cause,

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whether he acted with malice or not. Bal. 14. Esp. 533. Esp. C. 900

In Cont. when the act. is for a false & malicious civil suit it is called a vexatious lawsuit.

This division pursued.

1st Of Crim. prosec.ns - false & malicious.

If a man is falsely indicted for a crime that would injure his reputation he may have this act.n 1 Sid. 15. Yelv. 146. Sal. 14 so if the charge expos. to danger his life or liberty. Sal. 15. So an indict. false & subjecting to expence only is suff.t to support the action, Ray. 378. Salk. 15. ang.d Sty. 379. Esp. 528. Stra 977. E.t. Dubb.d sues alone for expence incurred in a malicious prosec.n of his wife - act.n lies.

E.t. shewing that danger to the life or liberty of Plff is not necessary - The indictm.t having been ill, so that Plff was in no danger of a conviction is no answer to the action. if the charge injures his reputation &c. Esp. 528. 4th Rep. 248. 3 Bl. 127. Sal. 15. 1 Bac. 61. Scandal vexation expence suff.t

So if the indict.t in the last case was not found by the grand jury yet the action lies for the vexation expence & scandal. Esp. 528. Co. L. 290. Sal. 14

So expence alone caused by insuff.t indict. suff.t to support the act.n - E.t. Indictm.t for exercising a trade without license - tho the reputation of the party is not injured nor his pers.n security endangered. Sal 15 in marg. 3 Mod. 127. 10 Mod. 148. 214. Cit. 2 Ld. Raym. 1373. 1 Bac. 61. Esp. 528. 2 Stra. 977. Salk. 14. 5. cont.

Public officers commencing prosec.n on false information not liable. But the person giving the false information knowing it to be false

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a without probable cause is so. 1 Lev. 187. Bro. E. 130. 2 T. R. 231. 2 Bac. 61.

But if a public offr. without information or of his own mere motion maliciously &c. prosecutes another. (Bacon. 161.) he is liable (1 Bac. 61. 2 T. Rep. 231. 225 Bro. E. 130 1 Bac. 158. Aliter the offr. acts ministerially. Contra infra.

But if the public offr. in the last case is the magistrate granting the warrant & the grievance is that Plff was arrested under it. Trespass not case is the proper remedy and in this respect the case in Bro. E. 130 is denied. 2 T. Rep. 231. Esp. 530. Doug. 650. "False imprisonment."

It must always appear from the declr. that the prosecn. for wh. &c is in some way at an end. In conspiracy "legitimo modo acquietatus" is necessary. ante. 9 Co. 56. b. Doug. 205. 10 Mod. 209. 2 T. Rep. 231. Hob. 267. 1 Stra. 114. "Plff was discharged from prison" not enough. But the omission to shew the prosecn. is at an end is cured by verdict. 1 Saund. 228. Esp. 532.

An allegation that "Plff was acquitted on the origl. prosecn." not supported by evidence of a nonpros. for this is not an acquittal. Bul. 14. Esp. 536. Sal. 21. 6 Mod 261. The declr. states all the proceedings in the origl. prosecution & any misrecital in a material part of the indict. &c is fatal. Esp 532. 3 T. Rep. 290. Ex. a variance between origl. record & declr. is to the day of acquittal. 6 Mod. 216. Secus if it is in an immaterial part. Esp 532. 2 Bl. R. 1050.

It seems that no writ or civil act. lies. agst. person of record

Jurors - grand jurors &c for even malicious acts done in the exercise of their judicial powers. 1 Bom. 158. Esp. 635. 1 T.R. 503. 13. 4. 34. 5. 7. 8. Comp. 161. 72. 1 Hawk 191. 2 Rawe 322. 2 Bl. R. 1141. 1 2 Co. 23. 2. 2 Mod. 219. Cro E. 130.

Malice may be & generally is inferred from want of probable cause. Bur 1970. but want of probable cause cannot be inferred from the most express malice. 1 T. Rep. 544. Esp. 529.

To prove malice Plff may give in evidence collateral circumstances as an admission made by Defts that the indictt was found - malicious &c. Esp. 535. Str. 691.

Convictn of Plff in the orig. prosecn by a competent jurisdiction is conclusive evidence of probable cause. Esp. 529. 1 Wils. 232. Hob. 267. 6 Mod 262.

Acquittal is in most cases presumption, but more than presumption evidence of the want of probable cause. i.e. in most cases, at sup. 4 T. R. 247. Salk. 15 pl. 5. But qu. Whether "ignoramus" found is prima facie evidence of want of probable cause?

Acquittal not always prima facie evidence of want of probable cause &c. If the Plff was bound over by a court of enquiry, & the bill of indictt has been found by a grand jury - onus lies on Plff the acquittal on trial the presumption being in favour of complaint. i.e. Defts Esp. 536. Bull. 14. Salk. 15. So if it appears from the report of the Judge, there was probable cause. Bul. 14. Esp. 529. 30.

But when the facts lie in the knowledge of Defts himself

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he must show probable cause, though the grand jury have found the indictment. 2 Bul. 14. Esp. 535. 6. 4. (6 Mod. 216.) Ex. prosecut. for robbing Deft.

And proof of the witness given before the grand jury is good evidence of probable cause. Bul. 14. 6 Mod. 216. & Deft. may at the orig. trial as to the existence of the crime charged is admitted. — if no other person was present at the time. — Proct. for robbing Dft. —

The existence of probable cause is a mixed question partly of fact, partly of law. What amounts to probable cause, is a question of law only, whether the circumstances alleged to prove probable cause are true is a question of fact. But the fact being given, the inference is a conclusion of law. 1 T. Rep. 545. 19. Bul. 14 Esp. 529.

Therefore regularly Deft. plea sh. shew the grounds of suspicion on which he acted. Ca. El. 134 Esp. 533.

So to seems necessary for Dft. to shew that the crime for which he prosecuted was committed — seems there can be no probable cause. Semb. Esp. 534. 6. Mod. 216. 2 Hawk. 120 Ex. Deft. believing his propty. to be stolen when it is not.

So what amounts to malice (as the existence of malice) the facts being given is a question of law. 2 Ld Ray. 1493. 1 T. R. 519. 1 Wils. 233.

When the action is for a malicious prosect. for felony, a copy of the record granted by the court in which the trial was, is necessary & the granting is discretionary. Esp. 534. 1 Bl. R. 385. 1 Bac. 61. When the crime charged

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if of a misdemeanor only, such copy not necessary. Esp. 534. 1 Bl. R. 385. Orig.l produced by Clk. of Pl.

Secondly, When the action lies for a groundless civil suit a one action Lawsuit. Gen.l rule as laid down is that the action does not lie for bringing a civil suit even though there is no right of action because it is a claim of right. Pl.ff is answerable for false clamor & is liable for cost, Bull N. Sal. 13. 4. Esp. 525. 1 B & P. 205 so no damages presumed even for arrest prosec.

Exception 1.st When there is good cause of action for one and another having no action sues & arrests the debtor, the action lies. Esp. 526. Bul. 12. Sal. 14.

Except.n 2. When Pl.ff in orig.l suit having good cause of action sues in a court not having cognizance the action lies. 4 Co. 14 But it is necessary that the def.t (the orig.l Pl.ff) should have known that the court had not cognizance. Esp. 526. Bul. 12. 2 Wils. 302.

3.d If a person having no right of action nor colour of right & knowing it to be so, sues another for the purpose of vexation, he is very liable 2 Wils. 305. No such case in the old books. 1 B & P. 388.

Let to if for such purpose he sues him for a much greater sum than is due. 1 Saund. 228. Esp. 525 6. 1 Sid. 424. But it is said that the action will not lie in the last case for arresting unless Pl.ff has been holden to receive bail. Esp. 526. Bul. 12.

When the suit

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is intirely groundless & known to be so by the sing.r Plff the
brot.s in the proper court & on arrest of the person. but
merely propl.r taken, action lies. Esp. 527. The first suit
being malicious. Ex. Defr. has sued out a second
fi. fa. for treble Plffs goods under it after having taken
other goods under fi. fa. Act.n lies for vexation & dam-
ages. Hob. 205. 66. Bul. 12.

The particular gravamen
must be stated, when founded on former civil suit,
& that it was done maliciously & with intent to injure
& oppress the Plff. 2 Wils. 205. Esp. 532. 1 Sal. 14. 1 Sid.
424. Ray. 380. So on purpose to hold Plff to bail,
if that is the injury. 1 Sal. 15. Bul. 12. no damages
being presumed.

2dly. whether unnecessarily arresting or
debts from home without any particular benefit to Ex.
but from apparent malice is a foundation for this act.n
decided not to be. Supr. ct. Con.

In the above recited cases
it is necessary that special damages be alleged & proved.
1 Sal. 14. 5. Ray. 374. Secus if a stranger incites A to bring
groundless suit ag.st B. — no spec.l damage necessary as ag.st
him (as in crim.l cases) not a claim of right by him. He is not
amenable. Sal. 14. Ray. 380. nor liable to costs.

First requisite in all cases to support this action for a
civil suit. 1st Former act.n determined. i.e. ended, for
it cannot otherwise appear to be groundless or unjust.
Doug. 205. Sal. 15.

2d. Damage. i.e. actual. already incurred

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a inevitable. Esp. 527. 31. Stra. 114. Bul. 13. Therefore if one forge a bond in my name. I can have no action till sued upon it.

But it is not necessary that the vexations suits shd. have been decided in favour of the present Plff. Ex. Non. suits suffered on the sigl. action. yet this lies. Esp. 527. Bul. 13. Any groundless proceedings by action when ended. is on this point sufft. Esp. 527.

Our Stat. gives an action agst. all who wittingly & willingly wrong others by procuring any suits with intent to vex & trouble &c. Treble damages — also subjects to fine $7. for third offence to be prosecuted agst. as common Barrator. St. 2 Geo 429.

Two cannot join in an action for a vexatious suit — injuries being distinct & personal. Kirb. 145. But there may be two Defts. sumb. Bul. 5. 1 Stra. 79. 2 ib. 910. Esp. 537.

Whether the damages may be recovered in this action agst. several Defts. Two pass. con. How can they be owned Esp. 537. 1 Stra. 79. 2 ib. 910 The malice of Defts. enters into the consid. of damages. Esp 537. 4 Burr 1971. not suitable by the Com. practice. R. L. 433.

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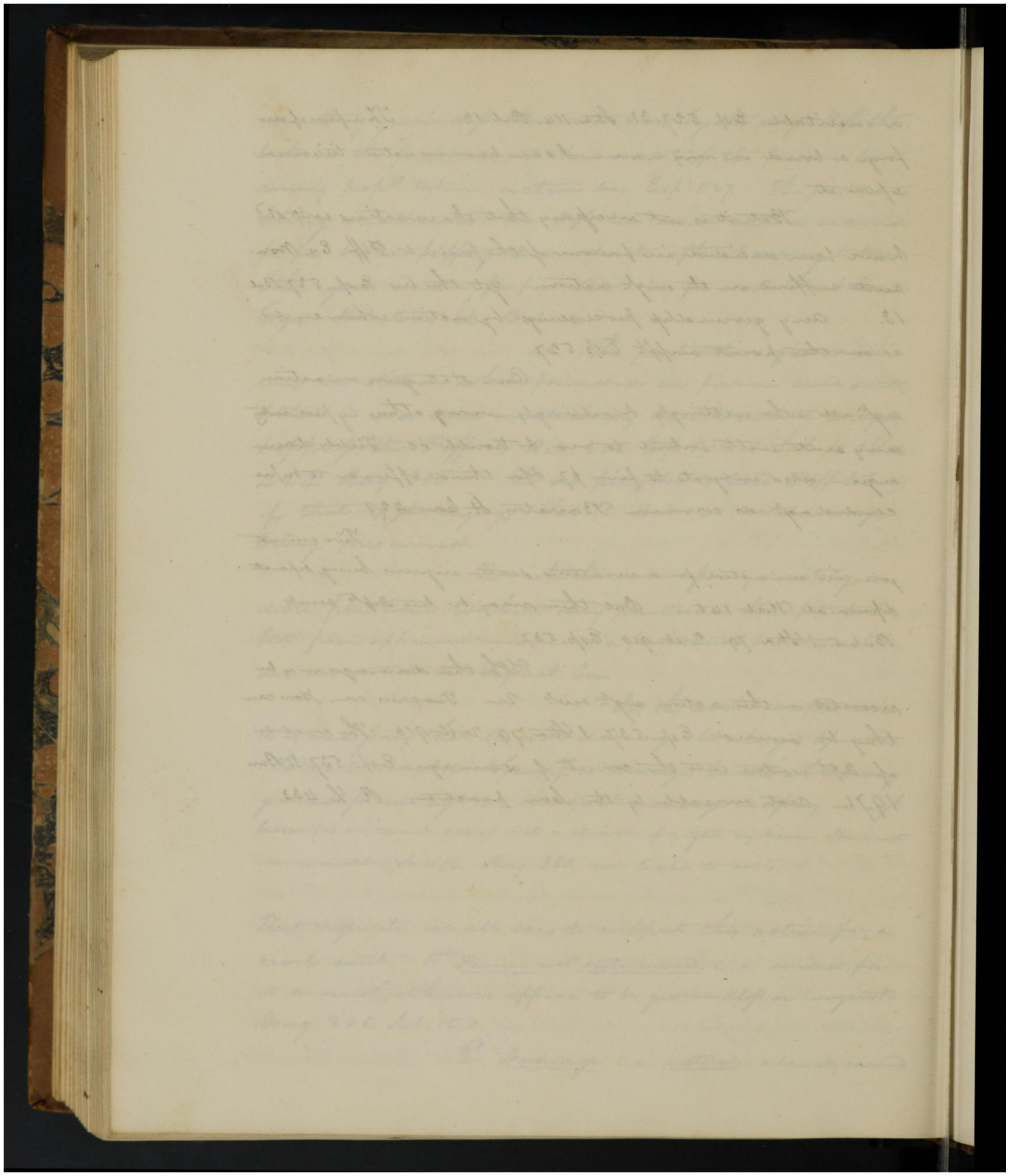


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Assault & Battery

A assault is an attempt or offer to do a corporal hurt to another by force without touching Ex. lifting a weapon or fist in a threatening manner. Com. "Batt." C. D. 1 Bac. 154. 3 Bl. 120. Esp. 312. Bul. 15 So presenting a gun. drawing, brandishing or sword. pointing a pitchfork &c. to one within reach of it. 2 Roll. 545. 1 Vin. 256. 1 Hawk. 133. Any unlawful setting upon the person by an offer to beat Pinch. 201 This is an inchoate violence & amt to an injury 3 Bl. 120. 3 Revis. N. E. L. 85. tho no actual damage

But a gesture otherwise amounting to an assault may be explained by words spoken at the time. so as to fall short of an ass. 1 Bac. 154. Ex. A lays his hand upon his sword & says "if it were not assizes time I'd" for the intention must operate with the act to constitute an ass. 1 Mod. 3. Esp. 312. 10 Mod. 187. 2 Rub. 545. Words alone can not amt to an ass. ancient opinions contra. 1 Bac. 154. 1 Hawk. 133. 134. 2 Roll. 545. 1 Com. 590. But threats of bodily hurt producing actual inconvenience are an injury Ex. Interruption of ones business. 3 Bl. 120. Remedy is Trespass — post. -

Battery consists in the actual commission of violence upon the person of another. Esp. 312. The least degree of it. if done in an angry, spiteful rude or insolent manner is battery. 1 Bac. 154. 6 Mod. 179. 12. 1 Com. 589. 1 Hawk. 134. Ex spitting in the face, treading on one's toes. The unlawful beating of another. 3 Bl. 120. Qu, is a batt. of course unlawful? for it may be justified. Sal. 407.

Every batt. includes an ass.- proving of battery will therefor support a charge of ass. & batt. 1 Bac. 154. Sal. 382

threats of bodily hurt, the not amounting to an ass. (for words alone cannot constitute an ass.) are in some cases actionable injuries. When they occasion an inconvenience they are actionable. Sc. cases not. 3 Bl. 120. Finch 202 Com. "Batt." C. D. 1 Com. 590. 1 2 Bl. 545 The action is trespass vi et armis 3. Bl. 120. ut sup.

In batt. the injury must be immediate. but not necessary that it should be instantaneous - Effect of the act of wrong done suffice - if proceeding a connected train of effects - In gen. any wanton act by which an injury supports the action. Dr. Vent. 295. E.g. Deft throws a squib into the market place which accidentally put out Pl's eye. 3 Wils. 403. 2 Bl. R. 892. Str. 634. The particular distinctions below trespass & case post.

So if one pushes another wantonly or carelessly & the latter falls agst a third, a ct. lies agst the first. Esp. 313. Bul. 16.

If a horse taking sudden fright runs against a person the rider could not be liable - not his act. - But if a third person struck the horse he would be liable for all consequent mischief. Esp. 313. 4 Mod. 405. ib. 24. 1 Com. 589. Sal 637 Bul. 16. That he is liable in an ac. on the case Dr. Sal 637. agst "Tris. on the case"

When a person receives bodily hurt from an act to which he consented he may sometimes have an ac. - in other cases it is said. Esp. 313.

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Rule. If the act consented to was legal, he has no remedy
Ex. but by playing at cudgels - no action. It promotes courage. 1 Bac. 154. If but by boxing consented to by him, he has an action - unlawful. Bul. 16. 2 Lw. 174. & consent could not make it lawful - & volenti non fit injuria does not apply - Are are not both participes criminis?

To consenting to be beaten does not justify the beating. Esp. 313. Comb. 218. Bul. 17. Lw. In the civil action? But that the injury happened in an amicable contest as wrestling is a good excuse - consent good. Lawes Pl. 125.

If one in defending himself accidentally injures another behind him he is liable to this action. 2 Bl. Rep. 896. T. Ray. 468.

Malicious intent is clearly not necessary to subjects to the action vi et armis for a lunatic is liable to it. Latch 13. 110. Doug. 640. Esp 399 Hob. 134. civiliter non criminaliter. 1 Term 81. It is a good rule that in cases arising ex delicto, innocence of intention excuses. Doug. 629. not universal. 1 Leon. 284. Cro E. 19.

But how far accident will excuse an involuntary trespass has been a question of much difficulty, according to 1 Term. 81. it is sufficient to make one liable that "he has been the physical cause of damage." This is too broad a rule, for it would not admit even inevitable accident as an excuse - If the injury happens by fault of the party injured: excused. Hob. 134.

It is said that "inevitable accident" or inevitable necessity only

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shall recover. Hob. 134. 1 Comyn. 589. 2 Ld. 35. 2 Roll. 548. 3 Wils 377. 2 Bl. R. 896. 3 Wils 410. Stra. 596. 1 Term. 81.

Meaning of "inevitable" what? That the accident should be physically unavoidable? if so the case in Bul. 16 seems not to be law, where a distinction is taken between wantonly pushing a drunken man ag^t another & attempting to assist him — for in the latter case the accident is not physically unavoidable & in Hob. 134 the 6^th the thing on the word "inevitable" agreed on the ground of neglect. 1 Bac. 154.5 Esp. 319. 38. recover if utterly without his fault. Hob. 134.

Bul. 16 supposes that if a horse used to run away with his rider takes fright & in running injures another, the rider would be liable on the ground of neglect. but the immediate injury would seem as physically inevitable, as if the horse had been used to running away &c. But here the remedy would be case for neglect — not the riders act. 1 Vent. 295. Most of the ex. given suppose some neglect, as the case of cutting a hedge of thorns, which fell on Pitts land — there was neglect. T. Ray^d 467. So in the case of lopping boughs, cocking guns. Stra 596. Bur. 2092. Esp. 383. So when B's timber floats on C's land 2 H. Bl. 257. 8.

Rule is clearly, that when the injury is inevitable the def^t is excused. Hob. 134. 2 Bl. R. 896. 3 Wils 37. Ex one taken with the sickness fall ag^t another,

The injury cannot be said to be inevitable when the act causing it is voluntary. i. e. when the act is not

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the effect of a cause above against contend. But still there is not any liability if the party damaged is himself the faulty cause. —

In the other case according to some opinions if the act causing the damage is lawful & the agent guilty of no neglect, no want of care, he is excused. Esp. 599. Bul. 15. b. Esp 313. 7. helping a drunken man. Bul. 16. 7. 5 Bac 168. sed. qu. better opinion seems to be, injury must be inevitable

In 2 Bur. 2092. Dan killed by Defts dog. — the Deft would not be considd as the agent, nor the act his, unless the injury was voluntary on his part — When the injury is wilful the author of it is undoubtedly liable.

But when the act causing the damage is unlawful, the author is in some way, either in Trespass or case liable at all events, whether there is the least neglect or not. for the consequences mediate or immediate. 2 Bl. R. 893. 2 Ld Ray. 480. 1574. 12 Mod. 609. 3 Mod. 295.

The above rules as to accidents apply to trespass in genl.

Three Kinds of defence. Denial or inficiation. Excuse. Justification. Bul. 17.

Affr he can justify in many cases. 1 Vern. 539. 3 Bl. 120. Ex. and Offr having legal process to arrest can may use violence in case of opposition so far as is necessary to effect the arrest. Esp. 314. 2 Buc. 158. 1 Hawk. pl. 13.

But a bailiff is not justifiable in this case unless there is actual resistance. Ray. 229. or an attempt to escape. 2 Stra 1029. Bul. 18. 9. Esp. 314. 3 Lev. 463. Cro. E. 93

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an arrest simply will justify an assault only.

But a molliter manus imponit in making the arrest is justified the no resistance. Sta. 1049. 2 Roll. 546. 1 Bac. 156. Bul. 19. 5 Com. 535.

Plea of molliter manus &c goes to the justification of the Batt. as well as assault. 5 Com. 355. Skin. 387. Com. Dig. 93. L. 2 Vents. 193. 3 Lev. 404. Esp. 314. but not of beating wounding &c. 8 T. Rep. 299.

Batt. is justifiable on the ground of self defence. 3 Bl. 120. as if one strikes me first I may strike him. so an asst by Pltff is suffic to justify a batt. by Defts as if Pltff lifts a weapon &c. 1 Com. 589. Bul 17. 8. Esp. 315. Plea. son assts &c.

But there must be some proportion between the assault & Batt. by Pltff & that by Defts For every assts &c however small will not justify every battery &c however great. 11 Mod. 43. Bul. 18. & the proportion is a question of evidence — a small blow will not justify a mayhem. Pltff strikes Defts a scuffle ensues & Pltff is mayhemed Defts is justified Salk 642. Sid. 246. Esp. 315. Seems if Pltff strikes a small blow & Defts in return mayhem

The plea in this case is "son assts demesne" i.e. that first assts proceeded from Pltff & that Defts struck in self defence Esp. 315. Salk 642.

But mayhem it seems is not justified by Pltffs aggressions unless the Pltffs act might endanger Defts life 1 Ray. 177. Esp 315. Sal. 642. 1 Mod. 43. or member 1 Com 590

As to the mode of injuria &c. 1 B & P. 60. 76. 86.

If the Pff was the blameable cause of the batt. (tho he did not strike nor threaten to strike) Defts is justified in some cases, as when Pff tilts the seat on which Deft was sitting. Deft hit off Pffs. fingers. 1 Roy 177. Sal. 642. But the many cases in this case seems to have been justified by Pffs attempting to gouge Defts. 11 Mod. 43. Roy 177. So when Pff. thrust his money into Defts mouth & a scuffle ensued Deft was justified. Esp. 315. 6 Co Jac. 366.

Parents justified in giving children reasonable correction. Master his servt. Schoolmaster his scholar Jailer his prisoner Esp. 315. 1 Sid. 176. 1 Hawk 130 So according to some how a his wife. 1 Hawk. 130. P.C.C. 80. 1 Bac. 155. These relations constitute special justification

A man may justify a batt. in defence of his wife, so of parent & child. Esp 314. Bul. 18. Ld Ray. 62

Clearly a servt may justify in defence of his master — but a converse. Bac. 568. Esp. 314. Bul. 18. Ld Ray. 62. 2 Roll. 546. 1 Hawk 484. Sal. 407. 1 Bl. 429. 5 Com. 554 Stra. 953. That the batt. must have been in defence of wife &c to prevent her being injured — not vindictive. Esp. 316. Ld Ray, 62, n.

So one may justify Batt. in defence of his property forcibly invaded, as by breaking a door, gate &c. But if there is nothing more than a mere entry on an inclosure (wch. implies force in law only) the owner is not justified in a batt. without a request to depart Esp. 314. Bul. 19. Sal. 641. 1 Hawk. 134.

In case of entry on lands however, the batt. must in pleading be justified not as a batt. but as a molliter &c Bul. 18. Esp. 314. 5. Ld Ray. 62. Sal. 407. 5 Com. 355. 1 Mod. 36

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8 T. Rep. 78. cor.

The last rules contemplate the owner of prop^y in poss^n & relate to his right of defending his prop^y: but when he is disseised or dispossessed a diff^t rule now obtains tho as to real prop^y not known at C.L.

At C.L. one who had a right of entry or poss^n on lands was allowed to regain poss^n by force from the disseisor &c 2 Bac. 555. 3 Bl. 179. 4 ib. 148.

But now by sev^l Eng. Statt. (first is 5^th Richd. 3^d) one may not enter on lands of which another is in poss^n (as by holding over after a term is expired — or taking a vacant poss^n) except in a peaceable manner. 2 Bac. 555. 4 Bl. 148. 3 ib. 179.

These Statt. contemplate only poss^ns which are in some degree & in some way abandoned by the owner. As in case of lease, when poss^n is given to lessee — & case of lands &c the poss^n of which is neglected by owner & vacants. merely taking a journey is not such an abandonment as to exclude force — owners right to re &c. "Forcible entry".

In case of pers^l property. owner not allowed at C.L. to regain poss^n by force 3 Bl. 4. 5. 3 Inst. 134. 2 Roll. R. 55. 6. 565. 6. unless feloniously taken

Provocation never justifies a batt^y but may mitigate damages. 1 Wils. 6. Esp. 317. A Serv^t cannot justify a batt^y in defence of his master's goods. 5 Com 354 Cro. C. 242.

ass^t & batt^y at diff^t times cannot be laid with a continuando. as "diversis diebus & vicibus" &c. Esp. 361. For an ass^t is an intire individual act. Comp. 828. 3 Bl. 212. Sal 637. 9

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In batt. of wife, husd must wife shd join. & the injury shd be laid "ad damnum ipsorum" for husd is damnified by cost & expense of suing & the wife is personally injured & damages would survive to her. Esp. 316. 1 Sid. 387. 1 Rol. 782. L. Ray 1208.

If damages are laid "ad dam." of the husd only Inofft arrested. Esp. 316. 1 Ld Ray. 1208. If Plff is not husd & wife it must be pleaded in abatement. Esp. 321. Stra. 480

If batt. has been committed agst husd & wife he alone must sue for the injury to himself. Esp. 316. 1 Ld Ray. 1208. 1 Rol. 782. pl. 2. bro. 1. 365. If both join in this case for the damages to both & recd damages are given. writ abates quoad the husd after verdict. (Esp. 316.) If joint damages Inofft arrested in toto.

Plff may say (in aggn of damages it is said) many facts for which he could not himself recover Ex. assenting Lucy Esp. 317. Sal. 642. Qu. Is it to aggravate damages or shew how inormous the trespass was? Ib.

In Eng a justification must be pleaded in case of a Batt. - as non aft. dimisit. & in other cases of Trespass Esp. 317. bro. Lits 282. i.e. where Dft on the facts shewn is prima facie a trespasser.

But circumstances which attended the transaction (as words spoken at the time tending to create a mutiny in Dfts ship) may be proved in mitigation of damages. - this if pleaded they would have been a justifn Esp. 317.

If Dfts justifn an aft &c. he must confess the batt. or the plea is ill Esps. 318. Sal. 637. Ex. Plea that Dfts horse ran away with

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him agst his will &c. for then is no battt by Dfts.

The gen. issue

to a plea of son asst & his own injuria &c. Esp. 317. 1 Bac. 155. 5 Com. 354.

If Dfts plead son asst &c & Plff can justify the asst he must reply it specially. for he cannot give his justification in evidence under the gen. issue de injuria &c. Esp. 317 Com. 288.

Matter of excuse

or any either to be plead or given in evidence. Esp. 317. Bul. 17. Sal. 637. 4 Mod. 404. sup. as inevitable accident.

To the plea of molliter

manus &c. Plff may reply de son tort demesne (which includes a denial of the justification & conclud) or any matter of fact which goes to the battery also quod vac molliter &c. 5 Com. 356. Skin 381. Lutw. 1436. Com. Pl" 3 Nov. 16.

Plff not confined in proof to the time laid in the declr. may prove any battt (not barred by st. of limitations) so the special plea must cover all the time, must be as broad as the declr. 5 Ba. 206. 7. 1 Bul. 138. 2 Saund. 295. Cro. Car. 228. Hob. 104. Rep. 229. 31 Esp. 407. 15. 319. 21. 282. Sal. 222. Co. L. 283. Cro. E. 32. Bul. 17. 4 Bac. 79.

And Dfts having no to prove a subsequent time when he plead son asst &c. serud not. Bul. 17. Platts asst. 447. for proof of Plffs asst on any day is suffit. Plff is driven to a novel assignment.

So the plea

be as broad as the declr. as to the subject matter. i.e. shd cover the whole injury. Esp 318. Ex. Plff charges asst Battt & wounding a plea reaching the battt. not the wounding is ill. Cro. E. 268. Son asst demesne covers the whole grievance. Esp. 318. for the words that Plff make an asst. Petual Dfts time whereby suspended himself if any damage or hurt. if happened &c. Cases of molliter manus.

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that does not answer the allegation of mourning.

In justifs. founded on the relation of husd. & wife, Servt. &c. the aspt. &c. must be averred to have been made to prevent injury to &c. that by way of mitigs. Esp. 318. La Ray. 62. n. 2 Roll. 346. Stra. 959. Wife cannot plead alone, Husd. must join in all cases. Esp. 318. Com. Dig. 239.

A former recovy. of damages agt. Deft. or another is a good bar. Co. C. 30. Esp. 319. 416. Sal. 11. Cas T. 73. 4 Bul. 20. Yelv. 68. 5 Bac. 185. 1 Com. 111. 2. for the uncertain damages are reduced in "sum judicatum". which takes away &c. 4 Bac. 118. Satisfaction not necessary. All R.'s reason is, that in case of torts damages being uncertain, Plff might multiply actions in hope of obtaining more. In case of contract, the sum being certain he has no such inducement. - if the agt. Deft. is solvent.

The rule holds even if further damages accrue after the first recovery. Esp. 319. Sal. 11. for the whole is the gist.

So in Trespass. grnd. a former recovy. is a bar to all continued trespasses committed before the date of the first writ. 2 Roll. 230.

In this act. as in all trespasses if the injury is done by several, the Plff may release all or any. Esp. 317. 5 T. Rep. 651. Release to one is release to all. Esp. 415. Mod. 66. As to severing damages exactly contradictory.

If two or more are charged jointly & are found guilty jointly. i.e. each guilty of all. Jury cannot sever damages. Esp. 328. 420. 5 Bac. 2790. Cartth. 19 11 Co. 5. Sunk. 317. pl. 10. Com. Dig. 118. tho they plead severally & exactly - so if pleading you agt. both by distinct damages cannot be severed. Esp. 420. Stra. 582.

If Deft. sever in

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in this plea. e.g. on pleading the gen.l issue. another a justification &c. They may say, tho the several Defts are supposed equally guilty according to Esp. 420. 2 Stra. 1146. 7. 9. 6 mod. 60. 11 Co. 6. 7. Bul. 20 Leo 1. 348. 350. Carth. 19. Leo. El. 860. Hob. 66. 9 Co. 79.b Stra 910. Leo 1. 384. 118. con Esp. 321. 1 Saund 207.c n. That the damages cannot be severed. 5 Bur. 2792.

But in the case where damages ought not to be severed Plff may prevent Defts from arresting judg.t or taking Error by omitting one assess. & taking judg.t for one only Then can be only one sev.l in this case. Bul. 20. Carth. 19. 11 Co. 7.a & sev.l goes only as to the one assessed when it was assessed Carth 20. Bul. 20. 1 Saund. 207.c n. Leo 1. 239. 243. If Plff will enter a nolle pros as to the other or without a nolle pros he may take judg.t for the greater damages as to both. Plff may arrest judg.t if he chooses or he may enter a nolle pros as to one Defts & take judg.t as to the other for the one assessed. Bul. 20. Leo 1. 173. 1. Carth. 19. Hob. 70

3.d It is said that the Jury may in trespass find one guilty as to one part & another as to another & severally assess the damages & the finding will be good. Esp. 420. Leo. 1. 860. without omitting - plea supposed to be gen.l issue. Now they are not found jointly guilty. (11 Co. 5. 7.a com) unless the diff.t Defts are found guilty (of diff.t facts) at diff.t times This qualification adopted by our Sup.r Court. Leo. 1. 54. & Bul 20 accords with 11 Co 5. 7 in this qualification. as to when the injury is an entire Battel. Jury cannot sever because the wrong was indivisible. R. 1. 434.

First rule is adopted in this state. i.e. if two Defts are jointly charged & found guilty. i.e each of the whole, damages cannot be severed. If one is compelled to pay the whole, no contribution in law or equity. Kirb. 116. 8 Vt. Rep. 186.

In Eng. it has been holden that a nolle pros. or a nonsuit as to one of several Defts before Judgt. agt. the others, discharges the act. as to all — it operates as a release to the one. Hob. 70. 180. Bul. 20 Coutts. 19. Cro. J. 178. Com.

And in Eng it has also been holden that the Ct. will give Plff leave to strike the name of one out of the declr. & then proceed & impose him as a witness. Rule: When the other Defts wish for his evidence. Bul. 285. 2 Bac. 287. 6 Mod. 141 If no evidence agt. him he may be sworn. If any at all, seems He must then be tried before he can testify. The court may take a verdict as to him before first taken.

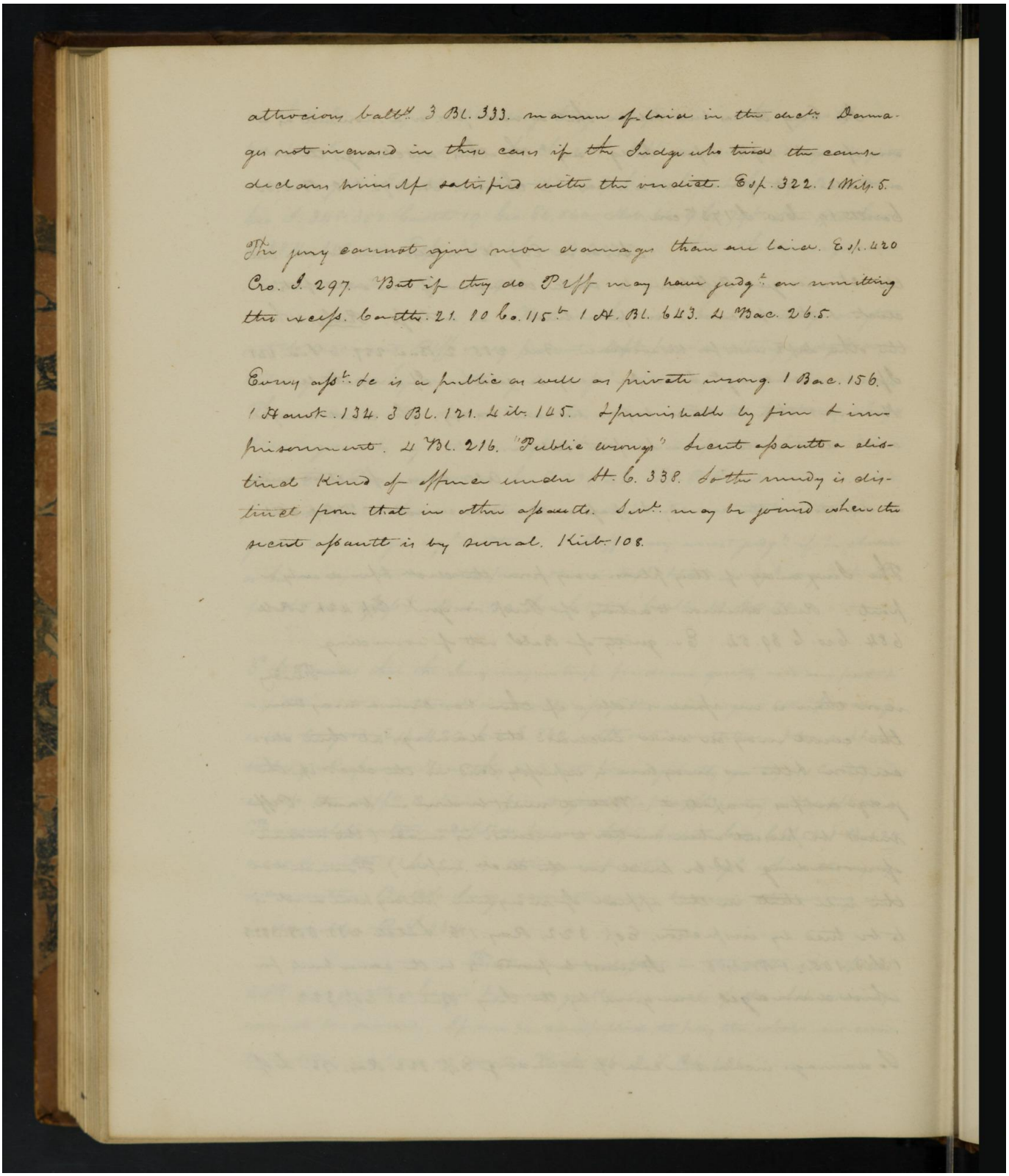
All causes of action arising ex delicto be the remedy trespass or case - are several. 5. T. Rep. 651.

The Jury may if they please vary from the declr. & find only a part - Rule common to actions of Trespass in gent. Esp. 421. 2 Rolle. 684. Cro. C. 39. 54. Et. guilty of Battery not of wounding.

Finding more than is in issue is idle - if there has been a mayhem, the court may on view increase the damages at their discretion & the mayhem is expressly laid in the declr. if the judge certifies & reports it. But it must be done in bank. Plff must be present when motion to increase is made (the manner of wounding shd. be laid in the declr. infra.) Founded on the rule that in the appeal of mayhem "mayhem or not" is to be tried by inspection. Esp. 322. Ray. 176. Latch. 233. 3 Bl. 382. 1 Sid. 108. 1 Wils. 5. It must be proved to be the same limb for which damages were given by the Jury. Bul. 21. Esp. 322.

No damages increased in case of wounding. Esp. 322. Ray. 176. So of

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attrocious battᵗ. 3 Bl. 333. maxim of law in the actⁿ. Damages not increased in this case if the Judge who tried the cause declares himself satisfied with the verdict. Esp. 322. 1 Wils. 5.

The jury cannot give more damages than are laid. Esp. 420 Cro. J. 297. But if they do Pᵗᶠ may have judgᵗ. on remitting the excess. Carth. 21. 10 Co. 115ᵇ. 1 H. Bl. 643. 2 Bac. 265.

Every assᵗ. &c is a public as well as private wrong. 1 Bac. 156. 1 Hawk. 134. 3 Bl. 121. 4 Geo. 145. Punishable by fine & imprisonment. 4 Bl. 216. "Public wrongs" & acts assault a distinct kind of offence under H. C. 338. So the mode is distinct from that in other assaults. Servᵗ. may be joined where the acts assault is by servt. Kirb. 108.

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Action of Trespass vi &c. for. False imprisonment.

Every unlawful restraint of one's liberty or rather any violation of one's right of Locomotion is false imprisonment. 3 Bl. 127. Esp. 326. Ex. illegal confinement in a private house, stript &c. 2 Inst. 589. 5 Bac. 169. Finch. 201.

Two requisites — first detention of the person. 2d unlawfulness of the detention. 3 Bl. 127. 2 Inst. 589.

The unlawfulness consists in want of authority. Authy may arise from legal process. Esp. 333. Salk 408. Or from special cause accounting from the necessity of the case to justification. 3 Bl. 127. as the arresting of a felon by a private person. Esp. 334. It lies not for the crew of a ship captured as a prize tho she proves to be no prize. the Law of nations. Doug. 572 Admiralty jurisdiction.

But any arrest of a person for a civil cause, without legal process, is unlawful restraint. 5 Bac. 169. 2 Inst. 512. A custom to imprison without legal process is not good. 5 Bac. 169. 2 Jon. 147.

A private person not guilty of false imprisonment by confining a person duly arrested at the officers request. 5 Bac. 169. pl. 24. 2 Rolle. 561. Qu. that an offr having made an arrest on final process cannot delegate his rights of custody in his own absence. 1 B & P. 24.

The most common cases are those of arrests under void process.

If a court of record is guilty of corrupt practices (as imprisoning thro malice) the Judge is not liable to an action if he acts judicially within his jurisdiction. Esp. 326

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Sal. 396. Comp. 172. Esp. 635. 1 T. Rep. 503. 13. 4. 534. 7. 2 Bl. R. 1114.

In Eng. a judge of a Ct. of record of gent. jurisdn. is not liable it seems for any judicial act. whether it happen thro' mistake or malice. if he confine himself to his proper jurisdn. Esp. 320. 12 Co 234. Sal 396. Roy. 467. Comp. 172. 1 T. Rep. 503. 34 5. 7. 8. 513. 14. 2 Bl. Rep. 1141. When all the cases are cited, — no proof in this case admitted agt. this "vehement violent" presumption" in favour of the judges integrity.

But it seems if a court of record of even gent. jurisdiction, has not jurisdn of the subject matter. Judges are liable for how they do not act judicially. 10 Co. 76. b. 1 Hawk. 86. 59

But if they have jurisdn of the subject matter & in their proceedings transgress their jurisdn they are not liable, cond. 2n 10 Co 76. 2 Bl. R. 1145. Sal. 396. E. g. awarding a capias agt. a Peer in a civil cause.

Courts of limited jurisdn, tho of record cont. are liable if they transgress their jurisdict even by mistake. 6 T. Rep 412. 2 Bl. R. 1145. Roy. 454 1 Sal. 396. Stra. 993. Esp. 331. 8 Co. 114. Aliter if they do not exceed their jurisdict. 2 Bl. Rep. 1145. but liable for malicious act. They being of record. Esp. 326. Sal. 396.

Ct. not of record as Justices are liable in Engd at C.L. for any mistake in judgt. Stra. 711. Co. C. 286. 394. 1 Bl. 354. 1 T. Rep. 536. Esp. 339. 1 Burr. 395. 2n unless they transgress their jurisdict 2 Bl. R. 1145. in some respect. But this rigor is mitigated by several Sts Esp. 338.

But the Ct. of B. R will not grant an information

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against a parties who appears to have acted uprightly. 1 T. Rep. 653.

Courts which can fine & imprison said to be courts of record Rep. 467. Salk. 200. Carth. 491. 3 Bl. 25. 12 Mod. 386. Denied to be universally true 2 Bl. R. 1146.

As to arrests of persons not liable to arrest, as arresting Ex^rs or admrs for debts due from Test^r &c. unlawful except on a suggestion of devastation. Esp. 326. 2 Bl. R. 1192. 3 Wils. 368.

False imprisonment lies in this case agt the Atty. or the sergt Plff - (is) the rule is gent. that the Atty who is instrumental in causing an illegal arrest is liable with the principal. 3 Wils. 345. 77. 2 Bl. R. 1192.

In this case, the Offrs could not be liable, sumr the subject matter being cognizable by, & the person being amenable to, the court 1 Geo. 76. 3 Wils. 385 Esp. 391. 1 Lev. 95. Stra 710. provided the court is of gent. jurisdiction

Exemption from arrest on sometimes, in Eng^d connects with the character of the individual. as Ex^rs &c. sup. sometimes it arises from temporary circumstances or particular privilege - as attendance on court as a suitor. a witness. 4 Leon. 275. 1 Bac. 222. 2 Roll. 273. 1 H. Bl. 636. In the latter cases the arrest is not illegal in the first instance - but a supersedeas issues. 1 Bac. 222. 8 T. Rep. 534. 2 Bl. Rep. 1113. 42. 2 T.R. 377. after which detention is illegal & action lies. 5 Bac. 171. Cro. J. 379. Doug. 649. 59. 2 agt the offr or the Plff only? Doug. 652. 4 Bac. 684. 685. F. N. B. 236. G. Co. 52.^a Comp. 9. agt Party & offr sumr 3 Bul. 97. What is said by Buller J. Doug. 652. must relate to an action after the supersedeas, or the prior detention of a Per

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The writ in this case is good, writ continues. 1 Keb. 220. 2 Bl. R. 1193.

Arresting a Pers. on tifficated Bailiff. off^r. not liable - bound to obey the writ. party may be subjected in case Doug. 646. 50. 10. 60. 76^c. 2 in case of trespass. 2 T. Rep 231. Esp. 530

Privilege of suitors dis allowed in case of collusion. so in vexatious action. 2 Bl. R. 1193. 11 Mod. 79. Comp. 9. 1 Dr. Bl. 636 It being discretionary with the court to allow or not. To whom a party attorney as a volunteer upon a petition (or with a view) of answering process when there is none.

Party attending arbitration under rule of court is protected eundo morando et redeundo. 3 East. 89.

Gaolers detaining prisoners for fees (tho' themselves entitled to a discharge) not false imprisonment 5 Bac. 171. 2 Inst. 53.

If the order of ct. is to confine an in a certain prison, confining in any other is false imprisonment 5 Bac. 171. Sal. 408. 5 Mod. 295. 3 Sal. 219.

A peace off^r is justified in arresting without warrant, on a reasonable charge of felony, tho' none is committed. Doug. 334. 5. pl. 73. 1 Roll. 43. Liens of a private person - But if a felony has been actually committed, a private person suspecting another to be guilty on reasonable ground (without malice) is not liable for arresting without warrant to carry before a magistrate. Esp. 334. 5. 5 Bac. 171. Doug. 345. Root. 66. So to prevent a breach of peace, or escape. 1 Bulst. 150. 2 Hawk. 82 Liens if no felony has been committed. Esp. 334. Doug. 340. 5.

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An arrest on sunday in civil cases being void by St. 29 Car. 2. is false imprisonment Esp. 327. 605. 5 Mod. 95. Sal. 78. 2 Lev. 111 4 Bac. Abr. 66. 1 T. Rep. 265. 2 Bl. Rep. 1195. Such an arrest good at C.L. 2 Bl. Rep. 1195. 2 Bulst. 72.

But Bail may take their principal on Sunday (holden con. ante to suffer bail 2 Bl. R. 1273) for he is in nature of gaoler - principal as prisoner & the taking by bail is retaking on escape. Sal. 626. 3 Sal. 148. Esp. 665. 2 Lev 2 Bl. R. 1273.

Arrest in civil cases by breaking open the doors of Defts house is false imprisonment. 5 Co. 93a Comyns. 1. Hob. 62. 2 Bac. Abr. 367. Cases of inner doors 2 McCly. 489.

It has been questioned whether if an arrest is made by illegally breaking the house the writ of the process is good. & the only remedy by action or whether the writ itself is void & may be set aside in a summary way by discharging the person arrested. Comyns. 1. 9. 8 St. 6045 not decided. Qu. the Ct's interference is discretionary. This was a case of breaking doors. Cro. E. 908. Kirk. 383. Since decided the writ of the process was held void in case of process taken by breaking a door & writ set aside 2 Bac. Abr. 367. 2 Lev. 385. 6. Con. 5 Co. 91. 3.

In the last case false imprisonment lies - case of breaking doors diff. from case of a suitor - privilege of the party arrest at suits illegal. Hob. 61 Comyns. 1. 9. Also questioned whether if an illegal arrest is made in consequence of which an other arrest is made which would otherwise be good, the latter is valid? Yes. unless some collusion. 2 Bl. Rep. 823. quere if there is collusion, semble. it.

Decided that an officer by an escape warrant may retake his prisoner in another state 1 Rolle. 107. The warrant is of no use. - As to bail piece from another State. 5 Co. 1. 67a.

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If an off.r by mistake arrests B instead of A. he is liable for false imprisonment — even if B discloses himself to be A. Doug. 42 2 Roll. 552. pl. 5. Esp. 328. 3 Com. 490. 3. 2 Roll. 552. No. 457. Hard. 323. In damages mitigated. Esp. 328.

Any person has a right to arrest another who is fighting. 5 Bac. 171. Hawk. 136. 2 ib. 81. & to restrain him till his passion is over.

In certain cases persons except the liable to be sued with their hus.d cannot be holden under arrest or mesne process. 2 Stra. 1272. 1 T.R. 486. 1 Bl. R. 720. But he is no instance of false imprisn.t brot. in these cases Doug. 648. argt. Cases to be brot.d Sal. 115. 2 H. Bl. 17. Semble not. tho process is legal, the service is sometimes set aside & the person discharged. 2 Bl. R. 1193. 4. analogy. Doug. 648. argt. Origl. arrest not illegal.

Arresting & confining one for a short time under a parol warrant from a justice of peace for examination is not illegal. 5 Bac 172. Roost 166. Mo. 408. Cro El. 829.

A private person may without warrant confine a person disordered in mind & who appears disposed to do mischief. 5 Bac. 172.

If an officer makes an arrest on a process from the face of which it appears that the Ct. issuing it had no jurisdiction, he is liable according to the current of authorities. Esp. 391. Bul. 82. 3. Hard. 480. some what cases the want of jurisdiction arises Ray. 230. con. Comp. 20. But the rule has been extended much further.

Thus it has been holden (without any regard to the cases appearing on

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the face or not) that when a court of limited jurisdict^n. has not jurisdict^n. of the cause (from whatever quarter the defect of jurisd^n. arose) the offr. would be liable. 10 Co. 76. 7 Co. 31a Esp. 337. Decision & reasoning in Marshalsea case. Reasoning contradicted in Ray. 230. Stra. 710. 993. 509. Supported in 2 Wils. 380. Esp. 398. 9. Dec^n. in the Marshalsea case seems still to be law in Eng^d. viz. that when the court issuing the process has no jurisd^n. of the subject matter every thing done under it is absolutely void — whether it appears or not upon the face. Esp. 391. Bul. 82. 3. 1 Vente. 383. 4. Comp. 172. Hard. 480. Stra. 710. 2 Ld. Raym. 953.

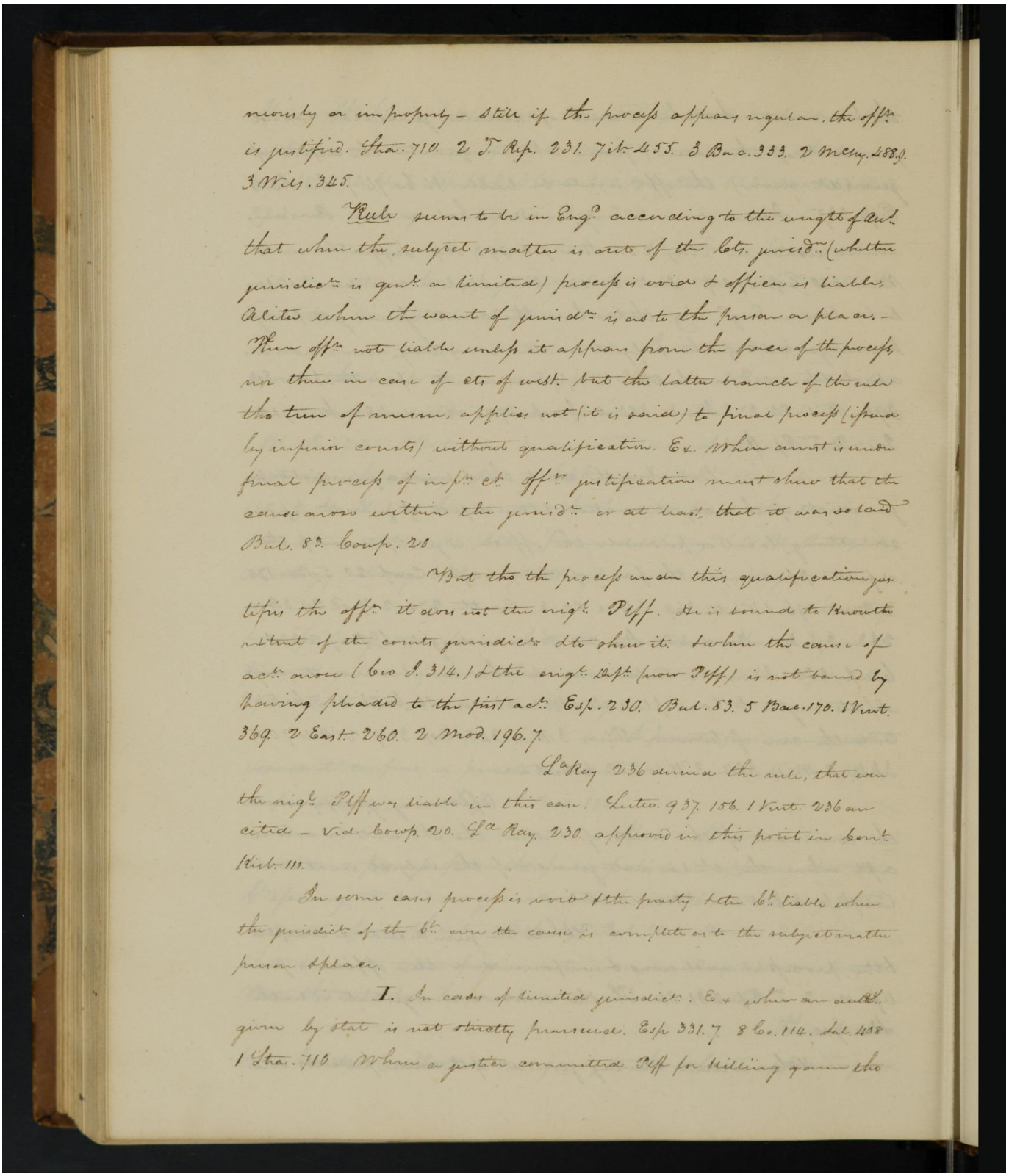
But when the court tho of limited jurisdiction has jurisdict^n. of the subject matter & the defect of jurisd^n. is from something local or personal, the officer is justified unless the defect appears upon the face of the process. Comp. 20. 5 Bac. 170 2 Mod. 196. 1 Vente. 369. 1 Bul. 82. 3. Carth. 274. 2 Mod. 29. 3 Bac. 233. Esp. 391. Hard. 480. Stra. 710. & according to Ld. Raym. 230. 1. Comp. 220. he is not liable even in this case because the party defendant ought to have pleaded it Bul. 83. con. 10. Co. 76. b. 5 Co. 54. a. As to the case of Common Pleas 3 Wils. 345. Esp. 329. 2 Vent. 705. 344. 2 Wils. 384. 3 Keb. 213. 6 Co. 54. a.

Offr. may justify under the command of the courts of Westm. tho the writ be void except where the ct. has not jurisd^n. of the subject matter. 10 Co. 76. b. 6 Co. 54. a. 3 Wils. 345.

Where the jurisdiction is complete & the process is malicious & unfounded the officer is justified. 2 Ld. Raym. 231. 81. Tho the court or magistrate is liable. Stra. 710.

Where a court having jurisd^n. of the cause proceeds irre-

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merely or improperly – still if the process appears regular the offr is justified. 1 Sta. 710. 2 T. Rep. 231. 7 ib. 455. 3 Bac. 333. 2 McCly. 288. 3 Wils. 345.

Rule seems to be in Engd according to the weight of Aut. that when the subject matter is out of the Cts. jurisdn (whether jurisdictn is gent or limited) process is void & officer is liable. Aliter when the want of jurisdn is as to the person or place. – Here offr not liable unless it appear from the face of the process, nor then in case of Cts of record. But the latter branch of the rule the term of reason, applies not (it is said) to final process (issued by inferior courts) without qualification. Ex. When arrest is under final process of inferr Ct. offr justification must show that the cause arose within the jurisdn or at least that it was so laid. Bul. 83. Comyn. 20

But tho the process under this qualification justifies the offr it does not the origl Defdt. He is bound to know the extent of the courts jurisdictn & to shew it. Hence the cause of actn arose (6 Co. 314.) & the origl Defdt (now Plff) is not bound by having pleaded to the first actn. Esp. 230. Bul. 83. 5 Bac. 170. 1 Wms. 369. 2 East. 260. 2 Mod. 196. 7.

La Ray 236 denies the rule, that even the origl Plff was liable in this case. Cited. 9 37. 156. 1 Wms. 236 as cited – Vid Comyn. 20. La Ray. 230. approved in this point in Bond Kirb. 111.

In some cases process is void & the party & the offr liable when the jurisdictn of the Ct over the cause is complete as to the subject matter person & place.

I. In cases of limited jurisdictn. Ex. when an authy given by statute is not strictly pursued. Esp 331. 7. 8 Co. 114. Sal. 438 1 Sta. 710 Where a justice committed Plff for killing game the

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he had sufficient effects to answer the penalty. Offr excused but the illegality of the warrant was not pleaded. 1 Wils. 150. Esp. 332. Where a person was committed on st. penalty of £13 which he refused pay, but was imprisoned by constable till he paid the fee which the stat did not allow. Here the Constable was deft. This was for abuse of process. no question of Jurisdict. — So agt commissioners of Bankrpt. for any commitment not warranted by their st. powers. Esp. 331. 2 Bl. R. 1035. 1141.

II. So in the case of the process of the cts of Westm. for any cts / order from any objection to the jurisdiction of the court is called void & the Plff in the process liable to this action. Irregularity. Ex. a capias returnable to the next term but one to that of the Dist. Esp. 328. 3 Com. Dig. 491. 3 Wils. 341. 5. 2 Bl. Rp. 825. Salk. 700. 1 Root. 315. officer not liable 3 Wils. 325. in this case if the process is from the cts of Westm. if the irregularity appeard upon the face of it.

III. So this the origl arrest were lawful tho for any subsequt oppression this action lies agt the offr or the magistrate, if he is in fault. Ex. Wanton cruelty in confining to a dungeon without air &c. Esp. 332. cites. 1 T. Rp. 536. Commitments by military commander. Jurisdn of magistrate must also appear.

When an offr justifies, proof that he acted as an offr is sufficient as to that fact. He is not bound to show his appointment. Show 1085. 3 T. Rp. 630. 2 ib. 366. 2 McCly. 485. But may not this be rebutted?

Genl rule. An arrest made under an irregular process is void. So if a process founded on irregular proceedings. Ex arrest on an ep. issued on a judgt set aside for irregularity. Esp. 329. 91. 3 East. 128. Show. 509. T. Ray. 73. 1 Ld. Ray. 95. 1 Sid. 272.

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1 Wils, 155. Qd that the officer serving the process is not liable. Esp. 391 i.e in case of bts of Westm. 1 Wils. 325. Qu if the bt is of limited jurisdiction & the irregularity appears. 2 Stra. 993. 4.

But an arrest on an enormous process is good 4 Bac. 450. Stra. 509. 3 Wils. 325. Esp. 391 ergo. the party may justify under enormous process, tille it be reversed. 3 Wils. 325.

Process has been holden void & irregular where filled up without proper authority. Ex. Where in Engd the Under Sheff left a blanck for Sheff. to fill up with the name of a Bff. Esp. 329. 2 Wils. 47. The person sued here was the person suing the process. It does not appear that he knew of the irregularity. Inft authy. Ex. Sheffs warrant. St. C. 24. 387.

Writ abates wh indirected to an indifferent person unless the name is inserted by the magistrate — So a writ drawn by Sheff to except in their own cases.

So when the process is issued informally Procs out of the Vice Chancellors Ct of Oxford — by town Clerk. Plff making oath of his cause of action & that he believes &c. to be sworn that he suspects. Esp. 329 Stra. 993. The party &c. officer & gaoler holden liable — all joining in one plea. Strange adds Bff & gaoler might have justified. denied 2 Wils. 385.

Offr not liable it is said if he had not joined in pleading with the others. Stra. 994. Qu. 2 Wils. 385.

So when the writ is not returnable on a day certain — irregular. Esp. 330. Bro. 9. 314. Dy. 262. pl. 33. 2 Bulst. 36. 1 Mod 81 Ex" at the next Ct of Marshalsea" but the rule applies only to mesne process 2 Mod

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58. Comyn 21. 2 d. "must count" adjudg. reffd.

Law general warrants of any kind - as a warrant to arrest the authors of a libel "whoever they are. Esp. 399. 1 Hal. Pl. C. 150. 2 Wils. 275. Hist. 213.

Requisites to Search Warrants. - 1st Granted on oath. 2d The grounds of suspicion declared 3 Executed in the day time by a known officer & in the presence of the Informer &c. Directed to a particular place ag.st the particular person in whose poss.n &c. Where these requisites are observed the Informer is justified & not by the warrt. Esp. 399. 2 Wils. 291. 2.

When the officer serving a process justifies under it he must only shew the writ or process itself Esp. 333. 7 Co. 52. 2 Roll 549. 2 that it is returned if mesne process 2 Str. 1184. Comyn. 20. 2 the return day has arrived. - In Eng.d Sheriffs deputy not obliged to shew his return - because not in his power. But the necessity of an off.r shewing a return obtains only in mesne process. Comyn. 20. 3 Co. 90.a 4 Co. 67.a 1 Wils. 17.

But if origl. Plff is Defd. he must shew a judg.t as well as writ in final process. Esp. 333. 2. Sal. 408. 9. for judg.t may have been moved upon the arrest & origl. Plff ought to take notice of it

Same rule when the act.n is ag.st a mere stranger, who procures the service of process for another - Secus if he acts in aid of the off.r at his request.

If a Sheriff does not return a writ when he ought to do it (or makes a false return) he may be treated as a trespasser ab initio. 5 Com. 581. 2 Roll. 503. 5 Bac. 102. Sal. 409 Ray. 632. Tho this is mere omission for the return is necessary to complete and validate the act

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If orig^{ls} Pltff & Offr are sued together they may join in defending & if they join & the plea of justification is insuff^{t} for Pltff. it is so for Offrs Esp. 336. Stra. 993. 1184. 509. So e contrario, if the plea is not good for Offrs it would be for orig^{ls} Pltff he loses his defence by joining. 1 Wils. 17. Ex. Offrs dont not shew the return of process &c when brought to do it.

Procuring, commanding, aiding, assisting makes one a princ^{ls} trespasser. Co. Lit. 57. 1 Sal. 409. 2 Hawk. 512. Servant keeping the key of a room knowing one is imprisond in it is guilty of false imprisonment. 3 Wils. 377. 5 Com. 279. Co. Lit. 57.a

Procuring one a foreign Prince, this pun, to imprison one is false imprisonment in procurer 2 Bl. Rep. 983. 1055. in

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Trespass for injuries to personal property.—

Trespass in its most extensive acceptance at C. L. is any transgression of Law short of Treason Felony & misprision of &c. When not considd as a word of technical import it is any violation of any law 3 Bl. 208. 5 Bac. 157.

The word as now used in Law denotes in its gen. sense any misfeazance committed to the injury of another person or propy. Esp. 380. 5 Com. 574.

The word in its most appropriate sense imports only injuries by force to the real & pers. propy. of another. Esp. 380. The trespasses now to be considd. comprise all forcible injuries to the pers. propy. of another.

The rights of pers. property in possn. liable to two species of injuries. 1st Abuse or damage while the possn. of the owner continues. 2 Amotion or deprivation of possn. 3 Bl. 145.

1st of Abuse. of pers. propy. without altering the possession. Ex poisoning one's cattle - killing his beasts & driving away cattle while taking away from the value of a chattel. falls under this description of Injury 3 Bl. 153. So if A's timber floats &c.

The remedy in these cases if the act is accompanied with force & is immediately injurious

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is by Trespass vi & armis. 3 Bl. 153. 5 Com. 582. 2 Roll. 556. l. 17. Esp. 598. If case is brot. when trespass is the proper remedy. Judgt. arrested vice versa. 6. T. Rep. 125. 2 Mod. 131. Bro. b. 141. 96.

2d Of Ouster or deprivation of poss. This kind of injury so far as it is remediable by Trespass vi & armis. consists chiefly in an unlawful taking (an unlawful detainer being chiefly remedied by Detinue or Trover) 3 Bl. 152.

The action of Trespass vi & armis gives damages, not restitution in specie 3 Bl. 151. It lies not for taking a Ship a goods or prizes tho the propty. has been adjudged no prize. For the question depends on the law of nations & is triable in the Admiralty Ct. only. Doug. 572. 98.

But in some instances where the right taking is lawful, Trespass lies for subsequt. injuries. Esp. 381. Ex. If a beast is taken as an Estray & afterwards labord. Trespass lies. Deptt. trespasser ab initio. Esp. 383. 405. 5 Com. 581. 3 Wils. 20. In some cases trespass lies not.

Rule Where the authy. to do the right act is given by law, an abuse of the authy. makes one a trespasser ab initio. Esp. 383. 405. 5 Com. 581. 2 Bul. 81. 2 Bl. 1201. 5 Bac. 161. 5 Co. 146. a. b. 2 Roll. 561. Yelv. 96. 7. 1 Bac. 36. 3 Wils. 20. Bun. 20. 1 Show. 12. Ex. of an Estray sup. 1 T. R. 12. Sal. 221.

So if one enters a tavern & afterwards steals, he is a Trespasser in entering (by relation) 8 Co. 146. Case of real propty. So if a bailiff does not make a return of a writ when brought to. Ex. mesne process. 5 Com. 581. 2 Roll. 563. l. 15. 20. 5 Bac. 162.

But the subject of right thus given by law must be a position

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misfeazance – not a nonfeazance. Ex. case of a Tavern. susp. when Deft. stole – but he would not have been a trespasser ab initio for refusing to pay the Tavenner for entertainment. Esp. 383. 5 Bac. 161. 8 Co. 146.b 2 Bulst. 312.

So if one having taken a distress lawfully, refuses to deliver on tender of suff.t amends 5 Com. 581. 2 Roll. 556. Distress of goods &c. but the injury is remedied by Case. 1 Rol. R. 130.

Except.n to the rule in case sup of the Sheff. who omits to return a Writ &c. 5 Bac. 162. Sal. 409 Ray. 632.

When the party gives the license under which the orig.l act is done. the other can never be made a trespasser by relation. Perk. sec. 191. 2 Inst. 64. 2 Roll. 561. 8 Co. 146.b Yelv. 96.7 For tho the law will punish (in case of abuse) the very act which was authorized by itself, yet it will not allow a party to treat that as unlawful which he himself made originally lawful. 5 Bac. 162. pl. 22. Ex. Unlawful detainer, abuse by Bailee &c. 5 Com. 581. con. cited. 5 Bac 162. pl. 20.

If indeed Bailee destroys the thing, trespass it is said lies: for he relinquishes the Bailment but he is not a trespasser ab initio semb. Lit. 371. Co. Lit. 57.a 8 Co. 13.b Mood. 248. 5 Bac. 266.

To maintain this action Pff must have poss.n – prop.l alone is not suff.t Esp. 383. 2 T. R. 489. Ex. Pff let a house & furniture to D. – Pff brot trespass. adjudged not to lie – Pff not possessed – it should have been trover. 1 T. Rep. 486. Now holden that Trover will not lie 7 T. Rep. 9.

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Bot constructive poss^{n} is against a stranger suffic. 5 Com. 577. 8. 5 Bac. 164. as Baila 2 Roll. 569. l. 5. 1 T. Rep. 480. 2 ib. 489. 769.

So generally any person having the gen^{l} property may maintain trespass ag^{t} a Stranger — For it draws to itself a poss^{n} in law. 5 Bac. 164. 5 Com. 578. Latch. 214. 2 Bulst 268. 1 Sid. 238 2 Roll. 569.

The agister of Cattle may maintain Tresp. ag^{t} a Stranger for taking them. 5 Com. 577. 2 Roll. 551. l. 25.

The gen^{l} prop^{y} contemplated by this rule must suppose a right either absolute or conditional of present poss^{n} 2ly as in case of Bailee to keep, Pawnee &c. alias it is contrary to 2 T. Rep. 489. 1 Bl. 480 Esp. 388. Suppose the case of a hirer for a certain time.

So he who has the special prop^{y} in goods may bring Tresp. 5 Bac. 164 F. N. B. 89. 92. 60. Lit. 89. 4 Co. 84. 2 Roll. 569 Same gen^{l} rule as in Trover — Bailor & he may both maintain the action. 2 Saund. 47.

If Bailee delivers the goods to a Stranger. Bailor cannot maintain tresp. tho in some cases he may trover. 5 Bac. 164. pl. 18. 175 pl. 30. Secus, if Bailee has only the bare custody as a Serv^{t} 5 Bac. 176.

If the prop^{y} is given to one, he may maintain trespass before he has taken poss^{n} 5 Bac 164. Latch 214. pl. 10 for prop^{y} draws a poss^{n} in law.

If goods of Testator are taken away before the will is proved Ex^{r} may maintain Tresp. after proving the Will. 5 Bac. 164 2 Bulst. 268. 1 T. Rep. 480. It has by relation a constructive poss^{n}

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from Testr. death. His right is from the Will not the probate.

So legatee of specific goods may maintain Trespass for taking after Exrs. assent - tho it be before delivery to him by Exr. 5 Bac. 164. Aliter if the legacy has been "of a third part of Testators goods" not specific - And in the first instance. Mr Rum supposes Trespass would not lie if the taking was before Exrs. assent to the legacy. 1 T. Rep 480.

In Trespass &c. for goods taken belonging to two. both should join - but the defect is pleadable in abatement only. 1 Com. 12. Sal. 32. 3 Lev. 354. 1 Roll. 31. Esp. 586. 411. Sal. 2. Sir. 323. Stra. 810. as Robbery goa. Larceny &c.

It seems that at C. L. Trespass does not lie for an act amounting to a felony as Robbery &c. by reason of Merger. 5 Com. 582. 5 T. Rep 5 Bac. 176 1 Lev. 21. 47 1 Com. 130. Yelv. 90. 1 Vid. 375. 2 Roll. 557 1 Mod. 383. 1 Sow 148. Latch. 144. Noy. 82 English authr. contradictory as to the application of this principle - No such principle has allways founded on supposition. remt. Lev. Stra. 873. Ray. 1372. 3 T.R. 176 argt. con. Bul. 131.

If a Sheriff or under Sheff takes the goods of one on exn. agt. another Sheff liable in this action. Doug. 40

In declaring the goods must be described with convenient certainty. Esp. 405. 6. "Divers goods" or "Diffs goods" not sufft. nor cured by verdict. For any recovery would not be a bar to another & Defdt. could not justify 2 Ray. 1410. 2 Bur. 2455. Stra. 637 5 Co. 35.

But this rule applies only where the action is founded on the taking of or injury to the goods themselves.

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not when the injury is laid by way of aggravation. There "Plff goods" generally, is suffic. Ev. Trosp. for breaking & entering Plffs house & spoiling his goods. Suffic. com. on spec. Demurrer. Esp. 406. 3 Wils. 292.

Trosp. for breaking & entering House & expelling Plff. expelling only aggravation unless Plff make a new object of it as a substantive trosp. base of novel assignment. 1 Bl. R. 230. 3 T. Rep. 292. 1 Show. Bl. 555. 1 Vent. 211. 2 Wils. 313. 3 Bl. 20. 4 Bac. 12.

So a gen. description is suffic. if it is made particular by reference to other things in the decl. Esp. 406. Several Keys for opening the house aforesaid. Sal. 643. 1 Vent. 114.

Trespasses of a permanent nature &c. may be laid with a continuando Esp. 316. 407. 8. Sal. 638. Rey. 239. otherwise "divers days dubio". 3 Bl. 212.

Laying with a continuando when the acts lie not in a continuance not cured by verdict. Unless some of them lie in continuance. Esp. 408. Sal. 639.

Plff must state poss. or property shewing a right of poss. i.e. either an actual or constructive possession. Esp. 406. 383. Sal. 640. "from Plff's house" not sufficient. Bro. J. 46. 4 T. Rep. 490. 1 ib. 480. 2 Lev. 156. "Taking" "way from Plff's land" not suffic. decls. Threats not good even after verdict. Value must be stated Esp. 407. 5 Bac. 190. 1 Sid. 39. 2 Lev. 230. Bro. J. 129. 5 Com. 349. 2 Vent. 174. Esp. 588. that value need not be alleged in Town. omitting amount of value cured by verdict. Esp. 407. 5 Bac. 196. Sid. 39.

Pendency of an action

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ag^t some party or parties for same trosp. is a good plea in abat. 5 Co. 61. 1 Com. Dig. 110. 1 Bac. 13. Cartt. 96. Lucas. if the other action for same trespass is ag^t a stranger. 1 Com. 50. Hob. 158. 2 Bac. 48. Dig. Stra. 420. 5 Bac. 192. pl. 15.

Day laid not material – Plff may prove trespass at any time not barred by stat of Limitations. Esp. 407. 15. 319. 21. Bul. 17. Ray. 231. Co. Lit. 283^a Cro. E. 32. Hob. 104. ergo. if a release is pleaded Dft^t must traverse as to the subg^t time Vid 415. 5 Bac. 106. 7. Bul. 38.

Plff by way of aggravating damages may lay in his decl^n things for which he could not have an action. Esp. 407. Pet. B. 196. Sal. 119. 1 Stra. 61. 1 Keb. 787. Qu. is it to aggravate damages. Esp. 317. Sal. 642. 1^a Ray. 1032.

If Trosp. is committed by several; plff may declare ag^t one or more or all – to ag^t each one separately. 5 Bac. 192. 3. Stra. 420. As to severing damages sup. "aff^t & Batt^y"

If on judg^t one is compelled to pay the whole he cannot oblige the other to contribute. Rule common to all torts. Hard. 152. 8 T. Rep. 186. Kirb. 116.

But if it appear from the decl^n that the Dft^s with another person certain to the decl^n is ill for not joining the latter – 5 Bac. 192. 3. 1 Leon. 41. Hob. 199. Qu as to the principle. Parts being several and Dft^s pleading or denying the fact does not hurt the decl^n Stra. 420. Hob. 199. Alter if the Dft^s (other) is not known.

Justification must be pleaded. Esp. 411. Co. Lit. 282. Stra. 61. If justification (pleaded by one of several) shows upon the whole Plff had no cause of action – Judg^t cannot go ag^t either, even if one

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is defaultid or found guilty. Ex. a licuit pleaded a gift &c
Esp. 421. 1 Stra. 610. Not. 54. Roy. 1372.

In Engd. "vi et armis"
are words of substance, for at C.L. the judgt in case of forcible injury was a capias pro fine – in other Pff paid a
sum of money in taking out an origl & the judgt was a misericordia. (2 Bac 11) Fine, Amercet. 8 Co. 39a. Imprisonm after the Judgt Esp. 408. 5 Bac 191. F.N.B. 196. Sal. 636. Bro C. 407
Bro. J. 443. 526. 36.

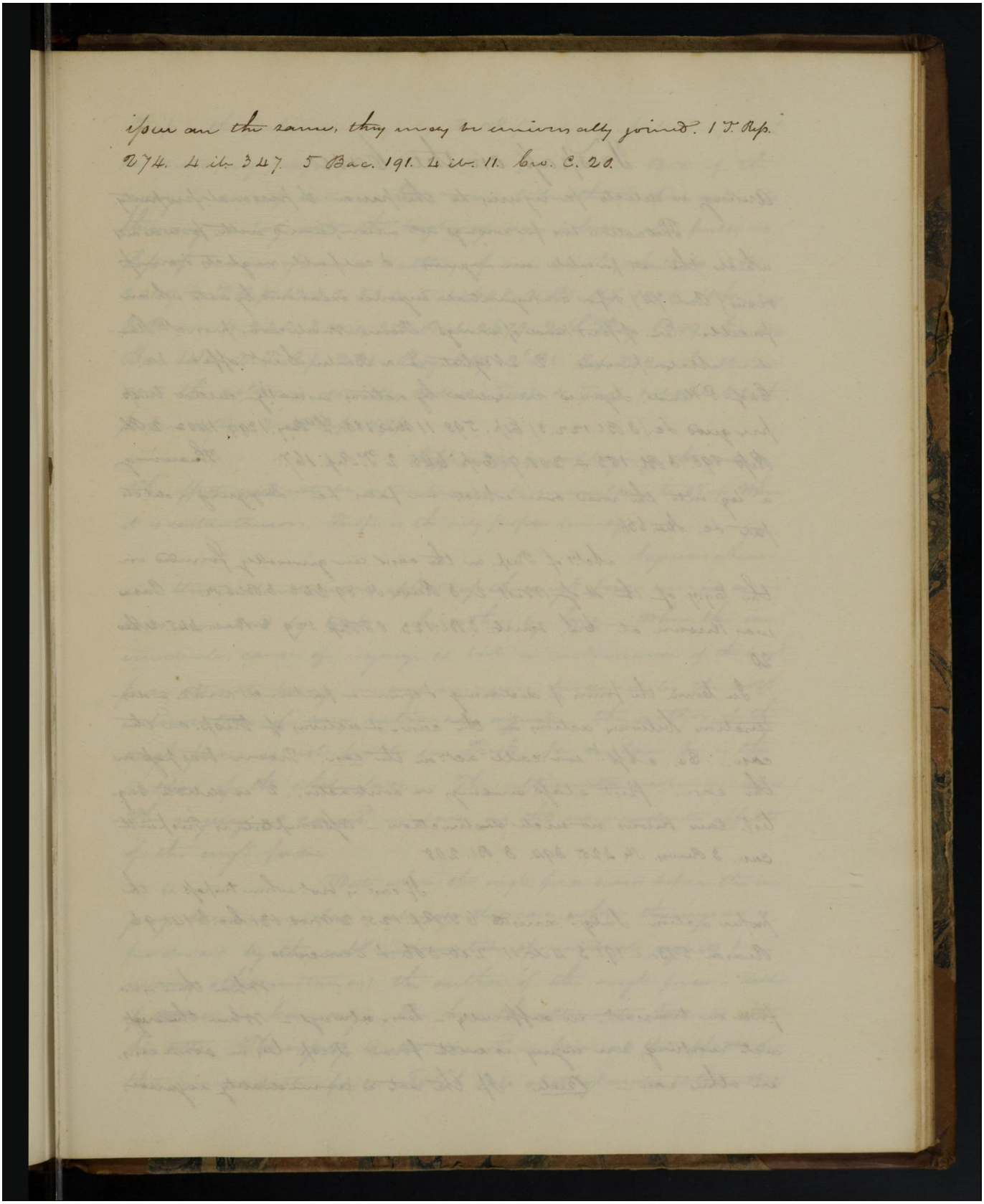
Now the writ of capias pro fine is taken away by St. 5 W. & M. But the Pff pays a substitute on signing judgt in actions for injuries with force. viz 6/8. ergo the reason of the rule continues. 5 Bac. 191. Sal. 631. 2 Roy. 985 con.

So "contra pacem" are words of substance in Engd. 5 Bac. 192.
Esp. 408. F.N.B. 93. Carth. 66. Sal. 636. Bro. Jt. 426. 43.

Three defects
aided by verdict & shall be amended. Esp. 408. Sal. 690
by St. 16. 7. Car. 2.

Decided in Car. nearly 30 Yrs ago. that Trespass & Case might be joined in one declt – no later decision. – St. C.L. such a joinder would be ill because diffr Judgt would be incompany. 8 Co. 39. Now the Capias pro fine is taken away by St W & M. yet the criterion has still been the difference or commonness of the Judgt 3 Wils. 321. Case for negligence & for misfeasance may be joined in Trover 3 Wils. 319. Trespass & Trover not joined, semb. 2 Wils. 322. 1 T. Rep. 274. In Covt the rule as to costs may be diffr as to the two causes of action 2 Bro. 268. 9. The identity or difference of the Judgt not an universal criterion. But when the judgt & genl

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issue are the same, they may be universally joined. 1 T. Rep. 274. 4 id. 347. 5 Bac. 191. 4 id. 11. Bro. C. 20.

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Trespass on the case.

Arising ex delicto for injuries to the person & personal property.

This action lies for wrongs not accompanied with force or acts which tho not forcible are injurious - & culpable neglects & omissions (Bul. 74) & for consquential injuries occasioned by acts wh. are forcible. Ex. of first kind of wrongs. Slanderous. Malicious prosecn. Slander. Malpraxis. 2° Neglect in a Bailee. Sheriff's officer &c. Ex of 3d Kind. Injuries remedied by action usually called trespass quare clausum &c. (3 Bl. 122. 3) Esp. 598. 11 Mod. 180. Ld Ray. 1399. 1402. 2 Bl. Rep. 895. 3 Bl. 153. 4. 208. 9. Esp. 645. 2 T. Rep. 167. Throwing a log into the road over which one falls &c. Digging a ditch pat &c. Stra. 686.

Acts of Trespass on the case are generally founded on the Eqity of the 13 of West 2. 3 Revis St. 89. 243. 3 Bl. 51. Case was known at C.L. Mirr. 3 Bl. 123. 8 T. Rep. 129. 2 Bac. 345. 2 Leo 20.

In Comn. the forms of declaring & common parlance make a distinction between actions on the case & actions of Trespass on the case. Ex. Assumpsit we call acts on the case. Tho we say trespass on the case, first class arising ex contractu. 2° ex delicto. English law knows no such distinction - Assumpsit is Trespass case. 3 Revis St. 425. 394. 3 Bl. 208.

If case is brot when trespass is the proper action Judgt arrests. 6 T. Rep. 125. 2 Mod. 131. Co. 6 141. 96. Reason 5 Bac. 191. 3. 4 it. 11. 2 it. 506. & e contra.

When there is no force in transact, no difficulty - Case always - When the right act working an injury is with force. Trespass lies in some cases, in others case - Rule If the act is immediately injurious

Trespass is the proper remedy. as Battery of one's self. - false imprisont. &c. destroying property with actual force &c. — But if the injury is consequential, Case seems to be the proper actn. - as throwing a log into the highway over which one falls &c. Loss of service from a battery of one's servt. child &c. 3 Bl. 208. 9 6. T. Rep. 123. 5. 53. 4. 5 Ab. 648. 2 Bl. Rep. 1055. - 1 Com. 204 3 Rivers A. 244. 3 Wils. 313. Bul. 26. 79. 2 Ld. Ray. 1399. Stra. 634 Bur. 1114. 2 T. Rep. 231. Ray. 407. 2 Bl. Rep. 892. In the last case the action is usually called Trespass & Trespass held also to be the proper action. 2 Ch. Rep. 476.

Difficulty in applying the rule — The effect need not be instantaneous to maintain Trespass. When it is instantaneous, Trespass. is the only proper remedy.

Injuries where not the instantaneous effect of the origl. force are in some cases remedied by trespass. - In others by Case. When the immediate cause of injury is but a continuance of the origl force & not bring in any measure produced by the volly intervention of any rational agent. the author of the origl. force is not liable in Trespass. for in law he is the author of the whole force — The ultimate violence of his the injury is consid. in law as the immediate effect of the origl. force.

But when the origl. force ceases before the injury commences (as is always the case when the injury is produced by the volt. intervention of rational agents & in many other instances) the author of the origl. force is liable, if at all, in Case only. For here the ultimate force is not his act. The injury is not consid. in law as the effect of the immediate force. Ex. A. bale shot of cannon 10 times this

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B. 2 strikes a foot ball. B kicks agst C.

Ex. One shoots a ball which after glancing 10 times hurts A's sert - the bodily hurt is in law the immediate effect of the origl force for the proximate cause or ultimate fact is but a continuation of the origl force or causa causans. Lord Thurlow has T. p. A's injury is not the immediate effect of the origl force (it is not in deed the purely physical force) The immediate cause of the injury to A is the causa causata. the physical hurt done to the sert. A's proper remedy therefor is case & actions by Masters in such cases always have been substantially as on principles they ought to be. 2 T. Rep. 167 8 Esp. 645. Sal. 206. tho they have been called trsp. 2 Lord Ray. 74. 831. 3 Wils. 8. 11. 2 T. Rep 167. 2 N. Rep. 446. 7. 3 East 599. 2 N. Rep. 276. that the masters remedy is T. p.

A throws a stone which bounds on or & in bounding hurts B.: here the vis impressa continues without intermediate rational agents & B. has trespass. - So if it bounds 100 times. So if one throws a log in the way or road & in throwing it hits me. 5 T. Rep. 648. Stra. 636.

But in the case put by Bl. J. of a foot ball, case would be the remedy - As all shot at a mark glances & wounds - T. p. lies. - So in the agrite case - So in turning out a mad ox. cutting thorns. lopping trees (Ray. 267) In these cases the injury is the immediate physical effect of the force continued & not altered by intervening free agents. - But if a log is thrown into the road & A falls over it. - Case lies - not the effect of the origl force continued. Bro. J. 446. 1 Com. 204. Esp. 599. Bro. C. 10. - So in

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case of the sheriff Stra. 636.

1 Vent. 295. case for riding a wild horse which ran over Pltff – 1 Com 208. Hers simil. Deft was not consid. as agent so far as related to the force. 2 Lev. 172. 2 Bl. R 899. 2 Ch. Rep. 117.

Deft. cant (the driving negligently) ran with force &c ag[t] Pltff horse – case adjudged to lie (not alleged as the act of Deft 3 East. 593. The Dec[n] did not describe the force as the pers[l] act of Deft 8 T. Rep. 188.

If I dig a trench on my own land & direct a water course from my neighbors the injury is the physical effect of force – Yet case not tresp. lies – Here the proximate cause is negative. viz – failure of the streams, ergo not a continuance of the force. 2 Wils. 174 Esp. 638. Stra. 5. 638. 9.

If a servt in performance of masters business commits a direct injury with force (1 East. 100) negligently. is Tresp. or Case the proper remedy ag[t] master? 1 B & P. 372. 6. T. Rep. 125. 2 H. Bl. 442. Sal. 441. 5 T. R. 649. Case simil. Stra. 1083. 7 T. Rep. 279. Burr. 2093. 2 Ch. Rep. 446. Deft ran over Pltff boat with force thro negligence of Dfdts pilot. Case the proper action – not the pers[l] act of Deft

If A wilfully runs his vessel ag[t] B's tresp. lies. If by negligence case lies – Injury immediate in both cases – It is his act in the former case – not in the latter. 8 T. Rep. 188. Case of mischief by one dog &c. post. 3 East. 593. Negligent driving carriage. Tresp. ag[t] driver. 2 Campb. 464. If the servt does it wilfully without masters order master not liable. 1 East. 106. 1 Com. 204

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In case part of lopping hus. cutting thorns &c. the force is continued. it is one conjoined act of force. case of spout altho. – for erecting the spout does not cause the rains. not conjoined force indeed before the injury took place

cutting down a head of water &c. is Trespass. it is like pouring water on P'ffs land – one conjoined act of force.

When case lies for injury accruing in consequence of an act of force, the origl act may be laid to have been done vi et armis tho the act is case more descriptive. semble. 3 Rews N. 244.

Whether the origl act was lawful or not, the criterion. 2 Bl. Rep. 892.

Said that case not Trespass lies where the act was origly lawful. Ex. Spout case. (Stra 636) not correct case part of cutting thorns &c. 2 Bl. Rep. 899. meaning Trespass lies not where the wrong act was not agt the person &c. 3 Bl. 154. 5 Com. 588. 2 Roll. 556. l. 17.

This act lies for a great variety of non & misfeasances. 1 Bac. 44. 3 Bl. 52. 122. 1 Com. 132. 224 Many of them have distinct titles. Trover. a/s Mandate.

A misfeasance for which this action lies on the ground of delictum must be a neglect of duty imposed or required by Law. Rep. 599. Ex. a finder of property is not bound to keep it safely – if he spoils thro neglect he is not liable. Ld Ray. 917. 1 Pow. C. 252. Cro. E. 219

Thus for negligence in his office a Sheriff is liable; so are other officers & private persons

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in many cases. 1 Com. 206. 7. 9. 1 Roll. 93. In Comm.ᵗ a Sheriff would be liable for not selling the Prop.ᵗʸ taken prox ps. In Eng.ᵈ he may return that it remains in his hands. propter defect.ᵐ inspectionis. 3 Bac. 366. Sal. 233. 1 Bl. & P. 360.

A person professing business for another in the line of his profession & doing it carelessly or unskilfully is liable in this action but if this business was not professional, he is not liable for want of skill unless in case a special agreement tho for negligence he is. L.ᵈ Ray. 214. 2 Wils. 359 Esp. 601 But in case of an undertaking in Physic or Surgery. it seems that unless the person undertaking make the practice of &c. a common profession; they are not liable even for neglect without a special undertaking. 3 Bl. 122. 66. Esp. 611. 1 Com. 165. folly of the patient.

If his servt. ag.ᵗ any one by whose act or culpable neglect, the health of another is impaired. Ex If his ag.ᵗ the seller of bad wine - which has injured another's health. So for exercising a noisome trade producing the same effect. Esp. 610. 1 Rol. 90. 5. 3 Bl. 122. 1 Com. 166. 70. 9 Co. 52. Hutt. 135. 3 Bac. 182. Ow. if he did not know it to be bad.ᵈ 1 Com. 166. 1 Roll. 90. 2 ib. 5. 3 Bl. 166. Implied warranty that provisions sold are good 1 Fonb. 110.

For mischief done by a dog. or biting. if addicted to such mischief. Owner liable Raving notice. not without such notice. Bro. L. 350. 1 Com. 208. Judgt. arrests if notice is not alleged. Sal. 662. 3 ib. 12. Lutw. 90. Esp. 601. 2

For injuries done by animals fera naturæ. as beasts, with.

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notice, owner liable (Ld. Ray. 606. 1 Com. 208. Bro. Con. 254. Ray. 109. tho the injury be diffte as to the object from owner had notice of. Stra. 1264. Sal. 662. Scienter not traversable. "Scienter" not bring a direct allegation on the ground of negligence 1 Com. 208.

If A, timber floats on B's prop. B. has case against. 2 H. Bl. 251. Esp. 639, &c.

It lies for a disturbance. i.e. hindering one from the full enjoyment of his right of some kind generally an incorporeal right. 3 Bl. 236. 41. 1 Com. 199. 9 Co. 112. 3 Lev. 266. Bro. C. 845. 1 Vent. 275. 2 ib. 186. 2 Rol. 104. 6. 9. Ex. obstructing a right of way — directing a water course &c. Stra. 5. 638.

For an escape either on mesne or final process this act. lies agt. the Sheff. 2 Bac. 245. 1 Show. 176. At C. L. the only action agt. Sheff. in either case was Trespass on the case (it.) Now by Stat. Westm. 2. 2 & 1 Rich. 2. Debt lies for an escape on final process. — But case still lies in both instances. Esp. 609. Bro. C. 17. Stra. 873. When Debt. is brot. the Jury cannot give less than the whole pr. agt. 2 Bl. R. 1043. 8. Aliter in case Esp. 609. 10. 2 T. Rep. 176.

When the process under which an arrest is made is void no act. for escape lies agt. Sheff. — Secus if erroneous only. Esp. 608. 9. Sal. 273. Bro. C. 188. 576. Barnes. 148. Esp. 659.

For non-appearance of Deft. Sheff himself only liable — for misfeasance & tort both he & Deft. liable. Ex. Vol. escape, in bringing on writ. Esp. 693. Bro. C. 175. Sal. 18. Doug. 40. Cowp. 403. 2 Mod. 32.

If a Sheff having arrested

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one on mesne process, refuses to take Sheff.ᵗˢ bail, when tendered he is liable in Case but not in Trespass — not a trespass ab initio. The abuse of the authority of the law bring negation. Leo. C. 140. 146. 96. Sta. 23. b. 1 Bac. 206. Sta. 6. 2 Wils. 213. 2 Mod. 31. 86. 146.ᵇ 1 Lion. 189. 1 Com. 489. 5 Ab. 582. 2 Rol. 561. 2.

This a Sᵗᵃ lies also agᵗ rescuers of one taken on mesne process. in favour of the origˡ Pltff. Bul. 62. 6 Mod. 211. Salk. 311. 8 T. Rep. 127. 1 Com. 204. Leo. 2. 219. 86. Esp. 657. 10. Leo. (Ca. C.) 77. Hob. 180. "Trespass vitᵗ" Jury may give the whole debt &c or less. — Expedient to pour the origˡ Deftᵗ insolvent or out of reach. Bul. 62. Esp. 657.

So it lies for rescue of one taken by final process, in favour of origˡ Pltff. Esp. 610. Leo. 6. 77. 109. Salk. 98. 5 Com. 438. Proceeding agᵗ rescuers discharges Sheff according to Esp. 610. So in this case in favour of Sheff. Salk. 94. 5 Ba. 399

It lies for Sheff agᵗ a person escaping either on mesne or final process & that the Sheff himself has not been sued. Esp. 612. 3. Leo. E. 53. So agᵗ Deftᵗ in favour of Sheff sued. Esp. 613. but not in favour of the party unless the escape be voluntary. Leo. E. 53.

But the Deftᵗ cannot maintain the action agᵗ the party escaping even the Sheff has recovered agᵗ him. for he is not liable to Sheff by law but on his cont. Esp. 613. Leo. E. 349. The ingᵗ is to Sheff & Party. not to Deftᵗ.

Attᵛ liable to this action for neglect or misconduct injuring their clients. Esp. 617. 2 Wils. 325. Bur. 2060. Sal. 86.

Attᵛ sometimes liable too, to adverse party

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for dishonest practices. Esp. 618. Ex. Attys. invariably took Judgt. agt. Defts, after the writ had been non pros? — Deft has Con- agt the Att. Dutt. 125. 3 Wils. 377. 3 Bl. 165. 1 Mod 209.

It lies agt Justices of Peace for refusing to do their duty. Ex. denying bail. refusing to authenticate instruments which require his signature, as writs Depositions &c Esp. 618. Leon. 323. 1 Hawk 90 1 Hal. 97.

It lies not agt a person who has sued out a writ. for not countermanding it on settlmt. unless malice is proved. 1 B & P. 388. 2 Wils. 302. No legal duty

It lies for a breach of trust in Bailee Esp. 618. Ld Ray. 909.

This action lies on the ground of negligence in all cases of Bailees. when the propt is injured for the want of that degree of care which according to the nature of Bailmt the law requires or which is expressly stipulated for. 1 Com. Dig. 466. 83. Sal. 26. Com. R. 133. Ld Ray. 909. Esp. 618.

It lies agt owners or masters of a vessel for goods lost or injured thro negligence, Esp. 623. Sal. 440. But the owners if sued must all be joined it is D. — as the right of act. is grounded on contract. 3 Sal. 203. 5th Rep. 651. con & that the case in Sal. 440. was treated as an action on Covt. But if one is sued alone he must plead it in abat. Esp. 623. Bun. 2611. 3 Sal. 203. 440. con.

Post master not liable for letters lost or notes in them: lost thro the fraud of the subordinate officers. Esp. 624. Sal. 17. Comp. 754. The office is for intelligence not insurance, no cert. no sum paid him by the Plff. — But

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for actual fraud of his own P. Mast^r is liable — So are the under offic^rs Coup. 760. arg^d L^d Mansfield. 3 Wils. 443.

Innkeepers liable for all property of their guests lost for want of that degree of care the law requires of them. 5 Bac. 179. Palm. 374. 2 Rol. 325. Bul. 73. 8 Co. 32. 1 Com. 210. Esp. 626. 3 Bl. 165. 6. Dy. 266. Pop. 178. Jones 13. not liable for goods stolen by guests Servt. or companions — or taken by public enemies. Vid^e Bailt & Inns. & Innkeepers."

The action lies for deceit in sales — as false warranty or a false affirmation. Esp. 629. Ex. affirming wine to be more than it was. Sal. 211. Warranting goods of such a value &c. 1 Com 166. 7. 1 Roll. 90. Pyke. 20. Esp. 629. Bro. I. 4. 2n. as to fraud in the sale of real estate 2 Day 128 Co. Lit. 384^a n. 1 Fonb. 366. 2 Cains 193. Comyn. Tit. 38. 6 5. j. 57.

Does not lie ag^t a vendor for false affirmation when vendee has been guilty of neglect — as vendee might have easily learned the true value &c. Ex. Vendor affirming that S.S. would give $100. So if the defects are visible. a gen^l warranty extends not to them. Esp. 629. 0. L^d Ray. 1188. Finch 289. 1 Fonb. 110. 1 Sal. 24. 2n Will not a spec^l Warranty subject in this case? 1 Com. 170. 3 Bl. 165. Gen^l warranty of a horse holden good after verdict tho he had but one eye Sal. 211. So it lies for artfully disguising known defects Esp. 632. 2 Roll. Rep. 5.

So when vendee practises fraud by a false affirmation as to his title to the goods sold. Scienter in this case said to be necessary — i.e. when fraud is the gist. Scienter how far alle in pleading Bul. 30. for the case. Esp. 632.

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1 Com. 171. All. 91. Carth. 90. 3 T. Rep. 57. 1 Vent. 109. 373. Cro. J. 474 1 Show. 63. 8. Sal. 210. Ray. 593. Bul. 30.

So it lies for injuries occasioned by any false affirmᵃ made to defraud, tho the person making it has no interest in the fraud. 3 T.R. 15⅞. 1 Com. 167.

So for injuries done by elevating a false putting. Ex. false dice - personating &c. Esp. 633. Mod. 583. Cro. E. 90. 1 Sid. 258. Bul. 32.

If A (by a wrongful act) make an innocent person liable over to a B I am liable to the former. Ex I chase A's cattle on B's land & other subject to damages - I am liable to him for the fraud. Rob. Ab. 525. Cro. E. 325. 1 Roll 100. Carth. 3. 4. All. 3. 2 Lev. 282.

When a public right is obstructed or violated to the injury of an individual he may maintain the actⁿ. Esp. 600. But he must state & show special damage. Ex. Plff as inhabitant of a certain place had a right to pass a ferry toll free - Ferryman refused to carry him. - He brot the action stating the common right - but not laying special damage - act. lay not. Sal. 12. 5 Co. 72. 3 Carth. 193. So of a public nuisance occasioning private damage.

So it lies for an injury ariᵍ from a nuisance in genˡ. Ex. obstructing antient lights. 9 Co. 58. 3 M. 126. 1 Vent. 239. But said that it must have stood time immemorial. Poph. 170. Cro. E. 118. Sal. 459. 6 Mod. 116. Wilmot Just. held 20 Yrs. ruffᵗ - perhaps 21. Esp. 636. Presumptⁿ of agᵗ 2 Lev. 175 adᵈ n. 1 B. & P. 400.

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If a man having built a house on his own land, sells it, neither he nor any person claiming under him may erect any building which will stop its light. – An injury in derogation of his own grant. Esp. 636. 1 Sw. 122. 1 Ban. 214. 1 Vent. 237. 9. tho the first is not an tient. But obstructing prospect is not actionable. 3 Bl. 217. 9 Co. 58. Esp. 636 Matter of pleasure only.

A house built near a stunt is on the N. side immediately entitled to the privileges of an antient messuage, sunt. Esp. 636. Ex. dec. lies for raising the stunt so as to obstruct the windows. 3 Wils. 461. 2 Bl. Rep. 924. Builder not foolish &c. in this case as when he builds by another's land.

One recovy. of damages for a nuisance is no bar to another (act. ag.) Esp. 637 Geo. E. 1912. Lev. 103. Every continuance of it is a new wrong. – The author of a nuisance does not discharge himself, by leasing or assigning from act. for injuries accruing after leasing &c. Sal. 460 Bac. 373. Esp. 637. act. also lies ag. assignee or lessee when the continuance occasions a new nuisance, Esp. 637 Dy. 250. Cases where the whole injury is done by the first erection. –

For obstructing lights action lies both in favour of lessee for years & reversioner, for it is an injury both to the present enjoyment & inheritance. Esp. 637. 4 Bac. 2141. Geo. C. 325. 237.

So this action lies for overhanging Pltf's house or land, so as to cast water upon it. 3 Bl. 216. F. N. B. 184. 1 Rol. 107. 1 Com. 263. so for erecting a spout &c. Stra. 634. a manufactory &c. the vapour of which injures Pltf's malthouse, brewhouse &c. Esp. 638. 1 Rolle. 89. Geo. C. 191. 3 Bl. 217. as a smelting house. So for infecting

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the air about one's house in any way so as to render it unwholesome
Esp. 637. 9 Co. 59.a 1 Com. 214. 2 Roll. 141.

Injuries affecting others
as standing in the relation to others of Husb^d, parent, child
Master have been treated of: "Dom. Rel." Esp. 644. 5. 6. Husb^d
Bul. 78. Cro. Jac. 501. 38. Parent— 3 Wils. 18. 3 Burr. 1878. 2 T. Rep.
186. L^d Ray. 1032. Mast^r— 2 Saund. 169. 2 Lev. 68. Fort. R.
390. Comp. 54. 2 Bl. Rep. 387. 3 Burr. 1345.

The act^s brot in
these cases have been in form trespass. but they are substantially actions on the case. Esp. 640. 8 T. Rep. 167. Sal. 206.
Ray. 1032.

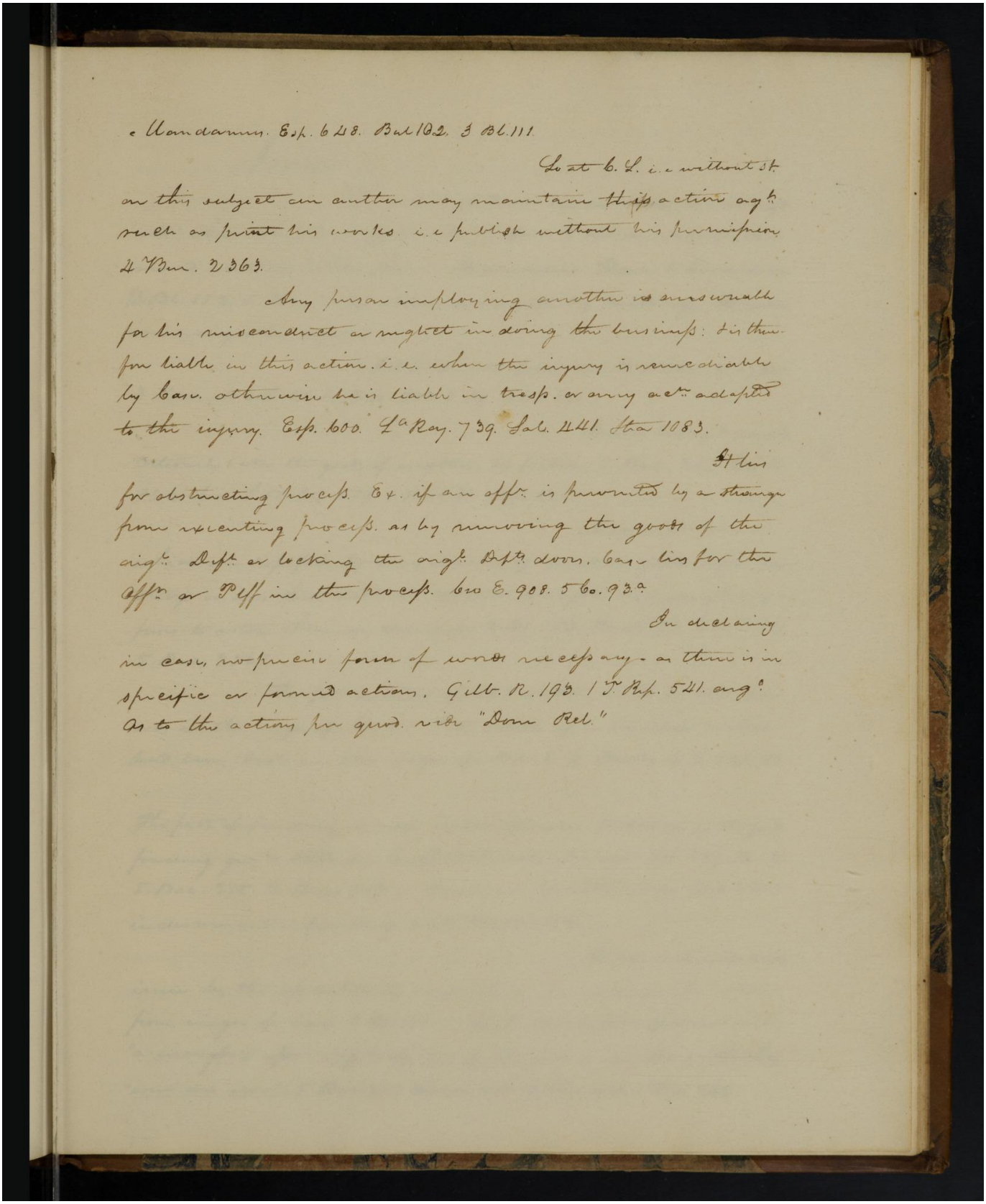
For other pers^l injuries — If a legal voter tenders
a vote & the returning officer refuses to accept it. Case
lies ag^t him Esp. 647. Sal. 19. 3 Lev. 17. at C. L.

So a candidate
for an election office may have this action ag^t the returning
off^r if the latter refuses to take or count his vote. Esp. 646.
2 Vent. 25. 1 Vern. 206. 2 Lev. 50. 3 Keb. 26. 32. So returning
off^r is liable to this action in favour of the candidate for
making a false return of the votes at an election. 1 Co. 99.
There are rules of C. L.

But holden that it lies not for a false
return of Members of Parliament. if the right is not determined in Parliat^t in favour of Plff. or cannot be determined
as in case of dispossession. Sal. 502. 6 Mod. 259. Lutwich 1 Wils.
127. 2 Lev. Esp. 647. Mo. 67. Dy. 275. There are rules of C. L. —
It on this subject in Eng giving double damages & costs 7 of
8 Wm 3.

So it lies ag^t an officer for making a false return to a

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c Mandamus. Esp. 628. Bul 102. 3 Bl. 111.

So at C. L. i.e. without St.

on this subject an author may maintain this action agt. such as print his works i.e publish without his permission 4 Burr. 2363.

Any person employing another is answerable for his misconduct or neglect in doing the business: & is therefore liable in this action. i.e. when the injury is remediable by Case. otherwise he is liable in Trespass. or any act. adapted to the injury. Esp. 600. 2 Ld Ray. 739. Salk. 441. Stra 1083.

It lies for obstructing process. Ex. if an offr. is prevented by a stranger from executing process. as by removing the goods of the arrg. Deft. or locking the arrg. Defts. doors. Case lies for the offr. or Plff in the process. 6 Mo. E. 908. 5 Co. 93.a

In declaring in case, no precise form of words necessary - as there is in specific or formed actions. Gilb. R. 193. 1 T. Rep. 541. arg.

As to the actions per quod. vide "Dom Rel."

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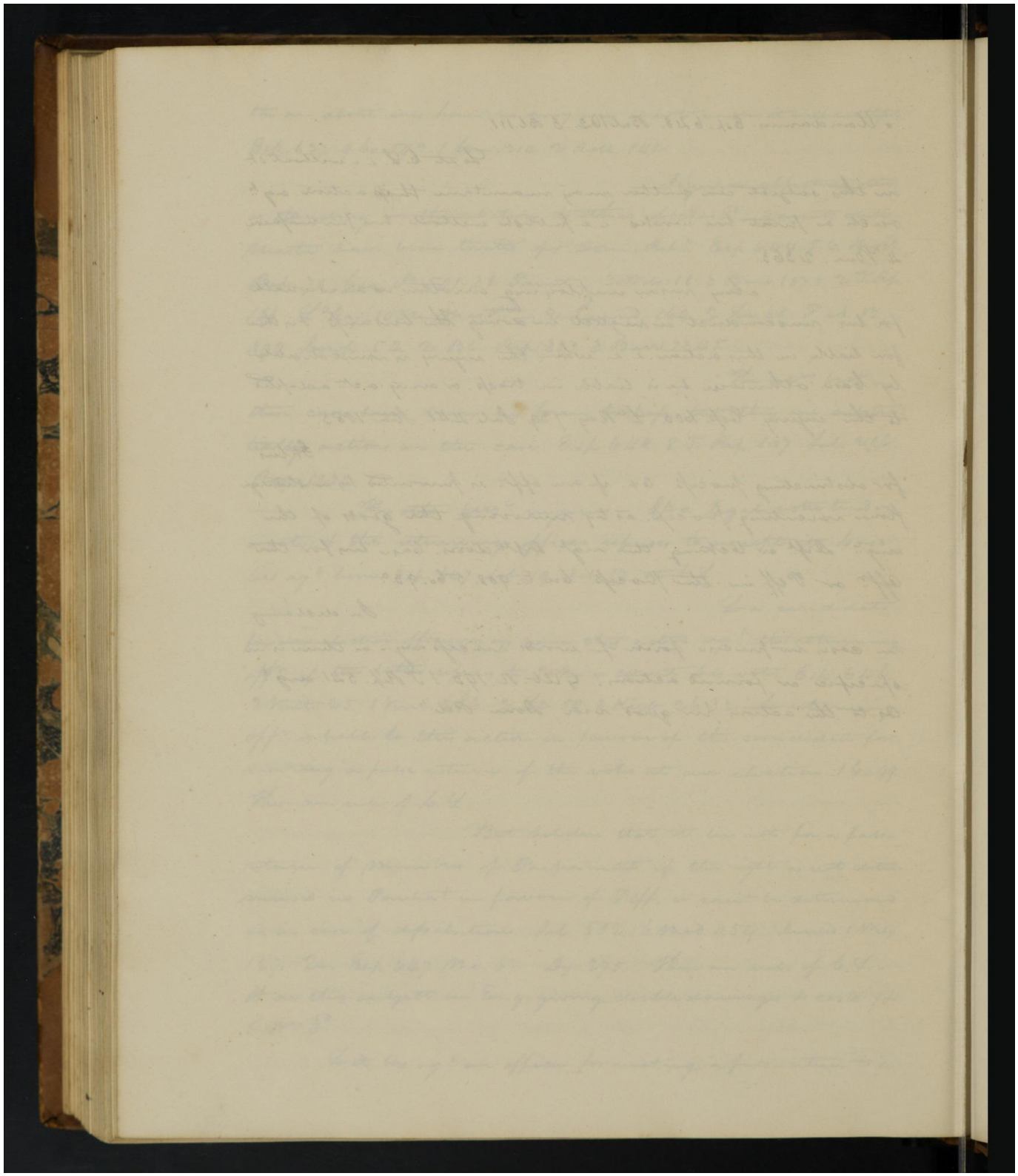


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Trover.—

This action of trover lies in cases (it was anc^t. send) where one formerly goods &c. & refused to deliver upon demand — but converted them. Anc^a called Trover & Conversion (3 Bl. 152. 5 Bac. 256) Since averment by finding. It now in many other cases.—

Action derived from the St. Westm. 2. 13 Ed. 1 3 Rawl. A. E. L. 58. &c. 2 Lil. 202. 3. 39. 243. 391.

It now lies ag^t. one who tortiously takes the goods of another; by fiction. 5 Bac. 257. Bro. E. 824. Bro. A. 50. Esp. 589. 1 Mod. 31. Stra. 128.

And in all cases in which one possessed by any means of another's goods sells, destroys or uses them without consent or right, or wrongfully refuses to return them on demand. 2 Bl. 153. Ball. 33. Bro. E. 781. 5 Bac. 256.

The first instance of this action in its present form was in the reign of Ed. 6. But action of a similar nature had been brot. in the reign of Hen. 8. 4 Rawl. E. L. 526. 385.

The fact of finding is now immaterial. Conversion is the gist. finding gen^y. state in Eng^d. but not always. Esp. 587. Bul. 33. 5 Bac. 275. 2 Buls. 313. — Manner of obtaining poss^n. but inducement — finding not traversable.

It has superseded detinue by the less certainty required in describing the goods from wager of law. 3 Bl. 153. Gen^l. definition of conversion "a wrongful assuming to dispose of the goods of another as tho' they "were one's own." 5 Bac. 257. 6 Mod. 212. 2 Buls. 280. 1 Sid. 264.

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The definition by fiction always supposes prospective lawfully gained But the action lies as well when the poss^{n} was tortious. 15 Bac 256. 7. Bro. 250. 1 Burr. 31. as when lawful; the gist being conversion: & this may consist either first in an unlawful taking. 2^{d} In an unlawful user. 3^{d} In an unlawful detainer. The evidence of conversion in these cases is diff^{t} There must be a misfeasance to constitute conversion. Esp. 590. 5 Bac. 257. 268. 9. Sal. 655. 1 Roll. 6.

1st A tortious taking is itself a conversion Laws Esp. 689. 5 Bac. 257. 1 Sid. 264. 2 T. Rep. 465. & no demand nor any thing of the kind necessary Esp. 580. 3 Wils. 146. Trespass is concurrent. Bac. 256. 7. Str. 943.

2^{d} By an unlawful use — This supposes poss^{n} lawful. Ex using a thing found, bailed &c. &c. 5 Bac. 257. 1 Com. 221. Bro E. 219. This is "an assuming to dispose of the goods of another as if they were one's own": When the taking is not tortious there must be some evidence of an actual conversion as in the last & following Ex. Esp. 580. misusing a thing entrusted to one's own care or found &c. is an unlawful user & a conversion. 1 Com. 221. Ex. a carrier of a box of goods breaks it open or sells it. 2 Sal. 655. 2 Bulst. 212. 2 T. R. 953.

So throwing paper found into the water. Bro. E. 219. 3 Bl. 153.

If Bailee of goods destroys them Trespass. it is & is concurrent with Detinue. Co. Lit. 57.a 5 Co. 13.b 2 Roll. 555. 5 Com. 581. Mod. 248. Bailment extinguished — Drawing part of a cask of wine & filling it with water is a conversion of the whole. Esp. 581. 1 Com. 221. Str. 576. assuming &c

That negligent custody of a thing is not unlawfully

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user. Esp. 580. 1. 90. Not a misfeasance (sup.) Hob. 251. 8 Co. 146. So no conversion. Ex. Finder of cloth suffers it to be moth eaten So if perishable articles are suffered to be spoiled for want of care Bro. E. 219. Ray. 909. 1 Bac. 48. Pow. 6. 252. Jones 48. Ray. 417. 5 Bac. 258. Hob. 17. Sal. 658. 143. 1 Roll. R. 665. Bur. 2827. 1 Bac. 243. 5 Bac. 269. Special action on the case lies in the case of finder Esp. 590. Ray. 917. Pow. 6. 252. Jones. 48. Swag. Bonn. Bonnin Salk 655. If carrier lose the goods Proves his not. Sal. 143. 655. &c. &c.

If the unlawful use consists in selling the propty. Indeb. assumpt. concurrent to recover the money sold for Bull. 131. Comyn. 419. 2 T. Rep. 144. Ib. 387. 6 Ib. 697.

3d Unlawful detainer – is a conversion as if the Deft. wrongfully refuses to deliver on demand – if indeed there has been actual conversion as by using, selling, destroying &c. a demand & refusal are not necessary to the right of action tho the possession was lawful. Esp. Dig. 589. 90. 1 Sid. 264.

But a refusal to deliver on demand is not itself a conversion or unlawful detainer – for it may be justifiable. Ex. not sufft. evidence of ownership accompanying the demand. Esp. 590. 2 Bull. 312. Comyn. 529. So Deft. may have had a lien upon the property if common carrier &c. 2 Show. 161. Ray. 752. Esp. 582. 2 Bur. 936. 2221. So it might have been destroyed by no fault of Deft. or lost or stolen. Sal. 655. Esp. 590. Bur. 2827.

A demand & refusal then are only evidence of an unlawful detainer or conversion Esp. 590. 1 Roll. 131. 3 Bl. 153. 2 Show. 179. Hob. 187. & only primâ facie evidence. 10 Co. 56. Co. E. 97. 495. Hardr. 48. Burr. 1243.

Afinder of goods has no lien on them for his expence & trouble
2 H. Bl. 254. 2 Bl. Rep. 1117. cant justify a detainer.

If one having
goods of another puts them into the hands of a third person
agt the command of the owner. this is conversion. (Esp. 581
2 T. Rep. 260. Servt is liable for a conversion by himself tho
to the use of his master done by his masters order. (Esp. 580.6
1 Wils. 328. Stra. 813. 1 Com. 221. Buls. 47. 2 Mod. 242.

A. timber
being on B's land - A asked liberty to take it. - B refused - B was not
holden guilty of conversion - no intermeddling - no trespass
5 Bac. 174. 8. 229. 59. 2 Buls. 310. 2 Mod. 245. 2 H. Bl. 257. 8.

If goods are sent by A to B. not to vest in B. but to answer an-
other purpose for A which cannot be answered - A may recover
for them after demand. 5 T. Rep. 215. 295.

Supposn A finds the
goods of B. & claims them - sues A on refusal. to deliver & recovers
the value - B then sues & proves his propt. Can B recover?
no most question. analogy to case of administration repealed
&c. 3 T. Rep 125. 2 Bac. 11. 1 H. Bl. 669. 82 ang. 4 Dall. 54.

It is not necessary for Plff to have the absolute ownership of
the thing. Ex Bailee may maintain the action a 3d person
he having the gen. property. 5 Bac 261. 2 Roll. 569. 1 Vid. 438.
Latch. 214.

So bailee having special property may perhaps in
all cases maintain the action agt a stranger. (1 Bos. & Pul.
40. 3 Esp. 140. 1 Com. D. 218. 1 Roll. A. b. 52) a common carrier
&c. 5 Bac. 165. 262. Mod. 245. Salk. 143. Esp. 577. 1 Mod. 31.

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So a Sheff who has taken goods in Ex^{tion} may maintain it. 1 Lev. 282. Bul. 33. 2 Saund. 47. n

So Lessee for years of a house thrown down may have it agst a stranger for the timber. Bul. 33. Esp. 577. Spec^{l} prop^{y}.

So poss^{n} alone gives a right to maintain the action agst all the world but the owner. Ex when one finds goods. Esp. 575. 1 Com. 219. Sha. 505. 777. Bul. 33. This gives him a kind of property which will support the action agst third persons. Cro. E. 819. 2 Saund. 47. a. n. 5 Co. 24. b. 3 Wils. 338. But the poss^{n} must be acquired legally & under claim & colour of right for if gained without colour of right it gives no spec^{l} property even agst strangers. 3 Wils. 338. 2 Saund. 47^{a}. n.

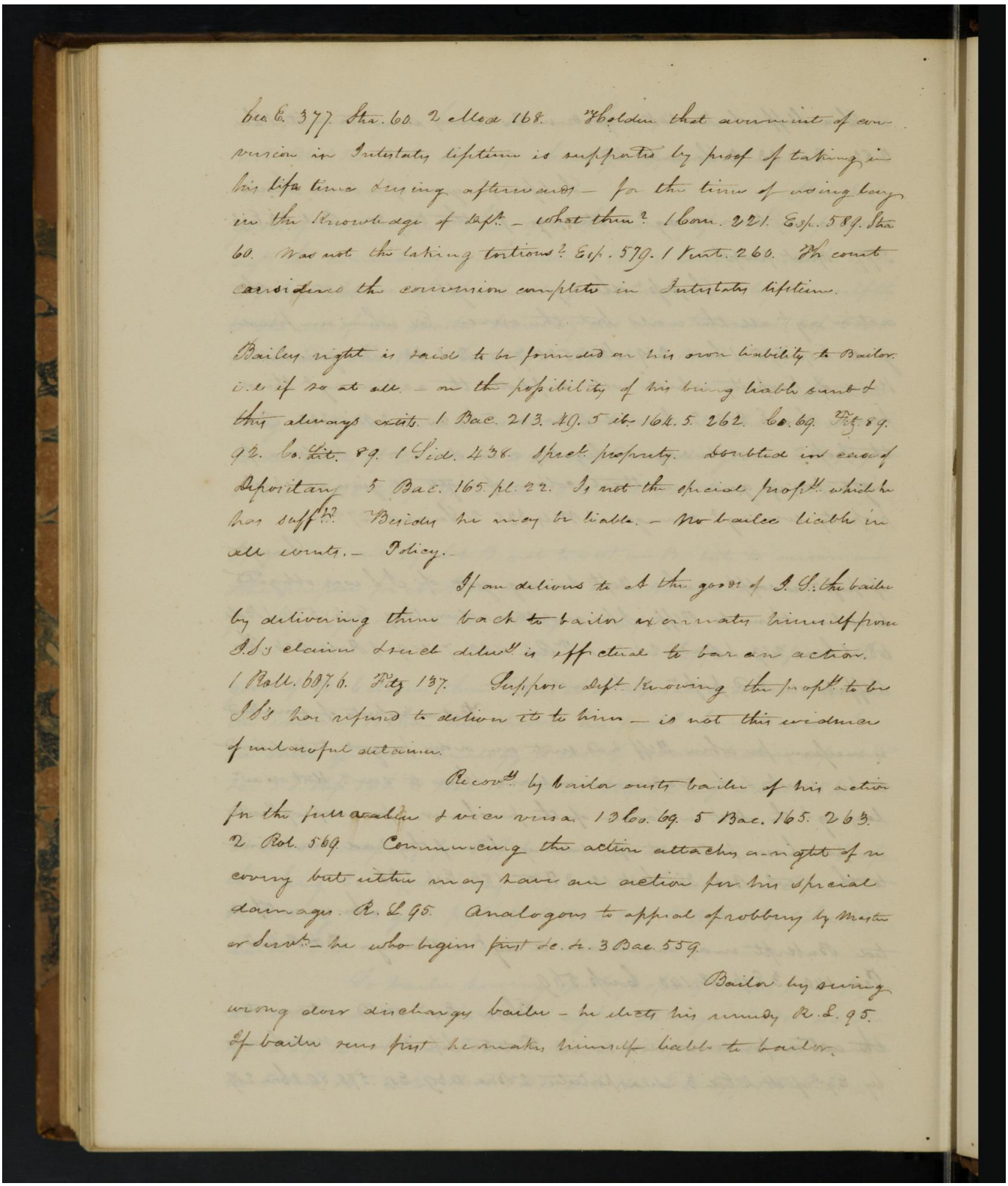
So right of poss^{n} is suffic^{t} as when Deft^{t} having goods of J. S. was obliged to deliver them to Plff. J.S.'s creditor - action lay. Esp. 576. 1 Bids. 68. 1 Com 219. 1 Bac. 242. 1 T. Rep. 480. 7 it. 9. 1 Roll. 606. tho Plff never had poss^{n}. 2 Saund. 47. n.

But a property of some kind is necessary for when Plff had sent an order for goods to be delivered to his servt & the tradesman delivered them to servt Held no act^{n} lay agst the Host in favour of the purchaser - for no prop^{y} vested in purchaser for want of delivery. Seen if they had been delivered to the servt. Bul. 36. Salk. 19. 3 Wm^{s}. 186. Esp. 576

An unentitled Bailee may maintain it agst a stranger. B & P. 44. Pea. 140. 3 Esp. R. 140. Comyns. 544.

Obsn. Ex^{tion} could not maintain the action for conversion &c in Testators life time - Now he may by Eq^{l} of 4 Ed. 3. de asportatis. 2 Bac. 439. Esp. 576. 89. 1 Com. 219.

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bea. E. 377. Sta. 60. 2 Mod 168. Holden that averment of conversion in Intestate's lifetime is supported by proof of taking in his life time & using afterwards — for the time of using being in the knowledge of Defdt — what then? 1 Com. 221. Esp. 589. Sta 60. Was not the taking tortious? Esp. 579. 1 Kent. 260. The court considered the conversion complete in Intestate's lifetime.

Bailee right is said to be founded on his own liability to Bailor. i.e if so at all. — on the possibility of his being liable and this always exists. 1 Bac. 213. 49. 5 ib. 164. 5. 262. Co. 69. Fitz 89. 92. Co. Lit. 89. 1 Sid. 438. Spec. property. doubted in case of Depositary 5 Bac. 165. pl. 22. Is not the special propty. which he has suffs. Besides he may be liable. — No bailee liable in all events. — Policy.

If an delivers to A the goods of B. the bailee by delivering them back to bailor or estrays himself from B's claim & such delivy is effectual to bar an action. 1 Roll. 607. 6. Fitz 137. Suppose Defdt knowing the propty. to be B's has refused to deliver it to him — is not this evidence of unlawful detainer.

Recovy by bailor ousts bailee of his action for the full value & vice versa. 13 Co. 69. 5 Bac. 165. 263. 2 Rol. 569. Commencing the action attaches a right of recovery but either may have an action for his special damages. R. L. 95. Analogous to appeal of robbery by Master or Servt — he who begins first &c. &c. 3 Bac. 559.

Bailor by suing wrong doer discharges bailee — he elects his remedy R. L. 95. If bailee sues first he makes himself liable to bailor.

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Said. 1360.69 that he who has the special propt. shall have trespass or this action agt him who has the gent. propt. 7 T. Rep. 12. 2 w. R. L 199. Com. Dig. that Bailee may have spec. act. on the case to recover special damages. 5 Bac. 185. 266. Why Tresp. or Trov. ag. Bailee. The action is not for the loss of propt. but of the use of it - Of the special interest - the value of the property is not even prima facie for the rule of damages.

Returning the goods to Plff after Conversion does not vest his right of recovery - Mitigates damages only. Esp. 581. 5 Bac. 266. 6 Mod. 212. Cro. J. 148. 1 Com. 221. 1 Roll. 56. 40. 2 Bl. R. 902. 6 T. Rep. 696. But when the conversion was in a tortious taking - if Defr. delivers it on demand; no damages for the taking - that is waived in this action Burr. 31.

Recovy in Trov. vests the property converted in Defr. except when it has been returned. Esp. 593. 1 Salk. 146. Stra. 1078. 5 Bac. 257.

A former recovy ag. a stranger is a good bar to the action. Esp. 593. Lev. J. 73. There can be but one recovery. Stra 1078.

So a recovy in indeb. Assp. the propt. having been sold is a bar. 5 Bac. 280. La Ray. 1217. So in Trespass when concurrent. Esp. 593.

Against whom. - Wrongful Taker - Bailee - Finder &c. So Servt.

Gent. Rule. The owner of propt. may in Engd. maintain trover - not only ag. first but any subsequent holder even a bona fide purchaser. Stra. 1187. Ex. Bailee or

Finder sells the goods. 1 Wils. 8. Esp. 579. Sal. 283. 1 Show. 168. 1 Bac. 237. 5 it. 260. b. provided the sale was not in market overt — or if thro by covin. 2 Bl. 450.

Except to gen. rule ante (so far as relates to others than first takers) in case of money & bills of exchange — Drawn for these can be brot only ag.st first taker by reason of currency. when they have been paid over to a 3d person in bona fide pur. chase — reason of policy. (Burr 2452. 7. Sal. 126. 1 Ray. 738 Case in Burr. of a bank note stolen &c.d away for val. consid.n Esp. 580. 3 g. 3 Burr. 1516. 1 Bl. Rep. 485. Doug. 611. R. L. 257.

For what? personal chattels in gen.l,

This action lies for choses in action of any kind the only evidence of property & debt and not to be alleged. Esp. 588. Bro. b. 190. 262. Bro. A. 657. Bro. E. 723. Com. 219. Salk 130. 283. 654. 1 Roll. 5. l. 20. 1 Roll. 125. Comp. 117. Esp. 543. 2 T. Rep. 708. So for title deeds 9 Mod

It lies not in gen.l for an animal feræ naturæ. (Qu if confined & val.) 2 Bl. 735. Tho for such reclaimed animals it does. Ex a hawk. 1 Com. 219. 1 Rol. 5. 5 Bac. 263. Fitz. 86. Hob. 283. Bro. E. 125. It lies for tame animals as dogs. Hob. 203. So in some cases tho not reclaimed bring merchandize & val. Ex Monkeys. Parrots &c. Bro. A. 262. 5 Bac. 264. 1 Com. 219. It does not lie for a negro slave in Eng.d or Comm.t 5 Bac. 263. Ray. 146. Salk. 397. Ray. 1274. 3 Lev. 336. 2 it. 201. Qu. 3 Keb. 785.

It lies not for conversion of a record — not private property — public affairs. It does not lie for copy of record. 5 Bac. 264. Hard. 111. Esp. 542.

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It has been holden that it lies not for money in lap in a bagg that it might be identified as in Detinue. Cro. E. 638. 61. In late cases holden, that as the object is not to recover in specie but damages only, it does lie for money not then circumstanced. 5 Bac. 264. 1 Com. 219. 1 Rol. 5 l. 15. 10 Co. Com. 89 Cro. E. 818. 41.

If feme covert loses husb^ds money at play trover lies by the Husb^d 5 Bac. 264. 1 Sid. 122. Bul. 32.

Where goods are pawned pawnor may maintain Trov. after tender of the money 5 Bac. 264. Co. L. 244. Esp. 590. Bul. 72. 4 Co. 83^b Ray. 916. 2 Com. 258. 1 Ld. 220. Sal. 522. If pawned on an usurious contract pawnor cannot maintain trover till he has tendered the money advanced & interest semb. 1 T. Rep. 153. The action being not to enforce but to be relieved ag^t the contract. Trover, an equitable action.

A parol gift of goods without some act of delivery does not transfer the property & the ad^n will lie in such case ag^t donee, he having taken poss^n Esp. 577. 1 Bac. 239. 2 Show. 30. In without demand^d wd not the gift by parol be a license? But delivering the keys of the room where the goods are kept to donee is suff^t Sta. 955. 1 East. 192.

One Tent. in Com^n or Joint tent. of a chattel cant maintain this action ag^t his companion – advantage taken of it on "not guilty" Esp. 586. Sal. 290. 1 Day. 301. Com. Dig. 250. 5. 5 Bac. 280. 1 T. Rep. 658. poss^n of one bc – secus if it be destroyed Esp. 586. Co. Litt. 200^a 1 East. 363. 8. Bul. 34. 9. If brot. by one only ag^t a stranger – plea in abat Sal. 290. 2 Lev. 133. Cro. E. 524. Esp. 211. Litt. 3. 323. Sal. 4. Sta. 820. Com. Dig. 250.

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In action lying for conversion of a personal property, only severing a thing from another freehold is not a conversion 5 Bac. 257. as taking a door from its place & carrying it away. Bro. I. 129. But if the averment is "posst as of his own goods" severance presumed. Bro. I. 129. after verdict. But tortiously taking a thing already severed is a conversion. Roy. 125. 5 Bac. 257.

Throwing goods overboard to save a ship - no conversion 5 Bac. 258. 2 Bulst. 280. Dect must state a place or it is ill in substance. Esp. 588. Bro. C. 78. 2 Vent. 30. R. L. 219.

Declaration in Trover ought to show posst in Plff. but stating posst as of his own goods is suffl. Moore. 691. Hard. 111. 1 Com. 222. 5 Bac. 271. sed vide. 2 Saund 379. Stra. 1023. not necessary to state demand & refusal.

Time of conversion must be averred - In an case for misfeas. Judgt was arrested. Esp. 588. 1 Vent. 135. Bro. I. 238. 1 Com 224. Bro. C. 97. When the time of conversion was laid before the trover the "afterwards converted" held an suffe & the "said" void. Vide as to the arrest of Judgt 3 Bl. 394. Barth 38. 9. Bro. I. 428. 5 Bac. 316.

The thing must be described with convenient certainty - Clim, with great accuracy "divers books" insuffe 1 Vent. 114. 317. 1 Lev. 301. Esp. 5. 87. 8. Roy. 588. 2 Lev. 176. Roy. 991. Bul. 37. Stra. 809. As to the necessity of alleging the value of the goods - 5 Bac. 275. Bro. I. 130. 47. 8. price & value. Fitz. N. B. 88. not necessary according to Esp. 588. 407. Bro. I. 148. 2 Lev. 230.

Said thus an

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only two good pleas in Trover — Gen.t issue & Release. Esp. 592.
1 Rob. 305. 5 Bac. 276. Many have been allowed. Yelv. 198.
1 Show. 146. Co. Lit. 73. Stra. 60. 1078. Sal. 654.

But a justification may be given in evidence under the gen.l issue
Esp. 593. Bul. 18. practice in Cont. — St. of Limitations in
Cont. does not run ag.t Trover con when concurrent with
trespass. Supt. Ct. Jur —

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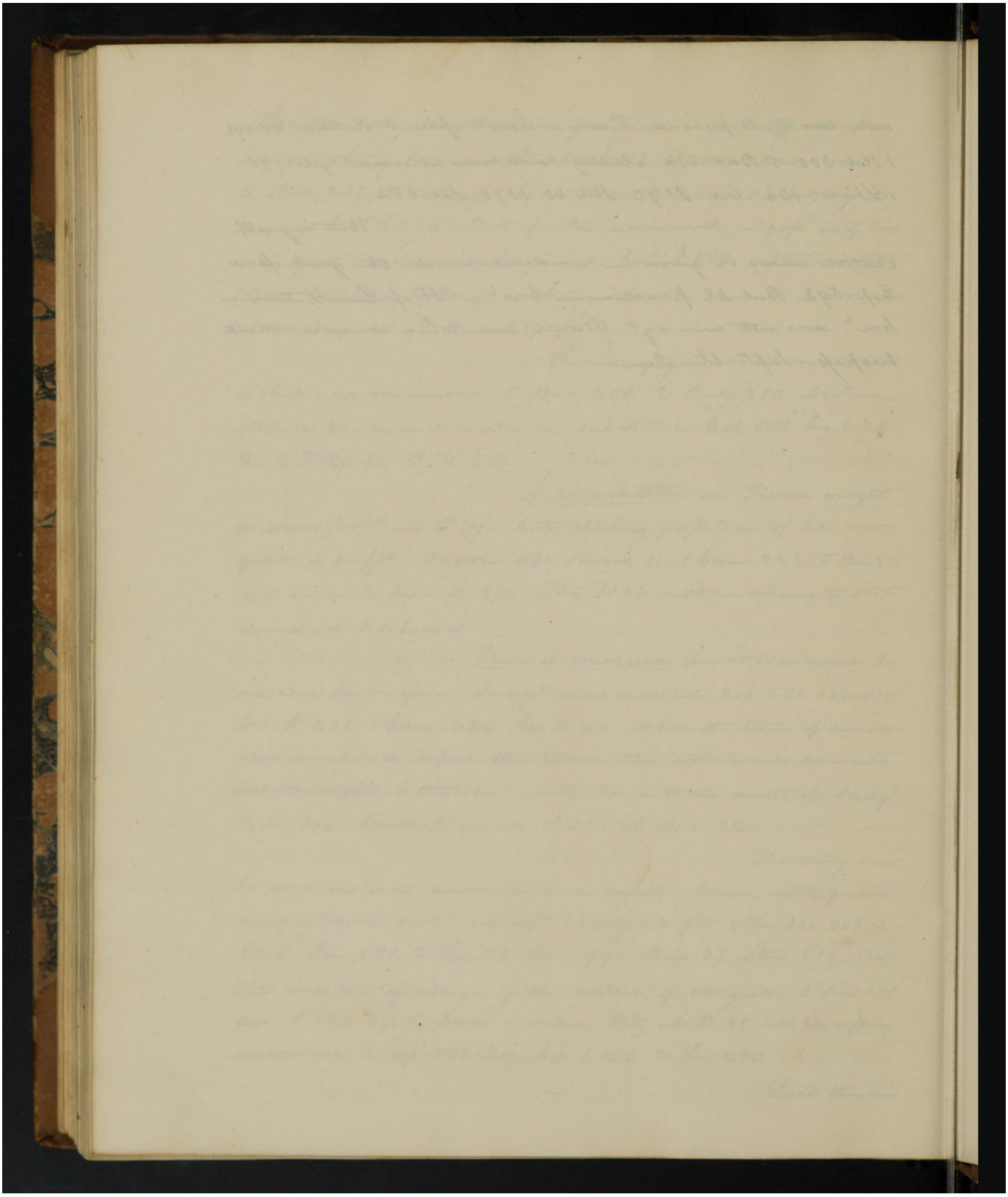


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Replevin.

In Engd Replevin is a restoring to the owner by legal process of cattle or goods distrained 4 Bac. 372. Esp. 346. Co. Lit. 145. for any cause or security given to try the right & the action if Judgt be agt him.

Distress is the taking of a pers. chattel, out of the poss. of the wrong doer into the custody of the party injured to produce satisfaction for the wrong committed — It is the act of the party injured. 3 Bl. 6. Sometimes signifies the thing taken by distress.

Replevin lies not for goods taken by a mere trespasser ab. init. 2 Lev. 93. Bul. 53. 3 Bl. 140. post. Writ is not granted but upon security given by Plff to try the right of the distrainor &c in Engd & to restore the property if Judgt is for distrainor. 3 Bl. 13. 147. Co. L. 145. Esp. 347. 8. If Plff in Replevin does not try the right. i. e. does not pursue his action or fails in it. the property is to be returned to distrainor who may have a writ de retorno habendo. — Co. L. 145. 4 Bac. 282. 372. 3.

If thing returned to distrainor he may keep it 'till tender of reasble amends no longer. 3 Bl. 147. — 58. 8 Co. 157a Esp. 377. Tender of reasble amends before distress makes the distress tortious. if before the impounding, it makes the impounding or detainer unlawful — not the taking. 8 Co. 147a Bul. 60. If after proof for distrainor, it makes further detainer tortious. ut supra. Esp. 357. 2 Lev. 40. 5 Co 76a 2 Roll. 561. & in the last case Plff may have detinue, or Trover. 8 Co. 147a cont.

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When distrs is taken it is to be impounded - in animate chattls in a pound overt. - animals generally in a pound overt. 3 Bl. 12. Co. Lit. 47.

Cum a distrs being in nature of a pledge, it could not be sold. Distrainor &c only kept it as a punishment to the owner if he was stubborn. 3 Bl. 10. 13. Burr 558. Sts. have in a great measure remedied this inconvenience, especially in case of distrs for rent. by allowing a sale in certain cases - but not in case of cattle taken damage feasant. 3 Bl. 10. 13. 4. Some other cases. There were always some exceptions to the old rule. 3 Bl. 14. 86. 41. 12 Mod. 330.

Writ of Replevin is demandable as a matter of right & even tho' writ is granted with right of distrs irreplevisable. 2 Bac. 373. Co. Lit. 145.

The principle cases in which distrs may be taken by the Eng. law are 1. 1 case of cattle damage feasant. 2 For non payt of rent. 3 Bl. 6. 7. Co. L. 46. Esp. 364. 55 Replevin may at 6 L. be by writ out of 6 Wk. or by Mandt. Ct. by plaint. Esp. 346. i.e Sheff sees precipe on complaint made. So Sheff may order his Bailiff by word to replevy. Esp. 347. F.N.B. 169.

In Engd writ of Replevin lies in all cases, except in which distrs is taken except when the distrs is founded on a capias in Withernam. This is a distrs by the owner of the orig. distrs. the latter being carried out of the Co. or concealed. In which case the Sheff returns that the goods &c are elongated. i.e carried to a distance - to a place unknown.

It obtains when the orig. distrainor having retained the goods on pt the writ of

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Replevin, on a claim that they are his own, which claim is decided against him, conceals them &c. ut supra.

So if there is no such claim but the Proph. is enabled &c. How there can be no replevin 3 Bl. 149. F. N. B. 69. 73. T. Ray 475.) of the D. distrs till the right distrs is forthcoming: When a writ de retorno &c is awarded the distrs cannot be found. sci. fa. lies ag.t the pledges in the writ of replev. 4 Bac. 382. F. N. B. 172 Esp. 347. Co. Lit. 322. Esp. 376. 2 Wils. 41.

II Of Replevin of Cattle taken Damage Feasant.

In this case the owner of the land has his election to distrain impound the cattle, or to bring Tresp. But if he distrains & the distrs escapes his action of Tresp is gone unless the escape was without his fault. 2 Sw. 91. 2. Same rule in case cattle dies. 4 Bac. 179. 12 Mod. 658. 63. 2.a Ray. 720. Sal. 248.

At C.L. the proceedings in Replevin were tedious - The writ must issue out of C.B. The goods &c. were thus long detained from the owner - By St. Marlb. 52. Edw. 3. The Sheriff is enabled to replevy immediately. 4 Bac. 373. 3 Bl. 147. F. N. B. 68. 9. 13 Co. 31

Analogy between taking body of Debtor & impounding cattle - both pledges. 2 Bac. 354. Demand not satisfied by death, nor by escape unless the party imprisoning is in fault - In both pledge being holden, no other remedy 5 Bac. 179. 12 Mod. 603.

The owner of cattle distrained must of necessity provide for them unless they put into pound overt. 3 Bl. 13. Co. L. 47.

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Every writ of Replev. for cattle taken damage pasant contains in form an acct. of Tresp. Gen'y. however Plff in Replev. does not dispute to recover damages but appears for the purpose of having Defts. damages assessed — If however the cattle were unjustly taken, Plff in Replev. recovers his damages.

The pound keeper has a lien upon the cattle impounded for his fees in case of settlement between the parties. 3 Burr 2en. as to this right agt. a Replev.

If cattle enter from the highway immaterial at C. L. whether the fence was good or not (2 H. Bl. 527) because it is unlawful to permit them to go at large in the highway.

For mischief done by animals from a disposition common to the species; the owner liable without notice or knowledge. as a Bear biting — or cattle trespassing — For that committed from a disposition not common to the species owner not liable without scienter. Ex. a dog biting. Esp. 501. 2 Ld. Ray. 606. The scienter not traversable. i.e by plea — but must appear true or false in evidence. 1 Rol. A. 46o. 18. 6co. C. 350.

If the owner of land chase a beast damage pasant on the land of its owner he is not liable for chasing — Secus of stranger — liable to both. Latch 120. 5 Bac. 179.

Distress not allowed to use a beast distrained — 3 Bl. 13. 6co. 8. 148. He becomes a trespasser ab initio

When there is a trial in Replev. the Deft. may either deny the taking or show his right to take in case of damage feas-

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saint. 4 Bac. 388.- The gen. issue is non cepit 1 Vent. 249
4 Bac. 388. Bul. 54. Upon this issue claim of prop. cannot
be given in evidence. It should be pleaded. Bul. 54. Sal. 5. 2 Ld.
92. 6 Mod. 81.

If Defr. justifies (in his own right or that of his wife)
because the beasts were damage feasant, he is called the Avow-
rant. Esp. 360. 2 Bl. 150. 2 Saund. 195. If he justifies in an-
other right as Servt &c. this S. to make cognizance. 3 Bl. 150.

Avowry is also in the nature of a plea to the replevin. The
replication is in nature of a plea to the avowry.

In this case both
parties are actors. i.e. Plff. The owners of the cattle suing for
damages & the Avowant in Engt for a return of the Cattle.
& in some cases damages 4 Bac. 373. 2 Mod. 149. Cow. E. 798.

That avowry is in nature of an actn appears from avowants
right to recover Judgt for the return of the distress & in
some cases damages. 4 Bac. 373. Esp. 376. 2 Wils. 117. Sal.
95. 2d Plff may plead in abatement of the avowry. 4 Bac.
373. 3d Avowant must not close with a certification. Cro. E.
530. 798. Carth. 122. 6 Mod. 103. Plow. 263. Lyle. 148.

But tho
the avowry is in nature of an action, our Statt. in Covenn may
it is 2d avow with his fellow. Cro. E. 530. 4 Bac. 373. Esp. 374
for taking cattle damage feasant. Overruled - He must
make cognizance as Bliff of the other. W. Jones. 253. 2 H. Bl.
386. 1 Roll. 220. pl. 14.

Tenants in Common may have several
avowries for rent, because it is in reality. 2 H. Bl. 387. arg.-

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Carth. 340. Sel. 389. Rep. 422.

As title to land may come in question in this action, it has been called when this is the case a real action. Now holden to be pers. as Disp. or debt — For land cannot be recovered in it. 4 Bac. 373. Finch 316. Comb. 472. b. 27.

Rule. That all distresses must be taken by day except in case of Beasts damage feasant. but they should escape. 3 Bl. 11. Esp. 360. Co. Lit 142. 60.1.

Distress for damage feasant must be made while the beasts are on the land. Esp. 360. Co. Lit. 142. 960. 22. Claim so with respect to distress for rent, except that it might be taken on fresh suit. Now remedied by St. 3 Bl. 11.

As to Distress for rent. Claim the L^d Lord might take as large a distress as he pleased. Tenant had no remedy. He now has by St. Marlb. 52. H. 3. a special action on the case. 3 Bl. 12. 3 Lev. 28. 1 Vent. 104. Stra. 851. (Disp. not maintainable.) 3 Burr 590.) in this case it bring no injury at C. L. except where gold or silver being of a known certain value were distrained — In other cases a special action on the case founded on the Stat. is the proper remedy.

Distress for rent is incident of com^n right (according to C. L.) in those cases only in which the owner of the rent has the reversion, — not where he has no future interest. — as in case of rent charge — or when the owner of Land conveys his whole interest reserving rent. Litt. 215. 18. Co. Lit. 142. 3. Esp. 355. 6. 2 Bl. 42. But he may have the right by clause of distress at C L.

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Now the right of distraining is by St. 2 Geo. 2 extended to all rents 2 Bl. 43. 3 St. 6. Esp. 355-6.

In case of distress for rent by St. Car. 2 if Dft. in the action of Replev. prevails he recovers his costs & so much in damages as is equal to the value of the distress. If that is less than the rent due — But if the distress is equal to or more than the value of the rent due, he recovers in damages the amount of the rent. & in the first case Distrainor may have a further distress. 3 Bl. 150. 1 Bul. 58. 3 T. Rep. 349. 2 H. Bl. 36. Esp. 377. 2 Wils. 116.

2. In the case of pers. property attached. Replevin in this case is never an adversary suit — No hearing on the replevin writ but on the attach. 2 Lev. 93. 1 Sub. 274. It is rather a "Mandatory precept" requiring the officer to deliver the goods &c.

By this writ propt. is restored to the owner on his finding security to prosecute & to answer such damages & demands & dues as the adverse party shall recover. St. Com. 360. The security to prosecute the replev. &c. is mere matter of form.

This writ founded in good policy — That the owner need not be dispossessed of his propt. For a long time on attaching is but for security, he suffers no injury — Security saffl.

Replevying in some measure superseded by rescripting.

Magistrate taking the bond acts ministrially. He is liable if bond is insuffl. (but not if the bondsman is responsible at the time) & the action may be brot. agt. him tho no previous suit has been brot. agt. the pledge Bul. 60.

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He becomes surety in this case, sent. for the whole debt, as in Eng^d. Staff does now even on the amt. of the bond taken on the case may be. 1 H. Bl. 76. Comp. 71. 2 H. Bl. 547. con. it. 36.

Case in H. Bl. stronger than a similar case here — Bond in Eng^d. bring for a return of the goods Esp. 348. Doug. 336. 2 T.R. 483. con. 2 H. Bl. 547. The act. is case. Bul. 60.

Olim doubted whether the action would lie — Bond in Eng^d. double the value of the goods. Bul. 60. 2 H. Bl. 36.

Questioned whether whether when prop^y. is taken to a small amount & replevied the Bondsman is liable for more than the value of the property — no decision alt. R^d aside from the words of the stat. — But the words of the St. explicit — analogy to case of receipts man who is always liable for the whole unless he delivers the property. Decided contra 2 T.R. Rep. 433. 2 H. Bl. 547. Esp. 348. 2 H. Bl. 36 &c. con.

Questioned also whether the bondsman can discharge himself by surrendering the goods after judg^t. for Def^t. in Replev^d. This question depends in some measure (i.e. so far as it is affected by the extent of his liability) upon the former — how far he is liable? Not like the case of a receipt man, he is bound only to deliver — not like bondsman in eng^d. replev. who engages only for the return of the property. — In Comm^t. he cant. sent.

If the prop^y. of one is attached for the debt &c of another, he has not an act^n. of Replevin — but he may have Trespass. For replevin in this case is not an adversary suit. — & no one can replevy unless he is a party to the suit & has a prop^y. in the goods. Kirb. 276. 2 Saugs.

So it seems Replevin is not the proper remedy for a mere Trespassing act according to the Laws of Engd. it being grounded on a distress. Bul. 53. Co. Lit. 145. Esp. 346. 3 Bl. 13. 146. 7. 2 Lev. 89. Raym. Bull. 52.

If cattle of a Firm sole is distrained & the mans. Husbd. alone may replevy. for propty. becomes Husbds. by intermarriage Esp. 375. 1 Sid. 81. 2. Bul. 53. But if the wife joins it is good after verdict — for presumption will be that they were joint tenants. Exrs. may replevy distress taken from Testator. Auth. supra.

If the goods of feme covert are distrained, they cannot join in replevin; injuries being personal. Co. L. 145. 6. Esp. 374. Bul. 53.

Goods distrained in a foreign country though brot. here cannot be replevied here. Esp. 372. 2 Skin 91. The capture might be lawful there.

Replevin lies of things personal only not of chattels of land. Esp. 372. 4 Bac. 385. F. N. B. 68.

Replevin is founded on the right (i.e. sensible) of property in the Plff. — Therefore it is a good plea in abatement or in bar that the property is in a stranger. Esp. 351. 2. 4 Bac. 373. 2 Lev. 92. Comb. 74. 243. Sal. 94.

Diffs. from actn. of Trespass. (Bul 53.) where Plffs. possn. is sufficient for in Replevin the Defts. is in possn. till dispossessed by the Replevin itself. —

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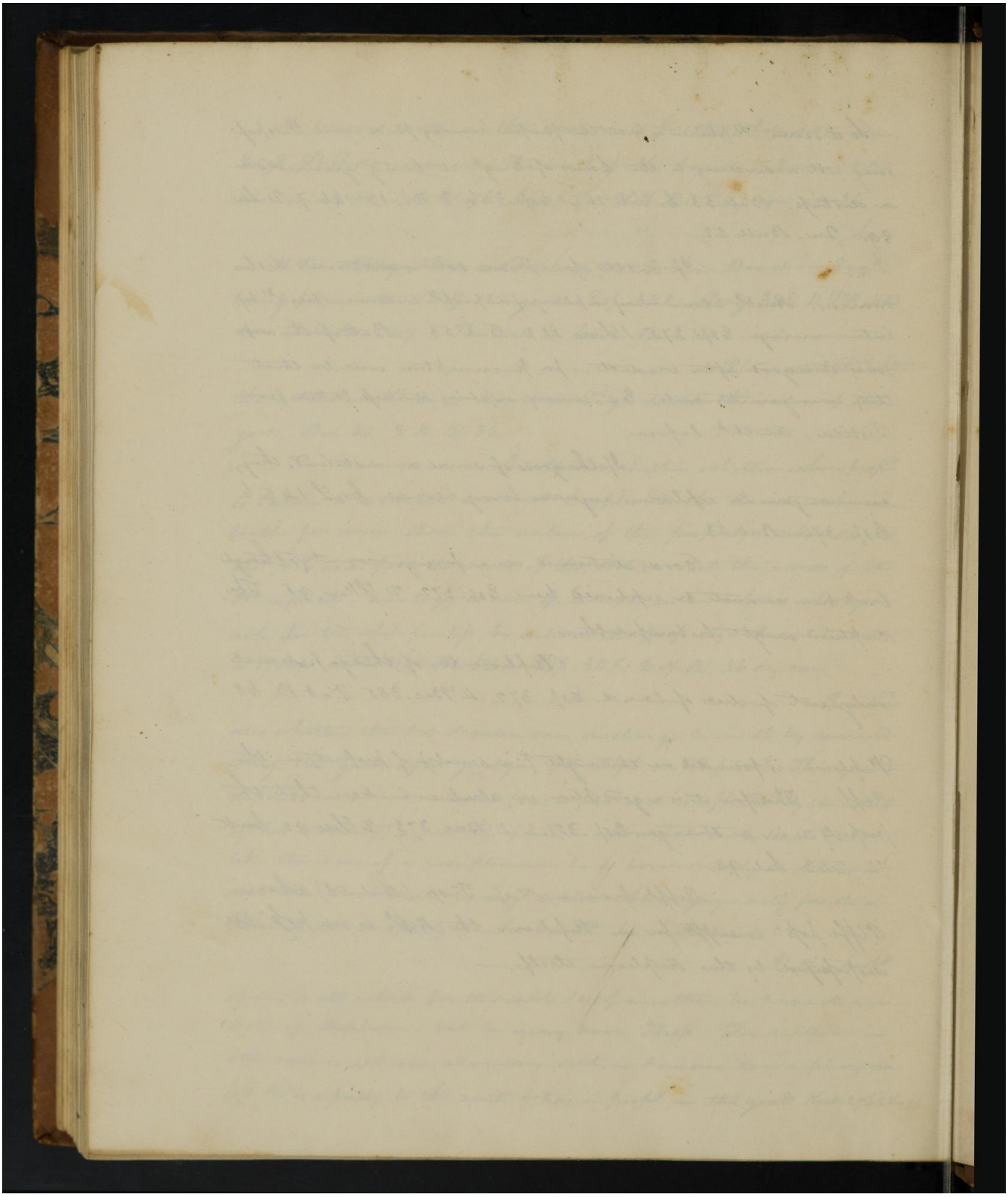


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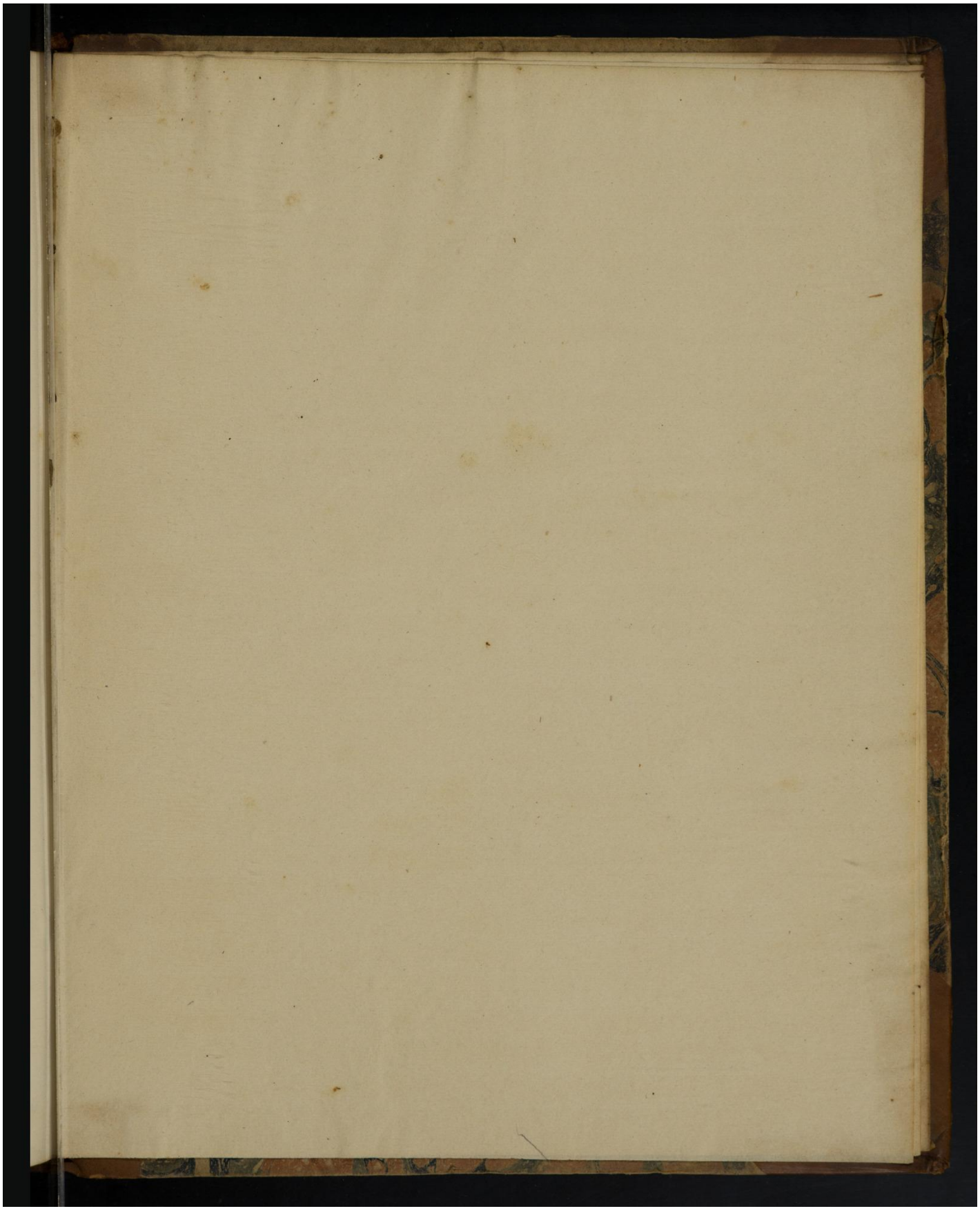


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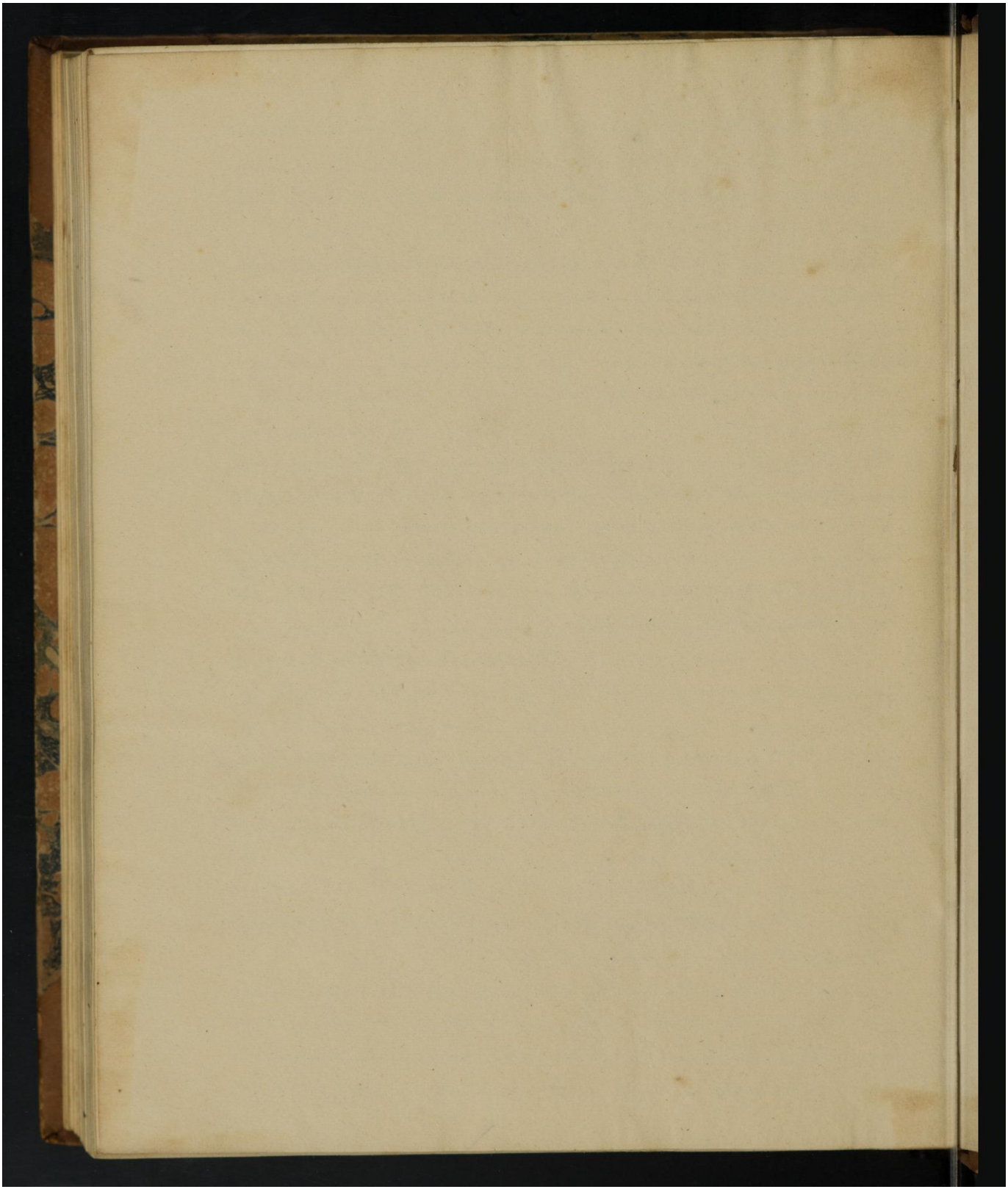


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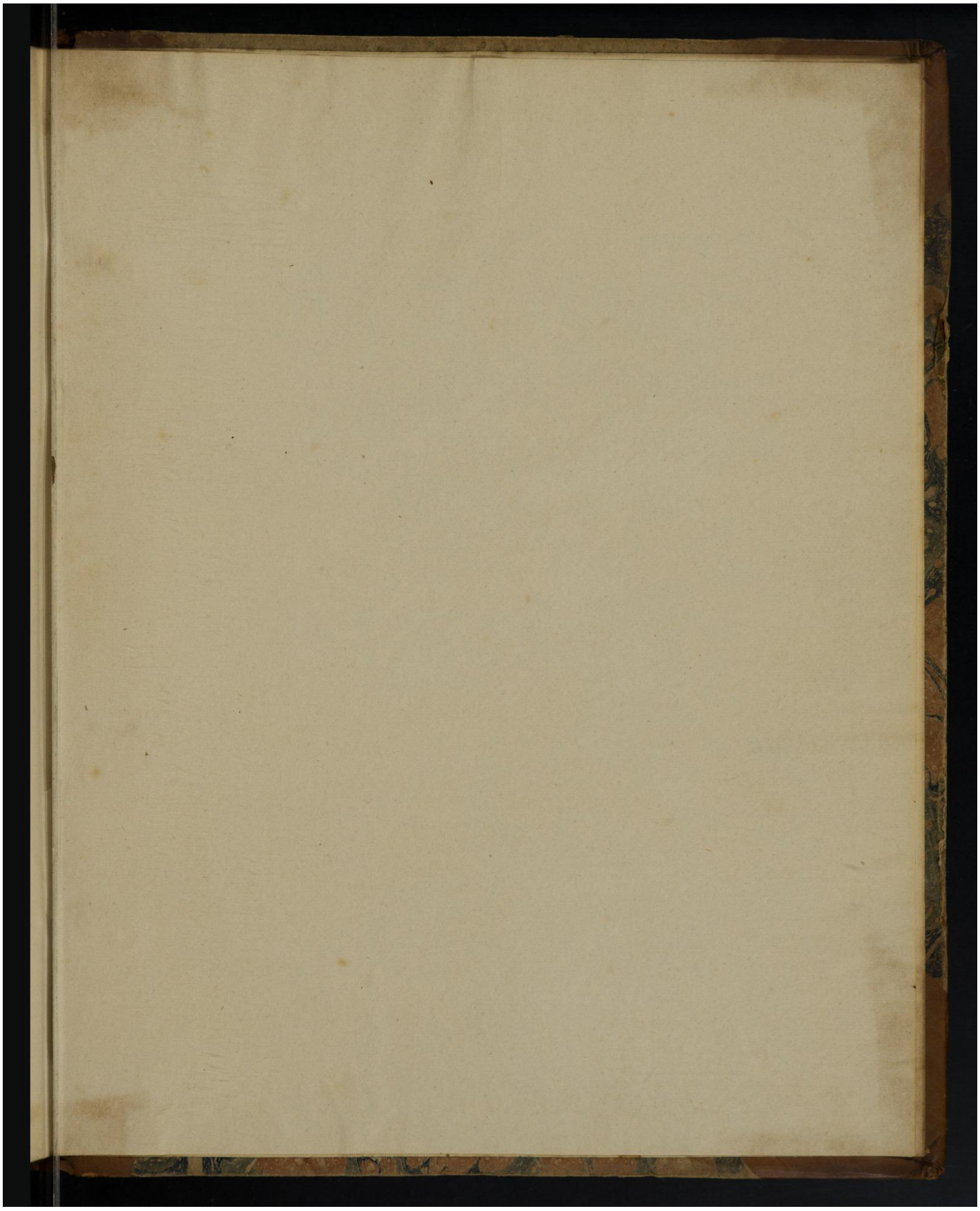


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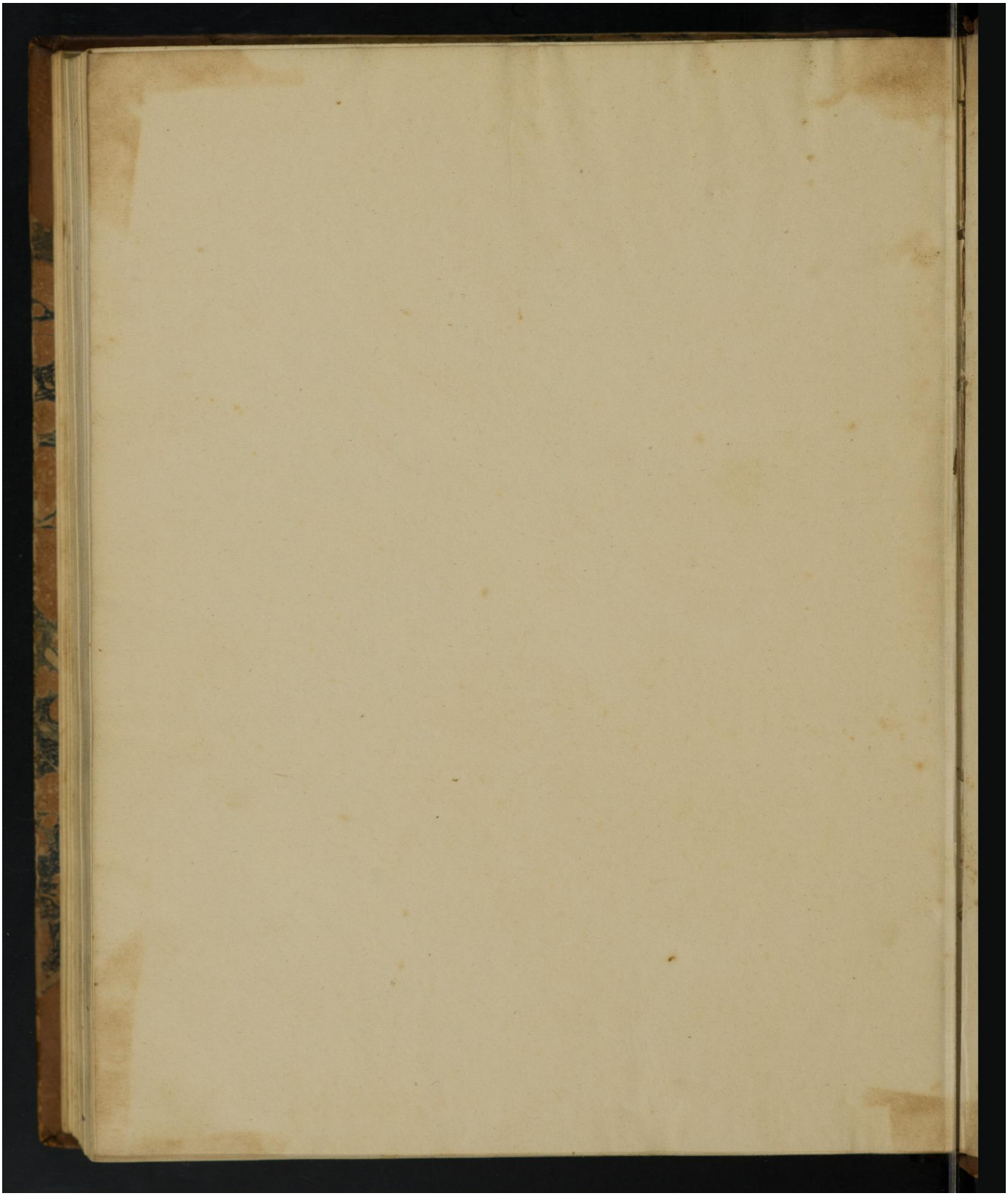


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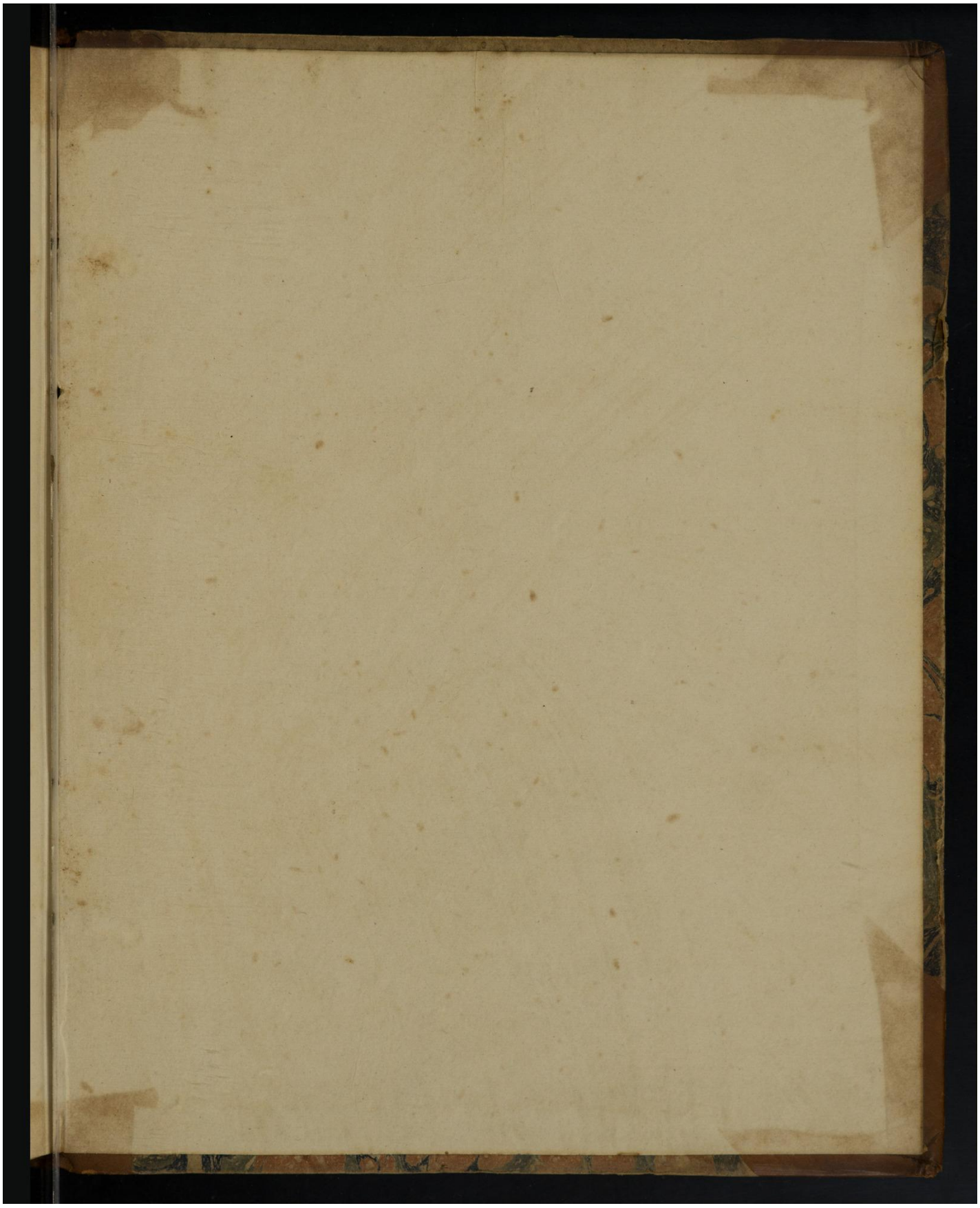


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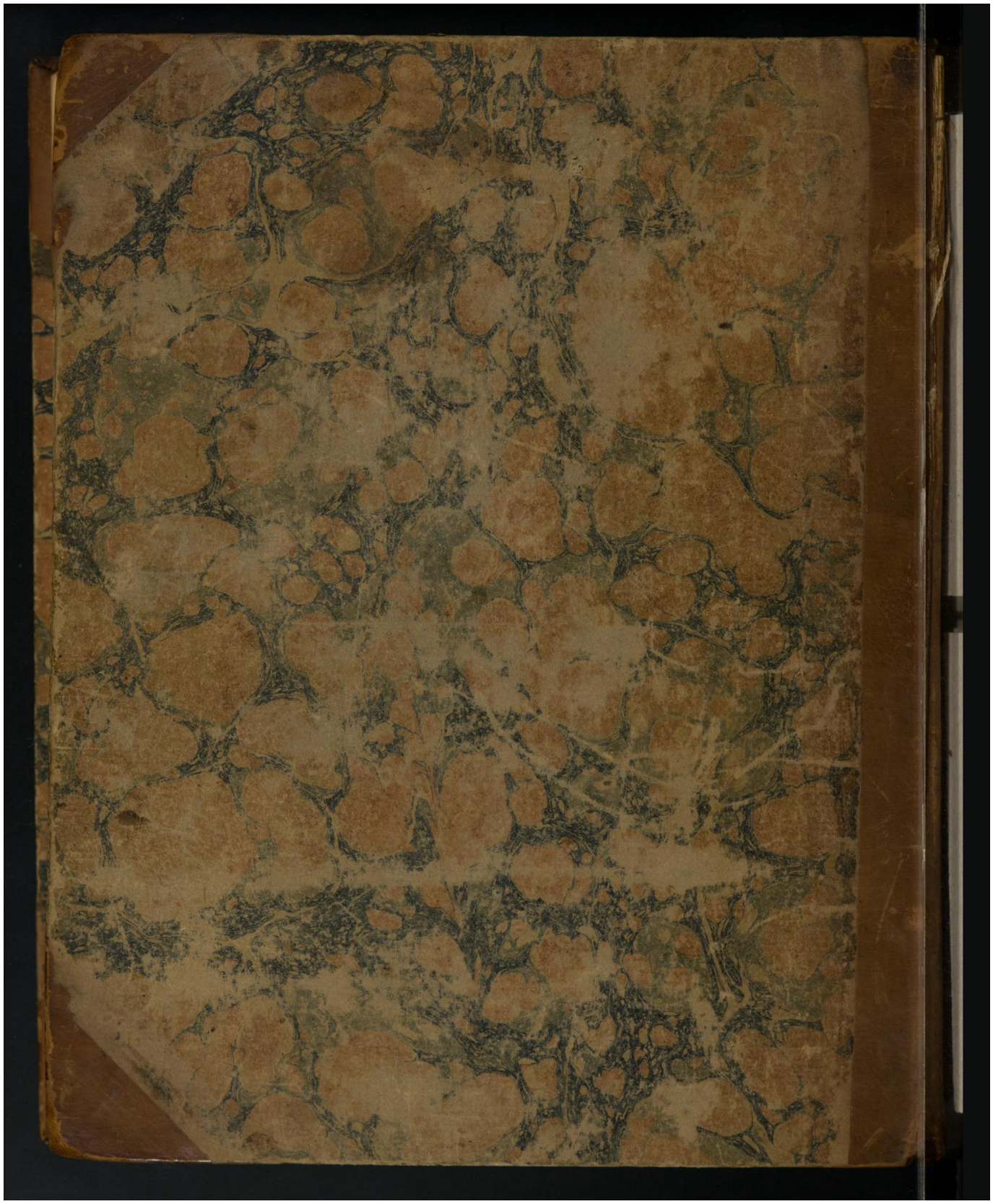


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