Charles Baldwin.

No. 99

Lectures

on

Municipal Law.

by

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Vigenti annorum Lucubrationes.

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Volume 1st

Lecture No. 1.

Municipal Law.

Law in its most general sense is a rule of action. 1 Bl. 38.

Municipal law is a rule of conduct, prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong. 1 Bl. 44.

The words "municipal law" are sometimes used in a more restricted sense. By the municipal law is meant the law of a particular state, as distinguished from the law of nations. Municipal law is that rule of civil conduct prescribed to the inhabitants of a state, which is binding on all persons and property within its jurisdiction, whether natives or foreigners. 1 Bl. 44.

"Prescribed" by this is meant, that it must be made known & promulgated. Ignorance of the law can not excuse a violation. — A law to punish persons for acts done before the passage of the law, is void. 3 Dallas. 386. if the intention of the legislature is clear

A retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. 7 John. 477.

The legislature are the supreme power in the government, & whatever they enact as law, is law, & no other power can question it. Every act of the legislature should receive a construction by which to preserve its constitutionality, if such a construction can be reasonably given.

to the very words of the law, that is to say, the common sense. 1. Bl. 59. 60.

3. To the rules to be observed in the construction or interpretation of a law. 1. The words of the rule are to be understood according to their known & proper import. Words of art are always to be understood, according to their acceptation in that art. As a general rule, that, if any words have a known & determined signification at common law or by a statute, expressed must be so to the common law to determine their signification in the construction of the statute. 6. Mod. 163. 1 4. Bac. 649 & 7. 17 & 19. Com. 513. 1. Bl. 59.

2. If there are any words, which happen still to be obscure, the intent must be resorted to, to determine their meaning. No private laws are made concerning the Commonwealth, they must be construed with a reference to the other 4. Bac. Ab. 58. 65. Com. Dig. 2d Ed. 102. 1. Com. 365. 1. Bl. 60. 1. Mod. 244

3. The words of the law are to be understood with regard to the subject matter. 1. Bl. 60.

4. The spirit of a statute is construction are to be [illegible] 1. & Mod. 344. 4. Bac. 662. 1. Bl. 61.

5. The last & most important rule is, that the words, spirit of the law are to be considered & when inconsistent with the rules of construction & from this must result the equity of the law, which is that of [illegible] the construction of that, wherein the law by reason of its universality, is deficient. But by the equity of the law I understand, not the construction of [illegible] with the secret spirit of it. Cowp. 714. 6. Mod. 61. & Bl. Com. 181. 1. Inst. 24.

Law. Nº 2

Municipal law is divided into two kinds - viz. the unwritten law, or the Lex non scripta, & the written law or Lex scripta.

1. The unwritten includes 1 the common law properly so called, 2 particular customs. & 3. particular laws observed only in certain places. The unwritten law is customary law, but, according to this division, the unwritten law & the common law are not the same. The common law is a branch of the unwritten law, as particular customs, which are a branch of the unwritten law are not common law. 1. Bl. 63. 67.

It is called unwritten, because its original & authority is not set down in writing, & there being no written memorial of it, it derives all its force from custom. 1. Bl. 64. 67.

The great branch of the unwritten law is the common law. All unwritten law is customary law. But common law, there one is found on immemorial usage - it is called general custom, it is called common law, as it is common to the whole state. 1 Bl. 63. 64. The common law is founded in its support - only on immemorial usage - by immemorial usage is meant an universal custom. For said no custom, general or particular is good, if its non existence can be proved in any part of the period of time between the reign of Richard 1st (1189) & the present time - this is the day of the law, & theory says - for a great part of the common law has been made since that time. 1 Bl. 65.

2. Inst. 253 Hor 2 Bl.

The common law is to be found in the records of courts of justice, in books of reports & traditional professional opinions, & in the treatises of learned men in the profession. It is then to be found in certain written memo-

Still however these memorials are not of themselves
but merely evidences of law. Record of parlia-
ment is known per se. So these memorials were
law per se, & proved as such (which) no. It seems to be
agreed from – but they are splendidum mendacium –
there is no authentick evidence of them but in records
of matter known. 1. Bl. 63. 64. 71.

A precedent is a former judicial decision on the
point in question – nothing short of this can be
called a precedent. All the sayings of learned men on
the opinions of a judge on the bench are not proper
ones; they are however prima facie evidence of what
is law. Precedents are always to be jealously,
strictly adhered & argued. They are not to be overthrown
because the reasons of them cannot be discovered. He
that would argue to a precedent must show not only
it ought not to be continued, the case proves
against him. 1. Bl. 69. 1. 6 John. R. 398 ? Doc. 415.

The customary law was built up by the court
of justice & the judges at Westminster. W. If there
be no unwritten law, there can be no regular way
for system of jurisprudence. If the the Lawmen
law was made by the courts of justice, it would
seem that it did not come within the province of
municipal law of which it is a branch, because
municipal law must be prescribed by the supreme
power. But to this it may be answered, that the
supreme power recognizes it, & when any way
custom is sanctioned by this acquiescence, it becomes
a law. Then rules of customary law are not laws, but
evidences of what the law has been, & hence become
evidences of immemorial custom.

The second branch of the unwritten law consists of
particular customs. The difference between this

the common law is explained by the term the custom.

A particular custom is a local usage. 1. Bl. 74.

This is called particular because it extends only to the inhabitants of some particular district. Other is the true difference between common law & particular customs, as to their general nature. But there are several rules that relate to particular customs only. 1st It is a general rule, that the particular custom must be specially pleaded as a matter of fact, that the existence of the custom must be shewn, & then that the case comes within the custom. Litt. Sect 265. 1. Inst. 175. 1. Bl. 76.

And as particular customs are to be specially pleaded, they are to be tried as matter of fact, & may be sometimes go to a jury. But if the custom has been before tried & decided in the court, it is not to be tried again. 1. Bl. 76.

There are two particular customs that do not come within this rule, viz. the customs of gavelkind & Borough English. These need not be specially pleaded. Co. Litt. 175. 1. Bl. 76.

Justice Blackstone ranks the Lex Mercatoria among particular customs, but I think improperly. The law merchant is no local usage. The mercantile law governs particular transactions within the realm, but is not confined to local limits, tis a branch of common law. 1. Bl. 75.

That it is not a particular custom appears 1st because it is not necessary that it be specially pleaded, as it must if were a particular custom. 2nd It is sometimes tried by a jury; particular customs are. 3rd It is not to be proved by witnesses; particular customs are. Where it is said that merchants may be examined

As to the evidence of customs, all that is meant to is that the judge may inquire of them, in the same manner as he would consult a dictionary, to find the meaning of some technical word. 2 Roll. Rep. 141. 3. Bl. 437. 2. Bl. 451. 461. 467. 2. Ben. 1218. 1224 or 1286. 1. Bl. R. 278. 4. T. R. 208. Cro. El. 13. 28. 109.

As to the requisites to make a good custom it is necessary 1 that it be immemorial. 2 reasonable. 3 certain. 4 peaceable an acquiesced in immemorially 5 reasonable or rather not unreasonable, 6 certain i.e. infallible, 7 not. compulsory 8 uncertain 6 compulsory 7 it must not clash but agree with other customs. 1. Bl. 76. 1 Bl. R. 278. 1 Insti. 113.

Customs in derogation of the common law are to be construed strictly, i.e. they are not to be extended by analogy or construction. 1 Bl. 78. 2 Bo. 24. 6 John 417

In England all customs must submit to the royal prerogative. 1. Bl. 77. 1 Inst. 15.

Lecture No 3

We have already observed the unwritten law consists of two kinds. 1. Law properly so called. 2. Custom.

In this kind of particular customs, some are those compleat by custom, & used only in particular districts, as the civil law common law 1. Bl. 67 7.

Some laws are binding in England by adoption, that is on account of any original colonial authority. 1 Bl. 78 80

The common statute laws of England, so far as they are binding in this country, derive their authority from a twofold source, i.e. sanction or adoption or usage - except when a statute of England is adopted by a statute of any of the states. It is true that our courts must not reject the common law of England, only in those

cases, when it is unjust absurd or inapplicable to our country i.e. the common law of Engd is prima facie the common law of this country. The reason why this ought to be considered thus, is, that in general it has been adopted & acted upon as our law by usage & common consent. This not precluded that all the common law of Engd is or ought to be adopted in this country, because those rules which arise from the royal prerogative cannot obtain here from the nature of the thing.

It has been made a great question, whether our law distinct from the common law of Engd can exist in town. The objection raised against the binding force of our judicial decisions was that they are not supported by immemorial usage. So far as the common law of Engd is not applicable to our situation, our courts are bound to reject it. Now it is perfectly clear, that every sovereign state must have a customary law of its own, without it there would be a failure of justice, & no uniform system of jurisprudence could exist. It is therefore indispensable that we have a common law of our own founded on our own usage. If we have a common law it must be without any reference to the positive rule of Engd concerning the reign of Richd 1st. Our customs are all founded as old as our government — for as formerly in Engd a custom of 60 years standing was good — we have a common law of our own, for our government has existed longer than this.

The 2nd branch of the municipal law is the lex scripta by which is meant the statute law or acts of parliament & &c. The ancient English statutes are not to be binding in this country as far as their common law is, i.e. they are prima facie the laws of this country. The reason why they are thus considered is, that our ancestors when they settled here brought over, as their birth right, so much of the laws as were then extant. To prove to you gentlemen, that these statutes are absolutely binding, not more force as far as applicable to their situation.

The English books are not agreed as to this, that these statutes were laws of nations. Others contend that modern English statute have any force here, but that ancient statute are prima facie evidence of new laws. Dick 411 Cit. 1 Bl. 101 12 Rep. 1. 62. 2 P Wms 75. Kirby 367. 1 Chicken Bl. 388.

It has been determined that by far the greatest portion of English statutes have never been adopted in this country. Many of these statutes are here adopted as reason - our courts of justice have adopted them so that what in England is termed common law, may here be called statutory law. As to cases on the case of bottomry can be no cause to the common law - they were made in England by statute & adopted in this country as common.

Statutes are public, private general or special. 1 Bl. 85.

A public statute is one that regards the whole community.

A private statute regards private persons or particular persons. 1 Bl. 85.

The application of this distinction is extremely difficult. The distinction is by no means general, but perhaps as general as can be given. Most public statutes do regard the whole community as the statute of Limit, consequently there is no difficulty there. But in many cases statutes relating to particulars & in the terms of them to a class of men are considered as public statutes. The rule of discrimination seems to be this viz. If the class of persons to whom the statute relates amount to a genus, it is a public one, but if it amount only to a species, it is a private one. But sometimes happens, that a genus may only be a species of a superior genus, in which case the rule is, if the class of persons contemplated by the statute, admit of a subdivision or rule species it is a public statute, if not it is a private statute. So a statute made relating to all mechanics is public, for the term mechanics is a genus, admitting of subdivisions or species. But if the statute relates to all incorporations it is private for this admits of no division but only individuals. Statutes qualifying persons to receive public offices are public;

but / concerning sheriffs is private. 4. Co. 76. 11 Vine. 496. 2 Ray 120. 3 Bl. 1. Bl. 86.

Every statute in Eyd that concerns the king is a private statute of course. 4. Co. 77. 8. Co. 28.

A statute giving a forfeiture to the king is public; every statute concerning public revenue is a public statute. 4. Bac. 10. Co. 57. Rowton 65. 12. Mod. 249. 613.

Lecture. No 4.

Statutes are again divided into such as are declaratory of the common law, & such as are remedial of it. A declaratory statute declares or promulgates what the common law is or has been. Hence they do not make laws, but promulgate those which are already made. Remedial statutes always introduce a new rule, & this is by supplying any defects — or abridging any superfluities in the common law. All remedial statutes thereby abrogate some rule. Our statute de excambio the terms of land is declaratory; but statutes in general are remedial. 1. Bl. 86.

Again, all statutes are divided into penal & remedial or beneficial, which is the most proper, though the word remedial is here used as contradistinguished from the word penal. A statute inflicting a punishment (vindictam) of any kind is penal. The word penalty in its most extensive signification is synonymous with punishment. But it is now used in a more limited sense, meaning a mulct, forfeiture or amercement. 4. Bac. 450. Bro. Jus. 414

There are certain statutes which operate as penal, but are not treated as such. All statutes which give higher remedies than natural justice requires, are penal, without being so considered. Salk. 212. 1. Wills 125. Bro Jus 414. All statutes then which are not penal are remedial

on nemine al. 1. Hils. 126. 3. Lo. 7. 7. S. R. 257.
Statute allowing costs in any case are penal, Costs were not known at common law, they were introduced by the statute of Gloucester in the reign of Edward 1st, & therefore are considered as a punishment to those who pay them Salk 205. 1 Bac. 511. 4. Mod. 7 Mod. 367. Carth. 113. 12 Ed.
But although statute inflicting a penalty of any kind are penal, it does not follow that a prosecution to recover this penalty is a penal action, for an action brought by an informal, to recover a penalty in his own name, in right is a civil action. The statute is penal but the action is civil. Debt is the proper action to recover a penalty. The form of the action is to determine whether it be civil or criminal penal. This distinction is very important, for a penal action is not within the statute of Perjuries - consequently the declaration cannot be assumpsit while civil actions are not so, testimony but such as is under oath will be admitted in a penal action. Consequently the affirmation of a Quaker is inadmissible in a penal action, while in a civil one it is. 1 Hils. 125 Comp. 382. 4. S. R. 753. 7. S. R. 257.
Statutes are divided into affirmative & negative. Affirmative statutes are couched in affirmative terms & negative terms in negative terms. This distinction is important only as it respects affirmative & negative statutes.
1 Blac. Ab. 4. Bac. 64.
Every statute in Eo commences its operation, from the first day of the session of parliament, in which it was enacted unless some time is appointed particularly for it to commence. Hence many statutes have a retrospective operation. But it is usual to appoint a time when the statute shall commence its operation. 2 Ray. 371. Holt 111, 222 309
From hence it follows that if two affirmative statutes are made on the same subject, & running the same general words & them was principally, & hence if they are so repugnant to each other that neither can stand, each shall repeal the other

though this is denied in some respects still it is law. This rule supposes, however, that no time is appointed for the statute to take effect. 4. Bac. 636 or 336. 17. Vin. 520. C. 11. 2. 187. This rule of English law has always been explained in Com. Statutes here do not take effect till a reasonable time has elapsed after their creation. The rule now is that no statute shall take effect, till the close of that session of the Legislature in which it was enacted & the respective citizens have had time to return home.

I will now treat of the construction of stat. law.

The object of construing law is to ascertain the will of the law maker. Hence the rules to be observed are such as are intended to assist the mind in ascertaining what the will of the law maker was. In the construction of statutes which are not penal, three points are to be considered, the old law, the mischief, & the remedy. 3. Co. 76. 1. Bl. 87.

The particular rules of construction, I have already given you, & those rules are to be observed in all stat. laws. But though these rules are to be observed, yet penal statutes are to be construed strictly - i.e. according to the will of them. This rule is not well expressed nor well explained - it operates on one side only. Now the meaning of the rule is, that penal statutes are to be construed strictly, or against the [illegible] sense of [illegible] him. The rule is in favour of the prisoner altogether i.e. no person shall be adjudged guilty who - a penal statute, unless he is so within the letter of it - & however strictly he may be so within the spirit of it. So if he is not within the letter, you cannot bring him within it - & on the other hand, tho a party is within the letter of it, he shall not be considered so, unless he is within the reason & spirit of it. The rule then amounts to this, a judge may resort to the spirit of a law, to take a party out of its penalty, though he cannot resort to the same to bring him in it. 1. Hawk. 53. 61. 116. 131. 138. Rom. 17. 170. 197. 225. 233. 310. 387 Rlond 465. 4 Bac 661 1. Haw. 168. 1. Hale 324. 570. 685. 1. Root 82. 163.

A statute inflicts a penalty on a person who shall do such or such a thing, yet in some cases matters or some events are not within the statute. So if a statute inflicts a penalty on any person who shall let blood in the street, a surgeon who bleeds a man there is not within the statute. If the repetition of one offence inflicts an additional punishment, an additional punishment, the offender is not liable to the accumulative or additional punishment, unless after he has been convicted of the first offence. 1 Hawk. P. C. 168. Rawl. 465. 4. Bac. 661. 1. Hale 324. 570. 665. 1. Rast. 52. 163.

To subject a person to the accumulative punishment he must have committed the second offence after conviction of the first. Mr Yates. This is proceeding too far, giving too liberal a construction.

Lecture N° 5.

The rule of strict construction in penal statutes against persons, is not universally observed. Thus by the statute of Edward 1st selling a master is made felo de se, the killing the husband by the wife, is not mentioned yet it extended, so in one or two other cases. Rawl. 66. Fox 6—71

But the intention of the legislature must be the rule of construction in criminal as well as civil cases. 1. C. R. 3.

Penal laws of one country cannot be taken notice of in another, so as to have any effect as to the punishment these laws are local not transitory. Courts of one country state cannot give the penal laws of another in criminal cases. 1. H. Bl. 123 1 & 3 T. R. 734. Hopkins 10

The penal laws of every country extend through the dominions of that country, and the courts of each country punish offences committed within the limits whether a foreigner or subject. Hopkins 10

When the penalty or forfeiture is incurred by the continuance of an offence or in consequence of a neglect or delinquency only one can be sued for at a time. But you may proceed

would say no penalty should be recovered, except for an offence which was committed before one convicted. 7 John. 134. 1 Caines 92.

But in all remedial statutes any thing is to be construed liberally, consequently the letter may be enlarged or restrained in order to obtain the intention of the legislature, so as to include cases not within the letter (to be read such as are within the letter - It is a law relating to executors, it may be extended to executors of administrators, for the reason is the same. - By an by the statute of Henry 8. all persons were authorised to devise, viz - outlaws, persons attainted, lunatics &c were excluded. Cro. E. 141. 4 Co. 124. It is settled that a statute taking away a common law remedy is to be strictly construed. Thus the statute of limitations taking away the common law remedy is to be strictly construed. So in assum. where money is received with the assumpsit the court have refused to be bound in the statute of limitations. 10. Mod. 282.

Remedial statutes long title are not to be construed so as to extend the meaning beyond the common letter, otherwise there would be no end to construction. E. 4. Stat 34 Henry 8. the construction itself might be construed literally & so and in practice Salk. 534. Carth. 396.

Statute partly penal & partly beneficial are to be construed strictly in part & liberally in part. i.e. strictly when it operates on the offence. Strictly when it operates against the person. So the statute against frauds which are generally penal, here when the statute acts on the offender & inflicts a punishment, the construction is strict, but when it acts on the offence by setting aside the fraudulent transaction the construction is liberal. 1 Bl. 44. 3. Co. 82. Plowd. 87. The different parts of a statute are so to be construed that if possible, the whole may stand. [illegible] construction is not bound. But a saving or proviso which is inconsistent to the body of the statute

no. nor. If the enacting part is general. E. g. a statute making the subject of the king saving the right of ... 1. 1. bo 47. 1. Bl. 81.

If two statutes repugnant to each other exist the latter no part of the former repeals the former. 11. Rep. 63. c. Bac. Abr. 287. 1. Inst. 111. 115.

So if the latter part of the same statute is repugnant to the former part, it shall be rejected the latter repeals the former in proportion to their repugnancy.

This is different from the case of saving ad repeal because this may proceed from mistake the statute be accounted for from inadvertence. 11 co. 63 Bac. 638. When the common law & the statute differ the common law always yields. The reason is the statute cannot repeal, since the time of making it can be ascertained the common law cannot be. Hence the statute law is declared of higher authority. 4. Bac. 638. 641.

Every statute is in its nature repealable, since it not to be presumed be no continuance of sovereign power. The legislature must be the judge of this & if any - repeal - is by an act of the legislature, of course a future legislature that shall never be repealed is void. Hence the power of subsequent legislature. 4. Bac. 638. 1. Bl. 90.

The law never favours the repeal of a former statute & implications, contrary the explication arising from inconsistency or inconsistency. 11. 60. 63. 10. c. 101. 111.

It must be observed that statutes do not repeal the common law. If there be no words, for prevent by such statutes employ negative of the common law may be maintained with it.

6. 1. The common law retains that maxim to the defendant 6 rep. & the statute 19 rep.

Upon repeal of a penal statute expired a temporary

wise than the common law it repeals it of course. 4. Bac. 641. 4. Bac 2026. 10. Mod. 337 1. Sw. 111. 115.

Affirmative statute sometimes give an accumulative remedy. & then it does not abrogate the common law. 4. Bac. 641. & tho it gives double damages for waste the party still has the original party may sue at common law. 2. Bac. Ab 3. 606.

Again it is said that an affirmative statute does not repeal another. This I think incorrect. for an act will always repeal another. if it is inconsistent with it. 2. Sho. 30 1. Bl. 91.

If a statute inflicts a higher or lower punishment for a crime than a former one, the former is repealed. 4. Bac. 654. 1. Sw. 2026. Leach 193.

When a statute inflicts a higher punishment for a crime than common law, the common law is not abrogated. but when it inflicts a lower punishment the common law is repealed. this rule is founded on the humanity of the law. 4. Bac 654. Leach 193.

Whenever a repealing statute is itself repealed, the statute first repealed is revived. 1. Bl. 90.

If one statute is to be repealed by things to be done at some future period, both of them should be repealed the first at the time, & the second when the first is to be repealed. 4. Bac. 64.

If a statute which has been repealed be revived then the repealing statute becomes of no force. 2. Sw. 646. 4. Bac. 644.

In construing a statute the preamble is to be regarded. 8 John. 327. 333. Lecture 4th.

. is a rule when a statute is repealed [illegible] all acts done under that statute — during its continuance are valid.

When a statute is declaratory and ab initio all acts void are void. this even is no contrary to the first principles of jurisprudence. 4. Bac 634. Leach 179.

If the statute is repealed by another, not such repeal on the same subject, such provisions as [illegible]

[illegible] the former statute, not repugn. 3. East 201

An agreement made in low can have no relation to [illegible] yet, statute, sometimes have [illegible] statutes, [illegible] of course, if a statute [illegible] act, & upon judgment is given against the [illegible] it is repealed, & a new case is made on the case not [illegible] the [illegible] cannot be punished. The cannot [illegible] the [illegible] law, for it was not void, nor in the [illegible] for it was not made when the [illegible] was committed. He may however at the [illegible] punished at common law. 1. Vent. 163. 1. Real. 53. 1. Br. A. 551.

The [illegible] was recognised in the court court of [illegible] in the case of the [illegible] A [illegible] covenant to [illegible] at the time of [illegible] but is afterwards [illegible] by a statute, the covenant is void [illegible] 192. Ld. Ray 1352. 1. L. Ray 417 331 in 327. [illegible] 91 B. & Aust 211. 8. C. R. 261.

If one engage, not to [illegible] & it is [illegible] by a statute the covenant is [illegible] law a statute requiring all citizens to [illegible] of [illegible] engaging against the [illegible] between an apprentice & his master. Salk. 198.

Common usage of the [illegible] to be [illegible] with the statute, which enacts that the [illegible] shall not be impaired by a statute. For by that statute in the [illegible] of it is meant, that no statute, in the [illegible] of it, shall impair a contract.

If one covenants not to do so or [illegible] & a statute [illegible] it [illegible] the covenant is not [illegible]. 1. Salk. 198.

In the two former cases the, the covenants [illegible] the statute, but in the latter case, performance is not inconsistent with the law.

If a contract become illegal by the statute, it must

...ction of statute is in force, a new act respecting statutes, ...
...will not make the contract good — thus in the case of ...
... 1 H. Bl. 64 & 165.

So, if by the casual & partial performance it might be ...
... a total, yet a partial performance may be made ...
... consistently with, & required by, the provisions ...
... & this partial performance may be ...
... on a count of quantum meruit, ...
... on a count of law. The contract cannot be ...
... before the passing statute. 1. Ent. 209. 210. 211. ...
... 1. T. R. 164. 2. H. Bl. 163. 5 Bl. 1. Com. Law. 31 — 211.
2.

The case is the same where a complete performance is ...
... impossible by an act of God — thus if a person is to carry 1 lb from London, & is hindered by [illegible] ...
... it he shall be bound to convey the remaining part. ...
... Saund 2 & 3. 1. Bac. Abr. 144.

Statute requiring what is impossible. 1. Bl. Com. 91.
For now that Statute contrary to the law of Nature is ...
... This principle is admitted in our Courts. Bl. ... ...
... matter of conscience it fails. Judges are bound to follow ...
... empower from which may be contrary to the law ...
... 5. Co. 118. 1. Bl. 71. 91. Mod. 57 — 87.

... acts in the constitution United S. & if they ...
... act contrary to the constitution are void. The ...
... object of the constitution is to restrain legislative ...
... powers. 2. Dallas 293. 271.

When a statute enables a court to do a matter of justice ...
... a party is bound to do it. 5. T. R. 632. Burg. 1 ...
... 4.

Lecture N° 7.

... statute makes a new law for an old offence, & enacts ...
... a new mode of remedy that only, it is construed by ...
... the ordinary course of common law ...
... to make that new remedy ...
... the old is [illegible] because the ...

1. Hawk. b. 1. 114. 7 Co. 118. Salk. 564. 2. Bac 102.

But if a statute creates a new offence, & a new jurisdiction for the trial of it, the court of ordinary criminal jurisdiction is [illegible].

The authorities are not agreed upon this subject. It appears to me that the court of King's bench would be [illegible]. 1 Hawk. 1. 2. Hale 5. Comyn. 524. [illegible] 640. Hawk. 302.

If a special authority is given by statute to [illegible] certain persons affecting the property of individuals, that authority must be strictly pursued, & it must appear upon the face of the proceeding to have been strictly pursued, else, it is not valid. Comyn. 26.

When a statute enables a certain portion of men to transact business by a vote of a majority, & [illegible] a certain number of them a quorum, [illegible] question whether a majority of the quorum can bind the whole, [illegible] the better opinion is that it will not.

Hence [illegible] have no power but such as is expressly given them or [illegible] by [illegible] to them. [illegible] 11, 60. 30. 3. T. R. 574. 4. T. R. 811. 682.

[illegible] that a private authority created by a statute [illegible] to one two or more persons [illegible] jointly [illegible].

But the case of a power of a public nature is [illegible], the act of a majority [illegible], the whole number being present. 2. Bac. 1018. 1. B. & P. 229–236. 3. T. R. 592.

But the above rule [illegible] not affect corporations, for when a corporation is [illegible], a majority of those present can act for the whole, [illegible] who [illegible] are disregarded. 2. Atk. 202. 212. 1. B. & P. 236. 7.

[illegible] void & voidable [illegible] very different. [illegible] a mere nullity ab initio. [illegible] voidable [illegible] by [illegible] of law. [illegible] a [illegible]. [illegible] of [illegible] that the [illegible].

[illegible] as to the construction of [illegible] upon the subject of the legislature can be obtained, by reference to the words used, to be the same as possible, but it is to [illegible]. But it cannot be [illegible] must have its literal construction 1 Burr. 346. 3 Co. 60 b. 2 Co. 1. Ro. Ab. 877. 2. 5 Co. 60 b. 1 Co. 310.

The rules as to the construction of [illegible] are the same in courts of equity as in courts of law, but the power of enforcing the law is in many cases different. In suits in the former for the construction of [illegible] covenants, bonds, mortgages &c. 3 Ch. Ca. 64. 2 Vern. 104. 1 Salk. 27.

Reading Statute] The mode of proceeding upon the [illegible] to plead a statute, nothing more is necessary than to say, that the parliament at [illegible] Statute of Limitations — nothing more is necessary than to plead, &c. [illegible] 3 Co. Rep. 11. 221.

Construing an Statute is a different thing from pleading a statute. Construing upon a statute consists in an enquiry [illegible] it or against the form of the statute in such cases provided, or by construction of it. Pleading a statute, is to quote the enacting clause of the statute, to recite its contents, & to conclude upon it as an affirmative thing, but often conditionally.

Lecture N° 5.

[illegible] to be noticed, as a matter of public right. But [illegible] no notice of private statutes unless they be set forth in the pleadings.

The rule [illegible] common principle that a bond or other [illegible] 6 Co. 46 — 76. 10 Co. 57. 1 Leo. 221. 1 Roll. 383. — 877.

[illegible] under any rule of pleading, the [illegible] engrossed, must be pleaded [illegible] 5 Co. 119. the [illegible] and the plaintiff [illegible] 2 Roll. Rep. 81 [illegible] 1 Lev. 111. [illegible]

Stat. must be pleaded. 4 Co. 76. 10 Co. 57. 1 Roll. Ab. 36.

In order to compel a party to recite a public Stat. yet a mere case need not be stated. 1 Bac. Ab. Pleas. C. 6. 4 Bac. Ab. 474. 3 Co. 76. 176. 8 Co. 153.

But the rule laid down by Hale is that a mere recital is not fatal unless it be of the enacting clause. 1 H. P. C. 358. 2. Hawk. P. C. 476. 17 Johns. R. 241. 1 Salk. 366. 2. Hawk. P. C. 476.

The effect of a recital of a Stat. that is not expressly enacted is to give good in the face of the statute a right which is expressly taken away by it, thereby making the recital a private statute, but this is not universally true. A pub. Stat. may, when pleaded to defeat a specialty must be plead. If to debt on bond the defendant pleads that the plaintiff would not take the specialty, he must plead it, but need not recite it. 1 Salk. 365. 1 Mod. 72. 3 Keb. 311. 317. 1 Co. 85. 117. Hob. 72. 3 Keb. 311. 317.

One who wants to found his action on a private act must plead it - for the jury must state the particulars of his claim - but he need not recite the public Stat. He may refer upon or other wise plead a Stat. when it may also be necessary to recite it, need not recite verbatim or the substance is sufficient. 5 T. R. 372. 1 Hawk. P. C. 57. But a mere necessary recital the punctuation or immaterial of the title has sometimes proved fatal. 3 Bac. Ab. 4. Bac. 659. 654.

A mere recital of a private act may also be so fatal. Modern cases say it is. But it must be material to be made always given. 1 Hawk. P. C. 71. 11 - 324. 6. Mo. 62.

If necessary to recite a private act, a permanent one to 4. Bac. 654. 2. Hawk. 192. 3 Co. Inst. 211 Bac. Ab. 224. 171.

When a pub. Stat. is pleaded the other may plead nul tiel record but not one non-existence of such a statute as

matter of fact to be true by a jury. But not but record can never be pleaded to public statute for this is a matter of fact, & must be tried by a jury, but the court are to determine whether a such statute, &c. 6 Co. 28 4 Co. 76. Cro. Car. 352 2. Ch. 57. 4. Ba. 695.

In declaring upon public statutes the pleader must plead them not recd not set out them — so plead a stat. as reciting more than to state the parts that concern their 13. Vin. 5. 4. 1. Ro. 3 Co. 2. Co. 1. Cente. 344.

To this rule there are these exceptions 1. If the party to a remedy both at com. & stat. law he may plead in action on the stat. must count as it stands & must not be drawn, that he is bound to pursue how than. There are many cases of this kind.

Bacon in his title of Actions has many rules 1. Com. 584 Salk 183. 4. Bac 14. rules 2. 4 Co. 77.

2. In an action on penal stat. the pleadings must on the stat. the words of this rule is not known to the court though they may see ect. 2. Hawk. 546. 7. T. R 521. 2. Salk. 333.

If a Pub. stat. gives a new form of action without any to com- ence, it must be counted on, & the pleadings must conform upon it. This is the case when a new form of action is given. 4 Bac. 646. 13. Vin. 504. 2. Salk. 333. Salk. 503.

But when a stat. gives an action or remedy to a new case it not necessary to count upon it. 1. Com. 290 13 Vin. 503. 2. Bac. 433. Dyer 83. 85.

In action on the stat. of mills & commissioners or highways & penal mills is stated it not necessary to count upon the stat. — but when the stat. does not expressly give any remedy at all, it not necessary to count on it. Salk. 182. Salk. 212.

If any statute prohibits an act & another inflicts a penalty both must be counted on. Rowl. 206. 2. Salk. 333.

When there is an offence against com. & stat. law you may in an indictment lay the offence as against both but it must be done in two counts. There are many cases, where there is an offence at com. law, which is made so by statute. Bac. Ab. 235.

If a temporary stat. has expired & is continued by a new act, reciting in the first is sufficient. 2 Hawk. 1066. If the words against the form of the statute" are made in an indictment for an offence at com. law, & not by stat. they will not vitiate the plea - they are mere surplusage. 5. T. R. 142. 1. D. 362.

If a contract good at com. law by parol, is by stat. required to be in writing, it is not necessary to declare, that it is in writing - the evidence may shew it. Such a stat. introduces a new rule of evidence, & no new rule of pleading. But if such a contract is pleaded in bar it must be alleged, to be necessary, to shew that it is in writing 12. Mod. 540. Bul. N. P. 279. 3. Bac. Ab. 10 Bac. 490 & 500 com. 28.

But if writing is necessary to the validity of a written at com. law, it is necessary in the pleading to shew the contract to be in writing. 2. Wils. 376. Esp. D. 307. Bro. Can. 271. 382. Barth. 279. 382. 5. 44. b.

Lecture 10.

When a stat. makes writing necessary to the validity of an act, not it is unknown to common law, it must be averred to be in writing, as in the case of misc. of lands. 12. Mod. 540. 4. Bac. Ab. Tit. Pl. 511.

In pleading stat. the exceptions in the enacting law must be negatives by the prosecutor. 2 Burr. 1124. 1128. 1137.

But an exception in a separate clause, need not be negatived by him who prosecutes - the advantage may be taken by way of defence. 1. T. R. 711. 144. 1. Bac. Ab. 154. Dong. 331. 6. T. R. 551. 1. Bac. Ab. 41. 4. T. R. 83.

For exceptions in the negative clause, you [illegible] the exception in the clause on which you build - but exception in a proviso

...tutive clause, or not, to be the test in applying the
law as to ... Where there are two remedies
in any case, one given by stat. either of them may be pur-
sued. 2. Hawk. 302. Bench 235. 2. Bac. 711. Salk. 45
Comp. 548. 644.

In case of the king if the pltff pursues the stat. rem-
edy & cannot support his action, he may in the same
suit resort upon the com. law remedy. 2. Bl. R. 1
1. Hawk. 311. 2. 10 302. 356. Salk. 212. 5. T. R. 551.
contra. 5. Co. 33. Cro. E. 131. 367. 677 con).

That which is no offence at com. law, is so by stat.
& particular course of proceeding is pointed out by
a stat. that mode must be pursued & no other. 2. Ro-
man. 676. Salk. 46 con 45. 7. Co. 36. 2. Bac. 306. 4. Bac. 325.
But this rule holds only in two classes of cases viz.
1. When the particular mode is prescribed in the forbid-
ding or enacting clause, so that the mode is incorpora-
ted with it. 2. When there is no prohibiting clause,
but the statute says whoever does this or that shall
be punished in such a manner, there is no offence created by
the terms of the statute. But when the mode of pro-
ceeding is pointed out in a separate substantive clause
the rule does not hold, & this is generally the case.
1. Bac. 544. 2. Hawk 302. Salk. 4. T. R. 104.

And if an act is prohibited by the stat. & a penalty
the stat. prescribes a new mode of proceeding, still
the com. law mode is not precluded — the stat. is only
accumulative remedy. 2. Bac. 306. 4 Bac. 544. 2. Hawk 302
4. T. R. 102. 104.

A stat. creates a right or an offence & gives no remedy
the com. law methods etc. 1. Bac. 544. 12. Vin. 414
418. 3. Lev. 230. Comp. 595. 10. 70. 11. 4. Bac. 545.
To this head the execution of any powers granted by stat.
is an offence at com. law, & the writs issued are such
as ought to conclude "contra formam statuti".
This may prosecute penal statutes.
A criminal case can be prosecuted by an individual as the
private might on a penalty, for the public is the party
injured & the same privileges as there. 2. Hawk 306. 4. T.

The stat. law may enact an individual in his private right to prosecute for an ff. given to the public — but this is for the law. 5 Bac. A. 130. 134. 2 Mich. 221. 247. 260. 133. 134. 242.

This practice has now been altered in some. In Engd an individual can prosecute even in felonies. A qui tam action, is one in wh. a penalty is brought partly for the individual & partly for the king. 1. Hawk. 251 1 Bac. 37. 3. Bl. 162. 4. Bl. 304.

It is carried on like a criminal case. It is like a civil case. 3. Bl. 161. 40. 80. 304.

Qui tam actions are almost universally founded on — penal stat, & are merely their creatures. 1. Bac. 37. 2 vo. 4. 677. 2 vo fm. 360.

A popular action is one given to any person who will sue for the penalty incurred by a breach of the stat. A qui tam action is not properly a popular one, nor vice versa. 3. Bl. 160. 2. Bac. 437.

A right to prosecute qui tam is often given to the party injured only. If the whole penalty is given to the party who will sue, tis a popular not qui tam.

Wherever a stat. prohibits an act for the benefit of an individual, he may have a civil action for the — Stat. 1. Hawk. 249 6. Mod. 261.

If an individual is civilly injured by an offence prohibited by a statute, he may have his civil action on the stat. 4. Bac. 643. 10. 80. 75. 760. 6.

When the stat. inflicts a penalty for disobeying any law of his right, & does not appropriate it, it belongs to the public. 1. Sunt. 154. 1 — 3. 2 Inst. 231. 230.

If the law gives a private individual an injunction to the public a stat. gives a penalty, & point to some who shall sue, any person may prosecute qui tam — 4. Bac. 19. 10. 1. Bac. 37. Lyc. 24. Laws 222 n 232. vers. 1. 232 n 237.

When the stat. is merely declaratory of the rights only no individual can prosecute qui tam, only the penalty in part of it goes to the prosecutor. 2. Hawk. 477

1. Bac. 31. Abr.

If a stat. provides an offence against the common law & gives a penalty, the party may have a qui tam action, tho the statute does not give the party the penalty in any part of it, for though it does not provide that he shall recover his own damages. This case is not well settled, tho the Courts think, his qui tam law. 2. H. 377. 1. Bac. Abr. Bar. 37. 4. Co. 13. 12. Co. 134. Bro. Ab. 135.

When a penal stat. gives expressly the whole penalty to the party, he need not join the king but may sue alone. 1. Keble 1. 227.

In conformity to these rules qui tam actions are given in cases of theft, forgery & many other crimes.

Lecture No 10th

When a law gives to the king for a misdemeanor, to the party injured, the party may recover damages on a conviction of the offender in the criminal. This is to be understood if it is not in the worst manner. Cro. Eliz. 490. 1. Bac. Abr. 5. Co. 111. 113.

When no form of action is prescribed for the recovery of the penalties, debt is the surest action but actions of assumpsit may lie. Money had & received is a good action for the recovery of a penalty. Cowp. 174. Burr. 7. 4. Bac. 659. Carth. 32. 2. Lev. 252.

When part of a penalty is given to the king & part to the prosecutor, if the king pardons the party he may have his remedy against the informer in this manner. mistake in pardon. 2. Hawk. 237. 10. Co. 64. 7. T. R. 436.

A bare qui tam conviction or acquittal on a qui tam prosecution is not to be pleaded in bar of subsequent prosecutions for the same offence. 11. Co. 64. Bro. Jan. 460. 1. Bac. 51. 4. Bac. 643. 3. Bl. 262.

There may be a second prosecution as where

by the grace of the operation of law of the action in question, there will be no bar to the new prosecution.

The pendency of a qui tam may be pleaded in abatement of the second same, say it was by plea in bar but this is incorrect. 1. Roll. Ab. 61. 3. Bac. Ab. 1423. Bro. t. 261 Holt. 203. 2. Hawk. 375.

A person bringing a penal action under a penal statute has no right to it, till he has commenced the action. By doing this he acquires an inchoate right, prior to the judgment commences. But here, before the action is brought, the king may have the whole penalty. 2. Mod. 11. 3. Mod. 60. 2. Bl. R. 937. 938. 2. Str. 938. 3 or 2. Burr. 1423. 2. H. Bl. 311.

After a qui tam is commenced, the king cannot take away the right of the prosecutor to the penalty, or prevent him from proceeding to recover it, tho the king may release his whole right to it. 2. Bl. 937. 11. Mod. 65. Hawk. 376. 11. Mod. 136. Skelton 82.

In case of a remedial stat. the party, as soon as the injury is done, has a inchoate right to compensation or damages, for the injury. 2. H. Bl. 311.

When a stat. gives a part of the penalty to the poor or to the king must discharge the forfeiture right before the suit is brought. 2. H. Bl. 311.

3. Mod. 27.

Before the stat. 4. H. 7. it was usual to the prosecutor could not release part of the penalty after the conviction. But occasioned many prosecutions for the conviction, to prevent a recovery. Stat. 4. H. 7

provides, that no common money in a popular action shall be a bar for any other prosecution of the same offence, if that release after conviction is void. Mod. thinks that by com. law, a sham qui tam will be no bar to a second action for the same offence. Therefore that stat. 4. H. 7. is in affirmance of com. law for the first proceeding is void. 1. Burr. 375. 395. 3. Co. 12.

A bond for release of the penalty after judgment void com. law bars the king from proceeding for

for share of the penalty. 11. c. 63.
Nor is the stat. 14. Eliz. the prosecution may not commence the prosecution at all, till the answer is made in court, under pain of the perjury. 1. Bac. 42. Hawk. 127.
1 Burr. 396. Peake, 14. 5. T. R. 98.
If a plaintiff in a popular action dies with process in force, the king may proceed in the suit. 5. Co. 48.
10 Jac. 11. Co. 65. 3. Bac. 162.
Persons pursuing these and a number of violating a penal statute only one penalty is recovered. But if they are prosecuted by the king and party the penalty. In the former case the penalty is cumulative as a debt. If they are joint tortfeasors but in the latter case the penalty is inflicted for the same as against each - as each one is guilty of the crime, each one is severally punished.
May. there is no ple for action for this is limitation. Bro. L. 44, 6. Salk. 182. 4. T. R. 809. Bac. 610 Peak. 4. P. 183.
The offence may consist in a number of facts. one fact may consist in a number of offences. in Public. Wrong. Where a moral act is complete but one offence, there can be but one penalty. Bac. 640.
In popular actions in which the plaintiff is entitled to no costs unless they are expressly given by the Statute costs as in other actions. 1. Bac. 39. 13. 241. Salk. 206. 1. Hen. R. 10.

It is an elementary principle that where an act is done contrary to the provisions of a statute forbidding it, an indictment will lie, unless the legislature prescribe a specific performance forfeiture. 4 John R. 352. 362
The mere change of phraseology in the Revised L. of N.Y. does not change the established rules of construction 2 Caines Cas. 150. N. 4 John R. 359.

Ld Coke's conduct, in his quarrel with the Court of Chancery, was not only erroneous but intemperate
4 John. 368.2.

Absolute Rights of Persons

The objects of law are rights and wrongs. Rights are those of persons and those of things. Wrongs are public or private. The rights of persons are absolute, or relative. Absolute rights which are such as appertain and belong to particular men, merely as individuals or single persons, may be reduced to three heads, viz. the right of personal security, the right of personal liberty, and the right of private property.

Relative Rights.

Relative rights are those which appertain to men as members of society, and as they stand connected with each other. They will be considered 1st as appertaining to magistrates 2nd to people.

Magistrates are first supreme; second subordinate. As to subordinate magistrates, I shall mention 1st the Coroner. This is an antient officer, chosen during life, by the people. His duty is first that of a Judge. 2nd Bailiff. 3. conservator of the peace. 4th as a substitute of the sheriff in ministerial employments.

2. Justices of the Peace. Appointed by the crown, to hold their offices during the pleasure of the king.

3rd Constables. Appointed by the jury at the court leet, or if no court leet by 2 justices. 1st Borsholder or headborough.

2nd keeper of the peace.

4th Surveyors of highways.

5th Overseers of the poor.

6th Sheriffs, of I shall particularly treat.

Sheriff and Jailor.

Sh. is derived from shire & reeve. 1 Bl. 334. 343. & denotes a keeper of the shire or county.

Sheriffs in Eng are appointed by the king. By stat they hold their offices but one year - tho the writ runs during good behaviour. 1 Bl. 342.

In Ken. they are appointed by the governor & council during good behaviour.

Every Sh. must reside in the county where he is appointed to act - how only he has 4 Bac. 435 jurisdiction.

Still if it is necessary to complete some act commenced in his own county, he may go into another to do it. This arises from the necessity of the case, where the act is to be done in two counties. 4 Bac. 235.

If a prisoner escapes to another county, the Sh. may pursue & retake him - for this is only in furtherance or continuance of the first act. Plow. 37.

He may by D. L. appoint deputies, who are his L.s & may execute all the ordinary ministerial duties of the sheriff. Holt 19. Kirby 240.

In this state our sh.s are all deputies of each other in their own counties.

The deputy is removable by the sh. - but while he is in office, the sheriff cant abridge his powers.

Sheriff & Jailor

Salk. 91. Holt. 33

Our county ct may disqualify remove or fine a deputy sh.

In Eng the deputy acts in the name of the Sh. - his own name is never used - a writ is not directed to him - nor is return made in his name. Salk. 96. Bonf. 65.

In Con. the deputy always acts in his own name - & writs are directed to him, & returned by him. Here if a writ is directed to the sheriff only, it may be served by his deputy general or special. Kirby 297.

A deputies powers I have rd cant be abridged while he is in office - he is not bound thereupon by an agreement entered into, not to serve writs on particular persons, or in particular parts of the county. Holt. 14. 2 Such agreements are void. 1 Pow. C. 195.

A deputy cant delegate his auty to another - he cant appoint a subdeputy - & this runs thro all kinds of representative officers. 4 Ba. 442.

He may however require the assistance of others in discharging his office if it necessary.

If a sheriff directs a warrant to 2 persons, either of them alone may make the arrest - this is an auty of public nature & is therefore
Str. 117. 1 Dust. 181.

If a deputy is guilty of any neglect of duty the Sh. may maintain an action in the case vs him

for he breaks by neglect an implied engagement to be faithful — & besides the Sh. becomes liable. 1. Roll. A. 94

A jailor too is the Sh. S. appointed by him & removable by him. The Sh. is ex officio keeper of the jail. 4. Bo. 34. 9. Bo. 119.

The Sh. has regularly no right to confine in any other place than the common jail — but in any other place, for a false imprisonment Hobt. 202. Latch. 16. 1. Sid. 318. 3. Ba. 181. Salk. 404.

A Sh. being ex officio keeper of the jail, can't be committed to it — & indeed in Bac. he can't be arrested — where we have but one common jail of which he is keeper. Perhaps where there is another not under his keeping he may be committed — this I dont know. If he commits an offence he must be committed to the next county jail. 2. Ba 299. Stiles 465. Hardy 48. Coroner may arrest & confine Sh. where he most safe & convenient 6. John. 22.
If he mainies a female prisoner in his own custody he is guilty of an escape 2. Ba. 292

Liability of the Sh. for the faults of his
The acts official of the deputy, he being the Sh.
S. are as often his own & he is liable 5. Bo. 89.
2. Lev. 188. 1 Vent. 314. 2. Mod. 19.

On this account the Sh. may take security of his deputy for his good behaviour as deputy. 4. Ba. 441.

Sheriff & Jailor

The official acts of the deputy, as a Ly. R. are as to all civil purposes the acts of the Sh. & he is liable for them – but the Sh. as Sh. is never liable for the acts of his deputy criminaliter. 2 Ld. Ray. 1344. Doug. 42. 2. T.R. 154. Bro. J. 330. 1. Vent. 238.

These acts must be official to make the Sh. liable – the Sh. is not liable for his private torts. Bro. A. 175. 1. Leon. 146.

Hence it has been questioned if he levies an execution on A's goods of B, is the Sh. liable. The better opinion is & indeed it is settled that he is liable – he must guard the public in the torts of his deputy, under an oath given by the Sh. 4 Ba. 142. note. 3. Wilh. 309. 2. Bl. R. 382. Doug. 42.

For deputy taking too much fees Sh. liable. 7 John 95.

When a Dep. is guilty of a mere neglect of official duty, the Sh. but not the Dep. is liable to the party injured, by 6 & – but the Sh. has a remedy on his deputy. As if he arrests a person & permits him to escape. The reason is he is not at 6 & a known public officer – & his name not appearing on the record as the writ is directed to the Sh. there is no evid in him Comyn. 403. 6. Salk. 18. 5. Bo. 89. 2. Ba. 259. 1. Roll. A. 94.

In Comyn. it is as the Dep. is not liable for a breach of duty – this may puzzle you without some explanation – by this phrase is meant a neglect of duty. For positive tort in his office he is as well liable as the Sh. Hence he may sue either. If he collects money on a writ & converts it to his own use he is liable. He is liable too for a voluntary escape as any other one would be. Salk. 18. Bro. A. 175. 749. Bro. J. 330

To the y. R as to the Sh. liability there is an exception - where a person requests the Sh. to appoint a particular person as special deputy the Sh. is not liable to the pltf, tho he is to third persons. 4. T.R. 120. Esp. D. 607.

This exception obviates only between the the Sh. & the person appointing requesting another appointment - the public must still be ~~appointed~~ defended.

If after the death of a Sh. the prisoners escape during the time before another appointment, no one is liable - neither his deputies, nor the jailor nor any other person. The only remedy is to retake the prisoners. 9. Co. 32. Bro. P. 996. 1. Mod.

If a Sh. begins a process & is removed before he completes it, he must go on & finish the business - or as tis termed he must hold over - his proceedings are entire & indivisible Salk. 333 Bro. J. 73. 1. Roll. ab. 893. 4.

The same R applies to constables & all other ministerial officers.

Powers & Duties of a Sh.

In Eng he is a judicial officer - as well as executive & ministerial - secus in Con. Bl. 343.

I shall consider him as a ministerial & executive officer. A ministerial officer is one whose duty tis to execute the L. under the command of a superior officer - an executive officer is one who does this not under another control.

The Sh. as conservator of the peace is an executive officer - as when he arrests felons, ~~&~~ & puts men under bonds. He must defend the county & may call out all men from exceptions 1 Bl. 349. 1 Inst. 168 over 16 years of age.

The Sh is a ministerial officer. He is bound to execute all legal process regularly directed to him. He, if he refuses to do this, is liable 1st crimin inaliter, & 2nd to a civil action by the party whose writ he neglects to execute Plowd. 37 Dyer. 60. 1 Bl. 345.

In bar if he don't return his writ he is liable to the party injured - but in Eng if he don't, the process is to obtain an order on him to shew cause why he don't - if he still neglects an attachment from the court & he is fined, to pay the pltf. Doug. 446 - 2 Bl. 291. Esp. D. 616. 2 H. Bl. 293. 1 Ba. & 206

A Sh. or ~~&~~ Dep. or constable is not bound to shew his writ till he executes it, even tho it is demanded of him - he is publickly known as an officer. But when an arrest is made or ~~party~~ is taken he must shew his auth 2 Bo. 69. Bro. & G. 48 Esp. D. 604. 8. T. R. 187.

But a special deputy or bailiff must first shew his auth or writ - as he is not generally known, if it is demanded - otherwise he is not compelled to produce it. 2 Bo. 69.

A Sh. or his dep. may command the posse comitatus to assist him if resisted in executing his office - & special dep. may do this 2 Inst. 193, 2 Ba. 459.

In case of great opposition is made or apprehended by the advice & consent of a councellor, a Sh may call out the military force, as such, to assist him - so may constables in their jurisdiction - They have at their command at common times the same force, tho not as a military force. This power over the militia English sheriffs are not possessed of.

A Sh. or other officer is not justified in a civil cas to break an outer door, to execute a process for the goods or person - a dwelling house is a mans castle. 5. Co. 91. Holt. 62. Bro. C. 307. Comyn. 1 Kirby 389

Sir Ed in some of the old books, that if the outer door is broken, the officer is a trespasser tho the process is good - but now the process is not good always - the man may be discharged generally on motion Comyn. 1. 5. Co. 92. 2. Ab. R. 829. 2. Bu. 367.

I find in the books no explanation of the term breaking - I suppose however that looping of any door or window that is fastened is a breaking - or raising the latch or a sash 1 Esp. 382. B. N. P. 82. Hawk. cro. 168. 5. Co. 92.

But this priviledge of the castle is construed strictly - it extends only to outer doors & windows. Comyn C. J. Holt 62. 269. 2. Rhow. 87. Comyn 17. 327. For this as

This priviledge extends only to the person of the owner & his goods & family - So arrest a stranger he may break an outer door or window 5. Co. 93. 1. Sid. 186

The propriety of this rule ~~that~~ is often questioned tho tis settled L. J. Eyre Sheriff. Ld Mans calls it an in

vidious privilege. In case of a criminal process, an outer door or window may be broken if necessary 4. Co. 91.

On a process to compel one to find sureties for his good behaviour, this privilege does not exist. 12. Co. 131. Moore. 606

So too on a process of forcible entry & detainer it does not exist. 4. Ba. 55[illegible].

So also if one known to have committed a felony is pursued by an officer or private person, a door or window may be broken to arrest him, if he has or has not a warrant - mere suspicion however is no excuse without warrant. 2 Hawk. 132.

The door or window of a house may also be broken to prevent an affray or a breach of the peace. 4. Ba. 456. 1. Roll. 66.

On a writ of habere facias possessionem an outer door may be broken if entrance is denied the officer. This an exception to the G. R. 1. Co. 91a

This reaches nothing but the mansion house - but all that is part & parcel of it is protected As a stone adjoining it. Sid. 186. 1. Hawk. 63, 4. Ba. 55[illegible].

A stone not adjoining the house is not protected - tho a contrary opinion has generally prevailed.

One case has occurred - a Sh. & his bailiff went to execute a process - his bailiff entered & was locked in the Sh was allowed to break the door to get him out

Parmr. 54, 622. 1. C.C.

If a man is taken & escapes, to retake him an outer door may be broken. Mod. 179. Roll. 138.

If a man is

2. Bl. R. 829.

By the stat. 29. Car. 2. no civil process can be executed on Sunday. Salk. 78. 4. Bac 456, 616.

If a prisoner is once lawfully taken & escapes he may be retaken on Sunday - for the recaption is a mere continuance of custody. Ba. 245. Ld. Ray. 1028. 6. Mod 98. 229.

When an arrest on Sunday is made, the court will discharge him on application. 6. Mod. 98. 5. Co. 93.

Law of Escapes. When a person under lawful arrest recently or violently evades the restraint he is to escape. 2. Ba. 229.

It is essential then to an escape, that there be a previous legal arrest. Bacon. 65. Esp. d. 607. 508. 9.

To legalize an arrest it must be made in pursuance of lawful authority - tis not always necessary however that there should be a warrant or writ - tho it must be under it. 4. Ba. 455.

To determine whether an arrest is legal, made by an

An arrest officer under a warrant correct in form is this - If the ct has legal entry to try the subject matter tis a process not void so as to subject the officer - if the ct has no jurisdiction tis secus. 2. Wils. 384. 3. Bac. 141. 5. Bac. 64. Sta. 509.

There is an essential difference between errors & void process. The first stands good till reversed by a ct of L. & the Sh. till then is justified in acting under it - a void process is a mere nullity - & from that there can be no escape, Vide supra.

From a void process there can be no escape & it wont excuse the Sh. in an arrest - but from an erroneous process there may be an escape, & would justify the Sh. in an arrest. A process is void for want of entry in the ct from which it issues - tis erroneous on account of want form or some mistake. vide supra.

A process may be void when the ct has jurisdiction of the subject matter - this is when the writ is irregular. As if the writ is made returnable at any other than the next term of the ct - this is void unless the time required by law between session & session dont exist. viscinii to come before the ct sets. Such writ is void - & there is no lawful writ. 3. Wils. 341. 1. Rood. 315. Bac. E. 154. Bacth. 148.

Where mesne process dont issue from the ct to which tis returnable, if tis issued by a ct of competent entry & returnable before the ct having jurisdiction tis good - but if tis not then issued & not then

returnable, tis void & there can be no escape

An officer having made arrest under fiscal process, cannot delegate to a stranger his right to retain the prisoner & go away himself - if he does tis an escape. 1 Bac. Ab. 24.

There can be no escape unless there is an arrest actually & regularly made - the person arrested must be touched, or there must be in the officer a power of immediate force which is tantamount to it - saying there I arrest you is no arrest - but saying I arrest you on such a process, if the prisoner submits this is an arrest -
Salk. 79. 586 B. N. P. 62

If one is arrested at the suit of A & while in custody the officer receives another writ in favr. he is in construction of L. arrested on both
Salk. 297. 3. Bac. 89

On the second writ it is unnecessary for the officer to go thro with the forms of a regular arrest - the first arrest is in construction of L sufficient for both writs.

The arrest must be regularly made. i. e. in a legal manner - or there can be no escape. Bacon 64. Esp. D. 604. 2. Ba. 296.

In civil cases there must not only be by a writ or warrant, but also by the authority of the officer to whom the writ is directed (be executed) - if the directed is a constable & he can serve it - & vice versa. he need not do it sua manu - his follower if he is

present or near away make the arrest - otherwise he cant. They must in this case be last in pursuit of the same object. Comyns. Dig. G. 6. Mod. 211

An arrest on the stat being void, if the person is permitted to go at large, he is not guilty of an escape Salk. 78 6. Mod. 96 Esp. D. 604.

I would also observe that if the arrest is made by breaking the door or windows, if such breaking is so clearly unlawful that the prisoner by applying to a ct could be liberated, there is no escape if the sh. permits him to go at large. Thus
Comyns. D. Esp. D. 604. C.

If an officer has an opportunity to arrest one on whom he has an process & neglects it the officer is liable in an action on the case - but not for an escape 2. Mod 29. 4. Ed. Bac. 391. 10. Mod. 291. C.

Escapes are of 2 kinds voluntary or negligent
3. Bo. 54. 3. Bl. 415

Persons committed must be kept in close custody - hence if the sh. permits one to leave the prison for a moment he is guilty of an escape.
3. Bo. 44. 2. Bl. 415 1. Roll. Ab. 806

A voluntary escape is one that takes place with the consent of the keeper a negligent escape is one without consent 4. Bl. 415

Voluntary escape. If an officer admits one to bail that is not bailable he is guilty of an escape. So.

too if he permits a prisoner ever with a keeper to go out of prison a moment to a reasonable distance there is an escape. 2. Ro. 44. Rowd. 96.

If a person arrested on final process to go at large for a moment is permitted, it is an escape. 2. T.R. 176 1.B. & P. 26

Prisoners committed on criminal process are confined to the walls of the prison - those on civil process may have if the Sh. please the liberty of the yard by giving bond - or not if he will in the discretion. Thus was once decided in Eng that if a man confined on execution & the Sh by habeas corpus ad testificandum took him to it, he was guilty of a voluntary escape. This is not Law. 1. Sid. 19. B. & P. 72 Kirby. 137

But if an officer that brings out a prisoner indulges him in any unnecessary or unreasonable liberty he is guilty of a voluntary escape. 2. Keb 305. Ld. Ray 732. 399. 788. 6. Mod. 78. Bro. B. 14.

The L. requires that when an officer has made an arrest or final process he must commit the prisoner within a reasonable time - or he is guilty of a voluntary escape. If he permits him to go at large with his L. he is guilty of a voluntary escape. 1.B. & P. 24. 2. T.R. 176.

Marrying a female prisoner is a voluntary escape. Ro. 17.

If the Sh. appoints a prisoner a turnkey he is guilty of a voluntary escape. Hardr. 311. Cro. J. 604.

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If a prisoner having the Sheriff & Jailor the liberty of the yard shews a disposition to escape, & the Sh. dont then confine him & he afterwards escapes the Sh is guilty of a voluntary escape. in Com. 1 Rool. 106. 12 S. 8. 2 S.R. 191.

The Sh. is never bound to grant the liberty of the yard the security is offered him — tis a mere indulgence in him, tho tis usual an almost universal practice to do it. After this indulgence is granted the Sh. may recommit him.

Negligent Escapes - If a prisoner arrested flies or gets away by force, the escape is negligent - to avoid one escape from prison by breaching the walls - 3. Bl 114. Bro. J. 419.

In an action for an escape vs an officer, the K. indorsement on the writ is sufficient evd. that it was delivered to him Bonif. 69.5

There is difference between escapes on mesne process & on final process. If a person arrested on final process is permitted to go at large a moment he is guilty of an escape. 2. T.R. 172 3. Bac. 415 Bosh. D. 608. 6.

But in mesne process at B. L. a person arrested on mesne process if he appears at the Ct. discharges the Sh. from an escape. In Com. tis enough if he appears during the life of the execution. 1. Bl. Rep. 1049. 2. T.R. 172. 5. Do 37. Salk 408. 2. Wils. 295 3 Bl. 418. Kirby 209 1 Bac. 494, 2. Swift. 174.

But if he dont then appear the officer is guilty of a negligent escape — nothing more for he may do this if he will even to prejudice 2. Wils. 294 Bro. P. 624. 1 S.L. 468.

But a person arrested on mesne procefs if committed to prison, may not go at large without such negligence of the Sh. to a voluntary escape 2 Wils. 295. Salk 271. Skin 542. 1 Roll. ab. 807

And in this case the voluntary return of the prisoner does bar the pltffs action vs the Sheriff. Salk. 271. 2. Wils. 295.

And if on his return the pltff goes on with his action vs the prisoner, this no waiver of his right of action vs the Sh. & indeed he ought to do this to ascertain the damages vs the Sheriff 2. Wils. 295

Reason of the distinction between mesne & final procefs. A Mesne procefs is intended merely to secure the dfdts appearance at a future day to answer the pltffs demands & before that time his no matter where he is — But final procefs is intended as a a discipline by which he may be induced to pay the pltffs debt — if therefore this discipline is relaxed but for a moment, this impossible to say but what it may be the means of entirely destroying its effect, it was intended to produce, & the pltff thus be deprived of his claim.

If one arrested on mesne procefs escapes, the pltffs remedy vs the Sh. is an action on the case — the damages here are presumptive — No recovery can be had unless he shows a right of action vs the dfdt. 2. Wils. 295. Str. 873 2. T. R. 129. 4. Do 611 7 John 189
The recovery will be for the damages actually sustained (they cant exceed the original debt. 7 John 218.
to do this he may prove any acknowledgment of the party escaping, of the existence of his right

action - This is an Exception to the G. Rule of evd - but tis a reasonable one - for the Defts acknowledgment in the first action would have secured the 1 Esp. R. 169 Peake R. 62 Pltff a recovery.

For an escape on final process, the Pltff has remedy by an action on the case or by the 2. statute Westminster 2. 13 Rich 2nd, an action of debt. in the Sh. 2. T.R. 129. 132. 2. H. Bl. 110. 119. Dr 134. 2. Bl R. 1048.

The remedies then of the Pltff in the Sh can there - in mesne process tis case - on final process case or debt. If case is brought the jury may give what damages they please - they may give the whole debt due from the Deft - or the damages resulting from the loss of his action vs the Deft, in this case his remedy vs 2. T.R. 129. 2. Wils. 295. the Deft is not barred.

But if debt on final process is brought the whole sum due from the Deft with the costs must be given 2. Bl. R. 1048. 2. T. R. 129. 132 his remedy vs the Deft is barred.

Here in case of voluntary escape by stat. whether on mesne or final process let the form of the action be debt or case. the whole debt must be given. Stat. Westm. 366. 1 Ed.

If a person arrested on mesne process but not actual by committed is rescued the Sh. is not liable - tis same in case of final process Bro. J. 419. Bro C. 879. 2 Bl. 416. Esp. D. 618.

The final process tis sd he ought to be supported by the power of the county - & tis sd he has enough time to raise it. I doubt see the propriety of this distinction - & in the R.

After commitment on mesne process, rescue is no excuse for the Sh. unless by a public enemy - by mob or riot or rebellion - his insufficient 1. Roll. 805 Sta. 494. 1 Bac. 85[a]

In cases of rescue where the Sh. is liable, the Pltf may sue either the Sh or the rescuers - he has his election - but by suing the rescuers it seems he waives his remedy on the Sh. this is not established by authy. tho I think it correct - for if he commences an action on the rescuers he precludes the Sh from ever after having a remedy against them. 6. Mod. 211. Bac. b. 77. or 109. Hut. 98. Dyer. 3. 610. 65. 69.

The ordinary & as I take it the only proper action in case of a rescue is trespass on the case - tho trespass will lie - but I cant see the reason of it, tho it is so ld by Holt. 180. Bac. A. 486.

In an action on rescues the jury may give the whole or a part of the debt in the original debt - if a part it is a bar to his claim in the first debt Dyer. 3. 65. 9 6. Mod. 211

But tho the L. allows this it would be downright bravery in a jury to give less than the whole debt unless it shewn that the debt is matter much of process.

~~In the~~ return of a rescue by a Sh. is conclusive as to L. - if there this is false, the Pltf cant prove it to be so - tho he may afterwards have an action on the Sh on the case, to recover his damages, if the return is false - for this rule is founded on the ground that the official return of a Sh shant be questioned unless his return is directly put in

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Upon – or otherwise, the Sh. might be taken by surprise by such a plea. Bro. E 781. Comb. 295. 1 Vent. 244, 2. Do. 175.

The Sh. also may have his action in the nature – tho I conceive this action lies only when the Sh. is himself liable to the plff – for the action as I suppose is given to him to indemnify himself in the demand of the plff who has his action in him. Bro. E. 77. or. 109. Holt. 180. Vent. 98

If the Sh. having out a Supersedeas or Habeas corpus a rescue is no excuse. Cro. 482. Bro. E. 610

Where a person under final or mesne process is actually committed to prison, a rescue by any other means than by the Act of God, or the Queens or public enemies is an excuse. 4. Co. 84a 2. H. Bl. 183. 4. T.R. 789. 2. Ba. 247. 1 Roll. Ab. 108. So decided in the state of N. Y. by the supreme ct.

It was once holden that a voluntary escape on final process entirely transferred the debt from the debt to Sh. But this is not L. The plff may have a new action of debt vs the escapee or a new execution by scire facias may be taken out against him. Hobb. 209. old R. 1. Ibid. 1. Show. 174. 2. Mod. 186. 1. Vent. 4. 269. 1. Ba. 196

Now by stat 8. 9. Wm 3rd a new execution may in such case be obtained without a scire facias, & I suppose the now understood that this is so at C. L. 3. Bl. 415. 1. Ba. 196. Bro. D. 332.

If there is a voluntary escape on mesne process neither of these methods can be pursued – that is

may if he pleases retake the escapee on an escape warrant. 5. Co. 89 b. 2. Wils. 295.

But when there is a voluntary escape, the Sh or jailor cant retake the prisoner - neither can do this, tho the other does the act, & he is not privy to it - if he is retaken there is a false imprison 3. Bl. 415. 9. Co. 52. 1. Sid. 330. 2. T. R. 196. 1. Vent. 269.

Any bond or security taken to save the Sh harmless in case of a voluntary escape, is void as in the L. I. Bac. E. 196. 7. 2. Bulst. 213. 10. Co. 100. b

But the Sh in this case the pltf may retake the prisoner even after a recovery vs the Sh. or jailor if he recovered less than the amount of the debt. B. N. P. 69. Esp. D. 611.

In case of the negligent escape he may retake the prisoner, or sue him on an action on the case - for here the Sh is not criminal, tho he is liable to the pltf. Bac. E. 294. 59. 9. Co. 52 b. 1. Ra. 55. 6.

If the sheriff has taken a bond in a negligent escape, he may recover on it - for this is lawful 1. Roll. 151.

But where an under Sh suffers an escape he cant at C. L. have an action in an escape - tho the principle is liable ans to the Sh. Bac. E. 349. Esp. D. 613.

Tis an interesting question in the U. S. whether if a prisoner escapes to another state, the Sh. may retake him on a bail piece, or an escape warrant? tis decided in the negative at of N. Y.

If a person arrested on criminal process escape from the arrest, he is guilty of a misdemeanour & punishable by fine & imprisonment - & in case of breaking the prison he is at C. L. guilty of a felony. I don't know that this L. is enforced in 2. Hawk. 122. 128. 4. Bl. 129, 130. this country.

A Sh. or other officer having made an arrest on criminal process, if there is a negligent escape is guilty of a misdemeanour & is liable to fine - if there is a voluntary escape he is punishable as an accessory after the fact. 2. Hawk. 194. 111. Rc. Lrs. 190. 4. Bl. 190.

But this in case the prisoner who escapes from the sh. is never retaken, for a voluntary escape the Sh is still punishable by fine & imprisonment, tho he can't, tho he can't be punished as an accessory. 4. Bl. 111.

If for a negligent escape the Sh has been compelled to pay the debt he may may maintain indebitatus assumpsit for money paid laid out & expended, in the escape - secus in case of voluntary escape - nor indeed any action - ex dolo malo non oritur actio. he is guilty of a crime. But if the sub-Sh. or jailor has permitted a voluntary escape, tis a different question whether the Sh can maintain this action - there are contrary decisions on this case - In Nisi prius there were two decisions that he could - & by Ld Kenyon one that he could not - I think therefore tis still quæstio vexata. But I think he ought to maintain it, as he was not guilty of crime in the escape - & tho he is liable civilly for the acts of his & the Sub-Sh. & jailor, still for their crimes I suppose he ought to be punished - & crime is the founda

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tion of his being injured a remedy vs the escape.
Peak. 146. vs this. Esp. D. 612.

If after a negligent escape the Sh retake the prisoner on a fresh suit, before he is sued, no action can be maintained vs him — for no damage is here sustained — Any retaking before before action brought is on fresh suit — An action may be brought if & supported, if the Sh. dont then retake the prisoner. Str. 708. 2 Bo. 44. 52. 2. T.R. 126. 1. Vent. 211. 217. Str. 879. Bro. P. 657. Bro. J. 657. 1. Roll. 106.

If however the Sh defends by plea a fresh suit, it must be specially pleaded. 2. T. R. 126

If too the prisoner returns voluntarily into custody, his equivalent to a recaption or fresh suit
Bon. A. 324. 2. T.R. 126. 1. B. & P. 418

But if the escape is voluntary a retaking on fresh suit, or a voluntary return, is no excuse to the Sh. — for he is guilty of wrong in the escape that this must purge 3. Bo. 52. Esp. D. 611. 612. 2. Wils. 294.

Where the escape is voluntary, a subsequent acquiescence in it by the Pltff must purge the wrong & free the Sh. from a suit by him. Salk. 271. Esp. D. 612.

But where the escape is negligent the Sh may for his own security retake the prisoner, even after action brought.

If a Sh. discharge a prisoner taken upon execution over on part of the money to himself, he is guilty of a voluntary escape. for Bro. P. 504. 1 Mod. 194. 2. Mo. 225.

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If after a negligent escape the pltf. discharges the escaper, the Sh cant retake him for his fees - & the reason is he has lost the lien he had whilst the pltf was in custody - he then might have retaken & him. Ld. 108.

An escape of prisoner having liberty of the yard, the escaper without the Sh consent, it being a negligent escape, a retaking on first writ, is a voluntary return in pun action, the Sh is saved from the action. 6 John. 121.

Besides this he may recover on the bond of indemnity which the prisoner by escaping has broken - tho he will recover but nominal damages. 1 Root. 127, 128.

How he cant after such escape be compelled to receive the prisoner again, unless by fresh cause. 1 Root 128.

In this case the Bondsman is not liable for the debt, after the pltf's remedy on the sh. is barred by the stat of limitations tho he may still recover nominal damages. So too if a judgt is recovered on the bond of indemnity, before the stat of limitations has barred the pltf's claim on sh, but this is afterwards barred, the bondsman may be relieved from the judgt by an audita querela 1 Root. 154.

Per a R. that a declaration upon a voluntary escape may be supported by proof of a negligent escape. 1 Kent. 217. 2 T.R. 126.

For a voluntary escape if the under sh is sued the

P. is excommunicated. Mr. Y. doubts the correctness of this Exp. 612.

False Return. If the Sh. makes a false return, the party injured may have an action vs the Sh. 1 Wils. 336. Cro. J. 615.

If the Sh. makes a false return of non est inventus he is liable to the pltff Esp. N. 616. 1 Str. 654 Bro. C. 729. The action would trespass on the case.

Where there is such a discharge, the judgt is forever defeated, altho the court is faulty on account of informality. 1. Ld. R. 557. 6. Bro. 5 Ed. 5.

And likewise a bond taken by the Sheriff that he shall be again produced is void as in L- for a discharge entirely compleat him. 1. B. & A. 242. 2 Bott 249.

If 2 joint debtors are taken in execution, & 1 is released by the pltf this a release of the both - for both are liable for the whole debt - & if one is discharged by a discharge of the whole debt as he is liable upon the 4 Term. 93. Salk 576. Bro. C. 551. Ld. Ray. 690.

But under the 5. Statt if a man takes one in damages of a bill & discharges him he may still, tho he discharges the first, take another - for these courts are seperate & independent 2. Bl. R. 1235. 2. Show. 441. 4. Ld. R. 825. Gilbert on R. 124. 158. 1812.

It was once holden that if a sole debtor died in prison or the debt was discharged because the pltf had elected his highest remedy - but now by stat. 21. Jac. 1. this declared explained & enacted that this not so. Hobt. 82. Bro. C. 850. Bro. J. 196. 149. 2. Ba. 354. Kirby 183.

But it was always holden that if one of 2 joint debtors dies the debt survives to the survivor. 5. Co. 86. Bro. C. 850. Bro. J. 196 149.

A bond given to the Sh. that the prisoner shall remain a true prisoner & pay pltf & agreed is void as in the stat. 23. Hen. 6th - this called a stat of Bar & Jaylor. When any part of a contract is rendered void by stat the

whole bond is void - but at b. l. one part may be void & another good. The Sh might have taken a bond that the prisoner shall remain a true prisoner is good - but if connected with an engagement to pay prison fees & board is void. Row. 68. 1 Vent. 237. 10 Co. 100 b. 2 Ra. 464. Hobt. 14, 1 Bro. b. 173. - 1 Rolle. 188. alter in bond in part. 1 P. W. 195.

A prisoner must support himself, unless after in Rowd 68. 1 Mod. 192. 12 Mod. is attainted of treason - then he is supported by the state.

If a Sh. levy a fi. fa. after the return day, by order of an atty, both are trespassers. 4 John. 490.

If a new Sh. receives a prisoner from his predecessor he is answerable for his escape, tho. under the old Sh. there had been a voluntary escape - & the plff has a remedy vs either - but a ~~suit~~ recovery vs one bars a suit vs another - 4 John 469.

A Sh. plff. may serve his own writ. 4 John 486. 2 Mass.

Husband & Wife

The right which the husband acquires to the personal property of the wife. 1st as to that in poss. & 2nd to choses in action.
1st the personal property of the wife in poss. [illegible] [illegible]. The husband at the time of marriage acquires an absolute title to it [illegible].
This absolute title [illegible] the moment she is married [illegible] the death of the husband [illegible] [illegible] [illegible] & not in the wife. [illegible] 2 Kent Com. [illegible]
× 1. Bac. 2 [illegible]
[illegible] this transfer that it [illegible] [illegible]. It may operate injuriously [illegible] [illegible].
[illegible] [illegible] be [illegible] the debts of the wife [illegible] [illegible] no [illegible]. [illegible] if the husband pays not the debts of the wife before [illegible] [illegible]. If the husband [illegible] before he has paid the debts, [illegible] cannot recover it from his [illegible]. But [illegible] in the last case provided the wife has property that [illegible] not in the [illegible], i.e. if the [illegible] [illegible] [illegible] [illegible].
The husband's liability to pay the [illegible] [illegible] not depend upon his receiving property from her: for he is liable, whether he does or not.
The husband is [illegible] [illegible] [illegible] to pay the wife's debts. For if he was, he would be liable to them after her death [illegible] [illegible] would [illegible].
But the wife is [illegible] [illegible] as the [illegible] [illegible] the debts [illegible] against her [illegible] her husband's death.
It may be asked then how the husband is to be

not at all. Here the husband must be sued with the wife, in case her debt is contracted before marriage. The ground of this is, the wife being [illegible] must be sued, & by marriage she is disposed of property. Therefore if a suit was commenced against her alone, judgment must go against her alone & she be imprisoned till her husb. was willing to pay the debt.

There [illegible] one without the other for the debt of the wife; & when one is set at liberty the other must be also. 1 D.&E. 486

B. Choses in action are notes, bonds, damages &c. Recog[illegible]. If it respects the land title, to those belonging to his wife, his power to dispose of them is as great as [illegible] as the former. But if he never exercises this right to reduce them to personal property or possession they will go on his decease to her or her [illegible] administrator. 1 Rolle 341. 1 Mod. 45. [illegible] 1 Mo. 186. 2 Ba. 428. [illegible] 25. [illegible] 263. contra 6 John. 112

There was a question made whether the husband assigning [illegible] to collect these choses before the money came into his [illegible] to whom they belong. The court said they were reduced to a possession, for the husband having got possession & that was sufficient.

If the wife survives, these choses go to the husband's executor & are as his own property.

The husband may assign these choses in action & the assignment is valid. It must be however for a valuable consideration. 2 Atk. 207. 1 P. Wms. [illegible] 444. 45

If the husband [illegible] continue he never can [illegible] it. When he dies they will [illegible] to her or her representatives. [illegible] by [illegible]

There is a rule in equity that the husband is [illegible] possession of his wife's choses, if he has made a [illegible] [illegible] upon her before marriage; [illegible] has nothing to do with jointure which [illegible] in lieu of dower. It may be in personal or real property.
2 Ver. 401. [illegible] 161. 1 P. W. 78. 91[illegible]. [illegible] 139.
2 Ves. 361. 64.

If the wife [illegible] the husband [illegible]

[illegible] to obtain it, must make [illegible] provision for
support of that [illegible] some other way, or have [illegible]
into court & [illegible] to such provision;
& then a course of [illegible] will [illegible] the money.
[illegible] 202. 12. 3. [illegible] 236. 2. [illegible] 177. 577.
If the husband [illegible] for the interest only, the court [illegible]
[illegible] 3. Atk. 21.
If the husband, before he has received his wife's portion,
become a bankrupt, the assignees shall not receive it,
without making some provision for the wife. 1. Ves. 7.
1. P. Wms 382. 2. Atk. 420.
If the husband had assigned these choses for a valuable [illegible]
[illegible] equity will not compel the
assignee to make the provision for the wife. 1. Ves. 7.
If the trustee is willing to transfer the choses to the
husband the Ct. of Chancy shall never interfere: & if the husband
has a legal title, he may obtain the choses without making
provision. 2. Atk. 240. [illegible] 413. 2. P. Wms. 637.
2. [illegible] 11. 2. Atk. 67, 420.
If the wife dies before the husband, her choses go to her
executor to pay her debts. By the com. law, the [illegible]
[illegible] remaining after the husband, who is rightful ad-
ministrator, has paid all her debts, goes to her repre-
sentatives. But in Eng. by the stat. 29. Car. [illegible] the husband is
not obliged to account for the surplus; it is his own.
It follows that [illegible] states where no such stat. [illegible]
the com. law rule governs. We have no such stat. in Conn.
N. York has one.
The [illegible] not have the same right to his wife's equitable
choses that he has to her legal ones. 4. [illegible] 51. 1. Roll. 710.
[illegible] 407. [illegible] 871. 1. P. Wms. 978. 382. 9. Atk. 226.
1. Ves. 15. 1. [illegible] 168.

[illegible]

[illegible] of these incomes who are
permitted to [illegible] estate [illegible] 1. [illegible]
[illegible] 367. 318. [illegible] 367. 4. [illegible] 11. 601. [illegible] 663. [illegible] 171.
[illegible] to [illegible] favour of [illegible].
If the husband [illegible] to collect [illegible]
[illegible] 1. [illegible] 177. [illegible] 163. 1. [illegible] 987.
[illegible] accrues to the wife [illegible]
[illegible] a [illegible] to collect [illegible]
[illegible] the husband [illegible] right of [illegible]

The husband may [illegible] the wife's [illegible], & if [illegible] wife would go to her [illegible], though the wife [illegible] the [illegible] the reason is, that real [illegible] on [illegible] of fee, but [illegible] in case of chattel real. [illegible] Moore. 395. Co. Lit. 351. [illegible] 344. [illegible] [illegible] 314. [illegible] 34.

[illegible] a feme sole has the [illegible] real, but at the time of marriage [illegible] [illegible] not [illegible] during coverture, on her death it shall go [illegible] to her as her [illegible].

So likewise, the wife, before marriage, [illegible] chattels real, & yet the husband gains nothing. Co. Lit. 351. [illegible] 84. 87. [illegible]. Co. [illegible] [illegible] 11. [illegible] 26.

Lecture 3rd.

What interest the husband acquires in the real property of his wife.

By marriage the husband acquires the usufruct of all the wife's real estate during coverture, whether she hold it in fee simple, fee tail or for life.

After marriage, the wife has no interest in the estate [illegible] the [illegible] in her. If an injury is done to the [illegible], as by committing waste, she must be joined in the action against the wrong-doer, with her husband. But if the injury committed, is [illegible] to the [illegible], she is not joined. Co. Lit. 351. 1. [illegible] 286. 1. [illegible] 11.

If the husband dies before the wife, she [illegible] the lands, tenements, [illegible] at the time of his death, and personal property goes to his executors.

If the wife dies first, the real estate [illegible] to her heirs, & the husband has no more interest in it at all. These are the husband's rights by marriage [illegible]. But [illegible] [illegible] a new interest, called an estate by the curtesy. To entitle him to this, he must have had a child born alive by his wife, who could have inherited [illegible] the [illegible] [illegible] actually seized. 2. Bl. 127. [illegible] by curtesy, [illegible] his death [illegible] go to his wife's heirs.

[illegible] of [illegible], tis not necessary to [illegible]

[illegible] to entitle the [illegible] to this estate by the [illegible] [illegible] is [illegible] the [illegible], a question might have arisen whether the [illegible] could [illegible] hold this estate, without having a child born. But the [illegible] has always prevailed & is now established.

It was formerly a question, whether a man could be [illegible] by the courtesy in a [illegible] estate, given to the use of his wife, [illegible] it is now settled in the affirmative. [illegible] [illegible]. 457. [illegible]. [illegible] [illegible]. 3. [illegible] 829. 3. Atk. 695. [illegible]. 47. 1. Atk. 607. 1. [illegible].

If the wife [illegible] has leased her lands, the husband [illegible] [illegible] nothing [illegible] the [illegible] in his death, [illegible] [illegible] [illegible], [illegible] to [illegible] that, which [illegible] [illegible] [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] to the [illegible]. 1. [illegible] [illegible] of wife's [illegible] [illegible] to the [illegible] 172. 1 Rob. 250 2. [illegible]. 1. [illegible]. 51.

[illegible] [illegible] of the wife in her husband's property.

[illegible] 1st of her paraphernalia, 2nd [illegible] & 3rd [illegible]. [illegible] by marriage. [illegible] [illegible] [illegible] is entitled [illegible] third part of the [illegible] prop[illegible] after all [illegible] are paid — in case there is no [illegible] [illegible]. The husband, however, may [illegible] it [illegible] [illegible] of the wife [illegible] [illegible] of distributions.

The paraphernalia of the wife is of two kinds, [illegible] which [illegible] [illegible] away. 1. [illegible] clothing. 2. Her [illegible]. The first [illegible] is absolutely hers, [illegible] [illegible] [illegible]. The [illegible], however, [illegible] the number of the [illegible] [illegible] it. [illegible] 1. [illegible] 556. [illegible] 276. 2. [illegible] 44.

[illegible] — though in case of [illegible] of personal [illegible], the wife's [illegible] [illegible] to pay the [illegible], by the [illegible]. [illegible] husband [illegible] may take them [illegible]. 3. Atk. 370, [illegible]. 2. [illegible] 217. [illegible] 678. 1. [illegible] 130.

If the husband pledges the wife's jewels [illegible], she [illegible] [illegible] the [illegible] of his [illegible] [illegible] for this purpose. 3. Atk. 37.

If [illegible] [illegible] to pay debts, [illegible] her jewels [illegible], she stands [illegible], & may compel a [illegible]. In this case she is [illegible] [illegible], not [illegible] volunteers. [illegible] notes. [illegible]. 30. [illegible] 1. [illegible] 104.

the most of the estate ... favorable point ... must be ...

Both are ...

Section 4th.

... entitled to ... time ... of all her natural ... estate ... during his life time ... the issue ... 3 Rev. 394. 10. ... 33. ... Rev. 515.

It is not necessary that the ... be ... actual ... of ... time, to entitle the husband to ... It ought to be ... sufficient. It must be ... that he ... of the ... and ... it. Though it is not necessary that the ... should ... in ... a ... time.

The right ... vests ... 2. R. 190. 6th ed. 31. The ... 3 Rev. 130. N. 6th ed. 5th ed. 9.

But ... cannot touch the ... do it ... by the ... of the wife while ... lives ... it will go to ... Before the wife ... husband ... heir ... lands ... rents ... valuable ... estate ... for life. The ... may be ... for ... by ... heir is obliged to ... the ... known, at a certain period after ... of ... if the ... be ... The ... in ... of the ... states have made ... alterations.

The estate ... may be barred ... ways.

1st. It may be barred by the husband ... alone. 2. ... alone ... and ... the wife ... alone ... legal title ... by ... in ... cases.

2nd. By an ... of the wife with ... This may be ... however, if the husband ... as his wife. 6. ... 34. 6. 6. 6.

3rd. By ... with the ... of the husband, ... the wife ... before a ... the ... and ... upon ... before a magistrate, that she ... her husband, ... must appear that ... in lieu of ... it must consist of ... property, it must ... and ... entirely on the ... of the husband, it must be a

competent for life, in general free intrans to his person, & her rank, & it must be conveyed to her & to trustees in use for her life. 1 Atk. 561.

If the wife makes a bad bargain as to her jointure application [illegible] the wife, the act will not avoid the actual [illegible] in, nor dower, notwithstanding the general rule in [illegible] of contracts [illegible] the time of marriage is not considered in a condition to make a good bargain.

It must be in writing in the jointure that it is in lieu of dower, or it may be compelled to make an election at the time, which she has to choose.

Jointure may be settled [illegible] marriage [illegible] dower [illegible] of an agreement before marriage. It may be settled without such agreement, the wife [illegible] between [illegible] jointure. She cannot have both.

Does a d. of real duty in lieu of dower, bar a the right of Dower? John. 907. 2 Bl. Rep. 25. 1 Ver. 365.

Consequently the wife was endowed ad ostium ecclesiae with [illegible] which she had absolutely.

When the husband gives his wife property by way of dower, she is not obliged to accept it, but if she does it will bar dower. 2 Q. Ca. a. 216. 2. Ver. 365. 3. Atk. 630. 4. Ca. t. to. t. il. 36.

A practice has prevailed in most of the states of conveying a small estate by the husband, in which [illegible] any qualifying words, he gives his wife one third of all his real estate for her life, to be in lieu of dower, for the law will not presume, that by such a vague [illegible], the husband meant his wife, should have not only one third, but her dower also. 2. Ray. 938. Bro. C. 178.

If a bond is given in trust for support of the wife [illegible] may choose between the bond & dower. 3. Atk. 6.

A mortgage of the premises wherein [illegible] is by the husband, will not affect her dower. She may redeem. Eq. Cas. Abr. 187.

If the husband's interest is vested [illegible] marriage the wife must widow, before she is entitled to dower

If ... here the heir pays his part of the redemption money to her, he need not pay the interest, because she has used & enjoyed the property.

If lands settled on the wife, in jointure, are mortgaged during husband's life, she may abandon them & claim dower, or redeem.

A wife cannot be endowed of an equity of redemption, for it is a personal chattel & may be [illegible] red. & this has been denied. 1. Atk. 606. 1. Cha. Cas. 271.

But this decision has been overruled. 2. P. Wms 2[illegible].

If the H. aliens mal fide, the W. can recover for her dower no more than it was worth when aliened. 2 John. 484.

The widow's quarantine is recognized by stat. in N.Y. 7 John 247

The wife of the mortgagor, can never be endowed with the mortgaged premises. Hard. 466. Bro. [illegible]. 140.

The W. of the mortgagor may. 7. John. 278. before foreclosure.

Lecture 5th

Right of the husband to pers. prop. accruing to the wife during coverture, as [illegible]

[illegible] this property, is contended, on the one hand, that he [illegible] absolute right. On the other, that it is in the same situation with choses in action belonging to the wife before marr. [illegible] of both of these dicta — the former [illegible] to [illegible]. [illegible] it is not [illegible] [illegible] take a suit in his own name, to recover such things as accrue to the wife during coverture, which [illegible] be [illegible] to [illegible] charge [illegible] [illegible]. Unless this the [illegible] of the law [illegible] must [illegible]. [illegible] in this way than in the other. The [illegible] is [illegible] of it are, 1. [illegible]. 5[illegible]. [illegible] 2. Vs. 676. 2. P. Wms 411.

The husband [illegible] it to damages on injuries done the wife before [illegible], as beating her, or slandering [illegible] [illegible] the husband is entitled to all damages, arising from injury [illegible] the wife before marr. — he [illegible] [illegible] they [illegible] [illegible] coverture, if [illegible] [illegible] to the wife. [illegible] [illegible] must be joined with her [illegible] [illegible]. 1. [illegible]. 360. [illegible]. 546. [illegible]. 30. 2. [illegible]. 111. 208. 1. Brownlow. 205.

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[illegible] to maintain action in his own name, for the damage he sustains in the loss of [illegible] consortium amitiæ. [illegible] is in action if [illegible] consortium amitiæ. [illegible] clear.

[illegible] have an action in her own name, [illegible] 1. Co. 132. 2. Roll. 546. Dr. Drage. 173.

[illegible] was a right to the labour of his wife, [illegible] may sue carries her away, he may commence an action to recover damages for the injury sustained.

[illegible] to the husband if his wife [illegible] her wrongs.

[illegible] of the action is a wrong, viz. trespass, but the [illegible] action on the case, for [illegible] of the wife [illegible] formerly, but is not now, suppose [illegible] action, the [illegible] wrong [illegible] necessary must be had. If the husband be necessary to the [illegible] for no one may take advantage of their own wrong.

Hob. 17. 3. T. R. 651. Rub. N. P. 17.

After separation, or written articles of agreement, it [illegible] action will not [illegible] 1. Wms. 1. 3. 182. 183.

Bur. S. C. 37. 3. T. R. 651. S. C. 357. 1 Esp. R. 16.

In this case, the marriage must be proved, not by reputation but by eye witness or the register. 4. Burn. Ec. 1. 2. Rub. 632. But. N. P. 28. Sent to Barlow in Jour. [illegible]

The only able negligence of the husband, the bare [illegible] of the wife's [illegible] like circumstance will not [illegible] damages.

The husband's power over his wife

[illegible] had the same power over her that he had over [illegible] under the reign of Car 2. however she has been treated cruelly. The lowest class of English citizens, have the right of chastising their wives. The laws of [illegible] recognize no such right.

The right of finding sureties for good behaviour

The action here lies on both sides, in case of misbehaviour threatening. One cannot bring suit to [illegible] of the peace by the aggrieved party, he will [illegible] his cause, means the offender bound over [illegible] for his or her good behaviour. 1 Bac. Ab. 119. 1. 3. [illegible]

It has been said that if [illegible] the wife leaves the husband without cause, he may seize & bring her back again. It is said too that, the husband may imprison the wife to prevent her going away with an adulterer. Stra. 875. 477. 1207. 3. Burr 1627. Hawk. 130. Moore 874. 2. Lev. 128. 4. [illegible] 1991. The law will not compel her to leave [illegible] she fled from her husband's brutality. Hawk. 130. 1. Salk. 113. Strange 1207. Bac. 634. Burr. 1991.

The husband's liability to pay the debts of the wife contracted before marr.

See Section 12. The husband's liability does not [illegible] after his ceasing [illegible] with his wife. But after her having come while coverture in [illegible] state. 1. [illegible]. 351. 3. Mod. 186. [illegible] 123 3. P. Wms. 409. [illegible] 366.
When a feme sole is sued & then marries [illegible] to judgment, [illegible] & she may be taken in execution [illegible] 2. Strange. 1167. 1272. 1. Salk. 125. Barnes 36. 2. Bl. R. 720.
The execution must therefore be against both [illegible] & if the wife is taken & the husband [illegible] be discharged. 1. [illegible]. 395. 1. Vent. 151. 1. D&E. 486.
If the wife [illegible] before judgment is obtained for a debt [illegible] before coverture, the husband is discharged [illegible] at any time against [illegible]. Bro. [illegible] 300. 1. Bac. 307 7. T. R. 348. Esp. 122. 1. Bac. 93. 1. Salk. [illegible]. 3. Mod. 186. Lutw. 20. If jud. is rendered & the wife die it may be collected of the husband. A debt due from the W. dum sola, can't be set off in a suit by the H. unless H. has promised to pay it. 2 Esp. R. 594.
If a man treat a woman as his W. he must pay for goods bought by her even of those who know she was not his W. 2 Esp. R. 637.

The husband's liability for the wife's torts, committed both before & after marr.

The husband is liable for the wife's torts committed before marr. on the same ground, as for her debts. Bro. Bar. 301. 1. Bac. 307 1. Wils. 149.
If the husband dies before they are recovered, the wife alone is liable - if she should die before they are collected, he is not liable - because torts or personal injuries die with the person. Still however, if after ~~her death~~, the assets were benefited by

this injury or tort, he might be liable in same cases.
1. Brownl. 212. 1. Roll. a. 6.

As to torts committed after marr., there are same law which both are liable, & some for which he alone is liable.
When the wife commits a tort in pursuance of his orders the husb. is liable because she is considered as his mem. agent. Bro. Bar. 55 S. 174. 2 S. 1. Roll. 348. Bro. Jar. 661.
When the tort is committed in each other's company, tis his wrong & she is excused. The ground of this is, a presumption of coercion on the part of the husb.
If the wife commit a tort, without the orders, consent or presence of the husb., tis her wrong - Husb action lies against both - & if he dies it survives against her.
1. Roll. A 51. Brownl. 122. Bro. Bar. 376.
The husbands liability for the publick offences of his wife
When the punishment inflicted is nothing more than a fine, the husb though innocent, is liable with the wife. 1. Hal S. 1. Hawk. S.
But when the imprisonment or corporal punishment the wife alone is subjected, because she has all the means of making satisfaction Hobart. 3rd Keb. 3. 2. Rol. 294.

What duties of Wife the Husband after marr must perform
If there were any duties incumbent on the wife to perform before marr. & she is incapacitated therefrom by marr the husb must do them - if a man marry a widow having children, that she is bound to support, he becomes liable after marriage to maintain them.
But the case is different if the unmarried woman is a pauper. Her children must remain paupers.
It is also a duty incumbent upon children, to maintain their parents. But a daughter, on her marr., or at least her husb, is exempt from this duty - the parents must go to their other children. This principle has been adopted in Conn. 1. Swa. 198.
It has been decided in Eng on the authority of the case in Strange, that the husb is not bound to support the child of the wife by a former husb 4. T. R. 118.
But judge P. thinks this cannot be law.
That it is by Eliz. 3 Dal. R. 1.
Query if the father them by his power & they become part of his family
Relat. of Elizabeth creates the duty of children to support their parents - there is no such law to this purpose.

Where, by the coercion of the husband, the wife has committed an offence, that is malum prohibitum merely, he alone is liable & she is excused.
So too where the offence is against nature, however atrocious it may be, the husband alone is liable.
But this don't extend to murder, that would have been so in a state of nature, as murder &c.
The wife is liable for treason.
Both are liable for keeping a bawdhouse. 1. Hale 45. 47. 1. Hawk. 2. 3.
In felony, a wife may be made accessary before the fact, not after. Hale & Hawk. ut supra. 4. Bl. 28.

What contracts of the wife are binding on husband alone.
The wife can act as atty for her husband — therefore if a contract is made under an express authority from him he is bound by it. Qui facit per alium facit per se.
The husband is bound by those contracts of the wife, which it was usual for her to make & him to ratify. The principle is presumed consent. 1. Roll. 350. 1. Bac. 124.
He is bound too if it be such a contract as wives, according to the custom of the country usually make.
1. Roll. 350. 1. Bac. 120. 1. Strange 645.
Were she to borrow money, the authors say he would not be liable. In this country & Pa. think he would.
The husband is bound by every contract of his wife for his use & by which he is actually & voluntarily benefited. Taking benefit of the contract furnishes evidence that he authorized it. 1. Bac. 120. 3. East 393.
If the husband is sick, insane, in a foreign country or in any other way incapable of conducting business, the wife may contract so as to bind precisely in his place & he will be bound. 1. Bac. 127.
The husband's hand for necessaries she may purchase when he refuses to afford her any. If the husband drives her out of doors, & publicly forbids all persons trusting her, he is bound for her necessaries. Salk. 118. Strange 1214. 6. T. R. 606. 4. Burr. 2078. 4 Esp. R. 41. 3 Esp. R. 280. 4 Esp. R. 41. 1 Esp. R. 351.
And if the husband himself, with good reason, has

Liable for her maintainance, tho he forbid all persons trusting her. Strange 875.

If she go without good cause, he is not bound to maintain her — if she returns, he is. But if she goes with an adulterer & afterwards comes back, he is obliged to receive & support her. Esp. 125. 1. Barn. 668. 12 Co. R. 51. 1. Bac. 299. Strange 478. 6. D. R. 603. Salk. 119.

If the husd provides necessaries for his wife at home, & treats her well, he has a right to forbid all persons trusting her. 1. Lev. 5. 1. Sid 107.

A wife driven from home by ill treatment, any man may receive & not be liable for it. 2 Co. R. 748

Lecture 7th

In case of the elopement of a wife with an adulterer the husbands liability to fulfil her contracts seems to depend upon the notoriety of the fact. It would seem that before the affair was known, he ought to be liable in the same manner, as the master for his servant after dismissal, before notice of it is given to the public. 1 Strange 647. 706. 6. T. R. 603.

The wife in such case would not be liable for necessaries. Peere

A wife living in adultery is bound by her contracts
× Gould. 1. Bos. & P. 334.

If an adulteress live with her husd he is liable for her contracts. Stra. 647. 706. 6. D. R. 604. 1. Bos. & P. 226.

Where by mutual agreement the wife has a separate maintainance, & this is publicly known & it is sufficient to support her, the husd is not liable for her contracts, even for necessaries — if it is not suff. he is liable. Ld. Ray 444. 1006. Peere if. Salk. 116. 12. Mod. 244. 6. Bo. 142. 7 the cont is not void of a separation takes place when there is no property, the husd if the wife can support herself by labour, is not bound to do it — if she is not, he is. 1. Salk. 116. 118. 4. Burr. 2177.

* To avoid being liable the H must show that the cred had notice of the separate maintainance. Esp. R. 258.

Though a man cannot forbid persons, in all cases trusting his wife for necessaries, he may forbid particular persons, who are his enemies. 1. Mod. 171. 2. Shows 283.

Ray 866 John 72. *

It is said, that if wife buys goods & sells on pawns them again the husband is not liable. 1. Salk. 118.
L. Reeve cannot account for the ground of decision, unless it is that they must come to his use, in order to make him liable — But his liability commenced at the moment of the purchase, & how can any thing misconduct of the wife discharge him?

If the wife without a special power of attorney give a bond in her own name, even for necessaries, it is void: the husband however is still liable in an assumpsit. 6. T. R. 176.

A contract for money loaned to be paid out for necessaries will not bind the husband in a court of law. but it will in Equity it ought to be so in law. 1. Salk 387. 1. P. Wms. 478. 559.

If the wife is committed to prison for a crime for which the alone is punishable, the husband is not bound to furnish her with necessaries. Hut. 105. various points. 1. Mod. 128 2. Vent. 155. 1. Lev. 345. 2. Ray 1006. 2. Lev. 16. 2. Strange 1122.

If debts due from & to the wife at the time of marr.
Upon the marr. all debts due from the husband to the wife are discharged. 1. Bl. 442. Bro. Can. 551.

If, after his death, a bond or note is found in favour of the wife against him, it survives against his executors Mr L. says the most survives — a personal contract once suspended, is forever extinguished. 2. H. Bl. 10. 1. Bl. 442. Bro. Can. 551.

Debts not to be paid till after his death.
Agreements entered into, by the husband & wife before marr. founding for her after his death are binding both in Law & Equity. Holt. 216. 2. Ray 550 and 515. Bunn. Rep. Ch. Couth. 512. 2. Ver. 480. 2. T. R. 318 on 341 2. T. R. 324. Salk. 325. 1. Fount. 13.

Their contracts as to marital property.
A conveyance of real property from a man to his intended wife, is binding.

It is a maxim of common law that the husband & wife cannot

Barons & feme

contract together after marr. Because they are one person in law. This is true as it respects personal property but false as to real property. For a grant of land to a man not vest in him but her. In abidance to this maxim of common law, they could not convey to each other. It is now settled that a husband cannot convey land to her husband during coverture. Co. Litt. 112. 187

So formerly the husband could not convey to his wife but a fiction was contrived to evade this. The husband conveyed to a third person & he to the wife. this was allowable.

But in Eq. the stat of uses enables the wife now, by a species of fine sur, to receive property directly from the husband. Thus if the husband conveys to Ba & his heirs for a price of land for the use of Ab. the wife of the latter takes without any further act vests in her.
Co. Litt. 112. 2. Roll Abr. Abrid. 111. Dyer 106.

In case we have no such stat, yet prevails the old in certain cases.

Lecture 8th

The husband cannot contract with the wife as it respects personal prop. this rule is universal in a court of law. But in equity an agreement before marr. on the part of the husband that the wife after marr. shall have certain articles, & the benefits of the salvo of them is binding - & in some cases she has been treated as a creditor to the estate for money so acquired, & loaned to the husband.
2 P. Wms 337

But a voluntary promise of the the husband that at some future time he will allow the wife such privileges, is not binding even in equity.

Of anti-

Of articles of separation.

Agreements of this nature are allowed in Eq. both in cases of law & equity & the parties are bound by all the legal covenants contained in them.
The H. to avoid liability for debts contracted by W. after separation must advertise, or be bound by a written contr. 3 John. 72

By separation the husd may renounce his marital right so far, as he does renounce them, he never can reclaim them. If they agree to live separately & nothing more, he loses all right to her person & nothing else.

If he covenants to support her he is bound by it, but in the case of a legacy if a legacy should come to her, he has it - so if lands descend to her he will use them.

But if he covenants to renounce all property he is bound by it. Nothing is here taken by implication - all must be expressed.

He can sue for no injury done her person after separation nor sue her - nor sue her person. Contra 6. Bac. 244. Peck 8. Dayt. Ed - note.

If he renounce all right to her fortune, she can convey real property in her own name - & other wise by fine & recovery. Strange 478. 2. Atk. 511. Compton vs Hollister 1. Hob. 8. Mod. 82. Burn & Bull 452. 542. 497. Pre. Chan. 614. 496. 2. Vez. 346. 9. Bro. Pl. ca. 614.

If the husd agree previous to a separation, to support the wife if a separation should be necessary, he is bound to do it. After separation on the grounds & conditions mentioned, the wife is considered a feme sole except as to managing again. Bro. Ca Cha. 334. 2. Vent. 217. 2. Bac. 243. 2. Vez. 611.

After separation, the articles must be changed or annulled, but by mutual agreement. Burn 532. The wife is insufficient to the extent inforced of obtaining her separate maintainance. For a man must be just before he is generous. 2. Vez. 336. Pre. Chan. 497. Strange 478. 2. Atk. 511. 3. Do. 547. 2. Bro. Ca. Chan. 90. 2 and 3. Do. 614. If H. & children live with W. he is liable for their support 3 Esp. R. 182.

Contracts by which a wife may bind herself.

It is a general rule that the wife cannot contract so as to bind herself. But there are exceptions. The criterion to discover these exceptions is this. Where she does not act under the coercion of the husband, & his marital rights are not affected by her so doing, she may make a contract that is binding on her.

The exceptions are, 1st Where he is banished the realm. She is then free from coercion, & his marital rights are not affected by her contracting. Baron & feme. 46. 124

Co. Litt. 133. Rolle. 400. Moore 546.
It is said in this case that he is civiliter mortuus. But it is not so — for she can't marry while he lives.

2nd When he abjures the realm she can contract & be bound by it. So also the wife of an alien may contract anyone's goods. Salk. 116. Camb. 402. L. Salk. 646. L. Ray. 147.
3rd When the husband is transported for 7 years only, she may bind herself by her contracts. 2 Bl. R. 1174 2 Ex. R. 27.
If the H. is a foreigner & lives abroad, she is liable. 2 Ex. R. 554. 587.
These exceptions are universally admitted.
If the H. is abroad & allows her so much power for her support & the appears & contracts as such a power rests in action must lie on her. 3 Ex. R. 18.

Lecture 9th

A wife living an separate maintenance can sue in her own name. She is then her husband's coercion, & his marital rights are not affected by her contracts. 2 T. Rep. 5. Barry of Baron Palmer. 1 D. & E. 5.
This has been controverted, & indeed overruled in one case if the court founded their decision on the grounds of separate maintenance — & it seems they did.
As to the L. on this subject see 3 Ex. R. 250. Cases there cited —

In opposition to the case of Palmer see 2. Bl. R. 1079. Hatch vs. Battel. Here was no covenant to live separately Next case 2. Bl. R. 1195. See vs Scott. Here was no covenant to prevent his reclaiming his wife & putting an end to the temporary separation.

4. T. Report 766. No covenant.

5. T. R. 676. No covenant.

6. T. R. 604. No covenant.

8. T. R. 514. In this case, the ct intends to overthrow the Barons. Yet this decision independent of opinion no way militates to be given, does not affect the Barons case. If this case was decided on the grounds of separate maintenance, & not on that of a covenant

it is directly opposed to the Baron's.

the wife may, during coverture, if the husd joins with him, in a fine or common recovery, make a binding conveyance of real property. Besides this there is a stat of Hen. 8. which renders valid certain leases, made by her & her husband for three lives or 21 years & no longer. We have no such stat in Conn.

In the U. S. there is no such mode of conveyance as by fine & recovery. But here the wife may convey her land by joining with her husd, in the common mode of conveyance. Ton 10. Co. 42. 1 H. Bl. 346. 1 Ves. 229. Co. Lit. 3 vol.
Vide as to fine & recovery in N.Y.
The husd & wife are joint in a conveyance, that he may convey the use & she the fee. She may convey clear if none of his rights are affected by it. If he disavows to it the deed is void ways. But if the wife dies before he does that the deed stands good. Authorities ut supra.

It is a maxim of com law that a freehold estate can be created to commence in future — & likewise that every remainder, must be created at the same time the particular estate is, upon which, it is limited. If a wife, three years, convey her land, to commence at the expiration of her husd's interest in them, such conveyance would be void — because the estate would be to commence in future, & the particular estate was created at the time of mar.

Such a conveyance might be made in Conn. for these maxims are here done away by stat.

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The husband may prevent the wife from receiving rents by deed. That he can in contemplation of law devise them is no question. but the same may an exist as in the case of a deed viz. that it may affect his rights, for he may be obliged to pay taxes which in his absence exceed the value of the land.

Lecture 10th

Of the wife's executing a power

A wife can execute a power without her husd, whether given her before or after marr. Wms' cases 197. 157. 3. bow. 567. Raw. 3. 150. 1. Roll. 349. 2. Ves. 75. 1. H. Bl. 246. Latch 39.

No person has ever questioned the right of the wife, to execute a naked authority — hence, if the legal title to land is vested in her, to convey to a third person, she may do it, with out her husd.

Power of the husd to convey away the real property of the wife.

If the husd convey away the real prty of the wife, the use during her life, also will pass or if she had an heir during coverture, the husds courtesy.

The power of the wife after coverture, to warn or confirm the contract entered into during coverture.

If an estate is conveyed to the wife during coverture & her husd accepts, after his death, she may agree or disagree to it as she please.

Contracts of the wife during coverture, as it respects real property, are not void, but merely voidable.
1. Roll or Roll. Ab. 349.
See 2. Bl. b. 293.

It is said, that the wife is entitled to the emoluments of an incumbency during the life time of husd, after his death. If this is the case it is on the principle of joint annuitship or survivorship.

Any contract made during coverture, respecting the wife's land, by the husband, she may confirm or annul after his death, at pleasure. An affirmation of the contract may be implied from her conduct — as if she receive rent of land leased by her husband. Roll. 349. Co. Lit. 26.

If the wife once met before marr. the husband, to account it during coverture, must join her husband with him in his action — after her husband's death, it survives against him. But must arising during coverture, he must sue the husband alone, if alive, or his executors if he dead. 1. Roll. 351. T. Ray 6. 1 or 2. Lev. 25.

The husband cannot release a contract made by his wife & a third person before marr. to take effect after his death. Where she has an annuity for life, the case is the same — for an annuity is real property. Moore 522.

A wife may lease an estate by her husband's negligence. Suppose a property is given to her, provided her husband perform certain conditions — now if he fails she loses the estate. Co. L. 246.

But where this condition is annexed by law, & not the parties, as for instance taking the oath of fealty, the wife shall not suffer by the husband's negligence. Co. Lit. 139.

In what cases the wife must join her husband in a suit Whenever the cause of action would survive to the wife they must join. 1. Wils. 224. 3. T. R. 591. 1 Bac. 304.

For choses due before coverture, for trespass committed on her lands before cov. for an injury done to her freehold, her person or character before or after cov. against action must be brought. 1. Bulst. 21. 1. Roll. Ab. 347. Bro. L. 537. Bro. Law. 417. 1. Lisb. 25. 1. Brownl. Cas. 25 or 204. Bro. Ju. 510. or 501. 587, Bro. Law. 90.

The reason for joining the wife in these cases is, that whatever the husd acquires is personal both of husband to him. Both as they are all choses in action, if he does not recover them to his own, during his life, they survive to the wife. Now if he should only obtain a judgment in his own name & die, it would go to his executor, whereas it ought to go to his wife. By joining her, & obtaining a joint judgment it will.

It is a settled by elementary writers, that the Husband can sue alone upon a chose in action belonging to his wife before coverture, & to support this position have cited the subjoined authorities - none of which apply to the case but merely show, that he can release for a chose, accruing to the wife during cov. for she may be joined at pleasure. 1. Ven. 268. 2. Roth. 21. 2. Ven. 66. 67. 2. Mod. 217. 3. Lev. 402. Ally 90. 1. Lev. 107. 3. T. R. 624. 1. Ven. 276. 2. Mod. 217

When the cause of action does not belong to the wife she need not be joined. 4. Mod. 156. 1. Salk. 114. Bro. Jan. 1777. 1. Roll. 348. 347. 2. Lev. 402. 1. Ven. 82.

In all actions upon choses belonging to the wife before coverture, she must be joined. 3. T. R. 627.

It is said that the reason why the wife cannot sue alone is, that coverture is a disqualification. But it is not absolutely so, as tho she do not exist - For, when she was alone for two days on her husd forty before marriage coverture can only be pleaded in abatement. But were she so disqualified that she had no right, recognized by law, it might be pleaded in bar, as well as abatement. 2. Ld. Ray.
Again it is said she cannot sue alone, because she & her husband make but one person in law. But were this true the husband could not sue - for it requires at least one person to make a suit.

But the substantial reason is that the suit shall not be vexed with a suit by a person, who, if beaten, would

must be liable to refund cost — If a fem. covert would not for she has no separate property.

Lecture 11th

When a debt accrues to the wife during cov. the husd may bring an action alone, or join his wife 4. Mod. 186. 1. Roll. Ab. 347. 3. Lev. 403. 1 Ver. 82. Salk. 114.

It has been decided that an action must by the H. & W. for work done by the W. will not lie. She it admitted that in an express promise, a joint action would lie. but said that the profits of the wife's labour would not survive to her. The same might have been said of an express promise — & therefore J. Reeve does not think the decision law.

It is true as a general rule, that when the husd. or property of the wife, is the mentorious cause of the action — the may be joined with the H. 1. Vent. 162. 2 vo. Jac. 205. 462. 999. 494. 1. Lev. 172. Owen 83.

If however in this case, that cause has occasioned no special damage to the H. the action may be joint or not, provided the cause of action would not survive to her, after his death. 2 vo. Jac. 205. 999. 494. 442.

If the property of the wife is recovered before cov. & converted afterwards the H. may join. 1. Bac. 906 1. Vent. 261. 262.

If joint judgment is obtained, in any of these cases & the H. dies before collection, by Engl. law it goes to the Survivor. there is no such law, but J. Reeve thinks it would survive to the wife. 1. Ver. 99 Bac 369.

When must the H. & W. be sued together? — — —
If the action would survive against her they must be joined. 1. Roll. 6. 347. Do. Lit. 351. 1. Leo. 312
ch for debts owed by W. before marr. 8 John. 149. 7. T. R. 348.
If the wife before marr. is alleged of lands, & the H...

neglects to performe her contracts, & is sued, the H. must not be joined for the covenant by operation of law is transplaced to the H. as thoughtis set supra.

Where the H. & W. are sued for a battery & the H. is found not guilty, judgment cannot go against the W. for in such case she might be imprisoned — a thing punishable by law.

If the H. & W. are beaten two actions accrue — for all the H. has an interest in recovering for the battery of the wife, the value was not lost. 2 Lutwyn. 1. Vent. 268.

Of the W.'s power to devise.

Dy com. law I. K. thinks a wife may devise or will away other lands, tho not to the wrong of her H.'s marital rights.

She can devise land jointly with her H.'s consent. Year B. 4. Hen. VI 91. 99. 27. Brooks devises 34. Eliz. Dav. 213. 376.

Antiently the W. had no separate property — hence as authors say, a W. generally shall not devise — for that would be to defeat the H.'s property.

The same authorities say she might devise her wearing apparel. Perm. Cby. H. III. 307.

So likewise what the H. gave her ad ostium ecclesiae she might devise. 1. Perm. Hist. 1813. Do 791. 68.

She may devise personal property given for her sole & separate use. 1. Ves. 214. 3. Atk. 709. 1. Ves. 190. 303. 518.

Whenever married women have separate property they may devise it as independent of state. 1. P. Wms 126. 2. Bro. 316. 82. 1. Ves. 214. 2. Do. 253. Ch. Chan. 205. 2. Ves. 75. 1. Bac. Chan. 10. Moore. 340. 1. Roll. A. 604. 912. 2. 14.

In Penn. W. may devise real property by law.

That the wife may devise her separate property only is fully established — but in Eng the stat of Hen. VIII. has enabled her from disposing by will of her real prop. 2. Ves. 190. 5 Vz. 309. 2. Do. 74. 2. 1. Ves. 214, 3. Atk. 707. 9. P. Wms 316. 1. Do. 126. 1. Bro. ca. Cha. 10. Ave. Chan. 205.

If the H. & W. separate, & he gives up all claim to her real property, she may devise it. 1. H. Bl. 3, 4. 9.

She may waive her choses — but if the H. induces them to do so & such devise is set aside. 1. Mod. 211. 2. 2. Atk. 92. Moore 240. 1. Roll. 608. 912. 214. 2. Bart 592

Hence com. at com. law is no disqualification to devise for when the W. has prop. at her own disposal she may devise it.

A W. may devise that which she holds in right of another as when she is an executrix.

In those states where there are no stat. similar to that of Henry 8. A. thinks the W. may devise her personal & real estate, if her H.'s rights are not affected thereby.

A H. may devise or make a donation causa mortis to his wife 9. P. Wms 94.

A married women cannot devise real estate in N. J. 2 R. S. 56

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Lecture 12th

Does marr. defeat the wife's will, previously made?
Marr. revokes the will of the w. made before marr.
2. Bl. 499. 2. P. Wms 624. 4. Co. 60. 2. T. R. 634.

If she chuse to devise her prop. in Fee & then marry, as this prop. would become her H.'s absolutely, the will would be nothing. A devise of real property would not be good.

In some cases the will is good — for instance, should she devise her choses in action, die before they were collected, as by law they did not vest in the H. till collected, the devise would stand.

Mr Lewis thinks a devise of any prop. would be good, should she survive her H. Goodl. 69. Pow. 943. 2 R. T. R. 692. 634. Sumn. Moore 3 & 1. 2. T. R. 643.

W.'s separate property

A W. may have separate prop. either personal or real over which she has absolute power. When real prop. was devised to the W. for waant for her separate use, it was formerly customary, to convey it to trustees for that purpose, the legal title resting in them. 2. Atk. 634 Prec. Ch. 184. 1. Ves. 518.
But now it is devised directly to the W. — & any words indicative of the devisors intention to that effect are sufficient. 1. P. Wms 127. 2. Do 616. 3. Do 334. 3. Bro. Co. Ch. 442. Prec. Ch. 187. 3. Atk. 399. 3. 2. Ves. 659.

The property thus mine cannot be taken by the H.'s creditors. This considered as a trust for her. Ans. ab. 2.

A gift of real prop. from the H. to the W. has been held to be separate use. Prec. Ch. 224.

There is no form of words necessary to create a separate property in the W. 2. P. Wms 144. 82. 3. Do. 98. 1. Atk. 269.

The separate prop. of the W. is liable in a bill of equity for

her contracts made during cov. Dens in a bt of Lower
2. P. Wms 144. 4. Do. 98. 1. Fount. 90.

But she is liable to the extent of her separate
property only. Her person is not liable. 2. Atk. 379.
1. Bro. Ch. C. 2. Ves. 130. 1. H. Bl. 234. 2. P. Wms 144.

If the H. with her separate property, procures her to
mortgage lands & take a receipt, after her death,
she will be considered as money agree, in equity, & the
heirs must pay her the money before they can get
the land. 1. Atk. 269. 2. P. Wms 82. 341.

If she lends her H. her own property in any case, & takes
a note bond or receipt for it, it may be collected
after his death. If she takes no note or bond, it can
not be collected — it is supposed to be paid for fam
ily purposes. Ans. it is not so.

Lecture. 13th

If the wife agree to pay the the H. her separate property she
may be compelled to it in a bt of Chan. 1. P. Wms 82. 341.

There is one case which seems not founded on principle
If the H. lives her separate property at interest in her
name, & the H. dies, this is considered as a payment to him
& goes to his executors.

A W. can alone dispose of her real property, which is in the
hands of trustees — But whether she can of her real prop
is unsettled — the legal title being in the cestuy que trust yet
she can compel him to convey by taking proper steps. 2. Vs 452
Pure in Chan. 36

She may in some cases sue by her husband — she is a feme sole
as to her separate property.
In case of separate maintenance, she may sue her H. in equity
in her own name.

Settlement of minor on his W. before marriage.

A minor's contracts in general are not binding - but a settlement made on his W. is not 2 Atk. 607.
Though not of course, for a Ct of Eqty will rescind it, if unreasonable & improvident. A jointure is subject to the same rules.

Of Marr. settlements made at the time of marr.

No man can, in general, settle his property on another to the injury of creditors, that are so prior in point of time to the settlement. But in the case of marr., or there is a good & valuable consideration, a settlement that is not extravagant, is binding against creditors - it must be confined to the wife, & the issue of the marr. 2. P. Wms 494. Eq Ca. Abr. 354 2. Salk. 6. 1. Vent. 193.

Marr. settlement made after marr.

If after marr. a settlement is made, in pursuance of a written agreement entered into before marr. it is good. So also it is good where the W. has received part from some person, only there was a sufficient settlement before. It will be good too where she receives part from trustees - if they refuse to assign it unless the H. makes a settlement on the W. 2. Atk. 420. Amb. Rc. 14

Unless attended by one of these three circumstances, settlements made after marr. are considered as voluntary grants, & are not binding against creditors. Prec. in Chan. 22. Vern. 2. 214. 2. Brown 140

Settlement on the wife at time of separation.

If a settlement of real prop. is made on article to give separately W. can only have the use of it - but if it is given to her sole & separate use, she then has absolutely. Prec. in Chan. 186. 3. Ves. Jun. 494.

If after settlement, the wife becomes a bankrupt her H. is said, must support her - this is doubtful.

Joint mortgage to the H. & W.

In case of a joint mortgage, if the H. dies, in Eqty, by the jus accrescendi, the interest survives to the W. 2. Ves. 683.
When this principle does not exist, J. Dennethorne she will would hold it.

A joint mortgage of the W.'s freehold is good & she is a creditor of her H.

If the H. & W. covenant to convey lands, as she is not bound by any act short of conveyance, she would not be held to do it. But this is disputed. See Comm. mak a covenant is binding. 1 Roll. 340. 2. Ver. 61.

If the W. mortgages her land for the H.'s debts, she may claim his personal estate for the purpose of indemnity. She claims as before the heirs & after the creditors. 1 Ver. 41. 404. 1. P. Wms. 347. 2. Atk. 344. 2. Mk. 344.

However if it can be proved by parol testy. that the money exist is satisfactive for their doing, it will cut off her claim where his feel forty. Amb. Rep. 150. 3. Bro. ca Chan 201. 1. P. Wms. 264.

In case of a joint mortgage, if that the money is not paid at the day but the H. takes up further money, it would be upon the mortgage. Vt supra.

Of the W.'s settlement

The W. by marr. gains her H.'s face of settlement — if he has none she gains none. Bunyon 344. 349.

When a new settlement is gained the old one is lost, for no person can have 2 settlements at the same time. Vt. supra.

If the H. has no settlement & runs away J. R. thinks, this his rights, the W. might be sent to her maiden settlement.

A marr. before the stat. 26. Geo. II. not legally celebrated, gained the W. a settlement with her H. It is not so now. Dy. 3 but it is with us & a long cohabitation together is held legal marr. 3. Mod. 341

In Comm. J. Rep. thinks, that the W. by a residence of 40 years gains a settlement by commonalty.

Of being witnesses for or against each other. Lecture 14th

It is a general rule that the H. & W. shall not be witnesses for or against each other. Even if all consent, the W. shall not be admitted when the H. is a party — for she may have a bias on her mind, if it might estrange domestic quiet. Even if he might be admitted to swear against himself she shall not

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1. T. R. 674. 2. Marriage 541. Hardw. 258.

This disability does not reach any other of the fœminæ sulcatives, but merely goes to their capability.

In Eccl. however in case of marow, they may testify against each other. Whether this would hold in this country is uncertain.

In case of personal abuse to the W. from the H., she is a good witness for the king. This was decided just in the case of Lord Audley 1. Hutt. 115. This decision was aimed to be law till finally settled by Anon case in 1. Strange 633.

Rights of defence between H. and W.

A H. may be justified for a battery in defence of his W. when she wants be justified for a battery in defence of herself, & vice versa. He is justified in killing a man attempting to ravish his W., because she might. & the same. He may not kill a man in the act of battery with her for she might not. Orall. 14. Esh. 314. Co. Rep. 62.

Celebration of Marr.

In Eng. the ceremony of marr. must be performed by a person in holy orders. if not it is by Stat. void. The bann. &c must be by a jus. of the peace, within his jurisdiction, by a licence in the county where he is settled, or by a consecrat. or judges of the supreme court any where.

If any person not authorized by stat. should marry a couple &c, he would be punishable. tho the marr. if previously intended by the parties, would be good. 1. Salk. 120. 437. &

So if a person authorized by stat. should marry a couple without publication, or consent of parent or guardian he may be punished — yet the marr. is valid. 1. Com. Dig. 545. 1. Bish. 64. 2. Ken. 376. 1. Salk. 490. 497. 2. Do. 437. Lombardbook 479.

The male must be 14. & the female 12 at the time of marr. either is under this age, on arriving at it he or she may disaffirm & make the marr. v. Co. 33. Salk. 44. Co. Litt. 33. v. Co. 43.

By the stat. Hen. 8th no prohibition, Gods law excepted, shall impeach any marr. without the Levitical degrees, therefore all marrs within them are voidable as that are contrary to Gods law. Those supposed to be prohibited by Gods law are where there is a precontract, or inhability. One either of which cases, the marr is voidable by the Eng. ecclesiastical law a divorce is necessary to annul it. Bro. L. 854.

But a precontract cannot now be considered as any objection to marr. 1. Bl. 439.

And the marr. is good until the sentence take place, if the parties be not divided then issue cannot be bastardized.

By our law, a marr. is void, by reason of a prior marr. Our law prohibits all marrs within the Levitical degrees tho it permits a man to marry his wife's sister.

All within the 2nd degree by cauty or affty are within the Levitical degrees. If marr within one void by our Stat. — by English law, they are voidable by divorce. Vaugh. 218. 2 Lev. 250. 2. Mod. 16.

Tho the contract has been once decreed, idiots and lunaticks are incapable of marr— they cannot consent to any thing. 1. Roll. 340.

For authorities on the subject of marr generally see. 1. Roll 360. 5. Co. 98. Carth. 27. 471. Co. Litt. 235. 1. Salk. 121. Bro. Law. 462.

If at the time of marr one of the parties has the other has & the other has not attained the proper age, as long as one may annul it so may the other. 6. Co. 22. Roll. Ab. 340. 1. Jon. 98. 7. Co. 43.

If a W. who at th. is not 14. has a child, it is a bastard.

A wife cannot be endowed unless 9 years old at her th. death Marr. contracted per verba in praesentiis are binding in N.Y. as if solemnized in facie ecclesiae. 2. John. 82.

Baron & Feme.
Divorces, & Allimony.

Divorces are of two kinds, a vinculo matrimonii, & a mensa & thoro. The former dotroy the marr absolutely — the latter gives the feme a liberty to live separate, gives the H. her marriage, & excuses the H. from supporting her — but they cannot marry. Divorces a vinculo are granted only for causes that existed prior to marr. — except by act of Parliament. 1. Inst. 235. 1. Salk. 121.

The spiritual court may grant divorces a mensa & thoro, for supervenient causes, as battery, cruelty & well grounded fear of bodily hurt. After such divorce neither party can marry while the other lives, the H. retains his marital rights as it respects the body of his W., he enjoys the usufruct of her real estate, & if a legacy is bequeathed to her, it is his. But when in such circumstances he has attempted to dispose of a term for years in right of his wife the Ct of Equity have prevented him by an injunction. Moore 664. Bro. Cas. 468.

In all cases of divorce a mensa & thoro the rights are not ascertained — & the spiritual Ct may compel the H. to allow the W. a maintainance, called her allimony — to recover this she can maintain a suit against her H. 1. Chan Ca. 164. 1. Inst. 82.

If a divorce is granted in a sister state, for any cause that by our law would not sanction one, allimony, if allowed, cannot be collected of the H. 1 John. 424.

The causes for which by stat. the Eccleſiaſtical Court in Eng. grant divorces, are fraudulent contracts, wilful absence, with total neglect of conjugal duty for three years, 7 years absence unheard of by Statutory, the case of 7 years absence no divorce is now absolute for it is presumed the absent party is dead.
When the H. is faulty the W. is entitled to dower — when she is faulty he is not entitled to curtesy. The Legislature may set aside a part of the H.'s estate, not exceeding ⅓, to the wife, & when set aside it vests in her.

The legislature may divorce for other causes either a vinculo or a mensa & thoro with alimony.

Addenda.

After enacting the stat of distributions, a question arose, whether the H. must distribute, to the next of kin as the law now stands. This point was settled by Stat 29. Car. II. 2. Mod. 29.
If an annuity is granted to a feme sole, & she marries & after dies, cov. arrears accrue, they will belong to the H. as such, so to arrears before cov. they belong to feme as debts, by the C. L. but by the Stat of Hen. VIII. they lie absolutely. Dyer 3. 4. Co. 51.
In the 2 Ver. 6. a question is made whether the estate of an H. is entitled to the choses of the W. on the death of the H. who had settled on her a separate jointure; they belong to her. The distinction J. R. thinks is this when an estate is settled as a jointure it have power, but none appoints as a future part of the W. chosen by the H. — but any other adequate settlement, not a joint one, as reversion, will not bar the wife of power, but stand as a purchase of her chosen.
A wife convicted of a treason for years remains an alien her abetters by marriage might withdraw of this term 10. Mod. 104.
The H. has the same power over leases in trust for the benefit of the W., unless expressed to be for her separate use, as over lease vested by grant to her, unless the term is settled as a jointure for the maintenance of the W. after his death. 2. Chan. Cas. 86. Freem. 82. 10. Bull. 118.

It has been asked, if a femme sole convey her land by bar to
purchase for her self, & marry, & receive the rents, & put out part
of the profits, for which she takes bonds, & other securities, &
die, will the H. hold this estate against her as long she chose
or in his own right as husband? He notes as H. yet there are
cases in which a different doctrine is holden. Cro. C. 116.
Hobb. 155. Case 113. 2. Inst. 62.

A lease from a H. for a certain number of years to commence
immediately on his death, of a term for years belonging to
his wife is void. Cr. E. 247. Pop. 4.

If a term of for twenty years remains, & the H. owner leases for ten y. this before the end of the 10 y.s
his wife is entitled to the residue the residue of the
10. y.s, & the H. for the residue of the term. 1. Ventr. 259.

In Cro. J. 208. there is an authority which proves, that an action
on a promise to a wife, to pay her so much for her services
in the name of herself & husband may be maintained. It is
mentioned that her no property subsist in the thing promised
yet it belongs to her H. & he might have brought the
action in his name alone.

The there is an action for a battery an husband may in
his own declaration demand damages for a battery on his
W. per quod consortium amisit.

A fine on the W. for life for, wast, or other offence shall
not be levied on the H. 11. C. 68. or 11. Rep. 68.

The debts of the W. contracted when sole are discharged by the
bankruptcy of the H. & he dies will not survive. 1. Ld. Ray. 249.

In 1. Salk. 114. there is a case where A. married B. who
had a large personal fortune & died & left a few child a daughter
it was resolved that A. should maintain such child. the
cause not appearing to the court that the H. is not
obliged to fulfil the duties of the W. after her death.
When an action is brought against H. & W. for a battery
by both, & the first is found not guilty & the last guilty, the
judgment must be, quod capiatur. Cro. Jac. 208.

In 6. Mod. 171. is an authority to shew, that if a woman who
elopes with an adulterer & has thereby forfeited her dower, is
is married again by her H. she shall have dower, & he is liable
for her miscarriages.

Settlement of Husband & Wife by articles of separation.

ge not affect the rights of purchasers on a contrary, unless
here is a covenant on the part of some friend to the W. on his
marriage, to indemnify the H. That as to a Bond after mar-
riage a separate maintenance is unquestionable. Some late
decisions however have rendered this questionable. 2. Ver. 342.

When sep. prop. has been promised for the W. by articles here
previous to marr., if such W. elopes from her H., & lives with
another, upon a bill by the W. for a specific performance, it will go against the H. 2. P. Wms. 264.
After an agreement to live separately, the H. cannot compel
the W. to cohabit with him. Peters case in 8. Mod. 22.
Grant by the H. to allow his W. a separate maintenance
is good. Finches Rep. 79.
When a H. before marr. gave a bond, stipulating to leave
his W. a certain sum of his own fortune, it was decreed in Chy
to be paid before the debts. Finches. Rep. 199.
The profits made by a W. of her sep. property are at her
disposal. Prec in Chan. 255.
Property arising to a feme sole by the death of her sep. property, the
intention of the testator, being fairly understood, to bring the
whole well together, tho it was not mentioned in the will, shall be
declared to be his intention. 2. Mod. 68. 70. 77.
A W. who with her H. levies a fine of her lands of Warranty,
is liable on the covenant warranty; the deed of a W. relative to a
fine, being as conclusive upon her as a fine could be. 12. Mod. 161.
An agreement of a W. to levy a fine of her lands will be thrown
out & relieved against her after the death of her H. 2. Ver. 454.
Where A. leases land to a H. & W. & the H. commits waste &
dies & the W. affirms the lease, by accepting the
rent, she will be liable for the waste committed by the H.
She may however waive this lease & avoid it.
In all the cases of contract where the H. is punished to join
the wife, when he might have sued alone, any cause of action grow-
ing to the W. — it survives to her. Carth. 251. that the H. will not simply
by promise to the W. the law supposes the consideration
cause of the right of action. — Yet in such case the H. must
sue alone. In the 4. Mod. 136. is an entry to prove, that in an
implied contract for work done by the W. the H. cannot
join.

In the case of Knight & Crudley v. Kent 1745. the judges differ

respecting the grp. whether the W. ought to be joined in an action of trespass, quare clausum fregit. on the law of the W.— J. & R. thinks the opinion depends on the nature of the injury, if the trespass affects the inheritance, as by injuring the houses destroying the trees, or plowing the soil, they ought to be joined for how the action would remain to the W. on the H's death— but if the injury were done to the emblements she ought not to join— for in such cases of action would not remain to her— yet her property being the principal cause of the action, the H has it at his election to join her or not.

In Bro. Jas. 77. it is said by the Ct, in a case, where a devise was made, to a W. if she would give a certain round to pay him £10. that if the H. die such cause of action would remain to the W— this is analogous to same bro. case wherein by a legacy was given to the W. during cov. if not collected till the H. dies— the right of recovery running to the W. — it is difficult to discover on what principle these decisions are founded— for the H may undoubtedly sue with out the W. recover all her choses, which accrued during cov— & in the principle case the H. was exclusively entitled to the services of the W— it is true that by the court in Ct, when there is an express promise to the W. the H. may join the W.— but in such a case it is not because the H. has the least interest therein

In Bro. Cov. 221 there is a case of an estate in premises granted to H. & W., & to his heirs in fee— the H. brought an action against the tenants to recover damages for waste repairing the house according to the lease— it was objected that the suit ought to have been brought against the name of the H. & W.— yet the Ct said it was well brought.

That the will of a W. as far as it respects things in action dvoit, & that her H. may be sued exec. see Brook on Devise Tit. 9. 4. Ming 6.

A. W. may devise her lands to her H. Where it is the custom of the manor. Ark. 123

A W. may devise, where by custom lands are devisable. tho not to her H. – because coercion would in this case be presumed – in the case cited there was no objection, on the general ground of incapacity, because Manor. 9. Edw. III. 6. Do. Br. Ls. & Pl. 44

In a case in Ambler 617. it said, that a H. had covenanted, that the W. might devise her real duty & did so, but it was holden that such devise was void for by the Stat. 34. Hen VIII. she was declared incapable of devising her real duty, & that the H. could not remove the disability created by the Stat. The C. said that tho the H. might give power to devise her duty, he could not plead, because the stat. includes it. This proves that they consd. create no disability in W. to devise, for if it did so, the H. could no more remove it than one created by Stat.

If the H. promises the W. that if she will sell her lands & give him the avails, he will leave her the amount so received, he is not bound to do it. But if he should give a bond to a third person in trust for her to this effect it will not be fraudulent as against creditors. 2. Ves. 148.

A gift to the W. as a donatio causa mortis is good. 1. P. Wms. 441.

An agreement by the H. & W. previous to marr. is not enforced by the marr. Chan. Cas. 118.

In 4. Co. 60. it was holden by the Ct. that marr. was a countermand of a will of real duty made by the W. which still in force which seems to be the same case, that Anderson considered the marr. of a feme, as a countermand of her will, the other Judges held indeed that the will was void, but it was because at the time of making it she was incapable of devising real duty by reason of the Stat. Hen. VIII

A settlement made by a Woman before marr. of her lands to her separate use without her H.'s knowledge will not bind him. 2 Ver 17.
The W. may be a Witness to prove her deed a bastard Hard 77.

In Wheatmouth's office of exchequer 2 Bill it is said, that when the W. has elected so to do, she cannot by making an election give her H. of the benefit of being a tenant, but that it is at owners of goods which she holds as Queen, for no benefit could accrue to him in that case, as they go to the next of kin to W. testator. — this doctrine as proposed in the first clause is very questionable for the H. might recover by Stat, is no other than that of Stat. viz. many legacies, after debts are paid — if there is no will it is not a marital right at com. l.

Whether a marr. regularly solemnized, obtained by duress of the same was valid has been much disputed. See 5. Vent. ab. 35. page Vauth. three cases. It is difficult to conceive why a contract the most infamous that can be framed should be valid, when obtained by menace, while all others thus obtained are void.
When alimony is given, it does not affect estates that the H. is personally liable.

A divorce for the cause of adultery is only a means of those of pretty the right of the H. or W. as it respects property, except such as is acquired by the personal services of the W. is affected by it, & she entitled to dower. Co. Litt. 32.
In Rome such divorce is a vinculo matrimonii, & all the effects of such divorce take place, except the issue are not bastards & she has dower.

In Eng. in a divorce a vinculo matrimonii which goes upon the ground that there has not been a marr., if the H. and the W. before marr. he owns her after marr. & all the property he married with her, belongs to the W. yet if this property has been conveyed bona fide to others by the

Barons & Feme

H. their rights are not affected. 2 Bay. 521. Ans B. 906.

A W. divorced a mensa & thoro is not entitled to the admin
istration of her H.'s estate, nor to a distributary share
thereof. Chic. in Chan. 111.

Lecture 1st

A S. is one subject to the final authy of another. A M. is one who exercises such authy.
This authy must be final in order to constitute a S. — for one who is subject to civil authy is not a S.
This authy of the M. is in general in consequence of some agreement between him & the S., or his guardian.
There are 6 species of S. known to our law in Engn. 1. Slaves. 2 Apps. 3. Menial S. 4 Day labourers. 5 Agents of every kind. 6. Relations of Princes in whose service the Stat.
At com. L. Slaves & relations of Princes in service are not known 1 Bl. 423. 1 Wood 468. 464. Salk. 666.
Of Slaves. It has been disputed whether our L. authorizes the holding of slaves. If legitimate Slavery was ever authorized in Engn. it must have been by natural L. from L. or local L.
Slavery is not authorized by natural L. if it is, it is then cases by captivity in war, by contract, or by being born a Slave.
As to captivity in war it is said the captor has a right to kill his enemy, & therefore a fortiori has a right to deprive him of his liberty. But this proposition is not true & the conclusion must of course be false. 2 Burl. 211. 1 Bl. 423.

As to contract. A contract cannot make a man a Slave strictly speaking. Slavery gives the M. power over the life of his slave which neither can grant because it is not his own. A surrender of a man's liberty is a transfer of his moral agency, which cannot be made. 1 Bl. 423.

Slavery by birth. This supposes a previous Slavery which cannot be.

2. Slavery is not authorized by com. L. — nor can the local L. of any country be enforced in Engn. — if a slave lands there his

ipso facto free. Salk. 666. 424. Lofft. 1.

In Eng under E. 3. they had villeins - but they were not strict slaves, for they had some rights. But this was abolished at the restoration of Ch 2nd in 1660. There is no species of Slavery now in Eng. Litt. Tent. 189. 194. 204. 2. Bl. 94. 96. 3. Hume Hist. Eng. 307.

The word villein was once synonimous with slave, & bacon with S.

3. In Comm. Slavery is legalized. It has been decided here that trover will not lie for taking a slave - but an action on the case will lie, for taking or detaining away a slave. Coxe says the action is trespass but he is mistaken.

A Sl. may both sue & be sued by his next friend - he may be a devisee, legatee, or take by devise.

A Slave cannot make contracts, by Stat. But the M. cannot take his duty - if he dies he may be sued.

If the Sl. marries with his M's consent he is ipso facto free - & the reason is the M has made a new relation inconsistent with his former one. If without consent he is not free. The same is true as it respects a minor child. 9. Co. 76 2 H. Bl. 511. 2 Bl. 93.

A Sl. cannot be freed from servitude if he marries without consent of his M. - But if a waif marries a freeman she is free during cov. - if she marry he bond during life, & if to a sl. she is a sl. still.

Lecture 2nd

By usage in Comm. an illegitimate child follows the condition of the mother. In Eng by com. l. he follows the condition of the father. In pursuance of usage an illegitimate child found to become a Sl in Comm. Litt. Tent. 187

2 Bl. 693.

In Lanc. the importation of N is entirely forbidden. & as to the born slaves after the 1st of March 1788 till August 1797. they were to be free at 28. & all born after August 1797. were to be free at 21.

In Eng. the there is no private power of slavery, offenders may be publically condemned to slavery as a punishment. i.e. confinement in New Gate.

Apprentices.

An apprentice is so called from the French word apprendre, to learn. & the reason is that persons under this description are generally bound out to get instruction. 1 Bl. 426.

It is a rule of Com. Law. that every appr. must be bound by deed. A parol contract is not binding on the parties. There is no other instance in which a deed is necessary to make a good contract, at Com. L. The reason of this is the legal solemnity of the deed. for it is two parts to be sealed & delivered. 6 Mod. 182. 2 Roll. 117. Salk. 68. 2 Ken. 64. 492.

It has been decided that a apprentice contract for appr. ship cannot be construed into any other species of contract. the deed is void entirely. 8. T. R. 374.

It was formerly said that there could be no such relation as M. & S. by appr. ship, unless the latter were entered in the deed by the christian name of appr. This is now not in the deed by the christian name of appr. This is now not necessary to be done — the intention must govern & let the man be what they will. 1 Burrow Rep. 57. 3. Bac. 546. 1 Ld. Raym. 739. 8. T. R. 379.

All other kinds of M. & S. may be retained by parol contract 3. Bac. 546.

By parol stat. in Eng. the Children of poor persons i.e. beggars, may be apprenticed out by the overseers, with the consent of two justices till 21 years of age. & the person so

persons to whom such goods are offered, must take them or forfeit a penalty or fine. 1 Bl. 429.

In Comm. we have a similar Stat. except that no person is obliged to take such offer. Stat. Comm. 123. § 59.
Offer, except offers are entitled to wages, for services done. Where there is no express agreement as to the sum, the D. shall recover upon a quantum meruit.

The wages of menial S.s are to be fixed by the parties, those of Lab. Labourers, by Stat. are to be settled by the Sheriff of the county or Justices of the Division. 1 Bl. 428. & 429.

In Comm. the wages of all S.s are settled by the parties, Vs. it is in Eng. except as to Labourers in Husbandry

If the indenture of an apprn is silent as to wages he can recover none, though he may receive them by special contract. 2 T. R. 374. 1 Bl. 429.

The stat. Eliz. provides that minors may bind themselves by their own contract as appr. ship — but according to the construction put upon the Stat. they are not liable upon their covenants — they are liable as long as the relation of M. & S. continues in fact. Vide Langdon v. Doe, he never his full time he is free of his trade, Cro. Jac. 497. Com. Dig. 448. 179. 2. Mod. 190. Comp. Ent. 81. § 18. 5. T. R. 716.
The rule thus far as to the minor S.s liability, remains the same as at Comm. L. notwithstanding this Stat.

If the father or Guardian joins in an indenture with the minor, he is bound by the covenant that the minor shall serve as an appr — but the appr. himself is not liable

The M. as bound of course to provide necessaries for his appr. unless otherwise agreed — Living in loco parentis is bound to provide him. Mere Misconduct is a good cause for the appr. to leave the service of his M. 1. Atk. § 18.

A minor is agst plea in bar if the S. is sued, & a good cause of action against the M. upon the cont.

The said an appr. cannot be discharged but by deed — This true he cont be discharged by contrad express, except by dea — but in case of fraud, abuse he is discharged without deed — the M. however is still liable on the cont. 2 Ray 1117. Salk. 68. 6. Mod. 182.

The meaning of the rule is, that the S. cannot be discharged by agreement in any other way than by deed, as the nature of the K. is co ligamine, quo ligatur. But the cont may be otherwise discharged — the indentures may be cancelled by both parties — or one may release to the other — it seems, the cont on his part. Strange 582. Doug. 259. 260 & it seems, the cont on his part. Strange 582. Doug. 259. 260 2. H. Bl. 374. 1. T. R. 738.

In N. Jamb. Comm. & most of the N. Eng. states, there are Stat. enabling the M. of Com. Gaol, in case of any default, i.e. breach of cont by the S. to discharge the S., & in case of default of the S. to punish him at discretion.

In Conn. if the Master turns away the S. without the consent of the father he cannot recover any wages on the cont — tho the S. or his father can recover on the cont. 1. Day's Rep. 189.

In Eng. there are three powers in which the appr. may be discharged viz. by complaint to the quarter sessions, by two justices out of sessions, with liberty of appeal to the quarter sessions (this authority is exercised in Eng. only in those cases where the binding was by agency of the K. or his Magistrates. But in Com. in all cases 3 Burr 1560. 1. Bl. 426.

The M. may also apply as well as the appr. & procure a discharge for a reasonable cause.

By Com. Law a M. cant assign his appr. — the reason is the cert is precary — Hobt. 134. 1. Keble 250.

The education & morals of the S. are to be attended to by the M. Salk. 68. 12. Mod. 553. 9. Bac. 555.

An award of arbitrators that the appr. shall be assigned is void unless he consents. A court of assignment is good however as between the assignor & assignee — the assignor is liable on his cont — & the reason is the rule of L. against assignments was intended for the advantage of the L. family, & not of the M. 2. Strange 1269. Ld Ray 683. Salk. 68. 1. Wil. 96. Ray 69.

But if in such assignment the L. goes de facto into the service of the assignee, he acquires thereby all the rights he had under his former M. — by assigns a settlement & the L. supposes he would become free at his trade, if he serves in pursuance of his assignment, on the same principle, the Master must keep the appr. upon his own cost & may not put him abroad or employ him in his trade & profession, unless the terms of the indenture allowed on the nature of the employment requires it. Hobt 134. 8. Mod 286 12. Mo. 446. Ld Ray 683.

On the same ground that the M. cannot assign, after his death the exrs of the M. cannot hold the appr. to service. Strange 1267. Salk. 68. 2. Ver. 65.

It has been said, that the exrs is bound to teach as much as he taught the L. of the testator. 1. Lev. 177. 1. Sid. 216.

This has been denied. 2. Stra. 1276. Salk. 66. Wat. L. of Part. 296.

Whether the exrs of the M. is bound to furnish cloathing & diet for the appr. is not settled. According to the common authorities says Mr Ly. the exrs must furnish necessaries according to the cont of the M. — but need not teach him in his trade or profession. This he says seems to be a hard rule & is not perhaps founded in principle. The reason why the Master furnishing the L. with necessaries was indemnified by the services of the appr. — but the exrs cannot hold the L. — Hence the mutuality of the contract is destroyed. — Mr Ly. says the ground of the rule is the cont, are independant of

each other — the M. may not reciprocally covt to furnish meat & drink for services — nor can the Appr. covt to serve for meat & drink — the reason is because the covts respectively of each other & of that kind may be pleaded in abatement in a declaration to entitle him to recover against the other party. 3. Salk. 41. Bro. C. 553. 1. Mod. 76. 1 Keb. 820. 1. Keb. 80.

The parties should have covenanted otherwise expressly so that they may be respondent.

A proportion is often given to the M. tho' the services of the Appr. are, before the time expired, ever ought to refund a part of the premium or pecuniary recompence — Restoration in Engl. is in this case matter of equitable jurisdiction. Ld. Ch. will not order restoration unless provision is made for it in the indenture — In one case a bill of Equity. would further than this ever been entertained. The parties has agreed upon a restoration if the M. dies before such a time — but the Chancellor allowed a restoration of more than the parties agreed upon. 1. Ver. 460. Finch 496. 1. Atk. 149.

If the M. turns away the Appr. he may not return, the M. must refund a proportionable part of the premium. 2 Ver. 64.

It has been holden that if the M. becomes a bankrupt, the Appr. may be compelled by Chy to refund a part of the premium But the Ld. of Equity, further, if are authorized by Stat. not only to discharge the Appr. in this case, but to compel the Appr. to refund. If the right of restoration arises from the discharge — Why then not to Chy. 1. Atk. 149. 9. Rac. 550. 1. Ed. 382. 12. Mod. 415. Salk. 67. 490. 1. Bl. 452. 1. Mod. 410.

Whatever an Appr. earns by his labour, while here so, is the M.'s If he receives money to the M.'s — If the party earned by the Appr. may be recovered in any form of action against the person who is bound to pay it for him to the M. 6. Mod. 69. 1. Ver. 488. 89. Salk. 68. Stra. 582. 12. Mod. 416.

Minial L. may take summer &c. may acquire party by their own labour & it shall be their's if they do not neglect the service of their M. 1. Just. 117.

Master & Servant

If they neglect their M.'s service action will lie against them or their employer. Bro. Jac. 653. 2. Lev. 63. 3. Rac. 567.

If an offr. or any other S. is retired away from the service of his M. action lies against the retiree, if he had the means of knowing that the service of the S. was due to another — a justification is within this rule. Comp. 65. 9. Vin. 20.

The form of the action differs with the case. If one takes a S. by force or trespass, in et armis will lie — for enticing seems to be the proper remedy. 2. Ld Ray. 1117. 1. Wms 469. Salk. 380.

In the case in Comyns the gravamen of the action was entertainment & yet this called trespass — If this is not a mistake of the reporter, Mr Ly. says he cant be reconciled to the general rule. 3. Rac. 567. 2. T.R. 167. Ld Ray 1032

In Eng. an offr gains a settlement in the place where he served the last 40 days. In Conn. the offr. gains no residence by his offr. while. Dea. Conn. 240. 487.

Menial Servants.

They are so called because they are domestic &c. & usually employed within doors. It is a general rule of law &c., that if no time for the continuance of service is fixed by the parties the contract shall be construed to mean a year. This is founded on the equitable principle that the employer should retain & maintain him for one year through all the revolutions of the seasons. 1. Bl. 426. 2 Bac. Ab. 546. F 168
In Lamb this is not L. says Mr L.

By the stat 5. Eliz., a menial S. cannot leave the service of his M. or the M. put him away, before an end of his term without a quarter's warning. Not so in Lamb.

Day Labourers.

By the stat 5. Eliz. & 6 Geo. I. all persons having no visible effects may be compelled to work at wages fixed by the justices of the Peace. & penalties are inflicted on such as give or exact more wages than are so settled. Not so in this country.

Agents.

There are various as factors, brokers, clerks, stewards, attorneys &c. They are not S., in the same sense as the foregoing are S. are S. only in such acts as affect the duty of their M. They are not subject to that control, since the employer is called principal & the employed, agent. 1. Bl. 454. 1. Wood 469. Amb. 243 247. 8.

Agents must act for their M. according to their contract, with such as are usual. For many duties & rights arise out of the nature of the employment to which the parties are presumed to have agreed. 1. Wood 469.

When agents pursue their instructions strictly they are not liable for casual losses — when they do not, they are. 1. Wood 469.

A factor is a foreign agent — a Broker one who manages at home. A factor may retain the goods of his principle.

for a particular or general balance in his own favour
The balance which is due for the agency of a specific article
is called particular — and due for the agency of all goods that
have come to his hands in the course of his business is called
general. He has a general & particular lien, when one is dealt
with. Amb. 244. 1. Burr. 489. 1. Bast 235. If he sells goods he
has a lien on the goods that remain unsold to that amount of the
net overplus that are sold — & if he lies goods he has a particular
specific lien. ante. 2. Bl. Rep. 1164. 1. East 4. ante subras

But by giving up possession he loses his lien upon them
tho his claim remain. 2. Bast 227. 229.

When the factor sells goods he has the same lien upon the
price of the goods in the hands of the purchaser, as on the
goods before they are sold — & he may give notice to the
purchaser not to pay the principal but himself
for the goods — & the purchaser after such notice pays
the principal the factor may recover of the purchaser
a second payment — but without such notice pay-
ment to the principal will discharge the debt. Comp. 251.

A factor it is said has no right lien upon goods not in
his actual possession, a constructive possession ie, a mere right of possession
confers no lien — Suppose goods are sent to B. at Liverpool
for the use of C at Manchester — the factor of A, B cannot detain
them as against A the principal at C the factor — for the
former may countermand them while in B's possession, & the
latter may recover them in trover as being constructively
in possession. 3. T. R. 119.

But while the goods remain in possession of B, the factor has
no lien & cannot retain them as against the principal — they
do not become a pledge in the hands of the factor, until he has
actual possession 1. Atk. 134. 2. Ver. 117.

When the authority given to an agent is discretionary & he has used
it reasonably, he is not liable for consequences. But if his in-
structions are explicit & peremptory — as if such a quantity of
goods at a certain price are to be bought — & the factor pays
a higher price & buys a less quantity, the principal may re-
claim the purchase. 1. Ver. 510.

So if the sum at which goods are to be sold is fixed in the instructions & the factor sells for less, the loss falls on the factor. 4. Com. 228.

The factor has no right to pawn the goods of his principal, & if he do the principal may claim them of the pawnee & factor demand of the pawnee, & tender to the factor the balance due to him, may have trover against the pawnee. 2 T.R. 604. 1. Bos. & P. 648. Stra. 1178.

The tender must be made to the factor not to the pawnee i.e. if any thing is due the factor from the principal. 1. H. Bl. 362.

The factor may buy & sell the goods of his principal in his own name. There is no necessity that the vendee should know whether the vendor is owner or factor.

This rule says Mr. L. is not in conformity to the general principles of M. & S. — & the reason is because factors are generally foreign agents & living from home in a foreign country, great inconvenience would ensue if parties dealt to trade in their own names. H. Bl. 362. Comb. 456. 1. T.R. 369. Bul. N.P. 139.

From the factors right to trade in his own name, arises his right to sue & be sued in his own name. 1. H. Bl. 81.

An auctioneer too sells in his own name, tho it may be known in particular instance that he sells for an other. Comb. 456 2. H. Bl. 591.

If an auctioneer sells for less than he is instructed to, he is not liable for the loss — the reason is there is an implied contract on the part of the bidder & owner that they shall go to the highest bidder. Comb. 396.

If however the auctioneer was directed by the owner not to set them up to the highest bidder under a certain price, he is bound by the instruction & liable for the loss — thus if the owner directs the auctioneer to put up Hogsheads of rum but a dollar for sale. If he puts it up for less & sells it for less, he is liable for the loss.

Master & Servant
Attorneys.

They are of the same class as B.s. An atty has a lien upon the papers & property of his client for his fees - & he may detain the document or property against whom suit is given, to pay the costs to him & not to his client. But at Com. L. the atty has a lien for nothing but his costs, i.e. his taxable fees.

Distinction is taken in Eng. between counsellors & attys. Attys have a lien for their taxable fees - counsellors have none. But an atty holds this lien subject to an equitable claim of an annuitant. Thus A mortgages £ 20 ℔ of B — the atty of A has taxable fees to that amount — he agrees with the mortgagee & pays his client - But suppose A is insolvent - B has a claim as cestui que trust to the same amount against A in a foreign suit - here the parties will be entitled to an set off & hence the atty's lien is nothing. 1 H. Bl. 24. 1 Ves. 2. 17. 6 T. 2. Do. 40. & 87. 1 East 164. 4 T. R. 129. 6 Do. 361. 456.

An atty must execute an instrument for his principal in the principal's name - if he sign it in his own he is bound & not the principal. 3 T. R. 570. 7. Co. 76. 2 East 142. 6 T. R. 177. The signature should be thus A. by B. his atty or B. for A. Batty 25. 27. 56. 75. Strange 703. 955. 1 T. R. 181.

An agent tho' he cannot bind his principal by any act executed as agent unless he be constituted by deed. Mr. Y. can not understand the reason of this rule. the agent may in many cases bind his principal by acting in pursuance of a mere parol authority - thus he may do it by a parol promise in. Suppose I will a house, request he may do by virtue of a parol authority & convey a piece of land which is necessary. Will not this bind the principal? If the rule be construed strictly it cannot. 7. T. R. 207. 2 Do. 213. Com. D. Atty. 6. 1. 1. Mr. Y. Mr. Bowman this is not to be confounded with another rule, which is, if A in the presence of B. be desired by B. to sign an instrument with B's name & A does it in his presence, B is bound by it. A does not sign this as B's atty. — it is the same as if B had signed it himself. The principal sometimes makes a mark & his name is affixed to it by another. See Com. Dig. Atty. A. Agency.

An agent for the public acting for a public or private company, but contracting for the public is not liable personally as such contract. The Exr. of the Ex. in Eng. is many liable personally for any loans for the public. Mr. Bowman says for many years. 1 T. R. 172. 674. 1 East 382. 1 Aso. 89. Ch. Sta. in Dealer.

Debottom assigned in Service.

specie of D. is unknown to the Com. L. Comm. Stat. Provides
a Debtor committed on execution, if no other means can be found to
the object on which he was imprisoned, shall satisfy the same by
ice if the creditor require it & the Sh. & think it was made
Comm. 54.

The following rules are applicable to M. & S., generally.

As to when the M. is bound (as to third persons) by the acts of his S. & when he can take advantage of them.

The general rule that lies at the foundation of all the law on this subject is, that those acts of the S. which are done by the M.'s command, either express or implied, are, in contemplation of law, the acts of the M. — for the maxim is qui facit per alium, facit per se. 4. Inst. 109. 1. Rol. 429.

It is regularly true that all acts done by the S. in pursuance of his M.'s business are done by his implied command. 2. H. Bl. 442

There classes of acts, done by the S., are accounted the acts of the M. — first whatever the S. does, at the express command of the M. 2nd whatever the M. impliedly permits the S. to do in any particular case, & 3rd whatever the M. permits the S. to do within the scope of a general authority of the M.

All contracts made with the S. as such, having authority, complete and legal contemplation made with the M. himself.

If A employs B as a factor on occasion to buy a horse for him & in his name it is an express command.

If A. generally wishes to buy a horse for A, & A tells him "you may if you please", it is an implied permission — & if the contract is such as they S. usually make, in the business in which he is employed, it is within the scope of a general authority, tho no express command or permission be given. As if a clerk in a grocer shop buys all goods for the customers may be declared on specially as if the M. himself had made it without the S. 3. Bac. 559. The S.'s name need not be mentioned in the action.

If a S. is cheated out of his M.'s property the M. may use the usual form of words. Bac. Jac. 223. 1. Roll. 98.

The acts of the S. are the acts of the M. — If the S. is robbed of his M.'s property, the M. may use the common words the Sheriff uses — as if the M. is absent at the time of robbery the M. or S. may use the words, but not both — the reason why the S. may use is because he is liable over to the M. ——— It may be true in many cases that the S. is liable to the M. — yet say Mr. L. he

is not liable in all cases. He is not liable in case of robbery or loss the goods are exposed by his misconduct. 3. Bac. 69.

The true reason of his right of action is, that the duty by virtue of the bailment is his, as against all persons whatever except the M. or consignee. Salk. 613. 3. Mod. 287.

A bare keeper gives him such a qualified property against all others that he may recover goods, if taken from him. 4. Mod. 303. 11. Co. 3.

But when the M. is present at the time of robbery, the goods are lost to him in his keeper & the S. can have no action for them. 12. Mod. 54. Salk. 613. 1. Mod. 148.

But a recovery before the promised by the M. bars the S. of his action & one by the S. bars the M. — So a mere commencement of the action before, may be pleaded in abatement to an action by the other. — & the same rule applies in case of goods taken by a mere wrong doer. Carth. 145. Salk. 127.

When the S. brings his action, he declares on a possession by himself as of his own goods, precisely as the M. would if he sued. 2. Saund. 47. 397. 3. Mod. 287.

This is a rule of pleading - but nothing furnishes so good evidence of S. as a rule of pleading. & hence pleading is called by Coke the key of the L.

The M. if his money is gained from the S. by any illegal contract may recover it in the same manner as if he himself was defrauded. But if the S. squanders it, the M. cannot recover it, but his remedy lies against his S. — This goes on the ground that the acts of the S. are the acts of M. — for if the M. himself had acted in the case, in one he could & in the other could not recover. 3. Bac. 559. 1. Bl. 430.

An Innkeeper, if his S. robs his guest, is himself liable — & if the S. sells bad liquor the M. is liable. — & the sale of the liquor is bad & unhealthy the S. is not liable — & the reason is because he acts as S. 8. H. 6. 32. Dyer 266. 1. Bl. 430. 1. Roll. 95. 2. Bac. 595. 568.

This rule says M. seems to be very questionable. Suppose an Innkeeper

should infuse poison into his guest's liquor either voluntarily, or by the command of his M. an inkeeper, if the guest should die, the S. would be guilty of murder. So if he should infuse slow poison, the injury the health of the guest, it would seem a fortiori, that he must be liable civiliter. 1 Wils. 328.

The act is itself a wrong & wilfully done - for when one person has no right to do an act, another doing it at his command, is as guilty as if he himself had done it. 3. Bac. Abr. 569. 1. Bl. 430.

The S. is bound to obey the lawful & honest commands of his M. & them alone. Esp. 1. 540. 484.

If the clerk of a store represents the quality of goods as different from what they are, it is the prevailing opinion, that in buying for his principal he does right - but this does not alter the law. It is said if the S. does a wrong of which he is ignorant he is not liable - thus if the M. locks up a man & gives the key to his S. who is ignorant of the false imprisonment, he is not liable being the involuntary instrument of his master's vengeance & not doing an act in itself unlawful.

But if the act is in itself unlawful, or accompanied with what the law deems force, the S. is liable whether he knew the act to be unlawful or not. Thus if A commands his S. to cut down a grove of trees & he does, he is liable, though he knew not that the grove belonged to A. - the L. of the soil does not consider the intention but the injury. 2. Bl. R. 892.

Those acts of the S. not done by the M.'s command, express or implied are not regularly deemed the acts of the M. & for them he is liable. They are not considered the acts of the M. & he is not liable. 2. Salk. 442. 1. Bl. 430. 8. T. R. 578. Chitty. 224.

So if the S. without express authority, enters into a contract not in discharge of his M.'s duty, business, he himself is bound. 3. Bac. Abr. 561

But in such case the M. afterwards adopts the contract, he is bound by it, this is no exception to the general rule, for it then becomes the M.'s real contract.

It has lain recently decided in Eng. that if the S. while actually performing his M.'s business, commits a wilfull injury upon another, the M. is not liable. 1. East 106.

The case was the S. wilfully drove his M.'s carriage against another — the action was brought against the M. but would not lie. Bos. & Pul. 472. Salk. 441. note. The reason is, that the act done was not in furtherance or furtherance of his M.'s business. Contra Wood 465. Salk. 441.

If a S. thro want of skill, or negligence, in the performance of his M.'s business injures another — the M. is liable. Thus if a coachman unskillfully or carelessly in driving by a cart, injures it the M. is liable. 2. T. R. 154. 7 Do. 162. Comp. 406.

The M. is liable bound as to third persons to employ skilful S. — but he is not the insurer against the carelessness & wantonness of his S.. 1. East 106. 2. H. Bl. 442. 6. T. R. 125. 7. Do. 454. 1. Bl. 491.

The S. negligently drove his M.'s cart against the cart of another & broke a hole of sack — the M. was liable. 2. Salk. 44. 3 Ld Ray 739

S. drove over a boy & the M. was liable. Salk. 481. Wood 465. 3. Bac. 562.

A surgeon appr. thro negligence in attempting to cure a wound injured a man — M. was liable. 2. Rall. 699.

If a blacksmith's S. injures a horse in shoeing him the blacksmith is liable. 1. Bl. 491.

A man lately brought an action on the case against a M. whose S. had wilfully injured a cart over him — it was not sustained because the Court held it should have been trespass vi et armis. The decision says Mr. L. was right & the reason wrong. In case was the proper action but the M. was not liable. 6. T. R. 125.

In a certain case it was soon after ruled, that to recover for an injury committed by a S.'s negligence, trespass, & not trespass vi et armis, was the proper action.

In this case it was holden that an action of trespass vi et armis against the M. for the S.'s wilfully driving his carr. against another, would lie. 1. Bast 106.

Where the M. is liable for a forcible injury committed by his servant in the course of his employment, there he is liable for the neglect of the S. in the same manner, & to the same extent. — In neither case can the M. be liable for an breach of the peace — for he is liable in either case only by the fiction or implication of the law — but he cannot be subjected to criminal action by any legal implication — for the maxim is in fictione juris consistit aequitas. But if the M. is liable in trespass he is liable to criminal action for a breach of the peace, as the latter is implied — & therefore he is liable in trespass for the acts of his S. i.e. where not done by command of his M. express or implied.

If A.'s S. employs the S. of another to do the business of A. which the other S. by his negligence injures a stranger, A the original master is liable as well as the S. who does the injury. 1. Bos. & Pull. 404. 6. T.R. 411.

Mr. doubts this principle, tho he does not undertake to say that it is not so. — No action will lie against the intermediate S. or him who employed the wrong doer. 6. T.R. 411

But if the contract stated by Mr. is founded in principle it will follow that the S. who employs the wrong doer is liable.

The M. is not liable for the wilful torts of his S. Ld Ray 710.

This rule Mr. thinks, tho there is no decision precisely in point, applies to those cases alone, where there is no privity of contract between the M. & party injured except an implied. Yorke 93. 1. Bl. 165. 1. H. Bl. 158.

If a Blacksmith's S. in shoeing a horse wilfully lames him the M. is liable on account of an implied contract that the horse shall be well done. So if the M. owns a S. to K.H. in a waggon & goes before & makes a special warranty & contract with all the coaches, that the S. shall not wilfully injure their carriages, no doubt the M. would be liable in case of wilful injury.

From the analogy of M. & S. to P. M. & deputy, attempts have been made to charge the P. M. for the faults of their deputies. But it is now settled that they are not liable. Ld Ray 946. Salk. 17. Carth. 389. Comp. 788. 3. Wil. 419.

This doctrine is founded on same principle. The P. M. himself is ad- to contracts with the public for the faithful discharge of his duty for his hire — the public has the portage & can punish him by wagon. — By analogy then to the principle, that the intermediate is not liable for the act of one employed by him, the P. M. is not liable. But the P. M. is liable for his own faults — & so an all deputies for theirs. Esp. N. 629. Comyn. 765. L. Bl. R. 906.

The P. M. is liable for any extortion practised in his office — & if money be obtained by any illegality, the injured party may have action of indictation & punishment against the P. M. himself. Comyn. 182. Comb. 450. 2 Ray 944.

As to the M.'s liability for the contracts of his Servant. In a general rule that the M. is bound by the contracts of his servant for him, when the S. acts within the scope of an authority delegated to him by the M. — & this authority may be either express or implied, or implied. 2 Salk. 234. 1 Bl. 457. 2 Atk. 548. 649. 1 Pr. 164. 2 Do. 531.

Agent authority is one where a person is not confined to individual contracts, but which extends to contracts generally or to all contracts of a certain kind or description. As in cases of stewards, Clerks & Factors. One whom one is employed to make all sorts of contracts.

Special authority is one which is confined to one or more individual contract or transaction. As if a man was merely employed to buy or sell a horse or farm for another. The express authority is one expressly given.
Agent authority may be implied from the M.'s general or frequent practice — as when one employs a steward to purchase provisions.

Special authority may be implied though it rarely happens. Such. makes a contract in the presence & apparently on his M.'s account. The M. can not prohibit it his silence & acquiescence are construed into an implied authority — for the maxim is, qui non prohibet cum prohibere potest, jubet. 1 Bl. 431. 1. Bos. 131. 2.

If a S. has practised purchasing with money & upon credit of his M. — the M. is not bound for any purchase of the S. on

his credit. If this the the articles were singular so that he had for — because the S had not been in the habit of taking up goods on trust. 2. Salk. 234. 1. Show. 95.

It is otherwise when the M. usually or frequently permits his S. to purchase upon credit. 1. Bl. 430. 3. Salk. 134. Comb. 456.

But in gen^l if the S without prior any purchases goods for the M. that come to his use, the M. is liable, tho no credit has been given to the S. before. Chitty 26. 2. Keble 625.

This using such articles is construed into an assent subsequent, which in L. is a ratification ab initio.

Suppose the M. has given him his S. no auty express or implied but entrusts him with money to buy certain articles — the S. embezzles the money, purchases the articles on trust for the use, he refusing them paid for — is he liable? 2. Ld Ray 224. 3. Salk. 234. 3. T. R. 760. 10. Mod. 110.

This is unsettled — but Mr L. thinks the M. not liable. In other cases the L. proceeds on the ground of assent subsequent by the M. his using the articles is considered such. But in the present case the M. knows not of the trust & cannot therefore be supposed to assent to it. The M. did not intend to give his S. trust with the trader — but the trader was so incautious as to trust him, — If the gen^l rule is, if one of two innocent persons must suffer by the act of another, the loss ought to fall upon him who trusted the rogue.

If a M. has permitted a S. to trade in his name on credit he may prevent it, by forbidding any merchant in particular, or by advertisement, people in general to trust him. But a private notification of the relation of M & S. will not produce this effect. — The mode in the prohibition not to trust, or notoriety of the prohibition should be as public as the credit has been given the S. Chitty 26. 3. T. R. 760. 1. Peake 49. 154. 12. Mod. 346.

If a servant in making a particular contract or selling goods make a warranty as to the quality of such goods, the M. is bound by it, unless he expressly restrain the servant from making it. 1. T. R. 172. 3. Do. 757. Salk. 289.

Where the S. in making a contract of warranty, acts within the scope of a general authority, even an express restriction, not made public, & not known to the purchaser, will not free the M. 2 Str. 1056. 1 Esp. R. 111.

But if M. had expressly forbidden the S. from making the warranty, the M. is not liable. 10. Mod. 109. Esp. N. P. 690.

If a S. has been in the practice of selling & warranting his M.'s horses, without the M.'s knowledge & consent, the M. is charged by the S.'s warranty, notwithstanding any private instruction unknown to the purchaser.

But if a S. is permitted to sell a particular horse, with an express instruction not to warrant, the M. is not bound by a warranty of the S. as he had no general authority to warrant. 2. Str. 960. 10. Mod. 109

But if the S. had no right to sell, the purchaser cannot recover the horse ag. the M. the purchaser takes this risque on himself — A fortiori he takes upon him the risque as to the right of warranty

In Civ. Jur. is a case like this Fa. 469. South vs Horne. A having a counterfeit Jewel entrusts it to B. to sell to a Banker for the king. B. delivered it to C. a Banker, who gave it to the king. He discovered the counterfeit & took from C. 6,800 ℔. C. sued A. the original owner to recover what he had paid. It was held that the action would not lie, because A. did not expressly warrant his S. B. to warrant it — But according to the rule of Civ. Law laid down, he any such case would have been liable — for he did not expressly forbid the sale, now warranting. 1. Roll. 95. Esp. 123. 143. 2. Ord. 95. 2. Roll. R. 5.

Another case is found in the books equally questionable. It is said that if a M. sends his S. to sell a horse at a public fair, & does not tell him to sell to any particular person, he is not liable to the implied warranty that the horse is sound. Salk. 282. 2. Str. 653 3. T. R. 757.

If a merchants clerk sells the goods of his M. & misrepresents the quality the M. is liable. 4. T. R. 177.

Master & Servant

The S. is not regularly liable for contracts made for his M. But if the S. takes upon himself especially the management like, he may subject himself upon such contracts. & when he does thus he does not act in the capacity of S. but in his own right independent of his M. 1 Roll. Ab. 522. Bac. 569.

If the S. makes a contract for the M. when he has no authority so to do & is implied, & they retain the M. himself is not bound, the S. must be personally liable. — Any one who acts for another & under his authority is to be considered his S. — hire or rate. Thus if a M. make a contract for his M. he is bound, for the casual employment of Gen. — 2 Ld. Ray. it is if a person contracts for his father. 1 Bl. 430

Hen Stat. P. 487 has introduced a new rule on this subject.

as to the M.'s liability for his acts & defaults: it extends to his acts.

& Strangers

Acts of the S. not done by the command of his M. or his servants implied, are not binding on the M. Skin 228. 1 Bl. 431.

It is also generally true, that acts so done, bind the S. 3. Bac. 562.

For the purpose of determining what acts are or are not in fact done or done by the M.'s command, it is to be observed as before, that all acts done by the S. not in discharge of the business or duty with which he is entrusted by the M. are not bound to be done by the M.'s command express or implied & consequently not binding upon him. Salk 14.

Hence it follows that they do regularly bind the S. Ep. D. 603.

Thus the M. is not generally liable for the wilful torts of the S. because they are not committed in discharge of the M.'s business, but the S. alone is liable, unless there is privity of contract. Bro. C. 175.

If the S. in performing his M.'s business do an injury to any one thro' negligence, ignorance, or want of skill, the S. as well as the M. is liable to the party injured, provided the transaction in which the S. was engaged was not founded on any contract express or implied between the M. & party injured. Dav. 108. 1 Wils. 328. Tom. Ray 220. 6. T. R. 411. 125.

A person committing a tres pass is liable, under whatever circumstances the acts. Ep. D. 440. 6. The law of trespass does not regard the intent when the action is brought immediately against the person injuring. If the S. do wrong his M.'s carriage against the person of another, whether wilfully or not he is liable.

But if the transaction in which the S. was engaged at the time of the negligent injury was founded on a contract express or implied between the M. & injured party, the M. only is liable, & the S. not. The 4th. doctrine not from the negative part of the rule &c. that the S. is not liable) stand sure in the books. But how it may be the case will support the position.

Suppose an offr. of a blacksmith leaves a horse there negligently. M. alone is liable - the S. can't be considered as a private one - a trustafier - nay if the Blk^th had done it himself he could not have been a bailee because of the bailment. He has lapsed for so has the S. Salk. 546. 603. Carth. 406

The injured party has no right to complain, except as to the injury consisting in the breach of the implied contract, to whom the horse with the privity of the contract has gone out of the question, & tho' S. can be no party to the contract, himself alone is liable.

To this rule however there is one exception & the reason of it must run the rule just laid down. The M. of a ship as well as the owner is liable to the freighters for any damage occasioned by the negligence of the M., when the ship freighting was formed on the contract of the owner & freighter only. Salk. 440. Carth. 58. 6. T. R. 125. 1. Vent. 190. 198. 238.

The owner & freighter are often citizens of different countries, the rule is founded upon general convenience & policy. The M. in this case might both countries & is in this case, rather an officer of the owner than a S. - tho' he is subject to the rules of M. & S.

If a S. commits a wilful tort, he is liable in all cases to the party injured - even tho' the contract has gone further on a contract between the M. & party injured - i.e. he is liable whether it violates the contract or not. - & the M. is also liable if it is a breach of the contract. Thus suppose the S. of a Blk^th wilfully leaves the horse of another. This is his own act, & not done in performance of his M's business.

No action of mere trespass will lie against a officer of the revenue, for an over payment to him, but application must be made to the government under whose orders he acts, he receives it for the govt not for himself. But an action will lie against a revenue officer for money illegally extorted from an individual - for there he acts for himself, & it is his own wilful wrong. Comp. 69. 162.

If an atty brings an action for any person against another, knowing that there is a nullity of the cause of action, he is not liable for the mistake because say the Court - he is a servant - the true reason is, the atty is not to judge whether his client shall bring an action - he can only advise. 1 Roll 88 1. Mod. 209. 2. Mod. 295.

There must be no fraud however on the part of the Atty - he is no more privileged on account of his profession than any other man - & unless the Mrs Atty after having suffered a non suit enters up final judgt against the Deft, he is held to be liable Hutton 127. Esp. D. 618.

The S in many cases is liable for injuries done the M. - He is guilty, liable for all wilful wrongs & negligence by which the M. is injured - As when the S was entrusted with the care of his M's cattle & by negligence permitted them to starve to death. 1 Wms 446. 9. Bac. 464.

And upon the same principle if the S loses goods that are entrusted before the duties are paid, or security given for the payment, the S is liable. Hob. Jas. 264. 10. Mod. 109.

But no action will lie by the S for mere breach of promise if no damage is sustained - nor for insolent or misbehaviour - there must be ground of connection. 1. Ld. 298. 9. Bac. 464.

But if damage ensues in consequence of such conduct, the S is liable 1. Lev. 188. 1. Ld. 298. Moore. 258. 2. Keble 88.

The same rule applies in case of neglect. 2. Mod. 325. 4. Burr. 2060 Esp. D. 617.

There is an implied contract between the M & S, that the S shall act with diligence & fidelity, for the breach of which he is liable. But if he fails for want of strength as well as what he is commanded, he is not liable. 10. Mod. 109. 9. Bac. 464.

Suppose a Miner employs a person & gives him wages - all mankind will be presumed to be bound by him in the profession. For a breach of such implied agreement, Mr Hawkins such person would be liable to his M. or employer.

But the S is not liable for the loss of his M's goods by robbery unless wilfully exposed by him - 4. Co. 84.

The S is not liable for losses occasioned by inevitable accident - as by Lightning. 10. Mod. 109.

Master & Servant

If the misconduct of the S. has subjected the M. to loss he is liable to the M. 1 Str. 1083. 10. Mod. 109.

This rule however does not apply to cases where the M. is actually a party to the wrong done. In this case they are joint tort feasors, for in trespass each joint tort feasor is liable for the whole wrong - one trespasser cannot maintain an action ag. his co trespasser, for his proportion of the damages recovered - this is a rule of policy. Ex malefitio non oritur actio. Hardres p. 164. 8. T. R. 186. Hinky 116.

as to the M.'s duty over his S.

The M. has a right to chastise his S. for a breach or neglect of duty - as for disturbance, insolence or ill manners incurred in this right is necessarily incident to the relation. No action can in these cases be maintained vs. the S. 1 Hawk. 111. 130. Cro. Car. 179. 1 Sid. 175. 177. 1 Keb. 90. 108. 428

This correction must be reasonable. The rule attains between schoolmaster & scholars. 2. C. Mod. 168. 4. Bo. 120.

Mr. Y. thinks they rule relative to a M.'s correcting his S. extends to them belonging to his family under his legal control, as 2 years minimal &c. after &c. perhaps to a kind by the year tho this is doubtful, it does not extend to all that live in the family as boarders &c.

In Com. the M. may commit his servitor assigned in service.

But the the M. has a right to correct, if he beats S. of full age other than slight & appears it is a question for a jury. Mr. Y. thinks this cant apply to menial S. - tho' it may to labourers by the day month, or year. 1 Bl. 428. Str. 168. 168.

This correction must be reasonable - Where the S. and a M. cant justify by a warranty. A distinction exists between a misunderstanding & battery -

hurt is a battery, but not a wounding. Wounding always means laceration, an hurt that occasions a contusion, / when true by the M. is damni pursequable. Thus in an action for assault & battery ag. the M. if he plead a wounding for disobedience it is no justification - he should plead the qua: if, as to the wounding. Then a battery may be justified by plea of disobedience. 2. Mod. 107. 5. Co. 120. 940. 218.

By the Stat. 4 & 5 of Anne. when the M is sued for beating his S. he is allowed to plead double, i.e. not guilty as to the whole, & justify as to part of the trespass.

When a M. wants justify for beating his S he must state the retainer of, the contract to serve that he is his S. the place where & the business in which he was employed - these all being issuable. 1. Sid. 177.

The M. cant delegate his authy to correct, because it is founded on personal trust. 9. Co. 76. 2. Ray. 910. 62. Bac. Abr. 960. Stra. 882.

If a M. correcting his S. kills him he is guilty of excusable homicide, or manslaughter, or murder, according to the circumstances of the case. 1. Hale 454. 473. 1. Hawk. 111. Keeling 60. 4. Mod. 284.

N.B. The S. may in civil cases plead himself in his M.'s stead, as will be shewn hereafter - it is a rule that the S. cant maintain any suit or action for, by plea of assault of the M. - as if it, the action, be against the M. for his person it cant be avoided on account of assault of the M. 1. Roll. Abr. 687. 9. Bac. 568.

As to the M.'s remedy for damages done his S. by third persons. In gen. the M. has a right to recover of third persons for any trespass act done to the S. in consequence of which he has sustained a loss. Thus if one entices away a S. the M. may sue him for loss of service - the action being laid with a per quod - this action is case, & the per quod is the gist of the action. Saund. 46. 6. Mod. 182. 3. Keb. 90. 2. Lev. 240. 2. Ray. 1116. 1. Mod. 63.

If one S. is forcibly taken the M. may maintain a action of trespass with a per quod alleging special damage. 2. Ld. Ray. 1032. Salk. 280. 191. 2. T. R. 167.

Master & Servant

If a S. without enticement leaves his M's service, & is purposely kept another knowing of the former retainer, an action for loss of service will lie against the latter M. — But in this case the Plff must shew that the defendt knew of the former retainer. 2 Lev. 68. Noy. 10. 106.

It is now settled that an indictment will not lie, even for enticing away the Servant, unless there is forcible taking. Salk. 380. 2 Salk. 191. 6 Mod. 116.

If a S. is beaten & slave, can maintain an action for the battery, i.e. the assault — the injury is a personal one & the M. has no right to the action. But if a loss of service ensues the M. may sue for this. Hence in this case a recovery by the one is bar to the other's suit. 9. 66. 119. 10. 80. 191. 2. Raym. 1098. 1. Ld. 175.

But the M. must declare with a per quod or the defect will be demurrable — loss of service too must be actually proved. Lev. Jac. 618. 9. Co. 113. 2. Roll. 682. 1. Rol. 429.

A minor child is a S. within the rules & an adult child as the case may be. A minor is of course the S. of his father or the father is bound to support & educate him. So he has a right to his service while a minor. If the said minor has been beaten he may recover for loss of service — not on account of the relation of P. & C. But of all the S. — Tho

On this principle a P. can recover in loco parentis may have an action for debauching his daughter. This action also arises out of the relation of M. & S. & not of P. & C. — & loss of service must be alleged in the gravamen of action — but this is not the only ground of damages — another is the relation of P. & C.

If one beats another S. so that he dies, the M. has no remedy — for the civil injury is merged in the public wrong — and as fine & punishment to the public, there is nothing left to satisfy the injured party. But in case when party is not satisfied, if any thing was left the M. might attain more. 3. Yelv. 87. Com. Dig. 344. 2 Roll. 568.

If a stranger injures the servant of a S. in attempting to cause it so that the M. loses service thereby, the M. may have his action on the case for proper remuneration against. 1. Roll. 98. 2. Bulst. 332. 9. Bac. 464.

But Mr. J. says he finds it no where laid down that if the injury is

occasioned by the negligence or unskilfulness of the Surgeon, the M. may have his action for damages. The rule is if he wilfully injures &c. Mr Chitty & Mr Starkie think that the M. in this case cant sue the S. com. Ep. 601. Bodday 214. 2 Wils. 359. 1 Roll. 90.

In the case of int. carnal or retainer & marriage of the servant retains a right & full satisfaction accrued ag. the S. is a bar to an action ag. a stranger the M. can have but one satisfaction. 10 Co. A. 98. 2 Burr. 1345.

But whether a recovery merely without satisfaction, ag. the S. will bear an action ag. the enticer is not settled. The qu. came before B. M. in the Ct. of K. Bench, but no decision was given. When there is a joint & several contract, a recovery ag. one without satisfaction does not bar an action ag. the other. But not so in case joint tort feasors. A bar recovery ag. one tort feasor is a bar to an action ag. another tho there be no satisfaction. But the present qu. is different. For from either of the enticers the injuries are not joint & several altho' nor joint tort feasors — the S. is liable upon contract & the enticer in damages on the case. However Mr C. thinks a recovery ag. the S. will bar the action ag. the enticer where there is no satisfaction. It cant be denied that the S. hath a right to the service by robbing him by going away. But it is the thinks very doubtful, whether a recovery merely ag. the enticer will bar the action ag. the S. Will damages for the entirement, retain the damages for the breach of contract between the M. & S.? It would seem by probable that damages for breach of contract would retain the damages for enticing the S. away. From this consideration it would seem reasonable to suppose a recovery ag. the stranger would not bar the action ag. the S. But to whom that nominal damages would perhaps be recovered — this being left to the jury.

As to the acts which the M. & S. may justify in each other see Mr Com. Dig. tit. an officer called maintenance for any to assist & support an other in maintaining an action. But a M. may assist his S. thus & his M. on grounds of the relation between them. 10 Co. 129. 2 Roll. 115.

A S. may also justify a battery in defence of his M. & may use the same force to beat the M. himself would have used to beat himself in his M.'s place. Salk. 407. 2. Roll. Rep. 546. 1. Bl. 429.

But a S. cant justify a battery in defence of his M.'s son or daughter or wife, S. for my is a stranger as they have each an action for the battery of the person. But he may justify in defence of his M.'s wife, the next of his goods — his right extends only to the defence of his M.'s person. 2. 1481. 1361.

Whether a M. may justify a battery in defence of his S. is uncertain. It is said in favour of the negative that the M. has his remedy by action for loss of service. This reason says Bl. J. is very unsatisfactory. What if the wrong done is unable to repund damages — the S. service is a right, his duty. Any man may justify a battery in defence of his goods or he may have an action of trespass. Because he may have trespass is no reason why he may not justify a battery in defence of his goods — therefore it ought not to affect in case of battery in defence of one's servant. The better opinion is that a M. may justify a battery in defence of his S. 2. Ray 62. Salk. 407. 2. Roll. Rep. 546. Barn. K. B. 124. 1. Bl. 429.

Parent & Child.

Lecture № 1

This title will include Guardian & Ward according to the Law of Eng. — A minor or infant is a person male or female under the age of 21. 1. Bl. 463. Litt 104. 259.

The age of minority is fixed at different times in different countries. By the Roman L was 25 — We will 1st consider the privileges & disabilities of infants or minors 1st As to crimes. In an indictment each of the 4 states that no person under the age of 7 years can be punished for any offence. Such a person the L. pronounces to be incapable of committing any crime. 1 Bl. 23. Hale 25. 1. Hawk. 1.

No person can be punished for a crime unless an intention is coupled with the criminal act. As there can be no will in this case, there can be no punishment. At 14 an infant can be punished for a crime as well as any other person — because he is then presumed to have arrived at an age to have a will of his own. Between 12 & 14 he is always a question of fact whether he is capable of committing a crime or not. The presumption of the L. is that he is not. Sed vide supra — but a presumption of L. like this may always be rebutted. 1 Hawk 2. 4. 6. 3. 4. Foster 70. 72. 1 Bl. 464.

The onus probandi however lies on the prosecutor. The presumption as to the crimes of an infant under 7. cannot be rebutted. Its presumptio juris, & jure. Accordingly some writers the presumption ceases before & after the age of 10 years & 6 months — between 7 & this time lies in favour of the Int — after this we know. If this difference does exist, it only shifts the burthen of proof in this last case from the prosecutor to the infant — but there

appears to be no such distinction in the English L., this it exists in the Roman L. The rule is laid down above. 4 Bl. 23. 1 Hawk. 1. 1 Hale. 25. 27.

It is observed in Bl & Bac that in some cases infants are liable as to misdemeanours, which are not capital. The cases however are not mentioned. Mr. Ty. supposes them to be amissio — for infants are excused from amissions where adults would not not so — it being a principle of L, that infants shall not be punished for mere neglect. 4. Bl. 22. 9. Bac. 130, 1 Hale 20, 1, 2.

It has been a standing rule or maxim in administering L, that an infant shall not be convicted on his own confession without good cause & caution — so jealous is the L. of the rights of infants. The judges in this case are to be his counsellors, & they have gone so far as to advise the infant has confessed the crime in Ct the judges have ground the fact not guilty, to be put in & the cause to proceed to trial. Cast 50. Kno. Jas. 466.

With regard to general statutes inflicting corporal punishments on infants, a material distinction is to be observed. In some cases they are punished under them tho not named & in some not. It is a little difficult to lay down a rule. Hal thinks this the true. If the offence created by stat is such as L, as is corporally punished at C. L. infants are within it, altho not named & may be punished under it. 1 Ent. 247. 354. 1 Hawk. 1. Rawl. 346. 1 Hale 2 19.

But if the stat prohibits an offence not punished at C. L. corporally, & inflicts a corporal punishment without creating an offence so punished at C. L. infants are not within it unless mentioned. Kno. Jas 274. 13 Vin. Ab. 501. 510.

A reason usually given is that the punishment is collateral with an to the offence, and it is not incident to it at L. L. This is not sufficient. The true reason is that the L. of L. in construing penal statutes, will not allow the punishment of infants at L. L. to be carried by mere implication, there are the leading distinctions relating to public offences.

2nd We are now to consider how infants are liable for their torts or civil injuries. I consider them liable at any age in relation if the injury is committed with force. The reason is that the L. in redressing an injury, does not regard the intent with which the action was committed. Criminal L regards the intention, but in private injuries it is not so the inquiry is not whether he intended to do it, but whether he did it. 1 Bac. Ab. 1. Hawk. P. C. 2. Bull. 547.

So to be sure that intent may sometimes alleviate the damages. There is 1 case in the books where an infant of 3 years old was sued in a case of assault & battery & it was not contended that the action would not lie. 3. Viner 395.

There is a distinction in principle between the case of a public & private wrong. It is wholly repugnant to the idea of justice, that a person should be punished where there is no will. But in the case of a civil injury, it is equitable that the party injured should have a compensation. May 29.

It has been adjudged that an infant of 17 years old is liable in an action of slander. But this case, it has been agreed that 1 under that age is not liable. This difference is not logical, & further there is no case where 1 under that age has been sued. 3. Bac. 137.

Now I conceive an infant is liable in an action of

boarder, unknown to his father, &c., sold liquor - then I can see no objection to his liability.

An infant is not liable in a civil action for his frauds & deceits, because of the reason for privileges as to contracts would be destroyed. Inasmuch he cannot be subject him from fraud in a contract, whereas a general rule that he can't make it. Shall he be more liable as a cheat, when even he is sole captain. In 1 of these cases the Lord Chief Justice that an infant is only liable for those torts that are attended with same degree of malice 1 Keble 744.

This can't be true for he is not liable for an action of slander where there is no degree of malice. All the cases are decided on a different ground that an infant is not liable for his frauds. Lord Mansfield & Hussey dissent from this rule. The former says the privileges of infants were given as a shield. not as a sword. The latter says that an infant would be liable in an action in contract if it arose ex delicto - his opinion was an obiter 1 T. Rep. 1802. Peak. R. 223.

All actions in tort merely can't be sustained as can an infant when the cause is ex contractu for the foundation of this action is the contract. 2 T. R. 93.

It was once holden by Judge Parker, that if an infant would once take upon himself to swear, & is of age no evidence of infancy should be admitted, because this would be to take advantage of his own wrong. This can't be as has been said since if so then an infant might lie with his contracts & they as such would bind him in all cases. 12 Vern 209.

In some cases they will become an action to be good in

an infant to prevent the consequence of his frauds. This however is a rule of Equity & a act of parl never meant to be left to the discretion of the Ct. 2 Mod. 38. 3 Vin. 496. 1 Saund 70 n 11. 2 Eq Ca. Ab. 518. 1 Ow. Ch 358.

A Act of Parl never can right an infant to his contracts to prevent the effects of fraud - are when his absolutely void - because that would help to make a bargain for the Infants. The last rule applies to those contracts, which are merely voidable. 1 Saund 701. 1 M. Rk 78.

Lecture No 2.

Infants liability for contracts & certain other particulars &c. 1. The age for choosing guardians in both sexes is 14. Before this time they have no right to choose a guardian. According to the English L. an infant may be in ext at any age - even an infant infant may be appointed, & the appointment will be good. But tho he be appointed & have all the rights of an exec, still he cant execute the duties till he is 17 years old. Consequently when his appointed under this age administration, durante minoritate usu testamento annexo, must be appointed 5. Co. 29. 99. 371. Carth 466. Roy 338. Mont 2. 907. 213. Saund. 158. 2 Bac. 775, 1. Com. 235. Co. Litt. 174. 3. Bac. 121. 2. Do. 381. Hob. 280. 1. Saund 76.

No person can be an administrator till he attains the age of 21 years. & the reason given is that an administrator must give bonds for the faithful performance of his office & its duties being appointed by L. An exec and natural born have bonds. Not being appointed by L, but by the testator himself 5. Co. 29. Saund. 319. Carth 446. 447. 5. Mod. 398. 12. Do. 174. 201. Salk 39. 2 Bac 381. 3 Do. 121. Saund. 5. 2 Roy 998

But in law the question whether a person can bear

extraordin 21. because by law K. can take is required to give bond for the faithful administration or execution of the duties of his office.

The age of consent to marry is in males 14, & in females 12. & no person under that age can be bound in any of the common trades. If 1 is over & the other under the age either may depart, because the agreement must be mutual. But according to the English L. a female may be betroth'd at 7. If she is, it seems, how B. does she is dower? she may be endowed out of his estate 1. Bl. 469. 1 Roll. 357. 1. Inst. 79. 2 Bl. 131. Litt. sect. 36.

The age of disposal of power party in Eng. is no law agreed to be 14 in males & 12 in females. By others 15, 16, 17, 18. The latter opinion seems to be that which fixes the age at 12 & 14. If then ages & agreement & custom they may make a valid disposal of power party. 2. Vern. 104. 469. 1. Inst. 79. 2. Mod. 318. Pr. Ch. 316. 1. Bl. 469. 2. Bo. 497.

Full age as was before observed is 21. This is completed on the day preceding the 21st anniversary of his birth. Law makes no fractions of a day. The days of the birth & age are included it cant be again, & it makes no difference whether he was born the former or latter part of the day. Salk. 44. 625. 1 Ray. 88. P. D. 144. 636. 2 Ray. 840. 1096.

Concerning contracts is a general rule that no person under the age of 21. can bind himself by a contract. Regularly the contracts of infants are not binding - i.e., void or voidable. 1 Bl. 456.

But if an adult make a contract with an infant he is bound by it whether the infant is or not. If there are

action is brought on this contract an adult cant plead that an infant joined with him. An adult whether he makes a contract with an infant, or joins in making a contract is bound & cant take advantage of the infancy to avoid the contract. Parr. b. 34. 1. 1 Mod. 25. 1. Str. 943. 2. Mod. 258. 1 Vint 81. Eno. Jas. 502.

The infants is become a sufficient consideration to support a contract. This is so common in Equity - who will compel a specific performance on the part of the adult. Mr Lyons to think that this ct would compel the infant to do equity. Eno. E. 502. 1. P. Wms 37. 40. 9. Vin. 398.

This is the general rule tho' its not an universal, for if the whole contract is absolutely void it will not help the chance of a benefit is always a sufficient consideration to uphold a contract in general. This is the case in all voidable contracts made by an infant & an adult. but in void contracts i.e. strictly non existent, there is no consideration to support the engagement on the other - therefore if an infant makes a contract which is absolutely void & legally non existent there being no consideration to support it, the adult is not bound Str. 934. 1. P. Wms 389. 40. 9 Vin. 393.

And it seems well settled that if an infant after having made a contract, receives the consideration moving towards himself, & afterwards avoids the contract he is not bound to restore the consideration received he had received. tho' it seems it a gift to him. It has however been disputed in this case. whether an action of trover would not lie, when the consideration was specific on an action of indebitatus assumpsit when money is paid. On the ground of the infants fraud.

the books seem support the idea, that either action can be maintained. Such proceedings might deprive the infant of his privileges or enable him & the adult to change the nature of the contract, i.e. the consideration from that not of a specific nature to 1 of a specific nature & oblige the infant to refund the consideration out of his own estate, by which means he may always embarrass the whole of his estate if he can find adults to trade with him 1 Ld 129. 3 Burr. 1480. 1481. 3 Lev. 169. 1 Hubble 905-913.

As to a general rule that infants are not bound by their contracts, yet there is one exception to this in the case of necessaries. It is a general rule of the L. L. that an infant may bind himself for necessaries by contract. These necessaries consist in general enumerated articles, which are all included in these viz. Food. Cloathing. Lodging, Education, Instruction as in a valuable trade. 1 Peer. Cont. 348. Bro. Jur 494. 1 Bl R. 41. 1 Bl 466. 4 T R. 578.

The reason why an infant is not bound by his contracts is a fear that he will squander away his Party Sometime must be fixed & this by L is 21. & of the age he must always be except in the case of necessaries when a court of Equity may exist. They must be absolutely necessary for him at the time of contracting - & what things are necessary must be determined by the infants situation & rank in life. Lev 583. Bro. Jur 540. Palm. 361.

The provision must always be reasonable & in all cases where the plea of infancy is put in, it is a matter of fact to be left to the jury, whether the articles furnished were necessaries or not - Hence it is that when the Def plead his infancy, the Plff may plead generally that they were furnished as necessaries. Whereas were it a

quesion of L. the plff would have to plead specially in his replication, what the things were that he furnished
6. T.R. 578. Esp. 612. Str. 1101. Bro. P. C. 483. Bro. Jur. 560. Barth. 110. 111.
4. Bac. 17. 1. Sand. 58.

Infants may bind themselves under them restrictions for the necessaries of their wife & children. He has the same power to contract for them & is bound by these contracts as much as if they were made for himself. consequently he may bind himself for articles necessary for them during coverture & coverture. Stra. 168. Esp. 161.

An infant is also bound by the contracts of wife made before marr. But the W himself must have been bound. Barnes Notes 95.

The exception must be understood with certain qualifications; for no infant can bind himself for necessaries if he is under the care of a parent or guardian or master, daily provided for. neither is it even that the parent guardian or Master dare furnish such necessaries as he may think proper.
2. Bl. R. 1325. 2. Atk 35. Peake R. 227.

From what has been said it follows that an infant can only bind himself in these 3 cases of cases, 1st When he has no parent guardian or master who is bound to provide for him 2nd When he has 1 but is out of the reach of his care. 3rd When he has 1 & is within his reach but is so ill provided for that he is suffering or in danger of it. In either of these 2 last cases the parent guardian or master is liable on the contract. An infant is not in strictness bound even for necessaries by his express contract - because he is not liable at common to the extent of his contract, but

only to the amount of the necessaries purnished. In the case of an adult who makes an agreement to pay a certain sum for goods, he is bound by it, altho the articles are not worth what the sum he agreed to give — but in the case of an infant he would not be bound — it would seem then that he was bound on an assumpsit, a quantum valebat implied by law. Latch 139. Lane Jac. 560. Palm 181. Lane C. 583. 1 Rolle. 72.

Lecture Nº

An infant cant bind himself in any way on paper that an adult can even for necessaries. This will appear from the following distinctions, which are on the ground that contract was made for necessaries. 1st An infant cant bind himself by a penal bond, & this however mentione on the consideration may be. Cro. Eliz. 164. Lane C. 920. 1 Roll. 54.

2. An infant may bind himself, by a single Bill even for the liquidated sum, given under hand & seal. 1 Lev. 86. Str. 999. 1 Hob. 382. 416. 425. 1 Lord 79.

3. By a negotiable note when actually negotiated, the infant is not bound. 1 D. R. 41.

4. By a not negotiable, or not actually negotiated he is bound. 1 Wms. 479. Lane C. 94, 5.

5. By a bill of exchange not negotiated he is bound — but when it is he is not bound. As between the drawer & payee he is liable. Lauth 160. Chitty 2. 20. 1 Lord 79.

6. By an account stated (i.e. liquidated & signed by the parties) the infant is not liable, or in an action of assumpsit consideration formed on an account stated he not bound. Latch 169. Noy 83. 9. Bac. 135. 1 D. R. 40.

The enquiry now is what are the reasons of these distinctions — we shall take the cases in their order. 1st Why may not an infant be bound by a penal bond? The reason given in the

books. is. that the Penalty may work to his own advantage as it may arise a forfeiture – This is not satisfactory for a relief might always be had vs the forfeiture. The reason is that the consideration cant be known it cant be tried whether the bond was given for necessaries or not. If a penal bond is executed the consideration never can be enquired into & therefore the infant will be obliged at all events to the bond which he has executed, without being permitted to deny that the consideration of the bond was necessaries – then the priviledges of infants would be totally destroyed 1. Saut. 172. Bro. C. 920. 1. Saut. 279. 1. Pow. C. 96. Chitty 20.

The reason then which runs thro all the cases is that "If the contract is such that the consideration is examinable he is bound – but if the nature of the contract excludes all enquiry into the consideration of it he is not bound.

2nd By a single bill he may bind himself – At first that now a single bill is not examinable – but it formerly was, & that too at the time the suit was laid down that he might bind himself by it – I find no case where a single bill is not examinable when the infant is an obligee 1. Hob 99. 2. 486. 323. 1. Keb. 186. 1. Str. 41. Augundo.

3rd By a negotiable note if negotiated he is not bound, because as between the endorsee & maker no enquiry can be had into the consideration. If then he was bound the principles of the Lex Mercatoria would be overthrown, so far as his priviledges must give way. But suppose the note is not negotiated, he is then bound by it because the consideration may then be enquired into, while it continues in the hands of the promisee. This a mere single contract on the principles of the 1. L. 2. T. R. 71. Lloyd 155. Doug. 614. 1. Saut. 279. 1. Wood. 301. Chitty 3. 82. 87. Peak R. 61. 2. Ed. 216. Esp. R. 113. 262.

4th By a bill of exchange before negotiated he is bound after it, not

This stands on the same footing with a general rule with regard to the 5th Rep. an account stated the infant is not bound tho the items may be examined. But the reason of this rule is, that it may settle at the time it was not looked into, & there is [illegible] cases says Ld Mansfield where the rule even tho the reason has ceased. Salk. 169. Ney. 81. 1 Bro. Par. 102. Parr. 636. 1 Term 73. 1 L.R. 40. 1.

Tho several cases are founded to support the general principle, that still there arises a question, whether in these cases notwithstanding the form of the contract the infant is not bound, he is bound by the original simple contract? As in the case of a person being tho he is not bound - now can he be bound in an action of indebitatus assumpsit for the necessaries which occasioned this bond? This depends on another question whether the bond does or does not merge the simple contract? And this on another whether a penal bond of an infant is void or voidable? The decision of this question will decide the 1st. If it is voidable it does merge it - if strictly void it has no effect at all. This question will be more fully considered under covenant - division of the subject. Suppose the bond is void - then I conceive the infant is bound on the original simple contract, entered on implied. This is agreeable to principle as well as analogy. Esp. 90. 176. 176. 1. Parr. 208. 216. 1 Term 6. 172. analogous in 2 Burr. 1078. 1 W. Bl. 462.

A single bill does certainly merge the contract - he has taken a security which is not void & they these are nothing he must receive. Esp. 164. B.N.P. 114. 1 P. Wms. 218.

An infant cant bind himself for money lent unless the money is actually expended for necessaries. P. Lord K. Holt. Ch. Salk. 277. 386. 6 Mod. 368. 1 Eq. Ca. Ab. 516.

At L the infant is not bound for this money unless

the Lender himself expends it in necessaries - in which case he is considered rather as a friend than Lender. 1. P. W. C 283. 5 S. X.

But in this the infant if the money is actually expended in necessaries, is bound to refund the value of the necessaries not as the case may be the whole value of the money lent. Hence the Lender of the money stands in the place of the vendor. & will recover as much as the vendor would have done if he had furnished them an article which would be simply the value of the necessaries. It has been decided that when the infant uses a mechanic & purchased articles to convey on his trade he was not bound. The presumes he has not sufficient discretion to make a contract, & that the articles purchased were not necessaries. Bro. Jac. 49. 349. Salk 279. 1 Roll. 729. Hut 1083.

So also an infant is not bound to pay for repairs done to his building. Such repairs are not considered as necessaries & may be made by the guardian 3. Salk. 196.

It has however been decided that if an infant takes a lease of a house or land & lives on it till the next day annum he is liable in either case if the reasonable hire, if it dont exceed 1 years rent) in an action of debt. The house is looked upon as his for the purpose of lodging. I dont see the reason of this decision as it respects land Bro. Jac. 320. 2 Salk 67 1. Rbout 38.

For necessary education an infant may bind himself - but what is necessary in 1 case would not be considered so in another. The kind of education differs in proportion to the person's rank. A liberal education may be considered necessary & proper for the infant son of a nobleman - whereas it would be unnecessary for the son of a poor man. It has been decided however in the reign of Ken. 1. that music &

learning are not necessary parts of an education. Doubted whether this rule would now be held to apply to the circumstances of many infants. 1 Vid 446

If an infant does what he is bound to do in an equitable manner he is bound by the act & cant set it aside, tho any stranger him not bound by his contracts except for necessaries. As in the case of fraudulent conveyance, Mortgage, a frequent case in 3 Burr 1801. 1 Sect. 1812 916 Burr 1795. 2 Bo. 88. 1 Bl R. 575.

An infant when sued in trover is bound by a demand & refusal in the same manner as a adult would be except that a day is allowed him after he comes of full age to disaffirm it for grounds as in cases of husband & wife &c. 1 Vent 298. 2 Do. 352. 429. 1 Ph 504. 2 Do. 401. 3 Do. 362. 2 Atk. 231. 3 Bo. 626.

So an infant when sued in trover is much bound by a demand & refusal as an adult would be except that they appear to be sued in his proper name. The reason of this distinction is that the plaintiff comes before the Ct voluntarily - but the Deft is compelled to appear.

An infant cant bind himself by contract except in the cases before mentioned yet when he acts as representative or in consequence of power he is bound, & in these cases the general rule is, that such acts of the infant as dont affect his own interest, but derive their power from an authority which he had a right to exercise, are regularly binding - tho an infant may do many acts not affecting his own interest. 3 Burr. 1802.

A person after having attained full age may ratify a contract made by him during infancy, & not thereby engaging. It is a general rule that a promise made after full age binds the promisor, tho founded on a contract (if the contract is not void) made during minority. 1 Str 690. 1 Ld R. 648. Esp. 163. Chitty 21.

If an infant gives a security during minority which is absolutely void, & after full age makes a promise, this promise will lay the foundation for an action on the original void contract, tho it can never set up the void security. Bac. Ab. Infancy. B. N. P. 155.

When then the instrument is absolutely void the subsequent promise must be the foundation for another action - but in the case of a voidable instrument, he may & must bring his action on the instrument & to a plea of infancy reply a promise after full age. Auter action pend. When a person after full age makes a new promise in consideration of a contract made during infancy, he is bound no further than to the extent of the promise. Esp. 164.

To a plea of infancy a replication of a promise after full age must provide as far as the plff is bound to support it by proving a promise in he need not set forth that the deft made it after full age. it will be presumed that he was of full age & the onus lies upon the infant. because the plff may not know his age. 1 Bac. 644. Esp. 164.

If an adult is jointly interested with an infant in a lease & the adult obtains a renewal of it in his own name merely, he shall be deemed as having acted as trustee for the infant & the infant may claim his moiety of it if to his benefit, but he need not if to his not beneficial. The reason is that leases are generally renewed, & the subsequent is a graft on the old stock. Bac. Ab.

If an infant is sued on a contract to which he is not bound he must plead it or give it in evidence under the general issue. He cant be discharged in a summary way as a pauper cannot, i.e. on motion. Bac. Ab. Infancy.

Lecture 6th

What contracts made by infants are void & what merely voidable. All contracts by which infants are not bound are void or voidable. The distinction between void & voidable is somewhat artificial. - but the consequences of it are very material. Ought to premise

that of late years it to have been inclined to consider those contracts by which infants are not bound as voidable merely & not void. & this is of advantage to the infant as it leaves it in his power to make void the contract or to ratify it when he is of full age. Having these this power, there are few cases in which there appears any injury to the infant. his contracts will be considered as absolutely void. the first general rule laid down on this subject is. that those contracts in which there is an apparent benefit or semblance of benefit are voidable. But on the other hand where there is no apparent benefit or semblance of same it those contracts are void. Bac. Ca. 562. 2 H. Bl. 511. 1. Pr. and 999. 98. 84. Mad. 310.

This is not I think the governing rule. the first or affirmative part is undoubtedly true. Hence it follows that the purchases of an infant are only voidable, because they are always presumed to be for his benefit. I know of no exception to this rule. If this part of the rule were not true he could not be a b - e, grantee or lessee, & he could take lands only by descent. Bac. Abr. 220. 2. Kent. 209. 1 Inst. 2. 3.

Upon the same principle a power of attorney given by an infant to accept seisin is only voidable. Yet has lately been decided that that an indenture made by a minor to serve as a S. was only voidable, because it might be for his benefit. These exceptions all conduce to illustrate the former part of the rule. 3. Burr. 1804. 1. Ball 790. 2. H. Bl. 511.

The latter branch of the rule that states generally true tis thus given not a criterion it has however been so that when an infant made a lease without reserving rent the lease was absolutely void. Moore 105. Dyer. 337.

This has been laid down as L. from time to time considered as such - but there is not a single decision to this point as is by the Mansfield in Bl. — consequently it dont appear

to be well grounded. If this there are strongly opinions to the contrary. Litt says a loan made by an infant may be voidable i.e. is voidable. 3 Bur. 1806.
This is so with reference to reserving rent. There is often a weight of authority on both sides of this point of the rule. Lord Mans. decisions have mentioned above to be void. He has not taken up the latter branch of this rule & proved it to be infirm. For it many times is true. But has advanced same arguments to prove that a loan made as above is not void. 1 Lev. 6. Noon. & B. S. Bac. 595.

1st Always he may make a loan without reserving rent to try his title. Now if this loan was strictly void, the def, or who is stranger to it might take advantage of it. But if it is only voidable he cant. For it is a general rule that whatever makes an instrument void may be given in evidence. An infant & so cant take advantage of his infancy to make void the lease. 3 Bur. 1806. 1 Cant 74. 2 Mod 25.
This proves absolutely that the loan of an infant is not void but voidable for the general rule is, that when the loan is strictly void, the def may take advantage of it. It is clear then on principle that the loan of an infant reserving rent or not is only voidable. Br. R. 774. 2. Atk. 161.

As to again that a penal bond executed by an infant is void. Because a penalty can never be a benefit or semblance of a benefit to an infant. 1 Cant. 84. Bro C. 320. Hut. 106. Esp. 164.
Then is in my opinion no more necessity that this bond should be void, than a single bill. Cant know that the reason that a penalty can never be for an infants benefit is or has ever been decided to be a good. At this day a penal bond would not only be considered void there are same opinions contrary to this opinion. I consider it as voidable. 3 Bur. 1804. Wood 404.
At K an infant cant plead non est factum to a bond, & pain infancy in evidence unless it but must plead it specially. This a jury cannot way do this. It a general rule that whatever makes an instrument absolutely void may be given in evidence on the general issue. To this rule

them are some exceptions. But what furnishes a strong argument is the idea, that a final bond of an infant is strictly void is this. that an infant having made a bequest of his mill for the payment of his debts, the Ld of Ld will understand that the final bond be good on the ground that it is ratified by the bequest But a strictly void bond, can never be ratified. In the 4 preceding cases the bond is only considered voidable. In Engl it wants to be considered as void. There are the cases brought in support of the latter branch of the rule. They have been considered & I think it appears at least doubtful. This in its nature a vague one or mean prospective perhaps a qualification of another rule. The general part of the rule relates chiefly to his purchases. This branch of it is not contradictorily pronounced as early - this universally considered as correct. The latter branch relates simply to those contracts which create a duty as bills or convey an interest present limit - such as bonds leases conveyances, obligations entered into by them conveying away their interests. I give you the true rule after examination. Gifts all deeds gifts grants wills or obligations mean by infants which do not take by warrant of law are void. Bonds or the other leases which do take by warrant of law are voidable. This rule was substantially laid down by Ld K. 3. Burr 1805, & 1 Ball. 430.

We will examine this by a few examples. If an infant makes a purchase then is only voidable not void. Pow. Cont. 29.33. But what bought or sold bargain of purchase is this according to the general rule as laid down above. Then there can be no appointment bought to an infant in conveying away his interest 3. Burr. 1805, 1. 4. Co. 124a 8. Co. 42 1. Cont 694.

An presumption is the other may be avoid upon his coming of age for two years till he is 21. then he may affirm or disaffirm as he pleases. But the L may do it before he is 21. Why is this merely voidable? because the interest & liberty of choosing he shall not immediately convey his purchase after he has come into values act. An infant with a house this contract

is merely voidable. The delivery is the entire act. It is a solemn act or transfer which shall not be considered so as to render the other party a wrong doer. If the sale was void he might immediately consider the other party as a tort feasor. On the other hand if an infant makes an executory agreement and has broken. but does not obtain him the contract is void. & if the purchaser takes him without delivery he is a trespasser. 1. Cro. 137. Hob. 171. Roll. 730. 2 Salk. 10. 1. Keb. 778.

There words in the rule which take effect by delivery are important as they respect the delivery of deeds & to which applied to sales they are also important. Hence the difference in deeds between those which convey an interest & those which do regale a power. The powers are generally voidable because they pass by delivery. the latter generally void because they don't pass - they enable another to convey & do effect. according to this rule gifts grants leases &c are all voidable as they pass by delivery. A power of an attorney by an infant is void except when which is to convey seisin or interest - because it don't convey an interest. It don't take effect by delivery. 2 Burr. 1808. Doy. 13. 1 Bl. 517. 1. H. Bl. 78.

Paw. denies this distinction between deeds - he has no argument on the point but only says the distinction is ill founded. 1. Paw. 92. 99.

The general rule is that those contracts of the infant which take effect by the delivery of the deed only are voidable - Yet this rule is to be connected with the following 1. Wherever the contract is in such a way detrimental that the interest of the infant can be preserved by keeping to this distinction, the Court have to consider it as void tho it pass by delivery. 2 Burr. 1808. 2. Bl. R. 579. 5. 79

This is well exemplified in a case in Bl. R. or rather in

Rebble in the case of a maid who sold her hair to a hawker, & afterwards maintained an action of assault & battery against him. Thus the general rule was positively overstepped for this privilege could in no other way be preserved. So it is not so in a penal bond for here it can be preserved. 3. Keb. 367.

Extra contracts by an infant are in general only voidable as a promissory note might still, Bill of exchange. A penal bond is an executory agreement, & is only voidable. 1. Parr. 88. 2. Str. 937. 1. Str. 481. 1 Ld. 41. 1 Vent. 41, 1 Keb. 1.

It has been denied that a bond by an infant to submit to an arbitration is voidable & not void. 1 Salk. 280. 1. Ld. 13.

Thus you see there are many few contracts of infants that are strictly void. An infant's deed mentioned as under may enable of this deed is the case of a power of attorney & this case is Rebble. If a contract is void pursuant to the adverse party may take advantage of it. But if it is only voidable only the party for whose benefit it was made so as his representatives can take advantage of it. This is a characteristical difference between contracts void and voidable & void 2. Str. 693. Str. 937. 2. M. Str. 911. 1 Vent. 34. Parr. Vent. 88. 1. Mod. 25.

If an infant sells a horse & delivers it, no I can bind it otherwise than as a binding contract except the infant or his representatives. But if he has not delivered it the adverse party & stranger may refuse to pay for it & consider it as void, & an execution may be levied on it.

Lecture No.

I observed in the last lecture that the voidable contracts of an infant could be taken advantage of only by the

infant or his representatives - According to this principle his a
rule that if a voidable conveyance of real property is made by
an infant, only he himself, coming of his minority can take
advantage of it - & his executors may & executors cannot
take advantage of it & come into power, they hold an exigent
grant with the tenant in tail. 4 Co. 124. 3. 1. Inst. 9. 337. 1. Roll. R. 4. 2. Bac. 152.

Then contracts of an infant which are only voidable may be
ratified when he comes of full age - & this confirmation
may be either express or implied. The former needs no ex-
planation - its sufficient an express acknowledgment of the
existing power of the contract. Implied confirmations do
need explanation. Thus if a lease is made by an infant now
of he continues in possession after full age he ratifies the contract
- & of course his own covenant & is liable for the rent
which has accrued during his minority & after it
for the contract takes effect also in this case. Bro. Ja. 92. 2. Bac. 63.
2. Bac. 554. 1. Vent. 312. 2. Vent. 203. 1. Roll. 731.
This case of a lease is only an example of a confirmation
for the general rule, that any acts of an infant after he at
tains full age evincing an intent to waive his privi-
lege of infancy ratifies the contract. Thus he takes away
advantages &c. Sty. 690. 3. Co. 61. Bro. Ja. 92. 2. Vent. 203.

But if a void contract never can be ratified, you perceive a
distinction between them which are void & those
voidable. If an infant takes a new lease of the same land at the
same terms, not increasing the rent & not diminishing the
terms, he can never ratify this new lease because it is void. 3. Co. 65.
Cr. R. 766. 1. H. Bl. 28. Doug. 654. Comyn. 201. 482. 2. Cr. R. 83. 1. Mk. 353.

There are two of the distinctions between the contracts which are
void & those which are voidable. We come now to speak of
the manner in which an infant may avoid his contract

which are voidable & there some rules are to be laid down. If an infant has conveyed his estate by fine or com. Rec. he may avoid this conveyance by a writ of error reversing his minority. But not after. If the reason is because during his minority the age is determined by inspection & there is nothing on the record 1 Just 380. So 1 Ld. Raym 229. 12. So 197. 2 Salk Rep. 2178.

This is the rule as to judicial conveyances but there is a material difference between this & a conveyance by matter in pais, i.e. by his own act, for as an infant may avoid a conveyance by matter in pais. As a fee simple pur autre estate during his minority or after he attains full age. So Litt. 217. 258. 380. 1 Just. 192.

But he was settled & that he cant avoid till full age because the avoidance is as much void as the first conveyance & there he may avoid the avoiding act. It follows from this that an infant while such stands an entrance to avoid a conveyance, a stranger cant enter the lands the party of the infant either by virtue of a feoffment made by the infant, or by some writ in his power vested upon it. The reason is the stranger has no right only under the voidable act of vecatur, & the feoffee is tolly is the case 1. 9. Rep. 137. 1808. 1 Bl. R. 573. 2 Bac. 1362. 1 R. 161

The rule is the same as to conveyance by matter in fact as deeds release &c. 3. Bac. 137.

It is ad by Justice Buller that the act of an infant binds him the reasoning of this is that it binds him voluntat an infant. 2. T. R. 161. 5. Bac. 137. 4. 1. Just. 380.

It is necessary to make some observations on some exceptions in favor in Equity on the subject of infants contracts as they fall under no division of the title at L. Mar. viz. the mind governments made by infants with consent of parents or guardians are for the most part binding on

ority – & for this reason because they are necessary to the principal principle contract, which is main. By this argument is meant to settle fully on & on both on ifan This is not attained at L.L. If this can may little known in the country – because the duty of the ancestor goes to all the children generally. But in Eng as the law takes the whole it has become necessary for the purpose of doing justice that the main. settlement agreements should be made in order to do justice to the younger children – i,e, that they may have a support. The reason why Ch can make the main settlement binding is because this Ct is the guardian of all infants in the kingdom. This is a branch of the royal prerogative delegated to the Chancellor – & consequently the Ct cannot restrain his power in this respect. He is the perpetual guardian of all infants. If by virtue of it these contracts are enforced in Ch by 1 Ca Cont 42. 2 Atk 56. 1 Ch. Ca. 132.

How far such contracts made by infants to be enforced in Ch is not settled – there is no general rule on this subject. the tis to be 1 that Ch may still enforce them contracts. their power is discretionary. 2 Atk 613. 1 Vern 101. 1 P.W. 574. 9 Mod 101. 1 Ellect. 46.

1. It has however been settled that the natural of a female infant in a main. position should be bound by a main. settlement or agreement made before marr. 1 Bro. Ch. Ca. 54.
2. Tis settled that a female infant may lose her right of dower by accepting under such an agreement a settlement by way of jointure – A jointure is a substitute for dower – if it has been taken before that she is bound by it at the it consists of real estate, which is on the L.L principle of jointure – for by that it must consist of real estate 2 Eq. a 101. 1 Ves. 515. 1 Ellect. 59.
Tis to by Point that tis not settled whether a male infant

can bind her real estate by such a marriage agreement I see no difference between making & making void & not impeding their power. 1 Vent 64 70. 2 Lev. 62. 211. 1 Pow. Con. 82. 2 P.W. 289.

It has however been settled that a male infant can for him if made with the consent of parents or guardian if (which is a question) during non settled to uses bind heir &c. Tant is in contract touching this is real Prec. 2 Ch. Ca 211. Pow. Con. 82. Stra 604.

And it has been decided by Ld Mansfield that if a female infant seized in fee covenants on marriage with the consent of her guardian in consideration of settlement to convey that estate away even to her H. she may still compel the performance of the contract. So in my opinion may a male infant 2 P.W. 243. 1 Pow. 48.

Ld Hardwicke says, speaking of this case, tis going a great way, yet he says there are cases in which she will do it, viz when the settlement of the H on the W is an adequate consideration & she names Finch 9. Ass. 613. 615. 1 Pow Cont. 80.

Again tis said by Ld Thurlow that the real estate of a female infant is not bound by a contract to convey it to her H. unless after the death of her H. she takes profer of her settlement. Yet he says the Ct ought not to go into the enquiry, whether the man settled is an adequate consideration for her real estate. This here case is directly opposed to the opinion of Ld Hardwick cited above. Upon the whole I think, and doubt whether it will bind her unless notified afterwards. Pow. Ca. 116.

Tis agreed that such a contract made by a female infant to convey R. will not bind her in chancery, unless the agreement is made before marr. because afterwards con-

cion is always supposed 2 Br. Par. R. 514. 9. Atk. 56. 1. Fonb. 70.

But the general question whether a male infant may bind his real estate by such a marriage settlement agreement is not settled yet it is settled that if he covenants with a female adult, to convey her estate to uses in contemplation of marr, he is bound by it this is only waiving his right to the contrary 2 Br. ch. 338 1. Fonb 70.

According to the comment of Fonb it seems settled that no marr. settlement agreement made by an infant male or female to settle real estate will ever be enforced by chy unless it is fair & reasonable & upon an adequate consideration. From the investigation which I have been able to make the subject I find no settled principles laid down which govern these cases. 1 Kent 61. 2. P.W. 244. 2. Br. ch. 115. 116. 152. 3. Atk. 615. P. Kent. 47, 80 1. Eq. ca. 282.

Another rule touching the equity is, if an infant capable of making a will & personal property, does bequeath it upon the payment of her debts, his estate will be compelled in equity to pay them. 1. Peer. 37. Wood. 403. 1. Fonb. 74.

Those debts are those which in L. he is not bound to pay this is a rule founded on the strictest principle. By L. he may make a Will of personal property by Chy he can make a bequest. Now in pursuance of this power can't he order his estate to pay this bequest to a creditor? Clearly he can why then can't he order his estate to pay his debts out of his personal property. There is no reason to the contrary & this only a legacy given to a creditor & not a satisfaction of a precedent debt. 1. Peer Wms 37.

I have already observed that an infants contracts may be ratified after full age & in Chy a contract made by any

either for an infant may be ratified by him after he attains full age, & this may be either expressly or implied. Expressly, as by an infant's undertaking to perform the contract — impliedly, by such acts as shew an intention to waive the minority. 1. Atk. 483.

A where land was given to a man and his children, & they have it for 41 years; now the children were not bound to it after 21 — & yet they continued to take rent for a considerable time after full age — & they established the decree them on the ground that they waived their right. 1. Atk. 483.

Lecture No

That powers an infant may execute. A power as used in L. is an authority conferred by 1 person on another in relation to some right or interest of him by whom the power is given — It is a general rule that infants cant execute a power over real estate. By general is meant a discretionary power — & the reason is they have no discretion. Parr. 49. 1. Ves. 279. 304. 3. Atk. 695.

But a naked or special power, i.e. where the manner of doing is pointed out in the power, may be executed by an infant because no discretion is necessary, as his interest in any manner affected, nor is there any danger of injuring any other person the acts as a mere instrument — As a power to sign a particular instrument in a particular manner. 1. Eq. Ca. Ab. 212. 3. Atk. 710. 714. Parr. Powers. 43. 48.

But an infant cant execute a power over his own inheritance — tis void because it may affect his interest. 1. Ves. 206. Parr. Pow. 43.

Thus suppose A devises an estate to an infant for life, & gives him power to make an estate for 3 lives. This power he cant execute — for he might destroy his own freehold. Auth. supra.

Mk. says that Ld Hard. gave it as his opinion, that there is no precedent in L, as in Eq'y that a power over real estate can be executed by an infant. By this nothing more is meant than that there is no instance of a general p. Ves. 104. 2 Vern. 48, 7, 8.

But it seems an infant may execute a general power over real prop'y, even tho his own interest should be affected by it, if he is old enough to bequeath it by will. The reason is if he is old enough he is considered at such an age that he is supposed in L to have the charge of his real prop'y 1 Ves. 369. Pow. Ven. 84.

The result of these rules & distinctions is 1st that an infant not interested in the execution of a power, may execute it so as to bind the principle to the extent of it, provided that the power does not amount to a discretionary duty over real estate. Ves 304, 305, 306. Viva 604: 2 P.W. 292. Pow. 84. 1. Powell on Powers 49.

2 tho he is interested he may execute a general or discretionary power over real prop'y, if he is of sufficient age to bequeath it by will. Pow. 84.

What offices an Infant may hold.

'Tis a Y. B. that infants may hold a ministerial office requiring only skill & diligence in the execution of its duties - but he can hold no office which requires discretion such as a judicial one. He may be a bailiff, steward or jailor, but he can't be a judge of a Ct of record or not of record. Bro. C. 396. 2 Bac. Abr. Offices 4th 1 Salk. 396. 2 Bac. 726. 796.

The reason why he may hold a ministerial office is not to be that if he can't execute it himself his deputy may. These offices are considered as property. The books don't tell us how this deputy is to be appointed - the infant can't appoint him but perhaps his guardian or the chancellor may. Suppose there an office is given to A & his heirs - A dies, & leaves a son 9 years old. This son may hold the office tho he can't

execute it – but his deputy may. Now the only difficulty is how this deputy is to be appointed. He certainly derives his authority from the infant – he must therefore be appointed by the guardian or Chancellor. 2. Roll. 153. 9. Bac. 526. 5. Eno. Com. Ca. 479. 11. Co. 4. 4. Mod. 279.

In time of minority then as it respects those offices which an infant may & may not hold is this – if the office can be executed by deputy he may hold it – if not, he cant hold it. tho' it's a ministerial one. Eno. C. 696. 697.

An infant cant be an attorney for want of discretion – the C will not permit him to take the oath. 3. Bac. 826. note. Eno. C. 696.

Nor can an infant in any case be a juror. 2 Inst. 422. He has no discretion to take the oath. 2d a juror actually an infant may be an extr at any age. Cat. 17 cited in the duties of that office. 3. Bac. 826. Hetl. 325.

Suppose then a person under years is appointed his deputy may execute it appointed by the Chancellor as ordinary as the case may be, & he is an administrator durante minoritate cum testamento annexo, & acts for & in behalf of the infant extr so far as an infant may hold & execute the office, & can hold & execute his office his privilege is destroyed – in other words an infant acting as an officer is bound by his official acts & towards the injured were it not so – for he acts under col and Vanity of L. & if he does an injury the L will merely make him responsible for it – If an infant being a janitor suffers an escape he is liable for it.

How far an infant is affected by the non performance of his of a condition annexed to his office. These conditions are of 2 kinds express & implied. Tis a G. R. that not minors at least an infant is bound by his express conditions as much as an adult – Thus even if an infant holds an estate by such an express condition is annexed, imposing a forfeiture upon the event of a certain thing he forfeits the estate

upon the non performance of the condition as much as if he were an adult. 1. Inst. 246. 1. Ves. 339. 560. 3. Co. 44. Barth. 48. 1. Vent 199.

The rule is indeed founded on the idea that he who gives an estate to another, has a right to desire that estate to come back to him, unless the conditions are performed. The estate goes out of his hands on the condition that such things be or be not done — but there is an exception in the case of an infant where the condition is to be performed & a forfeiture or penalty is to be forfeited. Here the infant is bound by the penalty — but when something collateral is to be done performed, the infant is not — for this might be made use of to mislead the infant to an indefinite extent, & consequently the privilege given him by L would be destroyed on at least endangered. 1. Inst. 246. 1. Vent 200. Barth. 48.

Implied Conditions.

Implied conditions may be either created by L. L. or else annexed to his estate. Implied conditions at L. L are such as are founded either on skill & confidence or such as are not — i.e. are the same whether skill & fidelity, or else something else. By implied conditions at L. L. founded on skill & fidelity in the person the infant are bound as well as all others. 3. Co. 44. 1. Inst 233. Hard. 11.

It is an implied condition annexed to all offices that the holder shall conduct faithfully & skillfully i.e. implied by L.L. If then an infant being a steward conducts unfaithfully or unskillfully, he forfeits his office. 1. Inst 230. 1. Bort 682. 3. L. Co. 44. Bro. Cases 6.

But by such conditions implied by L.L. as are not founded upon any trust, and skill or fidelity, meaning out of any special confidence in the infant he is not bound. Now tis a Rule L.

that if a lessee for life alienes his estate in fee he forfeits his life estate. This is a branch of the feudal system. his alienation, & the entry does not warrant — an infant dont forfeit by such alienation. 4 Co. 44 1 Roll. Rep. 1 Inst 239.

As to implied conditions by stat a distinction is taken which I dont understand. The R is this — Where the stat implying the condition gives a recovery vs the tenant for the breach or non performance of the condition, infants are bound by the implied condition — even when it only gives an entry. Where an infant being lessee for life or years commits waste, he forfeits his estate because the stat Glos. gives a recovery vs him Raym. 346. 1 Inst. 54a 1840 S. Bac. 474. 4 Co. 44b

But where the Stat L. gives only an entry, for the non performance or breach of a condition, the infant is not bound by the condition. 4 Co. 44b 1 Inst. 210b 1 Fonblanque. 82. 89.

As if an infant alienes in mortmain he does not forfeit his estate tho an adult would. The reason we may have assign for this distinction. (Perkins) tis this. Where the stat. takes away his priviledge but where it only gives a right of entry it does not take away his priviledge — (This a Gl. Re of L. that the priviledges of an infant shall not be taken away by mere implication. 4 Co. 44b 1 Inst 239a 1 Fonb. 82.

Lecture No

Tis a Gl. R. that infants are barred by the stat of limitations unless saved by a proviso. Stats of limitation are in the nature of conditions annexed to a right. Now in this case the infant is bound because there is an express condition annexed by stat. which takes away his priviledge unless complied with. For this reason the stat generally contains a clause in favour of infants. perhaps but the case in all the stats of limitations

that have been made. 1 Lev. 31. 2 Lv. Ca. 518. 3 Bac 513 4 Eq Ca Ab 524.

Yet tis a R. that if an exor or ~~Adm~~ or trustee sue an infant. does not sue upon their own contracts can not sue to recover his rights within the time prescribed by the stat of limitations, having power to do it, the infant is barred by the stat the savings & exceptions notwithstanding — & this is the R both in L. & Eq. — Thus in this state an action on a note of hand must be brot within 17 years — Now a note is given to ex in trust for an infant — on life the time for bringing the action within 17 years, a recovery on it is forever gone. This R relates to exors Admors & trustees who have a right to sue in their own names, & not to those cases where the action is to be brot by the infant in his own name. Thus suppose a legacy is given to an infant, an action to recover this must be brot in his own name, & the stat in such cases dont run as him. 3 P.W. 309.

How Infants are to sue and be sued.

I have already treated of the rights which infants acquire & the ~~actions~~ they incur, by their own acts. We will now consider the means of asserting those rights & enforcing those duties.

1st The right to sue. An infant must always sue by his guardian or prochein amy — he cannot appear by attorney 3 Bac. 148. Palm. 225. 250.

If an infant sues without guardian or prochein amy the def may plead to his disability. Rast. 287. 6a Litt 135. Lamb. 129. 3 Bac. 148, 7. 3 Bl. 301.

Anciently an infant plaintiff could appear only by guardian & not by next friend. But the stat 13 Westm. enabled infants to appear by either next friends or guardians as necessity Lev. Jac. 640. 3 Bac. 147. Str. 709. 2 Bac. 604. Palm. 295.

The cases where he may sue by prochein amy are 1st when he sues his guardian. 3 Bac. 147. Lev. Jac 640. Hutton 92.

2. When the suit is on a transgression & the guardian will not appear

for him - the if the guardian pretends the suit to be carried on at all as the y. supposes. Palm. 235. Hob. 361.
4. Where he has no guardian. Co. Litt 136b.
5. Where he is out of the guardian's care. 2. Bac. 640. 3. Bo. 147. Cro. Jac 640. Palm. 235, 6.

In all other cases he must sue by guardian - according to some opinions he may in any case sue by guardian or next friend Co. Litt 135b 2 Bac. 147. Cro. Car. 336. Hutton 92. 2. Lut. 330. 261.

Quere Is not this taking away the Chancellors Injunction Power?

If the H. & W. sue the H during an infant she need not appear by guardian - both may appear by an attorney appointed by the H. 3. Bac. 150. 2. Saund. 213.
When an infant sues by guardian the latter is liable for costs & is compellable to give security for them. So when the suit is by his next friend - & is liable to an attachment for non-payment. 2. Bac. 640. Eq. Ca. Ab. 72. Str. 506. 1026. 1. T. R. 571. 1. Will. 80.

According to some opinions the infant is liable for costs & the suit may proceed as either at his election. 4. D. E. 33. 2. P. W. 278.

The rule laid down in P. W. is denied to be L in a subsequent case where it is said that there is no case where the infant is not liable for costs either in L. or Eq. Str. 708. Cro. C. 23. 1. Bulst. 107. Cro. C. 166. 8 Co. 1. 2. Eq. Ca. Ab. 234. 1. Wils. 30. So. Litt 127.

The latter seems to be the better opinion - as an infant was not obliged to give a pledge at C. L, any I may bring a bill as his next friend - but cannot be given - still he must 2. Str. 1217. Bunnadiston 106. 124.
The infant also is clearly liable for costs. Str. 1217. Dyer 134. Bulst. 189. Cro. C. 164.

Is the guardian an accard of an infant Ejectt liable for costs? If so he is liable in the first instance to Eng. both Guard. & next friend must be admitted to appear by the Ct on by writ of Error that the infant may not be impann. 1. Str. 304. 709. 2 Ray 232. Salk 295. 298. Carth. 286. 3. Atk. 603. 3. Bac. 148.

Any 1 may bring a bill as next friend to an infant & sue without his consent, for he may get at his own risk, i.e. he may commence the suit but it may be discharged at refusal by the Infant. 1. Ch. 446. 2. Bac. 680. 3. Bo. 159. 161. 1 Eq. Ca. Ab. 92.

If an infant & an adult are exors, in an action brot by them both may appear by attorn for the suit is in right — & the other may take an attorn for both — sues if they are sued. 3. Bac. 150, 1. 1. Roll. 288. Bro. E. 541. 278. 2. Saund. 212. 213. Str. 784. 2 Ray 232. 600. 1449.

Tis the same if an infant who is sole exor sues alone. 3. Bac. 150a Bro. Jur. 420. 441. Carth. 129. Saund. 211. Sees if administrator.

How to be sued.

An infant Dft must always appear by guard — not by next friend for the statute West 2 not extend to infant Dfts. The plea is signed by the guard. 3. Bac. 148. 2 Bo. 61. Bro. Jur. 640. Hutt. 92. Co. Litt. 191. Hobt. 266.

Bail in an action vs the H. & W. the W being an infant she must appear by guard. 3. Bac. 150. 1. Vs. 31. 160. 165. 1. Roll. 288.

If infant is sued having no Guard, the Ct must appoint 1. fine or nota called Guard. ad litem. 5. Co. 59b. 3. Bl. 427. 3. Bac. 149. 150. Cro. Litt. 89, 135. 2. Lev. 196.

But if the infant has a Guard the Ct cant appoint 1 ad litem. unless the former is out of reach of the process or has misdemeaned himself. 3. Bac. 150a. 1. Sid. 424. Stile. 446.

The process however does not abate because the Guard is removed — time is given to cite him to appear at Ct — this is the practice of Ct. If an infant is sued & appears by attorn & the judgment is given as there it is erroneous & must be

amor lis. 3. Bac. 149. Mod 665. Cro. Jac 640. Hutton 92. 2. Buc 2 18.

Should there a fignment conclude with a verificatio as to the cautgang? with a verificatio. 1 Buc. 410. Barth 367.
So, the Guard is not cited. Judgment goes as him by default
And in Law it has been decided that when an infant & an
adult are sued together, as trespass, the Guard not being cited the judgment is erroneous in toto as to the infant.
In Eng if an infant & an adult join in a fine, it may be
reversed quoad the infant only. 2. Buc. 229. Holt 238.
Cro. E. 118. 824. Mod. 165. 2 Lev. 104. The reason is because the
interests are distinct.

How far does the Law regard infants in matters
Infants in matters of mere are in many cases regarded as in
esse. They cannot considered so in many cases in which
formerly they were not. 1. Bl. 130.
The killing of an unborn child is not murder but is
a great misdemeanour. 3. Buc. 668. 3. Bl. 198. 1. Hawk 120.

But if the child having received a mortal wound or injury
in ventre sa mere is born alive & then dies of the wound
or injury either a year & a day after the injury done, it is murder
i. e., it may be murder. 3. Inst. 50. 4 Bl. 197, 8. 1. Hawk 121, 1 Hal. 433 cont

Infants in ventre sa mere may inherit till they inherit the estate
which descends. They are presumptive heirs. 1. Rol. 611. Co 9th 99a
Hob 3. 1 C. W. 446. 2 Bl 208, Doug 581.
They may also take by devise the same as if born. 3. Buc. 124. Co Litt. 11.
+ Vaun 429 432.
They may take a legacy also. 1. Bro. Ch. 98. Bac Ab. 2 43.
They may take under statute of distributions. 2. Atk. 117. 1. P. W. 446.
So under a term for raising portions for such children as shall be
living at the death. Co Ch 50. 1. P. W. 246. 942. 2. M. Bl 999.

So under a bond in favour of such child can set aside. 2. Swans 28. -
Injunction as merits lie in behalf of such children. 2. Ves. 710. 711.
2 Atk 117. 2 Bac. 129. Pr. Ch. 82.
Under the stat. 12. Car. 2. he may have a testamentary Guard i.e. an
appointed by the father by deed or by will. 1 Bl. 110. 462. 466.
the may be an infant but cannot act till 17 - if twins are born they
are all in ventre. 2. Bac. 129. 1. Burn. 243. C. to 27
So if twins are bequeathed to the unborn son of A & he have twin
sons born, they take jointly. 3. Bac. 13.

Lecture No

Of the relative rights & duties of Parents & Children.
The enquiry under this head renders it necessary to consider the
different between legitimate & illegitimate Children for their
rights & duties are different when compared to them & each other.
Children who are Leg. & who Bastard. A Leg. Child is defined
to be 1 born in lawful wedlock, or within a competent
time afterwards. 1. Bl. 446. Co. Litt 244. Bro. Jen. 446.
No other than a child thus born can be legitimate. But tis
not universally true conversa that a child thus born is legitimate.
Ld. Ray. 483. Str. 490. C. Co. 98. 1. Bl 454.
Prima facie however he is a Leg. Child
An Illeg. Child is defined to be 1 born & begotten out of law
ful wedlock. 1. Bl. 454.
This definition also I conceive to be incomplete, such for that
after conception the parents intermarry, & the father dies
before the birth, is not the child Leg? He is not according
to the definition of an illeg. child born "1 born & begotten
out of lawful wedlock - or not born till a competent
time afterwards.
The above definition of a Leg. Child amounts only to this, that if
a child is born during lawful wedlock, the presumption is
that his Leg - Yet this can be very strong. 1. Bl 454.

There anciently no other proof of impotency mentioned in the books, than in such cases, where that such a marriage had legitimacy or profession of this fact could be proved first in 2 ways. 1st by sterility or impossibility of access by the H to the W. 2nd by shewing his impotency. The rule at present is much relaxed. Co. Litt 244. b. Co. 98. 2. Str. 940. 1. Bl. 457. Salk. 122. Esp. 483.

Formerly no other proof of non access was admissible but that of his absence extra quatuor maria from the time of conception to the birth. Absence within the realm could not be proved. Co. Litt 244. 1. Roll. 358. 1. Burn. 911. East 122. 1. Bac. 910. Salk. 122. 123. 483. Esp. 483. 2. Ray. 898. 1. Bl. 457.

Now if the H had been absent any length of time & his W should have a child at any time between seven after his return, the child would have been by presumption the H was not impotent. If he should after an absence of 20 years beyond the sea return & marry a woman who should have a child the next day after the marriage the child would be legitimate & be heir of the body impotent. Co. Litt 244a Salk. 122. 484. 2. Roll. 686.

2nd As to his impotency. Formerly this fact could not be proved otherwise than by a view of sage. According to some the age of impotency is any age under 14 - according to others 8. 1. Bac. 910 1. Roll. 348. Co. Litt 244. 1. Bl. 457.

The old rule was now much of them abolished England. Non access may be proved by other evidence than that of absence extra quatuor maria. The question is left to a jury upon the special circumstances of the case, & they may find non access tho he has been within the realm. Co. Litt 244. 3. P. W. 276. 6. Mod. 155. Str. 925. Esp. 484.

2. Impotence might be also inquired by other evidence than a want of age—as by his state of health. Esp. 483. 1. Bac. 11. Stra. 946.

There seem to admit no other proof of illegitimacy than what amounts to one impossibility. Esp. 483. Stra. 940.

It has lately been settled that other evidence than that of impotence & illegitimacy may be admitted to prove illegitimacy—viz. that the mother cohabited with J. S. that the child was reputed a bastard was called by the name of J. S. & that the mother took the name of J. S. Banq. 87. 1. T. R. 96. Esp. 483.

This goes to prove impossibility only—the sex of a man which is void & void ab initio is illegal. So in the case of a total divorce for cause existing before marriage which would render such a marriage unlawful. 1. Bl. 396, 440. 556. Co. Litt 235; 1. Bac. 311. 1. Roll 357. 360. 2. Co. 41.

But the legality of a marriage not absolutely void can only be called in question during the lifetime of the parties. 1. Bl. 440.

The issue cannot be bastardized after the death of either of the parties issue if born during wedlock.

A child begotten & born after a divorce a mensa & thoro is presumed to be illegitimate—never in the case of a voluntary separation—the presumption in both cases may be rebutted. 4. T. R. 356. 1. Bl. 457. Salk. 123. 1. Bac. 311. 2. Co. 42. 1. Roll 357. Esp. 483, 5. Stra. 925.

When the question of legitimacy is to depend on that of marriage the W is not admitted to prove non marriage. This is probably by others. But she is admitted to prove her own incon-

tinency from the incapacity of the cause. Carth. 434. Burr. 1117. Ld. Raym. 581. 1. Salk.

The former R is founded on decency policy & morality — the W is a good method to prove the time of the births — so is the H — so also as to the fact of marr. Carth. 594.

To declarations of the [illegible] then on matters of the children being born before marr. may be admitted after their death. This is not contradicting what is decency indecent. Carth. 594.

So an answer in Chy is good evidence as either party. Carth. 591. 594.

So travelling cum uxore between entry in a family bible, inscription on a tombstone & common fame good evidence of the birth & death of a child. Carth. 594.

All children born of a widow so long after her H's death, that by the natural course of gestation they cant be his, are bastards. 1. Bl. 456. 2 Ves. Jun. 441.

What is the complete 9 mos mentioned in the definition the R does not precisely ascertain. Ld. Raym. 485.

According to some 9 solar months & 10 days are the usual time of gestation — that is 240 days. according to others 40 weeks or 280 days. Palm. 9. 1. Rol. 356. 1. Bac. 312. Co. Litt. 123.

Nine solar months seem to be the usual time & one from which they most commonly. 2 Ves. Jun. 441 et infra cautio

If a child is born within the usual time of gestation after the H's death the presumed Leg. 1. Bac. 312. Palm. 9. Co. Litt. 8.

One born after that period is presumed illeg. 2 Ves. Jun. 441. 1. Rol. 357. 1. Bl. 456. Co. Litt. 8.

But 1. born 9. months & 14 days after has been considered legg. the mother having suffered much - & so 1. born 9 months & 20 days after. 1. Bac. 912. Eng. Jur 541. Salk 114. Ent. 488.

If a woman marries immediately after her husb death & has a child that might according to the usual course of gestation belong to either father he may neither become nurse at years of discretion choose his father. 1. Roll 359. 1. Bl 456. Co. Litt 8. 1. Bac. 912.

Child may not be bastard after his death if proved to have been a bastard - but depends on the person & the evidence

But the child may be known a man born in the intervening of his parents & the lawful issue of the man Ent. 480. 1. Bac. 915. Salk 121. 9 Co. 410.

If then the bastard enters on his fathers estate & dies seised his heirs shall hold to the exclusion of the male 1. Bac. 910. 7. Co. 42. Co. Litt. 93. 244.

But to entitle themselves them must have been married to the person by the bastard & issue - then dies seised his life the mother may enter & so his issue is seised at his death. Co. Litt 244. 1. Roll. 624. 1. Bac. 916.

Lecture VI

Of the rights & incapacities of bastards.

His rights are only such as he can gain - for he can take it nothing, being called nullius filius or filius populi & he is not of kin to any, but his own issue. 1. Bl 454. But the reason that he is nullius filius does not hold in all cases - for he can't marry within the prohibited degrees 1. Bl 454. 2 Mad. 164. 2 Ld Ray 68.

May to cases in which the L requires the parents consent to a Christian name. 1 T.R. 96. 100.

Indeed it seems to appear only to the L in this instance & by Litt & Bacon as a part matter of true succession cent inheritt. 1 T.R. 101. Litt 10a. Co. Litt. 129. 1 Bac 409. 1 Bl. 418. 449.

He may acquire a surname by reputation tho he has none by inheritance 1 Bl. 440 n 3.

& by this name he may purchase. Bac 31.

So he may by the name & description of A son B. tho' has the reputation of being A son B. By the description of issue he can never take because Christian is generally used as synonymous with heirs of the body. & he can never be heir in exigence. Co. Litt 8.

But he cant gain a surname by reputation but by continuance of time. Keb. C. 810. Parv. D. 93 & 1. Co. Litt 123.

Hence if a cont remainder is limited to the first unborn son of A with the L or Alley (he having none) & A has an Alley. he cant take tho' he had not the reputation of being A son or his Christ & his uncle tho' he be so with. Co. Litt 3a. 6. Co. 65. Bac E. 810.

But it has been so that such a limitation to the first son of A a woman, will enure to the heirs son of A towards & becomes he acquires the reputation of being her son by being born of her — & there is no uncertainty as to the person. Co. Litt 3a. 1. Bac. 309. Moy 33. 35.

If uncertainty in the person is the only objection in this can be obviated & the limitation is good. As not limited as two remote a contingency allowing there is no uncertainty

as to the person whom born – but is not the future issue of a bastard itself potentia remotissima? Mangnam Quaere if in dubio – the latter opinion seems to be on the limitation. 2. Bl. 170. Bro. C. 510. 1. P. W. 329.

He can have no heirs except those of his own body – for all other kindred must in traces to him – com. canon. & he common Co. Litt 3b 1. Bl. 459.

In Eng a bastards settlement is regulated by where he is born Burn. 7.

There is an exception to the R where a pauper is parochially as the parish where the child is born. 1. Bl. 459. Salk 121.

Of the duty of Parents to their bastard children.
Their principal duty is to maintain them – pur tant q'il sont pouvery them to do it Eng see 1. Bl. 459.

Tho the relation of parent & child is not recognized as to par poses strictly civil, it is as to certain natural duties Bac. 317. 1. Bl. 452 8.
The L in Eng on this subject depends on the statute Eliz 18. 7. Jac. 1. 4. Car. 1. 14. Car. 2 & 6. Geo. 2. 1. Bl. 458.

Of the rights & duties of parents to their Eng children & vice versa.
1st The duties of parents are principally, maintenance protection & education. 1. Bl. 446.
The duty of maintenance is founded on natural L. Those who have given life ought to preserve it as far as they are able. Maintenance consists in providing necessaries – this duty is reciprocal. 1. Bl. 446. 3. 453. Roy. 600.

The obligation of parents to support their children is absolute

Unconstitutional. Infants in judgment of law incapable to support themselves. 1 Bl. 449. 1 Ro. Ab. 3. 2 Ch. 288. 1 Ves. 160. 3 Atk. 332. 2 Bac. 290.

This duty is enforced in Eng. by stat. 43 Eliz. 1. Bl. 448.
The obligation under the stat. extends as well to grand parents as to parents. If it does not cease with the infancy of the child. for by the stat. all persons who are poor impotent or unable to support themselves (thro want of understanding age or infirmity) shall be supported by their parents & grand parents if of sufficient ability. 1. Bl. 449. Ste. 190.

But parents are not bound to support their adult children even if the latter were able by labour or otherwise to support them. Infants also are never deemed able to support themselves. 1 Bl. 144.

In Eng children are under a reciprocal obligation not. Duties as to grand children. Ste. 190. 2 Bl. 448. 1 Bl. 457.

The obligation on parents himself in Eng to support his poor is only secondary. relations are liable in the first instance. Grand parents are not liable if the pauper has parents to support him. So grand children are not liable if children are able. In Eng a man is not obliged to support his W's children by a former marr. even during coverture. No question can be made as to the W's liability at the time of marr. 4 Bac. 119. Esp. N. P. 1. 2. Burl. 946.
Stat 43 Eliz extends only to natural relations. Stev. 190. 455.

But is not the true principle that the H is bound if of ability if the W was poor in case he takes her even against. otherwise not. 1. Bl. 144. Ste. 248.
If the W was liable H ought to be — if she was not, he is not liable. 1. Bl. 448.

Clearly a man is not bound here or in Eng to support his W's parents Stra 190. 2. Bac. L. 338.
Quere ought not the duty to be bound if it was at the time of marriage? So is not bound to support his own W after a divorce a mensa & thoro Stra 955.

This duty however to support children does not disenable any 1 to disinherit them 1. Bl 447. 450.
As to the mode of enforcing this duty in Eng see 1. Bl. 144. 447.

2nd The duty of protecting children, proceeds on natural L. is wholly from this thence enforced by municipal L. 1. Bl. 450. 2 Inst 564.
So a man may justify an assault of his child - in defence he may assist him without incurring the guilt of maintainance in quarrels. 1 Bl. 430. 2 Inst 564.
He may sue any on the same violence that the child might himself. Cro Jac 296. Hob. 134. 88. 1. Bl. 430.
Vide Matt. Paternis
So vice versa as to children. 1. Bl. 453.

3. Parent are bound by natural L. to educate their children. 1. Bl. 450.
There is no provision in Eng to enforce this duty, except that poor children may be bound out as apprentices by the consent of the poor on justices & parents convicted under a penalty to send children abroad to be educated in the popish religion. 1. Bl. 451. 426.
The duties of children to parents consists in their obligation to obey & be subject to them deriving support - to support them when poor & protect them when necessary 1 Bl. 453.

Lecture No

The parent has a right & to be consulted as his duty to connect his child in a reasonable manner. 1. Hawk. 130.

By the Roman L the parent had power over the child's life But now if the parent exceeds the bounds of moderation & ma is influenced by malice the child may have an action against him by his prochein amy. But the only punishment in a equal degree, a slight transgression of it, or a mere error in judgment as to the proper mode of correction is not to be punished by L. It seems these last three must be accompanied with malice to subject the parent. Hawk. P.C. b. 1. Bl. 452.

This power of correction may be delegated by the parent to a master as to a school master the latter is then as to his duties in loco parentis. 1 Bl. 453.

The consent of a parent to the marr. of his child is also required by the english L & I am aware without such consent the marr. is void Eng. 1. Bl. 452.

By our L the marr. is good but the person who married them is liable to a fine.

2nd The parent has no power over his infant child to retain the services than as master or guardian & is liable as the case may be in an action, when the child attains the age of manhood as as the case may be infant. A minor is entitled to all the profits he acquires otherwise than by service — as by gift grant &c. 1. Bl. 452. 453.

3rd The father is entitled to whatever the infant child acquires by service. 1 Bl. 453.

Hence the parent is entitled to an action for any & who has beaten his infant child or otherwise injured him, so as to occasion the loss of his services. So for enticing him away. Ba. 828. Esp. 646. 9 Co. 118. 1. Bl. 453.

Still the infant if he has been beaten is entitled to damages for immediate personal injury Bac. 828. Esp. 646.

If the parent has incurred any expence on account of the injury done to his child, he may recover that also in his action for special damages as a ground of damages. T. Ray 284. 29 Wils. 18.

So an action lies for a parent in any / who has debauched his daughter & for quod &c. loss of service is id to be the gist of the action. It certainly was the original / was the nominal cause of the action, & without it no action would lie. Ld Ray 1032. 9. Burr. 1077. 1 Ray 164. 1 Bl. 373. Burr. 769. 770. Stile 393. 1 Roll R. 93.

The expences incurred by the parent during her illness may be recovered if specially laid. 9. Wils. 18. 1 Ray 299.

Wants not this alone support an action. 9. Burr 1877.

In that case the daughter was bound not to be a b, nor was it stated that the Plff was obliged to support her. she was aged 23. 1 Str. 164.

But the loss of service is not the sole or principle cause of action. The real cause is the infamy & disgrace occasioned to the family. 9. Wils. 19. Str. 648.

1. The least loss of service is sufficient to maintain the action tho not mentioning that the damages are proportioned to the loss of service. 9. Wils. 19. 1 Str. 164.

2. It lies tho the child is in a promising way a burden to the parent & of no profit - as the daughter of a nobleman Cro. 555.

3. The character of the daughter is never in any case taken the quantum of damages - & even her intimacy with others may goes in mitigation of damages

4. Actions of this kind have failed notwithstanding a loss of service - where there was no seduction - as in the case of a common prostitute - Or where the father has permitted the Plff living a married man to visit his daughter Rob 22. Peak 246.

But still it has been holden in the absence & in the weakness or, unless the daughter has in some way been proved to have been a s. of the parent. Ld Ray 1032. 9. Burr 1877. 2 Str. 164. 1 Ord 774. Cro. E. 769. 770. Stile 393.

It has lately been holden that it will not be proved, that the actress by reason her parents disapprovement if she be not in his family - she is of common carriage Lucas J. Lucas of age. Peak. 86. 233.

The age of the daughter is immaterial if she acted as S to the contract - A covenant of service is void any 9. Will. 18. 2. Wil. 166.

Under age she is a S of common intelligence she cannot act any wages or recover them herself. It is so in Exeter that the daughter should be in the fathers house at the time of the injury done - Quere in all cases? Suppose her an infant at a boarding school or running another person to the benefit of her parents. 9. Bac. 1878.

If an adult then cannot she maintain because she otherwise would be no S. 9. Bac. 1878.

The action lies for 1 standing in two parents. Abram arent, a master & S. 1. T. R. 4. Bac. 86.

In all these actions the daughter herself is a good witness for she is not interested in the event. 3. Will. 14.

Ancestrain fraudulently & per quod is substantially an action on the case. Cro. 645. T. Raym. 167 3. Bac. 866. 7. 6. East. 244. 8. T. R. 361. 2. Dr. 4. Bank. Co. Ed. Ray. 1032.

But when the act has illegally entered the pltffs house the pltff may sue for breaking & entering his house & lay the damages as consequential damages in aggravation. 2. Raym. 1167. 168. Ed. Ray. 1032. 1. H. Bl. 638. 2. Will. 24. Salk. 406. 642.

Here the action is in form trespass - trespass. The gist of the action is the unlawful breaking & of the house. Ld. replied. But if the latter action is but a means to enter the house before the Ld. Ray this must be pleaded as a justification. 2. T. R. 166.

Quere will an action lie for taking away the pltffs child without alledging loss of service or any other special damage. Example a trespass de filio vel uxore. It seems it will for the

Parent has an interest in the child to provide for its education 3. Bl. 130. Bro. C. 770. 3. Co. 38b 3 Burr 1878. 2 Bl. 1880.

The rights of the father cease when the son is 21 years of age. the mother as such has no authy. When the contracts the infant to be bound his agent. 1 Bl. 469.

How far the Parent made liable for the acts of the child
1st He is liable for their torts in same manner that a M. would be for the torts of his S.
2nd He is liable for their contracts in no other way than the M. would be for the contracts of his S., except in cases of contracts for necessaries.

Vide Master & Servant.

Guardian & Ward

Lecture 4th

Of the different kinds of Guards their rights & duties. A Guard is a term for any parent i.e. a person in loco parentis, viewing the child's minority. A child under a Guard is called a ward. 1 Bl. 460.
In Eng the Guard has the same both of the person & estate as his ward. Guards at L. L. were 4 1st Guard in Chivalry. Has obtained only where an estate holden by knight service vested in an infant by descent. It continued over the male till full age & over the female till 16 as many excluded to the person & estate. This has been abolished ever since the reformation.
2nd By nature. Same books & present that as common vests the father same as conferred to parents. 2 Bo 98. 2 Bo 22 2 Com 446 1 Bl 461.

But the father or neither or any ancestor may be Guard by nature at L. L. the father's claim excludes all others - next the mother. & among more distant relations if 2 have the same or equal claim as if the infant is heir apparent to his paternal or maternal grandmother priority in the person of the person seems to decide. 2 Com 445. 2 Bo 98. 6 Litt 88.

It extends only to the heir apparent of the ancestor & to other children. Doubt whether in Eng the daughter can be subject of 2 Bo 98 Bamtt 98 6 Bo Litt 84. 86
In Eng a father may destroy the claim of all other ancestors by by appointing a testamentary Guard by stat. 12. car. 2. 6 Bo Litt 88. 89.
When the father was natural Guard the person of the ward belonged to him in exclusion of the right of Guard in Chivalry - even if any other person was natural Guard. 6 Bo Litt 84 2 Bo 34 6 Mod 22
In Eng indeed the parents are stated natural Guards of all their children By this is meant not that they are Guards at L. L. but such as the L. of nature designates as proper Guards. & when there is room bounded by Particular L. the Chancellor settles at his discre

Guardian & Ward

tion with the Guardianship on the father & he being dead on the matter.

3. Guard. in Socage. This species of things proper to and takes place only when the infant tenant is male or female under 14 years of age by descent & holden in socage tenure. Mad 76. 1. Bl. 461. 2 Bo. Litt 87. 88.

It belongs to the nearest of the infant's kindred to whom the land cannot descend legally - that there may be no chance of trust. 1. Bl. 461.

Among claimants no distinction is to be made between whole & half blood. If 2 or more kindred are in equal degree, priority of proper admissions except that among brothers & sisters (as the half blood I suppose) the eldest is preferred & succeeds as ancestor the males. Co. Litt 88. 13.

He may have the heir's estate till he is 14 i.e. the Guardian maintains ejectment in his own name. 3. Burn. 418. 419. 2 Rawl. 41. Bro. Ju. 38.

This trust is not assignable like that of chivalry & this for the benefit of the infant. Co. Litt 90. 88. 3. Burn. 233. Vaugh. 181.

At 14 the ward may enter & oust the Guardian & occupy the land. The Guard is accountable for the benefits - he is also allowed his reasonable expenses - at 14 the infant may choose a Guard. Litt 123. 1. Bl. 461. 2. Burn. 687.

He may be prevented by the appointment of a testamentary Guard. Co. Litt 89.

4. Per quentuse. This takes place only when there is no other Guard - it extends to children who are not heirs apparent & to them person only it terminates at 14. 1. Bl. 461. Att. 15. 3. Burn 416. 3. Co. 38. Mad 784. Co. Litt. 84. 88. 89.

He enviseable only by a father or mother. Co. Litt 89. Can it ever take place to an heir apparent? it seems not - for if there is an parent he or she is the natural Guard. in this case till 21. If there is no father or mother the Ordinary appoints [illegible] who is a distant relation to take care of & the

final party & punished for the infant. 1. Bl. 461.

After 14. then living no guard. in Chivalry or socage, who is guard to the younger children appointed by the 2d on the infant Co Litt. 88.

1. By stat 12. Car. 2. a father whether of age himself or not may by will or deed with 2 witnesses appoint a guard. for any of all of his children who are infants & unmarried — even to infants en ventre. The guardianship extends to the person & all the estate — it may continue till 21 or terminate before that time Co Litt 88. 1. Bl. 462. 1. P. W. 703. 2. Do. 119. 2. Atk. 4. 2. Com. 234. 9. Do. 417. 2. Vill. 139.

guards by stat 2. Car. 6. 7. Co. 41. 9. Com. 47.

2nd As to guards by custom see Co Litt 88.

3. guards not enumerated by the old Co. & mentions. 4. Com. 415.

By election of the infant — this only takes place when there is none appointed by deed or by the father. This kind is of late origin — but it has been in use ever since the restoration (1660) & it seems before — election is so frequently to have been made before a judge on the circuit. Co. Litt 88. 1. Bac 375

There is no prescribed forms in Eng. Co Littleton relates it is named his guard by deed — parol elections good Co Litt 88. 1. Bl. 463. 470.

The age for choosing is 14 to be 14 — yet it is also that the choice may be before 14 or after. Co Litt 88.

Before this statute the restoration the practice of choosing guardians was almost wholly confined to infants under 14. The C. C during a guardian after that age unless Co Litt 89.

2nd By appointment of the Ld of Chy — this power is also of modern date. Fitzh. C. Pr. 172.

The Ld of Chy have exercised the power without opposition since 1676. Chy however never exercise this power when

the infant is provided with a Guard: in many cases may warn her not their power is extinct – tis discretionary & extends as well to the removal as to the appointment. 1 Bro. P. Ca. 544. 12 Mod. 408. Salk. 44. 2 Ray. 872. 1090. 8. Mod. 214. 2 Do. 116. 135. 2 Vern. 106. 2 Bac. 677. 8. Co. 126. 1 Eq. Ca. Ab. 260. 2 Mod. 177.

They may even remove testamentary Guardian. 1 Ves. 160.
So they may appoint a temporary Guard. & compel a Guardian to give security & make discretionary orders as to the support of the Infant & his estate. 2 Bac. 677.

3. By appointment of the ecclesiastical Ct – tho' Ct to the power of this Ct to appoint is not fully settled – it claims the right of appointing for the whole personalty & perhaps also them being no other Ct. 2 Lev. 162. 2 Bac. 677. Rep. 1470.
The right as to the person was always denied 2 Vern. 418. lately denied as to the real estate & custom that such Ct can appoint ad litem only. 2 Atk. 630. 2 Do. Salk. 121.

4th Guard. ad litem is a special Guard. appointed for a particular act – when an infant is a party & has no Guard he may be appointed in any Ct in which the Infant is sued. 2 Co. 39. Co. Litt. 135b. 136a. 2 Bac. 680. 3 Bl. 427. 2 Lev. 136.

The King may appoint the Guard. by Letters Patent – this Inquiry is not of use. Co. Litt. 87.
The City custom having no C. C. Guard. Chest Cat. 14 when Guard. dies for maintenance (leaving the father) as how are they provided for at C. L. The father & mother continues natural Guards. of them all according to the Infant of the times. 2 P. W. 116. 124. 2 Atk. 14.
The Ct of Chy may settle the Guardianship in their absence. Co. Litt. 87. 2 Bac. 679. 2 Vern. 231. 232.

Now indeed the statute 12. Car. 2. has given the Guardian liberum such cases to the father. Co. Litt 89.

Lecture No.

Under age & there is no Guardian in Chivalry, in socage, by testament by custom, in appointment of them or ecclesiastical &c. And only known to arise & are 1st Natural Guardians, 2 those appointed by statute 3. & to them.

Guardianship I think cant exist here for the father is the natural Guardian to the children & the mother as much so to all as any - indeed as one hears apparent - This Guardianship of the father continues till they are 21 years old as well to them property as to their persons. In Car. the Ct of Probate exercise the same authority that the Ct of Chy does in Eng. A Guardian appointed to an infant under age for choosing, continues till he is 21 unless the infant chooses another to the acceptance of the Ct. Newby 252.

The Ct of Probate is required by our L. to take securities for all the Guardians appointed by them, for the faithful discharge of their duties - to oblige them to account to the Ct or ward when he attains full age or sooner if the Ct or complainant should require it. But the Guardian is not liable to be sued to account by the ward while a minor, till called on by the judge of Probate to account.

In Eng all Guardians are (except in chivalry) compellable to account for the wards property in their hands. Co. Litt 87. 891.

The usual remedy in Eng is by a bill in Chy, this preceding being now extremely unusual - then their action of account at L. L. is compelling a discovery upon oath, the production of papers &c. 1 Ch. 269. 2 Bro. 671. 2 Cann. 231. Co. Litt 88, 7.

It is not unusual in Eng for Chy to compel the Guardian to account annually. 2 Cann. 231. 1 Ch. 269.

In Car the remedy is the action of account at L. & the Courts

are capable able to make oath of exhibit paper & on refusal the Auditors may commit him. If he decease to appear they will give the ward his whole account - it being in the nature of a decayed Stat. Car. 36.

If the wards estate is in danger thro the Guards insufficiency the latter the payment may be called [illegible] to account at any time 2 Cas. 230. 2 Bac. 577. 2 Mod. 177.

In case of misconduct in Guardian they will displace him or if there is reasonable ground to apprehend it - then the Ct may order him to procure surety, & on refusal may displace him. The Chancellor in all such cases acts discretionary 2 Cas 229. 1 P.W. 708. 2 Mod. 177. 2 Bac. 579. 1 Bl. 468. Salk. 44. 1 Ves. 160.

No Guardian except parents are bound at their own expence to maintain their wards but may apply the wards estate - but a parent when Guardian is allowed to support the ward if able 1 Bro. Ch. 387. Ves. 255. 2 Cas. 230. 3 Atk. 339.

If not able the parent may then apply the wards estate by Cas of Chary. 1 Ves. 160.

A widow having married again is not bound to support her children by a former marr - she may then apply their estate at discretion the reason it would be mutually benefitted with their support. 1 Bro. Ch. 268. 1 Ves. 160. note 2 Kent 268.

It has been so in the books, in case of them, that for anything more than necessary or ordinary expence in maintaining a child, the parent may apply the childs estate, if the object is for the childs benefit & the expence is reasonable & by means concurred for the childs apprenticeship to a useful trade. 2 Kent 253. 2 Ves. 197. 255. 2 Cas. 230.

Other R as now found by Chancellor Ken. 3 Atk 399. 2 Cas 229. Bunbury 196.

Equity must not carry cases of this kind beyond the strict circumstances. The Chancellor gives personal power not to alter common direction. 1 Ves. 160.

In case where the interest of an infant mortgagee is to be conveyed by a bill of foreclosure the guardian is not absolutely obliged to make the conveyance, nor can he be compelled to it under a penalty. If the infant has no guardian ad litem is appointed & authorized by the Ct. Ch. Ca. 184. Bun. 1778. 1. W. B. 575.

By 12 the Lands of an infant joint tenant or a tenant in common is empowered by the Ct of probate to make a partition of the land. Stat Law 254. 2. Bun. 1801.

In Eng the Legard or prochein amy tried many times the wards interest equal partition 2. Bac. 684. 2. Roll 256. 2. Bun. 1801.

If the ward enter on a composition with the guard accepts a less sum than is due, the ward not the guard has the benefit of it. 2 Bun. 230. 2 Bac 687. 2. Ch. Cas. 258.

The ward is considered in Chancery as ward for the ward & a stranger to account, unless the infant should take the profit he must account to him as guard. 1 Atk 489. 1. Ves. 396. 2 Bun. 230. 2 Bac. 687. 1. Roll. 661. 2 Ves. 295. Eq. Cas. Ab 280

If a person receives the profits of an infant's land during minority & afterwards for several years he shall account for the whole. 2. Bac. 687.

Guardians must allow interest on the infants money in their hands unless they show that interest could not be obtained for it. 2 Ves. 629.

It is the duty of guardians having legal power of their wards to keep down charges on the wards estate out of their profits & not out of their own. 2 Bun 231. 1. Ch. Ca. 156.

If the wards estate is in a mortgage guardians ought

To apply the profits of the estate to the infants. 2 Ld. Ca. Ch. 279.

The Guard. has no power to put the wards money in land. 2 Cas. 281. But if he does it taking a deed of the same the ward returning to years of age may elect either the to take the money or land. 1 Ves. 485. But if in this without making his election his estate shall mean the money for he cant claim the land for this is out duty as mine at L. 1 Ves. 409. 430. 2 Cas. 231.

On arrival the Guard in person may pay the wards money or is obliged to pay only principle & interest but if the money was stated to be appropriated in a particular way & the Guard has appointed it in another the ward may have at his election the interest or the profits. 2 Cas. 92. 2 Ves. 619.

Marr. of Wards.

The Chancellor in any case can only remove claimed by exts. the portion means without the consent of the Guard. Even if the Guard does consent to an unequal match. Whether as for contempt those who assist in such means after the prohibition. Call. 88. 8 Ca. 2. 1 W. & D. 160. 1 Ves. 160.

So if there is only an apprehension of the match being marred to her disparagement, the will the Guard's consent the Chancellor will prohibit it. Even the person of the ward of marriage. 2 Ves. W. 112. 9. Atk. 304.

Is this entry enviened unless either of the parents is Guard? According to the usage of Cas. Guard. may bind wards as apprentices. Lord Ley. held that the Guard. shall age males is ended by years. & in males not. If there is any distinction between the rights in their heirs not in their persons. That is, the Guard. shall of the estate of an infant female ceases after years but that of a male does not. But the Guard. shall of the person ceases both in males & females ceases. 1 Ves. 291.

Settlement of Infants.

Settlement is acquired 1st By birth. The place where a child is first known to be is prima facie his settlement. i.e. so deemed till another can be shewn. 1 Bl. 362. Carth 498. Comb. 364. Salk. 485. 1 Ld. Ray. 567.

This is generally the place of bastards settlement in Eng. In all cases if neither father [illegible] nor mother has a settlement, the child is to this in the place where he is born. 1 Bl. 362. Carth 498. Ld. Ray. 567.

But in the case of a beg. child under seven yrs of Age. even two, the presumption may be rebutted. The R. is the same in certain cases in Eng. as to Legit. children. 1 Bl. 363.

2nd Settlement may be acquired by parentage. If the place of the father's or supporting parents settlement, is the place of the child's settlement. These are called derivative settlements. 1 Bl. 363. Salk. 528. Ld Ray 1573. Hindy 207.

The R. holds in Eng as to all beg. children only. 1 Bl. 362.

In Bastards are settled where their mother

The settlement of children is the same in the first instance as their parents - so it follows them during their minority - & the last place of the parents settlement before the child attain full age is the place of the child's settlement. After the death of the father the settlement of the children follows that of the mother. Ld Ray 1579.

But if the mother marries a man settled in his settlement the child's settlement dont follow to the new place but continues in the town where the mother was settled previous to her marr. tho if they are under 7 years they may go with her for nurture - still the town of her former residence is the place of their settlement. 6 Mod. 87. Salk. 490. 528. 9. Ld. 257.

By the acquisition of a new settlement the old is lost. & no other way. 1 Bl. 363. Salk. 528. Burkett case 370

The R. dare hold absolutely I conclude when the 1st was gained by the Father of puty but where the settlement was a derivative 1. 1. B. 964. 2. T.R. 117.

An infant may in some cases gain a settlement of his own by & from his derivative one is lost. E.g. An infant apprentice in Eng. 1 B. 964. 2 Bac. Ab. 567. 2. M.R. 116. 366

This gaining a new settlement works an emancipation i.e. he is no longer a Pauper his father. After a child is emancipated after he ceases in fact to be considered as belonging to him in the character of a child or as being under his care or government i.e. his father he cant take the benefit of a new settlement acquired by them nor the he continues to live with him. 2. T.R. 116. 355. Str. 491. 1. East 206. 6. T.R. 543. 8. Do. 479. 1. Will. 183. Bur. Set cas 270. 98. 426.

Emancipation is effected 1st by full age. Bur. S. Ca. 270 1. Will. 189. 9. T.R. 356.

2. By marriage. Str. 488. 931.

3. By gaining a settlement of his own.

4. By contracting any relation which is inconsistent with his remaining in a subordinate station in his fathers family i.e. inconsistent with his remaining under the care & government of his parent. E.g. entering the army navy &c Bur. S. Cas. 698. 3. T.R. 119. 5. 356. 6. Do. 253. 7. Do. 419.

Attaining full age is not an emancipation if he continues a member of his fathers family. I suppose evidence of it. 6. T.R. 352. 2. East. 276.
But suppose he boards as a guest with his father?

As to settlement acquired by marriage. Upon the marriage of the W. settlement is communicated to the W. 1. B. 963. Str. 545.

If then a woman settles in a manner a man settles in B. Bar the place of his settlement & she ipso facto loses her maiden settlement. Bur. S.L. Ca. 122. 170. Salk. 524.

And it has been held that if H has no settlement at the time of her marr. hers is suspended during coverture, but revives at his death. Str. 645. 648. Root 299.

But it seems now established, that if the H. having no settlement shall remain within the realm, or being in the realm shall remain with & support her, her maiden settlement continues - indeed the Ct. held that if he has no settlement hers is not suspended. And in this case his children by the marr. are entitled to his maiden settlement. Bur. S. Cas. 367. 370. 122. 979.

Corporations.

Real Property

Real Prop is that estate which is permanent & immovable, & which descends to the heir – and prop which would otherwise be called pers, is by becoming the qualities of descent made real, as is the case with Heir Looms.

Real prop is divided into corporeal & incorporeal hereditaments – the former consists of land only – land being taken in its usual sense – for the term land equally includes land indigenously so called, & all that adheres to it, or is contained within it or upon it – as houses, trees, timber, minerals &c. all of which pass under the conveyance of land – Emblements also pass under a conveyance of the land upon which they are growing, tho on the death of the owner they are considered as pers prop & pass to the exor & not to the heir.

Incorporeal Hereditaments are rights not visible or tangible – generally spring out of the lands, as a right of way – but sometimes however spring out of & thing personal

There are different kinds of estate which may be holden in lands – & which are recognized by the L. – which have different qualities annexed to them, & different incidents arising out of them – No other than are of these estates then recognized, can by any words ingenuity or device be created – & to these estates no other than these recognized qualities or incidents can be annexed.

Estates in Fee Simple

There estates are the following - to wit -

I. Fee Simple

II Fee Tail - III Estate for Life. IV An Estate for years. & V An Estate at Will - under which falls what is usually called an Estate at Sufferance.

The three first of these estates are freehold - the two first are freehold of inheritance - which on the death of the tenant descend to the heir. The third is called a freehold not of inheritance, which on the death of the life man, goes to him in remainder or reversion - The fourth kind is final & when fall on the death of the tenant it goes to his estate The fifth from its circumstances & uncertainty cant strictly be called an estate - These two latter as can be distinguished from freehold estate, are called estates not freehold.

We will now proceed according to this division, & consider these estates in their order.

Fee Simple Estates.

The term fee simple is now applied to allodial property, it originating in the feudal system - & originally formerly the highest estate that could be held by a feudatory in a feud - but was applicable to no estate but what was held of a superior by an inferior - But a tenant in fee simple does not now in fact in Eng. hold of a superior - but his estate is allodial as it always has been in the U. S. the owner himself being lord paramount

A tenant in fee simple then, has the absolute uncon-
ditional right of disposing of his estate, either by
will or deed, & if during his lifetime he does neither
it will on his death descend to his heir general.

A fee simple could formerly be created only by
using the word Heirs - but this R is now some-
what relaxed - This word when used in its le-
gal sense is no description of the person, but of
the quantity of the estate about to be conveyed.
It was formerly necessary to use the term of perpe-
tuity forever - this this is now dispensed with.

If the estate is limited to any particular heirs of
the grantee this not a fee simple - Thus "to A
& the heirs of his body" - this is a fee tail.

But an attempt to limit a fee simple contrary
to the R.s of L is void - consequently the estate con-
veyed will be an unlimited fee simple.

'Tis a g. R. that the intention of Donor, Grantor
or Testator, shall guid in the construction of convey-
ances - this the R holds most strictly in Devises -
for in the construction of them, the intention of
the testator is the pole star - which if not contrary
to the R.s of L must be pursued - even tho the
terms used to denote this intention are not accu-
rately by the L - for the instrument part of the R
relates only to the intention, & not to the terms
used to denote it - Hence a fee simple, by Will, will
pass by the words Grant all my estate in fee sim-
ple, or by any other words indicative of an inten-
tion to grant a fee simple.

If an estate is given to A for life & after his death to his heirs. A shall not take an estate in fee simple because the word heirs is not descriptive of person but of the quantity of estate granted.

For the same reason when an estate is granted to a man for life, & after his death to the heirs of his body the grantee shall take an estate tail - but if you can collect from the instrument of conveyance, or the deed, or by an intention that the grantee as heirs should hold an estate for life, & that the remainder shall go to his heirs, whosoever they be at a future time, whether this intention shall not be pursued But when a marriage settlement agreement is entered to a man for his life, & after his death to his eldest heir, the ct of Chy will compel a settlement for life upon the man, & remainder to his eldest child in fee simple - So when he enters to a man for his life, & after his death to his heirs, the ct of Chy will compel an execution to him during his life - remainder to his children. The same heirs notwithstanding this it is not necessary to convey a fee simple by deed, from one joint tenant or coparcener to another So when the son conveyed the father, & the father conveyed the estate back again to the son by the words "I enfeoff my father as fully as he enfeoffed me" these held to be a fee simple.

A fee tail is a freehold estate of inheritance - but the estate descends to some particular heir or heirs pointed out by the donor - & not to the heirs general as in the case in a fee simple.

A fee tail may be created either by deed or by the operative words of which are, "to a man & the heirs of his body", being both words of inheritance. Without these words a fee tail cant be created by deed - but in a W. any words indicative of an intention to create a fee tail are sufficient.

Estates tail are founded on the stat de donis - or at C.L. upon the fee conditional, originating in the aristocratic pride of the English nobility - for the purpose of perpetuating estates in their families. These estates like the fees fail of modern times were limited to a man & the heirs of his body - or to some particular heirs of his body as male or female. The judges in the construction of these estates considered the intention of the donor, & held that they were estates given to the donee, to return to the donor, upon the non performance of certain conditions annexed - as that the donee should have heirs of his body; - & that then the estate should absolutely vest in the donee. This construction the nobility could not brook as it prevented a perpetuity - Thus thereupon in the reign of Edward I procured the passing of the stat Westminster 2nd [called de donis] which enacted that the will of the donor should govern when an estate is given to a man & the heirs of his body - & that at all events it shall go to the issue, if there be any - & if not it shall revert to the donor.

A tenant in tail after possibility of issue extinct,

is not liable for waste but in all other respects he is on the same footing as a tenant for life.

Under this stat was held that an estate to a man & the heirs of his body, was not a fee conditional, but a fee tail - But notwithstanding this a fee tail may be turned into a fee simple by a proceeding called by the judiciary, for the purpose of avoiding the ill effects of entailments.

It is necessary that on the death of the grantee his immediate heir should be in esse but it is sufficient that there be any remainders of those heirs they being deceased.

A tenant in tail can alienate nothing more of his estate than his own interest, & he can dispose of nothing by will.

A writ is suitable to a free dower in a fee tail, & the tenant may commit waste

If the estates that have been mentioned may be holden by one or more tenants - when holden by more than one, they are either joint tenants, coparceners, or tenants in common.

Whenever an estate is conveyed to two or more persons, it a joint tenancy unless the intention is otherwise particularly expressed.

Joint tenancy is created by the act of the parties - An estate in coparcenary by the operation of la

– coparcenors always taking by descent – hence it can be had only in estates of inheritance.

The destruction of either a joint tenancy or coparcenary, will constitute an estate in common, if more than one tenant remain. 6 Co. 47. Co. Litt. 22.

Estates may also be absolute or conditional.

Alienation

The reason why a grant of "all one's lands" conveys only an estate for the life of the grantee, whilst a grant "of all one's money or goods" conveys the whole interest in them, is that formerly no greater interest than a life estate could be alienated – & hence when more lasting alienations were introduced it was both proper & necessary to denote the intervision by appropriate words. The words "all my estate" in a D. will pass a fee simple if the testator had a fee simple.

After it was established that estates might be conveyed for a longer term than one's life, yet the feudatory could not for a longer time alienate his estate that he held in fee simple, but on his death it descended to his heir. At length however it became the practice for the feudatory to alienate by deed & then sue his own heirs. The practice was validified by the statute quia emptores – Finally by a stat. estat limited in the reign of Hen 8th uses fixed, that a grant in fee simple gave him his fee.

When alienation by deed was established two sins

settled, that no freehold estate could be made to commence in future — because livery of seisin was necessary, & because the end of conveyance formerly consisted of parol — & twas thought unprudent to let any estate commence in future, which must depend upon the memory of man.

But this maxim is dispensed with in the case of a will — & hence by way of remainder a freehold may be made to commence in future.

In law this maxim is disallowed.

Real Estate can only be acquired, either by Purchase or Descent.

Purchase comprehends every method of acquisition but that of descent. An estate by purchase is always acquired by the act of the parties & can by descent by operation of law & formerly land acquired by purchase could go to the children of the first purchaser only — but now a perchase nomen is considered as a perchase antiquum, & goes to the heir generat of the tenant.

Life estates, tho' contrary to their nature to descend, are real prop & freehold. They are also created by operation of law or by the act of the parties — If by the operation of L. they are called legal — if by the act of the parties especially by deed or grant they are called conventional.

Tis unnecessary in the creation of a life estate by the parties, to mention that it for the life of any one, or even that it is intended for a life estate for any estate conveyed to one without restriction or enlarging words, will be a life estate if the grantor

had capacity to convey. Any estate which is conveyed to one & has no certain or determinate end, & which by possibility may last for life, is an estate for life - As an estate granted during widowhood

The term heirs is not requisite to convey a fee in N.C. 1 Ro.R.S. 748 -

Dower.

This is an estate for life created by operation of L. & is that interest to which the W. on the death of her H is entitled in her estates of inheritance whether in fee simple or fee tail.

In Eng. this one third of all the estates of inheritance of which the H during any time of the coverture was seized - which seizin may be either in deed or in L - for the W being unable to compel her H to have actual seizin, she is allowed Dower, if he was constructively seized.

The W. would be neither actually nor constructively seized, if a stranger were in possession under an adverse title, & in such case the W. would be entitled to no dower.

In Eng a W may bar her dower by joining with her H. in a conveyance by a fine - but although her coverture the H cannot bar her either by deed or will - & the W is entitled to her dower in preference to others.

In a joint tenancy the W. can have no dower - the jus accrescendi preceding her rights.

Dower

In Eng the W can be endowed of no estate but such as her children if any she had, might have inherited. co. Litt 30.

How Dower may be Barred.

A W. may bar her dower by fine, or by eloping with an adulterer - And it may be barred by a jointure entered into before marr. which must be as high an estate as that which is barred - viz - real prop - at least a life estate - it must commence so instant that the H. dies - it must be settled upon her in lieu of dower - and it must be a competent likelihood.

If a jointure is settled upon a woman after marr. she may at her H's death, at her election, waive that & have dower - in Eng the law has sixty days to set off dower - if he dies in that time she is entitled to her moiety of dower.

By the English L if a woman is divorced a vinculo matrimonii, she can never be endowed - for such decrees in Eng are granted only for precontract causes.

By marr. the H. gains a freehold estate in the freehold of his W - for he has a conjunct may right therein, which continues as long as he is her H - and which possibly may be for his life - since it comes within the definition of a life estate.

But the dominion of the H. extends only to the use of the estate - he has no power over the inheritance - for an injury to the use he can

sue in trespass - but for the injury to the inheritance he must join with his W. to recover damages.

Curtesy.

A man on the death of his W. is tenant by the curtesy for the term of his natural life, of all her estates in fee simple or fee tail, of which she in her own right was at any time during coverture actually seised, & of which any child he might have had, born alive, might have been heir. Co. Litt. 29.

This estate is of antient origin & has been adopted in most of the United States.

By the custom of Gavelkind, the H. is tenant by the curtesy, whether he has had a child born alive or not Co. Litt. 29.

It has been questioned whether if the H. elopes from his W. & lives with another woman, he would not be barred of his curtesy? but it is decided that he would not. 2 P. W. 269. 276.

Conventional Estate for life.

If one leases an estate to another generally without any restriction, he conveys an estate for the life of the grantee, if he has sufficient interest to convey one.

When one leases an estate for life it shall be construed for the life of the lessee - if the lessor could convey such an one. But when the person for whose life his grantee shall be expressed, it shall be an estate for his life.

When an estate is granted to the holder during the life of a stranger, & the tenant per autre vie dies, he have the estate quasi, the lessee cant hold it for he is dead - his heir cant take it, for it cant descend - his heirs representatives cant take it, for it is not petty - & it cant escheat, for it part of a feud - this remnant of an estate was open at C. L. & the first occupant, until 29 E. 6. that the lessee might devise it like other personal petty.

Incidents of an estate for life.

A tenant for life is in law liable for waste, whether committed by himself or a stranger.

If he attempts to convey a greater estate than his profession, he forfeits his estate.

A tenant for life is entitled to hay bote, fire bote, plough bote, & house bote.

An estate for years however long its term is a year before a freehold, it being such a chattel interest as on his death goes to his exr. It is created by a court of the lessor with the lessee, that he shall enjoy the use of the estate for a certain time, on consideration that he pays the lessor an annual recompense, which is called rent - for this is the usual consideration

No technical words are necessary to create this estate - the intention governs. 2. Mod. 259. 1 Lil. 413. Hard. 306. Cro. E. 173. Cro. J. 42. 657.

It is necessary at C. L. that a lease for years be in writing - but by the stat of frauds & perjuries. 29 Car. 2. it must be by deed or note in writing, else it is void by the statute.

It is necessary at C. L. that a lease for years should commence in presenti - it may commence in future, it not being a freehold.

But this as to passing an estate a parol lease is void, under such an one, no entry & improvements will be justified - & the lessee having made improvements under such a lease will be entitled to the emblements, & therefore will have free ingress & egress to harvest & carry them off.

A lease for years must have a certain beginning & a certain period beyond which it cannot last tho perhaps it may terminate before that time ar.

Yet a question whether the estate would not be void from the uncertainty of its beginning & An intent was to commence on the first of May without naming the year. N.B. Christmas sufficiently certain, that the first of may next is in such case intended. 1 Mod. 180

A lease to a man for years or divers years to expire 1 year after he shall have determined to be good for two years. 1 Co. 95.

A lease operates from its delivery - but at C.L. only gives a right of entry - N which the entry the is liable for a trespass on the land - but the stat of Hen. has made it runn, that he who has a right to the land has also a right to possession - therefore a lease can maintain trespass before an entry. Cow. 42. 2 Mod. 209.

The incidents to an estate for years are the same as those to an estate for life - in neither can the tenants commit waste - for an injury by them to the inheritance is waste - but for an injury to the inheritance in them the remainder man can have trespass.

Estates at Will

That estate which is called an estate at will is in reality no estate at all - it cannot descend - it cannot go to the executors - it is not for life, it is not more than a licence of the landlord, that the tenant at will may enter & manure the land

Where a tenant has entered under such licence the land lord may whenever he please, order him off - & if the tenant remains he becomes a trespasser, & the land lords proper remedy is by an action of trespass, tho he may bring Ejectment - he cant oust him by force.

Not only the landlord ordering the tenant off, but any act of his inconsistent with peaceable enjoyment - as exercising an act of ownership over the land, will determine the estate -

Still however any right acquired by the tenant under such licence, to till & sow crops, will be preserved to him - if he has sown the land he will have free ingress & egress to cut down & carry away the crops - & the profits of all these emblements remains in the tenant, & he can maintain trespass or any one who injures them.

The lessor also may determine the estate by absolutely granting it, or by any act inconsistent with good husbandry - as by the commission of an act which in a tenant for life or years, would amount to waste - for instance in a tenant at will.

When the lessor determines the estate, he loses his right to emblements.

If the lessee remains upon the land, it has been determined that he shall pay the rent agreed on - tho Ld. supposes as the lease is void, an agreement to pay an entire sum ought also to be void - & a quantum meruit only paid - & he thinks it probable that the decision was on the ground, that the sum agreed was the best evidence of the question.

But if the upon dont continue on the land, he is deemed to pay a quarterly rent, for so long as he did continue stay.

An Estate at Sufferance.

This has all the qualities & incidents of an estate at will differing from it only in its origen — it commences when some other estate as for life has determined, & the tenant holds over in such a manner, as that we may imply the assent of the landlord thereto — as his mere pleasure of rent.

This estate in Eng is made to differ by statute from an estate at will — for now the landlord cant determine it, without some express act of his for that purpose.

Emblements.

When an estate is demised the Devisee dont take the emblements — thing go the estate — so on the death of the tenant in tail they go the estate.

He man who sows a crop is entitled to reap it either by himself or his representatives — if he could not foresee that his estate would determine before harvest — & also if he dont determine it by his own act.

Tenant A customarily holds whether he is tenant for life, for years, at will or by sufferance

Tho the intention of the testator is the thing that regulates it in Gift & Devise, yet in Law they have extended the principle, for they have determined that where an estate is given per se by the name the devisee shall have a fee simple.

Tho a lease for years must be in writing it need not be by deed.

Conditional Estates

An estate upon condition is one depending upon some uncertain event - by which it may either be created, or changed after it is created, or defeated after it is vested 1 Fearne 201. 2. Bl. 152.

Conditional estates are of two kinds - first, estates upon condition implied - & second estates upon condition expressed.

An estate upon condition implied, is one which is created by legal operation - And under the second division or estates upon condition expressed, all estates hitherto in pledge. 2 Bl. 152.

An estate upon condition implied is one in which the condition is implied from the nature & agence of the estate thus tis a condition tacitly annexed to every estate, that the owner shall do no act incompatible with that estate. Now a tenant for life cant grant a greater estate out of his estate, than one for life - hence if he should alone in fee he would do an act incompatible with the nature & agence of his estate - consequently the condition implied would prevent it having any effect, & he would forfeit his own estate. Litt. sec. 378. 1 Fearne 218. 2 Bl. 153.

An estate upon condition expressed is one upon which, there is annexed an express condition or qualification - by which the estate is to be created enlarged or diminished.

Express conditions are either precedent or subsequent. A condition precedent is one that must happen or be performed, before the estate can vest or be enlarged. A condition subsequent is one by which an estate already vested

may be defeated - Hence it appears that the objects of the condition are very different - the one is to create an estate the other to defeat it when vested. Litt. sec. 325. 1 Inst. 217. 2 T. R. 117.

There is also a material distinction to be observed between an express condition & a qualification which is a mere limitation - The words "so long as" "whilst" & "until" are words of limitation - the words "provided" "upon condition" & "so that" amount to a condition properly so called - Thus if an estate is granted to A so long as he shall live in the town of B - it is a limitation & not a condition - so too if it is granted to him while he continues tenant of the manor of Dale or until he removes from the manor of Dale it is not a condition - Litt. sec. 380 10. Co. 41. 1 T. R. 41 2 Bl. 155.

If the other hand if an estate is given to one for 20 years provided he shall continue to live in B - it is then a condition not a limitation.

This is apparently a distinction without a difference - But it will be observed if the qualification annexed to the estate is a limitation, the estate on the contingency happening ceases immediately, & of course without any act of him in reversion - But if an estate is granted with a qualification which is in strictness a condition, it may continue beyond the contingency, until the grantor or his assigns shall take advantage of it, by some act on their part, as an entry - Litt. sec. 347 2 Bl. 155. 3 T. R. 41.

When strict words of condition are used, & there is a limitation over to a third person - the qualification is then called a limitation & not a condition - As if by deed a man devises land to the heir at L. on condition that he pays a sum of money, for now I grant the devise if any - this shall be considered as a limitation - otherwise

no advantage could be taken of the non payment — for none but the heir himself could have entered for a breach of the condition 2. Bl. 155. 1 Vent. 182. Cro. E. 205. Doug 650. Ld. Ray 760. Salk. 229.

Tho formerly very much doubted whether a condition in a lease, that the lessee for years shall not alien is binding upon him — but tis now settled that he is bound by it 2 Bl. 3. 766. 2. Atk. 2 Ch. R. 57. 2 Do. 148.

Yet it still remained a doubt whether under these circumstances the lessee entire was bound by this condition — now he takes the term for the very purpose of converting it into a profit — But it is notwithstanding settled that he is bound by it also — as he can take the rents & profits & apply them to the necessary purposes. 2. Ch. R. 225.

An attempt to assign by deed in this case which is also void for want of some essential requisite occasions no forfeiture — for the act by the supposition is void & of course is no assignment. 2. Ch R. 661.

So also a proviso that if the lessee become bankrupt the lessor may enter is in like manner good — even in the assignees of the bankrupt — & it seems to be the later & better opinion that a proviso, that the term shall not be taken on execution but in such case shall be determined is good. 6. T. R 684. 1 Do. 61. 2. Do. 193.

If an express condition subsequent is impossible at the creation of it, the estate is absolute in the tenant — for all impossible conditions are void — So also if an express condition subsequent becomes void by the act of God, or the creation the estate vests absolutely without the performance of the condition.

so also if the subsequent condition be void, the condition it self is void & the estate absolute, unless for in having granted an estate vested in him, which shall not be defeated afterwards by a condition, impossible, illegal or repugnant. 1 Just. 206 1 Pow. 261. 2. Bl. 157.

But if a condition precedent is untrue or impossible the condition being void the estate is so - for the estate doth not vest as supposed 1 Just. 206. 2. Bl. 257.

It is a R that the performance of the condition of a covenant or other contract may be proved by parol. Barnad 10 Pow. 61 1 H 54

Estates holden in pledge fall under the division of estates depending upon a condition subsequent 2. Bl. 257 1 Just. 205 Pow. M 3 4.

They are of two kinds. 1 vivum vadium or living pledge - this is an estate granted upon condition that it shall be holden no longer, than until the rents & profits shall have discharged the debt - hence the pledgee called a living one returns it revives & reverts to the grantor - This estate is now little in use having given place to the mortuum vadium, or dead pledge; according to the modern technical term of Mortgage - & this is that estate that is now particularly to be treated of.

Mortgages

A mortgage is an estate granted by a debtor to a debt or upon condition, that the debtor, if by a certain day he pay the debt, may enter, & vacate his legal title or that in that event the estate shall reconvey - or to vary the phraseology, that the grant shall become void. Ld. Ray. 722. 1 Inst 205. 2 Bl. 157.

The grantor is here called the mortgagor & the grantee the mortgagee -

Coke is certainly guilty of a pleonasm when he says that mortgages are of two kinds, viz. vadium & mortuum vadium - pledges are of two kinds to be sure dead & living and the former only is a mortgage

It must upon the performance of the condition for the mortgagee to reconvey - but this is unnecessary to the revesting of the estate - for without it, the mortgagor may maintain an action of ejectment on the mortgage - But a reconveyance is surely a safer & more practical way for the mortgagor - for otherwise the legal title is apparently in the mortgagee - & then on the support of his claim, the mortgagor must depend entirely upon parol proof.

A mortgage is called a dead pledge as contradistinguished from a living pledge - because if the mortgagor fails to perform the condition, the mortgage becomes absolute & the mortgagee may enter & take possession of it without any probability of a suit, of living afterwards vested in the mortgagor, to whom the land is now forever

Mortgages

dead 2. Bl 158 Eno. 6 557. 559. 560

A mortgage then is an estate pledged by a debtor to secure his creditor's demand. & the term mortgage properly signifies the thing put in pledge, as the land: & not as is commonly supposed, the instrument by which the land is held.

The condition to a mortgage deed is called the defeasance, & may be either incorporated with the deed or annexed to it as a distinct instrument, counting upon the deed, & referring to it. Bac. Ab. M.

The latter as between the parties answers precisely the same purpose as if annexed to or incorporated in to the mortgage instrument - for being executed at one & the same time, be in fact but one deposition. But as it respects strangers it may be different - for one not knowing of the mortgage may purchase of the mortgagor, who from the deed is apparently possessed in fee, & then defeat the mortgagee of his lien.

Time is a distinction to be taken at L. L. between a grant made to secure a mere gift or gratuity, & a grant to secure an antecedent debt. In the latter case tender on the day discharges the mortgagee's lien, but not the debt for the retention unsatisfied - But in the former case the legal title is not only united in the mortgagor by the tender, but the duty which was original incumbent upon him, is in like manner discharged. Bac. Ab Tit. on 345. 1 Co. 77. & Just. 207. 209. & C.

The condition of mortgage deeds was formerly considered as subsidiary - but is now considered intermingled. 1. Co. 29. 1 Just 205. 206. 219. 221.

Formerly the mortgage in fee if forfeited, so that the estate became absolute in the mortgagee, as in such case it did, his W would be entitled to recover - to remedy which inconvenience, it became usual to grant it by a long term for years on condition that it should be void on payment of the mortgage money - & this continues in force to this day. In bar his entry to mortgage in fee - for this term ceases that the mortgagee W has no power. 2 Bac. 592. 1 Eq. ca. ab. 311. Com. C. 191. 2. Ch. 154.

If a bond is given by the mortgagor, conditioned for the performance of the condition of the mortgage deed non payment amounts to a breach of the condition of the bond & then work a forfeiture. two. f. 2 81. Yelv. 206. 2. Leon 116. 3 Keb 387.

N.B. L. if the defeasance annexed to the deed was not strictly performed, the estate vested absolutely in the mortgagee. But in Eng chy to remedy this evil has relieved, & after non performance still considered the mortgagor as owner of the land - & the debt as the principal & the mortgage as the accident - this of L. on the other hand considered the mortgage as the principal, & the debt as the accident - & thus in this respect the two acts acted in direct opposition to each other - but in the time of James 1st the dispute was decided in favour of chy - so that now if the debt is paid the after the estate had at L became absolute in the mortgagee, it will revert in the mortgagor, & he may at any time enter, until which time the mortgagee is the trustee. 1 Vern 378. Pow. ill. 14. 15. 169.

This equitable right to redeem after the day of payment is past, is called, the mortgagors, equity of

-emption – or a right of redemption in a ct of eqty – the in common parlance we call this right to redeem, both before & after the day of payment, an eqty of redemption – but in strictness this equitable right does not accrue untill after the day of payt is passed – for antecedent to this, the right to redeem is a legal right & may be enforced at L. Parr. M. 186.

Till redemption is actually made the mortgagee intirely continues prima in eqty, & he is entitled to the rents & profits – for which however he is liable to account. 9 Mod. 140.

If ct make a family settlement & afterwards mortgages the estate, the settlement is not injured any more than is absolutely necessary to the nature of the mortgage – & the person whom whom the settlement is made may redeem – for the mortgage is only binding pro tanto – so also if a d of land is made by ct to B, & ct mortgages the land to b – he a revocation pro tanto onely, & the devisee may redeem A sale or alienation however wanto completely defeat the devisee or grantee 1 Vin 132. 2 Vern 251. Dr Ray. 964. Parr. D. 613. 618 3. Atk. 778

But if land is devised by A to B & the owner afterwards mortgages the same land to the same person this is a total revocation of the d – for here the legal estate created by the mortgage merges the equitable one arising from the d – for they are incompatible with each other & cant both exist at the same time in the same person. Pr. Ch. 613. Eno. J. 49. Parr. M. 17. 8.
9 Ves. Jun. 407. 609. 5. Do. 656.

Of the Interest of the Mortgagor.

As soon as the estate is created by the delivery of the mortgage deeds, the legal title immediately vests in the mortgagee, & he may enter immediately. 2 Ves. 158.

Tho there is often an agreement that the mortgagor shall remain in possession until the day of payment arrives — & when this is the case he is tenant for years to the mortgagee — Bro. Jur. 659. Parr. 6. 106.

But when there is no such agreement & the mortgagor is left in possession, he is not a tenant for years to the mortgagee, but quasi a tenant at will to the mortgagee. Tho the mortgagor has the inheritance, & the mortgagee but a chattel interest the former is tenant at will, as it regards his free rent paper — but as to his quantity of interest, he has the right to the inheritance 3 Burr. 1913. Bro. J. 367. 659. Doug. 612. 270.

Before the st of 8. recognised the right of redemption the mortgagor was in a st of L. considered as a tenant at will, & in right as the owner of the land.

The mortgagee may bring his action of ejectment as the mortgagor without previous notice as is necessary to another tenant at will — but the mortgagor in possession pay rent, & his is not entitled to the entitlements if ejected. Doug 22. 1 Atk. 606. Parr. 11. 20.

A common tenant at will could have another tenant under him — but the mortgagor may, tho the mortgagee has power to defeat the lease — & he may either treat the under tenant as his own tenant

as as the tenant of the mortgagor — as he may at his election treat him as a wrong doer. Doug. 742. Burr. J. 606. Parr. 68. 9. 80. 9. East. 448.

The under tenant has no greater right as the mortgagee, than was possessed by the mortgagor — but if the mortgagee receives him as his own tenant, he may demand all the rent in arrear — tho he cant demand that which has already been paid to the mortgagor. Doug. 266. 1. Atk. 606. Burr. M. 68. 80.

The mortgagor when sued in ejectment by the mortgagee cant allege a title in a stranger — for he is estopped from saying this by his own deed — tho B. as the same as between the Mortgagor & his Lessee 1. T.R. 760. 7. T.R. 480. Parr. M. 567. 470.

The lease of the mortgagor is good as between & all other persons except the mortgagee. If therefore the mortgagor has made a lease, he should remain in possession, & the Lessee should sue in ejectment; he cant say that the legal title is in the mortgagee as he is estopped from doing this Burr. 2. 908. Parr. M. 75. 1. Bl. Ca. 59.

The mortgagor or his Lessee may have an action in any wrong done, in trespass, while they are in possession, & the latter may redeem land out of the hands of the mortgagee.

The mortgagor is deemed in law & for many purposes ought to be the real owner. & the right of the mortgagee is that of a mere chattel interest — & tho nominally he has the real title, the freehold remains in the mortgagor — Hence the latter may

A mortgage is an estate pledged for the security of a debt – & whatever is the power of the conveyance if it is intended to secure a debt, & not a purpose of the estate it is a mortgage – & every court for the loan of money, or the payment or forbearance of a debt, in which land is pledged is a mortgage in eqty. 2 Atk 495.

It is a maxim of the law that "that which is once a mortgage is always a mortgage" – by this is meant that all courts between the parties, at the time of making the mortgage, to depart the eqty of redemption shall be void. Such if the mortgagor agrees that he will never claim the right of redemption after the certain day is past – or that the mortgage shall become a sale after a certain day – or that it shall become a sale after the payment of an additional sum, in all these cases the court is void. 2 Vent. 364 1 Chan. 33. 190.

This R is formed for the protection of the obligor in order that he may be shielded from the oppression of the mortgagee – the mortgagor in general being in necessitous circumstances – It is immaterial whether this condition is contained in the same deed in instrument with the mortgage or in one that is distinct 2 Ves. 84. Com. R. 609. 1 Ves. 348. 128. 2. Do. 520. Com. M. 19 to 24.

But in an agreement subsequent to the making of the mortgage, that the mortgagor shall have the right of redemption of the eqty of redemption – is good & binding – for here no advantage can be taken of the situation of the mortgagor – So if the mortgagor execute a release to the mortgagee after the taking of the mortgage, with a condition to restore the estate upon certain conditions, the mortgagee cant be compelled to

victorem without the performance of the condition 2 Eq. ca. Ab. 597. 1 Ver. 63. 1 Bro. C. C. 54. 2 P. Wms. 60.

There is another exception to the Q. R. if once a mortgage always a mortgage - In the case of a family settlement, where a benefit is conferred upon the mortgagor, the agreement that the right of redemption shall remain only during the life of the mortgagor, will be binding - & his heir will have no right of redemption 2 Vent. 364. 1 Vern. 7. 199. 214. 2 Eq. Ca. Ab. 595.

Under certain circumstances too an absolute sale may be treated & considered as a mortgage - Thus if it was intended by the parties as a security for the debt, & this can be established by the evidence of facts, or the proof of which there can be no danger of perjury, be a mortgage - This principle is recognized by many cases may be considered as law tho there is no direct decision on the point. Ca. Ch. 226. 1 Ch. Ca. 60. 3. Wood. 399. 2. Atk. 71. Prec. M. 66.

The payment of the money due to the mortgagee may be proved by parol - For as the mortgagee cant be compelled to give a receipt in writing, the debtor could not be able to prove payment - & a tender would be of no avail to him - Barnard. 90. Prec. M. 59.

So also if the mortgagee has forgiven the debt it may be proved by parol - But parol cant be admitted as to an agreement between mortgagor, to charge the land otherwise than it would have been affected by the operation of law upon the contract 1 Ver. 281. Prec. M. 57.

remaining in posse acquires a settlement – and the mortgagee by remaining in posse before foreclosure can gain no settlement – Hence also the interest of the mortgagor descends to his heir equally as a legal inheritance – & it will also pass in a Devise under the description of Lands. And upon the same principle the mortgagor may convey his interest by deed – & in order that it be effectual, it is necessary that the deed have all the requisites of a deed of Land. Sur. 110. 2 Ves. 304. Doug. 610. 612. 3 P. W. 34. 2 Atk. 295. 1 Bro 605.

But tho the mortgagor is until foreclosure deemed to be the legal owner, still in favour of the mortgagee an injunction will issue to stay the commission of waste – for otherwise he might with impunity diminish the value of the pledge. 2 Atk. 744.

The Interest of the Mortgagee.

The interest of the mortgagee in the thing pledged is usually considered with reference to to several distinct periods.

1st As to his interest before forfeiture. His interest continues precisely as it was at the d. d, by a act of Parliament has no exclusive jurisdiction over it – i, e. he has the real legal title to the estate – defeasible by the performance of the condition – & the mortgagee may take immediate posse, which if refused, then he may obtain in a suit of ejectment – Prec. Ch. 222. 156. Prec. Ch. 549. 2 B.C. 188. 4 John R. 216. 6 Bro 290 2 Bro. 75.

And hence it is that any conveyance or lease that the mortgagor can make during this period as to the mortgagee is void – this Mr Gilbert says is inconsistent – or at least the word "void" is inconsistently used – but if it

were supplied by the most favourable" the R. wants to be positively expunged. If indeed the conveyance were void then persons might take advantage of it's invalidity which they confessedly cannot do – & if it were void the mortgagee could not ratify it; which he clearly cannot do. Parr. M. 80.

And as it is voidable it follows, that the mortgagee may receive the rent of the mortgagor before both before & after forfeiture, because the rent is payable to him who has the legal title – But the mortgagee cant compel the mortgagor before, to pay rent which he had already paid to the mortgagor. Doug. 266. Parr. M. 86.

A term for years in the hands of the heir may be mortgaged for all that remains of the term – & when this is done the mortgagee is considered as assignee of the term – But if the mortgage is not for the whole residue of the term, he will be considered as an under lessee of the mortgagor – & he will not be liable as assignee upon the covenants which run with the land unless he takes actual possession; in which case he is liable as any assignee, for he enjoys the rents & profits. 2 Ves. 275. 374. Doug. 338. 343. note

2nd As to his interest after the forfeiture. The mortgagee after forfeiture has a mere chattel interest still – a mere right to hold the property as another for the security of his debt – & the R is the same if the mortgagor should have brought his action of ejectment, & recovered possession – for this has not the quantity of interest. Doug. 610. 694. & Atk. 605. Parr. M. 92. 113. 178.

Hence even after forfeiture, the mortgagee interest must not regularly pass under a D. of lands &c. 2 Vent. 361. 1 Ver. 3. 2 Do. 621.

So too upon the mortgagee's death, his interest goes to his exrs & not to his heir - for until foreclosure it is a chattle interest - the debt being the principal, the mortgage the accident. 1 Ver. 269. Prec. Ch. 170.

It has been decided that the assignment of the debt by the mortgagee, carries with it the mortgage & that tho' there is no mention of the mortgage deeds. 1 P. W. 458. 1 Rep. 248. Prec. Ch. 358. 552.

The mortgagee before foreclosure cant do any act of ownership that will injure or incumber the mortgagor's right - As to make a lease of the lands for years to an under tenant - & this tho' made & still unexpired, shall be no bar to the former right of redemption. 1 Ch. Ca. 610. Prec. Ch.

As the mortgagee before foreclosure has but a chattle interest, he shall not be allowed to commit waste - & if he does, he is liable on his part to an injunction - for he has no right to injure the mortgagor's inheritance. 2 Vern. 392. 592. 2 Atk. 723.

But if the value of the thing pledged is insufficient for the security of the debt the mortgagee will not be restrained from the commission of waste - but in order to this he must be a mortgagee in fee & not for a term - for before the mortgage the mortgagor himself had not this right - & of course his grantee could not profit it. Prec. Ch. 95.

In all cases where the mortgagee does commit

waste, he shall account to the mortgagor for the value of what he has taken – & this must be applied to the debt principal & interest. So too he is allowed all expenses for repairs & other acts done for the preservation of the estate – these expenses are added to the debt & draw interest. 2. Atk. 329. 1 Wh. 94. 2 Ver. 84. 9. Mod. 518.

If a mortgage is made of an estate to which the mortgagor had at the time no title, & he afterwards acquired one, the mortgagee will still have the benefit of the purchase. 2 Ver. 11. 1 C. R. 760.

The mortgagee when in posse is not bound to expend money except for necessary repairs – this he is bound to do – for he is otherwise in equity guilty of waste. But if he has actually expended money in defence of the mortgagor's title, he may add it to his principal & it will carry interest as the mortgagor. 2 Atk. 518.

The mortgagee takes the estate subject to the same incidents to which it was subject in the hands of the mortgagor – & if the mortgagor in posse commits any act of forfeiture in favour of the remainder man or reversioner, the mortgagee's lien must go with the mortgagor's title. Pr. Ch. 571. 572. 2. P. W. 146. Pow. M. 99. 100.

Of the Equity of Redemption & who may claim it

The equitable interest remaining in the mortgagor after forfeiture is called the equity of redemption. Pow. M. 15.

his interest is frequently called a trust, & it is in his hands per a particular purpose, when it remains until foreclosure. 2. Atk. 240. 246 1 Do 606.

The mortgagor or any one having an interest in or him may redeem within a reasonable time thus if A makes a voluntary grant to B & mortgages to C - A & B have lost their right of redemption 1 Eq. Ca. Ab. 316. 1 Ver. 193.

If the mortgagor becomes a bankrupt his assignees may redeem - for all his estate is by the act of bankruptcy transferred to his assignees. 1 Bl. Co. 11.

If a mortgagor makes a lease this bona fide may redeem - & if the mortgagor sells his equity of redemption, the purchasor may redeem, & the right of the former is gone. 1 Ver. 93. 170. Doug. 22. Pow. on Mort. 102.

After the death of the mortgagor the heir has a right to redeem for the equity of redemption has become his by descent - & here it is to be observed that an equity of redemption is governed by the same rules of descent as any legal estate. 2. Ver. 364. Pow. 101.

And as the heir may redeem so may the heirs factors, the factetious heir, or devisee. 2 Bro. 174. 1 Bl. Rep. 190.

A judgt. creditor may at C. L. redeem - for a judgt. is an incumbrance upon all the real estate of the debtor - But this is not so by our L - a judgt. creditor has here no priority - & of course can no more than a simple contract creditor. 2 Atk. 200. 2 Do 440. 1 Ver. 377.

Also in case a judgt. creditor account as such redeem, still if he

him his execution upon the land, & has it not all to him, he may then redeem - for in such case he has acquired all the title passed by the mortgagor - & it is then also the practice to levy an attachment or execution upon an equity of redemption

In King when the commission of treason or felony forfeits the offenders estate to the crown, the king may redeem. 1 Br. Ch. Ca. 22.

The widow of the mortgagor if she has a jointure in the land may redeem - & if the jointure was settled after marr. then she is not bound by it may redeem. A jointress has only a life estate - & if she join with her H. in encumbering the estate, viz in her as a jointure, as by laying a fine, she an recompence shall pay one third of the debt - & if husband pays the whole his representatives may hold the land, until the heirs repay him two thirds - if husband on the other hand she has not joined in encumbering the estate, the heir must reimburse the whole sum paid by her. 1 Eq. Ca. Ab 319. 1 Vern. 93. 191. 193. 1 Ch. Ca. 211.

When the mortgagor or person entitled to redeem a minor, his guardian has a right to redeem, & it is his duty to do it if he has the means. Br. Ch. 137.

The H. of the mortgagor he being tenant by the courtesy has a right to redeem, he having a life estate - But on the other hand the mortgagee's H. has no right to redeem as tenant by the courtesy in dower - This is manifestly a distinction without a difference - and is now universally complained of - In consequence the widow is entitled to dower in in her H. equity of redemption.

1 Atk 603 ~~Sum 440~~. Pow. M. 112. & n. 320.

In order to entitle the H. to the century of an equity of redemption, there must have been seisin deeming conveyance, or a seisin which is equivalent in law to an actual seisin of the legal estate. Thus if one devises an equitable estate to trustees to the sole & private use of the W. how W can have no right to redeem after her death, for as to this duty she is as a feme sole, & it being in the actual power of the trustees, she having no control over it, she has no equitable seisin & of course cant redeem. 1 Vez. 278 307. Pow. M. 114 & n.

Further a subsequent incumbrancer may redeem of a former one - as a second mortgagee of the first - & a third of the second - Out of this arises the doctrine of tacking, of which more hereafter

If a subsequent mortgagee, before, or contemporaneous the mortgagor, his heir, or devisee may redeem of them - for the ultimate right of redemption is always in the mortgagor, unless he has conveyed it to another.

If a release or a quit claim of his whole equitable right has been obtained from the mortgagor by fraud, he may redeem notwithstanding. 1 Ch. Ca. 107 n. 12.

But in case of forfeiture to the crown, by the commission of treason or felony by the ~~crown~~ mortgagor, the mortgagee does lose his - for the mortgagor only loses his interest. Pow. M. 111.

As the fee is considered as remaining in the mortgagor, there may be different quantities of interest

made in different persons in the case of redemption – If a D. of an estate of redemption is made to A for life, & then to B in fee, or to A for years with remainder to B in fee, & they unite to redeem, A must pay one third & B two thirds – for he established that a life estate is worth one third of the fee – it was however once holden to be worth two fifths – but this is not L. Pa. Ch. 62.44, 1 Ch. R. 121. Pow. M. 20.

A remainder man can force the tenant for life by a bill in chy called quia timet, to have the interest down if the land is charged Sid. Rep. Ch. 67. 1 Ch. Ca. 279. Pow. M. 442.

If the tenant for life of the case of redemption pays off the mortgage, & has the same assigned over in trust for himself, & makes improvements & dies, & afterwards the remainder man or reversioner comes to redeem, his representatives shall have two thirds of the allowance for the lasting improvements – but nothing for the other third, because he received the benefit thereof during his life – & no interest shall be allowed during the life of the tenant for life for the money paid – for he is bound to keep down the interest during his estate. 2 Eq. Ca. Ab. 596. Pow. M. 121. 444.

After the death of the tenant for life redemption not having made before, his representatives, on redemption by them & the remainder, allow no more for the enjoyment of the estate, than it was actually worth – thus if the fee was worth £1000 when it was tenant for life, & B remainder man in fee – now during the life of A if redemption were made he must pay £1000, this being considered the value of

the life estate which is one third of the fee - yet if he dies third but one year or one month the clear life estate wouldn't not worth even month more - & if in such case the tenant for life had redeemed & paid £3000, & died in one month, the remainder man should not only pay two thirds, but the whole value, deducting that which the engagement for one months rent actually worth - for then can now be estimated. 1 Ver. 404.

An equity of redemption is never assets at L in a mortgage in fee - & Mr Ly. says that it is not in any case - But an equity of redemption is assets in every which will order a sale of the estate - & if a man at L. sells his equity, they will compel him to redeem. 2 Ver. 61. 1 Bro. 411. 2 Salk. 594. 3. P. W. 281.

But of the funds thus created, there is no priority of debts - but all are paid pari passu. So an equity of redemption is assets at L. & treated as other assets. 2. Bl. 811.

In Eng. the mortgagor reversion expectant upon a mortgage for years is legal assets - but this is not an equity of redemption, & therefore the process by law of fee estates, is useless - And judgt may be recovered here upon the estate has vested - But the execution of the writ cannot be taken out until the reversion of the estate to the mortgagor. This judgt is called quando accidunt, & is stayed until the reversion - known the extent ceases. 1 Ven. 312. 1 Salk 319. 2. Ver. 61.

An equity of redemption is devisable - & like any other estate may be sound for the payment of debts - & when it is devised for this purpose the debts are paid pari passu - for the equity is assets in every & not at L. 2. P. W. 412.

2 Atk. 80. 1 Inst. 112. 113. 181.

It was formerly holden that if an equity of redemption for the part of debts was devised as distinction was to be taken in the application of the assets — when lands were given were devised for the payment of debts generally, & when the devise for the payment of debts was made to an heir — in the former case the assets were considered as equitable — & all heirs were equally concerned & entitled, & that none were to be entitled upon the others — state, bond, or simple contract debts, if they did not attach upon the land so devised, were to be paid in proportion & by average — & so of the equitable incumbrances — But in the latter case the equity of redemption in the hands of the heir was considered as legal assets, & he was compelled to pay debts on specialty, before debts on promises the former having an antipicar preference of the other naturally & in conscience, a debt by bond & without specialty is as binding as the other. Prec. Ch. 126 Downs. 1 Ver. 63 261.

It was once holden by Lord Keeper Wright, that if land was devised for the payment of simple contract debts & legacies the former shall have no preference over the latter — But Mr. H does not consider this to be L. 2 Chan. 270. 2 Eq. Ca. Ab. 341. 1 Mod. 117. 1 Ch. Ca. 278. 2 Do. 248.

An incumbrancer or second mortgagee will have his debt out of the assets of the equity of redemption in preference to the other heirs who are not incumbrancers, because he has a lien upon the land & the others have not — so that the L. that there is no priority of debts where the assets are equitable, applies to those cases where there is no incumbrance. 1 Vern. 110.

An equity of redemption has never been held to be liable

to a bond conditioned in the life of the mortgagor Powell 132. 2. Atk 292.

It was formerly doubted whether there could be a perfect future of an equity of redemption. This arises when one dies leaving one child by one W. & others by a second - & then if after the death of the father the eldest son is actually seised of the equity, then of the half blood it was held could not inherit. - & if under these circumstances the eldest brother has a sister she will take to the exclusion of the brothers of the half blood. 1 Atk. 603. 6. Mort. Pow. 132.

It is a G.R. that no person shall be allowed to redeem unless he has what is called by Pow. the legal estate. By this is meant that no person is in G. allowed to redeem, unless he has a title to the estate, tho there may be persons having a claim upon those who have the legal estate - hence even of the mortgagor cannot redeem. So also where a claimant under a deed from the mortgagor's heir general, & brought his bill to redeem, & the mortgagor claimed a deed of settlement to the heirs special, the chancellor would not allow him to redeem, for he had not the title - tho he was willing to do it & take his chance w the special heir. 2 Eq Ca. Ab 605. 1 Ver. 182.

But if he who has the title, refuses to redeem any other person may do it - otherwise not. Thus where the mortgagor became a bankrupt, & a majority of the other prevented the assignees from redeeming, the other who were opposed to it were allowed to redeem. Barnes 30.

So also in G. if the mortgagor, heir would redeem, his other may - but if he is willing to redeem they cant. Barnes 30.

The equity of redemption being a creature of the ct of chy, that ct will make it subservient always, in subordinate to its own R.s, upon the principle that he who seeks equity must first do equity. & in pursuance of this maxim a ct of equity will decree a redemption in favour of the mortgagor, or those claiming under him, absolutely or conditionally as justice requires 2 Vent 352. 2 Ves 336 1 Bl. Re 70 Comyns 601.

And when the mortgagor has previously attempted to to avoid the mortgage deed at L. & then applies for a redemption to a ct of chy, they would not upon the same principle allow him to redeem unless he had previously paid all the costs of a suit at L. 2 Ves 336.

And the mortgagee can never compel the mortgagor to redeem before the day of payment - But in case of a bargain that he may at his own request be permitted by equity to redeem before day of payment. Thus where one mortgaged a debt which increasing in value, would pay the debt long before the day of payment, they him upon a bill filed for that purpose, allowed the mortgagor to redeem 1 Ves 292 1 Bl 394.

So also upon the principle that he who seek equity must first do equity, a ct of chy, will permit no encroachments on the part of the mortgagor. Vide 2 Eq. Ca. Ab 599.

And if a man makes two mortgages of different parts to the same person to secure two distinct loans, & one of the securities is sufficient, while the other is insufficient Equity will not let the mortgagor redeem one without redeeming the other, for this would operate inequitably

2. Ves. 207. 230. 1 Do. 21. 255.

So also if one makes two mortgages & dies, his heir claiming both by descent, & endeavours to defeat the one & then offers to redeem the other, he shall not be admitted to do it unless he redeems both, even the both of the securities are sufficient: but if he redeems one by purchase it is otherwise - for then he holds as a stranger to his ancestors title. 1 Eq. Ca. Ab. 324. 1 Vic. 255. 2 Do. 207.

A purchasor under the mortgagee will hold the land as the mortgagor & his heirs, for the sum actually due to the mortgagee, tho he purchased at a discount. Salk. 155. 1 Ver. 376. 464.

But as subsequent incumbrancers & cestui he shall hold it, if at all for as much only as he gave. The reasoning in support of this R is very unsatisfactory for it is said that a subsequent incumbrancer has as high an equity as a purchaser, & by taking the tallies gain from the former top to make both even. But Mr. Y. says he dont consider the equity of the cestui to be as high as that of the purchaser. 1 Ver. 376. 464.

So if there are several incumbrances & the heir of the mortgagor purchases in the first mortgage, & consequently gets the legal estate, still this shall not stand in the way of the subsequent incumbrancers, for more than he gave for it — this was said on the ground that the heir represents the ancestor 2 Vic. 257. 1 Do. 21. 376. 1 Eq. Ca. Ab. 324. Salk. 155.

Or a 4th R. that if the heir of the mortgagor or his tenant or agent, purchase in any of the incumbrances

at a discount, they shall hold as the remainder in encumbrance, for as much only as they gave. 2 Atk 53. Salk. 155. 1 Vern. 33 & 47.

But it is said that if a stranger, or the mortgagor himself as trustee purchases in the legal estate, to protect an encumbrance of their own, the purchase shall hold till he is paid his incumbrance even tho they should have purchased the legal title at a discount, for in a manner that where the equity is equal, the legal title shall prevail. Rep. Ch. 53. 1 Ver. 47.

If the mortgagor is indebted to the mortgagee other wise than upon the mortgage, he shall not redeem upon a bill filed for that purpose unless he pays such debt — but if the mortgagee brings a bill to foreclose the mortgagor, he shall compel him to pay the debt not secured by the mortgage. 1 Vern. 91. 284. Salk. 84. 2. Eq. Ca. Ab. 603.

And as the mortgagor cant redeem unless he pays the debt that is not secured as well as that which is so also cant his heir, he standing in the mortgagor's place. 1 Ver. 245. 1 P. W. 775. 1 Ver. 87. 1 Ch. Ca. 77.

But this is not the R when the mortgagee petitions for a foreclosure for if it were so it would make his part of the proceeding useless, which is not in the power of a court of equity — & in the other case the only reason in which they effect their object is, by supposing their aid or intercession in helping him redeem unless he complies with the terms which they impose upon him.

Upon the same principle it is that if a term for years is mortgaged, & the mortgagor dies, his executor

his will fides to redeem, shall pay as well the land debts that are not secured upon the mortgage to the mortgagee, by the mortgagor, as the debts that are. And tho' thereby he is as much bound to pay the debts that are not secured, if simple contract debts, as if it is a specialty - for the trust reposed by the will is in his hands as a debt for the payment of debts. Pr. Ch. 511. 2. Vern. 177. 2. Salk. 540.

But if there are mesne incumbrances, as are to rate, & the first incumbrancer has other debts than those secured by his mortgage, such unsecured debts shall be postponed to all the incumbrances. 2. Atk. 52. 1 Ves. 87. 3. Salk. 82. 540. 3. Atk. 556.

On the other hand upon the stat 4 & 5 W. & M. as upon point 6, the devisee of an equity of redemption cannot redeem unless he pays as well the debt which is not secured by the mortgage as that which is; for he is a mere volunteer & ought not to be placed in a better condition than his devisor. 1. Eq. Ca. Ab. 328. Ch. Ca. 311.

And the same Rule which have been laid down as to the mortgagee, extend to his assignees, & he will be allowed to have his unsecured demand upon the mortgagor paid, before the latter shall redeem - for his equity is as great as that of the mortgagor himself. 2. Ch. Rep. 365.

And in all these cases as to the debt to the mortgagee, it makes no difference whether they came to him before or after the execution of the mortgage. 2 Ch. R. 243.

In cases of this kind where there is a debt secured by bond, & there is an application by the mortgagor as his

in pursuance to indem, they will carry the debt even beyond the penalty of the bond if the principal & interest exceed it — for the penalty is only inserted as a term to induce a performance of the bond — if however the mortgage applies to specific things it will be the case. 2 Eq Ca Ab 611. 9 Mod. 118. Salk. 154. 2 Bl 432. S.

But in all these cases if the mortgagee to whom the bond debt is due, countenances a fraud upon a third person, by concealing his debt, the person so imposed upon may redeem the property of the mortgagee only — & the D is the same as to the mortgagee afterwards. Prec. Ch 142. Pr. Ch 131.

The purchaser of the equity of redemption for a valuable consideration may redeem without paying the bond debt or payment of the principal money only. Pr. Ch 81. Stra 1107. 2 Ver. 662. 1 Eq Ca. Ab 328.

And by way of corollary from all these Rs. the mortgagee claims upon the bond debt is good only as the mortgagor & his assets.

There has been a great deal of controversy in the books as to which are to have the stat. of limitations run upon an equity of redemption, the mortgagee living in possession. It now seems to be settled that right of possession by the mortgagee is not per se a bar to the right to redeem — because this possession is deemed to be as much to the mortgagor — but still the English Ch. will not suffer it to be, as to consider the mortgagee possession for 20 years, (which in long usage as to some claims gives a title) as prima facie a bar to the mortgagor's right to redeem. 1 Ab. R. 184. 9 Mod. 118. 2 Ch. R. 249. 1 Eq. Ca. Ab 318.

By a prima facie bar is meant that after such a possession by the mortgagee, there is a presumption raised that the mortgagor has abandoned his right of redemption — but this presumption may be rebutted by proof of such circumstances as reasonably account for the mortgagor's delay, consisting with the idea that he has not abandoned his right — & these facts are such as are contained in the excepting clause of the stat of limitations. Thus the mortgagor is disabled during the time, as being an infant, feme covert, insane, imprisoned or beyond the seas — in all which cases the presumption must be removed, & the mortgagor may redeem tho 20 years have elapsed since the mortgagee went into possession — And this presumption may be removed in other ways. As by recognizing the subsistence of mortgagor & mortgagee, by the latter within 20 years, which may have been done by taking interest on the original debt. 1 Vern. 340. 2 Atk. 388. 2 Ves. 518. 1 Ch. R. 184. 2 Atk. 388. 3 P. W. 289. 1 Eq. ca. Ab. 315.

And if the mortgagor is not presumptively precluded from redeeming, till 20 years in Eng. from the time of possession, so also if the reason of his not redeeming was any disability, he has after the removal of it 20 years in Eng. & five in this country, to claim his equity unless he is barred. 2 P. W. 287 note.

But unless there has been any fraud practised on the mortgagor to deprive him of his equity of redemption, as by making the mortgage an absolute sale without a defeasance, no length of time will be a bar — for tho' a K.B. at will in Eng. equity that no length of time shall bar a pawn — Thus where A for a small sum of money mortgaged lands to B — & B became the mortgagor it was expressed, that the

redemption should be quite 1 own money & in his life time — As mortgagee knows him abroad when he died — Postponement denied the money in the mortgage must be recovered in a suit exhibited to redeem within of time was objected 41 years running elapsed but the Ct decreed a redemption saying there was proved in the original agreement for the money to be paid with his own money, now there was no reason to make a mortgage that it could not be done otherwise. Rep. M. 151. Talb Ca 69. Select Cases in Chy 9 10.

After the stat of limitations is once attached, it will retain its operation, & as there is no limitation of the stat of limitations, if the presumption has once begun to be raised, no supervenient cause shall interfere to stop it. 2 Ves 414. 1 Eq Ca. Ab 915. Gilb Eq R 185. 2 Atk. 393.

The presumption arising from 20 years payment may be rebutted, when the agreement between the parties that the mortgage shall remain in force until the rents & profits shall have satisfied the debt, & no length of time will render these encumbrances void any presumption in time. 2 Ves 701. Ca. Ch. 429. 1 P W 241. 2. Atk. 969.

As a by R any act of the mortgagor by which he has recognized the right of redemption within 20 years, will prevent the Bar. 1 Ba Ca 302. 1 Do 142. 5 Mass Rep 505. 2 Eq Ca. Ab 596.

This is in the books that if the mortgagee submit to a redemption time will be no Bar — by this is meant that no time shall prejudice the mortgagee unless it be a title in the mortgagor, if he does not object upon the ground of lapse of time. Rep. M. 160

2 Atk. 150.

If the mortgagor himself continues in possession no presumption can ever be raised in him, on account of lapse of time. Prec. Ch. 160.

By the Englishe stat. 4 & 5. W. & M. the mortgagor is deprived of his equity of redemption, if he has been guilty of concealing any prior incumbrances. There is no such statute in Penn, & I think not in the union. 1 Ver. 396. 1 Eq. Ca. Ab. 320.

This a distinction no where taken the intent to be counted, that a second mortgage is a mortgage of the land itself & not of the equity of redemption for tho' the mortgagor could not redeem the first until he had redeemed the second - & if the second was of the equity of redemption, a third mortgage could never be made by the mortgagor.

Def. by the Mortgagee of the Mortgagor's Interest.
His interest in the term mortgaged is a mere chattle interest - which he may devise, & third may convey the mortgagor. 1 Ch. R. 32.

Tracy formerly holden that a d. in these words "I hereby devise all my mortgages" the whole interest in a mortgage in fee would not pass, it being forfeited & that the devisee at most took a life estate. Prec. Ch. 447. 457. 550.

Since however this settled that the interest of

mortgagee is but a trustee for him to be presumed that the Ct would consider that the words comprised all his interest in mortgages whether in fee, or for a term of years. Bunb. 178. Barn. M. 170.

But on the other hand the mortgagees interest will not regularly pass in a D under the description of lands tenements & hereditaments. If however the devisor has no other property answering to the description of lands, the mortgaged premises will pass. 1 Vent. 351. 1 Ver. 9. 2 Do. 620. 2 Ch. Ca. 61. Barnard. 457. 2 Eq. Ca. Ab 616. Barn. M. 172.

Whenever the devisee brings a bill to foreclose, there ought not to be made parties to it, who have an interest in the equity of redemption. 1 Eq. Ca. Ab. 318.

It is held by Barn. that a D of money on mortgage dont carry the interest due at the time of the testators death. Atk. Ch. says that there is much too general for it must be confined to carry return the principal. Barnard. 259. Barn. M. 176. 2 Atk. 119.

It is a question whether a D by the mortgagee will pass the interest, tho the will is not attested according to the requisites of the stat of frauds & perjuries— the better opinion seems to be that it will pass— for that stat relates to lands tenements & hereditaments, only, & these terms dont include mortgages. Barn. 178. Carth. 77 81. 95. 2 Mod 260. 1 Show. 68. 82.

Priority of Incumbrances & the Notice of such

If there are several mortgages or other incumbrances on the same estate, priority takes place among them according to the date of their respective Deeds, agreeable to the maxim, qui prior in tempore, potior est in jure. 2 Ver. 389. 524. Talb. 64. 1 Eq. Ca. Ab. 132.

But this priority is sometimes postponed, & prior mortgage postponed to a subsequent one — This happens 1st when the prior incumbrancer has been guilty of any fraud or neglect, affecting the interest of the subsequent incumbrancer — &

2nd when the subsequent incumbrancer purchases in the legal estate to protect his equity. 1 P. W. 240. 1 Ver. 360. 1 Ch. R. 268. 1 Ver. 182. 2 Ver. 579. Str. 440.

1st If the first mortgagee by fraud or artifice conceals his mortgage, to induce another person to give credit to, & advance money for the mortgagor, he shall upon the same principle be postponed to the person so imposed upon. Thus when the first mortgagee was present when the mortgagor proposed to give another mortgage of the same duty to another person, & made no mention of his own incumbrance — this was considered such evidence of fraud, that the second mortgage was postponed. 2 Ch. Ca. 59. 1 Ver. 270. Bunster 101. 1 Pow. C. 192. & Surname. Rep. Ch. 189.

So also if the first mortgagee is witness to the second mortgage & is knowing to the contents, & neglects to inform of his own he is postponed — & tis id the witness should be presumed to know the contents of the instrument — this however is by many thought for his protection, that witnessing instruments, are not in general acquainted with the contents of the instruments which they attest — & both Ed Chancellors.

& Ld Hardwicke have expressed their disapprobation of it. 1 P.W. 399. 1 Vez. 6. 1 Br. Ch. 775.

And upon the same ground if the first mortgagee is guilty of any neglect without fraud, in consequence of which a second is induced to advance money on the same security, the latter shall obtain a priority — As where the title deeds were left in the hands of the mortgagor, who was thus enabled to represent himself to others as the owner of the legal title, & one was induced to advance money upon the security, he was preferred to the first incumbrancer — for it a maxim that where one of two innocent persons must suffer, he who has been the occasioning cause of the suffering of either, shall bear it in the opinion. 1 Ves. 360. 1 Ves. 126. 3 P.W. 380. 2 Vern. 737. 1 C. R. 785. Nouse

In Eng the pledging of title deeds creates a lien upon the estate & they will compel a sale of the estate to satisfy the pawnee. 2 Burl. 606

If one is about to lend money upon the security of an estate, & applies to another to know if he has a mortgage upon it, & informs him that he is about to lend money upon it, if he says no, when in reality he has one, he is postponed to the enquirer. But if the second mortgagee does not inform him that he is going to lend money on the estate, the other is not bound to satisfy his incumbrance. 2 Ves. 554.

2nd When the subsequent incumbrancer purchases the legal estate, to protect his own equity, he shall be preferred to the prior incumbrancer.

If a third mort-

gage purchase the legal estate for the purpose of protecting his own equity, he shall be postponed to the intermediate incumbrancer, for where the equity is equal the legal title shall prevail. This is called in the L. of mortgages tacking - or tacking the legal estate to the equitable.

But in order to this it necessary that the third mortgagee should have taken his mortgage upon a valuable consideration, & without notice of the former mortgage - for if he had notice then equity is not equal. 1 Ves. 187. 2 Vent 352. Ch. Ca 246 2 Vez. 579. Show. 240. 2 Atk. 83.

He may have notice at the time he took the mortgage provided, he had not, when he made the loan under the expectation of being secured by the land 1 Ves. 188. 2 Vent. 352. 2 Ves 274.

And a subsequent incumbrancer may not only tack in this manner to the first mortgage, but to any incumbrance or title that carries the legal estate. 2 Ves. 272. 1 Do. 59.

But this L. R admits of an exception, when any one of the parties has more equity to call for the legal estate than the others - for he that has most equity shall be postponed. Thus if there are three incumbrancers, & the third contracts for the legal estate, he obtains a priority to the second. 2 Ves. 600. 2 Ch. Ca. 218. 2 Ves. 486 Rep. M. 174. 2 04. 2 12. 2 81.

If the first incumbrance carrying the legal estate comprises only part of the estate that is comprised in the latter mortgage, the former will protect the latter no further than the title extends. 2 Vent. 352.

1 Rk. Ca. 162.

If the joint incumbrance bought in comes from the third mortgage, the third mortgagee shall hold till both mortgages are paid. 1 Ch. Ca. 201. 1 Eq. Ca. Ab. 323.

If a subsequent mortgagee purchase a former satisfied incumbrance, carrying the legal title he may tack that to his own only, & thus acquire a priority to the intermediate incumbrancers. A satisfied incumbrance in this case is one that is satisfied in such a way, that relief in it can be had only in equity. 2 Ver. 90 152. Hard. 446. 1 Ver. 182. 1 Eq. R. 306.

And this R. prevails, tho the subsequent incumbrancer paid no consideration for the satisfied incumbrance. 1 Ver. 279. 1 Eq. Ca. Ab. 329. 1 Ch. Ca. 98.

And in one decided case it was held, that if the subsequent incumbrancer obtains the satisfied incumbrance, by some indirect means, as by stealing the evd of the legal title, he might still tack it to his only — the principle of this case however is to be doubted. 2 Ver. 159. 1 Ver. 82. 2 Rund. 278.

But when a former incumbrance is deficient in legal requisites, no priority can be obtained by purchasing it thus if a judgt has not been docketed, which is requisite by the stat 4 & 5 W. & M. it dont carry the legal estate. So too if a mortgage deed had not been executed there would be no incumbrance on the estate of the debtor — & as it dont carry the legal estate, the purchaser by it, dont gain any priority. 2 Ver. 254. 1 P. W. 240. 2 Eq. Ca. Ab. 602. 7 Mass. 52.

A subsequent mortgagee cant tack any incumbrance to his own mat. such as carries the legal estate – thus if the second mortgagee purchase in the second, he acquires over the third, a no greater priority than was possessed by the second – for the second mortgage dont carry the legal estate 2 P. W. 495. 1 Ca. 2 733.

A prior mortgage purchased in by a subsequent incumbrancer, will gain him no priority unless the prior mortgage then purchased in is forfeited – for upon that there is no equity of redemption 2 Ver. 156.

As a subsequent incumbrancer by purchasing in the legal estate may gain a priority, so he who has the legal estate may tack a subsequent sum advanced by him to the mortgagor upon the same security to such legal estate, provided he has notice of the intervening incumbrance. 1 Ch. Ca. 133. 2 Do. Ca. 2 Ch. 381. 2 P. W. 496. 2 Ver. 662.
As to notice vid. Ey. Ab. 296. 2 Ey. Ca. Ab. 324.

And tho a judgt. or stat. in Eng. will carry the legal estate, yet a subsequent incumbrancer cant tack the legal estate to his claim – neither can a second mortgagee tack a judgt. incumbrance on the prior – for the lien is here general & not specific. 2 P. W. 491. Ch. Ch. 496. 1 Eq. Ca. Ab. 92. 2 Ver. 662.

If there are two mortgages, the ~~first~~ mortgagee makes a subsequent loan, & takes out by a judgt. by way of security, he may tack the judgt. debt to his legal estate, & thus obtain a priority to the two incumbrances.

If the subsequent mortgagee purchase the legal estate to protect his own incumbrance, at the time of the loan

he shall not rack for the eqty is not then equal. Abr. Ca. 117. 2. Do. 95. 2. Atk. 238.

But if the conveyance first purchaser a defective deed a subsequent mortgagee with notice of it may obtain priority to it - because he id the legal title is at in him, & eqty will not interpose to wrest it from him, when both are equally upon a valuable consideration. But Ch. Ly considers this R. to be questionable, for the transaction is fair between the mortgagor & first mortgagee, & the former may renew his conveyance, & eqty will suppose it. 2. Ca. 644. 2 Ver. 292

A defective security will be enforced in eqty, as a trust where there is a general & not a specific lien. 3. Ca. 68 2. P. W. 541. 2. Ver. 664. 2 Salk. 449.

If the deed of the first mortgagee contains a clause providing, that the mortgaged premises, shall be a security for all subsequent loans, to binding - for the subsequent loan has precedence to the first coat & is considered part of it - & the mortgagee then lending the money will be postponed as to the last loan, tho he had notice of the intervening mortgage, in case the intermediate mortgagee had notice of the claim. But if neither of them had notice, the first of the intermediate loans, & the record of the claim, Ch. Ly says that the first will hold, & this by virtue of the provision in his deed - for then eqty is then equal. 2 Vern. 82.

In all these cases where notice varies the R. of priorities, if one of the parties changes the other in his hand in eqty to learn had notice, the latter in his answer must deny, or it will be taken for confessed 2 Vent. 361. 2. P. W. 249. 2. Ch. Ca. 20.

And the A is the same of the bill answer whereof part which amount to notice – it must be denied. 2 Ves. 566

Where the party charged with notice denies it on oath & there is but one witness to support the allegation the bill will be dismissed. But if there are circumstances in aid of the oath of the witness, the chancellor will retain & if the circumstances are contradictory he will direct an issue in a ct of L. to prove the fact. 1 Ves. 64. 52. 2 Ves. ch. 11. 2 Atk. 19. 141. 1 Ves. 66. 95.

Notice

As the right of a subsequent incumbrancer depends in volam cases upon his want of notice, it remains to enquire what this notice is

This of two kinds, actual & presumptive. Fonb. M. 256. 257.

He is said to have actual notice when he is regularly served by the other party with notice of the fact – & so when he is party to a deed or other instrument, which shews the notice. But a flying report is not deemed to be notice for the charge of notice must be founded upon something certain & circumstantial. Goldsb. 147. Rep. 256.

Presumptive notice is a conclusion of L. that one has notice, tho no actual proof of it is exhibited to him – & is a L. R. that if one cant make title but by a deed containing the fact he shall be deemed to have notice of that fact. 1 Vern. 317. 2 Vern. 662. Gilb. Eq. Rep. 8.

2 Ch. Ca. 46 615

So also if J.S devises land to A subject to the payment of legacies, & A mortgages this land to B, B shall be deemed to have notice of these legacies, for he makes title thro A under the D. 1 Vern. 215

But to this R. there is an exception in the case of the assignment of part only by an exec:- here the purchaser is not deemed to have notice of the will in favour of purchasers or exec:- for he can't know how much the assets amount to when compared with the debts & charges under the will. Prec. Ch. 361. 1 Vern. 174

How far he is bound by pecuniary legacies don't appear to be settled- but it would seem from a case in 2 Vern. that that of notice applies. Ch. R. how ever doubts it- for, if the purchaser knew that all is demised, how does he know but that he stands for the payt of debts. 2 Vern. 616. 1 Vern. 215.

Tis also a R. that if a deed declaring a power charged upon an estate, is demised or otherwise by itself or with other papers to the intended purchaser of the estate, he is presumed to have notice of the charges- for the papers are supposed to be demised to him that he may investigate the title- & if he don't he is guilty of gross neglect. 2. Vern. 486 2. Vern. 344. Prec. Ch. 251.

So also a recital in a deed stating or even implying that there is another incumbrance upon the premises and by another deed, is presumed to be notice to the person who has had power of the deed. 2 Atk. 54. 1 Vern. 387.

And notoriety is sufficient to put the party charged

with notice upon the enquiry is good notice in cases where persons entitled to an estate have power or in posse thereof, & minded not of him for two years after they came of age, was held to be a sufficient notice of a loan made by their guardians, & a ground from whence to conclude that they had notice of it, for finding a minor upon the estate was sufficient to put them upon an enquiry. And in analogy to this B. knowing now, the tis no where laid down, that notice to a prior mortgagee is notice to a subsequent one. 1 Atk. 490. 522 Pow. M. 270.

Notice to a mans attny, counsel or agent is deemed as much notice to the party himself, & the R obtains in all similar cases & the L will be the same the mortgagee is agent for both parties — now is it not trivial on whose recommendation or name he is employed 1 Ver 625. 2 Ver 573. 2 Ver. 477. 485 1 Ch. Ca 34. Pow. M. 272. 1 Ch. Ca. 110. 2 Ver. 388.

If one purchases in the name of another, without any entry upon him so to do, & he not having notice of this intention, yet if he afterwards agrees to it he makes the purchase his own ab initio. 2 Ver. 639. 1 Ch. R. Ca. 248.

And a subsequent mortgagee may take the legal estate to his self notwithstanding there has been an intermediate grant — strangers are not presumed to have notice of it. 2 Ver. 99 & 639. Call. Ca. 65. 1 Ch. Ca. 85. 2 Do. 130.

'Tis but tis so much a question whether one can take away a prior incumbrance, that no one has yet attempted it, & it seems to be the better opinion that it cant be done. This I think cannot

to a deed in order to have effect as third persons must be registered, & of course every one can have no notice of them in any prior instrument. Stat. Geo. 4th. 5.

Quere in law in what case called the registering counteracts the registering of the intermediate encumbrancer will not be a constructive notice to a prior incumbrancer to take from him the benefit of protecting himself by his legal title for if the second mortgagee had used due diligence he might have informed himself by the register who was the prior mortgagee & thus serving an actual notice upon him, secure himself in any further loan 1 Eq. C. Ab. 605. 2 Do. 607. Pow. M. 285 Sowerard

A subsequent mortgage registered is postponed to a prior mortgage not registered, if the subsequent one had no notice of the former this seems to imply that the registry is no notice but it must mean actual notice. 9 Ath. 364. 2 Do. 135. 2. Bro. P. Ca. 526. 1 Ver. 65.

But a subsequent mortgagee having notice of a prior mortgage not registered, will not gain a priority by registering - because this would be fraudulent - Ld. Hardwicke Bailey. 2. Ath. 390. 3 Do. 646. Ca. 646. 1 Ver. 64. Cowp. 712. Pow. M. 287.

A purchaser or mortgagee that for a valuable consideration, shall hold or take place in prior voluntary settlement, tho such purchaser or mortgagee has express notice thereof at the time of his purchase or loan - such voluntary settlement being made void as a purchase with or without notice by 27th Eliz. 27. Eliz. 4. 1 Eq. C. Ab. 334. 6. Cowp. 290. 711. Pow. M. 290.

It has been lately ruled by the L. of Kings Bench that a voluntary conveyance is per se void P. East. — 1 Bz. & M. 237.

If one purchases with notice of a prior incumbrance & afterwards sells to one who has no notice the 1st. purchaser will not be affected by it & he may take so too if one purchases with notice from one who purchased without, he will hold. Talb. 186. Ch. Ca. 81 3 Br. Ca. 125. 2 Bo. 66. 1 Atk. 571.

To whom the interest in a forfeited Mortgage shall belong on the Mortgagee's death.

It was formerly doubted whether it went to his exr. or his heir. — And a distinction was taken between the case where there appeared to be a bond for the payment of the money, & the condition was upon payt. to the exr. without mentioning the heir. — & those where mortgage was in fee & there was no bond or covenant for payment, or where the condition of the redemption was upon payt to the heir or exr. or heirs & assignees of the Mortgagee, & there was no receiving of profits to pay debts — For in the latter case the money was decreed to the heir, & in the former to the exr. — because upon these circumstances, the L. determined whether the mortgagee intended to change the nature of his property from fee into real. 1 Ca. Ca. 66. 1 Ver. 170. 1 Bz. & M. 326.

'Tis now however a R that the money sue in all cases belongs to the exr. unless indeed the mortgagee manifest a contrary intention — then as in the fee.

duty of every description it goes to the heir. 2 Hunt 98. Hard. 469. 1 Ch. Ca. 283. 2 Do. 91 92. 187 220.

The reason why this duty goes to the exor is that this money came originally from the personal estate, & must result immediately there again into the hands of the exor, that it not been paid out on mortgage. Prec. Ch. 299 301.

If the money is made payable in the time of the condition to the heir or exor of the mortgagee, if the mortgagor pays the money punctually on the day appointed, he may elect to pay to either of them. 1 Ch. Ca. 283. Prec. Ch. 299

If he elects to pay to the heir, the heir must convey to the mortgagor; for after the condition is performed, he who has the legal estate, holds it as mere trustee for the mortgagor. 1 Ch. Ca. 283. Bunter 80.

But tho the mortgagor has this election, still the heir is compellable in Chy to pay the money over to the exor, for it belongs to the personal pers. 2 Vent. 358. 361.

This holds whether the money is paid to the heir on the day of payt or at any subsequent time. 2 Vent. 361. Prec Ch. 302.

But at any rate the competent for the mortgagor to pay it to the exor on the day of payt, or at any time after - but if to the heir before it be at his peril if he is not responsible, Antea tit Debtor.

And if there are several exors any or either of them may receive, & give a good discharge for the

money. 1 Eq. Ca. Ab. 319.

The bequest of a specific legacy by a mortgagee to his exr, dont know him of the money due on the mortgage. 2 Ch. Ca. 137. 1 Ver. 312.

Thos R. said some with regard to an exr apply mutatis mutandis to an adm.

Both in case of an exr & an adm if there was no redemption, the law may be compelled to convey the land to the exr or adm, that they may raise the money upon it — for as the money was part of the real estate would have gone to them, so would the land which was in lieu them of — & the rule is the same tho the mortgage money is not wanted for the payment of debts — because the heir as such is not entitled to the money. 2 Vern. 193 367. 1 Eq. Ca. Ab. 320. 2 Ch. Ca. 50. 137.

Also even tho the mortgagor should release to the heir his right of redemption, the estate being forfeited still the liability to convey the legal estate is not discharged. 2 Vern. 193. 1 Do. 170. 4.

It is a R that if the owner of the incumbrance causes his estate to be real, it will be considered so by his representatives. Thus if a person purchases the interest of the mortgagee by an absolute deed, & the estate is afterwards redeemed, the money shall go to the heir observes heir — So too if the assignee of the mortgagee devises his interest as real estate, the heir of the devisee shall inherit it. 1 Vern. 271 2 Vern. 561. Pr. Ch. 265. Bun. 261.

If money secured by mortgage is entitled by the

mortgagee to be laid out in lands, the estate is excluded & the money thus due goes on his death where the land would have gone had it been purchased; for they consider that to be done from the time when it ought to be done. This R is not peculiar to mortgages but is a gen. R of equity, that holds in all similar cases 3. P. W. 217.

If two persons join in making a loan they are not joint tenants, in the mortgage they take, but tenants in common, for in securing the land their object is security for their money & not purchase. 1 Ch. R. 54. 1 Atk. 228. 2 P. W. 178. 1 Atk. 262. 1 Ver. 10.

The Interest of the Mortgagor's Wife.

At a fine covenant may pass in levying a fine & bind herself, so she may reconvey her dower by joining in a mortgage with her H. Finches L. 271.

A jointure of lands which are mortgaged may upon the death of the mortgagor redeem them, provided she did not join in encumbering the land, & her representatives may hold over until the whole money paid which was paid to redeem. This R applies to those cases where the jointure was made after the mortgage but if a jointress has joined with her H. in encumbering the land, she shall then pay a proportionable to the R out third of the debt - for this is the value of the life estate. 1 Ver. 203. 2 Bo. 228. 1 Ch Ca 271.

And the same R shall not apply to a jointure legally made, but is construed intended to make a joint

ure, or an entire agreement. But here the case supposes the mortgage to have been made without notice of the articles. 2. Ba. 228. 1 Vent. 334.

If a joint-tenant after marr. gives an bargains & sells & mortgages the land, & dies before the death of the other joint-tenant the debt is gone. 1 Ver. 177. 1 Eq. C. A. 316. Gilb. cas. Eq. 106.

If a mortgagee advances to the mortgagor an additional sum upon the same security, without notice of an intervening incumbrance, he will hold as to the first sum last advanced, as well as for the first - for he has taken the equitable right to the legal estate. 1 Ch. Ca. 119.

But a joint-tenant that is neither after marr. in mortgaged lands, & is merely voluntary, is void as a subsequent mortgagee, & thus this he has notice & indeed his case is hard indeed, for here the M. has no consideration for the settlement. Ch Ca. 66. Prec. Ch. 315. 316.

If a man before marr. gives his intended W. a bond conditioned, that he will on his death leave her a certain sum, & he don't do it, the bond is good at law - for the sum presumed she is considered as a creditor & return a debt many ways she can. Ch. Ch. 233. 2 Ver. 386. Prec. Ch. 316.

If a M upon a loan of his own money as his own debt takes a mortgage to himself & W, she as his representative is intitled to the mortgage, & on the redemption the money is to be paid to her - if however the mortgage money is wanted for the payment of debts, her estate must yield. 2 Ver. 643. 2 P.W. 364.

In Eng. the mortgagor W. is not entitled to dower in an equity of redemption, belonging to his H., unless entailed, the heir is alone entitled in fee — hence a devise over or such cases useless, for he has no interest in the equity. 1 Atk. 606. 2 Do. 525. Talb. Ca. 198. 3 P. W. 339. 1 Bl. R. 192. 161. 1 Ch. Ca. 226.

Contra. 2 P. W. 300. Ch. Ca. 133.

In Con. the contrary R is established, & the equity is to go to widow. that W.

In Eng the R contemplate a mortgage in fee before marr, & not a mortgage after marr — for in the latter case the H. cant take away the W's right of dower, neither can he in any way by his sole act encumber it 2 Co. 24.

But in Eng as well as in Con. the W. is entitled to dower, in the reversion expectant upon the determination of a mortgage for life, or for years, for this is a legal estate.

But W. has in the case of a mortgage for years, no interest in the unexpired residue of the term — and if such a mortgage has been satisfied, equity will remove it out of her way. Vaudry a reconveyance by the mortgagee. 2 Ves. 401. Ch. Ca. 139.

The claim of the H. to the W's land mortgaged, & his interest in the mortgage money due to him

A H by marr gains no other interest in his W's,

lands than an estate for his & his joint lives, or at most an estate for his own life – if he has an estate for his own life, he must have had issue born alive that could have inherited – if he has not such issue he holds his lands during the joint lives of himself & W. This right of the H is called an estate by the curtesy – It follows then that he can make a mortgage binding upon his W. for a longer time than for their joint lives, or as the case may be his own life – If however she joins in a fine she will be bound, & the better opinion seems to be that she will by a common recovery. 1 Just. 351 – 2 V. & W. 124. 4 Kins 62. Salk. 114. 1 Roll. Ab. 375. 2 Vin. 61.

So how if a W joins with her H in a mortgage or even in an alienation by deed she binds herself forever Stats of Bow 365.

And at L. L. if a W either joins her H in a deed or makes one herself conveying her own land, the deed is in itself absolutely void & can never be ratified Bract. 69 Bract. 101 Park. 114. 2 Bl. 122. 2 Vin. 526.

If a W. joins in a fine to secure a mortgage on her estate & it becomes forfeited, & part of the debt has been paid & another sum has been advanced by the mortgagee upon the same security, the estate will be holden in the W for that also for the mortgagee has the legal title, & he has as much equity to retain money out of the estate, as the W or her heirs has to hold the land, after the manner after when the equity is equal the L. must prevail. 1 Vin. 41. 2 Ch. Ca. 78.

Still in this case the W's real estate is liable to be taken to discharge this incumbrance, for to this the W has a claim to the extent exclusive of all legatees. 2 Vern. 604. 631.

1. W. 264.

And tho the H encumbrem her jointure by mortgage to secure her H. debt, still the feme absolutely pass with her jointure, for the man incern. 2. Ch. Ca. 161. 1 Ver 213.

If she joins in incumbering her own estate to discharge her H., she is considered in eqty as standing in the place of the mortgagee, & on the death of her H. is entitled to satisfaction out of his pety. 2. Atk 254.

Sir A. That if a feme sole being a mortgagee, marries, & her H. in consideration of her portion make a settlement, he is considered as a purchaser of the mortgage - & indeed the A. is the same with respect to her mortgagee, as to her chose in action. 2. Vern. 501. 1 Eq. Ca. Ab. 68.

But this A. dont hold in the case of a voluntary settlement made after marr. And it has been decided that a settlement after marr. in consequence of an agreem. of portion dont operate as a purchase for on her part there is no cont she being legally incapable of agreeing to the agreement. 2. Atk. 344.

And when a settlement the before marr. is expressed to be in consideration of a part of the H. portion, it will not be considered as a purchase of any other part, than that which is expressly named. Pr. Ch. 64. 1 Eq. Ca. Ab. 70.

In all these cases an extry agreement to make a settlement on the W. in consideration of her portion, will be considered as a purchase of it even tho the settlement is never made, provided the H. is in no default for not making it. Pr. Ch. 318. 1 Eq. Ca. Ab. 70. Gilb. Eq. R. 70.

But a settlement made by the H. upon the W. in consider-

tion of her portion, will not be regarded as a purchaser of it, if it falls short of the stipulated sum. 1 Ver. 68. 2 Cases 102. 1 Eq. Ca. Ab. 68

But without any settlement made the H. is entitled to the Ws mortgage as well at law as his chose in action, if he induces them to pass during coverture, for a mortgage is in the nature of a chose in action - & as to them his the R that they are his if he induces them to pass as by collecting or assigning them for a valuable considera tion. 2 Ves. 501. 2 Ch. 212. 1 Ch. W. 388.

But a voluntary assignment of the Ws mortgage by her H is not a motive it to pass with him the R. The assignee has in this case no higher claim than the H would have had, had he done nothing with it. 2 Ver. 401.

If the heir of the H. obtain pass of the Ws mortgage so that she can have no notice in a ct of Eq. they will not interfere in her behalf. 1 Ch W 458. 3 Do. 197.

But on the other hand if the W of the mortgagee has pass of the mortgage deed, so that the Ws entes have no claim upon the land at L, a ct Eq will not assist them 1 V. W 382. 459. 2 Do. 316.

When the H assigns the W. interest in the mortgage for a valuable consideration & the W has the mortgage deed, eqty will intervene & compel her to resign her claim to him, for her eqty is not equal to that of the assignee. 2 Ver. 230.

And a mere agreement made by the H. to assign to a third person the mortgage of his W, in secu rity of a debt, if this agreement is accompanied by

a delivery of the deed will bind the H. 2. P.W. 364. 2 Atk. 207

The fund from which Mortgages are to be Redeemed.

It is a R. of equity that the fund which has been created by contracting the debt, shall be first charged with the payt. Hence on the death of the mortgagor his real fund is first liable to discharge when the estate is devised of the heir - & they must be advanced by the exor if he has assets. Salk 451. Salk ca 84. 2 P.W. 358. 6. Bro. P. Cas. 520. Eq. ca. Ab 207.

altho the heir under these circumstances is liable to be sued upon the bond if one is given to the mortgagee - still he may compel the exor to pay the debt. Prec. Ch. 96. Kantes ut supra.

The same R equally prevails in favour of the devisee of the eqty of redemption - for a devisee is a factitious heir. Pr. Ch. 477. 1. Atk. 483.

Tis said that if the mortgagor bequeaths his real estate, still it must be applied to the payt of a mortgage - from this R it would seem that the devisees are to be preferred to the legatees of the testator. Pr. Ch. 477. 2 Ves. 701.

But Mr Y. considers that this R extends to residuary legatees only, & that with this limitation it connect - for otherwise it contradicts several established R.s as will soon appear.

This R again prevails only when the testator has

not directed otherwise. 1 Ver. 56

So the mortgagor, who is supposed to in the testator in his will, charges his real estate with the payt of his debts, yet this charge not the case estate only in those cases where there is a deficiency of the personal fund. But where one devises his real estate to be sold, for the payt of his debts, the personal is not liable. 1 Per. 51. 1 Eq. 203. 2 Vern. 111. Pa. Ch. 451.

And the R that the personal fund shall be applied to discumber the real estate, is never allowed to operate in favour of the heir to the prejudice of the simple contract & general legatees. For in such case, if the creditor whose demands attach both upon the personal & real party elect to take their recovery in the latter to save the heir, as the fund recedient of assets, yet he will not be compelled thereby to the disadvantage of the simple contract creditor or legatee — but they will be entitled to stand in the room of the specialty creditor, & to come upon the real estate to as large an extent, as the personal estate is diminished by the demands of the latter. Salk 154. 2 Ch. Ca 68 388. 1 Eq. Ab. 673, Pars. M. 377 to 386.

This warrants the qualification of the R laid down, that the personal estate must be applied to the payt of the mortgagee, when the mortgagor bequeaths his personal fund to the payment of debts.

The R is never held to be the same in favour of simple contract creditor & general legatee, as the devisee of the mortgagor, where the D is of the mortgaged estate. Salk. 154. Pars. M. 378.

If the testator devises his estate specifically, to an & dies leaving debts & legacies, & the creditor who might come upon

the real estate come upon the pers[onal] - if that be exhausted the general legatees must have recourse to the real estate - for so much as the pers[onal] estate fall short of the pay[ment] of debts become a general charge shall never take before specific ones. 1 P. W. 478. 403. Pow. M. 377.

A. of all a man's real estate is considered a specific D. & if both the real & pers[onal] estate be specifically devised, they shall contribute equally in discharging debts funerals & incumbrances. Pow. M. 381.

Where the descent between the mortgagor & his heir is broken, so that the latter is made to take by purchase he will be considered as a specific devisee - but when an estate is devised to one, whom he would have taken as heir, the D. is void & he takes as heir. Pow. M. 185. Salk. 246. 1 P. W. 401. 691.

Much has been said of the different kinds of legacies it may not be improper to remark here that a specific legacy is one, where the thing given is specified so that it may be known & distinguished from all others of the same kind -

A General legacy is one where the thing given is not specific, & yet is not residuary - as if A bequeaths to B £1000.

A residuary legacy is where one is appointed to take what remains of a particular fund after certain disbursements have been made from it - as in case one is named to receive what remains of the debts & legacies of the testator are discharged. 1 Eq. Ab. 295. 1 P. W. 699. 127. Pow. M. 366. 2. Vez. 522. 1 P. W. 452

Money may be made a specific legacy, but it must be so circumstanced that it may be specified & distinguished

from all other money of the testator, or of that which is contained in a certain bag or box - but a legacy is not specific but general as one of £1000 or in gold or in money. Ibid.

If the mortgagor devises his estate with the encumbrance or incumbrances thereupon, & there is nothing further manifesting the testators intention that the devisee should take it free & clear, he shall be entitled to the aid of the personal fund to redeem it. 2 P. W. 346. 1 Bro. C. C. 2 Ves. 2. 461.

But if there appears a clear intention upon the part of the will that the devisee shall take the estate so encumbered, even the real estate in the heir's hands shall be liable for this purpose. 2 Atk. 334.

If the mortgagor sells or assigns his equity of redemption & the assignee dies, his heir has no claim upon the personal fund of the mortgagor to discharge the estate - for here that fund has not been encreased by the purchase of the equity - but has been diminished. 1 Bro. C. C. 484 Barn. Ch. 310.

And in the same manner if the assignee devises the estate - the devisee has no claim upon the personal fund.

And upon the same principle if the mortgagee dies upon the mortgage, he not properly the debt & the owner of the equity of redemption, the mortgaged estate shall alone in the hands & the heir of the devisee and discharge it at the expence of the estate - even if the owner by his will charges a specific part of his personal with the payment of his debts. 1 Bro. C. C. 454. 458. 2 P. W. 337. Barn. Ch. 319.

If the heir at L. himself dies having no heir, the latter must have the profits of the real fund.

Of the Payments of the Principal & money due on Mortgages.

The L. of limit as many bars nothing in it peculiarly applicable to the L of mortgages — but there are R. growing out that make it necessary to attend to this rule yet.

In Eng. now the rate of lawful interest is fixed at five per cent per annum — in Ken & throughout U. Eng. it is at six — and the reservation in a bond of more than lawful interest renders it void — so too in a mortgage or grant, & then a. must & the real contract are void 12 Am. St. 2. 6. 16 sec. 1. Bus. 2259. Dang. 249. 2 J. C. R. 241. 2 Do. 519.

It is held by Ld Hardwicke that if the mortgage is drawn for five per cent & the mortgagee receives more, the mortgage is void. But this I think is unsound — for the mortgage will be rendered void only by the reservation, of illegal interest — but if there was no corrupt agreement when the mortgage was made, the contract will not be affected — the the reception of more subjects to the penalty. 2 Atk 154. Pere. Wms 21.

It was also held by Ld Hardwicke, that if a contract were made in Eng. for the mortgage of a plantation in the W. Indies, no more than legal interest in Eng could be paid — the the rate reserved was lawful interest in the W. Indies — this Ld H thinks might or might not commit usury

ing to circumstances – if the court was really to be governed in the W. Indies, they must resort from analogy not to the usury of the state – if to be executed in Eng. they would be usurious. 1 Ves. 324. 9. Alk. 727.

In Ireland if a mortgage reserves four per cent, with a clause of increase up to five, if payment is not punctual it is void – but if five is reserved with a clause of decrease to four if pay^t is punctual, it is good – The reason of this is taken from the statute of usury – Ir. Eq. Ca. 160. 481. 2. Ves. 316. 282. 9. Alk. 820.

But if there is covenant to pay the additional one five it will be good, & the ct will not relieve as it. Ir. Eq. Ca. 161 1. Ves. 132 Prec. Ch. 424.

But if an indulgence is given by the mortgagee, such agreement will be good to vacate the interest on the ground of forbearance – tis then considered no penalty but a liquidated satisfaction – against usury in the practice you which the mortgagor pays. 2 Eq. Ca. Ab. 611. 1 P. W. 625

Compound interest in mortgages is regularly not allowed in E or Ir – nor in any court. Ir. Ch. 116. 2. Ath. 311. 1. P. W. 615.

Subsequent acts between the parties may convert it into principal – thus if the mortgagee assigns his interest in the mortgaged estate, with the consent of the mortgagor, all the interest in his hands becomes principal. 1. Ves. 162 2. Ca. 135. 2 Eq. Ca. 60.

But this R. Court held if the assignee has not paid the interest as well as the principal actually due at the time – or if it appears that the assignment was

merely colourable — here the interest shall become part of the principal 1 Ch Ca. 319.

When the mortgagor assigns & states an account, this account between the mortgagee & assignee shall conclude the mortgagor from redeeming — for he was no party thereto. 1 Vern 168. Prec. Ch. 426.

When the assignment of the mortgage is without the mortgagor's consent, the assignee holds it on the same terms the assignor did. 1 Ver. 168. 2 Atk. 271.

It was once held that when the mortgage was forfeited the mortgagor could not redeem unless he paid compound interest — but this R is now exploded 2 Ver 395. 1 Eden 122. 258

The imposition of a M in Chy when confirmed by the chancellor, computing interest, & prescribing a time for its payt, has the effect of converting that interest into principal for that time — for this is the nature of a decree of ct. 1 P.W. 278. Pr. Ch. 500. 1 Br. P. Cas. 202. 566. 1 P.W. 483. 776.

But when the equity of redemption is in an infant & a bill is brought by the M. makes up a bill for his accruing interest, shall the infant is not regularly charged with interest upon interest — for in ordinary cases this is done by way of inflicting a penalty on the mortgagor for the non-performance of his contr. — this ought not to operate in an infant for he is not strictly liable for his neglects. 2 Ver 331. 2 Ch. Rep. 25. Prec. Ch. 492.

But if an infant having an estate of redemption is left in Chy, & the account is taken in a M in

they, the interest passes with money that can neither be found. 2. Ca. 443. Prec. Ch. 434.

It is ad that if an infant agrees to pay interest on interest in consequence of a bargain to himself, secured by that agreement, he shall be bound by it. 1 Eq. Ca. Ab. 285.

But tho a subsequent agreement between the parties will convert interest into principal, yet the mortgagor merely signing an account, acknowledging a certain sum to be due would do this – for in order to this there must be some judicial act – as the report of a M. in Chy – or an agreement between the parties 1 P. W. 562.

An agreement made before interest is due to convert it into principal, will not be enforced – for this is seen as oppression. Salk. 449. 2 Atk. 334. Vide 4 D & E. 6. 1. 3. 4.

When money is expended by the mortgagee in paying in defence of the mortgagor's title, it may be added to the principal & bear interest. 2 Atk. 518.

It has been observed that the tenant for life is compellable to keep down the interest during his possession. But a tenant in tail of the equity of redemption cannot be compelled to keep down the interest, by the remainder man or reversioner – nor can his representatives after his death be forced to do it – for in this case they as well as equity consider the remainder man, or reversioner, as in the power of the tenant in tail – as he may levy a fine or suffer a recovery & thus cut them off forever. 2 P. W. 285. Prec. Ch. 443. 1 Ves. 477. 480.

But if a tenant in tail or an estate of inheritance is an infant & is in possession of his guardian, he will be compelled to keep the interest down during the minority. — for here the reason in the former case dont operate — for an infant cant bar a remainder unless under the kings privy seal, which is never granted voluntarily to change the interest of the parties — but only in case of family settlements. Salk. 561. Show. 11. 444. 2 Atk. 527. 1 Ves. 477. 480.

But if the tenant in tail discharges the interest of incumbrances, the remainder man or reversioner shall have the benefit of it. 1 Ves. 477. 1 Br. Ch. 214.

If the first mortgagee takes possession of the land & suffers the mortgagor to receive the rents & profits without giving the interest the second mortgagee shall not suffer by it — but what the mortgagor receives shall be accounted to the first mortgagee, principal & interest. Ch. Ch. 40. 1 Ves. 170.

This R must be taken with a qualification — for the mortgagee is not in this case compelled to account for the rents & profits until he has notice of the claim of the second mortgagee. 2. Ch. R. 201.

When a bond is given to the mortgagee the holder has a right to receive upon that bond the whole principal & interest — & of course have a right to discharge the lien But on the other hand the holder of the mortgage deed if he has not the end of the debt, has no right to receive more than the accruing interest — for the debt is the principal & the mortgage is the incident. Salk 154. Ch. Ch. 261. 1 Eq. Ca. Ab. 365.

If the mortgagee after the mortgage is forfeited

refuse to receive the debt when tendered to him, he loses all claim to interest after the tender - for by refusing he acts in the wrong - But in this there a particular qualification - for if the mortgagor would entitle himself to the benefit of the tender, he must give six months notice that he is a mind to tender - & it must be made on the day of the determination of that notice - The same R extends to the mortgagee in possession also - But in case of this kind, the pltff ought to make oath that the money was always ready - & no profit was made upon it - but the mortgagee may prove to the contrary of this - & if he does the interest must run on. 1 Eq. Ca. Ab. 319. Prec. Ch. 554. 2. Ch. Ca. 206. 2 Vern. 378.

This tender must be strictly legal - But there is one exception - for the tender of a bank note is sufficient if the mortgagee made no objection to it on that ground - or if in case he did the mortgagor offered to change it. 2. Ver. 372. 3. Atk. 90. 2. Eq. Ca. Ab. 603. 1 Ba. 654 1 Eq. Ca. Ab. 319.

The money due upon the mortgage being a sum in gross is regularly to be tendered to the person of the mortgagee & tender upon the land, the mortgagee being absent is not good - tho it otherwise in a tender of rent. 1 Inst. 210. 2. Eq. Ca. Ab. 610

If a time & place are appointed, a tender at that time & place is sufficient, tho the mortgagee is absent. 1 Inst. 211. 212.

If there is no time or place appointed, the mortgagor may give notice of them, & if they are reasonable they will be good - and in a particular case it has been decided that a tender at the mortgagee's house is good

Thus was when the mortgagee kept out of the way to avoid a tender – 1 Ch. Ca. 123 & 29.

But if the mortgagee has any doubts as to the legality of the tender, his interest dont cease, till he has had reasonable time to consult counsel. As when a tender was made by one whose right to the equity of redemption was doubted by the mortgagee. 2 Eq. Ca. 605. Pow. M. 554 2. Atk. 90.

Held by Pow as a Q. R. that the interest reserved in a mortgage may be altered in a subsequent parol agreement, between the parties – the generality of this R is doubtful. Pow. M. 360. 6. Bro. P. Ca. 520.

Mode of Accounting.

The mortgagee has no right to the rents or profits till he takes posse – of course while the mortgagor is possessed, he need not account for them. 2. Atk 103. 1 Do. 244. Coup. 265.

But the mortgagee must account for the profits during his posse & they must be applied to the payt of his debt. 2. Atk. 394. 1 Ves. 476.

When the mortgagee is posse manager the estate himself, he has in the account, no allowance for his care & trouble for he has been called the bailiff of the mortgagor, & in a certain sense he is one & even if there is an agreement that he shall have a salary it will not be enforced, for tis deemed oppressive – as the mortgagor is considered to be the power of the mortgagee

still however if a skilful bailiff is employed by the mortgagee, a reasonable reward will be allowed him 1 Ver. 316. 2 Atk. 378. 2 Atk. 120.

If the mortgagee in possn assigns to an insolvent person without the mortgagors' consent, he still remains liable as such for the rent that accrues due at the assignment as for what afterwards accrues. 1 Eq. Ca. Ab. 328. 2 Ch. Ca. 2. 1 Ca. Ch. 68.

The mortgagee in possn is liable for the mere profits actually received, & not for the annual value of the land. But if he has been guilty of fraud or neglect so that the profits received are not so great, as they might have been, he will be liable for the annual value. 1 Ch. Ca. 254. 1 Ver. 45. 376. 1 Eq. Ca. Ab. 328.

Sir A. H. in accounting, that if the mortgagee has at any time visited the estate, the sum for which he let it shall in favour of the mortgagor be considered as the improved value during the whole time he was let - or indeed during the whole time he was in his possn - this presumption, the mortgagee may rebut - But it is for him to make use of the sum for which he visited the land to shew its annual value. Selden's Ch. Ca. 69.

If the first mortgagee takes possn & keeps out the rents on subsequent incumbrances, he will be charged in their favour with all the amount of the profits which he might have received. 1 Vern. 270. Pre. Ch. 90.

But if he suffers the mortgagor to remain in possn as on subsequent incumbrancer, he is compellable to account in the same way, as between himself & the second mortgagee. 2 Ch. Rep. 209. Prec. Ch. 468.

If the mortgagee permits the mortgagor in possession to make use of his own incumbrances to keep out other ones, or as he termed it in the case of mortgagee to fence, he will be charged with the profits from the time when they would have ended, without his interposition - 1 Ver. 267. 2 Ca. 182. Prec. Ch. 469.

When the mortgage has been assigned by the mortgagee, he must be made a party in the bill of redemption, that he may account for profits received. 1 Eq. Ca. 326. 1 Vern.

It laid down by Prec. in C. B, that when there are several mortgages, an account stated between the first mortgagee & mortgagor, will bind the rest if there is no fraud or collusion - the rule does not suppose this doctrine, & it appears unreasonable. Prec. Ch. 471. 1 Ch. Ca. 299 2. Ca. 92. 1 Eq. Ca. Ab. 19.

But the account between the mortgagee & assignee must bind the mortgagor - for he is no party to it 1. Ch. Ca. 48.

The assignee after several intermediate assignments is not bound to account for profits before his possession - but this R holds only where there are a number of intermediate assignments, & the ct will determine when they are sufficiently numerous to exempt the assignee from accounting 1 Ch. Ca. 102. 2. Ch. R. 992.

A mortgagee after having unsuccessfully attempted to defeat the mortgagor's title at L. brings a bill to redeem - then the ct will compel him to pay all the expenses of the mortgagor in the former suit, & they is added to the principal so that it may draw interest. 2 Ver. 596.

In accounting there are two modes - one by what is called annual rests & this is where the rents & profits exceed the interest, the surplus is applied to the principal - In the other the aggregate interest is thrown into one sum, & all the rents & profits into another - either of these modes may be adopted in any according to the circumstances of the case - where the profits greatly exceed the interest the former is most proper. - but this is often attended with great hardship to the mortgagor, especially when the sum is large & he is forced to enter upon the estate, & then can only raise pay his debt by parcels, & is a bailiff for the mortgagor without salary, subject to an account, the et will not upon any small excess of interest apply it to the principal - but adopt the latter Ratha R. 2. Atk. 384.

Of Foreclosure.

A decree of foreclosure is an order of the ct that the mortgagor shall redeem within a limited time, or and default of so doing be former foreclosed - that is barred & utterly excluded his eqty of redemption without recall unless upon special circumstances - 1 Eq. Ca. 119 Rep. Ch. 478.

When the estate mortgaged is a reversionary interest the decree is that the estate shall be sold & the money raised upon it Rep. Ch 478.

If there are several mortgagees of an entire thing mortgaged they must be made parties to the bill of foreclosure - But if any are refuse to join as plff, he must be made a deft that his rights

may be ascertained & cancelled. Bro. Ch. 368.

Chy will never decree a foreclosure, whilst the period limited for the payment of the money is unpaid, & the estate in consequence thereof forfeited to the mortgagee. 1 Ver 292. 2. Vent 365.

On a bill for foreclosure the title of the mortgagee cant be investigated - by this is meant that a ct of eqty will not try the defective title of the mortgagee - for on a bill to foreclose they can go no further than to bar the eqty of redemption. 1 Ch Ca. 244, Bro. Ch 476

The mortgagee may pursue at one & the same time all his remedies on the mortgagor - & the pendency of one suit is not pleadable in abatement to the other. 2 Atk 644. Doug 401.

Chy will refuse to decree a foreclosure, where the mortgagee is taking any unconscientious advantage of the mortgagor. Thus where he knew of a prior family settlement, & procured the trustee to convey the estate to him to protect his incumbrance - the ct on a bill by him to foreclose the children claiming under the family settlement, refused to do so - saying that if he might be suffered to profit himself by getting in the legal estate, they would not convey it or by a decree in eqty to foreclose. 2 Ver 271. Salk 540.

There are what are called constructive or implied foreclosures, tho they are not so in form. As where a mortgagor brings a bill to redeem & an account is taken before a M. in Chy, & then it appears due to the mortgagor, neglects to pay the ct will dismiss the bill, & he is then bound forever - for in this account

d his right 2 Atk 367.

If the heir of the mortgagor brings a bill to foreclose without joining the exrs, the defendant for the latter is a party in interest – & if it appears upon the hearing that the party seeking the foreclosure is the heir, & that the pers representatives are not warned, the chancellor will ex officio dismiss the bill – even tho there is no demurrer – for the rights of third persons are affected by the measure. 2 Bl Ca 23.

On a bill to foreclose it is necessary to make the exrs of the mortgagor a party. 2 P W 333.

But if the mortgagees heir at L has actually obtained a foreclosure, it will be binding tho the exrs or admrs are not a party – for if either should afterwards come in the heir of the mortgagee for the benefit of the mortgage the heir if the ex is worth more than the money, may pay him the money & take the benefit of the foreclosure to himself. 2 Ves Ch 173. 377. 1 Bl Ca 46. 478.

On a decree to foreclose within a certain number of months the computation of time must be according to calender months. 1 Bl Ca 46. Atk 604.

A decree to foreclose a tenant in tail of an estate of enfranchisement will bind not only the issue, but also the remainder men, altho the latter is no party to the suit. 1 Bl Ca 211.

But tho this is the law in case of a tenancy in tail, still if there is an express estate for life the remainder man ought to be a party. 2 Atk 101.

If there are several incumbrancers & the mortgagee wishes to obtain a complete bill to them all, they must all be made parties to the bill - otherwise they only incumber - for those who are not parties must be barred. 2 Ves. 518. 604. 188. 3 Pub. Acts 33.

If the mortgagee dies intestate his heir at law may maintain a bill to foreclose - & the exec or heir need not join in it. 1 Eq Ca. Ab 948.

A decree of foreclosure may be obtained as an infant - & the is not to dismiss the b. must, when a decree is obtained, be allowed a day to shew cause in it - & this day in it, is six calendar months after he has attained full age. 2 Ba. 148. 2 Ves. 992. 479. 1 Do. 295. Ca. Ch. 296. 2 Ves. 99

If during the day allowed him the infant shews no cause, the decree becomes absolute upon him - If how ever he does shew cause, he may upon motion, put in a new answer & make a new defence - for it would be unjust to give him a day to shew cause, if he was concluded by what his guardian had done - who may then make an improper defence. 2 Atk. 524. 1 P W. 504. 2 Do 401. 3 Bro Ca Cas 301.

But it is not hence to be inferred that he can have the decree set aside because he was an infant - for if this were the case the decree would be perfectly nugatory - but he may shew an error in the decree, as that was against 4 P W. 352. Prec. Ch. 487.

According to this mode of proceeding, there must be a process issued upon the infant on his coming of age - this is the nature of a subpoena. 4 Bl. 369. 2 Ba. 148.

But if an equity of redemption is vested in a feme sole & she marries, or if it descends to her either before or while she is covert, & a decree of foreclosure is obtained in her while she is covert, & she has no day allowed her in it after her coverture is removed, to shew cause why the decree she is bound. 2 P. W. 342. 1 Vern. 405. 2 Atk. 712.

If however there has been fraud practised in obtaining the decree, as by the collusion of H & mortgagee, Mr. H thinks she will be heard in the decree, otherwise she would be remediless. 2 P. W. 350. 9 Da. 298.

It has been remarked that after foreclosure, the mortgagor is utterly excluded from the equity of redemption unless under particular circumstances - But they will sometimes open a foreclosure even after it has been enrolled, & thus revive the right of redemption.

If the mortgagee has been guilty of any unfair or fraudulent conduct in obtaining the decree, they will open the foreclosure - thus where the mortgagee obtained a decree to foreclose the mortgagor, pending a suit by his estate to have the estate sold for the payt of his debts. 2 Mod 183. 2 Eq. Cas. Ab. 600. 607 2 Bro. Par. Ca. 644

If a mortgagee obtains foreclosure after a judgt entered has given notice of his demand, & tendered payt of the debt, they will in such case open the foreclosure. 1 Ch. Ca. 120 2 Ver. 601.

But where a foreclosure is opened in favour of a subsequent incumbrancer, he shall have allowed him all his expences, in the suit obtaining the decree. 2 Ver 186.

The time for payment limited on the decree of foreclosure, before it has become absolute, may under certain circumstances be changed or enlarged. As when it appeared that notwithstanding a continued exertion on the part of the mortgagor to sell the land mortgaged & pay what was due he was prevented by inevitable necessity - or when a rebellion subsisted. Banister Rep. 221, 2 Eq. Ca. Ab. 605.

But tis a Q. R in Eq. that a decree having once passed, shall never be opened in favour of a mere volunteer - as a devisee of the mortgagor - for a mortgagee is a purchaser, & consequently has equal equity with the volunteer - & he has always an absolute estate at L. by foreclosure. 1 Ch. Ca. 217. 1 Eq. Ca. Ab. 317.

In Which mortgage there can be no foreclosure, for the estate can never be forfeited - & of course there is no such thing as an equity of redemption. 1 Ver. 406. Ca. Ch. 423.

A foreclosure of a first mortgagee as a second will be opened, in favour of the second, if the first afterwards denies the land to the mortgagor. 1 Ver. 148. 2 Do. 238. Salk. 236 Cas. Ab. 595.

A foreclosure thus made absolute may be opened contrary to by the act of the mortgagor himself. Thus if after foreclosure he takes out process upon any security, with intent to recover his mortgage money - As by bringing debt on the bond given at the same time for the payt of the money, & performance of the covenants contained in the mortgage deed - such action opens the foreclosure. 1 Eq. Ca. Ab. 317. 1 Ver. Ca. Ca. 119. Cas. Ab. 596.

It was once holden in Law, that if the mortgagee obtained

a foreclosure, & took hopes under it, he could not afterwards open it - Mr. Ly thinks it would not be so now
2 Cas. t. 202.

Tis a Ly R that a foreclosure shall not be opened, unless the mortgagor has for several years acquiesced in the mortgagee's hopes under it. 2 Pro. Ca. ba 111. 1 Eq. ba. 409. 412.
Bro. Ca ba 404. 9 Do. 315.

In consummating the decree tis the practice in Eng to make it absolute by a further order, if the debt is not paid at the time limited. So how the first decree was conditional becomes absolute of course if the money is not paid by the day.

If a tenant in tail subject to a mortgage suffers a recovery & sells part thereof, & afterwards the mortgagee exhibits a bill for foreclosure or sale, this in tis he has a right to have all parts of the estate subject to his satisfaction, yet the rule is that the first sale shall not be intermeddled with unless the remainder was insufficient to satisfy the mortgage. 1 Ves. 261.

There once a R in Eq that a decree of foreclosure should not be made if the value of the land much exceeded the debt - but this R is now entirely exploded.

Estates in Possession & Expectancy

I shall only give a general view of this subject as a particular one is unnecessary. In the view of the subject, regard is not had to the quantity of interest in the tenants, but to the time of enjoyment. Estates therefore with regard to this consideration, may be either in possession or expectancy. There are two kinds of expectancies, one created by act of the parties, called a Remainder — the other by operation of l. called a Reversion. 2. Bl. 163.

Very little need be said of estates in possession, or as they are sometimes called estates executed. Whenever any books treat of estates, they are understood to be estates in possession unless the contrary be shewn. By an estate in possession is meant a present interest, not depending on any contingency, & accompanied with a right of present enjoyment. Mr J. thinks Bl. defective in this — for it applies to a reversion, as well as to an estate in possession. Pow. d. 249.

An estate in remainder is one limited to take effect & be enjoyed, after another estate in the same subject is expired or determined. The estate preceding a remainder is called a particular estate, & the subsequent one an estate in remainder. Co. Litt. 143.

These two estates are equal to a fee simple. As the L. knows no greater estate than a fee simple — if then this estate is divided into parts, all the parts put together make one entire whole. 1. Bl. 164. 2. Wood. 168.

It follows therefore from the last observation that no estate in remainder can be limited after a fee simple — because a fee simple embraces all the interest that can be had — there can be no remainder after it. 2. Bl. 164. Plowd. 29. Vesey 269.

It may seem that a life or remainder may be limited after a fee by an Executory Devise

This is not however true — for when any person is substituted for another in a certain event it is not additional to an estate previously for this is physically impossible — The most proper word to create a remainder, is the technical term remainder itself — tho it may be created in other words. Plowd. 134. 183. 170. Fearne 5. 242. 2. Bl. 164. 165.

There are several rules to be observed in creating remainder — 1st There must be a particular estate precedent to the remainder — the reason of this is that remainder is a relative expression & implies that some part of the thing has been previously disposed of. Co. L. 49-a. Plowd. 24-5. Fearne 5. 242.

An estate therefore to take effect in future without a particular estate is no remainder. 2 Bl. 165.

A freehold estate at C. L. cant take effect in future — it must take effect either in poss^n or remainder — the reason is that livery of seisin is necessary to convey this interest. 1. Co. 99. 2 Bray. 151. 2. Bl. 165.

The object of the last rule is, to prevent the freehold from being in abeyance — as this might tend to litter the freehold inheritance — & also there would be no occupant in capite — i.e. if by claim the estate, there is no person against whom he could bring an action. 2. Wills. 165. 2. Wood. 200.

It was observed that livery of seisin was another reason why a freehold interest could not be in abeyance. Livery of seisin operates immediately — it gives present poss^n; if it does not give immediate poss^n it gives nothing at all — therefore the freehold remainder can be in abeyance. Suppose an estate to be for years with remainder to B in fee — here A has livery of seisin for B's use — & in the name of B — & livery of seisin given to the particular tenant, inures to the remainder man B — & thus B is seised of his remainder in fee simple. 2. Bl. 166-7.

A tenancy at will is not sufficient to support a remainder – the reason is, that this is so precarious that that the L does not consider it a sufficient support. It will not support an estate for years or a remainder. 8 or 3. Co. 75. Ray. 151. Dyer 18.

And as there must be a particular estate to support a remainder, if it is void in its creation the remainder fails – so if given to one not in esse there can be remainder this void. 1. Jones 58. Co. L. 298. 2. Roll. 415. 2. Bl. 167.

If the particular estate is good in its creation, but is defeated before the remainder can vest in interest the remainder must fail. This rule is given by Bl in a different form – but Mr L thinks incorrectly. An estate to A for 10 years Remainder thereto to B in fee – now if at the expiration of 5 years A forfeits his estate, B's estate can never exist. 2. Bl. 169. 1. Jon. 58. 2. Wood. 180. 6. 7. Fearn. 209. 34. 41. 61.

Now this comes within my rule – It is a general rule that the remainder must take out of the grantor at the time of creating the particular estate – The meaning of this is that the absolute or contingent rights of the remainderman must be created at the time of the particular estate i.e. the remainderman must have a present right to a future & contingent enjoyment – Suppose an estate to A for life with remainder to B absolutely here the rule applies – But suppose an estate to A for life, with remainder to B for life in a contingency – here Mr Jones thinks the contingent right could go to the remainderman – for if so it is a vested interest – so, the rule applies only as to the vested interest. Litt. 60. 49. 2. Bl. 167. Litt. Rep. 671. 2. Wood. 177.

Plowd. 25.

That the interest must take effect in the contingent remainderman is certain – for it is evident that the interest limited continues in the grantor till the contingency happens – the interest is not in nubibus. 2. Bl. 169. Cruth. 162. 262. Fearn. 275. 285. 6. 267.

A remainder cant be limited on an estate already in fee, or vested beforehand. So he says the vested remaining may be granted, but it is a reversion, not a remainder. If it should be called a remainder, still it would be a reversion — indeed it seems they must both be created by the same instrument. Fearne 228.

A third general rule is that the remainder must vest in the grantee during the continuance of the particular estate — or eo instanti that it determines — The meaning of this rule is, that the interest must vest during the continuance of the particular estate — for if it vests in interest the fee may vest eo instanti, the particular estate determine. So if an estate is given to A for life, with remainder to B in fee, now the remainder vests in interest at the creation of the particular estate, & this is what the rule requires. & therefore follows that if the remainder does not vest in interest during the continuance of the particular estate, or eo instanti when it determines it must fail — for there can be no intervening estate, between the particular estate, & the remainder, to support them by. One must commence when the other determines consequently they must both be in esse together. Because like logicians!! Because an effect had preceded his cause they must both be in the same place at the same moment!!!! 1. Co. 66. 138. 2 Bl 164. Raym. 25. 3. Co. 21. For the rule contemplating a vested interest vide Fearne 233. 497. 240.

The above are the cardinal rules as to remainders in general.

Lecture No. ____

Remainders are of two kinds, vested & contingent. By a vested remainder is meant one vested in interest — for when it vests in posse it is no longer a remainder — A vested remainder is one in which a present interest passes to the grantee, but to be enjoyed in futuro, i.e. to take effect in posse in futuro. Fearne's definition is this, A vested remainder is one that carries with it a present, though not a future enjoyment. Fearn 1. Rep 3. 348. 2. Bl. 168. 2. Wood. 175.

A cont remainder is one in which no present interest passes to the grantee, but, is to take effect on the happening of some uncertain or contt event. May be made Bl. Definitive or to an uncertain person unnamed. On being asked if this cont interest was descendable, he said a Fee simple clothed with an interest was descendable. 3. Co. 20. Salk 228. 2. Bl. 169. 1. Bos & Pul. 215.

An estate to A for life with remainder to B. in fee is a vested remainder — to A for life & to B after his death is a cont remainder — for the uncertain who will be first A's estate may determine before his death, by forfeiture or crime. 1. Doug. 251, 7. 4. Jac R. Prog vs Prog 2 Ry. 5. Bt.

An estate to a person unborn, in remainder, is bad. By L.L. a cont remainder could not be limited even to an infant in ventre a mere unborn infant was born when the particular estate determined. Carw. 1. 320. 1. 2. Co. 51. 2. Bulst. 256. Moore 637. Salk 228.

By Stat 10 & 11. Wm 3rd this is done away & a posthumous child is capable of taking in remainder in the same manner as if it had been born in his father's lifetime. 2. Bl. 169. 4. Bac 124. 4. Mod. 282. 4. Bac. 312. 2. Mod. 300. Salk. 228. 2. Co. 51. As to intermediate profits vide 3. Atk 209. 3. Will. 526.

The limitation must be to one who by be an possibility, potentia proximus, may be in esse at or before the determination of the particular estate. A remainder for the determination of a remote possibility. Possibility is distinguished from a remote possibility. Po tentia remotissima. An estate for life to A. with remainder to his heirs is good. Now if this before A. the re

mainder will vest in the person who is A's heir. Fearn 175. 2 Co. 51. Co. Litt 264. 378. 2 Bl. 169.
On the other hand a remainder to the heirs of the eldest unborn son of B, is void in its creation; for the possibility in him is two remote — two depending contingencies are too much. Hob. 33. 2 Bl. 170. Co. Litt. 25 b. 184 a.

A remainder to a person not in esse by a particular name is void. for the same reason. 2 Bl. 170. Fearn 177, 12. Co. 51.

A remainder limited on the happening of an unlawful act is void. For such an act is in judgment of law manifestly impossible. It would be impolitic too for it would encourage crimes. A remainder to the first unborn illegitimate son of A is void. For this is considered in law too improbable, & hinder it will not permit a right to be created by an unlawful act. Fearn 178, 6. 2 Bl. 170. Bro. C. 507. 1 Bland. 92. 2 Co. 51.
A cont remainder of a freehold cant be limited on any estate less than a freehold — for unless the freehold keeps cant of the grantor, at the time of the creation of the remainder, such freehold remainder is void. 2 Wood 99. 2 Bl. 171. 1 Co. 130. 1 Ray 151.

Cont remainders may be defeated by the determination of the particular estate upon the contingency happens — But a conveyance by bargain & sale, lease & release, will not defeat it. 2 Lecon. 60. 3 Mod. 91.

A fine & common recovery will defeat it. 1 Co. 66. Bro. C. 630. 1 Salk. 224. 2 Bl. 171.
It is therefore a rule that if the contingency does not happen during the continuance of the particular estate, or so instantly that it determines, the remainder is void. 1 Co. 66. 135. 2 Bl. 171. 107. Fearn 241. 526. 244. 252. 262.

But a determination of the mere actual seizin of the particular tenant, does not of course defeat the cont remainder. Altho the particular tenant be actually disseised, still if the right of entry remains to him the remainder is not defeated. 2 Wood. 176, 3. 12. Mod. 174. 1 Ld Ray. 316.

In the preceding case, the estate of the particular tenant existed in point of law. In the time of the case was in being. it was usual to assent limited, to assent cant remainders. This practice still continues. 2. Roll A. 799. 2. Sid. 179. Moor 486. 2. Ch. R. 170. Co Litt. 378. 2. Bl. 171, 2 Fearn. 84. 7. 95. 129. 1.

The question of a remainder being vested or cant does not depend on the probability or improbability of the contingency's happening - but, upon the vesting of the limitation. Salk 223. 2. Wood. 181. 184. 17 192. Hob. 30. 3. T. R. 488.

An estate to A & the heirs of his body with remainder to B. this is vested - yet tis not probable it will take effect. The following rule is a universal criterion by which to determine whether a remainder is vested or cant. If the remainder has the present capacity of taking effect in possession, tis vested - if not tis cant Fearn. 149.

If an estate limited to 2 persons, with remainder to one on the happening of event, to the other on the happening of another - the last limitation in the alternative is still a cross remainder. Hob. 33. 4. Bac. 992. Cowp. 91. Dyer 303. 2. Bl. 384. note.

This is that cross remainders cant arise when there are more than 2 persons - this is not true. 4. Bac. 33 Eng. Jur 655.

This is always a question of construction, & the rule of construction is this - when a cross remainder is to be raised by implication for 2 persons the presumption is in favour of it. if more than 2 persons, against it. Cowp. 780. 91. 797. 1. East 229. 2. Do. 40. 446.

This is in the abstract that cross remainders cant be created by deed - but this is not true. The true rule is that cross remainders cant by words by implication in a deed but may be in a devise. 1. East 415.

But when cross remainders are limited, they are good however remote the remainder may be. To A & B, & after the death of both without issue of their body to be - here is plainly an implication, that as long as either has heirs of his body there shall be an estate tale. Cowp. 31. 780. 790. 1. East 229. 2. East. 40. 446. 466.

In Loca. it would seem that, from the construction of the stat. a freehold could be limited in a use to commence in futuro, to a person in being, on the immediate decease of a person in being. Ld Hale says, Mr. L. presumes no lawyer would venture to do it. Stat. Loan. 24.

Executory Devises.

The general nature of extry devises when once executed differs very little from Court remainders. Bl. definition is this. "is a devise of a future interest, not to take effect at the testators death, but on some future contg. Thus is not strictly correct for the words include a cont remainder as well as an executory devise — it is a general not a specific definition. 1. Ev. Cas. 186. 2. Bl. 172.

A better definition is, that it is such a limitation of a future interest by will, as the Law admits in devises, but not in L. L. conveyances. It follows then that if such a limitation as would be good in a deed is made in a devise, tis a cont remainder if not an extry devise. Fearn. 298, 1. 302. 2. Wms. 222. 9. T. R. 487. 2. Ves. 611. 9. T. R. 769. Camp. 234.

In making wills men are supposed to be entitled of the aid of learned men therefore greater indulgence is shewn them in their construction. A limitation in a devise which would be void in a deed is good, on account of indulgence shewn to a mans last will & testament. Fearn. 299. 2. Wms. 221. Ram. D. 250.

This doctrine of extry devises was wholly unknown to the antient L. L. Nor was it known at the time of H. 8th when to men first allowed. Its origin was in the reign of Elizabeth. 9. T. R. 93. 95.

An extry D. differs from a remainder in 3 essential particulars, viz. 1. the limitation requires no particular estate to support it. 2. By an extry D. a fee simple or other estate may be limited upon a freehold. 3. By an extry D. a remainder may be limited in a chattel interest after a life estate in it. Salk. 229. Cro. E. 478. 2. Bl. 172. 398. Fearn. 303, 4. 10. Mod. 420.

Such limitations as these can by L. L. conveyances exist. Ram. D. 250. 294. Fearn. 305, 6.

Hence it necessary to observe that a cont limitation may be so worded by D. that tho in its creation a good remainder yet it may in a certain event become an extry D. Thus if a cont limitation is made by D to Jo. for life with a power to the first taker capable of supporting it as a remainder & the first taker happens to fail before the limitation occurs by the death of the first devisee — the second limitation then shall then take effect as an extry D. — Hyett it.

it was a good cont remainder at its commencement. A estate to A for life, remainder to the unborn son of B. dies before the testator. Now this limitation fails & never takes effect & so becomes void, before the death of the testator - for the devise is not consummated before the testators death. Now the Ct will so consider it, it was magis valeat quam pereat, & will allow it to be an estate D. Because the testator knew before his death, that the particular estate had determined - so he must be supposed to have intended it as an estate D. - & the reason is of the first consequence the testator the estat commences, & after it has begun to operate another cannot change the nature of it. Fearn. 401. 418 Coll. Jon. 44.

To explain these three rules 1st An estate D cannot arise upon a freehold unless there be particular estate to support it. A limitation of lands or any other estate, by D. to B. & his heirs, to commence on the day of his marriage is good again a. D in fee to the heirs of B. & A. when he shall have any issue by any of Entry D. - yet unless he has issue living at the time of the marriage the limitation is void. Both of these would be void in a deed for it is a limitation of a freehold to commence in future, without a particular estate to support it. 2. Bl. 173. Fearn 403, 4. 2. Wood 233. Powr. D. 255. Lvo. E. 478.

And till the contingency happens the interest is left in D. as a reversion to the heirs at L. of the testator. E.g. To the unborn son of A when he attains 21 years - now till the heir holds the estate without account - but the limitation is defeasible. 2. Wood 233. 1. P.W. 505. Doug. 481. note.

2 A future estate may be limited after a contingent estate. Thus to A & his heirs if he dies before 21 then to B & his heirs. This is good by way of Entry D. Again to A & his heirs, if he pay B. 500 £, by such a time, if not to B & his heirs - this is good. In this case the 2nd fee is not to take effect after the 1st estate expires, for a fee exhausts all the interest that can be had in any subject. This then is a mere substitute for the first fee on a certain event. Powr. D. 245.

This is not a remainder for then a particular estate is carved out of an estate, & that the remainder constitute 1 estate. But this 2nd interest cant be carved by a fine or common recovery. In the same as this, Devise to pay to A if he does then & then, & if he does not then to B, heirs to A if he does then & then, & if he does not then to B, heirs to him. Fearn 409. 416. 2. Bl. 173 378. 2. Wood 181. 186. 226. Powr. D. 250.

A remainder may be created in a chattel interest, after the particular estate for the same person's life. Thus a term for years may be devised to A for life with remainder to B. But contra not be done by deed. 4. Co. 95. 2. Bl. 174. 2. Wms 238.

Such limitation may be made to any number succeeding by implication they are all in esse during the existence of the first devisee. 2 Bl. 174.

Formerly there was a distinction made as to limitations of this kind — as between the bequest of the use of the chattel during life & the thing itself for life — & when the use was given the subsequent limitation was holden to be void — but when the thing itself was given twice, held 10. But this now settled to be good in both cases. Fearn 304. 4. Co 95. 10. Co. 46. 1. P.W. 1. 2. Bl. 398.

There is one essential difference between the nature of a contingent remainder & an executory D. viz. A contingent remainder may be barred by a fine or common recovery. Cro. Jac 593. 2. Bl. 173. Fearn 406. 10. Co. 39. 2. Wood. 227.

An executory D. is not barable by a fine or common recovery, requires no particular estate to support it, the fee to hold is in abeyance. This is contrary to the common rule. It becomes necessary then to fix a time within which the contingency must happen, in order to prevent perpetuities. Fearn 314. 2. Bl. 174. Salk. 229. 12. Mod. 687. 2. Wood. 227. 230.

When therefore a question arises, why a contingent remainder is more likely to create perpetuity, than an executory D. you have the reason, which is, that a contingent remainder may be barred by a fine or common recovery, but that an executory D. cannot. In order to take effect within a life or lives in being, & 21 years & the fraction of a year afterwards. Salk. Cas. 226. 2. Co. 174. Lovy 520. 1. T.R. 595. 100. Fearn 314. 320. 356.

Thus to the use of A when he shall attain the age of 21 years, & if he has no son then to the unborn son of B when he attains 21 years. So also you may create a devise to A & his heirs, if a certain event, to the unborn son of B when 21 years old.

If according to the terms of the agreement the event may by possibility happen at a more remote period, than is prohibited by the rule last mentioned, it is void. Fearn 200. 314. 326. 356. 1. Will. 207. 2. Bl. 174.

Lecture No.

By Hotham Long Darrow this recites, as to remainders & chattel interest viz: That all the remainder men must be in esse during

the life of the first demisee, & that the event must happen dum the life of 1st demisee. But this is not so. For there a remainder to an unborn son of B. if he has one & if not then to an unborn son of C. must be void — for the event here might not happen during the life of B. & of course the son might not take. the ultimate interest. For the old rule see Litt. 381. 2. Bl. 173. Skinner 341.

But tis now settled that the rules of limitation are the same in all the 3 kinds of entry remainder & reversion. 3. Term 320. 381. 7. T.R. 102. 3. Atk. 262. 2. P. W. 421. 2. Wood. 290. 2. Br. Ca. Cas. 30. 3. Bos & Pul. 387. 395.

It follows then that if an entry D is limited to take effect after the general failure of issue it is void — for this may not take place till tis too late for the rule. E.G. To take effect after A dies without issue. Gift to A & his heirs & if he dies without issue then to B. As the case may be this contingency may happen at a time after the life of A being 21 years & a fraction of a year after issue — for the words import his issue ever failing, which may be a thousand years after his death. The application of the entry determines on the construction of the words "if he dies without issue" means the words may suspend a freehold of fee at any future time. So tis giving him an estate tail by implication, & the remainder in fee after the limited descendants become extinct — to be sure the giving must be within the time prescribed — but he must die without issue 100 years after his death. Term 216. 2. 582. 341. 2. Burr 877. Pasc. D. 476. Talb. cas. 268. 2. Wood. 322. 241. 3. Atk. 617.

This rule holds as to the three species of entry D. Term 322. 341. 1. Vent 79. 3. T.R. 146.

This rule supposes the entry D is subject to no other limitation — for if the words any use in there com. acceptation tis good. Term 352. Salk. 225. 3. T.R. 146. 7. T.R. 322. Pasc. D. 241.

You must remark remainder in point of time is of no consequence in cont remainder — because there is no danger of perpetuity, for tis alienable. But in entry D it is of consequence — for otherwise there would be a perpetuity. Observe this difference, a limitation to A & his heirs & if he dies without issue to B & his heirs. Now this is an estate tail by implication, but tis after after a fee & this is good. But if to A his heirs, & if he dies without heirs of his body then to remainder to B. this is an estate fee by implication & remainder over. This land by way of an entry D tis a remainder after an estate tail. 1. C.W. 23. Comp. 234. 7. T.R. 276. 9. Do. 145. Term. 301. 370.

If however we can of such a limitation over & of failure of heirs of the body – as if given – if he dies without heirs Raw if these words are qualified & restrained by other words shewing them words to be used in their restrict sense, meaning at his death, tis a good entry D. Brown his dying without issue, is confined to the life of a person in esse. But when tis not an estate tail by implication courts will construe it in almost any manner to take it out of the technical construction. As if he says – if he dies without heirs at the time of his death – this is good as an executory D. So having no issue behind him. Fearn 351. Salk. 225. 1. Will. 207. Com D. 251. 3. T. R. 146. 7. Do. 322.

In Cann it has been decided by the Supreme court of Pennsylvania, that to A & his heirs & if he dies without issue &c this is to be construed according to the ordinary acceptation & not according to the technical meaning Dickinson vs Whittlesey.

My thinks it best to adhere to the english L. for otherwise much of the english L. must be overturned. You cant give both constructions for one might then operate as a remainder. Tis established that no entry D shall take effect as such, if it can take effect by way of a remainder. Any limitation of a future estate, tending to create a perpetuity is void both in Eng & Penn. It has been shewn that this construction which we have adopted wants allow of perpetuity by means of an executory D. – consequently no remainder which would create a perpetuity is good. E.g. To A for life with remainder to his unborn son is good – but remainder to the unborn son of his unborn son is bad – for in this case the ultimate fee is always in abeyance. consequently the rule is then particularly established, viz. that no limitation can be carried further than the unborn children of a person on person in esse. Fearn 391, 2. 2. D. R. 251

5 Rep. C. Ban. 592. 3. Burr 1632. 1. B.W. 392.
In some such cases courts of justice construe according to the doctrine of as near as may be i. e. they will give an estate tail to the first devisee rather than that it should fail. 2. T.R. 348. 284.

When a cont. or other interest is devised over on a condition annexed to a preceding estate if the preceding estate never takes effect, the subsequent estate takes effect. Plow. E.G. Devise to a for years — remainder to his eldest son if he takes the name of the testator, if not to B — if he refuses B takes. This is a substitutionary gift from the other bequeathed by the terms of the limitation itself. This differs from the gift of particular estates determining during the life of the testator. Cam. 169. 999. 414 to 418. 1. Vis. 42. 2. T.R. 740. Salk. 229.
So a devise to A the eldest son of his body & remainder to B in fee — now if A dies before the testator B will have the estate on the death of the testator. 2. Vin. 122. 2. Doug. 323. Bro C. 422. Plowd. 540.
But the ultimate limitation cant take effect, if the preceding limitation fail thro the contingency of the ultimate can takes effect as a substitute for the other — but the preceding one was a contingency too remote — a fortiori the latter is too remote — the precedent is had in alienation. E.G. Devise of personal property to A & if he dies without heirs of his body to B. remainder on a contingency to B. A. die without issue. Now can B take? No; for the limitation to B was void — the gift is void & so the substitute cant succeed the principal. 2. T.R. 245. 261. 2. H. Bl. 362. 1. Ves. 134. Cases 417.

If a subsequent estate is dependant on a former one & if the subsequent estate is devised E.G. To A for life, remainder to the unborn son of B. A refuses to accept the grant — or dies then is the particular estate the remainder fails whether vested or cont. 2. T.R. 245. 261. Cases 417. 1. Ves. 134. 2. H. Bl. 362.

Vested remainders are descendible, devisable, transmissible & assignable, before the remainder man comes into poss. - here the interest is vested - there are no contradictions to this rule. Transmissible has the same meaning when applied to real Prty that descendible has, to real. 2 Wood. 147 And according to modern authorities the same rule applies to cont remainders & every dr except that they are assignable only in eqty. Them latter are called a possibility coupled with an interest. There can be no assignment of a possibility at L - for here there must be an interest to assign. The reason why a dr of eqty will construe a grant into an eqty dr, when it cant take effect as a grant, is to further the intention of the parties. Fearn 2 Bc. 291. 339. Tolb 117. 2. 1. Bl. R. 222. 605. 1. H. Bl. 30. 2. Wood. 213. 249. 1. Ves. 56. 3. T. R. 488. 93. 4. Bo. 248. 1. Bro Chy 131.

A cont + an eqty dr cant be conveyed at L. by deed, before the convey happens - for there must be a present interest in order to convey by deed. 2. Wood. 187. 212. Law. Cont. 152.

& indeed it is a maxim at L. that no man can convey by deed except an actual or potential interest. But the cont interests of this kind cant be conveyed by deed before the convey happens, they may be passed away by estoppel, i.e. is by fine & recovery, if they are executed. The ground of this is that he shall not be permitted to deny that he had a present interest - & this is no exception to the rule that a man cant convey away that which he has not. 2. Wood. 212. 298. Bro Jac 599. Fearn 310. 313.

A cont interest is assignable in eqty - & the reason is that in eqty it is an agreement to convey hereafter, & this will be enforced. This assignment in eqty must be for a valuable consideration. 2. Wood. 213. 1. Ves. 409. Fearn 440. 2. P. W. 604. 2. Mod. 101.

An eqty dr of a cont interest may be released to the owner of the land - & this can be done at L. - for it is a release of the interest. 1 Ves. 411. 11. Mod. 492. 2. Wood. 213.

An assignment of the intended husband before the covenant happens may take effect in a court of equity, but not in a court of law. The reason why a court of equity will do it is, that they consider in the light of articles of agreement, & can compel a specific performance. 2. Wood. 213. 1. Ves. 409. Fearn 440, 2. P. W. 608.

If the first limitation is an estate tail then that follows will necessarily be so too. It is laid down as a general rule that when there vests in possession, the following vests in interest & becomes a vested remainder. This rule does not apply to contingent remainders — The latter branch of the rule needs qualification — for Mr Fearn that it cant extend to those cases where the subsequent limitations depend upon events which have not happened, when the first vested in possession. 2. Ves. 249 Doug. 478. Fearn 486. 496.

As to a double convey as a convey with a double effect. 2. Ves. 243. 249. Doug 470. 2. P. W. 686.

Estate in Reversion.

An estate in reversion is the residue of an estate for life in the grantor, & to commence in poss. after the determination of same particular estate granted by him to another. 2. Bl. 175. Co. Litt. 22. b. 2. Wood. 172.

The reversion rests in the grantor on reversion by act of L. without any reservation at all - he need not make any reservation in his favour, for what he does not part with, remains with him as matter of course. 3. Lev. 406. 2. Bl. 175, 2. Wood. 170.

There is this distinction between a remainder & reversion. A remainder can only be created by act of the parties or some stress of common assurance - but a reversion is made only operation of L. A vested reversion is as transferable as well as a vested remainder. Hal 30. Co Litt. 22 a. 2. Wood. 173. 2 Bl. 175.

It seems then there may be at C.L. such a thing as a cont. reversion - but I know of but an instance when this can exist - viz this - Suppose A conveys to B a reversionary fee as long as the manor in Dale, so long as he shall continue tenant of sd manor. Now the grant is indeed a feesimple, but only while he continues tenant of the manor in Dale - so there can be no vested reversion in the grantor - for its uncertain whether B will always continue tenant of sd manor. see 2 Bl. 107. as to a base fee.

Now such a cont. reversion cant be conveyed by deed any more than a cont. remainder can - for there is no present interest & there can be no attornment. As reversions are created by the act of Law, it follows that if one grants an estate for life with a remainder to himself, he grants still be a reversion. Thus you see there is properly no limitation for the law continues it in him. 2. Bl. 176. 2. Wood. 173. See 2. 321.

On the other hand if an whom grant an estate to A for life with remainder to B & his heirs - here B wants not have a remainder but a remainder - for his estate by the act of the act of the Statutes. 2 Bl. 176.

When rent is reserved as a loan the rent for all the remainder & by a grant of the remainder the rent will pass with it. So A leases to B for 100 years at 100 ℔ per year & and at the end of ten years A grants to C now C will have the rent. Co. Litt. 143. 2 Bl. 174.

But this is not inseparably incident to remainder, for by special provision to the contrary remainders may be conveyed without rent & rent without remainders

A remainder will not pass by a general grant of the rent, tho the rent will pass by a general grant of the remainder. Co. Litt 151. 2 Bl. 176.

It was a rule of C. L. that where one had made a loan he could not grant the reversion till the day was turned. This is founded upon the doctrine of Attornment Now this doctrine is now entirely out of use it would seem, that this rule would of course & by presumption be now reversed in Eng. 2 Wood 173. Litt. Ed. 567. Co. Litt 46 b. 314 b. 2 Bl. 324 2 Atk.

A reversion may be granted by using any words expletive of the intent intended to be conveyed the word lands will pass a reversion. 1 Wood 174. 10. Co. 107 a. Plowd. 493.

A freehold vested reversion can only be granted by deed & Attornment or by fine - no livery of seisin is necessary - but a vested remainder for years before the stat. of Frauds & Perjuries might be conveyed without a deed for this is a chattel interest - but this cant pass without a memorandum or some writing. 2 Wood. 174. Perk. 861. Perkins note 61. Litt Ed. 567.

A devise of a reversion is good without any attornment. 2. Wood. 174. note.

As the whole reversion may be granted away, so it may be subdivided & a particular estate, or an estate carved out of it, & conveyed over leaving an ultimate reversion in the grantor. 2. Wood 174.

There may be a reversion of a chattel as well as a freehold estate. 2. Wood. 175.

A reversion expectant on a fee tail the law regards as of no value for many purposes, especially for the purpose of suffering a recovery. P.W. 443 3. P.W. 258.

It is a general rule that when a greater & less estate meet in the same person, the less is merged in the greater, if there is no intervening estate. Thus if a tenant for years purchases the fee, he ipso facto ceases to be tenant for years. This proceeds on the ground that there is a virtual surrender of the former. 2. Bl. 178. Bro. C. 302. But to produce this effect there 2 estates must be in one & the same right & in one & the same person. Plowd. 418. 2 Bl. 177. Bro. Jur. 275.

But if an estate tail & a reversion in fee should meet in one & the same person & same right, still there would be no merger, & the reason is there could be no surrender. 2. Bl. 177. 6 Co. 61. 8 Do. 74. Bro. C. 302.

Additional cases as to merger 1 Inst. 338. 3 Lev. 438

Joint Estates.

An estate is joint where there more owners than one, & the estate is undivided among them - Of them there are three kinds. 1st Estate holden in joint tenancy. 2. in coparcenary 3. in common.

I Joint Tenancy.

An estate in Joint Tenancy is where lands & tenements are granted to two or more persons to hold in fee simple, fee tail, for life, for years, or at will.

1 Joint Tenancy is always created by the act of the parties - & never by operation of law & consequently must be by deed or D.

The quantity of interest in the joint tenants must be the same - it must be created at the same time & by the same instrument - When all these things concur the estate is a joint tenancy, unless there are in the instrument some words shewing that were not the intention of the grantor, that the grantees should hold as joint tenants.

In the state of N.Y. this R of the L. L. is by statute reversed - & an estate granted to two or more is a tenancy in common - unless it be expressed in the instrument that the grantees shall hold as joint tenants.

In an estate of this description the act of one of the tenants is the act of all - & what is done to one is done to all - As if rent is reserved to one it enures to all - & where an injury is done to the land all the tenants must join in the suit or the

wrong doer.

In Ben however this R is dispensed with - & one of the tenants may sue for an injury done to the whole - This was first established in the case of coparceners, & no inconvenience being found to result therefrom, was extended to joint tenants of the other two descriptions.

One joint tenant can never sue another in trespass - but the stat of Glouc. has given the party injured in such case, an action of account This stat has been adopted in Ben.

So also if one joint tenant is guilty of waste, tho there could have been no remedy at C. L. - the stat has subjected him to an action of waste.

In estates holden in joint tenancy the jus accrescendi prevails, & the survivor takes the whole - & this applies to fee as well as to real fee tail estates holden; hence his rights descendible to the heirs. This doctrine is abolished by usage in Ben.

In Ben the estates of joint merchants, & the stock owned jointly by farmers are exceptions to this R - these dont go to the survivor, but to the heirs of the deceased.

Joint estates may be severed by the parties in their life time - & by upon the stat of frauds & perjuries they might be by parol - but more it must in writing - & if the division is amicably made by the parties - each quit claims to the other his right & title to the part which

the other taken.

If one of the joint tenants refuses to divide, the other by the stat. 31. Hen VIII can compel him to do it by writ of partition - In this writ the title which the plff & deft have to the land is set forth, & the ct upon a writ to the sheriff commanding him to go with twelve men on to the land & make equal partition of it - & which when done is returned to the ct, who accept of it as they do a verdict - & if the party is dissatisfied with the partition he may object to it as to a verdict, by motion in arrest.

In hor the sheriff goes out with three men & their partition is passed conclusive upon the parties - tis not returned into ct.

III Coparcenary

An estate in coparcenary is where lands of inheritance descend from the ancestor upon two or more persons — Hence multiple joint tenancy is created by operation of L. only, & never by the act of the parties At C.L. it can never arise except in the case of females — for if there is a male he or heir must exclude the whole — Coparceners then have the same quantity of interest & the same title — but it may not have commenced at the same time. Thus A dies & his lands descend to his sons B. & C. — & before partition B dies — & his undivided moiety descends to his son D — here D & C. are coparceners.

The entry of one coparcener is the entry of both — No action of trespass lies by one coparcener vs another, tho by stat an action of account is given them — but they have no action of waste — for at C.L. they were compel a partition — In this estate the jus accrescendi does prevail.

III Tenancy in Common

Tenants in Common are such as hold by several & distinct titles but by unity of possession. Hence the moment a joint tenancy or coparcenary is dissolved it becomes a tenancy in common.

A tenancy in common may be created by express words in a deed & under all circumstances the intention of the grantor in this respect must govern.

The tenants may by stat. compel each other to make partition — there is no survivorship.

In this estate the entry of one tenant is the entry of the whole and one tenant in Common has no action of trespass against his fellow — but as in coparcenary they are entitled to the actions of waste & account.

The stat of limitations cant regularly run in favour of one tenant in Common against another — & this will extend to joint tenants & coparceners — and the reason is that the possession of one is the possession of all.

But if one enters into possession & claims the estate as all his own, & holds adversely to the other tenants his possession will then give him a title as to them all, if it continues for the time required by the stat.

When one tenant is wrongfully held out by another, & this not only to obtain his share of the profits that has already accrued, but to get into possession, he may for the former have an action of

account, & for the latter a writ of ejectment - not however to eject the other but merely to put him self in.

The trespass &c. A dont lie in favour of one tenant in common vs another, yet if one is guilty of an entire destruction of the Poty, or any part of it it may then be maintained.

Incorporeal Hereditaments.

Real prty as we have it is divided into corporeal & incorporeal Hereditaments. The former of that which is visible & tangible - The latter are defined to be rights, issuing out of things corporeal, whether real or personal, or concerning, or annexed to or exercisable within the same.

Thus where one man has the right of way over another mans land - here the right exists without an ownership of the soil - & the interest is real & descends to the heir.

This rights of way be gained by mere implication of L. For if A sells B land which is enclosed by his own, he impliedly grants a right of way over his land.

A singular question arose in Ken - where the vendee levied his execution on a part of the debtors land, in the middle of his farm. As his title was gained by his own act, & not by the joint act of himself & the debtor, it was held that he was not entitled to the right of way - as it was his own folly to have elected this piece, when he might have had that which was accessible - A rights of way is always created by a cont express or implied - here there was none.

Title to Things Real.

Title is the means whereby the owner of lands has a just possn of his prty. 1 Inst. 345. 2. Bl 195.

To form a complete title several degrees or stages are requisite. 1st a naked possn, without any apparent right to hold - as in case of disseisin. 2. Bl. 195.

And until some act be done by the rightful owner, this is prima facie evidence of a legal title. 2. Bl. 196.

Without possn no title is perfect. 2 Bl. 196.

The 2nd step towards perfect title is the right of possn. This is first an apparent, & 2nd an actual right of possn.

The third step is a right of property.

The fourth is, when possn, right of possn & right of prty are joined

Descents

There are two methods by which Prty may be acquired – by Descent & Purchase – the latter includes every species except that by descent – Purchase may be termed actual Prty – Descent, ancestral – Devise by Deed of gift is the same a descent.

The L.s of descent in different states are different – they have not the L. of Eng. for their basis – the lis interwoven with the whole system of our government – but they strictly conform to the Eng. lish state of the distribution of real Prty. Real Prty in the U. S descends by the same R.s as does real in Eng.

By this stat real Prty descends to the children of the deceased parent – or if they are also dead to their legal representatives – If a man dies without issue his Prty goes to his next of kin – but if they are dead to their legal representatives – 29. Car. II & 1 Jac. II.

If a person dies intestate leaving none of those relations who are descendants in a direct line from the ancestor, & take as such the general R of the stat. of distributions is, that his pers. estate shall go to his next of kin in an equal degree.

By the state 22 & 29. Car. II, the mother took the whole of the estate of the intestate, in case there were no children or father living – & that to the exclusion of the brothers & sisters – but by the stat 1. Jac. II the mother is at perfect brothers & sis ters degraded, to the second degree, & can take only

an equal share with them.

It is also necessary to observe that by these statutes no preference is given to the male line to the exclusion of the female — neither is the whole blood preferred to the half blood.

We will now shew who those persons are that are entitled to the estate of the intestate person and to the stats 22 & 23 Car. II & 1 Jac. II.

1. When a man dies intestate leaving a W. & children the W. takes one third of the real estate, & the children or their representatives the remaining two thirds.

2. If there is no W the children & their representatives take the whole & that in exclusion of all descendants & collateral relations

3. In case there is no child or representation of a child, the W. is entitled to one half.

4. If there is no W. or lineal descendant, the intestate father takes the whole.

5. If the father is dead, then the mothers & brothers & sisters of the deceased, & the children of the deceased brothers & sisters (by representation) take the whole by equal shares.

6. If there are no brothers or sisters, or representations of them, the mother has the whole.

7. When the deceased leaves neither W. nor child nor representation of a child, nor father nor mother, but

brothers & sisters, & children by brothers & sisters deceased, these brothers & sisters take per stirpes & not per capita - i.e. what their parents would have taken had they been living.

8. But if all the brothers & sisters of the deceased had been dead, leaving children, some more & some less they would take per capita equal shares.

9. If a person dies intestate leaving neither W. nor child, nor father nor mother nor brother nor sister but has a grandfather or grandmother, such one will have the whole real estate in exclusion of uncles & aunts - & if there is a grandfather on the fathers side, or a grandmother on the mothers side, or vice versa, the whole is divided between them

10 If the intestate leaves no relations but uncles & aunts, & their children, these will share the estate per capita, they all being the same degree of kindred.

11 If there are none but grandchildren of the uncles & aunts of the deceased, & the children of uncles & aunts, they all take per capita equally - but had there been only one uncle or aunt living, such one would have taken the whole, in exclusion of grand nephews, & children of uncles & aunts of the deceased - for here we may observe of the aforesaid stat, that representation ceases after brothers & sisters children - i.e. after the third degree of kindred in the collateral line - but in a direct descending or ascending line representation continues ad infinitum

We may further observe that when there are relations both by the father & the mothers side in equal

degree of kindred, they shall equally alike – Provision that an acquittal of him will be presumed by them of either side – & the half blood will be equally entitled with the whole blood & infants in ventre sa mere with those already born.

The three states declare that the nearest of kin shall take in case the descending line is extinct, the decisions have departed from them, & prefer the brother in exclusion of the grandfather, who are both of an equal degree – With the exception those in equal degree with the deceased take equal shares in exclusion of all others – & if there is but one in the third degree he takes in exclusion of all in the fourth or more remote degree.

Advancement.

If the intestate in his life time has settled any estate in lands or given any pecuniary portion to any of his children, equal to the distributive shares of the other children, the child or children so advanced shall not have any part in the surplusage with the other children – But if the estate so given is not equal to the others shares, the children so advanced shall as much as will make them equal. But the heir at L. shall have an equal part in the distribution with other children, without any consideration of the value of the land, which it has by descent or otherwise from the intestate – But if the advancement is of any other thing than lands, made in the life time of the father he shall abate for the same in like manner with the

other children – do otherwise – shall being out Hotch Potch such advancement (not being lands) made by their father, before they shall be entitled to the same distributive shares – for the stat. evidently intends to promote equality as much as possible.

It has been determined in Eng. that small moveables and sums occasionally given to children, cant be deem'd an advancement or part thereof. Their maintenance, money, an allowance made by a father to his son whilst at the university, or whilst on his travels, or the like is not to be taken as any part of an advancement – they being merely his education.

But in this country J. R. says the sons expenses at college, especially if found charged in the fathers book as his son, would be considered as an advancement –

The fathers buying an office for his son or in the navy is considered in Eng as an advancement – so a provision made by a more settlement altho' in the nature of a purchase, is counted an advancement, & must be brought into Hotch Potch before a distributive share must be allowed.

Who is Entitled to Administration.

The next of kin to the intestate is entitled to administration – & to whom the ordinary must grant general letter of administration as the stat

31 Ed III & 21 Hen VIII cont

Among those of equal degree the ordinary may chuse whom he pleases - But these stat the H & in case of his death the representatives (in case he dies before administration is taken out) will be intitled to letters of administration on his Wife as tale, & not the next of kin. So the ordinary is compelled to grant administration of the effects to the widow or next of kin - but he may grant it to both or next of kin at discretion.

Originally the goods of the intestate went to the king thro his minister of justice - Afterwards the crown in favour of the church intrusted the prelates with this branch of prerogative & they disposed of at their pleasure in favour of the effects of the deceased - These things remained in statu quo until 13 the stat 13 Ed III which enacted that the ordinary should satisfy the debts of the deceased as far as effects would go - but still if there was a residuum the ordinary would keep that as before the stat - But from the improper use to which the residuum was put, the stat 31 Ed. III provided that in case of intestacy, the ordinary shall depute the nearest friends of the deceased to administer his goods

This is the origin of administrators - the stat 21 Hen VIII enlarges the power of the ordinary & authorises him to grant administration to the widow or next of kin or both at his discretion - & of persons of the same degree of kindred, he also has an election to accept which he pleases.

But still after the payment of debts the action

had the disposal of the residuum till the 22. & 23 Car. II. commonly called the stat of distributions, explained & enlarged by the stat 1 Jac. II, by which the admr may be compelled to make distribution to the nearest of kin of the residuum after the payt of debts. Hence by the stats 22 & 23. Car. II it appears that H was obliged to distribute the residuum of the Ws estate to the next of kin. But the stat 29. Car. II enacts that the stats 22 & 23 dont extend to femes covert intestate, that die intestate but that them the may demand & have administration, of their own debts credits, & all other goods estates & recover & enjoy the same But if the W. was executrix to another, then as to goods she has in that capacity administration must be granted to her next of kin.

Hence in the stats 22 & 23. & not in the 29 the question may arise, whether may have the Ws goods paying of the payt of her debts, the next of kin as he W? ought also which shall be after or after provided it is not absolutely settled by the stat. 31 Car. III & 21. Hen. VIII as the stat 22d seems to imply, by appointing the right of administration to be in the H.

Descent of Real Prop in Eng.

The doctrine of descent according to the Engl. & might more properly be known in the state of N.Y. than in the union - the state not having made provision for the gentle descent & beyond it, but leaves the estate to be distributed according to the L. L. of Eng.

1. In the descending line the eldest son excludes all other children - if there is no son the daughters inherit together & are coparceners.

2. If the eldest son is dead leaving issue the female, it excludes all other relations

If the lineal descendants fail the estate must ascend - we will therefore consider the ascending line.

In the failure of lineal descendants the estate must descend to the next kinsman of the whole blood if such kinsman is of the blood of the first acquirer of the estate - that is to say if the estate descended from R.S. the father to J.S. the son then his issue can inherit it - if it came from S.S his grandfather, then it admits males &

But when it is known to descend from the father's side it can never go to the mother's & vice versa. Thus if a person first acquires an estate it lets in no person of the collateral line but the policies in such cases supposes it to descend - first from the father's side - second from the mother's side in the following manner - viz.

1. the L. supposes it to descend from unckle the father of the intestate - his descendants

being extinct it supposes it came from Solomon his grandfather – then descendants being dead it supposes that it came from Jotham the great grandfather which lets in his great uncles &c – but the blood of the Stiles is extinct altogether – then search the maternal line of the father – & if no relations of the Father's side can be found, i.e. paternal or maternal, it then Stiles or Rowes – then the L supposes the estate to have descended from Mary's father, Samuel Hall – then in the mothers paternal line. that extinct – then in her maternal line

Cases Distributed.

1. J. S. died having sons A & B – & daughters C & D – & the eldest son excludes the whole.
2. H. left the same & 4 daughters C & D being dead & excludes all others
3. A & B are both dead without issue – C & D take together.
4. C. is dead having C & G sons – & F daughter E takes what his mother would have taken & excludes them & F.
5. D is dead having daughters K & M – they to be together as coparceners, what their mother would have taken.
6. No issue of F. S is living – his estate goes to his brothers of the whole blood – the eldest excluding the youngest till all dead, then to the sisters together & issue.
7. No brothers &c living the estate goes to uncles &c as in the last case.
8. No brothers &c living the estate goes to great uncles &c his fathers brothers – not to his fathers mothers brothers.
9. No great uncles living it goes to his fathers grand fathers brothers &c.

Descents.

10. The Sister are all dead the estate goes to the Father or mothers brothers &c

11. If every one else is dead it goes to the mothers paternal line.

12. If they all living dead it goes to the mothers maternal line.

The Estate then Escheats.

Alienation by Deed.

Alienation of real prop is in two ways — by operation of L & by deed.
When prop is granted with by the owner in fee simple, for tail or for life, it must be by a deed or at least a writ instrument the estate for years need not be created by deed, but it must be by a written instrument.
The same plan for reasons that deeds should be recorded — in others it is not.
Formerly lands were conveyed by livery of seisin or delivery But the inconvenience & uncertainty of this method of trans fer, induced a change to that of deed — by which change the delivery of a deed was substituted for a delivery of the land.

The stat of frauds requires that every agreement respecting conveyance of real prop should be in writing
In eqty a court to convey amounts to the same thing as a conveyance. For a breach of such agreement, a man in a court can merely recover damages — but in eqty are executive of the it, will be decreed. The prop is here considered as belonging to the covenantee, & if he dies it will descend to his heirs.

History of Alienation by Deed.

Originally when our Saxon ancestors came into Eng there was no such thing as alienating land — trees occasionally for services by by the people of their chieftain according to his will — & then they acquired no title to the soil any further than a right to improve it, so that they were merely tenants at will.
But in process of time it came to be granted first for years with the condition of faithful services — & afterwards for life.
This last practice gave rise to the rule that land granted to

a man, no time of continuance being specified, should be construed into an estate for life, this being the greatest estate that could then be conveyed – & the maxim is that a grant must be taken most strongly on the grantor.
But at last real forty was given to a man & his heirs i.e. to his use for life & then to his ~~descendants~~ children & descendants to the remotest posterity – still however no man could alienate

But soon after this the wages for crusades coming on, & Gentlemen of land being anxious to convey, a way was opened by which an individual might dispose of the forty he had acquired as contradistinguished from what he had inherited. The next change was liberty to alienate all acquired forty with the heirs consent. Then came the stat Westm 1st by which he might convey his acquired forty – but if taken to him & his assigns, all. Another step towards unshackling conveyances of land was permitting one to sell a ¼ of an entailed estate – & by the stat Westm 2nd this practice was sanctioned, & another fourth added. The stat quia emptores 18. Ed. 1st gave further facilities, by permitting all lands except those held of the crown to be sold – & by stat 34 & 35 this exception was abrogated & all real forty might be alienated on the payment of a fine; & by stat 4th 2nd without paying a fine.

By stat 19. Ed. 1st on which are founded all our laws for selling land for debts, half of a debtors land may be taken on execution & used to satisfy the demands of the creditor.
In this country the mode of selling land for debts is not the same as in Eng – tho the principle.

Who cannot Alienate

A person while under age of profn cant convey – tho he can when of profn – the object of this R is to prevent contention –

hence conveyance may be made to the man in keeping for this quiets the dispute. This is by a principle of the C. L. & not as has been sometimes supposed by the stat. Hen 8th. Rond 88. Hawk. P. Cr. Lead Pictures Title. Mom 761. Co Litt 9 Bacon.

Remainders & reversions can be sold - for during the continuance of the particular estate the remainder man cant be ousted.

In Eng. men attainted of treason cant convey - & in this country Piety is not forfeited for felony.

Another class that cant convey are non compotes mentis - under which are included, idiots lunatics, & indeed all persons who have no legal capacity to transact business. In the reign of Ed. 1st it was not doubted, but what the want of a person ~~of a person~~ of this description was void - for so stated in their registers to have been so decided. Subsequent to this however there was a change - but in the reign of Ed. 3d it was finally decided, that one who was non compos mentis could not himself plead such want of capacity, to avoid a cont - & the reason given is "that no man shall be allowed to stultify himself. This J. B. considers unsatisfactory - his heirs can do it.
In case of this kind a commission may issue to try if he be lunatick - which is in reality the same as if avoided by himself - It is usual however now for the attny general to file a bill in chancy to try the question of the contractor's sanity. Ld Mans. observes that this is not a sensible R - & Powell says, that there is danger of men fraudulently taking advantage of it, in case they make bad bargains, by pleading lunacy. But this applies equally to the limited R. 2 Bl. 291. Doe v. Fenn. 4 Bo. 133. 1 Bo. 123. Str. 1104.

There is one species of incompetency, viz intoxication which has little indulgence granted it, & the reason is because a man living

it upon himself — Hence the L. holds the conts of a drunken man binding — tho in Chy, if one person gets another drunk & induces him to make an unreasonable bargain, the drunkard will not be bound by it — & the reason is that to prevent drunk ness, not to prevent fraud — But there is a principle in Chy that goes still further — "no man may take undue advantage of another's situation" — on this ground the drunkard is not bound in the above instance — & now is the J. R. thinks in com. cases where he is bound into unreasonable bargains.

Minors can set aside their conts — J. R. thinks there is gen eral rule whether there void.

But these characters can all of them hold fealty if it is convey ed to them

In Eng. a married woman by joining with her H. can con vey freely by fine or com. recovery — & in this country by join ing with him she can do it in the com. way — If she conveys by fine without his consent, he may disagree to the sale — but if he neglects to do this she is bound by it — A married wo man can purchase freely.

Persons under duress, tho they have in general no privileges, & are under no disability, are not bound by their conts, they being voidable — by duress is meant false imprisonment.

Aliens tis to cant convey land — & the reason given is that they cant hold it — But if an alien purchases real freely of a man, the purchaser cant reclaim it — & unless a com mission is issued to him by govt he will hold it as all the world — & if it descends to his heirs they will still hold it — The reason why aliens are excluded from the purchase

of real prop is to prevent their engaging in agriculture real pursuits – hence he cant take a lease of land unless he is a farmer & restricts himself to a house, shop, & garden

Papists could not formerly convey – tho as the L. now stands they can.

Of the Requisites of a Deed.

A deed is a writing sealed & delivered conveying an interest in lands.

It must for a good or valuable consideration – a good consideration is love affection &c – a valuable consideration is money prop &c.

Good consideration deeds cant affect cr[edi]tors – for the maxim is "a man must be just before he is bountiful." This subject is almost inexplicable – Pow. explains it as well as any one who has made the attempt.

All agree however that fraud cred[ito]rs if existing are not good without a consideration – but when executed they are binding.

It is so that if lands are conveyed without a consideration the cred[ito]rs is not void – this principle appears intricate to learners – It had its origin in the civil wars of York & Lancaster, at which time twas customary for a man to convey prop to another for his own use – from this state of society arose the L – for twas presumed that if in a sale of land there was no consideration stated, the conveyance was meant to be for his own use – & going on this presumption, the st 27 enacted, after the introduction of the statute of uses, that the sale was only to secure the owner, the

use of the thing sold, & accordingly they gave it to him.

In every conveyance there must be a consideration good or real.

So said that when the conveyance is in writing, if a consideration is expressed, tis conclusive that there is one — for parol proof can never be admitted to deny it — still however, if the writing shews of itself that there is no consideration, tho one may be declared to exist, the conveyance is bad, & may be avoided by demurrer. But on the other hand if no consideration is expressed, parol testimony may be admitted to shew that there was one.

In sealed instruments where no consideration is expressed tis unnecessary to shew that there was one, for this the seal always implies on account of its solemnity. The magnitude of the consideration the seal does not shew — nor is it necessary that it should, for this may be proved by parol — but if this is not done & the seal alone is relied on, the damages given will be merely nominal. So a deed of gift will not even pass a chance on such a count. In a bond you will recover the whole sum, if tis a thousand pounds. — this depends on the form of the declaration — in bonds tis an action of debt & the whole is recovered — in covenant an equitable recovery is had — in a sealed contract whether covenant or bond, if the consideration is shewn in the instrument, to be good for nothing, no recovery is had — for tho the seal supposes a consideration, if this presumption is rebutted in the instrument, the seal will not give it effect. I go on the ground the legal title passes — A corrupt consideration may be proved corrupt by parol.

If the deed is fraudulent as it respects creditors, still tis binding between the parties – if, who owes B. 500 £, gives him a deed of forty mouth 100 £ – A owes other money – now this conveyance is not binding in the least as it respects other creditors – for the L regards this as a fraud & considers the forty as conveyed to B in trust for A – tho tis binding between the parties –

If the deed is "actually" as contra-distinguished from "legally" void, it is not good as it respects either subsequent or prior dent creditors – If "legally" void, tis binding in all but precedent creditors. The reason why these conts are good between the parties is, that policy requires it.

A deed not fraudulent, but having none except a good consideration, is void as precedent creditors if the grantor cont with other forty pay them.

The consideration may be a full & valuable one, & the cont void. If A, owing money & fearing his creditors will take his forty, goes to B, telling him his situation & desires to sell & escape, & B pays him the full value of the land & A runs away, the creditors can take this forty from B on the ground that he knew of A's situation, & assisted him to elude the demand on him.

Fraudulent conveyances are good as the grantor, his heirs & tis so as the creditors. But this is not understood to preclude the creditors from making use of the forty thus fraudulently conveyed to discharge debts, but merely to prevent his taking it to pay the heirs & legatees – this applies to real forty & to real when tis liable for debts – the L. R. thinks it optional with the creditors, whether or not he will do this.

A disputed question. As a fraudulent grant is void, if the fraudulent grantee convey to a bona fide purchaser, is the land still holden to the cstes of the original grantor? If he was privy to the fraud it would be holden unanimously by - & if he was not R. still thinks it would. Sed so however that the bona fide purchaser has equal claims in equity with the cstes of the original grantor - but in answer to this argument comes in the stubborn maxim, prior in tempore, potior est in jure - & hinds this no construction which destroys the effect of a stat. is good - now permitting third purchasers to hold in the case under consideration, defeats the stat as fraudulent conveyances - for if the first purchaser sees the land in danger while possessed by him, he has only to convey to a third person, & the D is defeated which was always from his own fraud - A sells purty fraudulently to B - & B conveys honestly to C - now those who say that the claims of cstes ought to be defeated, assert that A could have sold the purty himself, & ask why B should not do it as well as he. The answer is that tho A might have sold for a sufficient consideration, B can't who takes it fraudulently, because by such sale, tho his purty would be increased, As would not - & A could not sell unless his estate received as much increase from the consideration, as it did diminution, from defeasing of his land. Sed so too that B may be brought to punishment, & compelled to pay the cstes of A the amount he owes them - but this can't be so, for the L. dont consult a person to change his cstes but in the solitary instance of H & W - If purty is sold by execution that is not the debt one, & if purty is sold in a market overt the vendee is secure - the reason of this says J. R. is public policy - fraudulent bonds in the hands of third persons who are innocent are void.

Further requisites of a deed. Tis sd that the deed must be written on paper or parchment – tho J.R. doubts whether one must ten on something else would now be good. 6 Litt. 35.6.

The deed must be sealed – the reason why this came into use was that when deeds were first introduced, men could not write, tho they could seal.

At b.l. signing was unnecessary.

It must be delivered. The inquiry here instituted is has the grantee got the deed with the consent & intention of the grantor? There may be a formal delivery of the grantor that is void – 2. Roll. 25. Owen Rep. 95.

The grantee keeps of the deed is great evidence of a delivery – tho this may be rebutted.

Can a deed be delivered to the grantee as an escrow? J.R. thinks it cant – for in his opinion the grant takes in presenti, or not at all – As time a concurrent act, to be found at the time of delivery, as the part of money, or the delivery of another deed, may be required – yet in this case there is no delivery till such concurrent act is done. Dyer 34. Moores R. 647. 19. Hen. VIII 27. Do. Do. Cro. E. 520. 835. 584. Moore R. 642. 2. Roll. 26 25. Co. Litt 36. 1 Leon 140. Holt. 246. 9. Co. 2.

Tis sd a deed need not be signed – tho Bl. says it must be sealed & he thinks signed. Cro. E. 150. Salk. 462.

Tis sd that a deed must be read – tho J.R. thinks it needs not unless some person concerned saith is blind or cant read unless it to be done – in such he thinks it must. 2. Roll. 28. 2. Co. 9. 9.

A deed must be dated - the word dated is here used in its common acceptation. When it is doubtful at what time it was delivered reference may be had to this - which is prima facie evidence of that fact - the parol is admissible to show its incorrectness. If there is no date you have this prima facie evidence of the time of delivery - & this is all the evil that is sustained by the want of it - In bonds & notes a date is important. Co. Litt 6. 2. Rol. 21. Yelver. 193.

At C. L. witnesses are not necessary - tho in some states they are made so by stat. If there are no subscribing witnesses, the deed must be proved by other persons who were present, or by the hand writing. If there are wit nesses they must be had, if within the reach of a subpoena - if there are none, others may be called - for the maxim of the C. L. is that the best evidence that can be procured must be made use of.

If a witness is not in the state where the trial is had the Judge, therefore, is unnecessary to have him testify - for a deposition cant be enforced from him by C. L. & if it could, it would not in some states be admitted as proof - & a subpoena wont reach him, as our states are independent

By our stat two witnesses are necessary to a deed - it must be acknowledged before a justice - & then it must be recorded in a public office to complete the title - The C. L. of Eng. dont require a deed to be recorded - tho they have four recording counties - & in these as well as all other countries where deeds are in use, the deed is allowed from the time of recording - & not from the date - The object of recording is to prevent frauds.

Suppose A makes a deed to B - & B neglects to record - A then makes a second deed to C who knew of the former

one to B— b gets his recorded— still he does not hold— for he knew of the conveyance to B— & the object of the L is to save third persons from harm, who are ignorant of a former conveyance.

A reasonable time must be allowed a man to get his deed recorded.

As to Delivery 'Tis a R that if a person who has no capacity delivers a deed & afterwards on obtaining a capacity redelivers it, 'tis good.

Suppose a person not having capacity delivers a deed as an escrow— but afterwards obtains capacity & redelivers it— 'tis not good— the reason of this is that when the first delivery was, no capacity (read time present) — & the second delivery on the happening of some condy refers to that & is of course void.

Suppose a person has capacity, but labours under some impediment as disseisin, & delivers a deed— & when the impediment is removed redelivers it, 'tis not good— the reason is, ita lex scripta est, or perhaps because the stat says the deed of a disseisee is void to all intents & purposes, & of course cannot be made good by any subsequent act— 'tis the same with an escrow. Co. Litt 44. Cro E. 416. 9. Co. 35. 2. Roll. 26.

Parts of a Deed.

The parts of a deed hardly need mention— Deed contains consist of 2 kinds by L— viz one of seisin & another of warranty.

There may be an express cove^t of seisin – On a cove^t of seisin if the vendee hasnt poss^n an action may be brought immediately – on a cove^t of warranty it hasn can till the vendee is ejected – the nature of this cove^t of warranty is to secure ~~into secure~~ the buyer as all claims demands &c – but this dont mean to protect him as tortious claims – but only as legal claims –

In this cove^t the grantee if sued must give the grantor notice – if he has not & dont defend suit, he cant recover as the grantor. But if he has give notice, the grantee can recover of the grantor at all events & under all circumstances – for if the grantor dont defend in reason he loses all course.

The course of notice is to send to the grantor a writing returnable to ct, stating to him the case.

Quit claim deeds are hardly touched on in the books – they have no cove^ts. Its so however that if the consideration of any contract fails the money paid may be recovered – apply this R to quit claim deeds – But here a difficulty arrises – the man who sells does not perhaps ask the full value of the land on account of his doubtful title Here there is a bargain in which there is a hazard – & the purchaser after having lost ought not to recover. – but if there is no cove^t of hazzard, as if the vendor had no cove^t of claim on title, the purchaser ought to recover.

Who has a right to sue when the cove^tor dies. Some cove^ts are so to run with the land, go where it will. – If the breach of the cove^t is during the life of the covenantor, the exec^r of the cove^tee sues – but when after his death, the heir to whom the land & cove^t go, giving the action. 2. Vent 92. 1 Roll. 520.

If however the covenant dont run with the land the exte
cutor. 1 Vent 176. 334. 2 Lev 26.

If the covenant of seisin is broken as between A & B—&
B the covenantee dies, A having had no title to the land,
B's extrs must bring the action as A— for the cove-
nant is one that does not run with the land— his a personal
contract.

Suppose that A loans land to B for twenty years, on B's
engaging to pay 20£ per year— before the expiration of the 20
years A dies, B then owing him rent— here the action
is brought by the extrs of A, because the debt fell due
before his death. If however the land descends to C, As
heir & rent then becomes due, the heir must bring the
action— this is a covenant that runs with the land, &
whoever owns this has a right to the rent.

A right of way if attached to the land, is a covenant that
runs with it— A right to water is of the same descrip-
tion— & whenever the owner of the land is injured by
an obstruction to the water he has his remedy as the
opposition. 1 Ball 721. 5 Co. 12. Co Litt 385. 1 Lev 122. 1 Salk 317.

Who is to be sued when the covenantor dies & the covenant
has been broken? By the E. L. a deed is a specialty— &
the covenantor having bound his heirs, extrs & admrs
either of them may be sued. The reason of this is
that the heir is bound by specialty debt, as far as
he has assets— while in debts of less solemnity he is
not bound.

In those states where the land that goes to the extr
is made use of by him to pay debts, the Judge thinks
that a recovery could not be had vs the heir— for
the prty neither real nor pers. comes to him until

all the debts are paid — & of course he derives nothing from his ancestor to satisfy these claims.

If party is so disposed of, that a part goes to the heir when enough is left to the exr to pay all the debts but he fails & escapes, claim in chy as the heir will be allowed — for no volunteer, of which description is the heir, can have his claim allowed before creditors.

Every grantor who conveys with a covenant that runs with the land, is liable to the subsequent grantees of the land, haf there can so many hands — Thus if A grants to B in a covenant of warranty — B to C &c — now the last grantee may sue any one of the precedent grantors — but if the covenant dont run with the land, he can sue no one but his immediate grantor.

Doctrine of the liability of the assignees of a lease. Now A loans land to B for forty years, with a covenant of out repairs or something in their stead — & B undertakes to C — Now under certain circumstances, C is as much liable to A as is B, whether A is named or not — In order however to lay C under this liability, tis necessary 1st That the covenant should be one that runs with the land 2nd that it should be something relating to the premises 3rd the thing about which it is convenanted should be in existence at the time — as to repair a house there in being on the premises. The ground of the liability is not the covenant but the enjoyment of the land. But a covenant that B shall build a new house is not binding on C — nor in any case is A deprived of his remedy on B — his right on C is only an additional security. B owes A 100 ℔ rent — Now the rent runs with the land — is created by the covenant & is covenant about the land — C is therefore liable for it. 4 Co 16. 2 Leo. C. 207. 5 52.

In all these cases B is bound although he is not named.

Cases where B is bound when named. When B binds himself & his assigns to do some act on the premises, B is always bound, unless the covenant is broken before it is assigned to him - then he is free from all liability. Suppose B covenants to build a house in new & after the time has expired, the act being then undone & the covenant broken, assigns to B - Now A cant recover as B - for he did not purchase B's liability to satisfy a broken covenant. ⊂ Co. 16. an important case 6. Carpenters case.

If A bases to B & B covenants to do some collateral act, as to go to Hartford his assignee is not bound.

Implied covenants. Suppose a deed of bargain & sale says I give grant bargain sell & bases, & dont expressly make any covenant - here is an implied one of seisin on which an action may be brought. 4 Co. 80. Cowth. 98. 2. Mod. 72. 1 Esp. 67.

In this case it is plain & reasonable that there is a covenant of seisin - but the covenant extends to quiet enjoyment during the life of the grantor & no further. Co. Litt 384. ⊂ Co. 16. 24. Bro. C. 75.

Different Modes of conveying Land.

There are various modes of conveying land - two only are or two are in use.

Alienation by Deed.

Lord says Bl comprehend all things of a permanent substantial nature — when therefore this term is used in a deed, there is not only a transfer of the soil, but of every thing attached to it as houses trees &c — this is all done by the term land per se — for cujus est solum ejus est usque ad coelum. Of course then if any thing is intended to be reserved, the reservation must be express. which may be full — as above — thus trees houses mills, pieces &c must be named or they go with the land — In cases of reservation except is the proper word to be used — coal &c &c will not pass with the freehold tho not expressly reserved. Co. Litt 143. 4. Mod. 11.

Coke says an exception of a thing certain out of a thing generall or certain is bad. As a lease of 20 acres save one — I B. thinks the exception bad on account of its uncertainty as it is impossible to determine, which one is meant. Co. Litt. 45.

So also if the exception is repugnant to the grant it is not good — as if A makes a lease to B of a piece of land & a house except the house, the exception is not good. 2. Roll. 553.

A conveyance of land, which was originally good, may become bad, by some subsequent event — as erasure or interlineation. The L on this subject is, that if the instrument or deed is altered by the party holding it, the instrument is void — tis of no consequence whether the alteration is important or not — for the object of the L is to prevent all tampering with written instruments — but if the alteration is made by a stranger, it must be important to render the writing void. This will not be forgery unless intended to pervert right & justice. 11 Co. 27.

By the C. L. if the seal was broken off by accident, after the land was profered by the grantee, the deed was bad — I R think, however that this would not be so decided at the present time in any ct of justice. 1 Roll 40. 5 Co. 23.

Feoffment was a fee simple conveyance of land, by the delivery of something belonging to it, as a twig — a bit of turf, the door latch of a house &c without writing — as a token of the transfer.

Another species of conveyance was by gift of an estate tail — this was by deed.

A third kind was a grant whereby, by deed, an incorporeal hereditament was obtained.

A fourth method was by lease — this was either for years or for life — in this conveyance there must be a description of the land, tho no technical phrases are necessary — & the instrument recites as broad & liberal a construction as a will.

A fifth species of transfer was by a deed of exchange — here one man changed his land for another's.

A seventh was a writ of partition now in use.

The eighth & last that is worth meaning was a deed of release. It is a maxim of the C. L. that when a man is in posse of land, having a legal or equitable claim to it he may take a deed of release from any other person — thus if A holds land of B as a tenant, B may convey to him his title — if however B were to attempt to dispose of it to another with feoffment, the conveyance would not be good — this regulation springs from the doctrine of uses.

Alienation by Deed

Uses were considered as real prop. & were descendable & devisable, tho not forfeitable, nor subject to dower or curtesy, nor liable for debts.

If the person infeoffed for the use of another, sold the prop. it did not pass unless the purchaser was ignorant of another man's claim to the use

Uses were were made liable by stat. for debt, for forfeiture &c - & at last by stat 27 Hen. 8th were placed on the same ground with other real prop.

After this last stat the doctrine of uses became valid & important, except as it gave rise to conveyances by lease & release, & by bargain & sale.

Bargain & Sale is a kind of real contr. whereby the bargainor for some pecuniary consideration, bargains & sells, that is, contracts to convey the land the land to the bargainee; & becomes by such bargain a trustee for, or seised to the use of, the bargainee, & then the stat of uses completes the purchase: or as it has been well expressed, the bargain first vests the use, & then the stat. vests the poss.n. 2. Bl. 338. Atwo. Jac. 696.

These deeds of bargain & sale to pass a freehold must by stat 27 Hen. 8th c. 16, be made by indenture, & & enrolled within six months in one of the cts of Westminster hall, or with the custos rotulorum of the county. 2. Bl. 338.

Lease & release.

trust estates came into use to make provision for some idiot, lunatic &c. Thus suppose a gift or estate to B to hold in trust for the use of C. Now cts of E will decide that the poly goes to C— tho they have cqty to determine as they please. Dyer. 115.

The stat speaks of those seised to the use of another —now seisin implies real poly. If then A gives poly to B for the use of C for an hundred years, C has only the use. Dyer. 363.

Trust estates are to be enforced in cts of cqty —

They must be executed with the same solemnities as conveyances of other kinds— the conveyance cant be by parol, but must be either by deed or D. which must be executed with the usual solemnities.

The parties of trust estates are in general the same as those of other estates.

The cestuy que trust, may devise his trust, or alienate it as he sees it.

If a feme covert has a trust estate, her H is entitled to be tenant by the curtesy — this if the H. has one the H is not entitled to dower. Mr Sedman J. R. thinks to be a hasty one, that means the remainder of the L — & supposes that if it were to rise in any state of the union where it is unsettled, it would probably be reversed — the decision was had in Surry.

Trust estates are forfeitable for treason, & in cases of felony escheat to the crown — whereas other estates go to the crown for one year & then to the lord of the manor

If the trustee, professing the legal title sells the land to a bona fide purchaser, the purchaser will hold — such an event however is next to impossible — for it rarely happens that the trustee professes in the land himself — & the sale of one discovers it void — & besides this the cestuy que trust, very often has the possn — & in recording Counties where all titles to lands are known it never can be true in legal acceptation, that a third person is ignorant of a trust.

The cestuy que trust can in general enforce the legal title to land from the trustee, in a ct of equity. — It is true however that if A makes B trustee of land for C, with a manifest intention that he shall retain it in his hands & manage it, for C, who is not perhaps fit to transact business for himself, an account of his being an idiot lunatic or the like, C can in no way get his title — But where there is no ground for presuming such intention, the cestuy

que trust always can obtain it — Thus if A makes B trustee of land for the minor son of C. when such son attains full age he can always obtain the title. 2. Bl. 393, to 398. 2. Roll. 780. Parkham 76. 1. Eq. Ca 388. 1. Atk. 1. 1. Saunders. 424.

Of title by Levy of Execution.

At C. L. while the debtor was living there was no such thing as taking land by levy of execution But the cred by a writ of levari facias might levy upon the emblements to satisfy his debt - & if he had leased his land it might be levied upon & tho no title is acquired to it in this way, yet the lessee is made the tenant of the cred, & is bound to render the rent to him 9. Co 11.

When the debtor was dead his debts became liable thro for debts of a certain description, as specialty & recogl debts - When however was taken per them the fee did not pass but the land was appraised off to the cred at an annual value - & he then held it until such time as his demand was satisfied - & it then reverted to the heir of the debtor - This was called extending the land. The C. L. made no further provision upon this subject - But was enacted by the stat Westminster 2. that one moiety of the land might be extended during the lifetime of the debtor

In this country the L upon this subject is regulated by various stats - The states that compose the eastern section of the union, subject all the lands of a man whether living or dead for the payt of debts - This is effected by the levy of the execution upon the land itself. The cred then elects one person the debtor another - & a third is chosen by some justice of the peace - or in case the debtor neglect or refuses to make a choice, the justice chooses two - all of whom must be freeholders living in the town where the land lies - who go on & appraise the land, & the title is transferred to the cred from the debtor -

If after this the debtor refuses to give up possession the creditor has his remedy in a writ of ejectment in which suit he is put in possession provided his execution is not levied.

In the middle states the land is treated as a chattel & is sold at auction under a writ of venditioni exponas.

Upon the principles of the C.L. all lands are bound by the judgt - i.e. the owner cannot convey after judgt for a lien is then created in favour of the creditor. But in those states where there is a right to attach upon mesne process, this rule would hold.

Where a judgt is obtained not for a debt, but upon a writ of ejectment to recover the land itself the writ is not only conclusive upon the deft, but upon all third persons & any one who may be in possession at the time, will be turned out in favour of the pltff.

REEVE'S

LECTURES

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