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Hennings
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*Henry Broome
U. S. Attorney*
MAXIMS

128

LAW AND EQUITY,

COMPRISING

NOY'S MAXIMS,

FRANCIS'S MAXIMS,

AND

BRANCH'S PRINCIPIA LEGIS ET AQUITATIS,

WITH A TRANSLATION OF THE LATIN MAXIMS, AND REFERENCES TO MODERN AUTHORITIES BOTH BRITISH AND AMERICAN.

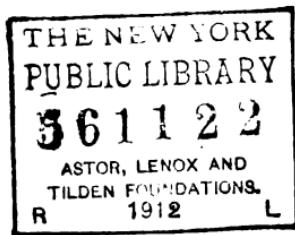
By WILLIAM WALLER HENING,

COUNSELLOR AT LAW,

Author of the Virginia Justice; the Lawyer's Guide, &c. and Editor of the Statutes at Large of Virginia.

RICHMOND:
PRINTED BY T. W. WHITE, MARKET-BRIDGE.

1824.



THE
PRINCIPAL
GROUNDS AND MAXIMS,
WITH
AN ANALYSIS.
OF THE
LAWS OF ENGLAND.

BY WILLIAM NOY, ESQUIRE;
FORMERLY OF LINCOLN'S INN,
Attorney-General, and of the Privy Council to King Charles I.

Lex plus laudatur, quando ratione probatur.

SECOND AMERICAN,
FROM THE NINTH LONDON EDITION,
With References to Modern Authorities, both British and American.

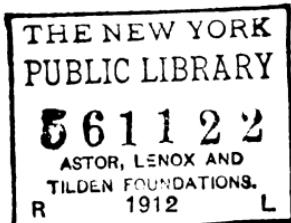
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W



DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the first day of March, in the forty eighth year of the Independence of the United States of America. *William Waller Hening*, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"The Principal Grounds and Maxims, with an Analysis of the Laws of England, by William Noy, Esq. formerly of Lincoln's-Inn, Attorney General, and of the Privy Council to King Charles the First. Lex plus laudatur, quando ratione probatur. Second American, from the Ninth London Edition, with reference to Modern Authorities, both British and American, by WILLIAM WALLER HENING, Counsellor at Law, Author of the Virginia Justice; The Lawyer's Guide, &c.; and Editor of the Statutes at Large of Virginia." In conformity to the Act of the Congress of the United States, entitled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, during the times therein mentioned."

R'D. JEFFRIES,
Clerk of the District of Virginia.

PREFACE

TO THE SECOND AMERICAN EDITION.

Noy's MAXIMS have been more variously represented by readers, and more rudely treated by editors, than any book, perhaps, which ever issued from the press. While some are in the constant habit of citing it, and even the celebrated lord *Mansfield*, has said that, "*Noy's Maxims* is cited in the courts, as a book of authority":* others affect to consider it as of no authority. But the frequent references made to it, in books of acknowledged merit, in England, and the fact that it has passed through nine editions in that country, and one in the United States, is conclusive proof of the estimation in which it is generally held.

The first edition was a translation from the Law French, made after the author's decease, and published in 1641.* It consisted of the *Maxims*, with a few illustrations to each; rarely citing any authority. In the fifth edition, very considerable additions were made, distinguished by this mark †. These were "materially altered," many of them "transposed," some of them "new-modelled," and some "expunged," by the editor of the sixth edition, whose labours were thus distinguished (*). The editor of the ninth edition has taken equal liberties with the matter, and much greater with the LITERARY CHARACTER of his predecessors, whom he represents as having "shamefully continued," and suffered to pass unnoticed, "defects which must have been apparent to the most superficial observer." He has also restored many illustrations of the maxims, to be found in the fifth edition, which were expunged by the editor of the sixth, and has omitted all those

* See Clarke's *Bibliotheca Legum*, or Law Catalogue, p. 239, 277.

introduced by the editor of the sixth edition, though most of them were very apposite.

In the present edition, the editor has availed himself of the labours of all those who have gone before him, in this work,—and has arranged the matter according to his own best judgment. He has introduced into the text, and in the notes, a variety of articles, first inserted in the *sixth* edition, but which were omitted in the *ninth*, and are thus distinguished (*), and he has restored to their original position others, which he conceives had been improperly transposed. Thus, under the *first* maxim, which inculcates the importance of religion, in a government, and the consequent necessity of keeping the *Lord's Day* holy, were inserted an abstract of those statutes which imposed certain penalties for the profanation of the Sabbath, by noisy and indecent sports or secular employments. These were transferred to the *second* maxim, by the editor of the *ninth* edition, under which maxim the illegality of judicial proceedings, on a Sunday, was alone contemplated. Not being able to perceive the propriety of this transposition, the editor has restored the subject matter to the place which it held in the sixth edition.

The text of the *ninth* edition has been adopted, in this, as being far more correct than any of the preceding: Indeed, many parts of the former editions were perfectly unintelligible.—Some of the notes of the *ninth* edition, which are very valuable, are inserted entire; others altered to suit the political institutions, and laws of the United States; and others, which related exclusively to the civil and ecclesiastical polity of England, have been expunged. In the translation of the Latin maxims, he has generally adopted that of the editor of the *ninth* edition; which if not the most *elegant*, is certainly the most *faithful*. Every scholar knows, that many of the Latin maxims will not admit of translation, either *free* or *literal*, without losing

much of their *point*. Hence, to the generality of readers, the most *faithful* translation is the best.

Since the publication of the first edition, which was comprised in 118 pages quarto, there have been added, *An Analysis of the Laws of England; a Treatise of Particular Estates, by Sir John Doderidge, Knt.; and Observations on a Deed of feoffment, by T. H. Gent.* The original Maxims of Noy were *loaded* with this extraneous matter, in the succeeding editions; and, to add to the *bulk*, the editor of the ninth edition, perceiving that the Treatise of Particular Estates had been improperly ascribed to Sir John Doderidge, and "that it was only an incorrect transposition, from pages 67 to 78 of Noy's Treatise of Tenures," has inserted *Noy's Tenures* entire, at the end of the book, and has not repeated that tract as a separate treatise. As the subjects, embraced by these *tracts* are much more ably discussed by subsequent writers of *undoubted authority*, and the propriety of swelling a book by the addition of *distinct treatises* is not generally acknowledged; they are entirely omitted in this edition.

The matter introduced by the editor of the *fifth* edition is thus distinguished †; that, by the editor of the *sixth* edition, thus *; and the additions made by the present editor are included within crotchetts, thus []; though, in some instances, he may have omitted it.

WILLIAM WALLER HENING.

RICHMOND, February 26th, 1824.

PREFACE

TO THE NINTH EDITION,

(*By W. M. Bythewood, Esq. of Lincoln's-Inn.*)

Noy's MAXIMS were originally written in Law French, and the first Edition of them was a translation, made after the Author's decease, by a person who was neither well acquainted with the language of the work, nor understood the subjects of which it treated. The mistakes of the Translator were innumerable, the phraseology confused, and the meaning frequently very difficult to be ascertained. Though these defects must have been apparent to the most superficial observer, they were shamefully continued, and remained unnoticed by all the subsequent Editors. (a) However, the intrinsic merit of the work was so great, and being so frequently cited as authority in the Abridgments, Digests, and Treatises of our most celebrated Authors, it has always made a part of every Lawyer's Library.

In the former Editions, a Treatise of particular Estates, said to have been written by Sir John Doderidge, was added; but it appears astonishing that all the former Editors could have overlooked the circumstance, that it was only an incorrect transposition, from pages 67 to 78 of Noy's Treatise of Tenures, which was evidently composed by the same person, who wrote the other part of that valuable work, and without which it would have been incomplete. No one would have the temerity to charge a man of Noy's acknowledged superior legal attainments with being a plagiarist. The editors also permitted the

(a) See Watkins's Principles of Conveyancing, xxii. 2d ed.

Tract to be called a Treatise of *particular Estates*, because that was the title of the first short section, though the remainder of it treats of "Possession, Reversion, Remainder, and Rights," which the most careless student, in the infancy of his inquiries, would not term "*Particular Estates*."

* * * * *

No pains have been spared in correcting the errors of the former impressions; the additions of the Editor of the Fifth Edition of the Maxims, marked †, have been generally retained, though they are sometimes transposed; the translation of the Latin Maxims, where correct, has been preserved, and when incorrect, amended; the Latin and Law French in the Maxims have been translated; Notes have been added occasionally; and references frequently made to the Statutes, Reports, Abridgments, Digests, and Treatises of established Merit, with a view of directing the student's attention to works calculated to assist him, and to supply, in some measure, the deficiency occasioned by the author having rarely cited any authority.

Both in the Maxims, and in the Tenures, occasionally, where the Text was not clear, or there was an evident omission, a few words have been inserted to render the sense complete; and in the whole collection the orthography has been modernized.

* * * * *

In the first five Editions of the Maxims, the Chapter on Leases was numbered xxxiv, and the next Chapter on Surrenders, by mistake, numbered xxxvi, and which, although incorrect, is retained in this Edition, because the work is frequently cited by the number of the Chapter: and in all the works the former paging is retained in the margin.

* * * * *

4, GRAY'S INN SQUARE,

14th April, 1821.

ADVERTISEMENT

TO THE SIXTH EDITION.

(By CHARLES BARTON, of the Inner Temple, Esq.)

THE eminent reputation which the *Maxims of Nov* have maintained, from so early a period as the reign of Charles II. to the present time, has rendered their merit unquestionable ; and five ample impressions are at length become insufficient to supply the demands of the profession ; no apology therefore is necessary for presenting the Public with a *sixth*. To this edition particular attention has been paid, and such improvements have been attempted, as, it is hoped, will meet with professional approbation.

Since the first publication of the work, considerable changes have taken place in the laws of England. The ancient tenures, with their feudal clogs and appendages, have been either abolished by the legislature, or suffered gradually to give place to a freer circulation of property : innumerable acts of Parliament, and resolutions of the Courts, have altered the law in various particulars ; but, strange as it may appear, none of these alterations are noticed in any preceding edition. So material an omission required the Editor's first attention.

The changes which the Law has undergone since the first publication of the work, have, therefore, been adverted to, either in notes distinct from the text, or in remarks distinguished by this mark ().*

Notwithstanding the general merit of the work, the reader will perceive it to be sometimes deficient in method, and exceedingly unequal and disproportionate in its differ-

Noy's Maxims.

B

ent parts. To remedy these defects, as far as it could be done without altering the text, or enlarging the work,

References have been subjoined at the foot of each chapter to books and cases of authority, where the subject is more elaborately discussed, or more methodically treated.

The Editor would think himself unworthy to be of the profession to which he belongs, if he felt the smallest inclination unjustly to depreciate the labours of his predecessors, whose wishes to benefit the profession were, possibly, as ardent as his own ; but the extreme incorrectness of the last edition has obliged him, in numerous instances, to sacrifice his private feelings to what he conceived to be for the public advantage.

Thirdly, therefore, the additions made by the last editor have been attentively considered, and materially altered; many of them have been transposed, some of them new-modelled, and some expunged; new cases have also been substituted in the room of those which were thought inapplicable—these are distinguished by this mark ().*

The Editor desires, however, to assure the profession, that none of these alterations have been made without mature consideration, and it is hoped, therefore, not without evident necessity.

The typographical errors of the last edition were also found to be exceedingly numerous ; and though the Editor dare not venture to assert that all of them are now expunged, yet so many have been detected as to afford him a reasonable hope, that no considerable number has escaped his observation.

Lastly, a new Table of Contents has been added; the Table of Maxims alphabetically arranged; and the Index to the principal matters considerably enlarged.

That all the additions and alterations of the present Editor were necessary, he presumes no one in possession of the old editions will deny, he rather fears it may be thought by some that *more* might have been done. It has

been suggested to him, that the work would have been rendered still more useful, had the reasons occasionally been adduced on which the grounds and maxims of the author are founded, and the exceptions to the general rules been instanced by examples. But the Editor is of a different opinion. To have done all this, so much additional labour must have been bestowed, and so much new matter introduced, that the work could no longer have maintained its present form, nor have been afforded for the moderate price it now bears. It may be remarked too, that to have added the reasons on which the maxims are founded, would have been to deprive the student of his most valuable, if not his only source of improvement. Legal knowledge can be obtained only by painful inquiry ; by thinking, reasoning, and investigating ; by tracing theorems to their principles, and adducing principles from established resolutions ; to have done for the student what he ought to do for himself, might render his studies pleasanter, but it would also render them ineffectual.

Upon the whole, the Editor has endeavoured to do all that on an attentive perusal appeared to be absolutely necessary, and no more. Whether he has successfully executed his intentions, it better becomes others to say than himself ; he hopes that he has not exceeded them ; for in editing an approved work, he thinks it invariably better to do too little than too much ; omissions will frequently be supplied by the judgment of the reader ; but the effect of redundancies, increase of price, and consumption of time, no efforts of his can easily repair.

PREFACE

TO THE FIRST EDITION.

(*From the Ninth Edition; but prefixed to the former editions as an
“INTRODUCTION.”*)

The matters contained, and handled in this ensuing Treatise, are chiefly as follows; viz.—

A SUMMARY consideration of the whole law, divided into the laws of reason, custom, and statutes.

What things these laws chiefly concern; as mens' possessions of chattels, and of lands, wherein some have fee-simple, some fee-tail, some estate for life, some for years, some at will, some have remainders, some have reversions: and the remedies those men shall have against them who wrong them in those estates.

Of whom lands are holden, and by what service, and what advantage the lord and guardian shall have by their tenure, as ward, relief, and marriage.

Of rent, common of pasture, way and liberties in lands, and the remedies to enjoy the same.

Of chattels real and personal, and some other things thereunto belonging.

How these estates in lands and chattels may be lawfully conveyed and assured from one man to another, by what instrument, deed, or writing; as by feoffment with livery of seisin, grant with attornment, bargain and sale inrolled, lease, assignment, release, confirmation, warranty, covenant, either absolute or upon condition.

Also of bargaining, selling, lending, restoring, promising, &c. of chattels personal, and how far a man shall be charged with the act or misdemeanor of another.

How these things may be left to our posterity after our death, by our will, our goods to our executors, and our lands to our heirs, or otherwise at our pleasure.

Lastly, for that divers controversies do often arise about the same, I have set down how the same may quietly be ended by friends, and of award, and of other things belonging to the same. And where gathered, some at the bar, and some out of divers learned writers, and expositors of the law.

These grounds and maxims of the law, being originally written in French, are therein very elegant and sententious: But now by their translation in our vulgar tongue, lose some of their grace and beauty, a thing incident unto all translations, which, if it cannot be avoided, it is therefore to be rather tolerated, because they are very profitable for those who do not understand the French tongue.

A
GENERAL TABLE
 OF THE
CONTENTS.

CHAP. I.

	PAGE
Definition of the Laws of England	1
OF THEOLOGY	1
<i>Maxim 1. Summa ratio est, quæ pro religione facit</i>	1
<i>2. Dies dominicus non est juridicus</i>	2
OF GRAMMAR	4
<i>Maxim 3. Ad proximum antecedens fiat relatio, nisi impediatur sententia</i>	4
OF LOGIC	
<i>Maxim 4. Cessante causa cessat effectus</i>	5
<i>5. Some things shall be construed according to the original cause thereof</i>	7
<i>6. Some things shall be construed according to the beginning thereof</i>	9
<i>7. Some things shall be construed according to the end thereof</i>	12
<i>8. Derivativa potestas non potest esse major primitiva</i>	13
<i>9. Quod ab initio non valet, in tractu temporis non convalescit</i>	13
<i>10. Unumquodque dissolvitur eo modo quo colligatur</i>	15
<i>11. He who claims a thing by a superior title, shall neither gain or lose by it</i>	17
<i>12. Debole fundamentum, fallit opus</i>	18
<i>13. Incidents cannot be severed</i>	18
<i>14. Actio personalis moritur cum persona</i>	18
<i>15. Things of a higher nature determine things of a lower nature</i>	21
<i>16. Majus continet minus</i>	22
<i>17. Majus dignum trahit ad se minus dignum</i>	23
OF PHILOSOPHY	
<i>Maxim 18. Naturæ vis maxima</i>	28

	PAGE
Maxim 19. <i>The law favours some persons</i>	24
20. <i>The law favours a man's person before his possession</i>	25
21. <i>The law favours matter of possession more than matter of right, when the right is equal</i>	25
22. <i>Matter of profit or interest shall be taken largely; and it may be assigned, but it cannot be countermanded: but matter of pleasure, trust or authority, shall be taken strictly, and may be countermanded</i>	26
 OF POLITICAL	
Maxim 23. <i>Nothing shall be void which by possibility may be good</i>	27
24. <i>Ex nudo pacto non oritur actio</i>	27
25. <i>The law favours a thing which is of necessity</i>	28
26. <i>The law favours a thing which is for the good of the commonwealth</i>	32
27. <i>Communis error facit jus</i>	32
28. <i>And the law favours things which are in the custody of the law</i>	33
29. <i>The husband and wife are one person</i>	33
30. <i>All that a woman has, appertains to her husband</i>	38
31. <i>The will of the wife is subject to the will of her husband</i>	39
 MORAL RULES	
Maxim 32. <i>The law favours works of charity, right and truth, and abhors fraud, covin, and uncertainties, which obscure the truth; contrarieties, delays, unnecessary circumstances, and such like. Dolus et fraus una in parte sanari debent.</i>	39
33. <i>No man can take advantage of his own wrong</i>	40
34. <i>Lex neminem cogit ad impossibilia, &c.</i>	41
 LAW CONSTRUCTIONS	
Maxim 35. <i>The law expounds things with equity and moderation, to moderate the strictness, &c.</i>	42
36. <i>Every act shall be taken most strictly against him who made it</i>	42
37. <i>He who cannot have the effect of the thing, shall have the thing itself</i>	45
38. <i>When many join in one act, the law says it is the act of him who could best do it, and that the thing should be done by those of the best skill.</i>	46

	PAGE
Maxim 39. When two titles concur, the elder shall be preferred	47
40. <i>By an acquittance for the last payment, all other arrearages are discharged</i>	47
41. <i>One thing shall enure for another</i>	47
42. <i>In one thing, all things following shall be included, in granting, demanding, or prohibiting</i>	48
43. <i>A man cannot qualify his own act</i>	49
44. <i>The construction of the law may be altered by the special agreement of the parties</i>	49
45. <i>The law regards the intent of the parties, and will imply their words thereunto</i>	50
46. <i>An intendment of the parties shall be ordered according to law</i>	50
47. <i>Qui per alium facit, per seipsum facere videtur</i>	50
CUSTOMS	
Maxim 48. Consuetudo est altera lex	52
CHAP. II.	
Of Statutes	53
CHAP. III.	
Of Possession in Fee-simple	55
CHAP. IV.	
Of Estates in Fee-tail	56
CHAP. V.	
Of Parceners	60
CHAP. VI.	
Of Joint-tenants	63
CHAP. VII.	
Of Tenants in Common	66
CHAP. VIII.	
Of Tenant in Dower	70
CHAP. IX.	
Of Tenant for Life	75
Noy's Maxims.	C

PAGE	
CHAP. X.	
Of Tenant for Term of Years	76
CHAP. XI.	
Of Tenant at Will	77
CHAP. XII.	
Of a Remainder	79
CHAP. XIII.	
Of a Reversion	80
CHAP. XIV.	
Of Waste	81
CHAP. XV.	
Of Discontinuance	82
CHAP. XVI.	
Of Descents which take away Entries	80
CHAP. XVII.	
Of Continual Claim	84
CHAP. XVIII.	
Of Remitter	84
CHAP. XIX.	
Of Tenures	85
CHAP. XX.	
Of the Diversity of Ages	87
CHAP. XXI.	
Of Rents	88
CHAP. XXII.	
Of Distress	89
CHAP. XXIII.	
Of Disseisin of Rent	92

	PAGE
CHAP. XXIV.	
Of Common	93
CHAP. XXV.	
Of Ways	93
CHAP. XXVI.	
Of Liberties	94
CHAP. XXVII.	
Of Chattles, real and personal	95
CHAP. XXVIII.	
Of Conveyances	97
CHAP. XXIX.	
Of Deeds in General	99
CHAP. XXX.	
Of a Bargain and Sale	102
CHAP. XXXI.	
Of Feoffments	103
CHAP. XXXII.	
Of a Deed of Exchange	107
CHAP. XXXIII.	
Of Grants	108
CHAP. XXXIV.	
Of Leases	110
CHAP. XXXVI.	
Of Surrenders	118
CHAP. XXXVII.	
Of Releases	119
CHAP. XXXVIII.	
Of a Confirmation	121

PAGE	
CHAP. XXXIX.	
Of a Condition	122
CHAP. XL.	
Of Warranties	139
CHAP. XLI.	
Of Covenants	141
CHAP. XLII.	
How Chattels Personal may be bargained, sold, exchanged, lent, and restored	144
CHAP. XLIII.	
Of Lending and Restoring	148
CHAP. XLIV.	
How far other men's Contracts and Misdemeanors bind us	151
CHAP. XLV.	
Of Wills and Testaments	153
CHAP. XLVI.	
Of Devises	155
CHAP. XLVII.	
Of Executors	161
CHAP. XLVIII.	
Of Administrators	164
CHAP. XLIX.	
Of an Heir	166
CHAP. L.	
Of Arbitrament	169

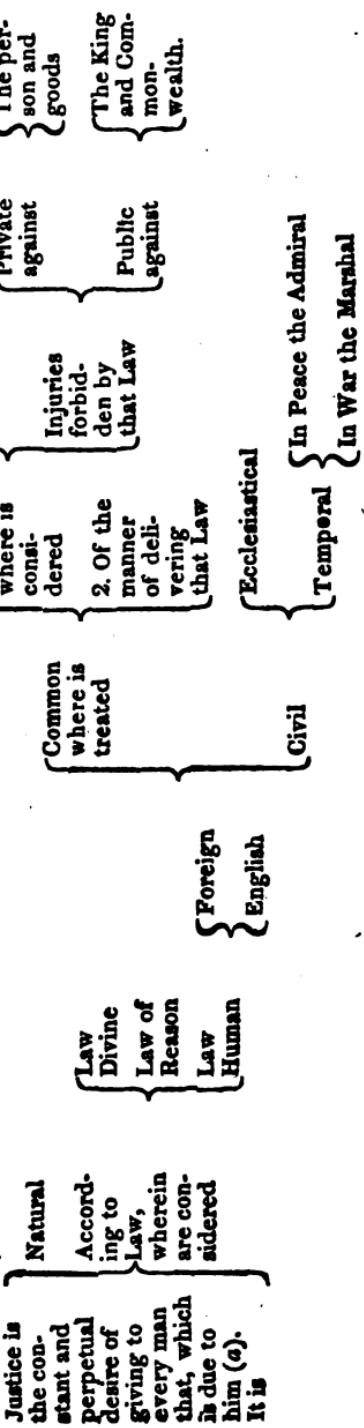
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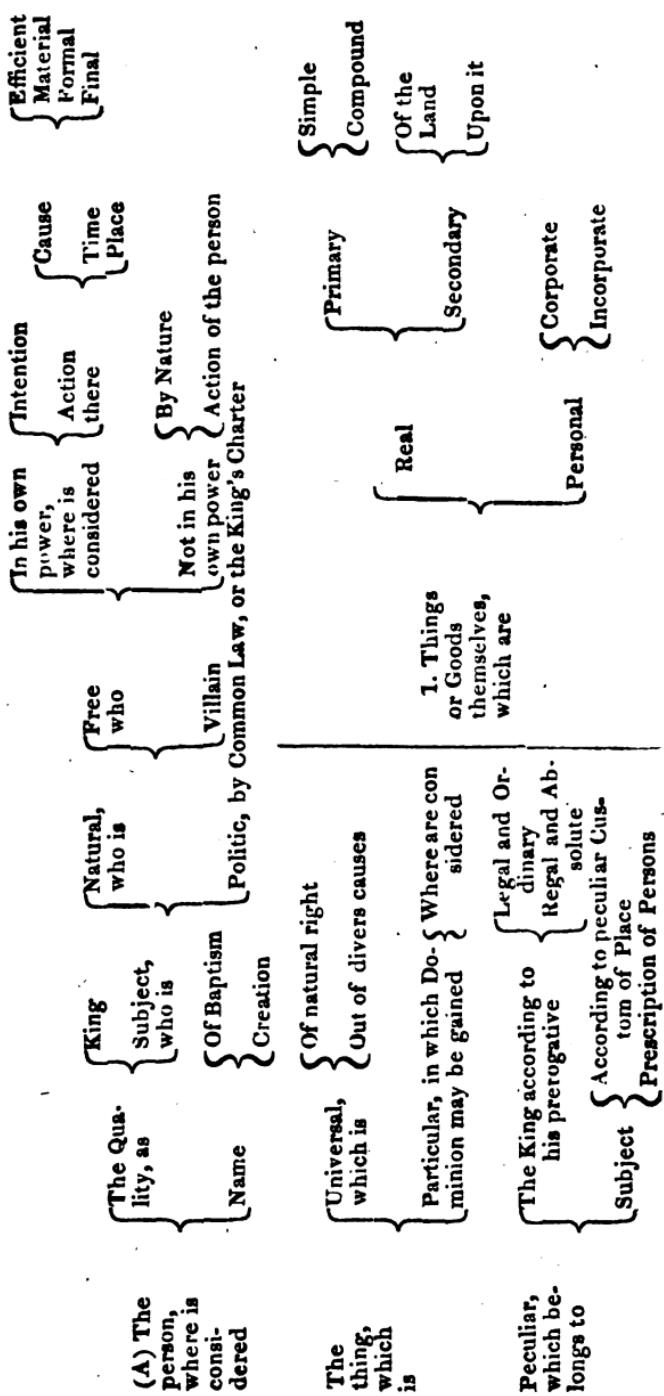
	PAGE
<i>Ad proximum antecedens fiat relatio, nisi impediatur sententia</i>	4
<i>Actio personalis moritur cum persona</i>	18
<i>All that a woman has appertains to her husband</i>	38
<i>A man cannot qualify his own act</i>	49
<i>An intendment of the parties shall be ordered according to law</i>	50
<i>By an acquittance for the last payment, all other arrearages are discharged</i>	47
<i>Cessante causa cessat effectus</i>	5
<i>Communis error facit jus</i>	32
<i>Consuetudo est altera lex</i>	52
<i>Dies Dominicus non est juridicus</i>	2
<i>Derivativa potestas non potest esse major primitiva</i>	13
<i>Debole fundamentum fallit opus</i>	18
<i>Ex nudo pacto non oritur actio</i>	27
<i>Every act shall be taken most strictly against him that made it</i>	42
<i>He who claims a thing by a superior title, shall neither gain or lose by it</i>	17
<i>He who cannot have the effect of the thing shall have the thing itself</i>	45
<i>Incidents cannot be severed</i>	18
<i>In one thing, all things following shall be included, in granting, &c.</i>	48
<i>Lex neminem cogit ad impossibilia</i>	41
<i>Majus continet minus</i>	22
<i>Majus dignum trahit ad se minus dignum</i>	23
<i>Matter of profit or interest shall be taken largely; but matter of pleasure, trust, or authority, strictly</i>	26
<i>Naturae vis maxima</i>	23
<i>Nothing shall be void which by possibility may be good</i>	27
<i>No man shall take advantage of his own wrong</i>	40
<i>One thing shall enure for another</i>	47

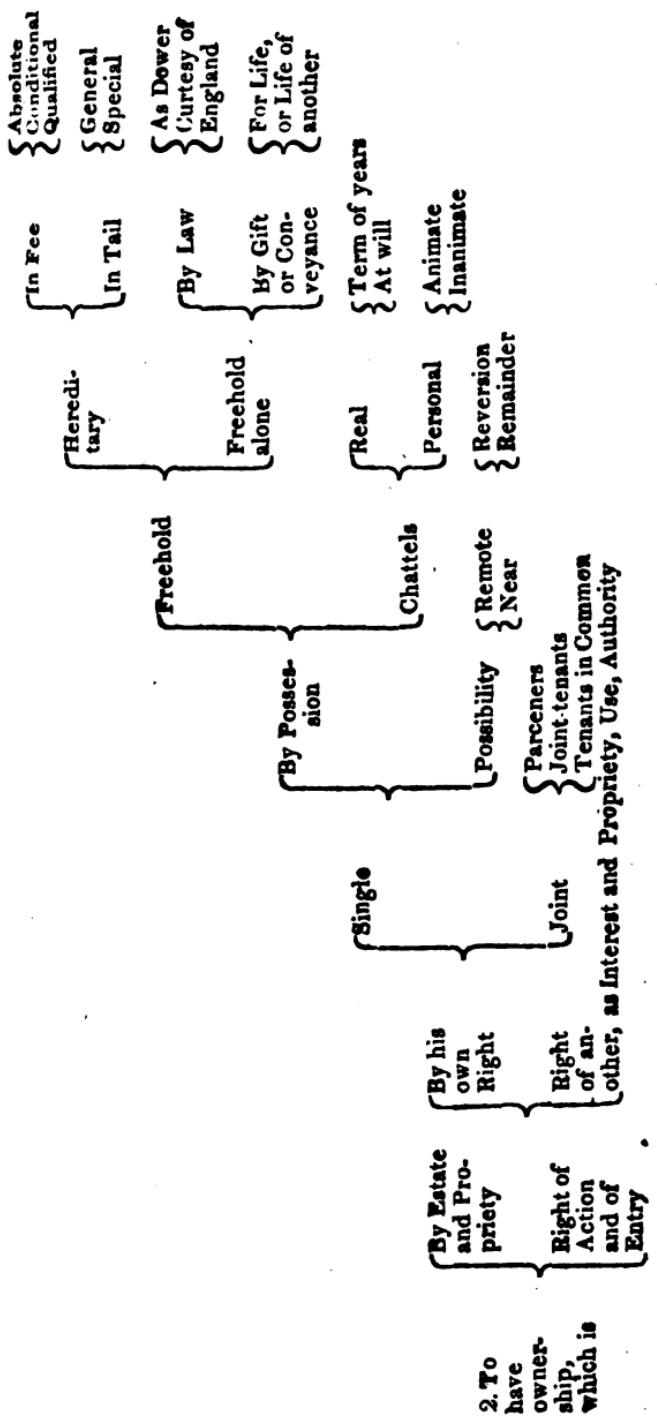
PAGE	
<i>Quod ab initio non valet, in tractu temporis non convalescit</i>	13
<i>Qui per alium facit, per seipsum facere videtur</i>	50
<i>Summa ratio est, quæ pro religione facit</i>	1
<i>Some things shall be construed according to the original cause thereof</i>	7
<i>Some things shall be construed according to the beginning thereof</i>	9
<i>Some things shall be construed according to the end thereof</i>	12
<i>Things of a higher nature determine things of a lower nature</i>	21
<i>The law favours some persons</i>	24
<i>The law favours a man's person before his possession</i>	25
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<i>The law favours a thing which is of necessity</i>	28
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<i>The law favours works of charity, right, and truth; abhorreth fraud, covin, uncertainties, &c.</i>	39
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<i>The will of the wife is subject to the will of her husband</i>	39
<i>The construction of the law may be altered by the special agreement of the parties</i>	49
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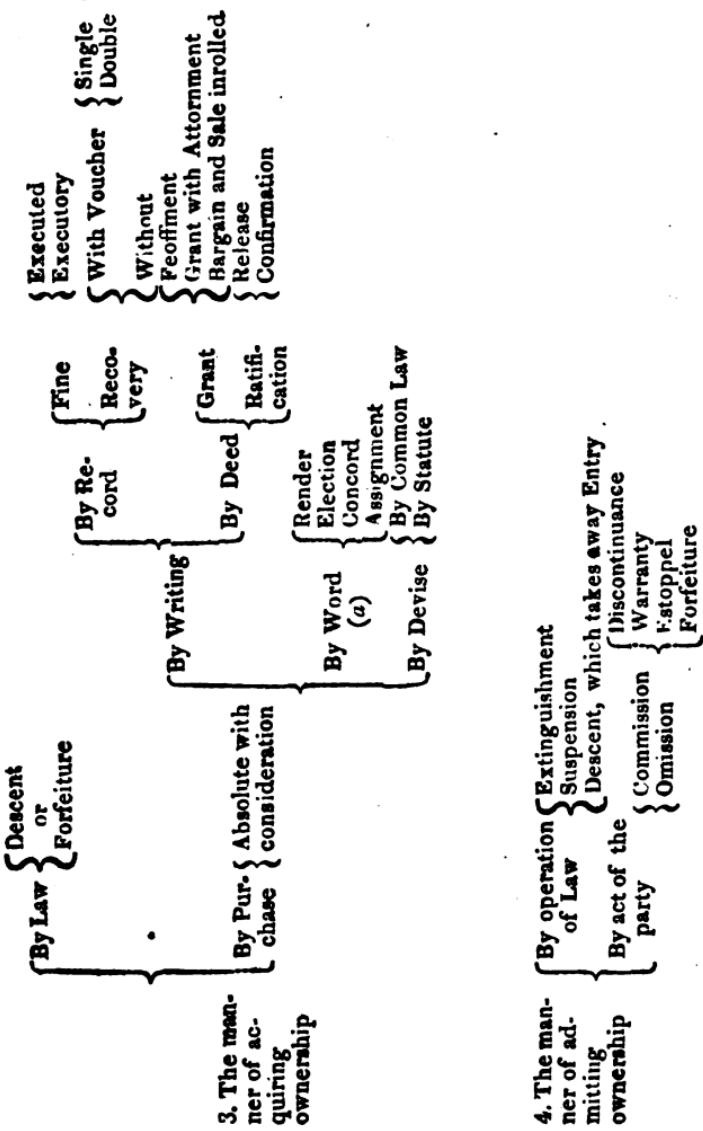
AN ANALYSIS OF THE LAWS OF ENGLAND.



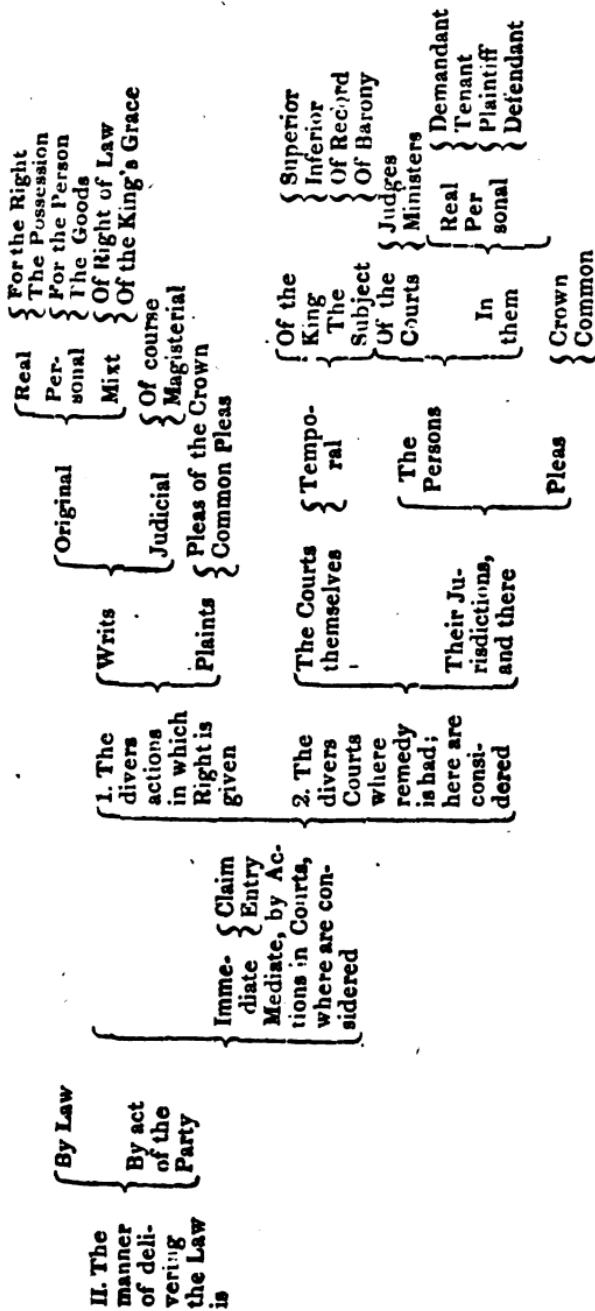
(a) *Jus. Inst. lib. 1. tit. 1.*







(a) Since the Statute of Frauds, all grants, &c. must be in writing.



3. The manner of Prosecution in Courts
- Direct
 - Collateral
- By Process
- Plea
 - By Pleading with that
 - Judgement
 - Execution
 - By the Court-adjournment
 - By Persons in the Court, as Essoin
4. The manner of defeating the Process
5. The manner of taking away the punishment
- By Prohibition
- Assignment of Errors
- Flight
- Pardon

MAXIMS
OF THE
ENGLISH LAWS.

CHAP. I.

The Laws of *England* are threefold—

Common Law, Customs, and Statutes.

THE common law is grounded on the rules of reason, and therefore we say in argument, that reason wills, that such a thing be done; or, that reason wills not, that such a thing be done. The rules of reason are of two sorts, some taken from learning as well divine as human, and some proper to itself only.

OF THEOLOGY.

1. *Summa ratio est, quæ pro religione facit (a).*

Where there is a tenure to find a preacher, if the lord purchase parcel of the land, yet the whole service remains, because it is for the advancement of religion.

† If any general custom were directly against the law of God, or if a statute were made directly contrary to the

(a) *The height of reason is, that which is done for religion.* Co. Litt.
341. a. Wing Max. 3.

law of God—as for instance, if it were enacted, that no one should give alms to any object in ever so necessitous a condition, such a custom or such an act would be void.—*Doct. and Stud. lib. 1. cap. 6.*

[On the principle of the foregoing maxim, it has been held, in England, that although regularly acts of parliament do not bind the king, unless he be particularly named, yet he is included in the general words of statutes for the furtherance of religion. See 5 Co. 14 b; 2 Co. 44 b.]

[On the same principle are founded the acts of almost every civilized state, prohibiting noisy and indecent sports, on a Sunday; as, in England, bull-baiting, bear-baiting, &c. by stat. 1 Car. 1; or labour (b), (except works of necessity or charity) or crying, or exposing goods to sale; but not to extend to dressing meat in families, inns, &c. nor to crying milk, morning or evening, 3 Car. 1. c. 1; 29 Car. 2. c. 7; or to crying mackerel, before and after divine service, 10 & 11 W. 3. c. 24; and such fish carriages may pass, whether laden, or returning empty. 2 Geo. 3. c. 15.]

[So, in Virginia, all labour, on a Sunday, is prohibited, except in the ordinary household offices of daily necessity, or other works of necessity or charity. 1 Rev. Code of 1819, p. 555 ¶ 5.]

[2]

2. Dies dominicus non est juridicus (a).

Sale on a Sunday shall not be accounted a sale in a market, to alter the property of the goods. *Wing. Max. 5. pl. 4.*

† If a fine be levied with proclamations according to the statute of 4 H. 7. cap. 24. if any of the proclamations be made on a Sunday, all the proclamations will be erroneous,

(b) A person can commit but *one* offence on the *same* day, by “*exercising his ordinary calling on a Sunday*”—*Crepps v. Durden et al.* Cowp. 640.

(a) *Sunday is no day in law.* Co. Litt. 135. a. 2 Saund. 291. *Wing. Max. 5.*

because the judges cannot sit on a Sunday, for this day is exempt from such business by the common law, by reason of the solemnity of it, in order that all mankind may apply themselves to their devotions, and the honour of God (b).

† If the teste of a writ of *Scire facias* be on a Sunday, it is error, because it is not a day in bank. *Dyer* 168.

† An indictment for exercising the trade of a butcher on a Sunday, must be laid to be *contra formam statuti* (c), for it was no offence at common law. *1 Stra.* 702.

† Law processes are not to be served on a Sunday (d), unless it be in cases of treason, felony, or on an escape.—*5 Ann. c. 9; 29 Car. 2. c. 7 (e).*

† If any part of the proceedings of a suit in any court of justice be entered and recorded to be done on a Sunday, it makes all void. *2 Inst. 264; See 3 Bur. 159.*

† The service of a citation on a Sunday is good, and not restrained by *29 Car. 2. c. 7.* and by two Judges the delivery of a declaration on a Sunday is well enough, it not being a process; but *Holt*, C. J. thought it ill, because the act intended to restrain all sort of legal proceedings. *1 Ld. Raym. 706.*

† A writ of inquiry cannot be executed on a Sunday. *1 Stra. 387.*

[See further on the subject of Maxim 2, *1 Atk. 58; 1 T. R. 265; Comy. Dig. TEMPS. (B. 3); 20 Vin. Abr. 61; 4 Bl. Com. 63; 1 Haw. P. C. 11; 3 Burn. Just. 106; Hen. Just. (3rd edi.) tit. SABBATH BREAKERS.]*

(b) *Plowd.* 265. *Dyer.* 181. b. And although the proclamations should be made on days which were *dies juridici*, yet if the contrary appear on record, the proclamations will be void; as no averment can be admitted against the record. *5 Cru. Dig. 99.*

(c) *Against the form of the statute.*

(d) And therefore, false imprisonment lies for an arrest on a Sun. day, *1 Salk. 78. 5 Mod. 95.*

[(e) So, by the laws of Virginia, process for treason, felony, riot, breach of the peace, or escape out of prison or custody, may be executed on a Sunday. *1 Rev. Code of 1819*, p. 281 § 19.—So process of attachment against debtors *actually absconding*. *Ibid. p. 480 § 19.*]

OF GRAMMAR.

Of grammar, the rules are infinite in the etymology of the word, and in the construction thereo'; what is nature, is simple.

3. *Ad proximum antecedens fiat relatio, nisi impediatur sententia (a).*

As an indictment against *J. S. servant to J. D.* in the county of Middlesex, butcher, &c. is not good; for servant is no addition, and butcher shall be referred to *J. D.* which is the next antecedent.

† An indictment that *Elizabeth* was in peace, &c. till *A.* the husband of the aforesaid *Elizabeth* of *D.* in the county of *S.* yeoman, murdered her, is good; for yeoman is an addition for the man only, and therefore the town must necessarily refer to the husband; but an indictment against *Alicia S. of D.* in the county of *S.* wife of *J. S.* spinster, &c. is not good, for spinster being an indifferent addition for man or woman, should refer to *J. S.* which is the next antecedent, and so the woman has no addition. *Dyer 46 b.*

* Sir *Thomas Cheyney* devised to *H.* his son, and to the heirs male of his body, remainder to *Thomas Cheyney of D.* and the heirs male of his body, upon condition that *he* or *they* or any of them should not discontinue. It became a question whether *H.* the son was included within the words *he* or *they*; and it was resolved that they did not refer to him, but to *Thomas Cheyney of D. and the heirs male of his body.* This sentence being the last antecedent.

5 Co. 68, Cheyney's Case.

[See further 2 *Haw. P. C.* book 2 ch. 23, s. 111; 2 *Hale P. C.* 176, 177.]

(a) *The antecedent bears relation to what follows next, unless it destroys the meaning of the sentence.* *Jenk. Cent. 180.*

OF LOGIC.

4. *Cessante causa cessat effectus (a).*

Neither the executor, nor the husband, of a woman guardian in socage, shall, after her death, have the wardship, because the natural affection is removed which was the cause thereof (b).

† It is no principal challenge to a juror that he has married the party's mother, if she is dead without issue, for the cause of the favour is removed. 14 H. 7. 2. (c).

† If the conosor in a statute-merchant be in execution and his lands also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and of the continuance of it until the debt be satisfied; therefore the discharge of the debt, which is the cause, discharges the execution which is the effect. Co. Litt. 76 (d).

† Upon a divorce, the woman shall have the goods given in marriage, not being spent; for the goods were given in advancement of the woman, and therefore it is reasonable that she should have them, the cause and consideration of the gift being defeated; for the cause ceasing, the effect also ceases. Dyer 13. (61). (e).

(a) *When the cause ceases, the effect ceases.* Co. Litt. 70 b. 76 a. 78 b. 11 Co. 49 b. 13 Co. 38. Wing. Max. 29. Plowd. Com. 268.

(b) *Litt. a. 125.* Co. Litt. 90 a. Wing. Max. p. 37, pl. 60. Fitzherbert cites two authorities, which make guardianship in socage grantable. F. N. B. 143. P. But Littleton's opinion militates strongly to the contrary; for if such a trust is so personal as not to be transmissible to executors, why should it be so to grantees? Accordingly, in arguing a modern case, it seems to have been taken for granted, that guardianship in socage cannot be assigned. Gilb. Eq. Rep. 177. Hargr. n. Co. Litt. 90 b (1). The executor or husband have not the affection the testator or his wife had, and which affection was the cause why the law gave them the wardship. Finch's Law, 9.

(c) Hargr. n. Co. Litt. 156 a. (2). Finch's Law, 9.

(d) *Vide 5 Bac. Abr. 706. Release,* (1).

(e) If the husband alien his wife's land, and they be afterwards divorced *causa precontractus*, or any other divorce which dissolves the

† The original cause of an amerciament being pardoned, the amerciament is pardoned: And if a man wound another the first day of May, and the King pardon him of all felonies and misdemeanors, the second day of May; but the party dies of his wounds the third day of May, so as this is no felony till after the pardon, yet the felony is pardoned; for the misdemeanor being pardoned, all things ensuing thereupon are also remitted (f).

* Though the general rule of law is, that a husband shall be answerable for the debts contracted by his wife, yet if they be legally separated, or if the wife carry on a sole trade, as by the custom of many places she may, the husband is no longer liable, for *cessante causa cessat effectus*. See 2 Bl. Rep. 1179; 1 T. R. 5; Cook. B. L. 36.

* If lessee commit waste, no action will lie if the thing wasted be repaired before the commencement of the action, because the cause of the action has ceased. Co. Litt. 204.

† If one grant a stewardship of a manor, and afterwards the manor is dismembered, the office is determined. If a corporation grant the office of a town-clerk, and surrender their patent to be renewed, all their offices are determined. Hutton's Rep. 87. And if the King grant an office to one at will, and twenty pounds salary during life, *pro officio illo* (g), now if the King remove him from his office, the salary shall cease (h).

† If an annuity be granted to two for counsel, and one of them refuse, the office and grant being entire, and not

marriage *a vinculo matrimonii*, the wife, during the life of the husband, may enter by the stat. 32 Hen. 8 c. 28. 8 Co. Litt. 326 a.

(f) Plowd. 401. 5 Co. 49 b. 6 Co. 79 b. Dyer, 99 b. pl. 65. Wing. Max. reg. 37, pl. 61. 1 Hale, H. P. C. 426. 5 Bac. Abr. 292. Finch's Law, 9.

(g) For his services. Co. Litt. 42 a. Finch's Law, 8. Wing. Max. 37, pl. 59.

(h) 5 Edw. 4. 8. b.

severable, the cause ceasing but in one, the whole annuity shall cease (i).

† But I find some exceptions in our books to this maxim; as where a man held rent by castle-guard, though the castle was ruined, yet the rent remained. *Davis's Rep.* And an arbitrament was between two of divers things; and among others, there was one article that one party should have yearly for the space of six years twenty shillings towards the keeping and educating of *A. B.* and *A. B.* died before the fourth year of the sixth year, yet the payment of the twenty shillings shall not cease during the six years, which is a certain term, and a duty to the party himself towards the finding of *A. B.* *Dyer* 329. a. (13).

5. Some things shall be construed, according to the original cause thereof. [3]

The executor may release before the probate of the will, because his title and interest is by the will, and not by the probate (a).

To make a man swear to bring me money upon pain of killing, if he bring it accordingly, it is felony (b).

Outlawry in trespass is no forfeiture of land, as outlawry of felony is; for although the non-appearance is the cause of the outlawry in both, yet the force of the outlawry shall be esteemed according to the heinousness of the offence, which is the principal cause of the process (c).

(i) If the King grant any office, whatsoever it be, which requires confidence or diligence, to two men, and one of them is attainted, there, perhaps, the whole office is forfeited to the King. For of an entire thing the King shall have the whole or nothing, for he shall not make another grantees to occupy in common with the other. *Plowd.* 380 a. 5 *Bac. Abr.* 212, 8vo. ed.

(a) An executor, before probate, may sell, give away, or dispose as he thinks proper, of the goods and chattels of the testator. *Off. Ex.* 34, 35. 3 *Bac. Abr.* 52, 8vo. ed.

(b) *Finch's Law*, 10. See 1 *Haw. P. C.* 96.

(c) *Co. Litt.* 128 a. and b. *Plow.* 541.

† So where two persons fight after a former quarrel, it shall be presumed to be out of malice from the first falling out (*d*).

† In civil cases, when the law gives power and authority to do any thing, the law judges of the thing itself by the act subsequent: as the law gives me power to enter a tavern; the lord to distrain his tenant's beasts; him in reversion to view if waste be made; a commoner to enter into the land to see his beasts, &c. But where he who enters a tavern commits a trespass by carrying away any thing, or the lord who distrains for rent, &c. stays the distress; or if he who enters to view waste breaks the house, or remains there a whole night, or the commoner cuts down trees, in these and the like cases the law will judge by the subsequent act, that they entered for that purpose, and they will be trespassers from the beginning. 8 Co. 146 b (*e*).

† Where a tenant in tail has issue two daughters, and dies, and the elder enters into the whole, and after entry makes a seofiment with warranty, which is a lineal warranty to the one and collateral to the other; the law judges by the act subsequent that the entry was not general for them both, but that it was only for her who made the seoffment; and it shall be warranty to commence by disseisin for the one moiety. 9 Co. 11 a (*f*).

* If judgment be had, or a fine levied, in pursuance of an usurious or unlawful contract, it may be avoided by averring the corrupt agreement. 2 Haw. P. C. 240.

* A man *non compos* shall not be punished for an offence against the laws, because his *madness* and not his intention was the cause. 2 Co. 124.

* If a man illegally detained in confinement, in order to obtain his liberty, promises an obligation at a future time and perform it accordingly; yet it shall be void. *Finch's Law.* 10.

(*d*) *Finch's Law*, 10.

(*e*) *Perk. s. 191.*

(*f*) *Litt. sec. 710.*

6. Some things shall be construed according to the beginning thereof.

As if a servant, who is out of his master's service, kill his master, through the malice which he bore him when he was his servant, this is petty treason (a).

† It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contents itself with the *immediate cause*, and judges of acts by *that* without looking to any farther degree (b).

† If I make a feoffment in fee, upon condition that the seoffee shall enfeoff over, and the seoffee be disseised, and a descent cast, and then the seoffee bind himself in a statute, which statute is discharged before the recovery of the land, this is no breach of the condition, because the land was never liable to the statute, and the possibility that it should be liable upon the recovery, the law does not respect. *Pilkington v. Winnington*, 2 Co. 59 b (c).

† So if I enfeoff two, upon condition to enfeoff, and one of them take a wife, the condition is not broken, and yet there is a remote possibility that the other joint-tenant may die, and then the feme is entitled to dower (d).

† So if a man purchase land in fee-simple, and die without issue; in the first degree the law respects dignity of sex and not proximity; and therefore the remote heir

(a) See *Plow.* 260; 1 *Haw.* P. C. 88.

(b) *Reg.* 1 *Bac. Max. Tracts.* 35.

(c) *Vide Litt. s. 358. Perk. s. 801.*

(d) The legal estate vested in a *trustee* in fee, or a *mortgagee* in fee of a forfeited mortgage, is in equity protected against his judgments, and other incumbrances, *Finch v. Earl of Winchelsea*, 1 P. Wms. 278. 1 Madd. Ch. 456, 2d. ed.; and from the dower of the wife, *Noel v. Jevon*, 2 Freem. 43. 9 Vin. Abr. 226, pl. 51. *Bennet v. Pope*, 2 Freem. 71; and from the tenancy by the courtesy of the husband of a female trustee, or mortgagee in fee, *Cashborn v. English*, 7 Vin. Abr. 156. 2 Eq. Ca. Abr. 728. 1 Atk. 603. S. C. 1 Cru. Dig. 523, 2d ed. Sug. Gilb. *Uses*, 18, n.

on the part of the father shall have it before the near heir on the part of the mother (e). But in any degree *paramont* the first, the law respects not; and therefore the near heir by the grandmother on the part of the father, shall have it before the remote heir of the grandfather on the part of the father.

(e) *Lord Bacon's Elements*, Reg. 1. p 3 *Tracts*, 37. So, according to *Clerc v. Brook*, Plowd Com. 450, when several are equally worthy in blood, as if all are of the male line on the part of the father ascending, or of the female line on the part of the father, the nearest shall be preferred in the succession; but if one is more worthy in blood than another, as if one is heir of the male line on the part of the father ascending, and the other is heir of the female line on the part of the father, their proximity is not regarded, but the more worthy; viz. the heir of the male line, though more remote, shall be preferred. And this doctrine is adopted by *Sir Matthew Hale*, Hist. Com. Law, 268, &c. ed. 1779. *Lord Chief Baron Gilbert*, Tenures, 19. *William Osgoode, Esq.* of Lincoln's-Inn, afterwards Chief Justice of Lower Canada, in a Tract, entitled, "Remarks on the Laws of Descent; and on the Reasons assigned by Mr. Justice Blackstone, for rejecting, in his Table of Descent, a point of doctrine laid down in Plowden, Lord Bacon, and Hale." *Dr. Woodeson*, 2 Lectures, 262. and *Mr. Cruise*, 3 Dig. 380, 2d ed.

The contrary position has been maintained by *Mr. Robinson*, "Law of Inheritances in Fee-simple," ch. 6. 55, &c. ed. 1755. *Mr. Justice Blackstone*, 3 Com. 238. *Professor Christian* has endeavoured to support Blackstone, 2 Com. 240, and *Mr. Osgoode*, in another anonymous Tract, entitled, "Remarks on the Inconsistency of the Table of Descents, projected by Mr. Professor Christian, in the twelfth edition of the Commentaries, with the Doctrine laid down by Sir William Blackstone, and by every writer on the Law of Descents," has opposed the doctrine of the Annotater with much clearness and force of reasoning. *Mr. Watkins*, "Law of Descents," 187, 3d ed. supports *Justice Blackstone* with much energy, though, it must be confessed, there is in this instance a want of clearness sometimes in his reasoning. A case exactly in point arose on the *Midland Circuit* in 1805, and was intended to have been argued in Westminster Hall, but was compromised. Several eminent counsel were however consulted, among whom the late learned *Mr. Serjeant Williams*, the celebrated editor of *Saunders's Reports*; and they were all of opinion that *Sir W. Blackstone's* doctrine was wrong. 3 *Cru. Dig.* 411. [For the law of descents, in the several states in the union, see *GARRIFTH'S LAW REGISTER OF THE UNITED STATES*. No professional or private gentleman should be without this very useful book.]

† The second rule under this maxim fails in covenous acts, which though they be conveyed through many degrees and reaches, yet the law takes heed to the corrupt beginning, and accounts all as one entire act.

† As if a feoffment be made of lands held by knights service to J. S. upon condition, that within a certain time he shall enfeoff J. D., which feoffment to J. D. shall be to the use of the wife of the first feoffer for her jointure, &c. this feoffment is within the statute of 32 H. 8. *nam dolus circuitu non purgatur* (f).

† In like manner, this rule holds not in criminal acts, except they have a full interruption, [affording sufficient time for the passions to cool,] because when the intention is matter of substance, and that which the law principally beholds, there the first motive will be principally regarded, and not the last impulsion. As if J. S. of malice prepensed discharge a pistol at J. D. and miss him, whereupon he throws down his pistol, and flies, and J. D. pursues him to kill him, whereupon he turns and kills J. D. with a dagger; if the law should consider the last impulsive cause, it would say, that it was in his own defence; but the law is otherwise, for it is but a pursuance and execution of the first murderous intent.

† But if J. S. had fallen down, his dagger drawn, and J. D. had fallen by haste upon his dagger, there J. D. had been *felo de se*, and J. S. shall go quit. 44 E. 3.

† Also you should not confound the act with the execution of the act; nor the entire act with the last part, or the consummation of the act.

† For if a disseisor enter into religion, the immediate cause is from the party, though the descent be cast in law: For the law only executes the act which the party procures, and therefore the descent shall not bind, & *sic e converso* (g).

† If a lease for years be made rendering a rent, and the lessee make a feoffment of part, and the lessor enter, the

(f) *For fraud is not purged by circuitu.*

(g) *And so on the contrary.*

immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party; but it is only the pursuance and putting in execution of the title which the law gives; and therefore the rent or condition shall be apportioned. *Dyer, 4 b. arg.*

† So in the binding of a right by a descent, you are to consider the whole time from the disseisin to the descent cast; and if at all times the person be not privileged, the descent binds;

† And therefore if a feme covert be disseised, and the baron die, and she take a new husband, and then the descent is cast: or if a man that is not *infra quatuor Maria* (*h*), be disseised, and he return into England (*i*), and go over sea again (*k*), and then a descent is cast, this descent binds because of the *interim* when the persons might have entered; and the law respects not the state of the person at the last time of the descent cast, but a continuance from the very disseisin to the descent. *Dyer, 143 b. 144 a. 9 H. 7. 24.*

† So if baron and feme be, and they join in a feoffment of the wife's land rendering a rent, and the baron die, and the feme take a new husband before any rent-day, and he accepts the rent, the feoffment is affirmed for ever.

7. Some things shall be construed according to the end thereof.

As if a man warned to answer a matter in a writ, there he shall not answer to any other matter than is contained in the writ, for that was the end of his coming. See *Co. Lit. 1. 3.*

† Vouchee comes into court to be viewed, and being viewed is adjudged of full age, yet he shall not be com-

(*h*) *Within the four seas.*

(*i*) If it be proved he had notice of the disseisin, either before or when he was in the kingdom. Vide *Litt. a. 440.*

(*k*) But the law seems otherwise if he be sent beyond the sea in the King's service by his command. *West's Symb. part 2, 68 a. Shep. Coun. 58. 77. Plevd. 366 a.* vide further on this subject *Doe, ex dem. Dureuse v. Jones, 4 Term Rep. 300.*

elled to answer till he comes in for that purpose by another process. 31 Edw. 3. Fitz. Abr. tit. Joinder in Action, pl. 10.

8. *Derivativa potestas non potest esse major primitiva (a).*

[4]

A servant shall be estopped to say the freehold is belonging to his master, by a recovery against his master, although the servant be a stranger to the recovery; for he shall not be in a better case than he is in, whose right he claims or justifies.

† The bailiff of the disseisor shall not say that the plaintiff has nothing in the land, for the master himself should not have such a plea, inasmuch as he is not tenant of the freehold. 28 Ass. pl. 24 (b).

* Where lessee opened a coal mine in *land* demised to him, and assigned over his term, the assignee could not work the mine, because the lessee having no right could not assign any, the *land* only having been let to the lessee. Co. Lit. 321; 5 Co. 113.

9. *Quod ab initio non valet, in tractu temporis non convalescit (aa).*

If an infant or married woman make a will, and publish the same, and afterwards die, being of full age or sole (bb), notwithstanding, this will is void.

(a) *The power derived cannot be greater than that from which it is derived.*

(b) *Wing. Max. p. 66.*

(aa) *That which is not good in the beginning, no length of time can make good.*

(bb) But if the testament being made during the coverture, she approve and confirm the same after the death of her husband; in this case the will is good, by reason of her new consent, or new declaration of her will; for then it is as it were a new will. Swind. 88. And although the will be made before marriage, and the wife survive the husband, yet it seems that the will shall not revive upon the husband's death. *Mrs. Lewis's case*, 4 Burn's Eccles. Law, 51, 6th ed. vide 2 P. Wms. 624. For, as it is the nature of a will to be ambula-

† If a man seised of lands in fee make a lease for twenty-one years, rendering rent, to begin presently, and the same day he make a lease to another for the like term, the second lease is void; and if the first lessee surrender his term to the lessor, or commit any act of forfeiture, &c. of his lease, the second lessee shall not have his term; because the lessor at the making of the second lease, had nothing in him but the reversion. *Plow. 432.*

† A bishop makes a lease of lands for four lives, which is contrary to the statute (c), though one of them dies in his life-time, so as now there be but three, and afterwards he dies, yet it shall not bind the successor; for those things which have a bad beginning cannot be brought to a good end. *10 Co. 62 a.*

tory during the testator's life, and marriage disables her from making any other will, the instrument ceases to be any longer ambulatory, and must be therefore void. *Forse v. Hembling*, 4 Co. 61 b. But where an estate is limited to uses, or a trust is created, and a power is given to a feme covert before marriage, to dispose of the property by way of appointment, notwithstanding coverture, such appointment either by deed or will may take effect. *Doe v. Staple*, 2 Freem. Rep. 695. But where, by marriage articles, a woman had power to dispose of her property by will after marriage, subsequent to the articles, but a few hours before the marriage she made a will, which was held to be revoked by the marriage. *Hodden v. Lloyd*, 2 Bro. C. C. 534. *Doe v. Staple*, 2 T. R. 684. Et vide Sug. Pow. 264.

By the civil law, the will of a woman made before marriage, who survives her husband, is of as great force as if she had not been married at all, *Swinb. p. 2. s. 9.* which was followed in *Brett v. Rigden*, *Plowd. Com. 343*; and the reason given is, that if it should be considered according to the time of the date, the will would be countermanded by the espousals; but it is not so, for it does not take effect until her death, at which time she was discovered, as she was at the time of making the will, and the intermarriage shall not countermand that which was of no effect in her life-time. *Godol. O. L. 29.* *8 Vin. Abr. 138, pl. 1.* *Pow. Dev. 564.* Mr. Cruise follows this opinion, *6 Dig. 118. s. 51. 2d edition.*

The law seems to be as settled in Mrs. Lewis's case. See further, *Roper, on Revocation*, 20. *1 Rob. Wills*, 372. *1 Bac. Abr. 483.* *Sergt. Williams's note*, *1 Saund. 278 b.* *1 Powell's Swinb. 145.* *Eden's note*, *2 Bro. C. C. 544.* *2 Rob. Husband and Wife*, 70. *2 Bl. Com. 499.*

(c) See *4 Bac. Abr. 69. Gwil. edit. Leases (E)*, Rule 4.

† But if I let to *B.* an acre by deed indented, in which I have nothing, and I purchase it afterwards, it is said it may be a good lease (*d*).

† Yet where a lease is made for life, the remainder to the corporation of *B.*, where there is no such corporation, it is void, though the king create such a corporation during the particular estate: So a remainder limited to *A.*, the son of *A. B.*, he having no such son, and afterwards a son is born to him, whose name is *A.* during the particular estate, yet it is void. *Doder. Eng. Law*, 233, 234.

† If a fine be levied without any original it is voidable, but not void; but if an original be brought, and a *retraxit* entered, and after that, a *concord* is made, or a fine levied, this is void, in respect the truth appears on record. *Co. Litt. 352 b (e)*.

† A *leasement* is made to the use of the husband for life, the remainder to *A. B.* remainder to the wife for her jointure, and *A. B.* dies in the life-time of the husband; this is not a jointure to bar dower, because it does not take effect immediately after the death of the husband. *Hutt. Rep. 50 (f)*.

10. Unumquodque dissolvitur eo modo quo colligatur (a).

An obligation or other matter in writing, cannot be discharged by an agreement by word, but by writing.

(*d*) Which is an exception to the rule, *Plowd. 434 (c). Plowd. Quer. 124 (b). Litt. s. 58. Co. Litt. 47 b. et n. (11). Hawk. Abr. 77. Finch's Law, 109. 4 Cru. Dig. 307. s. 56. 2d. edit. 4 Bac. Abr. 189. Vide Perk. s. 65. 159.*

(*e*) *Bro. Abr. Fixe*, pl. 18. *Co. Reading 10. Tr. 253. 5 Cru. Dig. 76.*
 (*f*) *Es vide 4 Co. 3 s. 3 Bac. Abr. 713. JOINTURE (B) 1.*

(*a*) Every thing is dissolved by the same mode in which it is bound together. *Nihil tam conveniens est naturali equitati, unumquodque dissolvi eo ligamine quo ligatum est.* Wing. Max. p. 68. 2 Inst. 573. It would be inconvenient that matters in writing, made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be

† As no estate can be vested in the King without matter of record, so no estate can be devested out of him but by matter of record. *Plowd.* 553.

† In case of attainder and office, the King is entitled by double matter of record; and therefore if the party be aggrieved, he ought to avoid it by double matter of record. *4 Co. 57.*

† An act of parliament cannot be avoided but by parliament; and an use which is raised by declaration and limitation, may cease only by words of declaration and limitation. *Bacon's Read. Stat. Uses.*

† Indentures being made for declaring the uses of a subsequent fine, recovery, &c. are only directory, and do not bind the estate or interest of the land; yet if the fine or recovery, &c. be pursued according to the indentures, there cannot be any bare averment, that after the making of the indentures, by mutual agreement of parties it was agreed that the assurance should be to other uses; but if other limitations of uses be made by writing or matter of so high a nature as the former, then the last agreement shall stand; for every contract and agreement must be dissolved by a matter of as high a nature as the other was. *5 Co. 26.* and *Suprema potestas seipsam dissolvere potest (b).*

* So remainders, reversions, rents, advowsons, and other things which lie in grant; as they cannot be granted without deed, so they cannot be surrendered without. *Co. Lit.* 338 a.

proved by the uncertain testimony of slippery memory. Countess of Rutland's case, *5 Co. 26 a.*

In equity an agreement in writing may be discharged by parol, *Legal v. Miller,* 2 Vcs. sen. 299. 9 Ves. 250. 3 Wooddeson's Lect. 428. *Phill. on Evid.* 603 4th edit. 1 *Fonbl Eq.* 592. 5th edit.; but the proof must be clear, *Buckhouse v. Crosby,* 2 Eq. Ca. Abr. 33. 1 *Madd. Ch.* 407. 2^d edit. *Sug. Vend.* 133. 5th edit. though it cannot be altered or contradicted by parol. *Roberts, on Frauds,* 89.

(b) *The highest power is able to dissolve itself.* See further, *Gilb. Uses,* 54. 259. *Wing. Max.* p. 71.

11. *He who claims a thing by a superior title, shall neither gain or lose by it.*

As if one joint-tenant make a lease for years, reserving a rent and die; the joint-tenant who survives shall have the reversion by survivorship but not the rent, because he comes in by the first feoffor, and not under his companion (a).

[5]

Also where the husband having leased for years, part of the term of his wife, reserving rent, the woman shall have the residue of the term, but not the rent (b).

† An executor recovers and dies intestate, administration of the goods of the first testator is committed to J. S. J. S. shall not sue out execution upon this recovery. 26 H. 8. 7 (c).

† Dower cannot be assigned reserving a rent, or with a remainder over, for she is in by the husband, and not by him who assigns the dower (c).

* If a man devise a term to J. S. and the executors of the testator agree that he shall have it upon condition; J. S. shall nevertheless have it absolutely; for, after the assent of the executors, he is in by the devise. 8. Co. 28 b. *Westwick's case.*

(a) *Co. Litt.* 185 a. 318 a. *Finch's Law*, 13. 1 *Co.* 96 a. *Shelley's case.* It seems the representatives to whom the reservation is made might maintain an action of debt, or covenant, either upon the covenant in law, or express covenant for payment of the rent, if there be any. 3 *Bac. Abr.* 696, n.

(b) 1 *Roll. Abr.* 344, pl. 10. 4 *Vin. Abr.* 49. *Sym's case*, Cro. Eliz. 33. The executors of the husband shall have the rent. *Co. Litt.* 46 b. *Blaxton v. Heath*, Poph. 145. 4 *Vin. Abr.* 117, pl. 10. *Sed vide* *Hal. MS Co. Litt.* 46 b. (3). 6 *ves.* 389. *Perk. a.* 834.

(c) *Finch*, 13. *Wing. Max.* p. 83. pl. 28.

12. *Debole fundamentum, fallit opus (a).*

When the estate whereunto the warranty annexed is defeated, the warranty is also defeated (b).

* All proceedings are void when the writ or process whereon they are founded, has been erroneous. See *Dyer* 223; 4 *Bur.* 2560. [But it often happens, in the progress of a cause, that erroneous proceedings are cured by the conduct of the adverse party, in not taking advantage of such errors, at a *proper time*, or in a *proper manner*; and finally, after verdict, by the act of *jeofails*].

* An action of debt, &c. brought by an outlaw is nugatory, because by outlawry, his right to bring actions is forfeited. *Co. Litt.* 286.

13. *Incidents cannot be severed.*

As if a man grant wood to be burnt in such a house, the wood cannot be granted away, but he who has the house shall have the wood also. 27 *E.* 4 11 b.

* If a lease is made to a man reserving rent, and the lessor grant the reversion to another, the rent passes to the grantees, although no mention be made of it in the deed, rent being incident to the reversion. *Co. Litt.* 317. a.

14. *Actio personalis moritur cum persona (aa).*

As if battery be done to a man, if he who did the battery, or the other die, the action is gone (bb).

If the lessor covenant to pay quit-rents during the term, his executor shall not pay it, for it is a personal covenant (cc).

(a) *A weak foundation destroys the superstructure.*

(b) *Litt.* s. 741. *Co. Litt.* 389 a. *Butler's note,* *Co. Litt.* 388 b. (1). 7 *Bac. Abr.* 243. *Warranty (O).*

(aa) A personal action dies with the person.

(bb) See 6 *Mod.* 126

(cc) But see 2 *Bac. Abr.* 69. *Covenant (E).*

† If a lessee for years commit waste, and die, no action of waste will lie against his executor or administrator for waste done before their time. *Co. Litt.* 53 b. So if the tenant commit waste, and he in the reversion die, the heir shall not have an action of waste, for the waste done in the life of his ancestor; nor shall a parson for waste done in the life-time of his predecessor. *Co. Litt.* ibid.

† If a woman tenant for life take a husband and the husband do waste, and the wife die, no action of waste lies against the husband in the *Tenuit* (d), for he was seised but *in jure uxoris* (e), and his wife was tenant of the freehold; but if a feme be possessed of a term for years, and take a husband, and the husband do waste, and the wife die, the husband shall be charged in an action of waste, for the law gives a power over the term to him. *Co. Litt.* 54. a.

† An action of debt lies not against executors upon a contract for the eating and drinking of the testator: for that action dies with him, because the executors cannot wage their law as their testator might have done. 9 *Co. 87. (f).*

(d) *He held.*

(e) *In right of his wife.*

(f) It was a principle of the common law, that if an injury were done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person *to whom*, or *by whom*, the wrong was done. And from a misconception, or misapplication of this principle, it was formerly doubted, whether *assumpsit* would lie either for or against an executor; because the *action*, it was said, was in form *trespass* upon the *case*, and therefore supposed a *wrong*, and in substance to recover *damages* only *in satisfaction* of the wrong. *Plow.* 180, *Norwood v. Read*; *Dy.* 14, pl. 69. *in margine*; 9 *Rep.* 86 b. 89 a. *Pinchon's case*; *Cro. Jac.* 294, *S. C.*; 10 *Rep.* 77 a. The case of the *Marshalsea*; *Yelv.* 20, *Slade v. Morley*; 1 *Lev.* 200, 201, *Palmer v. Lawson*; 2 *Ld. Raym.* 974, *Berwick v. Andrews*. But where the cause of action was founded upon any *malfeasance* or *mischief*, was a *tort*, or arose *ex delicto*; such as *trespass* for taking goods, &c. *trover*, *false imprisonment*, *assault* and *battery*, *slander*, *deceit*, *diverting a watercourse*, *obstructing lights*, *escape*, and many other cases of the like kind, where the *declaration* imputes a *tort* done

either to the person or property of another, and the *plea* must be not guilty, the rule was, *actio personalis moritur cum persona*; and this rule still holds with respect to the person by whom the injury is committed; for if he dies, no action of this kind can be brought against his executor or administrator, though in some of these cases, such as taking away goods, &c. a remedy may be had against the executor in another form. Sir W. Jones, 174, *Le Mason v. Dixon*; Latch. 167, 168. S. C.; Sir T. Raym. 57, *Hole v. Bradford*; Palm. 330, *Carter v. Fossett*; Cro. Car. 540, *Perkinson v. Gilford*; 1 Ld. Raym. 433, 434, *Kinsey v. Hayward*; Cowp. 375, *Hambly v. Trott*; 2 Bac. Abr. 445. fol. edit. 3 Bac. Abr. 98. 6 Bac. Abr. 697, 8vo. edit. But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed; for there the action survived. Latch. 168. Cro. Car. 540. Cowp. 375. It is true that no action of account lay either for or against an executor; not upon the principle before-mentioned, but because the account rested in the privity and knowledge of the testator only. Co. Litt. 89 b. 2 Inst. 404. But this action is since given to executors by the statute of West. 2. 13 Edw. 1. stat. 1. c. 23.; and against executors by statute 4 & 5 Anne, c. 16. s. 27. Nor did an action of debt lie against an executor upon a simple contract, when the testator could have waged his law; not because such action died with the person, but because the executor would lose the benefit of waging law. 9 Rep. 87 b. *Pinchon's case*; Cro. Eliz. 600. *Bowyer v. Garland*; Cowp. 375. For where the testator himself could not have waged his law, debt lay against his executor, as debt for rent upon a parol lease made to the testator, or by a gaoler for diet provided for him while in prison. 9 Rep. 87. b. But *assumpsit* always lay against an executor upon the simple contract of his testator, notwithstanding what is said to the contrary in Yelv. 20, *Slade v. Morley*. Plow. 180. 9 Rep. 87 b. So if the goods, &c. taken away, continued still in specie, in the hands of the wrong-doer, or of his executor, *relevar* or *detinere* would lie for or against the executor to recover back the specific goods, Sir W. Jones, 173, 174; or in case they were consumed, an action for *money had and received to recover the value*. Cowp. 377. The rule of *actio personalis moritur cum persona* has received considerable alterations by the statute 4 Edw. 3 c. 7. *de bonis asportatis in vita testatoris*, which reciting, that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and so as such trespasses have remained unpunished, enacts, "that the executor in such cases shall have an action against the trespassers, and recover their damages in like manner, as they whose executors they be should have had if they were living." And this remedy is further extended to executors of executors by stat. 25 Edw. 3. c. 5; and to administrators by stat. 31 Edw. 3 c. 11. The statute of 4 Edw. 3. being a remedial law, has always been expounded largely, and though it makes use of the word

† From a bare contract or promise, no action rises; it is called *nudum pactum* (g): As where a man makes a bargain and sale of lands, goods, &c. without any consideration or recompense to be paid for it; these are void in law, and the vendee cannot bring any action. *Doct. and Stud.* c. 24.

† A promise made for a thing past is also voidable, and no action dies: But action of debt may be brought on a bond or obligation without enquiring into the consideration, and the creditor need only prove the delivery of it. *Plowd.* 309.

15. *Things of a higher nature, determine things of a lower nature.*

As matters in writing determine an agreement by words.

[6]

trespasses only, has been extended to other cases within the meaning and intent of the statute. 1 Ventr. 187 *Emerson v. Emerson*; Sir W. Jones, 174; 2 Ld. Raym. 974, *Berwick v. Andrews*. Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the *personal estate* of the testator in his life-time, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be. Latch. 168. So that he may now have trespass or trover, 5 Rep. 27 a. *Russel's case*; Sir W. Jones, 174; action for a false return, 4 Mod. 403, *Williams v. Carey*; for an escape, 2 Ld. Raym. 973, *Berwick v. Andrews*; debt on a judgment against an executor suggesting a *devastavit*, 1 Salk. 314; action for removing goods taken in execution before the testator (the landlord) was paid a year's rent, 1 Str. 212, *Palgrave v. Windham*; and other actions of the like kind, for injuries done to the personal estate of the testator in his life-time. See also 2 Bac. Abr. 445. fol. edit. 3 Bac. Abr. 97. Gwil. 8vo. edit. Cro. Eliz. 377, *Rutland v. Rutland*; 1 Ventr. 187, *Emerson v. Emerson*. But the statute of Edw. 3. does not extend to injuries done to the *person*, or to the *freehold* of the testator; therefore an executor or administrator shall not have actions of assault and battery, false imprisonment, slander, deceit, diverting a watercourse, obstructing lights, cutting trees, and other actions of the like kind; for such causes of action still die with the person. Sir W. Jones, 174. Latch. 168. 1 Ventr. 187. [From Wms. n. 1 Saund. 216 (1), *Wheatly v. Lane*. See 1 Rev. Code 390, § 64, 66, as to actions by and against executors.]

(g) *A naked contract.* *Vide* 16 Vin. Abr. 16. *Terms of the Law, Nude Contract.*

If an offence which is murder at the common law, be made high treason, no appeal lies for it; because the murder is merged, and punishable as treason, for which no appeal lies. See *Dyer* 50.

† Where a man has liberties by prescription, and afterwards takes a grant of them from the King by patent, this determines the prescription; for matter in writing determines matter *in pais* (a). 21 H. 7. 5.

† A man is bound to take his remedy upon his highest security. As for instance: Suppose a man has an *assumpsit*, and a deed under hand and seal, in case he proceed upon the *assumpsit*, he will be nonsuited. 2 Stra. 1027. *Bulstrode v. Gilburn*. See also *Co. Litt.* 115. a; 5 *Co. 41.* a.

16. *Majus continet minus (aa).*

Where by the custom of a manor a man may demise for life, he may demise to his wife *durante viduitate* (bb).

† By pardon of murder, manslaughter is pardoned: And if an action of battery be brought, and the evidence proves it maiming, it is well; because it is battery and more. 31 Ass. pl. 1.

† Where there is a custom that a man shall not devise his lands for any higher estate than for life; yet if the devise be in fee, and the devisee claims but for life, the devise is good. When more is done than ought to be done, that seems to be done which was to be done: So that if a man tender more money than he ought to pay, it is good enough; for every greater contains the less; and the other ought to accept so much of it as is due to him. See 5 *Co. 11.*

(a) *Transacted in the country, without writing.*

(aa) *The greater contains the less.* Jenk. Cent. 208. 4 *Co. 46.*

(bb) *During her widowhood.* See *Whistlock's case*, 8 *Co. 70 b.*

17. *Majus dignum trahit ad se minus dignum (a).*

As the writings, the chest or box they are in (b).

† An adulterer takes the wife of another man, and new clothes her, the husband may take with his wife the clothes on her back. 11 H. 4. 31.

* Where a matter extends as well into a place within the jurisdiction of the common law, as into a franchise, it shall be tried at the common law. Co. Litt. 125. b.

* The right of possession shall draw with it the right of property. Ibid 266 a.

* If a man bargain and sell a manor with all trees growing thereon, and the manor do not pass on account of the Bargain and Sale not being enrolled, neither shall the trees pass, though as to them no enrolment is necessary. 11 Co. 48.

OF PHILOSOPHY.

18. *Naturæ vis maxima (aa).*

Natural affection or brotherly love are good causes or considerations to raise an use (bb).

And one brother may maintain a suit for another. See 2 Inst. 564; Plowd. 304. a; 1 Haw. P. C. 252.

† If there be mother and daughter, and the daughter is attainted of felony, such daughter cannot be heir to the mother; yet if after the attainer she kills her mother, this

(a) *The more worthy draws with it the less worthy.* 1 Inst. 43 b.

(b) *Off. Executor,* 64.

(aa) *The highest force is that of nature.* Bract. c. 23. 2 Inst. 564, some say *naturæ vis maxima.*

(bb) In a covenant to stand seised. Plowd. Com 309 a; Sug. Introd. Gib. Uses. liv. 245; 2 Bla. Com 338; 2 Roll Abr. 785; 2 Sand. Uses, 79, 80; 22 Vin. Abr. 124 204; 7 Bac. Abr. 96. 100; Com. Dig. Covenants (G 3). But it is absolutely necessary that the consideration be natural love and affection to a child, or near relation, or marriage. 4 Crv. Dig. 136, 2d edit.

is matricide and petit treason; for she still remains her daughter, and that by the law of nature. [The daughter not being heir to the mother, after attainer of felony, is on the principle of *corruption of blood*, which is abolished in Virginia, See 1 Rev. Code of 1819, p. 613. §. 36].

† If the son be attainted, and the father covenants in consideration of natural love to stand seised of land to his use, this is a good consideration to raise an use; because the privity of natural affection remains. And if a man attainted, obtain a charter of pardon, and be returned on a jury between his son and another, the challenge remains; for he may maintain any suit of his son though the blood be corrupted. Bract.

* A devise to provide for one's children, &c. are good considerations to raise an use. Co. Litt. 21.

* A statute making it felony for *any one* to entertain persons guilty of treason, &c. shall not extend to a wife who shall entertain her husband. 1. Haw. 2, 93.

19. *The law favours some persons; viz.*

[7]

Men out of the realm, or in prison, women married, infants, idiots, mad-men, men without intelligence, strangers who are neither parties nor privies, and things done in right of another person.

A descent shall not take away the entry of a man out of the realm, or in prison, or of a married woman, or of an infant. Co. Litt. 260 a, b; 261, a; 262, b; 259, a; 260, a; 246, a; 245, b; 2 Bac. Abr. 311, *Descent (H)*.

Where a lease is made to a husband and wife, after the death of the husband, the wife shall not be charged for waste, during the marriage. See Co. Litt. 54 a.

An idiot shall not be compelled to plead by his guardian or next friend, but shall be in the court: and he who pleads the best plea for him shall be admitted. See Co. Litt. 135, b; 247, a. [But see Coop. Eq. Plead. 32].

If a dumb man bring an action, he shall plead by his next friend.

If a lessee for years grant a rent-charge, and afterwards surrender the lease, the rent-charge shall be paid, during the term, to the grantee. *Co. Litt.* 185, a; 233, b; 238, b.

A man outlawed or excommunicated, may bring an action as an executor.

† The right of action of men out of the realm, &c. is saved till their impediments are removed, where others are bound by the Statutes of Limitation. 21 *Jac.* 1. c. 16. 4 & 5 *Ann.* c. 16. [The same law in Virginia. See 1 *Rev. Code of 1819*, p. 491.]

* Though the wife of a common person, being an alien, shall not be endowed (*Co. Litt.* 31 a.); yet the wife of the king shall, though an alien born. *Co. Litt.* 31. b.

20. *The law favours a man's person before his possession (a).*

Menace of corporeal pain shall avoid a deed, but not menace of his goods.

† An idiot, one *non compos mentis*, or a lunatic shall not avoid his own deed, be it executed in person, or by attorney; inasmuch as he cannot stultify himself; but he shall not lose his life for felony or murder. 4 *Co.* 124 (b).

† A villain set free for an hour will be always free. *Dyer* 59. b (c).

* Fear of death, imprisonment, &c. will excuse a man from going upon his land to make his claim. But the fear of having his goods destroyed or his house burnt will not. *Co. Litt.* 246. a.

21. *The law favours matter of possession more than matter of right, when the right is equal.*

As if a man purchase several lands at one time, held of

[8]

(a) *Finch's Law*, 29.

(b) *Co. Litt.* 247 a. vide 2 *Com.* 291, 292. *Fonb. Eq.* book 1. c. 2. s. 1, notes (d.) and (g.).

(c) See Mr. Hargrave's learned notes, *Co. Lit.* 123 a. (3) (6). *Perk. sect. 314.*

several lords by knight service and die, the lord who first seizes the ward shall have it, otherwise the elder lord.

* Husband and wife purchase lands to them and the heirs of their bodies, and die leaving issue under 14 years of age. In this case, if the *maternal grandmother* assume the guardianship before the *paternal grandfather* doth, she shall retain it. *Finch's Law* 30; see also *Co. Litt.* 88 a.

* Tenants in common of personal estates having equal right to the goods, he that first gets possession of them shall hold them against the other. *Co. Litt.* 200 a.

22. Matter of profit or interest shall be taken largely: and it may be assigned, but it cannot be countermanded: but matter of pleasure, trust or authority, shall be taken strictly, and may be countermanded.

As a license to a person to walk in my park, or in my garden, extends only to himself, and not to his servant, nor to any other in his company, for it is matter of pleasure only. Otherwise it is of a license to hunt, kill, and carry away the deer, which is matter of profit.

A church-way is matter of ease.

† It is felony in the sheriff to behead one who ought to be hanged. *35 H. 6. 58.*

† A license to come into my house to speak with me, or a letter of attorney may be countermanded (a). So of goods bailed over to be delivered to *J. S.*, or to dispose of them in alms. Otherwise it is of a thing bailed in consideration or satisfaction of another thing; as if the bailor had been bound to pay such a sum; or if he says, that whereas *J. S.* has enfeoffed him of such land, in consideration thereof he gives him the money. *Dyer, 49.*

* A man deviseth that his two executors shall stake the profits of his lands until his heir be of age, to pay debts, &c. one of them dies, and then the other, who leaves executors. The executors of him last dying shall take the

(a) So of a license, *4 Term Rep.* 78.

profits, because it is a matter of *interest*, and survives ; had it been only an authority, it would have been otherwise.
Dyer 210.

* If a man hath power of attorney to deliver seisin, and he deliver it otherwise than in his power, it is void ; because authorities must be strictly pursued. *Co. Litt.* 258. a.

OF POLITICAL.

23. *Nothing shall be void which by possibility may be good.*

If land be given to a man, and to a woman married to another man, and the heirs of their two bodies, this is a present estate-tail, because of the possibility. See *Co. Litt.* 25 b ; *2 Bac. Abr.* 548.

† Where I suffer an injury joined with a loss, the law shall give me a remedy and recompense according to my certain and uncertain loss ; and even sometimes where the thing is not in being but utterly extinguished. *Hob.* 43.

* Leases for years ought to have a *time certain* mentioned when they are to begin, and when they are to end. Yet if a lease be made for so many years as J. N. shall name, it is not void for uncertainty, for when he has named the years, the lease will be good ; and *id certum est quod certum reddi potest.* *Co. Litt.* 45 b.

24. *Ex nudo pacto non oritur actio (a).*

[9]

No man is bound to his promise, nor any use can be raised, without good consideration.

A consideration must be some cause or occasion which must amount to a recompense in deed, or in law, as money, or natural affection ; not long acquaintance, nor great familiarity (b).

(a) *An action cannot arise from a naked agreement.* *Plow. Com.* 305.

(b) Nor will the consideration of a person adopting the name of the covenantor be sufficient to raise a use. *Hatten's case,* *Jenk. Cent.* 2, case 60 ; *Sug. Gilb. Uses,* 456.

* Thus if I bargain and sell all my trees in such a close, or the like, and no consideration is expressed, nothing passes; because there is not *quid pro quo*, which there must be to constitute a good contract. *Dyer* 90 b. *See Co. Litt.* 106; 8 *Co.* 80; 1 *Pow. Contr.* 330; 1 *Fonb. Eq.* B. 1. ch. 5. §. 1.

25. *The law favours a thing which is of necessity.*

As to pay funeral expenses shall not be said to administer (*a*); to distrain in the night, damage feasant; to kill another, to save his own life, [shall not be said to be] murder.

A servant to beat another to save his master, if he cannot do it otherwise.

To drive another man's cattle amongst mine own, until I come to a place to separate them, is no trespass.

† Necessity is of three sorts, necessity of preservation of life, necessity of obedience, and necessity of the act of God or of a stranger (*b*).

† *First*, of preservation of life.

† If persons be in danger of drowning by the casting away of a boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another, to save his life, thrust him from it, whereby he is drowned; this is neither *se defendendo* (*c*) nor by misadventure, but justifiable. *Bac.*

† So if felons be in a gaol, and the gaol by accident is set on fire, whereby the prisoners get free, this is no escape, nor breaking of prison. 15 *H.* 7. 2. *per Keble.*

† So if upon the statute, that every merchant who sets his merchandise on land without satisfying the customer, or agreeing for it (which agreement is construed to be for a certain quantity) shall forfeit his merchandise, it happens

(*a*) *Godol.* 95. *Off. Ex.* 174, 3 *Bac. Abr.* 22.

(*b*) *Bac. Max. Reg.* 5 *T. B.* 55.

(*c*) *In self defence,*

that by tempest, a great quantity of the merchandise is cast overboard, whereby the merchant agrees with the customers by estimation, which falls short of the truth, yet the over-quantity is not forfeited; where note, that necessity dispenseth with the direct letter of a statute law. 14 H. 7. 29. *per Read.* 4 Ed. 6. pl. 4. *Ed.* 6. 20, *condic.*

† So if a man have a right to land, and do not make his entry for fear of force, the law allows him a continual claim, which shall be as beneficial to him as an entry; so shall a man save his default of appearance by *cretain de eau*, (the overflowing of waters) and avoid his debt by *duress*. 12 H. 4. 20. 14 H. 4. 30. B. 38. H. 6. 11. 28 H. 6. 8. 39 H. 6. 50. *Co. Litt.* 150 b.

† The second necessity is of obedience, and therefore where baron and feme commit a felony, the feme can neither be principal nor accessory, because the law intends her to have no will, on account of the subjection and obedience she owes to her husband. *Staundf.* 28; *Fitz. Abr.* tit. *Coron.* 160.

† So one reason among others, why ambassadors are used to be excused of practices against the state where they reside, except it be in point of conspiracy, which is against the law of nations and society, is, because *non constat* (*d*), whether they have it in *mandatis* (*e*), and then they are excused by necessity of obedience.

† The third necessity is of the act of God, (*f*) or of a

(*d*) *It does not appear.*

(*e*) *In their instructions.*

(*f*) Although the *act of God* be an expression which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place *inevitable accident*: religion and reason, which can never be at variance without certain injury to one of them, assure us, that "not a gust of wind "blows, nor a flash of lightning gleams, without the knowledge and "guidance of a superintending mind;" but this doctrine loses its dignity and sublimity by a technical application of it, which may, in some instances, border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous. *Jones on Bailments*, 104.

stranger, as if I be particular tenant for years of a house, and it be overthrown by a great tempest or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging to it some cottages which have been infected, whereby I can procure none to inhabit them, or no workmen to repair them, and so they fall down; in all these cases I am excused in waste: But of this learning when and how the act of God and strangers excuse, there are other particular rules. *B. 42 Ed. 3. 6. B. Wast. 31. 42 Ed. 3. 6. 19 Ed. 3. per Th. Fitz. Wast. 30. 32 Ed. 3. Fitzh. Wast. 105. 44 Ed. 3. 31.*

† But then it is to be noted, that necessity privileges only *quoad jura privat* (*g*); for in all cases, if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuses not: For *privilegium non valet contra rem publicam* (*h*): And as another says, *necessitas publica major est quam privata* (*i*): For death is the last and farthest point of particular necessity, and the law imposes it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life. As if in the danger of tempest, those who are in the ship throw over other men's goods, they are not answerable; but if a man be commanded to bring ordnance or ammunition to relieve any of the king's towns which are distressed, then he cannot for any danger of tempest justify the throwing of them overboard; for in that case the speech of the *Roman* holds good, who, when the same necessity of weather was alledged to prevent him from embarking, said, *Necesse est ut eam, non ut vivam* (*k*). So in the case put before of husband and wife, if they join in committing treason, the necessity of obedience does not excuse the offence as it does in felony, because it is against the commonwealth.

† So if a fire be in a street, I may justify the pulling down of the wall or house of another man to save the row

(*g*) *As to private rights.*

(*h*) *Privilegio does not avail against the commonwea'th.*

(*i*) *The public is greater than the private necessity.*

(*k*) *It is necessary that I go, not that I live.*

from the spreading of the fire; but if I be assailed in my house, in the city or town, and distressed, and to save my life I set fire to my own house, which spreads and takes hold upon other houses adjoining, this is not justifiable, but I am subject to their action upon the case; because I cannot rescue mine own life by doing any thing which is against the commonwealth: But if it had been but a private trespass, as the going over another's ground, or the breaking of his enclosure when I am pursued for the safeguard of my life, it is justifiable. 13 H. 8. 16. *per Shelley.* 12 H. 8. 10. *per Brooke.* 22 Ass. pl. 56. 6 Ed. 4. 7.

† This rule admits an exception, when the law intends some fault or wrong in the party who has brought himself into the necessity; which is *necessitas culpabilis* (*l*).

† And the common case proves this exception: that is, if a mad man commit a felony, he shall not lose his life for it, because his infirmity came by the act of God. But if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default; for the reason of loss or deprivation of will and election by necessity and by infirmity is all one; for the want of *arbitrium solutum* (*m*), is the matter; and therefore as *infirmitas culpabilis* (*n*) excuse not, neither does *necessitas culpabilis* (*o*). 21 H. 7. 13.

* If a man assails me to rob me, and I kill him; or if a woman kill him who assails her to ravish her, it is justifiable. 4. H. 7. 2.

* Though regularly the lord can only distrain in the day time, yet cattle damage feasant may be distrained in the night, otherwise they might be gone before they could be taken. *Co. Litt.* 142. (b).

[For more illustrations of this maxim, see *Bac. El.* p. 55. 1 *Blac. Com.* 130.]

- (*l*) *A culpable necessity.*
- (*m*) *Free will.*
- (*n*) *Culpable infirmity.*
- (*o*) *Culpable necessity.*

26. The law favours things for the good of the commonwealth.

As killing of foxes, and the pulling down a house, of necessity to stay a fire (*a*).

† In cases which are for the public good of the people, a man may justify doing a wrong. As in time of war a man may erect bulwarks on another man's lands (*b*).

† A man may justify the razing a house which is burning, for the safety of the neighbouring houses. And if a sheriff pursue a felon to a house, and to apprehend the felon, he breaks open the door of the house, he may justify it; because it is for the good of the public, that felons should be taken. But it is otherwise in cases of common arrests for debt, trespass, &c. because these are of a private nature, and not for the good of the commonwealth in general. *Plowd.* 322.

† Valuable things for the benefit and maintenance of trade, which by consequence are for the good of the public, and are in any place by authority of law, shall not be distrained: As a horse in an inn, materials in a weaver's shop for making of cloth, sacks of corn in a mill, market, &c. and no man shall be distrained by the instruments of his trade or profession; as the axe of a carpenter, books of a scholar, &c. when other goods may be taken. *Co. Litt.* 47. *a.*

27. Communis error facit jus (aa).

As an acquittance made by the mayor alone, where there be a hundred precedents, is good.

† This is established upon custom; for the law so favours the public good, that it will permit a common error to pass for right: As in cases of common recoveries, first

(*a*) *Dyer*, 36.

(*b*) *Dyer*, 60. *Plowd.* 322.

(*aa*) *Common error becomes right.* 4 *Inst.* 240.

had upon feigned and unlawful ground, which nevertheless having been used a long time, they having been taken and allowed by divers persons well learned, as law, are esteemed good. And that a common recovery bars an estate-tail, is not to be disputed; because a great part of the inheritances of the kingdom depends upon it. *Plowd.* 33. b.

28. *And the law favours things which are in the custody of the law.*

Goods taken by distress, shall not be taken in execution for the debt of the owner thereof.

+ Tenant for life the remainder to the right heir of J. S. tenant for life is disseised, and the descent cast, and afterwards J. S. dies, and after that the lessee for life dies, the entry of the right heir of J. S. is lawful; for this is commonly in the custody of the law, which preserves it lawfully and without any violence or destruction. 1 *Co.* 134. b.

+ Where beasts are impounded in the same land for damage-feasant, the lord of the land cannot distrain them for rent, because they are in the custody of the law. *Br. tit. Distress.*

29. *The husband and wife are one person.*

They cannot sue one another, nor make any grant one to another (*a*). And if a woman marry with her obligor, the debt is extinct (*b*), and she shall never have any action if another were bound with him: for by the marriage the action is suspended (*c*); and an action personally suspended against one, is a discharge to all.

(*a*) *Litt. sect. 168.* Yet he may give to a trustee for her benefit, and the gift will be good. So he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, to her use. *Co. Litt. 112 a. Hargr. n. Co. Litt. 3 a (1). 1 Rob. Hubb. and Wife,* 53. *Wing. Max. 765.*

(*b*) *Co. Litt. 264 b;* and *Butler's notes (1) and (2).*

(*c*) But if the husband, before the marriage, give a bond to his *in-*

Noy's Maxims. 5

An obligation with a condition to enfeoff a woman before such a day, and before the day the obligor takes her to wife, the obligation is forfeited, because he cannot enfeoff her; but he may make a lease for years with a remainder to his wife.

When a joint purchase is made during the marriage, every one shall have the whole (*d*).

When a joint purchase during the marriage is made, and the husband sell, the wife shall have a *cui in vita* (*e*) for the whole against both; and on a seofment made to one man and his wife, and to a third person, the third person shall have one moiety.

[11] * If a joint estate in land be made to a man and his wife and a third person, the man and his wife shall have but a moiety, and the third person the other moiety: So, if it be given to a man and his wife and two others, they shall have but a third; for they are but one person in law. *Litt.* § 665; *Co. Litt.* 187 *a*.

† A seofment is made to a man and woman and their heirs, with warranty, they intermarry, and after are impleaded and recover in value, moieties shall not be between them; for though they were sole when the warranty was made, yet at the time when they recovered and had execution, they were husband and wife, at which time they cannot take by moieties. *Plowd.* 483.

tended wife, with a condition to avoid it, if he leave her a certain sum of money at his death, the obligation would not be dissolved by their marriage; for the engagement never ripened into a duty, during the husband's life, and it could not have been released by him. *Smith v. Stafford*, Hob. 216; *Clark v. Thompson*, Cro. Jac. 571; *Tylle v. Peirce*, Cro. Car. 376; *Gage v. Acton*, 1 Ld. Raym. 515; *Milbourn v. Ewart*, 5 Term Rep. 381. 384. Thus it appears, that the express agreement of the parties created a right not inconsistent with the rules of marriage; so that, although the right be suspended, it is not extinguished by it. *2 Rop. Husb. and wife*, 77.

(*d*) That is, the husband and wife will be joint-tenants, and the survivor will have the whole.

(*e*) *In whose life.* See F. N. B. 193.

† At the common law, a man during the coverture could neither in possession, reversion or remainder, limit an estate to his wife: But by st. 27 H. 8. c. 10. a man may covenant with others to stand seised to the use of his wife, or make any other conveyance to the use of his wife; but he may not covenant with his wife to stand seised to her use: for they are one person in law. A man may devise lands by will to his wife, because the devise does not take effect till after his death. *Co, Litt. 112.*

† An action of debt lies against the husband for goods delivered or sold to the wife, for the law presumes they must come to the use and possession of the husband; and the husband and wife are but one person. *Pract. Reg. 102.* But the wife may not make any contract or agreement without the consent of the husband; (except it be for necessary apparel, goods for her family, &c.) and if she bargain and sell any goods, if the buyer knows her to be a feme covert, the contract shall be void; unless it be for such things as she usually trades for, by the consent of her husband. *2 Inst. 713.*

† If a woman sole be indebted, and then take husband, it is now become the debt of the husband and wife, and both are to be sued for it; but after the death of the wife, the husband is not liable; unless there be a judgment obtained against them both during the marriage. *Pract. Reg. 105.*

† A wife can never answer in any action without her husband: And if upon an action of trespass the wife comes in upon a *cepi corpus*, and the husband does not appear, she must be set at large, without any mainprise, till her husband does appear; but he appearing may answer without her; and therefore a protection cast by the husband serves for the wife also. *Finch's Law, 41.*

† A man must answer for the trespasses of his wife; and if a feme covert slander any person, the husband and wife must be sued for it. But for scandalous words against a man and his wife, the husband may prosecute one action

alone for his slander, and afterwards join in an action with his wife for her's. *Style's Rep.* 113.

† If a married woman be assaulted and beaten, if the husband is thereby deprived of her service or conversation, he alone may commence an action of trespass. 3 Co. 113.

† A husband has power over his wife's person; but if he threatens to kill her, &c. she may make him find security for the peace. *Fitz. N. Br.* 80.

† The husband is the *head of the wife*, and all things which are the wife's are the husband's; so that by marriage with a woman who has a term of years, the husband is possessed of it in her right, and has power to dispose of it; and if she have goods and chattels, by the intermarriage, they immediately become the husband's (f).

† The husband has power to dispose of things in action; and his release of an obligation made to the feme, or where goods were taken from her whilst she was sole, shall be good against the wife; but if he die without making such release, the wife shall have an action upon the obligation, and not the executors of the husband. 39 H. 6.

† And if an obligation made to a feme, become payable during coverture, and afterwards the wife die, the husband shall have an action of debt upon it; because it was

(f) *Co. Litt.* 351 a. But the freehold or inheritance of the wife is subject to other rules, for the husband, by the marriage, does not become absolute proprietor of the freehold or inheritance; although, as the governor of the family, he is so far master of it, as to receive the profits of it during her life; but he has no power to make an absolute sale of it without her consent. 1 Bac. Abr. 476. *Baron and Feme* (C) 1. Although a man who marries a woman seised in fee, gains a *freehold* in right of his wife, yet it must be pleaded, that the husband and wife, in right of the wife, were seised in *fee*, not of freehold merely; and if he state that he is seised in *his demesne as of freehold in right of his wife*, it will be bad on a special demurrer. *Polybank v Hawkins*, Dougl 329. So in *Catlin v. Milner*, 2 Lutw. 1422. 1425, where it is stated, that the husband alone was seised in *his demesne as of fee* in right of his wife, it is well held not to be good pleading; for they are both seised in right of the wife; and so are all the precedents. *Wms. n. 1 Saund.* 253

a duty to the feme, and a thing in action before marriage ; but it is otherwise where rent is in arrear. F. N. B. 121.

† Where a wife has a term of years the husband cannot devise it to another by will, or grant a rent-charge (g) out of it ; for she had an estate in it before, and so has at the time of his death ; and she surviving, is remitted to the term, whereupon she shall avoid the rent-charge. *Plowd.* 418.

† If husband and wife bargain and sell the wife's lands by indenture, and the vendee grant them a yearly rent out of it, her acceptanee of this rent, after her husband's death, does not bar her of the land, although the acceptance be an agreement to the bargain ; the bargain being but a contract is the bargain of the husband only ; for a wife is *sub potestate viri* (h) ; and therefore it is, that the judges, when a woman is to acknowledge a fine of lands, do examine her privately, whether she be willing to do it, or come by compulsion of the husband. *Off. of Exec.* 210.

[From the practice, in England, of taking the privy examination of the wife, on fines and recoveries, originated the law of Virginia, in relation to conveyances by husband and wife, where there never were any fines and recoveries. See 2 Hen. Stat. at Lar. 317; 1 Rev. Code of 1819, pa. 366, note :]

† For this reason the writ, *cui in vita* (i), is given to the wife by law, for the recovery of her land after her husband's death, being aliened by him. And in many cases, the law helps the wife, because she is under the power of her husband : As if baron and feme, in right of the wife, have title to enter into lands, and the tenant dies seised, the entry of the husband upon the heir, who is in by de-

(g) *Co. Litt.* 184 b. Her right being paramount, and her interest not having been displaced, she will be entitled to the term discharged from the payment of the rent, yet he might have granted away the term itself 1 *Bac. Abr.* 476. *Baron and Feme* (C. 2). 1 *Roper Husb. and Wife*, 178. *Harg. n. Co. Litt.* 184 b. (6).

(h) *Under the power of her husband.*

(i) *In whose life.*

scent, is taken away; but if the husband die, the wife or her heirs may enter upon the issue; for the laches of the husband shall not turn to the prejudice of the wife or her heirs. *Litt. Ten.* 235. But it is otherwise if the wrong be done to the feme before marriage: And if it be for the performance of a condition annexed to the estate; as where a feoffment is made to the feme reserving rent, and for default of payment a re-entry, in that case the laches of the husband shall bar the wife for ever. *Co. Litt.* 24.

30. All that a woman has, appertains to her husband.

Personal things, and things absolutely real, as lands, rents, and so forth, or chattels real, and things in action, are only in her right; notwithstanding chattels real, and things in action, he may dispose of at his pleasure (*a*), but not will nor charge them; and he shall have her real chattels, if he survive. Of things in action, the woman may dispose by her last will, and she may make her husband her executor, and he shall recover them to the use of the last will of his wife (*b*).

If a lessee for years grant his term to a man, or woman, and to another, they are joint-tenants: but if goods be given to her and to another, her husband and the other are tenants in common.

The husband may release an obligation, or trespass for goods taken when his wife was sole, and it shall be good against the woman if he die; but if he die without making any such release, the woman shall have the action, and not the executor of her husband.

[12] The woman surviving, shall have all things in action; or her executors, if she die. *Co. Litt.* 351 a. *Bull. note* (1).

(*a*) *1 Bac. Abr.* 476. *3 Bac. Abr.* 65. *2 Bl. Com.* 435.

(*b*) If the husband survive his wife, then he is entitled to administration to her effects, and he will thereby become entitled to all her personal estate, which continued in action or unrecovered at her death. *2 Bl. Com.* 435. *Tell. Ex.* 84. 224. 1. *Rop. Husb. and Wife,* 203.

The husband shall be charged with the debts of his wife
(c) only during her life.

* A feme covert cannot make an executor without the consent of her husband; and the administration of her goods of right belong to him. 4 Co. 51. b.

[See further as to the property of husband and wife, *Hargrave's and Butler's, Co. Litt. 3. a. note (1)*; 32. a. n. (10); 325. b. n. (1); 351. a. n. (1)].

31. *The will of the wife is subject to the will of her husband.*

Note. A seoffment made to the wife, she shall have nothing if her husband do not thereto agree. See *Co. Litt. 352, 356.*

* If a feme sole devise lands to a man and afterwards take him to husband and dies; the heirs of the wife shall have the land; because after marriage the will of the wife is in judgment by law restrained, and subject to that of her husband. 4 Co. 91. a.

* Though a feme covert may purchase without the consent of her husband, yet he may disagree thereto; and if he agree to it and die, she may nevertheless waive the purchase, and so may her heirs if she have not agreed thereto, for she had no free will. *Co. Litt. 3. a.*

MORAL RULES.

32. *The law favours works of charity, right, and truth, and abhors fraud, covin, and uncertainties which obscure the truth; contrarieties, delays, unnecessary circumstances, and such like. Dolus et fraus una in parte sanari debent (a).*

* The law favours works of charity; therefore charitable uses are not taken away by stat. 23. H. 8. c. 10,

(c) Contracted before marriage. After marriage the reasonable debts she contracts are his debts.

(a) *Deceit and fraud should be remedied on all occasions.*

though the words of the statute are general, but only *superstitious* uses. 1 Co. 24. a.

* *It favours right*: so that no act (even though under pretext of religion) shall work a wrong to a stranger who has right, and bar him of his entry; therefore if disseisor have issue and enter into religion, the disseisee shall not be barred of his entry. Co. Litt. 248 b.

* If tenant for life plead covenously to the disinheritance of him in reversion, it is a forfeiture, for the law abhoreth fraud. Co. Litt. 252. a.

* If a man make a lease for so many years as A. shall live, it is void for uncertainty. Co. Litt. 45. a.

A grant of all his woods in Black Acre, which may be reasonably spared, is a void grant, if it be not reserved to a third person, to appoint what may be spared.

[13] A feoffment made in fee of two acres to two men, *habendum* (b) one acre to one, and the other acre to the other, this *habendum* is void.

33. No man can take advantage of his own wrong.

If a man be bound to appear at a day, and before the day the obligor put him in prison, the bond is void. See Co. Litt. 208. a.

† One in execution escapes, and the gaoler takes him again, the party, if he will, may have him to remain in prison in execution for him still, for the escape is his own wrong: and if one in prison upon execution escape, and he be taken, he shall not bring an *audita querela* to discharge himself of his imprisonment; for he shall not take advantage of his own wrong. 3 Co.

† A. devises lands to B. until eight hundred pounds be levied for his daughter's portion; his son and heir enters, and conceals the will, whereupon he receives the profits before the will is discovered; but afterwards the devisee enters and receives the profits, until they amount to six

(b) *To have.*

hundred pounds ; the heir is to supply the rest, for he shall not take advantage of his own wrong. 4 Co. 63.

† If lessor and lessee for years join in the cutting down of timber-trees, the lessor shall not punish the lessee in a writ of waste, and take advantage of his own wrong. *Perk.* 41.

34. *Lex neminem cogit ad impossibilia, &c. (a).*

The law compels no man to shew that which by intention he does not know : as if a servant be bound to serve his master in all his lawful commands, it is a good plea, to say, he served him lawfully.

A covenant to make a new lease upon the surrender of the old lease, and afterwards the covenantor makes a lease by fine, for more years, to a stranger, the covenant is broken, although the lessee did not surrender, which by the words ought to be the first act, because the other had disabled to take, or to make.

† If a man be bound in an obligation, &c. with condition, that if the obligor go from the church of St. Paul's, London, to the church of St. Peter's at Rome, within three hours, this condition is void and impossible, but the obligation may be good. *Co. Litt.* 206.

† And so it is of a feoffment upon condition, that the feoffee shall go as aforesaid, the feoffment is absolute, and the condition void ; because it is a condition subsequent. But if there be a condition precedent impossible, no estate or interest is acquired thereby (b). *Co. ib.*

† If a lease be made for forty years upon condition that the lessee dwell upon the lands the whole term, and he die at the end of ten years, the executors shall enjoy the land, because the condition is become impossible. *Dod.* 37 *Eliz.*

(a) *The law does not compel any man to do what is impossible.* 5 Co. 21.

(b) In case of a feoffment in fee, with a condition subsequent, which is impossible, the estate of the feoffee is absolute ; but if the condition precedent be impossible, no estate or interest will arise, *Co. Litt.* 206 b.

If a man be bound by recognizance or bond, with condition for his appearance the next term in such a court, and before the day the conusee or the conusor die, the obligation is saved.

+ If a deed remain in one court, it may be pleaded in another court, without shewing forth; for the law does not compel any one to impossibilities. And if a lessee covenant to leave woods, &c. in good condition, and during the term they are blown down by winds, the lessee shall not be sued, because it is impossible he should perform his covenant. 1 Co. 98.

LAW CONSTRUCTIONS.

[14]

35. *The law expounds things with equity and moderation, to moderate the strictness. It is no trespass to beat an apprentice with a reasonable correction, or to go with a woman to a justice of peace, to have the peace of her husband against the will of her husband, which equity restrains the generality, if there be any mischief or inconvenience in it: as if a man make a feoffment of his lands in C. and with common in all his land, the common shall be intended within his lands in C. and not in his other lands he shall have elsewhere.*

36. *Every act shall be taken most strictly against him who made it.*

As if two tenants in common grant a rent of ten shillings, this is several, and the grantees shall have twenty shillings (a); but if they make a lease, and reserve ten shillings, they shall have only ten shillings between them.

(a) *Lord Nottingham's MS n. Co. Litt. 267 b. (1) Finch's Law, 63.* Perhaps this doctrine may be considered a mere quibble in the present day. If the recital stated the intention to be only to grant a rent of ten shillings, that would counteract the operation of this rule of law. Vide *Shelley v. Wright*, Willes, 9. *Henn v. Handson*, 1 Sidf. 141. *Thorpe v. Thorpe*, 1 Ld. Raym. 235. Because it is a maxim of

So an obligation to pay ten shillings at the feast of our Lord God (*b*), it is no plea to say that he did pay it; but he must shew at what time, or else it will be taken he paid it after the feast. See *Co. Litt.* 303. *b*.

† If tenant in fee make a lease for life, without expressing for whose life, it shall be intended for the life of the lessee, and shall be taken strongly against the lessor; but if tenant in tail make such a lease, it shall be taken for the life of the lessor, because otherwise it would work a wrong to the reversioner. *Co. Litt.* 42 a (*c*).

† When a grant is uncertain, and the words of it are ambiguous, the grant shall be taken most strongly against the grantor. As if a man grant an annuity out of land, and he has no land at the time of the grant, yet the grant shall charge his person. *Trin. 9 H. 6.* And if a deed be good for some parcels, and for some parcels not, that which is for the advantage of the grantee shall stand good.

† If a man give lands to another *et heredibus* (*d*), it shall be a fee-simple without the word *suis* (*e*), and though he do not give him a fee-simple expressly (*f*). If I give lands to *A. B.* and his heirs male, this will be a good fee-simple, and

the highest antiquity in the law, that all deeds shall be construed favourably, and as near the apparent *intention* of the parties as possible; for where the intention is clear, too minute a stress ought not to be laid even on the strict and precise signification of words. *4 Cru. Dig.* 292, 293. If such an unjust advantage were attempted to be taken by the grantee of the rent, it seems clear that equity would restrain him, and oblige him to pay the costs. However, when tenants in common grant a rent-charge, it is prudent to add a proviso and declaration, that the grantee is only to receive the sum actually intended, or otherwise to make a conveyance to uses, to the end and intent that the person to have the rent may receive it, and subject thereto to the use of the grantors, as tenants in common in fee.

(*b*) *Christmas.*

(*c*) *Perk.* s. 104.

(*d*) *And to heirs.*

(*e*) *His.*

(*f*) *1 Plow. Com.* 28 a. 29. Lord Coke says, it is safe to follow *Lleton*, and add *suis*. *Co. Litt.* 8 *b*.

the word “males” is void (*g*). And if a man give lands to one *et filio suo primogenito* (*h*), and he has no son at the time of the gift, but afterwards he has a son, that son shall have the land by way of remainder; for the law construes the limitation strong against the maker (*i*).

† If I sow all my land with corn, and then make a lease of it for years, the corn belongs to the lessee, if I except it not. 32 H. 6.

† If I give a horse to *A. B.* being present, and say unto him, *A. C. take this*, it is a good gift, though I call him by a wrong name: but so it would not be if I delivered it for the use of *A. C.* where I meant *A. B.* So if I say to *A. B.* *Here, I give you my ring, with the ruby*, and deliver it with my hand; though the ring bear a diamond and no ruby, this is a good gift, for these shall be taken strongly against the giver. Bac. Max. 87.

† But though grants are taken strongly against the makers, yet no wrong must thereby be done, as already observed. And a man may not be obliged by his own act to do some things which are against law: as a dyer was bound not to use his trade for two years, and the obligation was held against the common law (*k*). And if a husbandman be bound not to till or sow his ground, the obligation is contrary to the common law, and void. 11 Co. 53.

(*g*) Co. Litt. 13 a; Plowd. 18. Bac. Max. 12.

(*h*) *And to his first-born son.*

(*i*) Plowd. 29.

(*k*) *Vide note, infra, Condition,* * 78.

37. *He who cannot have the effect of the thing, shall have the thing itself.*

Ut res magis valeat quam pereat (a).

As if a termor grant his term *habendum immediate post mortem suam* (b), the grantee shall have it presently(c).

(a) *That a thing may rather be good than void.*

(b) *To have immediately after his death.*

(c) *Germain v. Orchard*, 1 Salk. 346. 14 Vin. 157, pl. 14. 3 Bac. Abr. 399. The reason assigned by the court is, because by the grant of lands in the premises to the grantee, his executors, administrators, and assigns, the whole term of years is transferred, and since by the premises the whole term passed presently, but by the *habendum* not till after the death of the grantor; *ex consequentia* the *habendum* was repugnant to the premises, and void; and this judgment was affirmed in the House of Peers.

This judgment partakes a little of legal sophistry, and it seems would not in the present day be followed; for though the *habendum*, as well as all other parts of a deed, are generally taken most strongly against the grantor, and most in advantage of the grantee; yet it nevertheless must be construed as near the intention of the parties as can be. *Shep. Touch.* 101. and see *Litt. s. 298*, and the comment. And as it seems clear that an assignment of a term may be made on a contingency, it therefore follows, as a necessary consequence, that it may be assigned from a certain day to come. *Welcden v. Elkington*, *Plow. Com.* 524.

There are many maxims of law, that deeds, especially such as execute mutual agreements for valuable consideration, should be construed liberally, *ut res magis valeat*, according to the intent, which ought always to prevail, unless it be contrary to law. A strained construction should not be made to overturn the lawful intent of the parties. Lord Mansfield. If we can support the intention, by any construction, we will do it Mr. Justice Denison. *Wright, ex dem. Plowden v. Cartwright*, 1 Burr. 285, 286.

It seems clear there would be relief in equity against such a construction, as that mentioned in the text.

To avoid this question, when an assignment is intended to be made from a future day, it should be made to a trustee in trust for the grantor, till the commencement of the intended time, and then in trust for the assignee, his executors, &c. for the residue of the term.

Assignments of terms for years from a future period, as from Michaelmas day next, are not uncommon, and though they are not technically correct, according to the old cases, yet no objection is raised to

† Tenant in tail makes a lease for life, this shall be construed for the life of the lessor (*d*).

† An annuity granted *pro consilio impendendo* (*e*), or a feoffment for instructing a son, or for paying a sum of money, is a condition without conditional words; because otherwise, the party would be without remedy. Mar. 141, 142.

38. *When many join in one act, the law says it is the act of him who could best do it, and that the thing should be done by those of best skill.*

[15] As if the disseisee, and the heir of the disseisor, who is in by descent, join in a feoffment, this shall be the feoffment of the heir only, and the confirmation of the disseisee.

And the merchant shall weigh the wares, and not the collectors (*a*).

† If a condition be, that the obligee shall carry to the shop of the obligor (being a tailor) three yards of cloth, which shall be there cut out, and then that the obligor should make the obligee a coat of it, the obligor, viz. the tailor, is bound to cut it out (*b*).

† Issues joined shall be tried by those who have most skill, viz. issues upon points of law, that is, demurrs shall

the title on that account. But when an assignment is to take effect immediately in interest to avoid the above objection, it is prudent to make the *habendum* "from the day next before the day of the date," or "henceforth."

(*d*) *Litt.* s. 283. *Co. Litt.* 42. So if lessee for term of his own life makes a lease generally *with livery*, this the law construes an estate for his own life only. *Co. Litt.* 183 a. 2 Bac. Abr. 559. *Estate for Life, &c.* (A). 4 *Cru. Dig.* 295. 348.

(*e*) *For giving his advice.*

(*a*) The author probably had in his mind, *Reniger v. Fugessa*, 1 *Plowd. Com.* 1.

(*b*) Finch's Law, 61. For the principal point is the making of the coat, and before that can be done, it must of necessity be cut out, and who shall do this is not expressed, and therefore the law appoints the tailor to do it, because he has the greatest knowledge and skill to do it, and it belongs to his business. *Plow. Com.* 15 a.

be argued before, and adjudged by the judges learned in the law, &c. 4 Eliz. 230 b.

† Disseisin of an office in the Common Pleas, or erasure of a record there, shall be tried by the filacers and attorneys attending in that court. 11 E. 4. 3 b; 2 Mod. 304.

39. *When two titles concur, the elder shall be preferred.*
2 Inst. 714.

† A disseisor lets the land to the disseisee for years or at will; now if he enters, the law will say, that he is in on his ancient and better title (a).

* When one mortgages lands, and afterwards grants a lease of them, and gives the lessee possession, the mortgagee if he did not assent to the demise, may recover the premises, by ejectment against the lessee. *Doug. 21.*

40. *By an acquittance for the last payment, all other arrearages are discharged.*

* If a tenant be in arrear twenty years, and his landlord give him a receipt for the last rent, all arrearages shall be held to be paid; and no proof shall be admitted to the contrary. *Co. Litt. 373. a.*

* Though but part of a sum be paid, yet if acquittance be given for the whole, it is a discharge. *Ibid.*

41. *One thing shall enure for another.*

If the lessor enfeoff the lessee for life (aa), it shall be taken for a confirmation. See *Co. Litt. 30. b.*

* A man having a rent charge issuing out of the wife's lands, releases it to the husband and his heirs; yet the husband shall not have it, but it shall enure by way of extinguishment. *Plowd. 372.*

(a) But the entry must be *congeable*, and the lease must not be by indenture or matter of record, because that would estop the disseisee and he would not be *remitted*. *Litt. s. 693, 694, 696. Perk. s. 159.*

(aa) Without any words of limitation.

42. In one thing, all things following shall be included, in granting, demanding, or prohibiting.

If a man make a grant of land, and except a close of wood out of it, the law will give him a way to the wood (*a*).

† As confederacy and combination to execute any unlawful act is punishable by law, before the unlawful act is executed, the law punishes the combination and confederacy to prevent the unlawful act; and therefore the commission of oyer and terminer gives power to the commissioners to inquire of all combinations, confederacies, &c. 9 Co. 57.

In action of waste, a writ of estrepelement will lie; and when it comes to the sheriff, by virtue of it, he may resist those who will make waste; or if he cannot otherwise prevent it, he may imprison them: And if it be necessary, he may take the *posse comitatus* for his aid; though the words of the writ are only, that he shall personally go to the mesusage and take order that no waste be done, hanging the plea; because when any thing is commanded, that is also commanded by which we may come at it. 5 Co. 115.

† If a man grant to me all his trees growing in his woods, it is implied, that I may come upon the ground and cut them down, and carry them through all his land (though his grass receive injury by the carriage) and he shall not have a writ of trespass against me; for trees are such things, that if they are not carried by carts, I cannot have them to make my best profit of them: and a man shall always justify the necessary circumstance where he has title to the principal thing (*b*).

† In case a lessor upon his lease excepts the trees, and afterwards has an intention to sell them, the law, as incident to the exception, gives to him and those who are

(*a*) *Perk.* s. 110. *Finch's Law*, 63. *Wms.* n. 1 *Saund.* 322 b. (6). And whenever the law gives any thing, it gives also a remedy for the same; *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest.* *Co. Litt.* 56 a.

(*b*) *Plow. Com.* 16. *Finch's Law*, 63.

willing to buy them, power to enter and shew and view the trees ; because without entry, they cannot be viewed ; and without view, they cannot be bought. 11 Co. 52 a.

† If a man has mines hidden within his lands, and make a lease of the said lands and all the mines in the same, there the lessee may dig for them ; for *quando aliquis quid concedit, &c.* (c) But if a man lease his land to another, in which there is a hidden mine, but mines are not mentioned in the grant, he cannot dig for it, if he do it is waste ; though if he make a lease of all his lands and all the mines, it is otherwise for the reasons aforesaid. 5 Co. 12.

† A tenant at will sows corn on the ground, and the lessor ousts him, he shall have free entry, egress and regress, to cut and carry away the same ; for when the law gives any thing to any one, it gives implicitly whatsoever is necessary for the taking and enjoying of the same : and if the lessee be disturbed in carrying his crop, he may bring an action upon the case and recover damages. 1 Inst. 56.

† If land be granted to a man, the law allows him a way to it without being expressly mentioned. And a landlord may enter the house and lands of his tenant to view repairs, &c.

43. A man cannot qualify his own act.

As to release an obligation until such a time.

† Upon the grant of the reversion of three acres, and the tenant attorns for one, this is good for all three. Fitzh. Abr. tit. *Variance*, 43.

* If an obligee release his debt till Michaelmas it is good forever Co. Litt. 274. b.

44. The construction of the law may be altered by the special agreement of the parties.

[16]

If a house be blown down with the wind, the lessee is

(c) For when any one grants any thing, &c.

excused in waste; but if he have covenanted to repair it, there an action of covenant lies by the agreement of the parties (a). See *Co. Litt.* 53.

* If two joint tenants exchange with one another, they would, by construction of law, hold the exchanged lands jointly; but if the exchange expresses that they shall hold in common, it shall be so. *Co. Litt.* 51. a.

45. *The law regards the intent of the parties and will imply their words thereunto.*

And that which is taken by common intendment shall be taken to be the intent of the parties: And common intendment is not such an intendment as stands indifferent, but such an intent, as has the most vehement presumption. All uncertainty may be known by circumstances, every deed being made to some purpose, reason would that it should be construed to some purpose; and a variance shall be taken most beneficial for him to whom it is made, and at his election.

46. *An intendment of the parties shall be ordered according to law.*

If a man make a lease to a man and to his heirs for ten years, intending his heirs shall have it if he die, notwithstanding the intent, the executors shall have it.

+ Two joint-tenants of an acre of land, change it with a stranger, they shall be joint-tenants of the land exchanged; but if the exchange be to have the acre in common between them, this is good. *Co. Litt.* 188, 190.

[17] **47. *Qui per alium facit, per seipsum facere videtur (aa).***

A promise made to the wife in consideration of a thing to be performed by her husband, if he agree, and perform

(a) See the first note to *Covenants*, post. * 85.

(aa) He who acts by another is held to act by himself. 1 Inst. 258.

the consideration, in an action of the case, he shall declare the assumption was made to him.

And if my servant sell my goods to another, in an action of debt I shall suppose he bought them of me.

† A servant by command of his master may make claim of land for his master; and if the servant do all he was commanded, and which his master ought to do, there it is as sufficient as if his master had done it himself. 1 *Inst.* 258.

† If I declare by my last will, that *A. B.* shall alien my land, and he do so, it is my alienation by him; and if I give authority to my bailiff to sell my sheep, or other cattle, and he do so, it is my sale by him. *Plowd.* 475.

† If a man have a bailiff or servant, who is known to be his servant, and he send him to fairs and markets to buy or sell, his master shall be charged with the payment, if the thing which is merchandised comes to his use; and so it is if a man sends his boy to market, *consideratis considerantibus*. And if a man make another his factor to buy things for him, if he buy merchandise of any, the master shall be charged by his contract, though the goods come not to his possession. 4 *E. 2.*

† If a servant sell me cloth, and warrant it to be of a certain length, the action lies against the master only, and not the servant: And if a surgeon undertake the cure of a person, and by sending medicines by his servant the wound is hurt and made worse, the patient shall have an action against the master and not against the servant. If a receiver make a deputy, the writ of account shall be brought agianst the receiver only, because the money was received to his use. 18 *H. 8.*

† But though things done by another are, as it were, done by a man's self; yet corporal and personal things cannot be done by another; as suit of court cannot be done by any other but the tenant himself. 7 *H. 4.*

CUSTOMS.

48. *Consuetudo est altera lex (a).*

Customs are of two sorts: General customs in use throughout the whole realm, sometimes called Maxims; and particular customs used in some certain county, city, town, or lordship, whereof some have been specified before, and some follow here, and where occasion is offered.

GENERAL CUSTOMS.

Every custom is a sufficient authority to itself; and what is a custom, and what is not, shall always be determined by the judges, because they are known to none but to the learned.

[18]

A custom shall be taken strictly.

A particular custom, except the same be a record in some court, shall be pleaded and tried by twelve men.

† When a reasonable act once done, was found to be beneficial and agreeable to the people, then did they use and practice it often, and so by the reiteration of the same, it became a custom; which being practised time out of mind without interruption, for the quiet and by the approbation of the people, obtained the force of a law.

† The general customs used throughout all England, is the common law; for Coke says, the common law is a common opinion generally received. Plowden says, it is nothing else but common use. And according to Finch, the common law is a law used by prescription throughout

(a) *Custom is another law.* 4 Co. 21. *Consuetudo tollit communem legem.* Co. Litt. 33 b. The unwritten law is that which usage has approved: for all customs which are established by the consent of those who use them, obtain the force of a law. *Just. Inst.* 1. 2 9. See also *Vinnius*, 24, 25. No custom can prevail against right reason, and the law of nature. The will of the people is the foundation of custom: but if it be grounded not upon reason, but error, it is not the will of the people. *Taylor's Civil Law*, 246, 247. 2d edition.

the kingdom: And the best expounder of the law is custom.

† The different customs of manors and places have chiefly arisen by the several nations who have had government over this kingdom, the Britains, Romans, Saxons, Danes and Normans, who have left behind them part of their languages, and part of their usages.

† Acres of land are to be accounted according to the measure of the country: and if a man bargain and sell so many acres of wood, they shall be measured according to the usage of that country (a).

CHAP. II.

STATUTES.

THE last ground of the laws of England stands in divers statutes made by our sovereign lord the king and his progenitors, and by the lords spiritual and temporal, and the commoners, in divers parliaments, in such cases where the former laws seemed not sufficient to punish evil men, and to reward the good.

Of general statutes, the judges will take notice, if they be not pleaded; but not of special or particular (aa).

(a) See further concerning *customs*. Hargr. n. Co Litt. 110 b. (1), (2) 115 a (8), (9). 2 Bac Abr. 232. 7 Bac. Abr 441. Gwil edit. 7 Vin. Abr. 164. 19 Vin Abr 511 3 Supp. Vin Abr. 66. Com. Dig. *Custom*, in Index. 3 Cru. Dig 468. Robins Gav. 32. 225

(aa) As to the distinction between *public* and *private* acts, and the rules of evidence in relation to them, see *Philips on Evid.* 309, 310, 384, 4th edit.; *Gibl. Evid.* 12. 45, 46, 4th edit., 10, 39, 40, *Sedgwick's edit.*; *Bull. N. P.* 222, 224; *Peake's Evid.* 26, 2d edit. 29, 4th edit.; *Hargr. n. Co Litt.* 98 b (1); *2 Saund. 155. Wms. note*; *Doug. 97. notes*; *2. T. Rep.* 575; *5 Cru. Dig.* 4; *12 East* 479; *Sug. Vend* 640, 5th edit.; *1 Bl. Com.* 85; *1 Burn. Just.*, XXIV: *Co. Litt.* 381. a note.

[By the laws of Virginia, private acts of assembly may be given in evidence, without pleading them specially. 1 Rev. Code of 1819, p. 510 § 92.]

All acts of parliament, as well private as general, shall be taken by reasonable construction, to be collected out of the words of the act only, according to the true intention and meaning of the maker (b).

[19] *Four lessons to be observed, where contrary laws come in question.*

1. The inferior law must give place to the superior.
2. The law general must yield to the law special.
3. Man's laws to God's laws.
4. An old law to a new law.

And oftentimes all these laws must be joined together to help a man to his right : as if a man disseised, and the disseisor made a feoffment to defraud the plaintiff, in this case it appears, that an unlawful entry is prohibited by the law of reason.

But the plaintiff shall recover the double damage, and that is by the statute of 8 H. 6. And that the damages shall be assessed by twelve men : that is, by the custom of the realm : And so, in some cases, these three laws do maintain the plaintiff's right.

And these laws concern either men's possessions or the punishment of offences.

And so much shall be sufficient to be said touching common law, customs, and statutes.

(b) The collection 6 Bac. Abr. 384. *Statute* (1) 5. is an admirable commentary on our author, and shews what a masterly view he took of the subject. *Vide* 1 Bl. Com 88. and Christian's note. Lord Bacon's Maxims, Reg. 12. Tracts 75. Barrington's Observations on the Ancient Statutes, 523. 5th edition.—The rule above laid down, by the author, for the construction of statutes, applies to *remedial* statutes only; for *penal* statutes are construed strictly, and according to the letter; thus the stat. 1 Edw. 6. c. 12, enacting that persons convicted of stealing *horses* should be guilty of felony without clergy, was held not to extend to the stealing of *one horse*, though evidently within the meaning of the legislature. *Bac. El. c. 12.*

CONCERNING POSSESSIONS.

[20]

The difference between possession and seisin is ; lessee for years is possessed, and yet the lessor is still seised ; and therefore the terms of the law are, that of chattels a man is possessed ; whereas in seafinments, gifts in tail, and leases for life, he is described as seised.

CHAP. III.

OF POSSESSION IN FEE-SIMPLE.

TENANT in fee-simple is he who has lands or tenements to hold to him and his heirs for ever (a). It is the best inheritance a man may have ; he may sell, or grant, or make his will of those lands.

And if a man die, they descend to his heir of the whole blood. [See further as to the law of descents, post. ch. IV., and 2 Bl. Com. 104.]

[(a) At the common law, if lands were conveyed by *deed*; without naming the *heirs* of the grantee, he would have only an estate for life, (*Co. Litt. sec. 1. Perk. s. 243*) ; but a *devise* to a man forever, would create a fee-simple, (*Co. Litt. 9 b ; 27, a*). The law, in this respect, was altered in Virginia, by act of 1785, which declares that "every estate in lands thereafter granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or operation of law." See 12 *Gen. Stat. at Lar.* 157 ; 1 *Rev. Code of 1819*, p. 369 § 27.]

[21]

CHAP. IV.

FEE-TAIL.

FEE TAIL is of whose body he shall come who shall inherit (a).

Tenant in tail is said to be in two manners: tenant in tail general, and tenant in tail special. *Litt. s. 13.*

General tail is, where lands or tenements are given to a man and the heirs of his body. *Litt. s. 14, 15.*

Special tail is, where lands or tenements are given to a man and his wife, and to the heirs of their two bodies (*Litt. s. 16*) or to their heirs males, or to their heirs females (b).

(a) [Estates in fee-tail were converted into fee-simple, in Virginia, by act of October 1776, and the creation of such estates in future prevented, by declaring that every limitation of an estate, which, as the law formerly stood, would have been a fee-tail, shall be deemed a fee-simple. *See 9 Hen. Stat. at Lar. 226; 12. Ibid 156; 1 Rev. Code of 1819, pa. 368, § 22.* In some of the states in the union, however, the statute *de donis*, under which estates tail originated, still operates; and even in those states, where they are converted into fee-simple, it may be sometimes necessary to know what limitation of an estate, would constitute a fee-tail, in order that it may be ascertained whether it be converted into a fee-simple, or not. For the learning on this subject, see *Hargrave's Co. Litt.*]]

[~~(a)~~ Where personal estate is limited either by deed or will to one in tail, it is an absolute and complete disposition of the whole to him, his executors, or administrators; he may dispose of it as he pleases; if he do not dispose of it, it goes to his executors or administrators, and not to his issue; and it does not go to the remainder-men, or revert to the donor for default of issue. *Feerne Ex Dev. Bul. edit. 461, 463. 2 Roper on Legacies 393, 2 edit.; 8 Rep. 95; Co. Litt. 186. Harg. note (7).*]

(b) If lands be given to a man and to the heirs males or females of his body, he has an estate in general tail in him. *Co. Litt. 25 b.* So that it seems in such a case the proper expression would be tenant in

Tenant in tail is not punishable for waste.

Tenant in tail cannot devise his lands, nor bargain, sell, or grant, but for term of his life, without a fine or recovery.

If a man will purchase lands in fee, it behoves him to have these words "and his heirs" in his purchase.

If a man would grant lands in tail, it behoves him to appoint what body they shall come of (c).

Yet a *devise* of lands to a man and his heirs males is a good intail (d) and of lands to a man for ever, a good fee-simple (e).

How lands shall descend (a).

[22]

Inheritance is an estate which descends : It cannot linearly ascend from the son who purchases in fee, and dies,

general tail male, or female; and where it is limited to the heirs male or female of a particular man by a particular woman, or of a man and woman, tenant in *special tail male*, or female, Com. Dig. (B 4) pl. 3. B 5) pl. 4, 5. are contradictory. Litt. s. 21. cited, does not support. Comyn. 1 Cru. Dig. 85. does not notice this distinction. *Vide* 2 Bac. Abr. 547. *Estate in Tail (C)*, which is a good collection on this subject.

(c) For if lands be granted to a man and his heirs male, this is a fee-simple. Co. Litt. 13 a. So if the limitation had been to the donee and his heirs female, or to the donee and his heirs male or female, Litt. s. 31. but in a will those words will create an estate-tail. *Baker v. Wall*, 1 Ld. Raym. 185. Co. Litt. 27 b. Though it would be an estate-tail in the case of a grant, if the words "of his body" had been added, Co. Litt. 25 b. Litt. s. 26. *Idle v. Coke*, 2 Salk. 621, pl 3, without the word *begotten*. 10 Vin. Abr. 257. 2 Bac Abr. 544. 547.

(d) Co. Litt. 9 b 27 a. Cwp. 833. 9 East, 382. 7 Taunt. 85. 3 Bac. Abr. 256. 6 Cru. Dig. 288.

(e) Co. Litt. 9 b. 1 Co. 85 b. 1 P. Wms. 77. Cwp. 352. 3 Burr. 1895. 11 East. 518 4 Bac. Abr. 250. 6 Cru. Dig. 260.

[(a) The law of descents was altered, in Virginia, by act of 1785, which took effect the first day of January 1787. By this law very important innovations were made on the common law rule. Estates of inheritance descend in parcenary, to male and female ; they may ascend to the father; and those of the half-blood may inherit, in a certain proportion. See 12. Hen. Stat. at Lar. 138; 1. Rev. Code of 1819. ch. 96. pa. 355.]

to his father; but descends to the brother or uncle of the son or to his heirs, being the next of the whole blood; for the half blood shall not inherit, but the most worthy of blood; as of the blood of the father before the mother, of the elder brother before the other, if born within marriage.

A descent shall be intended to the heir of him who was last actually seised; that the sister of the whole blood, where the elder brother enters after the death of his father, and not his brother of the half blood, nor any other collateral cousin shall inherit; yet notwithstanding such a one is heir to a common ancestor: In which rule every word is to be observed, and so in every maxim, if the land, rent, advowson, or such like, descends to the elder son, and he die before any entry or receipt of the rent, or presentment to the church, the younger son shall have and inherit: And the reason is, because that in all inheritances in possession, he who claims title thereunto as heir ought to make himself heir to him who was last actually seised.

[23]

Here the possession of the lessee for years or of the guardian, shall invest the actual possession and inheritance in the elder brother.

But he dying seised of a reversion, or a remainder, or an estate for life or in tail, there he who claims the reversion or remainder as heir, ought to make himself heir to him who had the gift, or made the purchase.

Feodo excludes an estate-tail, in which the second son shall inherit before the daughter (*b*).

And if the lands be once settled in the blood of the father, the heir of the mother shall never have them; because they are not of the blood of him who was last seised (*c*). [But see note (*a*) ante.]

And lands shall descend to the heir of the blood of the first purchaser:

As if the father purchase land, and it descend to the son, who enters and dies without heirs of the father's part, then

(*b*) Plowd. 57. Co. Litt. 15 b: Watk. Des. 86.

(*c*) See Watk. Des. 149. 173.

the land shall descend to the heirs of the mother, or father of the father, and not to the heirs of the mother of the son, although they are more near of blood to him who was last seised, yet they are not of the blood of the first purchaser.

If the heirs be females in equal distance, as daughters, sisters, aunts, &c, (d) they shall inherit together, and are but one heir, and are called parceners. [See notes to next chapter.]

[For the principal rules of descent, at common law, with the feudal reasons on which they are founded, see 1 Bl. Com. 193; 2 Bl. Com. 208; Co. Litt. 237 a. ~~(F)~~ But see 1 Rev. Code of 1819 of Virginia, ch. 96, by which it will appear that the law of descents has been materially altered.]

GAVELKIND

Descends to all the sons, and if no sons, to all the daughters (a), and may be given by will by the custom.

(d) Or their heirs *per stirpes jure representationis*. *Vide Watk. Des.*
89. 150, n. *Rob. Gavelk* 91.

(a) 2 Bac. Abr. 300. *Descent (D).* *Rob. Gavelk.* 90.

CHAP. V.

PARCENERS.

PARCENERS are of two sorts: Women and their heirs (*a*) by the common law, men by the custom (*b*).

They may have a writ of partition (*c*), and the sheriff may go to the lands, and by the oaths of twelve men make partition between them, and the eldest shall have the capital messuage by the common law, and the youngest by the custom (*d*). Where the parties will not shew to the jury the certainty, there they shall be discharged in conscience, if they make partition of so much as is presumed and known by presumptions and likelihoods.

[25] Parceners may by agreement make partition by deed or by word, and the eldest first choose, unless their agreement be to the contrary.

(*a*) The lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. 2 *BL Com.* 217.

(*b*) Of gavelkind, &c.—[And now by the laws of Virginia, lands descend to males and females, in parcenary. See 12 *Hen. Stat. at Lar.* 138; 1 *Rev. Code of 1819*, ch. 96 §. 1.]

(*c*) And so may heirs in gavelkind at the common law. *Bract.* 71 b. Joint-tenants and tenants in common in fee by the 31 H. 8 c. 1; joint-tenants and tenants in common for life, or years, by the 32 H. 8. c. 32. *Litt. s* 247. 265. *F N. B.* 62. *Rob. Gavelk.* 105. *Co. Litt.* 167. *Booth, Real Actions,* 244. 1 *Bac. Abr.* 699. 3 *Bac. Abr.* 699. 2 *Cru. Dig.* 598, 2d edit. [And so may joint-tenants and tenants in common be compelled to make partition, by the laws of Virginia. See 12 *Hen. Stat. at Lar.* 349, 1 *Rev. Code of 1819*, ch. 98.]

[*d*] But, in Virginia, no parcener shall have any privilege over another in divisions, &c. See 13 *Hen. Stat. at Lar.* 123, 1 *Rev. Code of 1819*, pa. 358 § 21.]

Every part at the time of partition must be of an even yearly value, without incumbrance.

Rent may be reserved for equality of partition (and may be distrained for) without a deed (*e*).

(e) At the common law, estates of freehold, either corporeal or incorporeal, could not be voluntarily partitioned by *joint-tenants* without a deed. *Litt. s. 290. Co. Litt. 169 a. 187 a.* *Tenants in common*, however, might have made a partition by parol without deed, if as to corporeal estates they afterwards perfected the partition in severalty by livery of seisin, *Co. Litt. 169 a.*; and *coparceners*, whether of lands lying in livery or in grant, and although of lands situate in different counties, might have made a partition by parol without deed, *Litt. s. 250. Co. Litt. 169 a.*; and so joint-tenants for years might have made partition by parol without a deed *Dyer, 350 b. pl. 20. Co. Litt. 187 a. Roberts on Frauds, 283.*

Since the statute of Frauds and Perjuries a *writing* is necessary to perfect a partition by agreement among tenants in common or coparceners, or joint-tenants for years, though as to joint-tenants in fee a *deed* is necessary now, because it was so at common law. *4 Cru. Dig. 96. s. 16, 2d edit. 2 Bl. Com. 324*, and see *Johnson v. Wilson*, Willes, 248.

The modern method of effecting a partition in fee by agreement, is by lease and release to uses, or by the declaration of the uses of a fine or recovery. *

The courts of common law are now rarely resorted to for obtaining a partition of estates, because they have a difficulty of proceeding to the full extent of justice, and if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in those courts; or if any of the tenants in possession are seized of particular estates only, the persons entitled in remainder cannot be bound by the judgment in a writ of partition. *Mitford's (now Lord Redesdale) Pleadings, 110, 2d edit. Hargr. n. Co. Litt. 169 a. (2). 1 Fonbl. Eq. 21.* Partitions in courts of equity are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to certain persons to make the partition required, who proceed to divide the estate without a jury, and upon the return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties. But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition give possession, and order enjoyment accordingly, until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day to shew cause against the decree after attaining twenty-one, *Tuckfield v. Buller, Amb. 198. 1 Dick. 240. S. C. 2 Cru. Dig. 541, 2d edit. 2*

[25] **Parceners by divers descents, before partition being disseised, shall have one assise.**

A parcener before partition may charge or demise her part.

The entry or act of one coparcener or joint-tenant shall be the act of both, when it is for their good.

If a parcener after partition be entered (f), she may en-

Madd. Ch. 460, 2d edit., although the infant, whether plaintiff or defendant, be only *cestui que trust*, and the legal estate capable of being conveyed by the trustees, *Lord Brook v. Lord and Lady Hertford*, 2 P. Wms. 519. *Attorney-General v. Hamilton*, 1 Madd. Rep. 214; but if no cause should be shewn, or cause shewn should not be allowed, the decree may then be extended to compel mutual conveyances. If a contingent remainder not capable of being barred or destroyed should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined; in either of which cases a supplemental bill would be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment. *Mif. Plead.* 97, 3d edit. 2 Cru. Dig. 512, 2d edit.

A partition at law is perfected by the delivery of possession, in pursuance of the judgment of the court of law, which concludes all the parties to it without any conveyance whatever being made by them. But partition in equity proceeds upon CONVEYANCES to be executed by the parties, 1 *Madd. Chan.* 245, 2d edit.; in which case the same conveyances are necessary to confer a legal title, as if the parties had agreed to a private partition; and if the parties be not competent to execute the conveyances, the partition cannot be perfected. *Whalley v. Dawson*, 2 Sch. & Lef. 372. And where any of the parties are feme covert or tenants in tail, a fine or recovery will be equally necessary. But see as to the power of *parceners* tenants in tail. *Co. Litt.* 173 b. Husbands of parceners in fee, *Co. Litt.* 169, b. 170 b. 171 a. Infants parceners, *Co. Litt.* 171 a. *Litt.* s. 258. However, in all cases where the lands are entailed, or the parties are married women, it is advisable to have a fine or recovery, and in case of infancy to delay a partition by agreement until majority, or proceed in some other mode to effectuate it.

[Cases may however occur, in which the difficulties of obtaining the legal estate, even by bill in equity, are so great, as to make it necessary to apply for legislative aid; as where there are infants, lunatics, &c. interested.]

(f) That is evicted by entry without action from the part allotted to her, by a person claiming under a superior title.

ter upon her sister's part, and hold it with her in par-
nary, and have a new partition, if she sold none of her
part before she was ousted (g).

CHAP. VII.

JOINT-TENANTS.

JOINT-TENANTS are such as have joint estates in goods or lands, where he who survives shall have all without incumbrance, if the tenements abide in the same [26] plight as they were granted (a).

(g) *Litt.* s. 262. 1 *Bac. Abr.* 703.

(a) *Co. Litt.* 180. *Litt.* s. 277. 3 *Bac. Abr.* 691. *Com. Dig. Estate* (K 1). 2 *Bl. Com.* 179. Each of them may sever the joint-tenancy at his pleasure, by a gift or conveyance to a stranger to take effect in his life time, or by a release to his companion, *Co. Litt.* 186 a. *Perk.* s. 193. 197. 2 *Saund.* 96. 3 *Bac Abr.* 693-4, or by an alteration of the seisin, as by a conveyance to the use of, or in trust for himself.

An exception is to be made of *joint-merchants*; for the wares, merchandises, debts, or duties, they have as joint-merchants or partners do not survive, but go to the executors of him who dies; and this is *per legem mercatoriam*, which is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* *Co. Litt.* 182 a. 2 *Beawes*, 99. *Noy*, 55. *Com. Dig. Merchant* (D). 3 *Bac Abr.* 675. *Joint-tenants, &c.* (C). In pleading, when the estate of partners in the partnership property is to be mentioned, it is usually described a tenancy in common. *Watson on Partnership*, 65, 2d edit.

Where two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, it is a joint-tenancy, that is, a purchase by them jointly of the chance

[The right of survivorship was abolished in Virginia, by an act of 1786, see 12 Hen. Stat. at L. 350: 1 Rev. Code of 1819, pa. 359 & 2.]

of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are not equal and this appears in the deed itself, it makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered in equity but as a trustee for the others, in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they are to be considered as tenants in common, or the survivors as trustees for those who are dead. Per Master of the Rolls. *Lake v. Gibson*, 1 Eq. Ca. Abr. 291 pl. 3. *Jefferies v. Small*, 1 Vern. 217. *Lake v. Craddock*, 3 P. Wms. 158. See further, Watson on Partnership, 73, 2d edit. 2 Madd. Ch. 115, 2d edit. 2 Fonbl. Treat. Eq. 103, 5th edit. Sug. Vend. 522, 5th edit. So a lease renewed by one partner in his own name clandestinely is a trust for the partnership, and to be accounted for as partnership property. *Burroughs v. Elton*, 11 Ves. 29. *Featherstonhaugh v. Fenwick*, 17 Ves. 298

It was formerly held, that lands purchased for the purpose of a partnership concern were, in all respects, a portion of the partnership fund, and were therefore distributable as personal property. Watson on Partnership, 81, 2d edit. However, in *Thornton v. Dixon*, 3 Bro. C. C. 199, Lord Thurlow determined, that though a copartnership agreement may alter the nature of real property, it must be express so to do; and, that upon the death of partners, the houses and lands they held and used in the trade, would descend according to the rules of the common law. See also *Bell v. Phyn*, 7 Ves 453. *Balmain v. Shore*, 9 Ves. 500. The doctrine upon this subject has been altered by a very recent decision in the case of *Townsend and others, executors of W. Mackintosh v. Devaynes and J. Mackintosh*, reported Appendix, 1 Montagu on Partnership, 97. There is also a *dictum* of Lord Eldon, in *Selkirk v. Davies*, 2 Dow. P. C. 242, in which his Lordship is represented to have stated it as his opinion, that all property involved in a partnership concern ought to be considered as personal. The question will probably soon be brought forward again to receive a more solemn adjudication; in the mean time it is well understood to be the opinion of many gentlemen of the first professional eminence, that where real estate has been purchased with partnership property for the use of the partnership, it becomes personal property, not only

Joint-tenants may have several estates (*b*).

A joint-tenant cannot grant a rent-charge but for term of his own life.

A joint-tenant may make a lease for life or for years of his part, or release, and the lessee for years may enter, although the lessor die before the lease begin, and his heir shall have the rent, but the survivor the reversion.

A joint-tenant may have a writ of partition by the statute of 31 H. 8. c. 32 (*c*). A partition made by joint-tenants, of estates of inheritance, must be by deed, by word 'tis void.

[See further on the subject of joint-tenants, 2 Bl. Com. 180; Co. Litt. 180 b. 188 a.]

as between the members of the partnership respectively, and as between the partnership and creditors, but also as between the representatives of a deceased partner. Eden's note, 3 Bro. C. C. 200.

So if two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies, when the principal or interest is paid, the survivor shall not have the whole but the representative of him who is dead shall have his proportion. *Petty v. Steward*, 1 Ch. Rep. 58. 3 Atk. 734. 5 Bac. Abr. 39. 46. 20 Vin. Abr. 147. 2 Pow. Mortg. 699, 4th edit.

So if two take a lease jointly of a farm, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive. *Jefferies v. Small*, 1 Vern. 217. 1 Eq. Ca. Abr. 290.

So part owners of a ship are tenants in common. *Ex parte Young*, 2 Ves. & B. 242. Vide *Curtis v. Perry*, 6 Ves. 739. *Ex parte Yallop*, 15 Ves. 60.

(*b*) i.e. Two may have joint estates for their lives, and several inheritances, or the inheritance to one of them, *Co. Litt.* 182 a. b. 183 a. 184 a. 189 b.; but an estate of freehold cannot stand in jointure with a term for years; nor a reversion upon a freehold, with a freehold and inheritance in possession, *Litt. s. 302*; nor a seisin in the right of a political capacity, with a seisin in a natural capacity. *Litt. 297*. *Co. Litt.* 188 a. 4 Bac. Abr. 677.

[(*c*) So, by laws of Virginia, 1786, 12 Hen. Stat. at Lar. 349; 1 Rev. Code of 1819, p. 359]

CHAP. VIII.

TENANTS IN COMMON.

TENANTS in common are those who hold lands and tenements by several titles (*a*).

(*a*) The usual method of creating a tenancy in common, is to limit the estate to two or more persons, as tenants in common, and not as joint-tenants: or if it be intended to bar dower, as to one moiety, &c. to uses to bar dower in the usual way; and as to the other moiety, &c. to uses in fee, or to other uses to bar dower.

The words "equally to be divided" create a tenancy in common in a will, *Ratcliff's case*, 3 Co 39 b. *King v. Rumbal*, Cro. Jac. 448. *Blissett v. Cranwell*, Salk. 226. *Prince v. Heylin*, 1 Atk. 493. or "equally to them," *Denn v. Gaskin*, Cowp. 657. or "equally and their heirs," *Lewen v. Cox*, Cro. Eliz. 695. 1 Vern. 32. or "and their heirs respectively," *Forset v. Frumpton*, Sty. 434. or any other words indicating an intention that the devisees shall take several and distinct shares, more especially where it is not an immediate devise, but an executory trust. *Barker v. Gilles*, 2 P. Wms. 280. 9 Mod. 157. 2 Eq. Ca. Abr. 536. 3 Bro. Parl. Ca. 104. *Eltricke v. Eltricke*, Amb. 656. *Prince v. Heylin*, 1 Atk. 493. *Sheppard v. Gibbons*, 2 Atk. 441. *Maryat v. Townley*, 1 Ves. 102. *Stones v. Heurtly*, 1 Ves. 165. *Rose v. Hill*, 3 Burr. 1881. *Garland v. Thomas*, 1 Bos. & Pul. New Rep. 82. 6 Cru. Dig. 426. 3 Bac. Abr. 679.

In conveyances deriving their effect from the principles of the common law, the words "equally to be divided" will not create a tenancy in common. *Furze v. Weeks*, 2 Roll Abr. 90, pl. 5. 14 Vin. Abr. 482. *Stringer v. Phillips*, 3 Bac. Abr. 679. Limitations in a conveyance to uses receive the same construction as if contained in a deed at common law. Co. Litt. 42 a. (10). *Abraham v. Twigg*, Cro. Eliz. 478. *Atwaters v. Birt*, Cro. Eliz. 856. *Nevell v. Nevell*, 1 Roll. Abr. 837. R. pl. 1. 10 Vin. Abr. 245. *Makepiece v. Fletcher*, Com. 457. *Tapner v. Mertott*, Willes, 177. *Stratten v. Best*, 2 Bro. C. C. 233. *Doe v. Morgan*, 3 T. R. 763. *A'pass v. Watkins*, 8 T. R. 516. The cases upon this subject are stated and commented on in a superior manner by Sir John Leach, in his able reply. *Cholmondeley v. Clinton*, 2 Meriv. [314]. See also Sug. Gilb. Usrs, 143. 3 Bac. Abr. Gwill. edit. 679. 680.

They may join in action personal, but they must have several actions real.

It was formerly held, that words *regulating* or *modifying* an estate created by a deed, operating by way of use, should be construed in a different manner than when applied to a common law conveyance. Thus Lord Hardwicke, in a case where the question was, whether the words *equally to be divided* would create a tenancy in common in a deed, operating by way of use, observed, 2 Ves. 257, "It is objected that there is no warrant to construe a deed to uses, as to the limitations and words of it, in a greater latitude than a conveyance at common law, and if construed in a different manner would cause great confusion; which I hold to be true in general: for the statute joining the estate and the use together, it becomes one entire conveyance by force of the statute; and the words are to be construed the same way: but this is to be taken with some restriction. As to the words of limitation in a deed, they are, to be sure, to be construed in that manner, viz. in the same sense; but where they are words of regulation or modification of the estate, as the words *equally to be divided* are, and not words of limitation, I think there is no harm in giving them greater latitude in deeds on the statute of Uses, which are trusts at common law, than in feoffments, which are strict conveyances at common law" *Rigden v. Vallier*, 2 Ves 257. 3 Atk. 734.

So where *J. C.* by lease and release conveyed the lands in question to trustees, to the use of himself and his wife, for their lives, remainder to the use of all and every the children of *J. C.* and their heirs, equally to be divided amongst them, the question being whether they took as joint-tenants or tenants in common. Lord Chief Justice Lee delivered the unanimous opinion of the whole court, that this being a deed of uses must be construed according to the intent of the parties, which most plainly was, that the children should take in common. *Goodtitle v. Stokes*, 1 Wils. 341. and see *Denn v. Caskin*, Cowp: 660.

If it should be established that conveyances to uses, which are now become the common assurances of the realm, were to be construed in the same manner as wills, even with respect only to the words of regulation, or modification of the estate; such a doctrine would, in some degree, tend to introduce all that latitude and uncertainty which now prevails in the construction of testamentary dispositions. Of this opinion was the late Mr. Booth, the author of the *Treatise on Real Actions*, and the most able conveyancer of the last century; who, in one of his opinions, says, "If deeds of uses must be governed by the same rules as prevail with respect to wills, then a limitation to a man's male descendants, or male children, may create an estate in tail; and an absolute inheritance may pass by a limitation to the use of the grantee for ever, which will produce infinite confusion." 2 Cas. &

They may have a writ of partition by the statute of H. 8. c. 32. [So, by laws of Virginia, 1786, 12 Hen. Stat. at Lar. 349; 1 Rev. Code of 1819, pa. 359.]

Opin. 279. Mr. Booth's opinion is confirmed by Lord Chief Justice Willes and his brethren, in the case of *Tapner v. Marlott*, Willes, 180, where he says, "As to what was insisted upon, that a conveyance to uses is to be construed as a will, and in a different manner from other conveyances, we are all clearly of a contrary opinion; for, since the statute of uses, an use is turned into a legal estate, to all intents and purposes, it must be conveyed exactly in the same manner, and by the same words: and if it were otherwise, as most conveyances are now made by way of use, endless confusion would ensue."

Lord Thurlow, *Stratton v. Best*, 2 Bro. C. C. 240; and Lord Kenyon, *Doe, dem. Mussell v. Morgan*, 3 T. R. 765; *Alpass v. Watkins*, 8 T. R. 519, have fully assented to this doctrine. Therefore the better opinion seems now to be, that conveyances to uses are to be construed in the same manner as deeds deriving their effect from the common law. 4 Cru. Dig. 309. Vide Sug. Pow. 463, 2d edit. Sug. note, Gilb. Uses, 144. 1 Sand. Uses, 118, 3d edit.

The same construction is put upon a trust *executed* as upon legal estates. *Wright v. Pearson*, Amb. 358. 1 Eden, 119. 1 Fonbl. Eq. 406, 5th edit. b. 1. ch. 6. s. 8; 1 Madd. Ch. 452. 552, 2d edit; 4 Cru. Dig. 310, 4th edit. Trusts executed are those where the trusts are directly and wholly declared by the deed or will to attach on the lands immediately. Trusts *executory*, are those which are only directory, or prescribe the intended limitations of some future conveyance or settlement, directed by the articles or will to be made for effectuating them. In decreeing the execution of marriage articles, and in the construction of executory trust estates, the Court of Chancery regards the end and consideration of the settlement, and the intent of the trusts, beyond the legal operation of the words in which the articles or the trusts are expressed. Fearne's Rem. 90. Butler's edit. 3d edit. 62; 1 Madd. Ch. 552.

The analogy between the construction of legal estates and trusts executed, has been frequently affirmed: and Lord Talbot, speaking of *Bale v. Coleman*, 2 Vern. 670. 1 P. Wms. 142. 8 Vin. Abr. 265, pl. 7. says, "The execution was to be of the same estate as he had in the trust." An observation which seems equally applicable to all cases of trusts executed; that is, where the estates are finally limited by the deed or will itself, without any kind of reference to any further execution of them by a conveyance directed by that deed or will; for, in such cases, any occasional conveyance that may at any time be required of the legal estate from the trustees, may well be deemed a matter of form only; and not otherwise requisite, than for the mere purpose of investing the subsisting trusts, whatever they may be,

If one parcener, joint-tenant, or tenant in common take all, the others have no remedy but by *ejectione firmæ*, or such like, or waste (b). [27]

GAVELKIND LANDS.

Tenant by the courtesy of Kent, whether he have issue or no, until he marry, or so forth; but he may not commit waste.

with their cognate and commensurate *legal* clothings; whilst limitations, whose effect is referred by the deed or will itself, to a conveyance directed to be made for their establishment, may reasonably be considered as left to some degree of modification by that supplemental part of the deed or will *viz.* the conveyance to which their completion is referred. In the one case, the limitations may be deemed to receive their intended shape from the words of the deed or will itself; when, in the other case, they are in a state of embryo, till delivered by the directed conveyance, which is intended to model and give them their ultimate form. Fearne's Rem. 143. Butler's edit. 93, 2d edit. The limitations of trust estates, of whatever description, cannot be carried to a greater length, or go further towards a perpetuity than the limitations of legal estates; but limitations of trust estates are expounded more freely, with more regard to the evident intent, and with less adherence to the legal import of technical expressions than limitations of legal estate. Fearne's Rem. Butler's edit. 145. 3d edit. 94.

(b) This was at common law; but by stat. *West.* 2, c. 22; and 4 *Anne* c. 16, actions of account are reciprocally given.—[So, by laws of Virginia, one joint-tenant or tenant in common, may maintain an action of account against the other, for receiving more than his just share or proportion. See 1 *Rev. Code* of 1819, pa. 509, § 81.]

CHAP. VIII.

TENANT IN DOWER.

A WOMAN shall be endowed of all sorts of inheritance of her husband, where the issue that she may have by him may inherit as heir to his father (*a*), by metes and bounds of a third part.

[Trust estates, and an equity of redemption are excepted, in England; but *trusts* are subject to dower and courtesy in Virginia. See act of 1785, 12 Hen. Stat. at Lar. 157, 158; 1 Rev. Code of 1819, p. 370, § 30.]

She shall have house-room, and meat and drink, in common for forty days (*b*). But she may not kill a bullock (*c*)

(*a*) If tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife has no estate in the tenements, and the husband has an estate only as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife die, in the life of the husband, and he afterwards take another wife and die, his second wife shall not be endowed in this case, because her issue could not by possibility inherit. *Litt. s. 53.* Although the wife be an hundred years old, or the husband at his death was but four or seven years old, yet the wife will be entitled to dower; because it is by nature possible that the wife may have issue; and though the husband be of such tender years, he has *habitum*, though he has not *potentiam* at the time. *Co. Litt. 33 a. 40 b. Co. Litt. 31 b. Perk. s. 301, 302.*

(*b*) By *Magna Charta*, cap. 7. 2 *Inst. 16*, one of the reasons for the widow continuing forty days within the capital messuage, was the apprehension of a supposititious child, which deceit was not uncommonly practised in these times, as may be inferred from the old writ *De ventre inspiciendo*. Barrington on Ancient Statutes, 10, 5th edit.

(*c*) *Nota by Newton.* The woman shall not have meat and drink; for the statute does not extend to it. But Fitzherbert, in abridging the case, queries if she may not kill any things for her provision, if there be not any provision in the house. F. N. B. 162 A. n. on the writ *De quarentina habenda*.

with those forty days after the death of her husband, in which time her dower ought to be assigned her.

[By the laws of *Virginia*, "The dead victuals and liquors which, at the death of the testator or intestate, shall have been laid in for consumption of his family, shall not be sold by the executor or administrator, but shall remain for the use of such family, without account thereof being made. If, however, before its final consumption, any child shall leave the family, such child shall have a right to carry with him or her an equal share of what shall then be on hand. Any live stock, which may be necessary for the food of the family, may be also killed for that use, at any time before the sale, division, or distribution of the estate." *Act of 1785*, 12. *Hen. Stat. at Lar.* 150; 1 *Rev. Code of 1819*, pa. 387, § 51—And the widow may remain in the mansion house, until dower be assigned, rent free, *Act of 1785*, 12. *Hen. Stat. at Lar.* 162; 1 *Rev. Code of 1819*, pa. 403, § 2.]

The assignment by him who had the freehold is good but by him who is guardian in socage, or tenant by *elegit*, or statute, or lessee for years, is not. *Perk. s. 404; Co. Litt. 35 a.*

She is to demand her dower on the land. She shall recover damages when her husband dies seised, from the death of her husband, if the heir be not ready at the first day to assign her dower (*d*). [28]

She shall have all her chattels real again, except her husband sell them (*e*). He cannot charge them or give them by his will. And likewise her bonds, though the money were due in the life of her husband (*f*); and all

(*d*) *Statute of Merton*, 20 *Hen. 3. c. 1.* 2 *Inst. 79. Co. Litt. 32 b. Muchall's Doctor and Student*, 140, 18th edit and by the *statute of Gloucester*, she is entitled to costs as well as damages. 6 *Ed. 1. c. 1. 2 Inst. 283.*

(*e*) 1 *Bac. Abr. 476. Baron and Feme (C).* 2.

(*f*) *Choses in action*, are debts owing, arrears of rent, legacies, residuary personal estate, money in the funds, upon mortgage, &c. 1 *Bac. Abr. 480.* Marriage is only a qualified gift to the husband of his wife's

convenient apparel, but if she have more than is fit for her degree, it will be assets.

chooses in action, viz. upon condition, that he reduce them into possession during its continuance; for if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it. *Buller's n. Co. Litt.* 351 a (1). *IL Scawen v. Blunt*, 7 Ves. 294. A mere intention to reduce the wife's *chooses in action* into possession, will be insufficient. The acts to effect that purpose must be such as to change the property in them, in other words, must be something to divest the wife's right, and to make that of the husband absolute; such as judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied for his use. *Prec. Chan.* 412. 418. *Blount v. Bestland*, 5 Ves. 515. The transfer of stock into the wife's name, to which she became entitled during the marriage, will not be considered as a payment or transfer to her husband, so as to defeat her right by survivorship. *Wildman v. Wildman*, 9 Ves. 174. Where the father of *A.* a married woman, drew a check on his bankers in her favour for £10,000. On the same day she presented it, and instead of money she took from them a *promissory note*, payable on demand, which she delivered to *B.* her husband. During *B's.* life all the money secured by the note remained with the bankers, except £1,000, which were received by *B.* and for which he gave his receipt, and he received the interest on the remaining sum of £9,000 up to his death. *A.* having survived her husband, claimed that sum as not having been received by him during his life. And it was determined in her favour by Sir Thomas Plumer V. C. because the note was a *choose in action* of the wife, which, upon her husband's death, survived to her; and he observed, that if immediately after the check had been given, the husband had died, since it gave no legal right to sue the bankers if they had refused payment, the father alone could have recovered against them; that the note given to the wife in lieu of the check, gave a right to recover the sum, but that it was merely *in action*, and not like money or a chattel; and that the receipt by the husband of the £1,000, and of interest upon the remainder, was not a reduction into possession of such remainder, as such receipt did not alter the nature of the note, it still continuing a *choose in action*, a security for the remaining sum of £9,000. *Nash v. Nash*, 2 Madd. Rep. 133.

So also where money was left in the hands of trustees for the benefit of the wife, and her husband died, she was declared to be entitled to it by survivorship, her husband having made no disposition of it during his life. *Twidell v. Wise*, 1 Vern. 161. 1 Rob. *Husb. and Wife* 209.

A woman shall be barred of her dower (g) so long as she detains the body of the heir being in ward, or the writings of the son's land.

Where the wife has any right or duty, which by possibility may happen to accrue during the coverture, the husband may by release discharge it; but where the wife has a right or duty, which by no possibility can accrue to her during the coverture, the husband cannot release it. *Gage v. Acton*, 1 Salk. 326-7. Com. Rep. 67. 1 Lord Raym. 515.

As if a lease be made to a husband and wife for the term of twenty-one years, the remainder to the survivor of them for twenty-one years, and the husband grants away this term and dies, this shall not bar the wife, because she had only a possibility, and no interest. *Lampet's case*, 10 Co. 51 a. This point is not perhaps correctly stated. *Co. Liu.* 46. b However it is followed. 1 *Roll Abr.* 344, pl. 5. 2 *Roll. Abr.* 48, pl. 3. 4 *Vin. Abr.* 43, pl. 11. 14 *Vin. Abr.* 72 (M), pl. 3. *Roper's Tracts*, 79 *Roper, Husb. and Wife*, 238. *Butl. n. Co. Litt.* 351 a. (1) II.

[(g) She shall also lose her dower, if she elope from her husband and live with an adulterer, *Stat. West* 2. 13 Ed. 1. c. 34; Same law in Virginia; see 1 *Rev. Code of 1819*, p. 404 § 10.]

[But the most usual way in which a widow is barred of dower, in England, is by the creation of *trust* estates which though liable to courtesy, "have not yet been subjected to dower, more from a cautious adherence to some hasty precedents, than from any well settled principle." 2 *Bl. Com.* 337. And from analogy to trusts it has been determined that the wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband before the marriage. 2 *Bl. Com.* 132, *Christian's note* (11.) The reason assigned why the wife has not dower out of a trust estate is, that she was not endowed of an use at common law. *Ibid.* Before the statute of uses there was neither dower nor tenancy by the courtesy of an use. It is therefore an unaccountable inconsistency, that since the statute, the husband should have courtesy of a trust estate, and that the wife should, out of a similar estate, be deprived of dower. *Christian's note* (13) to 2 *Bl. Com.* 337. See *Colt v. Colt*, 1 Chan. Rep. 134, 254; 2 *P. Wms.* 640; 3 *P. Wms.* 229; 1 *Bro.* 326.]

[On the proper mode of conveying estates to USES TO BAR DOWER, much learning is displayed in the books while the most eminent lawyers, in England, regret the necessity of resorting to that subterfuge. But, in Virginia, this is obviated by legislative provision, which subjects trust estates, to both courtesy and dower. See act of 1785, 12 *Gen. Stat. at Lar.* 157, 158; 1 *Rev. Code of 1819*, p. 370, § 30.]

A woman shall not be endowed of any lands which her husband jointly held with another at the time of his death (h). [But by the laws of Virginia, estates held in joint-tenancy are subject to courtesy and dower. *See act of 1786, 12 Hen. Stat. at Lar. 350; 1 Rev. Code of 1819, ch. 98, p. 359 § 2.*]

DOWER OF GAVELKIND LANDS.

The woman shall be endowed of one half so long as she is unmarried and chaste, and it may be held with the heir in common. *Co. Litt. 33 b, 111 a.*

It is of lands and tenements, and not of a fair or such like. Where the heir loses not his inheritance, there she loses not her dower. *Robin. Gavel. 169.*

[29]

JOINTURE.

If a woman have a jointure before marriage, she may claim no dower. *27 H. 8. c. 10 (a).*

If it be made during marriage, she may enter into her jointure presently (b).

If she enter or accept of it, she shall not be endowed (c).

(h) *Litt. s. 45. 1 Roll. Abr. 676 (G), pl 4. F. N. B. 147 (E).*

See further on the subject of Dower, *Co. Litt. 31 a. & Harg. notes;* *1 Roper on Husband and Wife, 332, &c;* and *Fin. and Bac. Abr.; Com. and Cru Dig;* and a few observations at the end of the old editions of *Gilbert on Uses*.

(a) [Same law in Virginia, *See act of 1785, 12 Hen. Stat. at Lar. 164; 1 Rev. Code of 1819, p. 404, § 11.* At common law, a jointure would bar dower, even though the wife were a minor at the time she agreed to it, *Drury v. Drury, 5 Br. Par. Ca 570.* But in Virginia, if the conveyance were before marriage and during the infancy of the feme, or if it were after marriage, in either case the widow may at her election waive such jointure, and demand her dower. *Act of 1785; 12 Hen. Stat at Lar 164; 1 Rev. Code of 1819, p. 404, § 11.]*

(b) That is, without any assignment by the heir. And if it were made during coverture, she might, at common law, waive it on her husband's death and demand her dower, (*Co. Litt. 36 b.*) as she may now do by the laws of Virginia above cited.

(c) *Co. Litt. 36 b. 3 Co. 26 a. 4 Co. 3 a. Plowd. Com. 396 a. 1 Eden, 138. 3 Bac. Abr. 718.*

If she should be expulsed of any part of her jointure, she shall be endowed of the residue of her husband's lands (d).

CHAP. IX.

TENANT FOR TERM OF LIFE.

TENANT for term of life, is he who has lands or tenements for term of his life, or another man's life, and no one of lesser estate can have a freehold.

If a tenant for life sow the lands, and die before the corn be reaped, his executor shall have it, but not the grass or other fruit.

If a tenant for life be impanelled upon an inquest, and forfeit issues and die, they shall be levied upon him in the reversion, and so likewise if the husband, on the lands of the wife.

[Few subjects in the law have produced such a diversity of opinion, as the properties of an estate *pur autre vie* (*for the life of another*,) and the doctrine of *special occupancy*. The cases, in the English books, are numerous and contradictory. To reconcile them has ever proved a vain attempt. See in 7 *Ves.* 445, the doubts expressed by lord Eldon. See further 2 *Bl. Com.* 120; *Ibid.* 260; *Co. Litt.* 41. b; 2 *Bac. Abr.* 558, 561, 564; *Cru. Dig. Estates for life.*]

(d) So, in Virginia. *Act of 1785, 12 Hen. Stat. at Lar.* 165; *1 Rev. Code of 1819, p. 405, § 13.*

[See further on the subject of jointures, 2 *Bl. Com.* 137. *Co. Litt.* 36. b. *Wood. Inst.* 23.]

[The law of Virginia, taken from stat. 29 Car. 2, c. 3. § 12, & 14, Geo. 2. c. 20, § 3, makes an estate for the life of another divisible, and if necessary to be assets in the hands of the devisee; if not devised, to be assets in the hands of the heir, as special occupant, or of executors or administrators, if no special occupant, and subject to debts, legacies, and distribution. *Act of 1785, 12 Hen. Stat. at Larg. 152; 1 Rev. Code of 1819, p. 389, § 61.*]

CHAP. X.

TENANT FOR TERM OF YEARS (a).

TENANT for term of years is, where a man lets lands or tenements to another for certain years.

He may enter when he will, the death of the lessor is no let, and may grant away his term before it begin (b): But before he enter he cannot surrender, nor have any action of trespass, nor take a release (c).

He is bound to repair the tenements.

The lessor may enter to see what dilapidation or waste there is; and he may distrain for his rent, or have an action of debt.

(a) The doctrine of leases and terms for years is treated in a masterly manner in 4 Bac. Abr. 1; 7 Idem, 483; to which may be added Wms. n. 2 Saund. 180; Com. Dig. Estates (G 1); 1 Cru. Dig. 256.

(b) Because it is an *interesse termini*, Co. Litt. 46 b. 338. 4 Bac. Abr. 195, *Gwil. edit.*

(c) But when an estate for years is created by bargain and sale under the statute of uses, the bargainer may take a release before entry.

If tenant for life or years grant a greater estate than he has himself he forfeits his term (*d*).

[See further as to the law relating to tenant for years, 2 Bl. Com. 140; Co. Litt. 43 b.]

CHAP. XI.

TENANT AT WILL.

TENANT at will is he who holds lands or tenements at the will of another.

The lessor may reserve a yearly rent, and may distrain for it, or have an action of debt; the lessee is not bound to repair the tenements.

The will is determined by the death of the lessor (*a*) or of a woman lessee by her marriage; or when the lessee will take upon him to do that which none but the lessor may do lawfully, it determines the will and possession, and the lessor may have an action of trespass for it.

[31]

(*d*) This depends on the species of conveyance by which it is granted; if it be by those which divest the remainder or reversion, as a feoffment, recovery or fine, it is a forfeiture; if by bargain and sale, or lease and release, it is not. 2 Lev. 60, 3 Mod. 151.

(*a*) *Sed quære de hoc.* The courts have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will; but have rather held them to be tenancies from year to year, as long as both parties please, especially where an annual rent is reserved. 1 Cru. Dig. 83 2 T. R. 159 It has been settled, by several modern cases, that six months notice to quit must be given by a landlord to his tenant at will, or to his executors, before the end of which time an ejectment will not lie. *Christian's note*, 2 Bl. Com. 147 (3). *Butler's note*, Co. Litt. 270 b. (1). 4 Gwill. Bac. Abr. 180-1. 2 Sets. N. P. 688, 5th edit. 667, 4th edit. For where the duration of a lease is not prescribed by the terms of the contract, but is left subject to the will of the parties, the law, for the sake of con-

The lessee shall have reasonable time to take away his goods and his corn ; but he shall lose his fallow and his dung carried forth.

venience, and that neither of the parties may be surprised or distressed by the caprice of the other, will not permit the tenancy to be determined without a regular notice. What shall be a regular notice must depend upon the nature of the letting: hence, if the letting be originally for a month or week, a month's or week's notice will be sufficient. 1 T. R. 102. *Espin Ni. Pr. Ca.* 94. 267. But where there is a clear tenancy from year to year, there must be half a year or 183 days notice, (*Bradley's Points. MS.* 134) at the least, and determinable with the year. This notice being required for the sake of convenience, it must, consequently, extend to a tenancy in houses as well as in lands; it may be waived by the party giving it; or it may be wholly dispensed with by the consent of both parties. But no collateral considerations, such as a reservation of the rent quarterly shall be construed to be a dispensation with it. What shall be a waiver of a notice is a question of fact to be determined by the conduct of the party who has given it. *Vide Shirley v. Newman*, *Espin. Ca.* 266. *Oakappie v. Copons*, 4 T. R. 361. The receipt of rent accruing due after the expiration of the notice, *eo nomine* as rent, or the taking of a distress for such rent, have both been helden to be a waiver of it. *Goodright v. Cordwent*, 6 T. R. 219. *Zouch v. Willingale*, 1 H. Bl. 311.

The notice, except where the lessor means to proceed under the statute for double rent, need not be in writing: but, if it be in writing, a slight inaccuracy, where the intention of the party given is apparent upon the face of it, will not vitiate it. Therefore a notice delivered to a tenant at *Michaelmas* 1795, to quit at "Lady Day, which will be in the year 1795," was held to be good. *Doe v. Kightley*, 7 T. R. 63. 7 Bac Abr 487-8. Though by the stat 29 Car. 2 cap. 3. of *Frauds and Perjuries*, no parol lease for above three years is to have any other effect than only as a lease at will; yet such a lease by the construction of the courts ensures as a tenancy from year to year, and requires therefore a regular notice to determine the interest, as in other similar holdings. *Clayton v. Blakey*, 8 T. R. 3. But though the lease be void by the statute of Frauds, as to the duration of the term, in other respects the lease may be regarded as having an operation, at least, so far as its terms are applicable to a tenancy from year to year. So that if land be let for seven years by parole, and the landlord, agrees that the tenant shall enter at Lady Day, and quit at Candlemas, though such verbal lease is void by the statute of Frauds as to the extent of interest intended to be granted, yet the landlord can only put an end to the tenancy at Candlemas. *Doe dem. Rigge v. Bell*, 5 T. R. 471. *Roberts on Frauds*, 245.

[See more concerning tenancy at will, 2 *Bl. Com.* 145, 147, *Christian's note (3)*; *Co. Litt.* 55 a.]

[A tenancy at *sufferance*, is where a man takes a lease for a term, and after the expiration of it, continues to hold possession of it, without any new lease from the owner of the estate. Or, if a man make a lease at will and die, the estate at will is thereby determined; but if the tenant continues possession, he is tenant at sufferance. 2 *Bl. Com.* 150. But a lease at will is now considered a lease from year to year, which cannot be vacated without half a year's notice to quit. 2 *T. R.* 159; 3 *Wils.* 25. Where a tenant has a lease for a term certain and holds over, after the expiration of it, it is not necessary for the landlord to give him notice to quit, in order to recover possession by ejectment. 1 *T. R.* 53, 162. But if the landlord afterwards receives rent, or does any act by which he proves his assent to the continuance of the tenant, this turns the estate at sufferance, into a tenancy from year to year. See 2 *Bl. Com.* 151, *Christian's note (5)*].

CHAP. XII.

REMAINDER.

A **REMAINDER** is the residue of an estate at the same time appointed over, and must be grounded upon some particular estate given before, granted for years, or life, and so forth (a).

(a) *Vide 5 Bac. Abr.* 715. *Gwil. edit.*; *Com. Dig. Estate* (B 13). *Noy's Ten.* 72. *2 Cru. Dig.* 262. *Fearne's Rem.* 11. *Bull. edit.*; 7, 3d edit.

And ought to begin in possession, when the particular estate ends : There should be no intermediate time between either, whether created by grant or will (b).

No remainder can be of a chattel personal (c): A remainder cannot depend on a matter *ex post facto*, as upon estate-tail, upon condition, that if the tenant in tail sell, then [32] the land to remain to another, is a void remainder.

CHAP. XIII.

REVERSION.

A REVERSION is the residue of an estate which is left, after some particular estate granted out, in the grantor: As if a man grant lands for life, without further granting, the reversion of the fee-simple is in the lessor.

[See further on the doctrine of reversions, 2 *Bl. Com.* 175; *Co. Litt.* 22. b.]

[(b) By *will* a remainder in *effect and substance* may be created without a particular estate to support it; but in technical language it is called an *executory devise*. See 1 *Sid* 153; *Fearne, Ex. Dev. passim.*
[C] See some important provisions, as to *reminders* and *contingent limitations*, introduced into the laws of Virginia, at the revision of 1819, 1 *Rev. Code*, p. 368 § 20; p. 369 § 26]

(c) Personal property cannot be rendered unalienable longer than for lives in being and 21 years after; it may, however, be limited in strict settlement for life, with remainder to sons and daughters in tail; but it will be the absolute property of the first tenant in tail. See 8 *Co. 95*; *Co. Litt.* 18 b; *Harg. a.* (7.)

CHAP. XIV.**WASTE.**

Waste lies against a tenant by the courtesy, for life, for years, or in dower, and they shall lose the place wasted, and treble damages.

Waste lies not against a tenant by *elegit*, statute merchant or staple, but account after the debt or damage levied.

Waste or account will not lie against a tenant in mortgage, because he had fee conditional (a).

Waste is not given to the heir for waste in the life of his father (b).

[28]

Waste is given against the assignee of the tenant for life, or of another's life, but not against the assignee of a tenant in dower, or of the courtesy, it is to be brought against themselves.

It is waste to pull up the forms, benches, doors, windows, walls, filberd-trees, or willows planted (c).

(a) Though at law a mortgagee in fee may commit waste, yet he will be restrained in equity before foreclosure. *Hanson v. Derby*, 2 Vern. 392. 5 Bac. Abr. 15. 18. 7 Idem, 294. 1 Pow. Mortg. 248, 4th edit. If, however, the security be defective, the Court of Chancery will not restrain a mortgagee from his legal privileges. But the money arising from the sale of timber must be applied towards payment of the mortgage. *Withrington v. Banks*, Seld. Cas. ch. 31. 2 Cru. Dig. 116. Et vide *Hardy v. Reeves*, 4 Ves. 480.

(b) [So at common law, but remedied by statute, and an action of waste given to the heir. See 1 Rev. Code of 1819, p. 463 § 4.]

(c) See further, Com. Dig. *Waste*. 2 Bl. Com. 281; Co. Litt. 53; [Concerning the action of waste in Virginia, see 1 Rev. Code of 1819, ch. 117, p. 462]. It has been held that a tenant may, during the continuance of his estate, but not afterwards, remove chimney pieces or

CHAP. XXV.

DISCONTINUANCE.

DISCONTINUANCE is where a man who has the present possession, by making a larger estate than he ought, divests the inheritance of the lands or tenements out of another, and dies, and the other has right to have them; but he cannot enter because of such alienation, but is put to his writ.

If a man seised in the right of his wife, or if a tenant in tail made a feoffment, and died, the wife could not enter, nor the issue in tail, nor he in reversion, but were put to their action.

[34] Now the wife may enter by the statute 32 H. 8. and a recovery suffered by the tenant by courtesy, or by the tenant after the possibility of issue extinct, or for term of life, is now made no discontinuance.

Such things as pass by way of a grant by deed without livery and seisin, cannot be discontinued as a reversion, or rent-charge, common, &c.

A release or confirmation without warranty makes no discontinuance (a).

wainscot put up by himself. 1 Atk. 477. This action is now very seldom brought, and has given way to a much more expeditious and easy remedy by an action on the case in the nature of waste. As to the pleadings in the latter action, see *Wms. n. 2 Saund.* 252. a. b.

(a) See *Co. Litt.* 325 a. 333 a. *Butler's notes.*

CHAP. XVI.

DESCENTS.

DESCENTS which take away entries, are where a man disseises another and dies, and his heir enters, or makes a feoffment to another in fee or in tail, and he dies, and his heir enters, these descents put a man from his entry.

A descent during minority, marriage, *non sanæ mentis*, imprisonment, or being out of the realm, do not take away an entry.

Disseisin of rents in gross, the lord notwithstanding may distrain (a).

A dying seised of a term for life, or of a remainder or reversion, does not take away an entry (b). He must die seised of the freehold and inheritance.

A disseisin cannot be to one joint tenant or parcener alone, if it be not to the other.

If a condition be broken after a descent, the donor, feoffor, or his heirs may enter.

A wrongful disseisin is no descent, unless the disseisor have quiet possession five years without entry or claim. 32 H. 8.

(a) *Vide Gilb. Rents*, 106.

(b) Or put him who has right to his action. *Co. Litt.* 239 b. 243 a. *Finch's Law*, b. 2. ch. 3. 120, *Pickering's edit.* 1 Co. 134 b. 8 Co. 101 b. *Gilb. Ten.* 22. *Watk. Des.* 110.

CHAP. XVII.**CONTINUAL CLAIM.**

CONTINUAL claim is a demand made by another of the property or possession of a thing which he has not in his possession, but is withholden from him wrongfully, and it defeats a descent happening within a year and a day after it is made, and now by the statute within five years.

[See *Gilb. Ten. 39*; *Co. Litt. 250 b.*]

CHAP. XVIII.**REMITTER.**

REMITTER is when by a new title the freehold is cast [36] upon a man, whose entry was taken away by a descent or discontinuance, he shall be in by the elder title: As if tenant in tail discontinue the estate-tail, and if he afterward disseise his discontinuuee, and die thereof seised, and the land descend to his issue, in that case he is said to be in his remitter, viz. seised of his ancient estate-tail.

When the entry of a man is lawful, and he takes an estate to himself when he is of full age, if it be not by deed indented, or matter of record which shall estop him, it shall be to him a good remitter.

A remitter to the tenant shall be a remitter to him in the remainder and reversion (a).

(a) *Vide Butl. n. Co. Litt. 347 b. (1). Rites's Introduction, 133. Gilb. Ten. 129.*

CHAP. XIX.**TENURES.***

ALL lands are holden of the King immediately, or of some other person ; and therefore when any person who has a fee dies without heir, the land shall escheat to the lord (*a*).

And they are holden for the most part either by knight service or in socage (*b*).

Knight service draws to it, ward, marriage and relief, viz.

OF WARD, MARRIAGE AND RELIEF (*b*). [37]

The heir male unmarried shall be in ward until twenty-one years of age.

If he be married in the life of his ancestors, yet the lord shall have the profit of the land till his full age.

None shall be in ward during the life of the father.

If the heir refuse a convenient marriage, he shall pay to the lord the value when he comes to full age.

If the ward marry against the will of the guardian, he shall pay him the double value of his marriage : But if the heir be of the full age aforesaid, he shall pay a relief.

A relief for a whole knight's fee is five pounds ; for half a knight's fee fifty shillings ; for a quarter, twenty-five shillings ; for more, more ; for less, less ; accordingly.

A relief is no service, but is incident to a service, the guardian must not commit waste, *vide CHATELls REAL*.

[(*a*) By the constitution of Virginia, article 20, all escheats heretofore going to the king shall go to the commonwealth.]

(*b*) By the above statute 12 Car. 2. c. 24, Knight's service with its incidents of ward, marriage, and relief, were abolished, and every such tenure converted into *free* and *common socage*.

* Most of the ancient tenures were abolished in England, by stat-
12 Car. 2. c. 24, and never prevailed in the United States. See *Co. Litt.*
85 a. *Hargr. n. (1)*.

TENURE IN SOCAGE.

Tenure in socage is where the tenant holds of his lord by fealty, suit of court, and certain rent for all manner of service. *Litt.* § 117.

[38] The lord shall not have the wardship, but a relief presently after the death of his tenant.

A relief for socage land is a year's rent, and is to be paid presently upon a descent or purchase. As if the land were held by fealty, and ten shillings rent per annum, ten shillings shall be paid for relief.

The next of the kin to whom the inheritance cannot descend (*a*), shall have the wardship of the land and of the heir, until his age of fourteen years, to the use of the heir, at which age the heir may call him to account.

If the guardian die, the heir cannot have an action of account against the executor of the guardian. The executor of the guardian may not have the wardship, but some other of the next of kin. The husband cannot alien the interest of the wife in the guardianship, nor hold it; if she die it cannot be sold.

If another man occupy the lands of the heir as warden in socage, the heir may call him to account as guardian.

If the guardian hold the lands after the heir is fourteen, the heir shall call him to account as his bailiff (*b*).

[See further concerning socage tenure, *Co. Litt.* 85 *b*; *2 Bl. Com.* 79; *Wright's Tenures* 142.]

(*a*) *Hargr. n. Co. Litt.* 88 *b* (2).

(*b*) The authority of the guardian ceasing, by the common law, at so early an age as fourteen, was found to be productive of many inconveniences. This occasioned the *stat. 12 Car. 2. c. 24*, allowing parents to appoint guardians to their children until twenty-one. See *Co. Litt.* 93 *b. Hargr. n. (3)*. The Court of Chancery, in England, being the supreme guardian, and having the superintendent jurisdiction of all infants, affords redress of all complaints relating to wards and guardians. *2 Bl. Com.* 141.

GAVELKIND.

[39]

The next of kin shall have the guardianship of the body and lands, until the heir be fifteen years of age.

CHAP. XX.**DIVERSITIES OF AGES.**

A MAN has but two ages (*a*).

The full age of male and female is twenty-one.

A WOMAN HAS SIX AGES.

The lord her father may distrain for aid for her marriage when she is seven.

She is dowable at nine.

She is able to assent to matrimony at twelve.

She shall not be in ward if she be fourteen.

She shall go out of ward at sixteen.

She may sell or give her lands at twenty-one.

No man may be sworn in any jury before he be twenty-one; before which age, all gifts, grants or deeds, which do not take effect by delivery of his own hands, are void, and all others voidable, except for necessary meat, drink, and apparel, &c.

[*(a)* According to lord Coke, and the modern authorities, a man has four ages;—at 12 he may take the oath of allegiance; at 14 he is at years of discretion, and may chuse his guardian, make his will of personality, &c. [but in Virginia, no person under 18 years of age can dispose of his chattels by will. 1 *Rev. Code of 1819*, p. 377 § 6.]; at 17 may be an executor; and at 21 is entirely at his own disposal. *Co. Litt. 78 b*; 2 *Bl. Com.* 463.]

An infant may do any thing for his own advantage, as to be executor, or such like : An infant shall sue by his next friend, and answer by his guardian.

GAVELKIND.

The heir may give or sell at fifteen years of age.

1. The land must descend, not be given him by will.
2. He must have full recompense.
3. It must be by seoffment, and livery of seisin with his own hands, not by warrant of attorney, or any other conveyance.

By the civil law an infant may be an executor at seventeen years of age.

[40] An infant may make a will of his goods at fourteen years of age, and a maid at twelve (a).

CHAP. XXI.

RENTS.

THERE are three kinds of rents; rent-service, rent-charge, rent-seck (aa).

Rent-service is where a man holds his lands of his lord by a certain rent, &c.

Rent-charge is granted or reserved out of certain lands by deed with a clause of distress.

Rent-seck is a rent granted without a distress ; or rent-service, severed from other service, becomes a rent-seck.

(a) *Gadolphin's Orphan's Legacy*, 23 7 Bac. Abr. 300 Hargr. n. Co. Litt. 89 b. (6).—[But by the laws of Virginia, no persons under the age of eighteen years, shall be capable of disposing of their chattels by will, 1 Rev. Code of 1819, p. 377 § 6.]

(aa) Or, dry-rent. The difference between a rent charge and a rent-seck is, if there be a clause of distress, it is a rent-charge, if there be none, it is a rent-seck. Co. Litt. 143 b. Gilb. Rents, 38.

The reservation of a rent without a deed is void, if the reversion be not in the reservor. If a rent be granted from the reversion, it is a rent-seck.

[41]

He who has no seisin of a rent-seck, is without remedy for the same.

The gift of a penny by the tenant in name of seisin of a rent-seck, is a good possession and seisin.

No rent can be reserved upon any feoffment, gift, or lease, but only to the donor and his heirs, not to any stranger. *Co. Litt.* 143 b.

A rent-charge is extinct by the grantee's purchase of parcel of the land, but by the purchase of any of his ancestors it shall not; it shall be apportioned like rent-service, according to the value of the land: but if the whole land descend of the same inheritance, the rent is extinguished.

By the grant of the reversion, the rents and services pass. If rent be granted to a man without saying more, he shall have it for term of his life. If the lord accept of rent or service of the feoffee, he excludes himself of the arrearages for the time of the feoffor.

For a rent-charge behind, one may have an action of annuity, or distress.

CHAP. XXXII.

DISTRESS.

For what, when, and where a man may distrain.

A MAN may distrain for a rent-charge, rent-service, heriot-service, and all manner of service, as homage, escuage, fealty, suit of court, and relief, &c.

[42]

Heriot custom must be seized, and for amerciaments in

Noy's Maxims. . 12

a leet, upon whose ground soever it be in the liberty. A man may not distrain for rent after the lease is ended, nor have debt upon a lease for life, before the estate of freehold be determined (a).

A man cannot distrain in the night, except for damage-feasant.

A man cannot distrain the beasts of a stranger that come by escape, until they have been levant and couchant on the ground, but for damage-feasant.

A man cannot distrain the oxen of the plough, nor a millstone, nor such like, which is for the commonwealth; nor a cloak in a taylor's shop, nor victuals, nor corn in sheafs, but if it be in a cart, he may for damage-feasant (b).

A distress must be always of such things as the sheriff may make a replevin.

A man may not sever horses joined together, or to a cart (c).

[43] If a man put cattle into a pasture for a week, and afterwards J. N. gives him notice that he will keep them no longer, and the owner will not fetch them away, J. N. may distrain them damage-feasant.

If a man take beasts damage-feasant, and driving them by the highway to the pound, the beasts enter into the house of the owner, and the taker prays the delivery of them, and the owner will not deliver them, a writ of rescous lies.

If a man distrain goods he may put them where he will; but if they perish, he shall answer for them.

If cattle, they ought to be put in a common pound, or else in an open place where the owner may lawfully come

(a) 1 *Roll. Abr.* 594 (G), pl. 1; 4 *Rep.* 49. But he may now by 8 *Ann. c. 14. s 4. Wms. n 2 Survid.* 304 (8); [and the same provision in Virginia, See 1 *Rev. Code of 1819*, p. 451 § 20, 21.]

(b) This is to be understood of distress for rent only, and not of distress given in the nature of an execution, by any particular statute, as for poor rates, &c. 3 *Salk.* 136.

(c) This point seems not to be fully settled. See 1 *Vent.* 36; *Raym.* 18; 1 *Sid.* 422; *Co. Litt.* 47 a, *Hargr. n. (12)*:

and feed them, and notice given to him thereof, and then if they die, it is in default of the owner.

Cattle taken damage-feasant may be impounded in the same land; but goods or cattle taken for other things may not.

Sheep cannot be distrained, if there be a sufficient distress besides.

No man shall drive a distress out of the county wherein it was taken.

No distress shall be driven forth of the hundred, but to [44] a pound overt within three miles.

A distress cannot be impounded in several places, upon pain of five pounds and treble damage.

The executor or administrator of him who had rent or fee-farm in fee, in fee tail, or for life, may have debt against the tenant who should pay it, or distrain: and this is by the stat. 32 H. 8. c. 28.

So may the husband after the death of his wife, or his executor or administrator. So may he who has rent for another man's life, distrain for the arrearages after his death, or have an action of debt. 32 H. 8. c. 37.

But if the landlord will distrain the goods or cattle of his deceased tenant, and sell them, or work them, or convert them to his own use, he shall be executor of his own wrong (d).

(d) 2 Bac Abr 348; Leon 220; Owen 124; 9 Vin. Abr. 160, pl 8, n.; Gibb. Dist 71; 6 Bac. Abr. 34; Co. Litt 47, a; 141, a; 2 Bl Com. 41; 3 Bac Abr 20.—A distress, at the common law, being considered only as a pledge to procure satisfaction, could not be sold; but this being found inconvenient when made for rent in arrear, was remedied by statute, See 2 W. & M. c. 5; 1 Rev. Code of 1819, ch. 113, p. 446; 3 Bl Com. 13.

CHAP. XXXIII.**DISSEISIN OF RENTS.**

*Three causes of disseisin of rent-service, rescous,
replevin, inclosure:*

[45] **FOUR** of rent-charge, rescous, replevin, denial, and inclosure: Two of rent-seck, denial and inclosure. Forestalling is a disseisin of all.

Forestalling is when the tenant does with force and arms waylay or threaten in such manner, that the lord dares not distrain or demand the rent.

Denial is, if there be no distress on the land, or if there be no one ready to pay the rent, &c.

And of such disseisins a man may have an action of novel disseisin against the tenant, and recover his rent and arrearages, and his damage and costs; and if the rent be behind another time, he shall have a re-disseisin and recover double damage.

Rescous and pound breach, is if the lord distrain when there is no rent nor service behind, the tenant cannot rescue; otherwise if another distrain wrongfully; but no man can break the pound, although he rendered amends before the cattle were impounded.

If the lord come to distrain, and see the beasts, and the servant drive them out of his fee, the lord cannot have rescous, because he had not the possession, but he may follow them and distrain, but not for damage-feasant.

CHAP. XXXIV.**COMMON.**

[46]

Common is the right which a man has to put his beasts to pasture, or to use and occupy the ground which is another man's.

THERE are divers commons, viz. common in gross, common appendant, common appurtenant, common because of neighbourhood. See *Terms of the Law*.

The lords of wastes, woods, and pastures, may approve against their tenants and neighbours with common appurtenant, leaving sufficient common and pasture to their tenants.

As if one tenant surcharge the common, the other tenants may have against him a writ *de admensuratione pasture*, but not against him who has common for beasts without number; neither may the lord inclose from such tenants, if he do, the tenant may bring an assise against him, and recover treble damage; but the lord may have a *quo jure*, and make the tenant shew by what title he claims.

See further, *Co. Litt. 122. a; 2 Bl. Com. 32.*

CHAP. XXXV.

[47]

WAYS.

The king's highway is that which leads from village to village.

A COMMON highway is that which leads from a village into the fields.

A private way is that which leads from one certain place to another. 3 Ed. 3.

In the king's highway the king has only passage for himself and his people; and the freehold and all the profits are in the lord of the soil, as they are presented at the leet.

Of a common highway the freehold and the profits are to him who has the land next thereto adjoining; and if it be stopped, and I be damned by it, I have no remedy but by presentment in the leet.

If a private way be straitened, or if a bridge there which another ought to repair, be decayed, an action on the case lies; but if the way be stopped, an assise of nuisance lies, and the lessee may have it after the lessor's years begin, or the lessee may have an action on the case. If the most part of a waterway be stopped, an assise will lie.

See further, Co. Litt. 56 a; 2 Bl. Com. 35; 2 Com. Dig. 397.

[48]

CHAP. XXVI.

LIBERTIES.

A Liberty is a royal privilege in the hands of a subject.

ALL liberties are derived from the crown, and therefore are extinguished if they come to the crown again by escheat, forfeiture, or the like; for the greater drowns the lesser.

One may have a park, a leet, waif, stray, wreck of sea, and *tenura placitorum*, by prescription, and without allow-

ance in eyre ; but not cognizance of plea ; nor *cattala felonum, vel fugitivorum aut utlagatorum.*

A liberty may be forfeited by misusing it ; as to keep a market otherwise than it is granted.

A liberty may be forfeited for not using it when it is for the good of the commonwealth ; as not to exercise the office of the clerk of the market ; but not to use a market, is no forfeiture.

Whatsoever is in the king by reason of his prerogative, cannot be granted or pardoned by general, but by special words.

CHAP. XXVII.

[49]

OF CHATTELS REAL.

Chattels real are guardianships, leases for years, or at will, &c. (a).

GUARDIANSHIP is the benefit of having the custody of the body or lands, or both, where the heir is within age : And the lord of whom the land is holden by knight service shall have the same to his own use ; and as it is a chattel real, therefore his executor shall have it.

The guardian must not do waste, nor enfeoff, upon pain of losing the wardship : But he must maintain the building out of the issues of the lands, and so restore it to the heir.

If the committee of the king commit waste, &c. the wardship shall be committed to another ; if the grantee, he shall lose the wardship.

(a) Chattels real are not called so, as being real estate, but because they are extractions out of the real. 3 *Atk.* 492. 4 *Bac. Abr.* 328. See further as to chattels real, 2 *Wac. Abr.* 60, *Gwill. edit.*

And one of the friends of the ward, being his next friend who will, may sue for him.

If a lease be made to a man and his heirs for twenty years, it is a chattel, and his executor shall have it: Otherwise if a man give by will a lease to a man and his heirs, here the word "heirs" are words of purchase, and the heirs shall have it (b).

[50] If a man grant *proximam advocationem* to J. S. and his heirs, it is but a chattel, for it is but for *unica vice*.

Writings pawned for money lent, are chattels (c).

If a woman have execution of lands by statute merchant, and take a husband, he may grant it, for it is a chattel.

OF CHATTELS PERSONAL.

Chattels personal are gold, silver, plate, jewels, utensils, beasts, and other chattels and moveable goods whatsoever, obligations, and corn upon the ground.

All goods, as well moveable as unmoveable, corn upon the ground, obligations, right of actions, money out of bags, and corn out of sacks, *sunt catalla* (d).

Money does not pass, by the grant of all his goods and chattels; nor hawks, nor hounds, nor other things *feræ naturæ* (e). for the property is not in any person, not even after they are made tame, any longer than they are in his possession; as my hounds following me, or following my man; or my hawk, flying after a fowl, or my deer straying out of my park: But if they stray of their own accord, it is lawful for any man to take them; and the heir shall have them.

[51] All chattels shall go to the executors; as vats and furnaces fixed in a brew-house, or dye-house, by the lessee;

(b) See on the distinction between *purchase* and *limitation*. *Fearne Conting. Rem.*

(c) 3 *Bac. Abr.* 65.

(d) Are chattels.

(e) Of a wild nature. See *Toller's Ex.* 147.

but if they be fixed by tenant in fee, the heir shall have them (f).

Now something has been said concerning possessions: it follows that it be shewn, how they may be conveyed from one man to another.

CHAP. XXVIII.

OF CONVEYANCES.

IN every conveyance there must be a grantor and a grantee, and something granted. *Perk.* § 1. The conveyance of some persons is void, of others voidable. *Perk.* § 2.

Conveyance of a woman covert is void, without the consent of her husband, and it ought to be made in her and his name, except it be done as executor to another. *Perk.* § 6, 7.

The conveyance of an infant which does not take effect by the delivery of his own hands, is void; and an action of trespass will lie against the grantee for taking the things given. *Perk.* § 12, 13, 14.

Otherwise it is but voidable, except it be as executor, or for necessary meat and drink, &c. for his advantage. *Perk.* § 14.

Voidable of *non sanæ memorie* or made by duress. [52] *Perk.* § 16, 17, 18.

Voidable by the parties themselves and their heirs, and by those who shall have their estates, except *non sanæ* himself. *Perk.* § 21.

Grants by fine are voidable by a writ of error, by an

(f) *Vide 3 Bac. Abr. 60. Com. Dig. Bienes (A. 1.) ; 2 Bl. Com. 120, 385 ; Co. Litt. 18 b, 147 b.* as to personal chattels.

infant during his non-age, and by the husband for a fine levied by his wife alone during their marriage. *Perk.* ¶ 19, 20.

The conveyance of some persons cannot be good for ever without the consent of others; as the dean without the chapter; the mayor without the commonalty; and of other bodies politic who have a common seal; or of a parson without the patron and ordinary. *Perk.* ¶ 31.

If there be no addition in the conveyance it shall be intended the elder (a).

A conveyance made to a woman covert shall be good and of effect, until her husband do disagree. See *Perk.* 154.

An infant may be grantee, so may a woman outlawed, a villain, a bastard, and a felon.

A bastard can have no heir but the issue of his body lawfully begotten.

[53] An infant at the age of discretion by his actual entry, and a woman against the will of her husband may be a disseisor or a trespasser.

In all conveyances there must be one named, who may take by force of the grant, at the beginning of the grant.

A grant made to the right heirs of one who is dead is good, or *custodibus Eccle.* is good for goods.

All chattels, real or personal, may be granted or given without a deed (b).

Rent-service, rent-seck, rent-charge, common of pasture, or of turbary, reversion, remainder, advowson, or other things, which lie not in manual occupation, cannot be conveyed for years, for life, in tail, or in fee, without writing.

(a) If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father grant an annuity without any addition, yet the grant is good; for he cannot deny his own deed. *Perk.* s. 37. 3 *Bac. Abr.* 378. *Grants (C.)*

(b) But since the statute of frauds, a writing is necessary as to chattels real. *Vide Roberts on Frauds,* 164.

The mayor or commonalty, or the like, cannot make a lease for years without a deed.

See further as to alienations 2 Bl. Com. 287.

CHAP. XXXIX.

OF DEEDS.

Three things needful and pertaining to every deed are, writing, sealing, and delivering.

IN the writing must be shewn the persons names, their [54] dwelling place, and degree (a).

Things granted upon what consideration, the estate, whether absolute or conditional, with the other circumstances, and the time when it was done.

No grant can be made but to him who was party to the deed, except it be by way of remainder.

The words must be sufficient in law to bind the parties ; as if a man grant *omnes terras certa sua* (b), a lease for years passes not, but freehold only, at least *nec per omnia bona sua* (c).

Exceptio semper ultimo ponenda est (d).

The *habendum* must include the premises.

A condition cannot be reserved but by the grantor ; and it is proper to follow the *habendum* presently.

The *habendum* or condition must not be repugnant to the premises, if it be, it is void, and the deed will take effect by the premises.

(a) See 2 Vin. Abr. 81. 88. *Additions* (C).

(b) *All his certain lands.*

(c) *Not for all his goods.* See Co Litt. 118 b.

(d) *The exception is always placed at the end.*

A warranty is good although it extend not unto all the lands, nor to all the feoffees, or be made by one of the feoffors.

If a deed be erased or interlined in the date, or in any material place, it is very suspicious (e).

See further concerning deeds, 2 Bl. Com. 298; Shep. Touchstone, ch. 5.

[55]

OF SEALING. (f)

A writing cannot be said to be a deed if it be not sealed, although it be written and delivered, it is but an escrow.

And if it were sufficiently sealed, yet if the print of the seal be utterly defaced, the deed is insufficient, it is not my deed (g).

It cannot be pleaded, but it may be given in evidence (h).

OF DELIVERY.

A deed takes effect by the delivery, and if the first delivery take any effect, the second is void.

A jury shall be charged to enquire of the delivery, but not of the date; yet every deed shall be intended to be made when it bears date (i).

(e) See *Shep. Touch* 68, 69. *Vin. Faits* (T) to (Z). *Com. Dig. Faits* (F). *Hal. MSS. Co. Litt.* 35 b. (7). *Gilb. Evid.* 93. *Sedg. edit.*; 105, 4th edit.

(f) *Perk. s. 134. Com. Dig. Faits* (A 2). *Shep. Touch.* 55. *Philips on Evid.* 505, 4th edit.

(g) Such defect, arising from accident, would be supplied in equity. *2 Ch. Rep.* 100; *2 Vern.* 473.

(h) See *Perk. s. 135, &c. Gilb. Evid.* 95, *Sedg. edit.*; 107, 4th edit.

(i) *Com. Dig. Evidence* (A 3). *Hargr. n. Co. Litt.* 36 a. (5) and (6); *Phil. on Evid.* 506, 585, 4th edit. As to the execution of deeds under powers, see *Sug. Pow.* 231, 2d edit. *Phil. on Evid.* 507.

*Diversity in delivering of a Writing as a
DEED OR ESCROW (k).*

This delivery ought to be made by the party himself, or by his sufficient attorney, and so it shall bind him whosoever wrote or sealed the same.

If one be bound to make assurance, he need not deliver [56] the deed unless there be one to read it to him before (l).

And if any writing be read in any other form to a man unlearned (m), it shall not be his deed although he seal and deliver it (n).

THERE ARE TWO SORTS OF DEEDS.

A deed poll, which is the deed of the grantor; a deed indented, which is the mutual deed of either party. But in law, one is the deed of the grantor, and the other the counter part. And if any variance be in them, it shall be taken as it is in the deed of the grantor; and if the grantor seal only, it is good.

As to deeds in general, see 2 Bl. Com. 295, Shep. T. c. 4.

(k) A writing is delivered as an *escrow* when it is delivered not to the grantee himself, but to a third person, to hold till some condition on the part of the grantee be performed; till which it is no deed, and may be revoked on failure. *Co. Litt. 36, a.*

(l) *Thoroughgood's case, 2 Co. 9 b.*

(m) Or to a blind man, *Shulter's case, 12 Co. 90. See also 4 Cru. Dig. 31. 2d edit.*

(n) *Manser's case, 2 Co. 3 a.*

CHAP. XXX.

BARGAINS AND SALES.

[40] NO manors, lands, tenements, or other hereditaments can pass, alter, or change from one man to another, whereby an estate of inheritance or freehold (a) is made, or takes effect in any person or persons, or any use thereof is made, by reason only of any bargain and sale thereof, except the same be made by writing indented, sealed, and inrolled in one of the courts of record at Westminster, or within the same county or counties where the tenements so bargained do lie, before the *custos rotulorum* and two justices of peace, and the clerk of the peace, or two of them, whereof the clerk of the peace to be one, and that within six (b) months after the date of such writing indented. 27 H. 8. c. 16. [See *Rev. Code of 1819. Index. tit. "CONVEYANCES;" "DEEDS."*]

The inrolment shall be intended the first day of the term, and shall have relation to the delivery of the deed against all strangers.

See further, as to Bargains and Sales. Shep. T. ch. 10.

(a) Bargains and sales for years are not restrained by this statute; and though they are not by deed indented nor inrolled, yet the statute of uses executes the possession to the use. 2 Inst 671. *Heyward's case*, 2 Co. 36. *Foxe's case*, 8 Co. 94. *Gib. Uses*, 85, 285. 2 Sand. *Uses*, 42, 3d edit. 4 Cru. Dig. 123, 2d edit. 1 Bac. Abr. 463.

(b) Lunar months. 2 Inst. 674; *Gib. Uses*, 99. The time for inrolment is exclusive of the day of the date; and any instant of the last day of six lunar months shall be said to be, within the six months. *Thomas v. Popham*, Dyer, 218 b.

CHAP. XXXI.

FEOFFMENTS.

BY a feoffment an estate is made, by the delivery of possession and seisin, by the party, or his sufficient attorney (a).

A man cannot make livery of seisin before he has the possession.

A joint-tenant cannot enfeoff his companion (b).

A coparcener may make a feoffment of his part, or release.

A man cannot enfeoff his wife.

A disseisor cannot enfeoff the disseisee; for his entry is [58] lawful upon the disseisor.

Such persons as have possession in lands for years or for life, &c. cannot take by livery and seisin of the same lands (c).

If a feoffment be made, and the lessee for years give leave to the lessor to make livery and seisin of the premises, saving to himself his lease, &c. and he does, the term is not surrendered; for the lessee had an interest which could not be surrendered without his consent to surrender, and here his intent to surrender does not appear; where-

(a) Since the 29 Car. 2. c 3, it must be put in writing, and signed by the parties making the same. See further, 3 Bac. Abr. 144. 2 Sand. Uses, 1. Butl. n. Co. Litt. 271 b. (1) I.

(b) See the reason, 3 Bac. Abr. 694. [The statute of uses, 27 Hen. 8. c. 10, which by transferring the possession to the use, rendered livery of seisin unnecessary to pass the freehold, deeds of feoffment have been almost superseded by conveyances by lease and release.]

(c) Because having the possession already, they cannot have a further possession: the proper way of conveying a greater estate to them, is by release in enlargement; or to confirm their possession, a confirmation.

fore he may enter, and have his term, and the rent is renewed : But it is otherwise with a lessee for life, and the rent is extinct.

The lessor cannot make livery and seisin, against the will of the lessee being on the land ; but he may grant the reversion, and if the lessee do attorn, the freehold will pass without livery of seisin,

See further as to a deed of feoffment, Shep T. ch. 15; 2 Bl. Com. 310; Co. Litt. 271 b, note (1).

LIVERY OF SEISIN.

[59] Livery of seisin is a ceremony used in conveyance of lands, that the common people might know the passing or alteration of the estate. It is requisite in all feoffments, gifts in tail, and leases for life, made by deed or without deed.

No freehold will pass without livery of seisin, except by way of surrender, partition, or exchange, or by matter of record, or by testament.

Livery of seisin must be made in the life-time of him who made the estate.

Dona clandestina sunt semper suspiciora (d).

By livery of seisin in one county, the lands in another county will not pass.

Livery within view is good, if the feoffee do enter in the life-time of the feoffor.

Livery cannot be made of an estate to be given *in futuro*, for no estate of freehold can be given *in futuro*, but shall take effect presently by livery and seisin.

OF USES. (e)

The statute of 27 H. 8. c. 10. has advanced uses, and established a surety for him who has the use against the

(d) Clandestine gifts are always suspicious

(e) See, on the Doctrine of Uses, *Cruise on Uses*, or 1 *Cru. Dig.* 387, 2d edit; *Butl. n. Co. Litt.* 271 b. (1,) II. to the end. On Trusts, 1

feoffees (*f*) : For before the statute, the feoffees were owners of the land, but now that is destroyed, and the *cestui que use* (*g*) is the owner of the land : Before the statute the possession ruled the use, but since, the use governs the possession. Indentures subsequent are sufficient to direct the uses of a fine or recovery precedent, when no other certain and full declaration was made before (*h*). [80]

The intention of the statute of uses was to abolish conveyances to uses ; but the strict construction put on it by the

Cru. Dig. 451, 2d ed; Butl. n. Co. Litt. 291 b. (1). On Uses and Trusts, Sanders on Uses and Trusts; Sugd. edit. of Gilbert on Uses; Rowe's edit. of Bacon on Uses; the second book of Fonblanche's Treatise of Equity; Sugden on Powers.

A devise may be made to uses under the statute of uses. Thus a devise to *A*. and his heirs, to the use of *B*. and his heirs, would give the legal fee to *B*. But if the testator's intention cannot take effect under the statute of uses, the law will leave its effect to the statute of wills. Thus if a devise be made to the use of *A*. for life, with remainders over, if it were considered as a limitation under the statute of uses, it would be void for a want of a seisin to serve the uses, *Butl. n. Co. Litt. 271 b. (1), III. 5.* So if a devise be to *A*. and his heirs, to the use of *B*. and his heirs, and *A* die in the testator's life time, perhaps the courts would, in favour of the intention, construe the devise as a disposition not affected by the statute of uses, but as giving the fee to *B* at once. But even admitting that the devise would be void at law, yet equity would compel the testator's heir to fulfil the intention, by conveying the estate to the same uses. *Sug. Pow. 133, 2d edit.* But whether a devise to uses operates solely by the statute of wills, *1 Collectanea Juridica, 427;* or by that statute jointly with the statute of uses, is, except in a very few cases, a matter rather of speculation than of use, *2 Fonbl. Eq. 24, 5th Edit.* as it is now settled that an immediate devise to uses, without a seisin to serve those uses, is good ; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best, with the intention of the testator. *Butl. n. ubi supra.* See further, *Powell on Devises, 272; 1 Sand. Uses, 203, 3d edit; 195, 2d edit; Gilb. Uses, 162. 281. Sugd. edit. 356. 486. 1 Cru. Dig. 436, 2d edit.* The subject is interesting and leads to important results.

(*f*) To uses.

(*g*) He who has the use.

(*h*) *Gilb. Uses, 54. 259.*

courts, has restored the effect of them in the doctrine of *trusts*, which are now applied to the same purposes as uses were before the statute. See *1 Atk.* 591.

ATTORNEY.

An attorney ought to do every thing in the name, and as the act of him who gave him the authority; as leases in name of the lessor (*i*), but he must say, by virtue of his letter of attorney, I do deliver you possession and seisin of, &c. for, &c.

An attorney must first take possession before he can make livery of seisin.

If an attorney do make livery of seisin otherwise than he has warrant, then it is a disseisin to the feoffor. See *Co. Litt.* 52. a, note (2).

An attorney must be made by writing sealed, and not by word (*k*).

(*i*) *Combes's case*, 9 Co. 76 b. But it is immaterial whether the attorney place his own name first or last. Therefore an execution thus "for J. B. (the principal), M. W. (the attorney), L. S." is valid. *Wilks v. Backs*, 2 East, 142. The proper way is "J. B. by M. W." 1 Wms. Cons. 175.

Where an attorney enters into an *agreement* on behalf of his principal, the agreement should be made and signed in the name of the principal by him as attorney; for if an attorney covenant in his own name for himself, his heirs, &c. he will himself be personally bound, though he be described in the instrument as covenanting for, and on the part of his principal. *Appleton v. Binke*, 5 East, 148; *Kendray v. Hodgson*, 5 Esp. Ca 228; See *Duke of Norfolk v. Worthy*, 1 Campb. N. P. 337. *Bowen v. Morris*, 2 Taunt. 375; *Sugd. Vend.* 42, 5th edit.

(*k*) Though the contract itself must, by the statute of frauds be in writing, an authority to buy or treat for lands as agent for another may be good, and effectual without any writing. *Waller v. Hendon and Cox*. 5 Vin. Abr. 524. pl 45. *Wedderburne v. Carr*, cited 3 Wooddes. Lect. 427. *Coles v. Trecotthick*, 9 Ves. 250. It is, however, in all cases highly desirable that the agent should have a written authority.

CHAP. XXXIII.**EXCHANGE.**

In an exchange both the estates must be equal (a).

There must be two grants, and in every grant mention must be made of this word "Exchange."

It may be done without livery of seisin, if it be in one shire, or else it must be done by indenture, and by this word "Exchange," or else nothing passes without livery.

Exchange imports in the law a condition of re-entry, and a warranty, voucher, and recompense, of the other land which was given in exchange. *Bustard's case*, 4 Co. 121 a.

An assignee cannot re-enter, nor vouch, but rebate (b); an exchanger may re-enter upon an assignee (c). And the same condition defeated in part, is defeated in the whole (d). And the same law is in partition (e).

(a) That is, equal in *interest*, as fee-simple for fee-simple, &c. but it is not necessary that they should be of equal *value*. *Litt. s. 64; 2 Bl. Com. 323*

(b) *Finch's Law*, 116. In case of eviction from the part received in exchange by a person claiming under a superior title. *Litt. s. 262.*

(c) Of the part given in exchange, in case of eviction from the part received in exchange, before alienation in fee of any part of the land received in exchange. *Litt. s. 262.*

(d) *Dumpson's case*, 4 Co. 120 a.

(e) *Co. Litt. 173 b. 1 Bac. Abr. 703. Coparcenres (F).*

[61]

CHAP. XXXIII.**GRANTS.**

GRANTS must be certain. A grant to *J. S.* or *J. N.* is void for the uncertainty, although it be delivered to *J. S.*, for the delivery of the deed will not make a void grant good, or to take effect.

The lord cannot grant the wardship of his living tenant, because of the uncertainty who shall be his heir, unless he name some person.

[62] When any thing is granted which is not certain, as one of my horses, then the choice is in the grantee.

When several things are granted, then it is in the choice of him that is to do the first act.

A man cannot charge or grant that which he never had.

A man may charge a reversion.

A parson may grant his tithes, or the wool of his sheep, for years.

A thing in action, a cause of suit, right of entry, or a title for a condition broken, or such like, may not be given or granted to a stranger, but only to the tenant of the ground, or to him who has the reversion or remainder. See 10 Co. 48.

A thing which cannot begin without a deed cannot be granted without a deed; as a rent-charge, fair, &c. Every thing which is not given by delivery of hands, must be passed by deed. The right of a thing real or personal, cannot be given in, nor released by word. A rent, or condition, or a re-entry, cannot be reserved to one who is not party to the deed. See *ante Max. 10.*

All things which are incident to others, pass by the grant of those things which they are incident to. See *ante, Max. 13.*

[63] A man by his grant cannot prejudice him who has an elder title.

If no estate be expressed in the grant, and livery and seisin be made, then the grantee has only an estate for life: But if there be such words in the grant, as will manifest the will of the grantor, so if his will be not against the law, the estate shall be taken according to his intent and will.

All grants shall have a reasonable construction and all grants are made to some purpose, and therefore reason would they should be construed to some purpose. See *ante Max. 45.*

A grant shall be taken most strongly against him who made it, and most beneficially for him to whom it is made.

To grants of reversion, or of rent, &c. there must be attornment, otherwise nothing passes, if it be not by matter of record.

See further on the subject of grants, *Co. Litt. 9. a;* *Shep. Touchs. ch. 12; 2 Bl. Com. 317.*

ATTORNMENT. (a)

Attornment is the agreement of the tenant to the grant by writing or by word; as if he say, I do agree to the grant made to you, or I am well contented with it, or I do attorn unto you, or I do become your tenant, or I do deliver unto the grantee a penny by way of seisin of a rent, or pay, or do but one service only in the name of the whole; [64] it is good for all.

(a) By stats. 4 Anne, c. 16. s. 9. and 11. Geo. 2. c. 19. s. 11. attornment is, in all cases, become unnecessary, though it is still operative; thus, if a termor attorn to the grant of a stranger, it would be a forfeiture. *Vide* further, *Gilb. Ten. 81;* *Wright's Ten. 171* *Wms. n. 1* *Saund. 234 a. (4); Sug. Gilb. Uses, 198, (7), 225; Rits, 88; 1 Pow. Mortg. 227, Butler's note, Co Litt. 309 a. (1); 3 Bac. Abr. 387, Grants (G). [In Virginia, grants of rents, or reversions, or remainders are good without attornment; and any tenant who shall have paid his rent to the grantor, before notice of the grant, shall not suffer thereby. Attornments to strangers are void, unless by consent of the landlord or the judgment or decree of a court. See 12 Hen. Stat. at Lar. 158; 1 Rev. Code of 1819, p. 370 § 32, 33.]*

It must be done in the life-time of the grantor.

Without attornment a seignory, a rent-charge, a remainder, or a reversion, will not pass but by matter of record.

Without attornment services pass not by the sale of the manor, nor from the manor but by bargain and sale inrolled.

Attornment must be made by the tenant of the freehold, when a rent-charge is granted.

By the attornment of the termor to the grantee of a reversion, with livery, the reversion and the rent also pass, though no mention be made thereof. Before attornment a man cannot distrain, nor have any action of waste.

By fine the lord may have the wardship of the body and lands, before the attornment of his tenant.

The end of attornment is to perfect grants, and therefore cannot be made upon condition or for a time.

A tenant who is to perfect a grant by attornment, cannot consent for a time, nor upon a condition, nor for part of a thing granted; but it shall enure for the whole absolutely.

[65] **If the tenant have not true notice of all the grant, then such attornment is void.**

Attornment is unnecessary upon a devise (b).

CHAP. XXXIV.

LEASES.

A LEASE for years must be for time certain, and ought to express the term, and when it should begin, and when it should end, certainly; and therefore a lease for a year, and

(b) Of a rent-service or a rent-charge, or of a reversion expectant on a lease for life or years, and the devisee might have distrained, or had a writ of waste, though the tenant never attorned. *Litt. s. 585, 586.*

so from year to year during the life of J. S. is but for two years, and it may be made by word or writing. If I lease to J. N. to hold until one hundred pounds be paid, and make no livery of seisin, he has an estate only at will. See 1 Mod. 180; 1 Stra. 655.

A lease from year to year, so long as both parties please, after the commencement of any year it is a lease for that year, &c. till warning be given to depart. 14 H. 8. 16. [Such a lease is good for two years certain, and afterwards an estate at will. *Bul. N. P.* 84; 1 *Wils.* 262.]

A lease beginning from henceforth shall be accounted from the day of the delivery; for the making shall be taken inclusive from the day of the making, or of the date exclusive (a).

If lands descend to the heir, before his entry, he may make a lease thereof.

A man lets a house *cum pertin'* (b), no lands pass: But if a man let a house *cum omnibus terris eidem pertin'* (c), there the lands enjoyed therewith pass. [But it has been held that a close adjoining to the house, and also orchards, gardens, yards, and cartilages will pass by the word *appurtenances*. See *Plowd.* 170; *Cro. Jac.* 526.]

If a man let lands wherein are coal-mines, quarries, and the like, if they have been used the tenant may use them, and if they be not open, if the tenant open them and employ them not on the land, it is waste: Likewise marl. The land is the place where the rent is to be paid and demanded, if no other place between the parties be limited.

Trespass is not given for not paying the rent to the lessor on the land although it be payable there.

And if a man let lands without impeachment of waste (d), and a stranger cut down the trees, and the lessee brings an action of trespass, he shall not recover for the value of the

(a) See *Pugh v. Duke of Leeds*, Cowp. 714. *Sug. Pow.* 587, 2d edit; *Powell on Powers*, 433, 540.

(b) *With the appurtenances*.

(c) *With all the lands belonging to the same*.

(d) *Without any liability to punishment for committing waste*.

trees, but for the crop, and breaking of his close; and the heir of the lessor shall have such trees, and not the executor of the lessee, unless they be cut by the lessee, and enjoyed by the grantee without waste.

[67] Lessee for years or for life, tenant in dower or by the curtesy, or tenant in tail after possibility, &c. have only a special interest or property in the trees (*e*), being upon the ground, growing as a thing annexed unto the land, as they are annexed thereunto.

But if the lessee (*f*) or any other sever them from the land, the property and interest of the lessee in them is determined, and the lessor may take them as things which are parcel of his inheritance, the interest of the lessee being determined.

To accept the rent of a void lease will not make the lease good; but of a voidable lease it will (*g*).

If the husband and wife do purchase lands to them and the heirs of the husband, and he make a lease, and die, his wife may enter, and avoid the lease for her life; but if she die, leaving the husband, who afterwards dies before the term ends, the lease is good to the lessee against the heir.

Where it is covenanted and granted to *J. S.* that he shall have five acres of land in *D.* for years, this is a good lease, for *concessit* (*h*) is of such force as *dimisit* (*i*).

If a man make a lease for ten years, and afterwards makes another lease for twenty-one years, the latter shall be a good lease for eleven years, when the first is expired.

[68] If the lessee at his own cost put glass into the window, he cannot take the same away again, but if he do he shall

(*e*) This special interest or property extends principally to housebote, ploughbote, and haybote, *viz.* necessary wood for fuel, implements of husbandry and repairs. *Co. Litt.* 41 *a*,

(*f*) See *Herlakenden's case*, 4 Co. 63 *a*.

(*g*) *Vide Wms. n. 2 Saund.* 180 *a*; 4 *Bac. Abr.* 13, 117, *Leases* (*C*) and (*H*); 7 *Bac. Abr.* 64, *Void and Voidable*; 1 *Rep. Hubb. and Wife*, 90.

(*h*) Granted.

(*i*) Demised.

be punished for waste (*k*) : And so of wainscot and beds fastened to the ceiling, if not fixed with screws.

Tenant in tail may make a lease for such lands or inheritance, as have been commonly letten to farm, if the old lease be expired, surrendered, or ended, within one year after the making of the new : but not without impeachment of waste, nor above twenty-one years, or three lives, from the day of the making, nor without reserving the old rent, or more, 32 H. 8. 28. Indenture of lease, by tenant in tail, for twenty-one years, made according to the form of the statute, rendering the ancient or more rent, if the tenant in tail die, it is a good lease against his issue; but if a tenant in tail die without issue, the donor may avoid this lease by entry (*l*). 32 H. 8. 28. And if he in the remainder do accept the rent, it shall not tie him, for as the tail is determined, the lease is determined and void. *Ed.* 6. 19.

The husband may make such a lease of his wife's lands by indenture, in the name of the husband and wife, but she must seal the lease, and the rent must be reserved to the husband and his wife, and to the heirs of the wife, according to her estate of inheritance. *See Co. Litt. 45 a.*

[69]

A lease made by the husband alone, of the lands of his wife, is void after his death, but the lessee shall have his corn (*m*).

By the husband and wife voidable, if it be not made as aforesaid.

If a man let lands for years, or for life, reserving a rent, and enter into any part thereof, and take the profit thereof, the whole rent is extinguished, and shall be suspended during his holding thereof.

(*k*) *Co. Litt. 53 a; 4 Co. 63 b; 1 Atk. 477; 3 Bac. Abr. 63.* The doctrine of annexation has, on principles of public policy, been gradually relaxing. *Ambl. 113; 2 Str. 1141; Toll. Ex. 198; Off. Ex. 62.*

(*l*) *Pain's case, 8 Co. 34 a.*

(*m*) That is, which he has sown.—Such a lease seems not to be void absolutely, but only voidable, by the entry of the wife, *Hob. 5; Cro. Jac. 332.*

The acceptance of a re-demise to begin presently is a suspension of the rent before any entry: Otherwise of a re-demise to begin *in futuro* (n).

RESERVATIONS AND EXCEPTIONS.

There are divers words by which a man may reserve a rent, and the like, which he had not before, or to keep that which he had, as *tenendum*, *reservendum*, *solvendum*, *faciendum* (o), it must be out of a messuage, and where a distress may be taken, and not out of a rent, and must be comprehended within the purport of the same word.

Exceptions of part ought always to be of such things as the grantor had in possession at the time of the grant.

[70] The heir shall not have that which is reserved, if it be not reserved to him by special words.

If a man make a feoffment of lands, and reserve any part of the profits thereof, as the grass or the wood, that reservation is void; because it is repugnant to the feoffment. See *Shep. Touchs.* 79.

A man by a feoffment, release, confirmation, or fine, may grant all his right in the land, saving unto him his rent-charge, &c. Things which are gained only by taking and using, as pasture for four bullocks, or two loads of wood, cannot be reserved but by way of indenture, and then they shall take effect by way of grant from the grantee to the grantor, during his life, and no longer, without special words.

Exceptions of things, as wood, mines, quarry, marl, or the like, if they be used it is implied by the law, that they shall be used; and the things without which they cannot be had, is implied to be excepted, although no, &c.

But otherwise, if they be not used, then the way and such like must be excepted.

An assignee may be made of lands given in fee, or for

(n) *In futuro.*

(o) *To hold, to reserve, to pay, to make.* See Co. Litt. 47 a.

life, or for years, or of a rent-charge, although no mention be made of "assigus" in the grant.

But otherwise it is of a promise, covenant, or grant or warranty. [71]

If a lessee assign over his term, the lessor (*p*) may charge the lessee or assignee (*q*) at his pleasure.

But if the lessor accept of the rent of the assignee, knowing of the assignment, he has determined his acceptance, and shall not have an action of debt against the lessee, for rent due after the assignment (*r*).

If after the assignment of the lessee the lessor grant away his reversion, the grantees cannot have an action of debt against the lessee (*s*).

If a lessee assign over his interest and die, his executor shall not be charged for rent due after his death (*t*).

(*p*) An assignee of a reversion may have an action of debt for rent against the lessee, and the action being founded, not upon any privity of contract, but upon privity of estate only, is local. *Wms. n. 1 Saund.* 241 b. 238 (1) 4. *Com. Dig.* (N. 4. 6.)

(*q*) The lessor may bring an action of debt against the assignee, upon the privity of estate there is between them by virtue of the assignment for the rent actually incurred during his enjoyment. *2 Bac. Abr.* 73, *Covenant* (E) 4. *1 Fonbl. Eq.* 359 (y).

(*r*) By reason of his own acceptance, which has extinguished the privity of contract. *Walker's case*, 3 Co. 24 a. b; *Cro. Jac.* 334. Nor can he distrain, though he may still have an action on the lessee's covenant for the payment of the rent. *1 Roll. Abr.* 522 (N.) pl. 1; *6 Vin. Abr.* 412; *Bull. N. P.* 159; *1 Saund.* 240. But if the covenant be merely implied by law, as *yielding and paying*, it seems his acceptance of the assignee for his tenant leaves him without remedy against the lessee. *1 Fonbl.* 362, 5th ed. *Wms. n. 1 Saund.* 241 a. And the assignee of the reversion may have an action of covenant by *32 Hen. 8. c. 34. Brett v. Cumberland*, *Cro. Jac.* 521, 522. *Thurby v. Plant*, *1 Saund.* 240. See further, *Bull. n. Co. Litt.* 269 b (3); *Gib. Ten.* 67, 68; *Sug. Vend.* 31, 254, 5th ed. *Staines v. Morris*, *1 Ves. & Bea.* 11; *2 Bac. Abr.* 72, 73; *2 Saund.* 302 a. (5)

(*s*) Because there was no privity of estate between them, as the lessee assigned his term before the grant of the reversion. *1 Saund.* 241.

(*t*) Lord Coke, in *Walker's case*, 3 Rep. 24 a. says, it was adjudged in *Overton v. Sydall*, that if the executor of a lessee for years assigns

If the executor of a lessee assign over his interest, an action of debt does not lie against him for rent due after the assignment. (See last note).

If the lessor enter for a condition broken, or the lessee surrender, or the term end, the lessor may have an action of debt for the arrearages. [See 8 Anne c. 14 § 6; 1 Rev. Code of 1819, p. 451 § 20, 21, by which the lessor may *distrain*.]

A lease for years rendering rent, with a condition, that if the lessee assign his term, the lessor may re-enter; the lessee assigns, the lessor receives the rent from the hands of

over his interest, an action of *debt* doth not lie against him for rent due after the assignment, and that if the *lessee for years* assigns over his interest, and dies, the executor shall not be charged for rent due after his death; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was determined. In answer to which it may be observed, 1. That *Popham* the Chief Justice, in his report of the same case, (Poph 120.) says, that he was of another opinion: and in Moor, 352, *Walker v Harris*; Latch. 262, *Iremonger v Newnam*; and in 1 Show. 341, *Pitcher v. Tovey*, it is said that no judgment was given. 2. The case may be admitted to be law, if the lessor, after the assignment, either by the lessee or the executor, accepted of the assignee as his tenant: for then the lessor cannot bring *debt* against the executor, because the privity of contract was determined by the assignment, and acceptance of the assignee. But, 3dly, if it were decided in that case, either that the assignment itself, without any acceptance of the assignee, destroyed the privity of contract; or that the death of the lessee for years, after an assignment of the term by him, without any acceptance of the assignee, determined the privity of contract; so that the lessor in either of these cases cannot maintain an action of *debt* after such assignment, such decision appears not to be well considered; and indeed the case of *Overton* and *Sydhall* has been frequently denied. 1 Sid. 266, *Heller v. Cusbard*. 1 Lev 127, S. C. 3 Mod. 325, *Coghill v Freelove*. 2 Vent. 209, S. C. 4 Mod. 76, *Pitcher v. Tovey*. For it is now settled by these cases, that the privity of contract of the testator is not determined by his death, but the executor shall be charged with all his contracts so long as he has assets; and therefore he shall not discharge himself by making an assignment without the consent of the lessor, but shall still be liable in an action of *debt*, as well as *covenants*, for the rent incurred afterwards; and so, where the testator himself has assigned the term in his life-time, his executor is chargeable in the same manner. 3 Mod. 326, *Wilkins v Fry*; 1 Meriv. 265. Wm. n. 1 Saund. 241. [See 1 Rev. Code of 1819, p. 452, 453.]

the assignee, not knowing of the assignment, it shall not [72] exclude the lessor of his entry.

A thing in action may be assigned over for a good cause, as just debt: As where a man is indebted to me twenty pounds, and another owes him twenty pounds, he may assign over his obligation to me in satisfaction of my debt, and I may justify the suing for the same in the name of my debtor at my own proper costs and charges.

Also where one has brought an action of debt against J. N. who promises me, that if I will aid him against J. N. I shall be paid out of the sum in demand, I may aid him.

An assignee of lands, though he be not named in the condition, yet he may pay the money to save his land (u).

But he shall receive none, if he be not named: The tender shall be to the executor of the feoffees (v).

An assignee shall always be intended, to be him who has the whole estate of the assignor, which is assignable. A condition is not assignable (w); nor the office of an executor or administrator. The law will not allow an assignee in law, if there be an assignee in deed (x): So long as any part of the estate remained to the assignor, the tender ought to be made to him or his heirs, and it serves; yet a colourable payment to the heir shall not divest the estate out of the assignee, as a true payment will (y). *Vide Covenants.*

[73]

(u) Thus, a feoffee upon condition to pay a sum at *Michaelmas*, and in default the feoffor to re-enter, the feoffee aliens before *Michaelmas*, the second feoffee may pay. *Litt. s. 336, 5 Co 96 b.*

(v) See *Litt. s. 337; Co. Litt. 210 a.* The personal representatives are always entitled to money secured on mortgage. See *Bull. n. Co. Litt. 208 b.*

(w) See *Litt. s. 347; Fearne's Rem. 192, 2d ed.; Butler's ed. 271; Wms. n. 1 Saund 288; Perk. s. 831; Co. Litt. 215. a.*

(x) Assignees are either *in fact*, sometimes called *in deed*, or *in law*. *Com. Dig. Assignment (B); Co. Litt. 8 b.* The law will never seek out an assignee in law, when there is an assignee in fact. *5 Co. 97 a; 3 Buls. 169;* A devisee is an assignee in law. *2 Shaw. 59; 3 Vin. Abr 156.*

(y) *Vide Litt. 336; Co. Litt. 209 b; Goodall's case; 5 Co. 96 a; Shep. Touch. 143; Doug. 187.*

CHAP. XXXVI.**SURRENDERS.**

A SURRENDER is an instrument testifying with apt words, that the particular tenant of lands or tenements, for life or years, does sufficiently consent, that he who has the next immediate remainder or reversion thereof, shall also have the particular estate of the same in possession, and that he yields or gives the same to him for ever. A surrender ought forthwith to give a present possession of the (*a*) thing surrendered unto him who has such an estate, wherein it may be drowned (*b*).

A joint-tenant cannot surrender to his companion.

An estate in things, though it cannot be granted without a deed, may be determined by the surrender of the deed to the tenant of the land (*c*).

Lessee for years cannot surrender before his term begins, he may grant, but he cannot surrender even a part of his lease (*d*).

[74] *Surrenders are made in two ways, in*

DEED, OR IN LAW.

A surrender in law is when the lessee for years takes a new lease for more years. [Though the new lease be for a

(*a*) Or *executed* interest in the thing surrendered, sometimes called a *vested* interest. *Watk. Des.* 42, 3d edit; *Fearne's Rem.* 1; *Sug. Gilb. Usur.* 231; As if tenant for life in remainder surrender to the remainder-man in fee, he cannot have a present possession, but only a present right to future enjoyment. *Perk. s. 605. 616.*

(*b*) *Com. Dig. Surrender* (l. 1.), (l. 2.); *Shep. Touche*, 300; *Cs. Litt.* 338 a; *Perk. s. 584*; *4 Bac. Abr.* 209; *Wms. n. 1 Saund.* 235 b. (9).

(*c*) *Vide Co. Litt.* 338 a; *Perk. s. 581. 585*; *Roberts on Frauds* 247.

(*d*) Because it is only a right to enter at a future time. *Cs. Litt.* 338 a. But he may release to the lessor.

less number of years than the old one, it is equally a surrender in law. *Shep. Touchs.* 301.]

A surrender in deed must have sufficient words to prove the assent and will of the surrenderer to surrender, and that the other do also thereunto agree (*e*).

The husband may surrender his wife's dower for his life, and her lease for ever.

By deed indented a man may surrender upon condition. [See further 2 Bl. Com. 326; *Shep. Touch. c. 17*; Co. Litt. 337. note (1).]

CHAP. XXXVIII.

RELEASES.

A RELEASE is the giving or discharging of a right or action, which a man has or claims against another, or out of or in his lands.

(*e*) Where an estate is limited to *A.* for life, remainder to *B.* for life, remainder to *C.* the eldest son of *A.* in fee; and *A.* in the lifetime of *B.* in consideration of an annuity of £14, to be paid by the said *C.* to him out of the premises, and for other considerations, did, by deed, give, grant, surrender, and confirm unto the said *C.* and his heirs, the said premises; it was held, that, though the deed could not operate as a *surrender*, according to the intent of the parties, upon account of *B.*'s intermediate estate for life, yet there being a consideration of blood between father and son, the conveyance should operate as a covenant to stand seised. *Per Lord Kenyon, Stafford Summer Assizes, 1797, Dec.*, on demise of *Woolley v. Pickard*; and it must be pleaded as a covenant to stand seised, and not as a *surrender*. 4 Mod. 150, *Barker v. Lade*. Wms. n. 1 Saund. 236 c. A similar circumstance occasionally occurs in practice; and the validity of many titles depends on this construction. 2 Saund. *Uses*, 79, 3d ed.; *Bulter's n. Co. Litt. 337 b.* (²).

A release or confirmation made by him, who at the time of the making thereof had no right, is void, though a right come to him afterwards, unless it be with warranty, and then it shall bar him of all right which shall come to him after the warranty made.

[75] Release or confirmation made to him who at the time of the release or confirmation made, had nothing in the lands, is void, it behoves him to have a freehold or a possession and privity.

A release made to a lessee for years, before his entry, is void (a).

A man cannot release upon a condition, nor for a time, nor for part; but either the condition is void, and the time is void, and the release shall enure to the party to whom it is made for ever, for the whole, by way of extinguishment. But a man may deliver a release to another as an escrow, to deliver to J. S. as his act and deed, if J. S. do perform such a thing, or a release upon a condition by deed indented, may be good.

A joint-tenant of a rent charge may release, yet all the rent is not extinct; or if he purchase the lands, his companion shall have the rent still.

If the grantee release parcel of a rent-charge to the grantor, yet all the rent is not extinct.

A release to enlarge an estate ought to have these words "and his heirs" or words to shew what estate he shall have.

[76] A release made to him who has a reversion or a remainder shall serve and help him who has the freehold: So shall a release made to a tenant for life, or a tenant in tail, enure to him in the reversion or remainder, if they plead it: and so to trespassers and seofees, but not to disseisors. *Litt. s. 522.*

A release of all manner of actions does not take away an entry, nor prevent the taking of one's goods again, nor is it any plea against an executor.

(a) i. e. At common law; but after a bargain and sale for years, under the Statute of Uses, it is otherwise:

A release of all demands extinguishes all actions real and personal, appeals, executions, rent-charge, common of pasture, rent-service, and all right and seizure, and all right in lands and property in chattels; but not a possibility (b) or future duty (c), as a rent payable after my death, and the like.

[See on the doctrine of Releases. *Co. Lit.* 264, a; *Shep. Touch*, c. 19; *2 Bl. Com.* 324.

CHAP. XXXVIII.

CONFIRMATION.

CONFIRMATION is when one ratifies the possession, as by deed, to make his possession perfect, or to discharge his estate, which may be defeated by another's entry.

As if a tenant for life will grant a rent-charge in fee, [77] then he in the reversion may confirm the same grant.

Where a man by his entry may defeat an estate, there by his deed of confirmation he may make the estate good.

A confirmation cannot enlarge an estate which is determined by express condition or limitation (a). To confirm an estate for an hour, if it be to tenant for life, it is

(b) But it might be released by proper words; for he who is to have an interest by any possibility, may release the same to the present possessor, as well as if he had a future right, because it is according to the policy of the law, for the quiet and peace of the possessors. *Lampet's case*, 10 Co. 48 a. b; *Gib. Uses*, 143; *Ritno*, 48. So possibilities of personal estates are devisable, as well as assignable, in equity. *Fearne's Rem.* 549. 560, *Bull. ed.* 439 447, 3d ed.

(c) A release of all actions will discharge a bond debt payable at a future day, for it is *debitum in presenti*, though *solvendum in futuro*. *Co. Lit.* 292 b.

(a) For though a confirmation may make a voidable or defeasable estate good, it cannot operate on an estate which is void in law *Co. Lit.* 295 b. So a confirmation of a void lease does not make it good. *Dyer*, 239 b; *Com. Dig. Confirmation* (D. 1.)

good for life: if to tenant in fee, for ever. *See Litt. s. 519; Co. Litt. 297 a.*

A lease for years may be confirmed for a time, or upon condition, or for a piece of the land: But if a freehold be confirmed, it shall enure to the whole absolutely.

A confirmation to enlarge an estate, must have words to shew what estate he shall have.

The estate for tenant for life can only be confirmed to his heirs, by *habendum* the land to him and his heirs; and therefore it is good to have such *habendum* in all confirmations (b).

In a confirmation new service cannot be reserved, but an old service may be abridged (c).

A confirmation made to one disseisor, shall be voidable to the other; so shall not a release.

[*See as to confirmation, Co. Litt. 295 b. n. (1); 2 Bl. Com. 325.*]

[*Of the conveyance by Lease and Release, omitted by the author because its validity was doubted by him, but now very common, see 2 Bl. Com. 339; 2 Mod. 249; Raym. 798; 3 Burr. 1794.*]

CHAP. XXXIX.

[78]

CONDITION.

THERE are two sorts of conditions, one expressed by words, another implied by the law; the one called a condition in deed, the other a condition in law.

If an estate be made, and the condition is against the law, the estate is good, and the condition is void.

(b) *Litt. s. 523, 532, 533; Co. Litt. 299 a; Com. Dig. Confirmation (B. 3.)*

(c) As if the tenant held by fealty and 20*s.* rent, the lord may confirm his estate, to hold only 12*d.* rent. *Litt. s. 538.*

If the estate begin by the condition, then both are void.

Bonds with conditions, expressly against the law, are void (*a*).

Conditions repugnant, the estate good, the conditions void.

(*a*) All the instances of conditions against law, in a proper sense, are reducible under one of these heads :—

1st. Either to do something which is *malum in se*, or *malum prohibitum*. *Co. Litt.* 206.

2dly. To omit the doing of something which is a duty. *Palm.* 172. *Hob.* 12, *Norton v. Simms*.

3dly. To encourage such crimes and omissions. *Fitzh* tit. *Obligation*, 13. *Bro* tit. *Obligation*, 34. *Dyer*, 118.

Such conditions as these the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes; and therefore, as in the text, and in *Co. Litt.* 206, a feoffment shall be absolute for an unlawful condition subsequent, and a bond void. But where there may be a way discovered to perform the condition, without a breach of the law, it shall be good, *Hob.* 12; *Cro. Car.* 22; *Perk. s.* 228; *Mitchell v. Reynolds*, 1 P. Wms. 189; in which case the subject is treated in a masterly manner.

Where the condition of a bond is entire, and the whole be against law, it is void; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest. *Rex v. Yale*, 2 Brown. P. C. 381; 5 Vin. Abr. 99, pl. 9; *Chesman v. Nainby*, 2 Ld Raym, 1459; 2 Stra. 744, *S.C.*; *Norton v. Simms*, Hob. 14; Mo. 856, 857, pl. 1175. *Twyne's case*. 3 Co 83 *a*; *Mosdel v. Middleton*, 1 Vent. 237; 1 Saund. 66 *a*. But if a sheriff take a bond for a point against 23 H. 6, concerning bail bonds, and also for a just debt, the whole bond is void; for the letter of the statute is so. *Norton v. Simms*, Hob. 14; 3 Vin. Abr. 451.

Those bonds which chiefly deserve consideration, on the ground of unlawfulness, are such as relate to—

I. Bonds restraining trade.

Though a bond, covenant, or promise, even on good consideration, not to use a trade *any where in England*, is void, as being too general a restraint of trade; yet if such bond covenant, or promise, be not to use a trade *at a particular place*, it is good. *Prugnell v. Gosse*, Allen, 67. For the same reason it seems, that a bond, covenant, or promise, not to use a trade with *particular customers* by name, if founded on a good consideration, is also valid. *Hunlocke v. Blackstone*, 2 Saund.

Conditions impossible, are void, the estate good : It shall not enlarge any estate.

156. All the cases on this subject, prior to *Mitchell v. Reynolds*, 1 P. Wms. 181, are noticed in that case. There, in debt on bond, the defendant prayed oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in *L.*, in the parish of *St. A.* for the term of five years, if the defendant should not exercise the trade of a baker *within that parish* during the said term ; or in case he did, should, within three days after proof thereof made, pay to the plaintiff £50, then the obligation to be void : and pleaded that he was a baker by trade ; that he had served an apprenticeship to it, by reason whereof the bond was void in law, wherefore he traded as he well might ; and, on demurrer, the court was of opinion, that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the bond was good ; and that the true distinction was not between *promises* and *bonds*, but between contracts *with* and *without* consideration ; and that wherever a sufficient consideration appeared to make it a proper and a useful contract, and such as could not be set aside without injury to a fair contractor, it ought to be maintained ; but with this constant diversity, viz. where the restraint is *general*, not to exercise a trade *throughout the kingdom*, and where it is limited to a *particular place*—that the former is void, being of no benefit to either party, and only oppressive ; but the other is good. The principle of this case was afterwards recognized and adopted in *Cheeman v. Nainby*, 2 Stra. 739 ; 2 Ld Raym. 1456 ; 3 Bro. P. C. 349. *S. C.* So, where the condition of a bond was, that, in consideration *A.* would take *B.* as an assistant in his business as a surgeon, for so long a time as it should please *A.*, *B.* agreed not to practice on his own account for fourteen years within ten miles of the place where *A.* lived, the bond was held good. *Davis v. Mason*, 5 T. R. 118. See *Sloman v. Walter*, 1 Bro. C. C. 418. And where by indenture between *A.* and *B.* and *C.*, dissolving their partnership as rope-makers, *A.* and *B.* covenanted to allow *C.*, during his life, two shillings on every hundred weight of cordage which they should make, on the recommendation of *C.*, for any of his friends and connections, and whose debts should turn out to be good : and that *A.* and *B.* should stand the risk of such debts incurred ; but should not be compelled to furnish goods to any of *C.*'s connections whom they should be dissuaded to trust. And *C.* covenanted not to carry on the business of a rope-maker during his life (except on government contracts) ; and that all debts contracted, or to be contracted in his or their name, pursuant to the indenture, should be the exclusive property of *A.* and *B.* ; and that *C.* should, during his life, exclusively employ *A.* and *B.*, and no other person, to make all the

By pleading, a man cannot defeat an estate of freehold, by force of a condition in deed, unless he shew the condi-

cordage ordered of him, by or for his friends and connections, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever. It was holden, that the covenant by *C.* to employ *A* and *B* exclusively to make cordage for his friends, and not to employ any other, *A* and *B.* not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together according to the apparent reasonable intent of the parties; and the general object being only to appropriate to *A* and *B.* so much of *C.*'s. private trade as they chose to give his friends credit for, so much only was covenanted to be transferred: and *C.* was still at liberty to work for any of his friends, who were refused to be trusted by *A.* and *B.*; by which construction the restraint on *C.* was only co-extensive, as in reason it could only be intended to be, with the benefit to *A* and *B.*; and therefore the restraint on *C.* could be no prejudice to public trade. *Gale v. Reed*, 8 East, 80; 2 Saund. 156 n. See *Crutwell v. Lye*, 17 Ves. 335 1 Fonb. Eq. 265, 5th edit. 1 Bac. Abr. 645, Gwill. edit. *Conditions (K).*

II. Bonds of resignation.

In *Fytche v. Bishop of London*, it was determined by the court of Common Pleas, that general bonds of resignation were legal; which judgment, upon a writ of error, was affirmed in the King's Bench: but upon a writ of error that judgment was reversed by the House of Lords. See *Cunningham's Law of Simony*; 1 Bro. C. C. 96; 3 Burn's Ecc. Law, 356, 6th ed. Mitf. Plead. 157, 3d edit. This decision, which was brought about by the great eloquence and ability of Lord Chancellor Thurlow, and the honest zeal of the bishops, was contrary to the opinion of all the judges, except Eyre, B. See *Dr. Watson's (Bishop of Llandaff) Life of Himself*, vol. 1. 180. The principle of this decision is not generally favoured, or likely to be extended. Thus a bond given by an incumbent to the patron on presentation to reside on the living, or to resign if he did not return to it after notice, has been adjudged good. *Bagshaw v. Bossley*, 4 T. R. 78. So in *Partridge v. Whiston*, 4 T. R. 359, the court of King's Bench adjudged that a bond with a condition to resign on the patron's son coming of canonical age, was good: they said that, as the case was not precisely similar to the *Bishop of London v. Fytche*, they were bound by the established series of precedents. See *Durston v. Sandys*, 1 Vern. 411; *Peele v. Earl of Carlisle*, 1 Stra. 227; *Peele v. Capel*, 1 Stra. 534. *Grey v. Hesketh*, Ambl. 268. 3 Burn's Eccles. Law, 354, 6th edit.; *Newman v. Newman*, 4 Maul. & Selw. 66; *Lord Kirkcudbright v. Lady Kirkcud-*

tion of record, or in writing sealed; yet the jury may help a man, where the judges will take their verdict at large: of chattels he may.

bright, 8 Ves. 61; *Dashwood v. Peyton*, 18 Ves. 36. 46; 6 Bac. Abr. 192. *Simony* (B), &c. 1 Ib^d. 644. *Conditions* (K); 1 Fonb. Eq. 232.

III. Marriage brocage bonds.

Though these bonds are good at law, yet in equity they are justly condemned as introductory of infinite mischief, *Law v. Law*, 3 P. Wms 394; but equity does not interpose on account of any particular injury done to the party, who is *particeps criminis*, and not entitled to relief, but on public considerations, that marriage, as it greatly concerns the public good, may be on a proper foundation, *Law v. Law*, Cas. Temp. Talb. 132; 2 Eq. Ca. Abr. 187, pl 2; *Debenham v. Ox*, 1 Ves. 277; and therefore such a bond is in no case to be countenanced. Thus where the plaintiff gave a bond to the defendant, conditioned in effect, that if the plaintiff married *J. S.*, then the plaintiff to pay a certain sum of money; the defendant procured the marriage, and put the bond in suit; but it was decreed to be delivered up, the young gentlewoman having £2,000 portion, and the man being sixty years of age, and having seven children. *Drury v. Hooke*, 1 Vern. 412; 2 Ch. Ca. 176. See *Ch. Rep.* 87. *Tothill*, p. 27, edit 1820. So a bond for payment of £500, for procuring a marriage between persons of equal rank, fortune, &c. was, on appeal from the court of Chancery, declared by the House of Lords to be void; because such bonds to match makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not to be countenanced in equity; for marriage ought to be procured by the mediation of friends and relations; and such bonds would be of evil example to executors, guardians, trustees, servants, and others, who have the care of children. *Hall v. Potter*, Show. P. C. 76; *Smith v. Aykwell*, 3 Atk. 566. So a bond to give money, if such a marriage could be obtained, is ill; and, by the same reason, a bond to forgive a sum of money, in the same event, must be ill also. *Hamilton v. Mohun*, 1 P. Wms. 120. So wherever a mother or father, or guardian, insist upon a private gain, or security, for obtaining or consenting to a marriage, and obtains it of the intended husband, it will be set aside in equity. Thus *J. S.*, by will, gave his niece £1,200, she married, but, antecedently to the marriage, her father took a bond from the then intended husband to pay him £200, in case the daughter should die without issue male in the life-time of her husband; the daughter died without issue male, living her husband; the father sued the husband at law upon the bond, and the husband on a bill was relieved against this bond; for, it appearing that no money was paid, nor any consideration for entering into it, the court took it to be in the nature of a marriage brocage bond, and therefore ordered it to

The word "proviso" makes a condition; but when it depends upon another sentence, or has reference to another part of the deed, it makes no condition, but a qualification

[79]

be delivered up. *Anon.* 2 Eq. Ca. Abr. 187, pl 1; *Lamlee v. Hanman*, 2 Vern. 466, 499; *Hamilton v. Mohun*, 1 P. Wms 118; *Salk. 158*; 2 Vern. 652; *Gilb. Chan* 297; 1 Eq Ca. Abr 90, pl. 6; 10 Mod. 447; *Keat v. Allen*, 2 Vern. 588; *Anon.* Prec Chan 267; *Tooke v. Atkins*, 1 Vern. 451; *Gale v. Lindo*, 1 Vern. 475; *Kemp v. Coleman*, 1 Salk. 156; *Cole v. Gibson*, 1 Ves. 503; *Belt's Supp* 211; *Hylton v. Hylton*, 2 Ves. 547. The power of a parent or guardian ought not to be used for such purposes, as it would be making a way to enable them to sell infants under their care. And these contracts with the father, mother, or guardian, though of the same nature with brocage bonds, are of more mischievous consequence, because it would happen more frequently; and it is now a settled rule, that if the father, on the marriage of his son, take a bond of the son, to pay him a sum of money, or make him any recompense, it is void, being procured by coercion, while he is under the control of his father. *Treat. of Eq* b. 1. ch. iv. s. 10. *Fonbl.* 5th edit. 260. And as these contracts are avoided on reasons of public inconvenience, they will not admit of subsequent confirmation by the party, *Shirley v. Martin*, 1 *Fonbl* 264 n, (1); 3 P. Wms. 74; *Cole v. Gibson*, 1 Ves. 536; *Morse v. Royal*, 12 Ves. 364. 373; *Crowe v. Ballard*, 1 Ves. jun. 220; and consequently the party entitled to relief in a court of equity cannot release his right to a remedy, and thereby indirectly effect a confirmation: as it would be contrary to the maxims—that which is originally bad cannot be made good; and that which cannot be done directly cannot be done indirectly. *Sed vide* 1 Ves 507. And the court will decree a gratuity actually paid to be refunded: Thus where a servant maid prevailed with her master's niece, who was about fifteen years old, and lived in the same house with him, and was entitled to a good fortune, to marry his journeyman, without the consent or knowledge of her uncle; and for the good offices she was to do the journeyman in that affair, he had given her a bond of £100, conditioned to pay her fifty guineas at six months end; and after he had gained the niece's good will, by the help of this maid, and the young lady had been prevailed on to go with him in a hackney coach to be married, he gave the maid fifty guineas more, the marriage was had: and afterwards the maid servant married, and the bond not being paid, was put in suit, and judgment obtained on it; and a bill was brought against the defendants, the maid servant and her husband, to be relieved against this bond, and to have the fifty guineas repaid; because the bond was entered into, and the money given for no good consideration, but only on account of this marriage brocage. And the Master of the Rolls decreed the

or limitation of the sentence, or of that part of the deed, as " provided that the person of the grantee shall not be " charged."

bond to be given up, and satisfaction to be acknowledged on the judgment, and the fifty guineas received to be repaid; and if it were not done on service of the order, the defendants were to pay costs; and this, notwithstanding the husband of the servant maid, insisted by his answer, that he looked upon the bond and fifty guineas as his wife's fortune, and had married her in prospect of it; and this decree was affirmed by Lord Keeper Wright. *Goldsmith v. Bruning*, 1 Eq. Ca. Abr. 89, pl. 4; *Smith v. Bruning*, 2 Vern. 392. S. C.

IV. In restraint of marriage.

It was a rule in the civil law, that marriage ought to be free, 3 *Ves.* 96, and the same policy has obtained in equity; and therefore, in case of a bond in common form for payment of money, but proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond: the court will decree this bond to be delivered up to be cancelled, as being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any compulsion. *Key v. Bradshaw*, 2 Vern. 102; 1 Eq. Ca. Abr. 88. So, if *A.*, being a widow, gives a bond to *B.* for £20, if she should marry again, and *B.* gives a bond to the widow, to pay her executors the like sum if she did not marry again, and the widow soon after marries, her bond will be decreed to be delivered up. *Baker v. White*, 2 Vern. 215; *Woodhouse v. Shepley*, 2 Atk. 535. See *Lowe v. Peers*, 4 Burr. 2225; *Bateman v. Wells*, Tothill, p. 25, ed. 1820. So, where a bequest of an allowance to a feme covert was made on condition that she lived apart from her husband, the condition was held *contra bonos mores*, and void. *Brown v. Peck*, 1 Eden. 140. *Vide Athelney's note*, Shep. Touch 132 (*x*).

V. To a kept mistress.

Both courts of law and equity make a distinction, when it appears that these bonds are given as a reward for past cohabitation, and when it appears that they are given as an inducement to future concubinage: and therefore,

1st. *Premium pudicitiae.* A bond purporting to be in consideration of cohabitation had between the obligor and obligee, was held to be good; *per Clive, Bathurst, and Gould, Justices*, (absent Chief Justice *Wilnot*) without hearing the other side. *Clive, Justice*; I am in a court of common law, and not in an ecclesiastical court; if a man has lived with a girl, and afterwards gives her a bond, it is good; suppose this bond had been given by the defendant to the plaintiff for being his mistress, it would have been good in point of law, although in a court of equity, it would be postponed to creditors. Sir Joseph Jekyll,

He who has interest in a condition, may fulfil the same for safeguard of himself.

Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond; and where it is *premium pudoris*, a court of equity will not relieve against such a bond. This condition is incapable of an explanation to make the bond an illegal act. *Bathurst, Justice;* where a man is bound in honour and conscience, God forbid that a court of law should say the contrary; and wherever it appears that the man is the seducer, the bond is good. Bracton says, when a man cohabits with an unmarried woman, it is *legitima concubina*, and *Exodus*, cap. xxii. v. 16. “*If a man entice a maid that is not betrothed, and lie with her, he shall surely endow her to be his wife.*” See also *Deuteronomy*, cap. xxii. v. 28, 29. “*If a man find a damsel who is a virgin not betrothed, and lay hold of her, and lie with her, and they be found;* then the man who laid with her, shall give unto the damsel’s father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days.” Honour and conscience ought to bind every man in point of law. In an action in the King’s Bench, upon a promise of marriage, the evidence upon the trial was, that the defendant had bragged and boasted that he had debauched the plaintiff, by promising her marriage; this cause being tried before me on the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and 1500 damages, which I thought right; the court of King’s Bench approving of my opinion, refused to set aside the verdict, and thought 1500 damages were little enough. *Gould, Justice;* the court may take this for a lawful and conscientious consideration; we must presume, that the defendant has done what in honour and conscience he ought to have done, and that he thought himself a wrong doer, and gave the plaintiff this bond to make her amends. *Turner v. Vaughan*, 2 Wils. 339.

Formerly it has been held in a court of equity, that if it were charged in a bill, and proved in evidence, that the defendant was a common strumpet, and commonly dealt and practised after that manner, and was used to draw in young gentlemen, the court would relieve against a bond given to such a woman. *Whaley v. Norton*, 1 Vern. 484. Though it seem, even in case the woman had been a prostitute, the court would not formerly relieve the party himself, who was culpable, though it was otherwise, when his executor sought relief. *Matthew v. Hanbury*, 2 Vern. 187; *Bainham v. Manning*, 2 Vern. 242; *Body v. ——*, 2 Ch. Ca. 15; 19 Vla. Abr. 301. (E). However, the liberality of modern judges has softened this severity, on the ground, that a provision enables a woman in such an unfortunate situation, to lead a course of life, more conducive to her happiness. A

Between the parties, it is not requisite the condition be performed in every thing, if the other party do agree; but to a stranger it must.

voluntary bond given by a person to a common woman, after he had kept her two years, was not relieved against, upon a bill by the executor of the obligor. *Hill v. Spencer*, Ambl. 641. Lord Camden, in delivering his judgment, said, I am clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities given to common prostitutes, went upon the circumstances of the *securities* being given *previous* to the *cohabitation; a consideration, which being turpis in its nature, the court has relieved against them*. In this case, the bond was not given for a consideration, but was voluntary. *H.* had resort to her for near two years before he gave her the bond. Past service could not be a consideration at law, and nothing was stipulated for the future. There is no principle in equity which says, a man may not give a voluntary bond to a common prostitute: it would be going but a little further to say, he could not give her money without her being liable to be called upon for it. There is no circumstance of fraud in this case; and I do not think, that in the case of a voluntary bond, the obligee being a common prostitute, is, of itself, a sufficient ground for relief. And according to that case, the woman having been criminally connected with another man after she was taken into keeping, does not invalidate the bond. So, a voluntary bond during cohabitation, to a woman, previously of a very loose life; and soon afterwards another bond, expressly securing a continuance of the connection by an annuity in case of separation; on a bill by the executor to have the bonds delivered up, was, by the court of Exchequer, dismissed with costs; the former being considered unimpeached; and the latter void at law, as *pro turpi causa*. *Gray v. Mathias*, 5 Ves. 286. So a bill brought to be relieved against a bond given to a housekeeper for secret service, was dismissed. *Bainham v. Manning*, 2 Vern 242.

If the consideration be *premium pudicitiae pellicis*, equity will not assist the obligee, if she knew the obligor were a married man. Thus, a bill for payment of a sum of money, and an annuity secured by a deed poll by defendant to plaintiff, who, being a young woman, came to live in the family of defendant, then a married man, as a companion to his sister, and who, by continuing to live with him, occasioned a separation from his wife, was dismissed, but without costs, on account of her previous good character. *Priest v. Parrot*, 2 Ves. 160.

But it seems that equity will not in any case relieve the obligor on his own application: as where he had seduced his wife's sister, and had several children by her, and had given her a bond for payment of money, as a provision for her and the children, the bond being put in suit against him, he brought a bill, suggesting that the bonds were not

If the obligee be party to any act, by which the condition cannot be performed, then the obligor shall be discharged; so he shall be by the act of God.

given for money lent, or any valuable consideration, Lord Somers decreed the payment of what was due on the bond for principal and interest, with costs, by a short day, or else the bill to be dismissed with costs: and his Lordship said it was a pity he could do no more. *Spicer v. Hayward*, Prec. Chan. 114; 1 Fonb. Eq. 229.

These bonds being merely voluntary, even though *præmium judicis*, the payment of them, out of the personal estate, will be postponed by a court of equity, until all the other creditors, whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if there be any. *Jones v. Powell*, 1 Eq. Ca. Abr. 84, pl. 2; *Cray v. Rooke*, Ca. Temp. Talbot, 153; *Harris v. Marchioness of Annandale*, 2 P. Wms. 432; 3 Bro. Par. Ca. 445; 1 Eq. Ca. Abr. 87, pl. 6. *S. C.* Thus, where *A.* having a wife who lived separate from him, afterwards courted and married another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife, that the former was alive, *A.* in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee for the second wife, to leave her 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts; Sir Joseph Jekyll held, that if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife; after such time as she knew the first wife was living, and to induce her to continue with *A.*, this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. *Lady Cox's case*, 3 P. Wms 339; 2 Eq. Ca. Abr. 182, pl. 6. 258, pl. 13. So, where there was a bond by *S. C.*, upon articles, in consideration of 10*l.* which imported a direct assignment by Mr. *H.* of his wife, who was herself a party, to the use of *S. C.*, with covenants for quiet enjoyment, and further assurance; upon a bill to have this bond postponed, and to be relieved against an assignment and bill of sale of goods made by *S. G.* in trust, and for the benefit of Mrs. *H.*; as to creditors, the bond and bill of sale were set aside, because they appeared to be for undue consideration. *Robinson v. Gee*, 1 Ves. 254 But a bond of this kind must be paid before legacies, for although voluntary, yet it transfers a right in the life of the obligor, and legacies arise only from the will, which takes effect only from the testator's death, and therefore ought to be postponed to a right created in the testator's life-time. *Fairebeard v. Bowers*, 2 Vern 202; Prec. Chan. 17. *S. C.*; *Jones v. Powell*, 1 Eq. Ca. Abr. 143, pl. 15, 16; Gilb. Chan. 297—8; *Cray v. Rooke*, Cas. Temp. Talbot, 155; 2 Eq. Ca. Abr. 182, pl. 7.

Where the first act in the condition is to be performed by the obligee, and he will not do it, there the obligation is not forfeited.

But the bond or deed must be executed, for in matters *executory*, even on the consideration *præmium pudicitie*, the court of Chancery will not compel the party or his executors, to fulfil an agreement to provide for a forsaken kept mistress *Whaley v. Norton*, 1 Vern. 483. Thus, a general demurrer was allowed to a bill against the widow and executrix of the testator, to enforce an agreement by him when single, first by a letter to the plaintiff, and afterwards by a parol agreement with her, to settle an annuity on the plaintiff, who was separated from her husband, and a deed of separation was executed by them, in which the husband gave up all claim to any property the plaintiff might acquire. After this separation, the plaintiff was induced to live with the testator, and lived with him for several years; when he, being about to marry, communicated his intention to a lady, a friend of the plaintiff, requesting her to break the matter to the plaintiff, and expressing an intention to settle upon her £100 a year. The testator wrote afterwards to the plaintiff, enclosing her £25, which he said, "I look upon as a quarter of the annuity I intend securing to you for your life, which shall be regularly paid at the four usual quarters. I shall send you £50 in the course of a few days, and will send you the same sum at Christmas, to purchase what you may have occasion for to make you comfortable." In consequence of the proposal of the annuity, it was finally agreed between the plaintiff and the testator, that the connection should cease, and that the plaintiff should not in any respect, impede or endeavour to prevent the intended marriage with the defendant; and that the plaintiff should in future live a retired, chaste, and virtuous life, and should so conduct herself, as in no respect to interfere with the connection, by way of marriage, which the testator was about to form; every one of which stipulations the plaintiff performed; and the testator promised or agreed to settle upon the plaintiff £100 per annum for life. *Sir Thomas Plumer, Vice Chancellor.* This bill states only an agreement to secure an annuity, and that agreement was not founded on any good, meritorious, or valuable consideration; it was therefore voluntary, and I take it to be a clear rule in this court, that a bill does not lie to enforce a voluntary agreement. It has been contended, that there was a moral obligation to provide for this woman. Did that moral obligation arise in respect of the past adulterous intercourse? Certainly not. Though separated from her husband, she was not absolved from her marital obligation to live chastely; and her connection with the testator, was a high offence by the divine law, as well as against society. Whether, if any annuity had been settled, the court would take it from her; or whether the court would refuse her any assistance, as in *Priest v. Par-*

Where no time is set, if the condition be for the good of a stranger, or of the obligee, then it is to be performed within convenient time; if for the good of the obligor at

not, it is not necessary to consider. *Matheron v. L——e*, 1 Madd. Rep. 558. 563.

But if there be any *fraud* practised on the unfortunate woman, a court of equity would afford her relief: thus, where a man having debauched a young woman, and intending afterwards to put a trick on her, made a settlement upon her of £30 a year for life, out of an estate which was not his; the court decreed him to make it good out of an estate which he had of his own, and this decree was afterwards affirmed on appeal to the House of Lords. *Carew v. Safford*, 1 Eq. Cas. Abr. 31, pl. 4. And where Sir W. B., having seduced Mrs. O., then a young lady of about fourteen years of age, of a good family, and entitled to £12,000 fortune, settled on her £300 per annum, for years; but the estate was incumbered, and, Mrs. O. dying, her administrator brought a bill in order to disincumber the land which was charged with this annuity, and was relieved accordingly. *Ord v. Blacket*, cited in *Marchioness of Annandale v. Harris*, 1 Eq. Ca. Abr. 87, pl. 6; 2 P. Wms. 433; 19 Vin. Abr. 303, pl. 2.

Under the maxim, that *equity relieves against accidents*, *Grounds and Rudiments of Law and Equity*, 87, it seems, if the grantee in a voluntary deed, or the obligee in a voluntary bond, lose the deed or by accident, they may have remedy against the grantor or obligor in equity. *Underwood v. Staney*, 1 Ch. Ca. 78. 13 Vin. Abr. 104, pl. 4; 20 Vin. Abr. 101, pl. 2; Lat. 24; 2 Ch. Ca. 30. Though 1 Eq. Ca. Abr. 92, pl. 4. adds, "Quare, for these matters are discretionary;" and there certainly are some *old cases contra*. *Miller v. Reames*, 1 Rol. Abr. 375. *Chancery* (C). pl. 1. *Vincent v. Beverly*, Noy, 82; Pop. 205, 206. See *Toulmin v. Price*, 5 Ves. 235. Though in a more modern case where J. S., a little before his death, granted an annuity of 30*l. per annum* to his housekeeper, and entered into a voluntary bond for payment of the annuity, and the bond being lost, his representatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her, service alone being a consideration, and no *turpis contractus* shall be presumed, unless proved. *Lightbone v. Weedes*, 1 Eq. Ca Abr. 24, pl. 7; Ibid. 93. pl. 5.

2d. *Premium Concubinati* (a) Though a court of law will not inquire into the consideration of a bond, yet if it appear to be illegal on the face of it, the court cannot sanction the claim: thus a bond reciting, that the parties had agreed to *live together*, therefore the obligor had agreed to find the woman meat, drink, washing, lodging,

(a) See Taylor's Elements of Civil Law, 273.

any time during their lives. The word "immediately" shall not have such a strict construction, but that it shall suffice, if it be done in convenient time.

&c.; and to leave her an annuity of 60*l.* a year, if he quitted her, or she outlived him: and if they had any child, he was to take care of and provide for it. But if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or leave her any annuity. *Per Lord Mansfield.*—It is the price of prostitution, *præmium prostitutionis*: for if she becomes virtuous, she is to lose the annuity. It appears clearly upon the condition, that the bond is illegal and void. *Walker v. Perkins*, 3 Burr. 1568.

But after a verdict at law upon a bond *præmium concubinati*, against the obligor, a demurrer was allowed to a bill to have it delivered up, charging the consideration to have been an agreement by the defendant to cohabit with the plaintiff as his wife; and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery. *Franco v. Bolton*, 3 Ves. 368.

VI. Bonds for gaming debts.

By the 9th Ann. c. 14. all bonds and other securities, given for money won at play, or money lent at the time to play with, are utterly void. See further, 4 Bla. Com. 172; 1 Fonbl. Eq. 233. 1 Rev. Code of 1819, p. 561. But a man has been allowed to recover money which he had lent to the defendant to game with, and at the same time won it of him; for the word *contract* was not mentioned in the statute 9 Ann. c. 14. *Barjean v. Walmesley*, 2 Str. 1249. So, where plaintiff lent defendant money to bet at a horse race, he was allowed to recover. *Aleinbrook v. Hall*, 2 Wils. 309. See also *Wettenhall v. Wood*, 1 Esp. N. P. C. 18; *Robinson v. Bland*, 1 Bla. 234 256; 2 Burr. 1077; *Faikney v. Regnous*, 4 Burr. 2069; *Aubert v. Maze*, 2 Bos. & Pul. 371.

VII. Of relief at law, and in equity, on an illegal transaction, where the claimant is particeps criminis.

1st. At law:—Where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, or if one recovers money *mala fide*, by suit in an inferior court, he may bring *indebitatus assumpsi* for the money. *Moses v. Macfarlan*, 2 Burr. 1005; 1 Bl. Rep. 219. S. C. But where one knowingly pays money upon an illegal consideration, or where the act is in itself immoral, or a violation of the general laws of public policy, he is *particeps criminis*, and he shall not have this action, for he parted with his money freely, and *volenti non fit injuria*. *Tomkine v. Bernet*, 1 Salk. 22; Skin. 411, S. C. For where both parties are equally offenders against such laws, *potior est conditio defendantis*. *Smith v. Bromley*, Doug. 698; not because the defendant is more favoured, but because the plaintiff must draw his justice from pure fountains. Therefore though if A. agree to give B.

If a man be bound to pay money, or farm rent, he must seek the parties : But if he be bound to perform all payments, if he tender his rent on the land, it suffices.

money for doing an illegal act, as if a wager be made on a boxing match, *B.* cannot (though he do the act) recover the money by an action ; yet if the money be paid, *A.* cannot recover it back again. *Webb v. Bishop*, Bull. N. P. 132, 7th edit. See *Lacaussade v. White*, 7 T. R. 535; *Howne v. Hancock*, 8 T. R. 575; *Vandyck v. Hewitt*, 1 East. 96.

2d. In equity :—*Equity extends relief to particeps criminis*, on grounds of public policy, *Hatch v. Hatch*, 9 Ves. 292 299; *Sharley v. Martin*, cited 11 Ves. 536, 537. 9 Ves. 299 ; therefore it is no objection that the plaintiff himself was a party in the illegal transaction, because the public interest requiring that relief should be given, it is given to the public through the plaintiff, though he be himself *particeps criminis*. *Lord St. John v. Lady St. John*, 11 Ves. 535, 536. Thus *A.* by his interest with the Commissioners of Excise, got an office in that branch of the revenue for *B.*, who, in consideration thereof, gave a bond to *A.*, to pay him 10 per annum, as long as *B.* enjoyed the place ; equity relieved against the bond. *Law v. Law*, 3 P. Wms. 391; Cas. Temp. Talb. 140; 2 Eq. Cas. Abr. 187, pl. 10. So money advanced by the plaintiff to the defendant to procure him a commission in the marines, was decreed to be refunded with interest, the plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged : first, upon grounds of public policy ; and, secondly, as the plaintiff had been imposed upon, the defendant knowing that he was incapable of holding the commission. *Morris v. M' Cullock*, Amb 432; 2 Eden, 190. A private agreement obtained by a father from his son, in derogation of an allowed sale, of the command of a post office packet, by the father to the son, duly registered in the name of the son, upon a promise by the officers of the post office, that if he would convey the vessel to the son, they would appoint the son commander of the packet, in the room of his father, on a bill filed by the widow and executrix of the son against the executors of the father, an account was decreed. *Per Sir William Grant*—That the agreement, which is impeached by this bill, was illegal, as being a fraud upon the post office, cannot be doubted after the cases of *Hartwell v. Hartwell*, 4 Ves. 811; *Thompson v. Thompson*, 7 Ves. 470 ; and more particularly *Parsons v. Thompson*, 1 Hen. Bla. 322; *Garforth v. Fearon*, Ibid. 327. I think it illegal also upon the ground of its being a fraud on the provisions of the ship registry acts. Stat. 26 Geo. 3 c. 60; Stat. 34 Geo. 3 c. 68. The father therefore could never have enforced it ; but my doubt was, whether the father having received the profits, this court would decree them to be ac-

[80] If the seofee or seoffor die before the day of payment, the tender shall be to the executor, although the heir of the seofee enter, if the heir be not named. See **ASSIGNEE in ASSIGNMENT.**

The money must be tendered so long before sun-set, that the receiver may see to tell it.

counted for, and refunded; or whether the general rule, that *in pari delicto melior est conditio possidentis*, should prevail; as both are guilty of a violation of the law. Upon an examination of the cases, however, I think the plaintiffs are entitled to the relief sought by the bill. Courts both of law and equity have held, that two parties may concur in an illegal act, without being deemed to be in all respects *in pari delicto*. I consider this agreement, as substantially, the mere act of the father. He put up to sale a situation, which the young man would naturally be desirous of obtaining, and could obtain only upon the terms prescribed by his father. In the case of *Morris v. McCullock*, Amb. 432, the parties were more independent of each other; yet the money paid was decreed to be returned. In *Goldsmith v. Bruning*, 1 Eq. Ca. Abr 89, pl. 4, a marriage brocage case, the party obtaining money by the sale of her influence must have been considered as more criminal than the purchaser; for she was decreed, first, at the Rolls, and afterwards upon appeal, to refund the sum which she had received. There is no case calling in question that decision. Lord Thurlow, indeed, in *Neville v. Wilkinson*, 1 Bro. C. C. 543. (see 547-8, and Eden's notes) seems to have thought, that in all cases where money was paid for an illegal purpose, it might be recovered back, observing, that "if courts of justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state in which they were before." It is, however, unnecessary, in the present case, to lay down so broad a rule. These parties are not, I think, *in pari delicto*, by entering into this illegal agreement. It was not confirmed; if indeed it admitted confirmation, by signing the account. The account must therefore be taken as if the son had been, from the beginning, the actual owner of the packet, and entitled to all its earnings. As the plaintiff chooses to open the account, the defendants are not bound by any deductions which they agreed to make, if they can establish a right to the sums deducted. *Osborne v. Williams*, 18 Ves. 379.

The profits of a partnership in underwriting, made illegal by the stat. 6 Geo. 1. c. 18 s. 12, cannot be recovered at law, *Sullivan v. Greaves*, Parke's Insurance, 8; *Michell v. Cockburn*, 2 Hen. Bla. 379; nor be the subject of account in equity. *Knowles v. Haughton*, 11 Ves. 168; contra *Watts v. Brooks*, 3 Ves. 612, but now over-ruled.

To pay part of a sum at the day, cannot be satisfaction for the whole sum; as a horse or a robe is. But before the day, or at another place at the day of the request, and acceptance of the obligee, is full satisfaction.

An acquittance is a good bar though nothing be paid.
See *Co. Litt.* 373 a.

In all cases of conditions, for payment of a certain sum in gross, touching lands or tenements, if lawful tender be once refused, he who made the tender is discharged for ever.

And the manner of the tender, and payment shall be directed by him who made it, and not by him who did accept it, as that he paid the sum in full satisfaction, and that he accepted thereof in full satisfaction.

Where a man is bound to pay money, to make a seof-
ment, or renounce an office, or the like, and no time is li-
mited when he shall do it, then upon request, he is bound
to perform it, in so short a time as he can.

But where the time is limited, if he refused before the
day, it is of no consequence, if he be ready to perform it
at the day.

Where a covenant or condition is, to marry or enfeoff a
stranger by such a day, the refusal of the stranger is no
plea, as that of the obligee is. The obligee is to be ready
on the land at his own peril: a stranger must be requested;
if he refuse, the obligation is forfeited; wherefore it is good
to have these words, "*If the stranger do thereunto assent.*"

*For the doctrine of conditions, see Co. Litt. 201 a. n. (1)
Shep. Touch. ch. 6.*

ENTRY.

The determination of an estate, is not effected, before entry.

When any person will enter for a condition broken, he
must be seised in the same course and manner, as he was
when he parted with his possession.

It behoves such persons as will re-enter upon their tenants, to make a previous demand of the rent.

If the lessor demand before he die, his heir may enter.
If the lessor distrain he may not re-enter.

[82] The lessor may accept of the rent, and yet re-enter: But if he receive the next rent, he may not, for that establishes the lease.

Entry into one acre, in the name of more, is good; if the land do not extend into two counties.

By the entry of the husband, the freehold shall be in the wife: And so of the like.

In gavelkind land, the eldest son only, shall enter for the breach of a condition.

See further concerning entry, Co. Litt. 202 a; 240 b.

DEMAND.

The land is the place where the rent is to be paid and demanded, if there be no other place appointed.

And there the lessor himself, or his sufficient attorney, a little before sun-set, in the presence of two or three sufficient witnesses shall say, "Here I demand of J. B. ten pounds due to me at the feast of, &c. for a messuage, &c. which he holds of me in lease by indenture, &c." and there remain the last day the rent is due to be paid, until it be so dark, that he could not see to tell the money.

CHAP. XL.

[83]

WARRANTIES. (a)

THERE are three sorts of warranties; lineal, collateral, and by disseisin.

Warranty lineal, is where a man by his deed binds him and his heirs to warranty, and dies, and the warranty descends to his issue.

Warranty collateral, is in another line, so that he to whom it descends cannot convey the title which he has in the tenements, by him who made warranty (b).

Warranty by disseisin, is where he who has no right to enter, enters, and makes a warranty ; this is by disseisin, and bars not.

Lineal warranty, bars him who claims a fee-simple, and also fee-tail, with assets in fee : If he sell, his son may have a *formedon*.

Collateral warranty, is a bar to both, except in some cases, which are remedied by statute, as warranty by tenant by the courtesy, except the heir has an equivalent by descent from the same tenant.

Tenant in dower, for life, remedied, but do bar him in reversion.

[84]

A warranty descends always to the heir at the common law, viz. the eldest son (c), and follows the estate, and if the estate may be defeated, the warranty may also (d).

(a) Warranties, in England, have been almost entirely superseded in practice, by *covenants*, which in their usual form, binding the *heirs*, *executors*, and *administrators* of the covenantor (as far as assets extend) are deemed a better security than any warranty. See 2 Bl Com 304.

(b) Lord Chancellor *Cowper* said. that "a collateral warranty was certainly one of the harshest and most cruel points of the common law; because there was not so much as an intended recompense; yet he could not find that Chancery had ever given relief in it." Earl of *Bath v. Sherwin*, 10 Mod. 3. 4.

(c) *Litt. s. 718; Co. Litt. 376 a 386 b.*

(d) *Shep. Touch. 201; Litt. s. 745. 747. 748; Co. Litt. 391 b.*

It bars not the second son in gavelkind, although all the sons shall be vouched, and not the eldest son alone: yet he only shall be barred.

To plead a warranty against him that made it, or his heirs, is called a Rebutter.

Where fee or freehold is warranted, the party shall have no advantage, if he be not tenant.

Where a lease for years is warranted, it shall be taken by way of covenant, and good if he be ousted.

The seffor by the words of *dedi & concessi* (e) shall be bound to warranty during his own life (f).

(e) *I gave and granted.*

(f) A warranty may be made upon any kind of conveyance, *Co. Litt.* 385 a; 7 Bac. Abr. 227. *Warranty* (B); and may be annexed to freeholds or inheritances, *Co. Litt.* 378 b. 389 a; *Gib. Ten.* 176; either lying in livery or in grant, and either corporeal or incorporeal, *Co. Litt.* 366. a; but it cannot be annexed to chattels real or personal, and if a man warrants chattels real or personal, the party shall have an action of covenant, or an action on the case, or an action of deceit. *Co. Litt.* 101 b. 389 a.

In modern conveyances by deed, a warranty is never inserted, because covenants are more beneficial to both parties; for if the covenantor, covenant for himself and his heirs, it is then a covenant real, and descends upon the heirs, 2 Saund. 136. who are bound to perform it, provided they have assets by descent, but not otherwise; and the *executors* and *administrators* are bound by every covenant, and also in a bond without being named, *Dyer*, 14, pl. 69. unless it be such an act as is to be performed personally by the covenantor, and there has been no breach before his death, *Co. Litt.* 209 a; *Cro. Eliz.* 553; so that a covenant in which the heir is named, is a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor, who usually *covenants* only, for the acts of himself and his ancestors, whereas a general warranty extends to all mankind. 2 Bl. Com. 304.

CHAP. XLII.

[85]

COVENANTS.

COVENANTS are of two sorts; expressed by words in the deed, or implied (*a*) by the law. A covenant in deed is an agreement made by a deed in writing, and sealed between two persons, to perform some things; for no writ of covenant is maintainable without such a specialty, but in London, &c.

When a covenant extends to a thing in being, parcel of the demise, or the thing to be done by force of the cove-

(*a*) Thus the words "grant" or "demise" in a lease for years, create a covenant in law for quiet enjoyment of the lands demised, during the term; and if the lessee be evicted by the lessor, or by any person claiming a lawful title to the land, he may bring an action thereupon. 4 Co. 80 b; 5 Co. 17 a. 4 *Bull. n. Co. Litt.* 384 a. (1). So in a lease for years, the words "yielding and paying" create a covenant for payment of the rent. 1 *Roll Abr.* 519. *Cov pl.* 10; 6 *Vin Abr.* 379, *pl.* 10; *Bull. N. P.* 157, *Bridgman's edit*; 2 *Bac. Abr.* 65. *Cov (B)*; *Com. Dig. Cov. (A 4.)*. The distinction between implied covenants by operation of law, and express covenants, is, that express covenants are taken more strictly. 3 *Burr.* 1639. 4 *Cru. Dig.* 449; 2 *Bac. Abr.* 65. Hence an express covenant to pay the rent, is binding on the tenant, both at law and in equity, in every event, and in every state and condition of the premises: *Monk v. Cooper*, 2 *Stra.* 763; because the party by his own contract creates the duty or charge upon himself, and he might have provided against it by his own contract. *Paradine v. Jane*, *Sti.* 47, 48; *Allen*, 26, 27. And so if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. *Dyer.* 33 a; 18 *Vin Abr.* 515, *pl.* 10. And it now appears to be settled, both in law and equity, that if a tenant covenant to repair, damage by fire excepted, he cannot be relieved from the payment of rent, if the premises are destroyed by fire. *Belfour v. Weston*, 1 *T. R.* 310; *Hase v. Groves*, 3 *Anst.* 687; *Holtzapffel v. Baker*, 18 *Ves.* 115; *Et vide* 2 *Eden*, 219.

The doctrine of implied covenants is confined to land property. Hence, if goods be demised by indenture, for years, and the lessee be evicted, covenant does not lie upon the word "demise;" for the law does not create a covenant, for a personal thing. *Com. Dig. Covenant (A 4)*; 1 *Selwyn's Nis. Pr.* 480, 2d edit.

nant, is *quodammodo* annexed, or appertaining, to the thing demised, and goes with the land, it shall bind the assignee although he be not named: As to repair the houses, it shall bind all that shall come to the same, by the act of the law, or by the act of the party (b).

But if the covenant concern the land, or thing demised in some sort, the assignee shall not be charged, although he be named; as to make a wall at another person's house, or to pay a sum of money to the lessor, or to a stranger; but the lessee, his executors and administrators shall be charged.

[86] If the covenant extend to a thing which had no being, but is to be made new upon the demised land, it shall bind the assignee, if he be named, because he will have the benefit of it.

If a man make an under-lease for years, and the lessee covenant and grant to pay, &c. to the lessor, his heirs and assigns, yearly during, &c. ten pounds, his executor shall have it (c).

On a covenant in law, upon a demise, or grant, the assignee in deed, or in law may have a writ of covenant.

An obligation to perform all covenants and grants, is forfeited on the breach of a covenant in law.

A covenant in law is not broken, but by an elder title (d).

(b) In covenants concerning the inheritance, the heir shall have an action of covenant for breach, though he be not named, 2 *Lev.* 92.

(c) 1 *Vent.* 161 Because the lease, from which the underlease was derived, devolved to the executor, the rent, as accessory, shall follow the principal. But if a lease be made by the owner of the inheritance, reserving the rent at Michaelmas, or ten days after, if the rent be not paid at Michaelmas, and before the ten days are expired, the lessor dies, his heir, and not his executor shall have the rent. 10 *Co.* 127 b. So if the lessor die on the day on which the rent is to be paid, after sun set and before midnight, the heir, and not the executor, shall have the rent. 3 *Bac. Abr.* 63; 6 *Bac. Abr.* 23. *Co. Litt.* 202 a. (1). 1 *Saund.* 287; *Salk.* 578.

(d) Vide *Noke's case*, 4 *Co.* 80 b. 3. The eviction must be by one who has a prior title, though it is otherwise, it has been said, where there is an express covenant, 2 *Leon.* 104; *Cro. Eliz.* 214; 2 *Brownl.*

A covenant in law may be qualified (*e*), by the mutual consent of the parties (*f*).

161. though it seems now to be settled, that an express covenant, in the most general terms, shall be restrained, to lawful interruptions. *3 T. R. 584; Loft. 460; Vaugh. 118; 2 Bac. Abr. 65; Vide Wms. n. 1 Saund. 322 (2).*

(*e*) Thus an express covenant, will qualify the generality, of an implied covenant, and restrain it, so that it shall not extend farther, than the express covenant. *Noke's case, 4 Co. 80 b. Cro Eliz. 674; 1 Mod. 113; Gainsford v. Griffith, 1 Saund 60. and n. (2) : 1 Ves. 101.*

(*f*) The usual covenants upon the sale of an estate in fee simple are, that the vendor is seised, and has power to convey in fee; for quiet enjoyment; that the estate is free from incumbrances; and for further assurance. The vendor, if he was himself a purchaser for valuable consideration, delivering or covenanting to deliver, his title-deeds, covenants against his own acts only; if his title be by descent, by devise, or otherwise, as a purchaser, not for valuable consideration, he covenants against the acts of the last purchaser; or, at least, of the person immediately preceding him. See *Loyd v. Griffith, 3 Atk. 264; Wakeman v. The Duchess of Rutland, 3 Ves. 233. 504; 8 Bro. Parl. Cas 145; 15 Ves. 263, n.*

The usual covenants upon the sale of a leasehold estate are, that notwithstanding any act done by the vendor, or the person under whom he beneficially claims, the lease is valid; not forfeited, surrendered, or determined, or become void or voidable; that the vendor has, or the assigning parties have, good right to assign; that the rent has been paid, and the covenants performed, up to a certain time; for quiet enjoyment during the term; free from incumbrances; and for further assurance. The assignee is bound to covenant with the assignor, that he will pay the rent, and perform the covenants in future; and indemnify the assignor, from the payment and performance thereof, although it be not mentioned in the conditions of sale, *Pember v. Mather, 1 Bro. C. C 52; or although the assignment be, by an executor or trustee, not beneficially interested in the purchase money, who only covenants that he has not incumbered, Staines v. Morris, 1 Ves. & B. 8.*

When an estate is sold by trustees or executors, it is the usual practice for the parties beneficially interested in the purchase money, to covenant for the title, "notwithstanding their own acts, and those of the person under whom they claim, but so nevertheless as to be answerable in damages only rateably, to the amount of the purchase money received by each respectively."

A covenant being part of a deed is subject to the general rules of exposition of all parts of deeds: As, 1. To be always taken most

CHAP. XLII.

How Chattels Personal may be Bargained, Sold, Exchanged, Lent, and Restored.

A CONTRACT is properly where a man for his money, shall have by the assent of another, certain goods, or some other profit at the time of the contract, or after.

[87] In all bargains, sales, contracts, promises, and agreements, there must be *quid pro quo* (*a*) presently, except a day be given expressly for the payment, or else it is nothing but communication. *Shep. Counsellor* 249.

If a man agree for the price of wares, he cannot carry them away before he has paid for them, if he have not a day expressly given him to pay for them.

But the merchant shall retain the wares until he be paid for them; and if the other take them, the merchant may have an action of trespass, or an action of debt, for the money, at his choice (*b*).

strongly against the covenantor, and most in advantage of the covenantee. 2. To be taken according to the intent of the parties. 3. To be construed *ut res magis valeat quam pereat*. 4 When no time is limited for its performance, it should be done within a reasonable time *Shep. Touch. 166.*

(*a*) *An equivalent for value received.* But the contract, &c. must be legal; for transactions which have for their object the encouragement of manifest crimes, such as murder, theft, perjury, and personal outrage, can never receive the sanction of a court of judicature; and any engagement for a reward to abstain from such crimes, is equally discountenanced, as it might effectually lead either to criminality or extortion. *Shep. Touch. 132.*

Every transaction, the object of which is the violation of a public or private duty, is also void; such are bribes for appointing to offices of trust, private engagements that an office shall be held in trust for a person by whose interest it was procured, agreements to stifle a prosecution for any crime of a public nature. *See Parsons v. Thompson*, 2 H. B. 322; *Garyorth v. Feuron*, ib 327; *Blachford v. Preston*, 8 T. R. 89; *Collins v. Blantern*, 2 Wils. 347; 1 Fonb. Eq. 255, 5th ed.; 2 *Evan's Pothier on Contracts*, 2.

(*b*) *Manby v. Scott*, 1 Mod. 173; *Dyer*, 30 a. pl. 203.

If the bargain be, that you shall give me ten pounds for my horse, and you give me one-penny in earnest, which I accept, this is a perfect bargain (*c*), you shall have the horse by an action on the case, and I shall have the money by an action of debt. (*d*)

If I say the price of a cow is four pounds, and you say you will give me four pounds, and do not pay me presently, you cannot have her afterwards, except I will; for it is no contract. But if you begin directly to tell your money, if I sell her to another, you shall have your action on the case, against me.

If I buy a hundred loads of wood, to be taken in such a

[88]

(*c*) Notwithstanding the earnest, the money must be paid upon the fetching away the goods, where no other time for payment is appointed. The earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money, is void. After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore if the vendee do not come and pay, and take the goods, the vendor ought to go and request him; and then if he do not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person. Per Lord Holt, *Langfort v. Tiler*, 1 Salk. 113; Vide *Peeram v. Palmer*, Gilb. Evidence, 170. Sedgw. edit.; 191 4th edit.

(*d*) If a man by word of mouth sell to me his horse, or any other thing, and I give him, or promise him nothing for it; this is void, and will not alter the property of the thing sold. But if one sell me a horse, or any other thing, for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or all, or part of the money is paid in hand; or I give earnest money (although it be but a penny) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a good bargain and sale of the thing, to alter the property thereof; and in the first case, I may have an action for the thing, and the seller for his money; in the second case, I may sue for and recover the thing bought; in the third, I may sue for the thing bought, and the seller for the residue of the money; in the fourth case, where earnest is given, we may have reciprocal remedies, one against another; and in the last case, the seller may sue for his money. *Sheppard's Touchstone*, 224; *Sheppard's Counsellor*, 252.

wood, at the appointment of the vendor; if he upon request will not assign them unto me, I may take them, or I may sell them: But if a stranger cut down any part of the trees, I cannot take them; but I may supply my vendee with the residue, or have my action on the case.

If the bargain be, that I shall give you ten pounds for such a wood, if I like it upon the view thereof, this is a bargain at my pleasure, upon my view: And if the day be agreed upon, though I disagree before the day, if I agree at the day, the bargain is perfect, although afterwards I disagree. But I may not cut the wood, before I have paid for it; if I do, an action of trespass, will lie against me; and if you sell it to another, an action of trespass on the case, will lie against you. *Shep. Counsellor*, 257.

If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt, until he be delivered; yet the property of the horse, is by the bargain, in the bargainer or buyer: But if he presently tender me my money, and I refuse it, he may take the horse, or have an action of *detinue*. And if the horse die, in my stable, between the bargain, and the delivery, I may have an action of debt, for my money, because by the bargain, the property was in the buyer. *Hob* 41.

[89]

If a deed be made of goods and chattels, and delivered to the use of the donee, the property of the goods and chattels, are in the donee presently; but before any entry or agreement, the donee may refuse them, if he will.

If I take the horse of another man, and sell him, and the owner take him again, I may have an action of debt, for the money; for the bargain was perfect by the delivery of the horse (*e*), & *caveat emptor* (*f*). Every contract imports in itself an assumption: For when one agrees to pay money, or deliver a thing upon consideration, he does, as it were, assume and promise to pay and deliver the same; and therefore, when one sells any goods to another, and

(*e*) But this applies exclusively to sales in market overt. *2 Inst.* 719.

(*f*) *Let the purchaser beware.*

agrees to deliver them at a day to come, and the other in consideration thereof, agrees to pay so much money, on the delivery, or after, in this case, he may have an action of debt, or an action on the case, upon the assumption.

The duty to resign an action personal, may not be apportioned: As if I sell my horse, and another man's for ten pounds, who takes his horse again, I shall have all the money. (g)

If a man retain a servant for ten pounds *per annum*, and he depart within the year, he can have no wages: If it were to be paid at two feasts, and the man after the first feast die, he shall have wages but for the first feast: Therefore men provide for it in their agreements.

By a sale made in a fair or market, the property is altered, so that the buyer know not of the former property, and do pay toll, and enter it; and those things as therenpon ought to be done, it must be on the market, and at the place where such things are usually sold; as plate at the goldsmith's stall, and not in his inner shop. See 2 Bl. Com. 250; 2 Wooddeson's Lect. 412. 431; 3 Ibid. 213; 2 Hawk. P. C. 250; 1 Hale, P. C. 542; 2 Inst. 714; Perk. § 93.

In an exchange of a horse for a horse, or such like, the bargain is good, without giving of a day, or delivery.

If a thing be promised by way of recompense, for a thing which is performed, it is rather an accord, than a contract; and upon an accord, there lies no action of account; but if he to whom the promise be made, had been put to expense by reason of the act which he has performed; then he shall have account, for the thing promised, though he that made the promise, has no profit thereby: As if a man say to another man, "You have cured such a poor man," or "You have made such a highway," &c.

The intent of the party, shall be taken according to the law: As if a man retain a servant, and do not say one

(g) See further on contracts for the sale and purchase of goods and chattels, *Roberts on Frauds*, 164. 166, &c.; *Phillips Evid.* 465, 4th ed.

[90]

[91]

year, or how long he shall serve him, it shall be taken for one year, according to the statute.

In all contracts, he that speaks obscurely or ambiguously (*h*), is said to speak at his own peril; and such expressions are to be taken strongly against himself.

CHAP. XLIII.

OF LENDING AND RESTORING.

IF money, corn, wine, or any other such thing which cannot be re-delivered, or occupied, be borrowed, and it perish, it is at the peril of the borrower.

But if a horse, or a cart, or such other things, as may be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss, if they perish not through the default of him who borrows them, or he who made a promise at the time of delivery, to re-deliver them safe again. If they be used in any other manner than according to the lending, in whatever manner they may perish, if it be not by default of the owner; he who borrowed them shall be charged with them, in law and conscience. (*a*)

[92] (*h*) There are two sorts of ambiguities of words, the one *ambiguitas patens*, and the other *latens*. *Patens* is that, which appears to be ambiguous upon the deed or instrument: *latens* is that which seems certain and without ambiguity, for any thing that appears upon the deed or instrument; but there is some collateral matter ou' of the deed, which occasions the ambiguity *Bac. Maxims Reg. 23. Tr. 99. See further, T. Raymond, 411; Roberts on Frauds, 15; 2 Roberts on Wills, 13. Sugden's Vendors, 115. 134, 5th ed; Phillips on Evidence, 566, 4th ed; 7 Bac. Abr. 342; Pow. Dev. 502. 513.*

(*a*) If a man borrow a horse, for the purpose of coming to London, and go towards Bath, or having borrowed him for a week, keep him for a month, he becomes responsible, for any accident which may be-

If a man have goods to keep till a certain day, he shall be charged, or not charged after, as default is, or is not, in him.

But if he receive any thing, for keeping them safe, or make a promise, to re-deliver them, he shall be charged with all chances which may happen, because of his promise.

If one man find goods of another, and they be hurt or lost by the negligence of him who found them, he shall be liable to make them good to the owner.

If a common carrier go by ways which are dangerous on account of robbers, and will drive by night, or other unfit times, and be robbed (b); or if he over-charge his horses; or drive so that his load fall into the water; or be otherwise hurt by his default; he shall be answerable for his negligence. (c)

And if a carrier would refuse to carry, unless a promise were made to him, that he shall not be charged with any such miscarriage, that promise were void.

fall the horse, in his journey to Bath, or after the expiration of the week. 2 *Ld Raym.* 915; *Doct. and Stud.* 222, ed. 1815 *dial.* 2 *ch.* 38; *Jones on Bailments.* 68; See *Terms of the Law, Bailment,* 35 *b*; 2 *Sheppard's Counsellor.* 266; *Hargr. n Co. Litt.* 89; 2 *Fonbl. Eq.* 180 (*i*); 1 *Bac Abr* 368; *Shiells v. Blackburn*, 1 *Hen. Blacks.* 158.

(b) *Doct. and Stud.* 222, *dial.* 2 *ch.* 38. And in the reign of Elizabeth it was resolved, that if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them. *Co. Litt.* 89 *a*; *Mo.* 462; 1 *Roll. Abr.* 2 *Woodlief and Curties.* The modern rule concerning a common carrier is, that "nothing will excuse him, except the act of God, or of the king's enemies" *Bull. N. Pr* 70, 71. 1 *Stra.* 128; If robbery excused a carrier, confederacies would be formed between carriers and desperate villains with little or no chance of detection, to the infinite injury of commerce and extreme inconvenience of society *Ld Raym.* 917; 12 *Mod.* 487; *Jones*, 104.

(c) In an action against a carrier, it was holden to be no excuse, "that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water had gushed," *Dale v. Hall*, 1 *Wils. part 1*, 281; but the true reason of this decision is not mentioned by the reporter: it was in fact, *at least ordinary* negligence, to let a rat do such mischief in the vessel. *Jones*, 105.

Every innholder is bound by the law to keep in safety *bona & catalla* (*d*), of his guest, so long as they are within the inn, though the guest did not deliver them unto him, nor acquaint him with them. (*e*)

[93] He shall not be charged, if the servant or companion of the guest, embezzle them ; or if the guest leave them in the outward court.

The ostler shall not answer for the horse which is put to pasture (*f*), at the request of the guest; but if he do it without the guest's orders, he shall. (*g*)

If any man offer to take away my goods, I may lay my hands upon him, and rather beat him than suffer him to take or carry them away.

[For a very lucid view of the LAW OF BAILEMENTS, see Sir William Jones's celebrated treatise on that subject.]

(*d*) *The goods and chattels.*

(*e*) *Vide Jones*, 91 94, 95; 12 *Mod.* 487; 2 *Cro.* 189; *Mo.* 78; *Dyer*, 158 b; 1 *And.* 29; 1 *BL. Com.* 430.

(*f*) Even if he turn out the horse, by order of the owner, and receive pay for his grass and care, he is chargeable for ordinary negligence, as a bailee for hire, though not as innkeeper; for if a man, to whom horses are bailed for agistment, leave open the gates of his field, in consequence of which neglect they stray and are stolen, the owner may have an action against him. *Mo.* 543; 1 *Roll. Abr.* 4; *Jones*, 92.

(*g*) *Cayle's case*, 8 *Co 32*. See also *Countess of Salop's case*, 5 *Co 13 b*. So also if a shepherd to whom sheep are intrusted, by negligence suffers them to be drowned, or otherwise to perish, an action upon the case lies. *Wing. Mar.* 670, *pl. 3*.

CHAP. XLIV.

How far other men's Contracts and Misdemeanors bind us.

A MAN shall be bound by many trespasses of his wife, but not to sustain corporeal punishment for it.

For murder, felony, battery, trespass, borrowing or receiving money in his master's name, by a servant, the master shall be not charged, unless it be done by his command, or came to his use by his assent.

If I command one to do a trespass, I shall be a trespasser (*a*), or even if I do but consent. There is no accessory in trespass. (*b*)

We shall be charged if any of our family lay or cast any thing into the highway, to the nuisance of his Majesty's liege people. [94]

Every man is bound to make recompense for such hurt as his beasts shall do in the corn or grass of his neighbour, though he knew not that they were there; and for his dogs, bears, &c. if they hurt the goods or chattels of any other, because he is to govern them.

A man shall not be charged by the contract of his wife, or his servant, if the thing come to his use, having no notice of it: but if he authorise them to buy generally, he shall be charged though they come not to his use, or he had no notice thereof. (*c*)

If a wife or servant accustomed to buy or sell, if he sell his master's horse or exchange his ox for wheat which,

(*a*) This must be understood to extend only to servants and others over whom I may have a lawful authority; and in case of a servant he is not excused, for he is only to obey his master in matters that are honest and lawful. 1 *Bl. Com.* 430.

(*b*) 20 *Vin. Abr.* 461, (R. 2); *Ibid.* 461, *pl. 4 and 5*; 4 *Bl. Com.* 36.

(*c*) 4 *Bac. Abr.* 585, *Master and Servant* (K).

comes to his master's use, his master cannot have an action of trespass for it; but he shall be charged for the corn, and the other need not to shew that he had warrant to buy for him.

If a man servant who keeps his shop, or who is accustomed to sell for him, shall give away his goods, he shall have trespass against the donee.

[95] But if I deliver my goods to another to keep to my use, and he give them away, I shall not; for the donee had no notice whose goods they were, as in the case of the servant.

If a man make another his general receiver, who receives money, and makes an acquittance, and pays not his master, yet that payment discharges the debtor.

If a servant keep his master's fire negligently, an action lies against the master: Otherwise, if he carry it negligently in the street. See Stat. 6 Anne c. 3.

If I command my servant to distrain, and he ride on the horse taken for the distress, he shall be punished, not I.

If a man command his servant to sell a thing which is defective, generally to whom he can sell it, deceit lies not against him: Otherwise if he bid him sell it to such a man, it does.

A contract or a promise made to the wife is good, when the husband agrees. so it is to a servant; and it shall be said to be made to the husband and master himself. (d)

If a man take a wife who is in debt, he shall be charged with her debts during her life; if she die, he shall be discharged. (e)

(d) See further, 4 Bac. Abr. 582. *Master and Servant* (I), (K).

(e) 1 *Roll. Abr.* 351. (G), pl. 2; 4 *Vin. Abr.* 142. But he will be liable as her administrator to the extent of her assets. *Heard v. Stamford*, Cas. Temp. Talb. 173; 1 *P. Wms.* 465. 468.

CHAP. XLV.

[96]

WILLS AND TESTAMENTS. (a)

HAVING hitherto treated of such contracts as take effect in the life-time of the parties, with their differences, it is now necessary to treat of instruments which take effect after their deaths, that those things which men have preserved with care, and procured with pains in their life, might be left to their posterity in peace and quietness after their death: Of which sort are last wills and testaments.

There are Two Sorts of Wills; Written and Nuncupative.

A nuncupative testament is when the testator by word only, without writing, declares his will before a sufficient number of (b) witnesses concerning his chattels only; for lands pass not but by writing. It may for the better continuance after the making be put in writing, and proved; but it is still a testament nuncupative.

A written testament is that, which at the very time of the making thereof is put in writing, by which kind of

(a) *Testamentum*, or last will, is thus described by Modestinus:—
Voluntatis nostrae justa sententia de eo quod quis post mortem suam fieri vellet. D. 28. 1. 1; 2 Bl. Com. 499. One great and principal use of a good definition is this, that it may be considered as a whole doctrine in epitome: and thus, I am persuaded, all the necessary knowledge upon the subject of *testamenti factio* would turn up, by carefully surveying the terms contained in the definition before us. Taylor's Civil Law, 531, 2d edit.

(b) [The principles of the English statutes of 29 Car. 2. c. 3. s. 19, and 4 & 5 Anne c. 16. in relation to nuncupative wills, have been adopted by nearly all the states in the union, varying only in a few circumstances. The regulations of the several states will be found in the 2d volume of Anthor's edition of *Sheppard's Touchstone*, and in the 3d and 4th volumes of GRAYTH's LAW REGISTER of the United States.—For the present law of Virginia, See 1 Rev. Code of 1819, p. 377, § 7, 8.]

[97] testament in writing only, lands and tenements pass, and not by word of mouth only.

Two things are required to the perfection of a will by which lands pass, viz. first, writing, which is the beginning (*c*); secondly, the death of the devisor, which is the finishing.

In a will of goods there must be an executor named; it is otherwise of lands.

A man may make one executor or more simply, or conditionally for a time, or for parcel of his chattels.

If no executor be named, then it still retains the name of the last will, and shall be annexed to the letters of administration on account of the legacies.

Gavelkind lands may be devised by custom.

Lands holden in socage tenure are all devisable in writing, but knights service two parts in three. (*d*)

Fear, fraud, and flattery, are three unfit things to be at the making of a will.

A woman may make a will of the goods of her husband by his consent and license: By word is sufficient, and of the goods she has as executor without his consent; but she cannot give them unto him.

[98] A boy after his age of fourteen, and a maid after her age of twelve, may make a will of their goods and chattels by the civil law (*e*). [But by the laws of Virginia, none under eighteen, 1 Rev. Code of 1819, p. 377, § 6.]

The will of the testator shall be always observed, if it be not impossible, or greatly contrary to the law.

A devisor is intended *inops concilii* (*f*), and the law

(*c*) [For the origin of conveying lands by will, and the several English statutes regulating such conveyances, See 2 Bl. Com. 373 et seq:— and for a view of the laws of the several states, on the same subject, See 2 Shep. Touch. Anthon's edit.; and Griffith's Law Register, vol 3 & 4. For the existing laws of Virginia, see 1 Rev. Code of 1819, p. 375, as amended by act of 1822, ch 27 § 2, which requires that the witnesses should subscribe their names, in the presence of the testator.]

(*d*) These distinctions were abolished by stat. 29. Car. 2. c. 14.

(*e*) Hargr. n Co Litt. 189 b. (6).

(*f*) Wanting counsel.

shall be his counsel ; and according to his intent appearing in his will, shall supply the defect of his words.

A prerogative will is five pounds in another diocese.

A man cannot traverse the probate of a testament, or letters of administration directly, but he may say against the testament, that the testator never made the party his executor. (g)

CHAP. XLVI.

DEVISES.

A DEVISE ought to be good and effectual at the time of the death of the devisor.

The devisee (a) cannot enter into a term for years, or take a chattel personal but by the delivery of the executor.

But he may sue for it in *Court Christian*. (b)

(g) *But see Toll. Ex. 76* [The power of contesting the validity of a will is expressly provided for, in Virginia, even after probate, by bill in chancery ; and an issue *devisavit vel non*, is a matter of course. See 1 Rev. Code of 1819, p 378 § 13.]

(a) When *chattels*, either real or personal, are given by will, it is a *bequest*; *devise* is exclusively applied to gifts by will of estates of *freehold* or *inheritance*. So the person to whom chattels are given by will is, in strict propriety, called a *legatee*, and not a *devisee*.

(b) *The Ecclesiastical Court*—[And such is the constant course in England.] Cases have occurred in which courts of common law have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon proof of an express *assumption*, or undertaking by the executor to pay them. But it seems to be the opinion of modern judges, that this jurisdiction extends to cases of *specific* legacies only ; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. *Atkins v. Hill*, Cowp. 284 ; *Doe, dem. Lord Say and Sele v. Grey*, 3 East. Rep. 120. So it seems

[99] Into freehold or inheritance he may enter.

Devises are purchasers: So if a lease for years be willed to a man and his heirs, the heir shall have it; for heir is a name of purchase here.

A reversion of lands or tenements will pass by the name of lands and tenements in a devise.

If a man devise all his lands and tenements, a lease for years does not pass where he has lands in fee, and also a lease of land there, otherwise it will. (c)

to be the better opinion, that when the legacy is not specific, but merely a gift out of general assets, and particularly when a married woman is the legatee, that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit of doing. *Deeks v. Strutt*. 5 T. R. 690; 2 Rop. Leg. 595. Thus legacies bequeathed to married women, ought, in general, to be paid to their husbands; but in cases where the husband has made no provision for his wife, the executors may withhold payment of the legacy until he consent to make a suitable provision, as the Court of Chancery, upon a bill filed by the husband for the legacy, would refuse to make such an order, unless the husband consented to a reasonable settlement on the wife, out of the legacy; *Brown v. Eton*, 3 P. Wms 202. 2 Eq. Cas. Abr. 241, pl. 29, or unless the legacy be under £200, or £10, in annual payment. *March v. Head*, 3 Atk. 721: *Beames's Orders in Chancery*, 464; 1 Madd. Ch. 482, 2d edit.; and it seems, that though the wife elope from her husband, and cohabit with another man, if she be unprovided for, the court will not allow her husband to take her property, without making a provision for her. *Ball v. Montgomery*, 4 Bro. C. C. 339. 345. See also *Carr v. Eastabrooke*, 4 Ves 146. But if the wife consent in court, or if abroad, before proper commissioners, for the husband to receive her legacy, the court will decree it accordingly, without requiring any settlement. *Willa:es v. Cay*, 2 Atk. 67; *Parsons v. Dunne*, 2 Ves 60; *Ellis v. Atkinson*, 3 Bro. C. C. 565. But when the feme-legatee is the subject of a foreign state, by the law of which the husband would be entitled to receive the whole of his wife's property, without making any provision for her, the Court of Chancery will dispense with the wife's consent in such cases, and decree the legacy to her husband. *Campbell v. French*. 3 Ves. 323; 1 Rop. Leg. 372; 1 Fonb. Eq. 98, n.—See *Francis's Maxims*, p. 3.

(c) *Rose v. Bartlett*, Cro. Car. 292. There has been much fluctuation of opinion on the subject. See *Davis v. Gibbe*, 3 P. Wms. 26; *Addis v. Clement*, 2 P. Wms 456; *Lowther v. Cavendish*, Ambl 356; 1 *Eden*, 99. 110. 113; *Turner v. Husler*, 1 Bro. C. C. 78; *Knotsford v.*

If a man devise all his goods, a rent-charge which he had for years will pass, and all other his personal chattels.

And if a man give all his moveables to one, he shall have all his horse, cattle, pans, and personal chattels; and if he give all his immoveables to another, he shall have all his corn growing, and fruit on his trees, and the chattels real. (d)

A man may devise lands or goods to an infant in the mother's womb (e), or goods to the churchwardens of D.

Gardiner, 2 Atk. 450; *Pistol v. Riccardson*, 1 H. Blacks. 26, n; 2 P. Wms. 459, n; *Lane v. Earl Stanhope*, 6 Term Rep 345; *Thompson v. Lady Lawley*, 2 Bos. and Pull. 303; 5 Ves. 476; 6 Cru. Dig. 232, 2d edit. 1 Rob. on Wills, 440; 2 Rob. Leg. 360. Whenever it can be collected from the words of the will, that the testator's intention was that both freehold and leasehold should pass, the will has that effect.

(d) *Godolphin's Orphan's Legacy*, 392, s. 6. 7. See *Perk* s. 525

(e) *Scatterwood v. Edge*, 1 Salk. 229. It was formerly disputed, whether a devise to an infant in *ventre sa mere* was good or not; some held that it was not, whilst others contended it was; but all agreed that a devise to an infant when he should be born was good. A devise to such infant necessarily implies a future disposition, to take effect at its birth, as much as if the words "when he shall be born" were added; for we cannot imagine an intention, that the child should take the estate before it is born. But at this day it is clearly agreed that a devise to an infant in *ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise. So a limitation to the child of which the wife was supposed *enfant* was a good contingent remainder (the wife taking a preceding estate for life) to a supposed child in *ventre sa mere*; and if there had been no devise to the wife for life, the devise to the child for life, being *in futuro* (by which must be meant being in its own nature future), would have been a good executory devise. 1 Freem. 244. 293; *Fearne's Rem.* 533-4-5, *Butler's edit.*; 426, 3d edit. An infant in *ventre sa mere* may take a share of real estate under a devise "to the use and behoof of all and every such child or children of my said brother as shall be living at the time of his decease". *Doe v. Clarke*, 2 Hen. Bl. 400; *Clarke v. Blake*, 2 Bro. C. C. 321; 2 Ves. jun. 673. And it is now settled, that an infant *en ventre sa mere* shall be considered, generally speaking, as born for all purposes for its own benefit. *Lancashire v. Lancashire*, 5 T. R. 49; *Watk. Des.* 142. A child *en ventre sa mere* may be vouched in a recovery, though for the purpose of answering over in value. *Co. Litt.* 390 a. It may be the subject of murder, 3 Inst. 50, 51. It may take under the statute of distributions,

There is great diversity where the property is devised, and when the occupation is devised: a man may devise, that a man shall have the occupation of his plate, or other [100] chattels during his life, or for years, and if he die within the term, that it shall remain to *M. A.* and it is good; for the first has but the occupation, and the other after him shall have the property.

But if a chattel be given to one for life, the remainder to another, the remainder is void. See ch. 12 n. (c)

For a grant or devise of a chattel for an hour is good

as living at the intestate's death. *Edwards v. Freeman*, 2 P. Wms. 446; *Wallis v. Hodson*, 2 Atk. 114. It may be entitled to the benefit of a charge for raising portions for children living at the death of the testator. *Hale v. Hale*, Pre. Ch. 50. It may obtain an injunction to stay the commission of waste to its disadvantage. *Musgrave v. Parry*, 2 Vern. 710. It will prevent a remainder from taking effect which depended upon the death of its father, without leaving issue. *Burdet v. Hopgood*, 1 P. Wms. 487. A limitation to it for life, with remainder to its first and other sons successively in tail, will, as it seems, be a good limitation, which could not be unless a posthumous child is considered in law a child *in esse*. *Long v. Blackall*, 3 Ves. 486; 7 T. R. 700 *S. C.* and *Per Buller, J. Thelluson v. Woodford*, 4 Ves. 322. Upon the whole, "posthumous children are entitled to all the privileges and advantages of other persons." 1 *Rop. Leg.* 89; 2 *Fonb. Eq.* 349. ☐ Lord Kenyon's opinion, to which he seems to have adhered so firmly in *Pierson v. Garnett*, 2 Bro. C. C. 47; *Cooper v. Forbes*, Ibid. 63; *Freemantle v. Freemantle*, 1 Cox, 248. is now overruled.

As to illegitimate children, it seems settled, that if an illegitimate child *en ventre sa mere*, be so described as to ascertain the object intended to be pointed out, it may take under that description, as in the case of a bequest to the natural child with which a woman is now *ensient*, *without reference to any person as the father*; nor would such a bequest be invalidated, by the testator giving as a reason for the legacy, that he believed he was the father of such child. *Wilkinson v. Adam*, 1 Ves. & B. 423; *Gordon v. Gordon*, 1 Meriv. 141. But a bequest to "such child as *A.* may happen to be *ensient* with, *by me*," has been held void. *Earle v. Wilson*, 17 Ves. 528 Eden's note, 2 Bro. C. C. 321. So a limitation to a bastard not *in esse* is held to be void; for the law does not favour such generation, or expect that such should be. *Fearne's Rem.* 249, *Butler's edit.*; 176, 3d *edit.* See further, *Hargr. n. Co. Litt.* 3 b. (1); 3 *Bac. Abr.* 378. *Grants (C)*; 2 *Roll. Abr.* 43, 44; 4 *Vin. Abr.* 233. *Bastard (P)*; 14 *Vin. Abr.* 37; 1 *Fonb. Eq.* 349.

for ever, and the devisee may dispose of it; but if he do not, the other shall have it. (*f*)

A man may devise his lands he holds in lease, but not his lease under this condition; provided that if the lessee die within the term, then the lessor shall have it.

If a man will his goods to his wife, and that after her decease his son and heir shall have the house wherein they are; she shall have the house for term of her life, yet it is not devised unto her by express words. But it appears that his intent was so by the words. (*g*)

If a man will his lands to his wife till his son come to the age of twenty-one years, and the woman take another husband and die, the husband shall have the interest (*h*).

(*f*) In equity, limitations over of chattels personal, after a bequest to one for life, are good as executory bequests.

The ancient distinction between the bequest of the use of a personal thing, and the thing itself to any one for life, &c. has been completely settled, in the constructive operation of such a limited gift, to entitle the restricted legatee only to the use of the thing for the period expressed.

In case of a bequest of goods to one for life, with remainder over, the legatee for life was formerly compellable in equity to give security for the goods being forthcoming at his decease: but the latter practice is for an inventory to be signed by the legatee for life, &c. to be deposited with the Master for the benefit of all the parties: which Lord Thurlow observed was more equal justice; as there ought to be danger in order to require security. *Foley v. Burnell*, 1 Bro. C. C. 279; *Slanning v. Style*, 3 P. Wms. 336; *Hyde v. Parratt*, 1 P. Wms. 6, and notes; *Fearne's Rem.* 404, 406, 407. *Butler's edit.*; 30, 34, 35. *Powell's edit.* 302, 306, 3d. edit.

(*g*) *Bro. Abr. Devise*, pl. 52; *Vaugh.* 263. A good commentary on all the cases. *Horton v. Horton*, Cro. Jac. 75. For by the express words of the will the heir was not to take it till after the death of the wife; therefore if she did not take it, no one else could. So if a man having a wife and two daughters, heirs at law, devise lands to one of the daughters after the wife's death; this is a devise to the wife for life by implication, though the daughter is but one of the co-heirs. *Hutton v. Simpson*, 2 Vern. 723.

(*h*) See *Co. Litt.* 46 b. 351 a; *Boraston's case*; 3 Co. 19; *Palm.* 192; 1 *Eq. Cas. Abr.* 188, pl. 8; *Fearne's Rem. Butl. edit.* 242, 401; 3d edit. 168.

[101] By a devise, a man may have the fee-simple without the express word "heirs :" As if lands be willed to a man for ever, or to have and to hold to him and to his assigns, &c.

By will, lands may be entailed without the word "body :" As if lands be given to a man and his heirs male, it makes an estate tail.

If a man will that his executors shall sell his lands, the inheritance descends to the heir (i); yet the executors may enter and enfeoff the vendee (k).

But if lands be given to the executor to sell, and they receive the profits thereof to their own use, and do not sell the same in reasonable time, the heir may enter. *Litt. s. 383.*

One executor may sell if the others will not (l).

If lands be recovered against tenant for life, or for years, by an action of waste or superior title, he cannot gather his corn. *Perk. s. 515; Co. Litt. 55 b.*

If the cognisee have sown the lands, and the cognisor bring a *scire*, the cognisee shall have the corn sown (m.)

If a man devise *omnia bona & catalla* (n), hawks nor hounds do not pass, nor the deer in the park, nor the fish in the ponds.

(i) *Co. Litt. 236 a.*

(k) *Vide Litt. s. 169; Hargr. n. Co. Litt. 113 a (2); 1 Roll. Abr. 329, 330; 3 Vin. Abr. 419 420; 4 Bac. Abr. 281, Devise (E); 6 Cru. Dig. 456, 2d ed.; Sug. Pow. 102. 2d ed. Pow. Dev. 302; Toll. Executors, 363. 413.*

(l) By 21 Hen. 8. cap. 4. See *Co. Litt. 113 a 181 b; 1 Rev. Code of 1819, pa. 388 § 52.*

(m) *Co. Litt. 55 b; Perk. s. 517.* See further on the subject of *Emblements*, *Perk. s. 512 to 524*; *Vin. Abr. Emblements per tot. and Executor (U)*. *Com. Dig. Biens, (B) (C) and (G)*. *Bac. Abr. Executors and Administrators, H 3 Gib. Evidence, 242, 4th edit; 209, Sedg. edit; Toll. Ex 205; Hargr. notes, Co. Litt. 55 a, b.*

(n) *All his goods and chattels.*

CHAP. XLVIII.

[102]

EXECUTORS.

AN executor is he who is named and appointed by the testator to be his successor in his stead to enter, and to have his goods and chattels, to bring actions against his debtors, and pay his legacies so far as his goods and chattels will extend.

Where two executors are made, and one proves the will, and the other refuses, notwithstanding he who refuses may administer at his pleasure, and the other must name him in every action for every thing due to the testator, and his release shall be a good bar. If he survive he may administer, and not the executor of him who died: But otherwise if all had refused. (a)

If one prove the will in the name of both, he who does not administer shall not be charged.

If the executor do any one act which is proper to an executor, as to receive the testator's debts, or to give acquittance for the same, &c. he cannot refuse.

But other acts of charity or humanity he may do, as to dispose of the testator's goods about the funeral, to feed his cattle lest they perish, or to keep his goods lest they be stolen: These things may every one do without danger. [103]

When executors bring an action, it shall be in all their names, as well of them who refuse, as of the others.

But an action must be brought against him only who administers; and he who first comes shall first answer.

(a) *Vide Off. Ex. 42; 3 Bac. Abr. 43, Executor (E), 9; Dyer, 160 s. (42); Pawlet v. Freak, Hard. 111, pl. 2; House v. Lord Petre, 1 Salk. 311.* After one has proved, the other cannot renounce till after his death; but if he then renounce, the testator is dead intestate. *Com. Dig. Administrator* (B. 1.); 11 *Vin. Abr.* 68, pl. 21. 31.

An executor of an executor, is executor to the first testator (*b*), and shall have an action of debt, account, &c. or of trespass, as of the goods of the first testator carried away, an execution of statutes and recognizances, &c. Stat. 25 Ed. 5; 1 Rev. Code of 1519, pa. 390, § 64, 65.

The title and interest of an executor is by the testament, and not by the probate; and without shewing the probate they may release the debts: But the justices will not allow them to sue actions. (*c*)

The executor shall have the wardship of the body and lands of the ward in knights service, but not in socage, and leases for years, and rent-charges for years, statutes, recognizances, bonds, lands in execution, corn upon the ground, gold, silver, plate, jewels, money, debts, cattle, and all [104] other goods and chattels of the testator, if they be not de-

(*b*) 2 Bla. Com. 506; Toll. Ex. 243; 3 Bac. Abr. 19. *Executors* (B). 2. 1, pl. 2; *Com. Dig. Administration* (G). But this is to be understood, when the first executor proves the will, *Palm.* 156; for if the executor die after administering, and before probate, his executor cannot prove the will of the first testator; because he is not named executor to him in the will; and no one can prove the will, but who is named executor in the will; *Wankford v. Wankford*, 1 Salk. 309; and administration of the goods of the first testator *cum testamento annexo*, must be granted to the executor of the executor, if the residue of the goods of the first testator were bequeathed by his last will to the first executor; or, otherwise to the residuary legatee, if any, or to the next of kin of the first testator. *Roll. Abr.* 907 pl. 10; *Isted v. Stanley*, Dyer. 372 a, (8); *Day v. Chapfield*, 1 Vern. 200; 11 *Vin. Abr.* 67 pl. 10 20 27; 3 *Locc. Abr.* 19, *Executors* (B) 2. 1 pl. 3.

(*c*) *Shep. Touch* 474; *Godolp. Orphan's Legacy*, 144; *Off. Ex. b. 4* An executor may assent to a legacy, assign a term, or release an action as well as a debt, before probate, *Middleton's case*, 5 Co 28 a; *Hudson v. Hudson*, 1 Atk. 461; and in short, is a complete executor, before probate, for all purposes, excepting that he cannot declare in an action before probate; for without producing his letters testamentary, he cannot assert his right in court; but he may commence an action at law, *Bacon's Law Tracts*, 160; 1 *Salk.* 303; 4 *Burn's Eccl. Law*, 246. 6th ed.; or file a bill in equity before probate, *Humphreys v. Humphreys*, 3 P Wms. 351; and when produced, it shall have relation to the time of suing out the writ, or filing the bill; and on a bill in equity, it is sufficient, if the probate be obtained at any time before the hearing. 3 *Bac. Abr.* 53; *Toll. Ex.* 46; *Com. Dig. Administration*, (B. 9.)

vised, and may devise them : But if the executor give by will *omnia bona & catalla sua* (*d*), the goods of the testator pass not, neither shall they be forfeited by the executor.

An executor is chargeable for all duties of the testator which are certain, so far as he shall have assets : But not for trespass, nor for receipt of rents, nor for occupation of lands, as bailiff, or guardian in socage, &c. for this is not any duty certain. If the executor waste the goods of the testator, he shall pay for them out of his own.

An executor shall be charged only with such goods as come to his hands ; but if a stranger take them out of his possession, they are assets in his hands. See *Shep. Touch.* 490.

If an executor take another man's goods amongst the goods of the testator, he shall be excused for the taking in an action of trespass.

Duties by matter of record shall be satisfied before duties by specialty ; and duties by specialty before charges on contract ; and legacies after other duties. (*e*)

An executor may pay a debt or credit of the same kind, or degree pending the writ, before notice of the action, but not after notice or issue joined. See *Toll. Ex.* 289.

An executor may pay debts with his own money, and retain so much of the testator's goods, but not lands appointed to be sold.

[105]

Any of these words, *dehere*, *solvore*, *recipere* (*f*), borrowed, or any word which will prove a man a debtor, or to have the money, if it be by writing, will charge the executor or administrator, but not the heir, if he be not named.

(*d*) All his goods and chattels.

(*e*) *Godolph Orph. Leg.* 215; *Toll. Ex.* 258; *3 Bac. Abr.* 79. Executor, (*L.*) 2.—[Debts of every kind as well by simple contract as by record and specialty, must be paid before legacies. *Went. c. 12.*]

(*f*) To owe, to pay, to receive.

CHAP. XLVIII.**ADMINISTRATORS.**

AN administrator is he to whom the ordinary of the place, where the intestate dwelt, commits the intestate's goods, chattels, credits, and rights.

For wheresoever a man dies intestate, either because he was so negligent that he made no testament, or made such an executor as refused to prove it, or otherwise is of no force ; the ordinary may commit the administration of his goods to the widow or next of kin making request, or to both; which he pleases, and he may revoke it again at his pleasure.

[106] The ordinary may assign also a tutor to the intestate's children, to his sons until fourteen, to his daughters until twelve years ; but so that it may be not a prejudice to him who is the guardian. And after those years he or she may respectively choose their own curators, and the guardian may confirm them, if there be no good order taken by their father's will ; and if such a tutor die, the infant cannot have an action of account against his executor. See *Harg. n. Co. Litt. 88 b; Vaugh. 184.*

The power and charge of an administrator is equal in every point to the power and charge of an executor. (a)

(a) Though some are of opinion that one of several administrators may without the others sell goods, release debts, plead to actions, and the like, in the same manner as executors may, *Goldeb.* 141; *S Bac. Abr.* 30; *5 Bac. Abr.* 700; *Toll. Ex.* 408; yet this is doubted by others because they all have but one entire authority, wherein they ought to join in what they do. *Godolphin's Orphan's Legacy,* 134, 4th ed.; *Shep. Touch.* 485; *Hudson v. Hudson,* 1 Atk. 460; 11 *Vin. Abr.* 73. *2 Foss. Eq.* 391, n. 5th ed.; *Bacon's Law Tracts,* 162, ed. 1737; *Works,* 4th vol. 83; *Supp. Off. Executor,* *Wilson's ed.* 124; *4 Burn's Eccle. Law,* 316, 6th ed. *Wood's Inst.* 325, 10th ed. It seems to be the better opi-

A man may have an action on the case against the executor or administrator, upon the assumption of the testator, upon good consideration; or debt for labourers wages, by the statute.

And if a man make an infant his executor, the ordinary may commit the execution of the will to the tutor of the child, to the child's behoof, until he be of the age of seventeen years, and if it be granted for longer time, it is void.

An administrator *durante minoritate* (b) can do nothing to the prejudice of the infant, he cannot sell any of the goods of the deceased, unless it be upon necessity; as for the payment of debts, or that they would perish; nor let a lease for a longer time than whilst he is executor. See 3 Bac. Abr. 13, Executors. (B)

An infant upon the true payment of a debt due to the testator, may make an acquittance, and it shall be good: for a child may better his estate, but not make it worse. [107]

nion, that, a title to a leasehold estate, cannot be safely accepted from one or more of several administrators, when the others have not united in some manner in the sale or conveyance or subsequently assented.

(b) During minority.

CHAP. XLIX.

HEIR.

JF a man die seised of any lands, and do not dispose of them by his will, they descend to his heir as aforesaid. (*a*)

And he shall have not only the glass and wainscot (*b*), but any other of such like things affixed to the freehold or ground ; as tables, dormants (*c*), furnaces, vats in the brewhouse or dyehouse (*d*) ; and the box or chest where-

(*a*) A bastard, by the general consent of almost all civilized nations, is considered, as it were, the first of his family. For which reason he cannot by law be heir to his father; for he has none, at least the law knows of none. D. 1. 5. 23. [He is *nullius filius*, and therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. 1 Bl. Com. 458.]

And upon the same principles, having no legal relations, no body can claim a legal succession to him, except the heirs of his body, who spring from him, and without whom he has no relations at all. Taylor's Civil Law, 273.

[But, by the laws of Virginia, bastards shall be capable of inheriting or of transmitting inheritance on the part of the mother, in like manner as if they had been lawfully begotten of such mother. 1 Rev. Code of 1819, p. 357 § 18.]

(*b*) *Herlakenden's case*, 4 Co. 63 b. 64 a; *Swinb. pt. 6. s. 7. 2 Pow. ed. 758.*

(*c*) i. e. Bedsteads or couches, fastened to the ceiling with ropes, or nailed. *Sed vide contra*, 3 Atk. 478, as to landlord and tenant.

(*d*) 1 *Powell's Swinb.* 256; 3 *Bac. Abr.* 63. *Executors*, (H) 3; *Off. Ex.* 60 62; *Godol. Orp. Leg.* 127. The law seems now to be held not so strictly as formerly, and if these things can be taken away, without prejudice to the fabric of the house, or soil of the freehold, it seems, that the executor shall have them; as tables, although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise : 3 *Gwill. Bac. Abr.* 64; *Toll. Ex.* 198; and hangings, tapestry, and iron backs to chimnies, belonging to the executor, *Harvey v. Harvey*, 2 Str. 1141; and Ld. Ch. Baron Comyns, at the Assizes at Worcester, upon an action of trover, brought by the executor against the heir, was of opinion, that a *cider mill* which is let

in the evidences are (e) ; the hawks and the hounds ; the

very deep into the ground, and is certainly fixed to the freehold, was personal estate, and he directed the jury to find for the executor. *Ex relatione Mr. Wilbraham*, 3 Atk. 14. 16. So Lord Hardwicke decided that a fire engine, set up for the benefit of a colliery, by a tenant for life, was, as between his executor and the remainder-man, to be considered as part of his personal estate, and should go to the executor, for the increase of assets *in favour of creditors*. And his Lordship observed, that, so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold ; but, since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done. Coppers and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire engines, and in brewhouses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of trade, *landlords* will not be allowed to retain them. It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man : but even in these cases, it does admit the consideration of public conveniency for determining the question I think, he added, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir. *Lawton v. Lawton*, 3 Atk. 13. So if tenant in tail, erect a fire engine to work a colliery, it will be considered as part of his personal estate, and not go with the estate to the remainder-man, but this does not hold between the heir and executor, *Lord Dudley v. Lord Warde*, Ambl. 113. See also *Bul. N. P.* 34.

(e) *Off Ex. 64; Godol Orp. Leg. 127; 4 Burn's Eccl. Law. 304, 6th ed.* But those deeds and writings which relate to terms for years, goods, chattels, or debts, belong to the executor, 3 *Bac. Abr.* 65. *Toll. Ex.* 192. So where a bill was filed in Chancery for an antique horn, with this old inscription, *Pecote this Horne to hold Huy thy Land*, and which had immemorially gone with the plaintiff's estate, and was delivered to his ancestors to hold their land by, and praying that it might be restored ; the Lord Keeper was of opinion, that if the land were held by the tenure of a *horn* or *cornage*, (*Co. Litt. 107 a.*) the heir would be well entitled to this monument of antiquity at Law, *Pusey v. Pusey*, 1. Vern. 273.

doves in the dove-house; the fish in the pond; and the deer in the park (*f*), and such like.

He shall be charged by specialty for the debts of his ancestor, so long as he has assets, if the executor or administrator have not sufficient. (*g*)

No law or statute charges the heir for the wrong or trespass of his father, but by express words.

[108]

WIDOW.

The widow shall have all her apparel, her bed, her coffer, her chains, borders, and jewels (*h*), by the honourable custom of the realm, except her husband unkindly give any of them away (*i*): or be so in debt, that it can-

(*f*) And rabbits in a warren; if the ancestor had the inheritance, *Godol. Orp. Leg.* 126. or but for life, in the pond, warren, park, or dove-house: but if the deceased were but a termor, they go to the executor, as necessary chattels, following their principal, *Off. Ex.* 53; *Hargr. n. Co Litt.* 8 a. (10.)

(*g*) But the body of the heir is protected, and the plaintiff shall only have a *special elegit* of lands descended in fee-simple, *Leson's case*, 1 Dyer, 81 a. pl. 62. or *pur autre vie*, by the statute of frauds. And if the heir pay his ancestor's debts to the value of the land descended, he shall hold the land discharged: because otherwise he might be chargeable *ad infinitum*, *Buckley v. Nightengale*, 1 Stra. 665; and the heir must be expressly named, in a writing under hand and seal, otherwise he is not chargeable. *Gifford v. Manley*, Cas. Temp. Talb. 108; 3 Bac. Abr. 458, *Heir*, &c. (F.)

(*h*) Suitable to her degree, 2 Bla. Com. 436; *Com. Dig. Baron and Feme*, (F 3.) 2 Pow. Swinb. 760 pt. 6. s. 7; *Godolph. Orp. Leg.* 130; 3 Bac. Abr. 66; *Toll. Ex.* 229.

(*i*) Whatever jewels a wife wears for the ornament of her person, the husband may alien in his life-time, 3 Atk. 394; but he cannot bequeath them, by his will, any more than an ancestor can heir looms from the heir. *Tipping v. Tipping*, 1 P. Wms. 730. So if a husband pledge his wife's paraphernalia, and die, leaving a sufficient estate to redeem the pledge, and pay all his debts, she will be entitled to have it redeemed out of the husband's personal estate; although a specific legatee would be entitled in equity to have it disincumbered, or to receive an equivalent out of the personal estate of the testator. *Graham v. Londonderry*, 3 Atk. 395; 3 Bac. Abr. 66. And as a specific or any other legatee shall, in equity, stand in the place of a bond

not be paid without her bed (*k*). &c.; yet even in that case she shall have her necessary apparel.

CHAP. L.

ARBITRAMENT.

What Things are arbitrable, and what not.

THINGS and actions personal uncertain are arbitrable; as trespass, taking away a ward, &c. (*a*)

But things certain are not arbitrable, unless the submission be by specialty, or they be joined with others uncertain; as debt with trespass. (*b*)

creditor or mortgagee, and take as much out of the real assets, as such creditor by bond or mortgage shall have taken out of the personal estate from his specific or other legacy, (*Cox's n. 1 P. Wms.* 680,) much more shall the wife be privileged with respect to her *bona paraphernalia*, which are preferred to legacies, and the court will marshal the assets for that purpose. *1 P. Wms.* 730.

(*k*) In which case they must be put in the inventory with the other goods of the deceased, towards the payment of his debts, *2 Pow. Swinb.* 761; *Supp. Off. Ex.* 62.

(*a*) *Com. Dig. Arbitrament* (D 3); *1 Roll. Abr.* 242 (A); *3 Vin. Abr.* 40. (A); *1 Bac. Abr.* 203. *Arbitrament.* (A.)

(*b*) A certain and fixed debt is not discharged by an award; for the end and design of an arbitration is to reduce uncertain debts and duties to a certainty; and to award a man a certain debt, is to give him no more, nor do any greater thing for him than was done before, for now he can have but an action, and that he might have before; and to give him less than he had before is to do him a manifest injustice, which the arbitrator cannot do. *1 Roll. Abr.* 264. (R), pl 2; *3 Vin. Abr.* 101; *1 Bac. Abr.* 203. But if £20 be due to a man, and he and another submit all personal things, &c. to arbitration, there, if the arbitrator award £10, it is a good award, because there were other uncertain things submitted, and the arbitrator had consideration of

Some matters concerning the commonwealth are not arbitrable; as criminal offences, felonies, and the like, concerning crimes.

In the submission, three things are to be regarded :

[109] *First,* That it be made in writing with the covenants of the parties; or bonds subsequent, sufficient to bind them, their heirs, executors, administrators and assigns (c), to perform the award which shall be thereupon made; that both the arbitrators may know their power; and the parties revoke not their power; for all is void which is not contained in the submission, or necessarily depending thereupon; and the arbitrator's labour is lost, if they want means to compel the same to be executed.

Secondly. That there be power given to them sufficient to do all things necessary for terminating the controversies; as to appoint times and places for their meetings, to examine and decide the matters submitted, and to bring the parties with their proofs, evidences, and witnesses, thicker together before them, and to punish the parties defective by means of their award, and to expound and correct such doubtful sentences and questions, as may arise upon their award, afterwards inconvenient to either parties, contrary to equity, and the arbitrator's real meaning; which inconveniences were not before seen by them, at the making of the award. *Temporis filia veritas.* (d)

Thirdly, Convenient time and place are to be limited, for the yielding up, their award to the parties, or to their assigns.

[By stat. 9 & 10. Will. 3. c. 15, copied almost verbatim into the act of Assembly of Virginia, of 1789, all

all, and set one against the other in making the award, so as perhaps the debt of £20 was diminished in consideration of some trespasses done by him to the other party. *Allen* 52; *Godfrey v. Godfrey*, 2 Mod. 303; 1 Bac. Abr. 203; 1 Roll Abr. 264. (R), pl. 3; 3 Vin. 102, pl. 3; *Kyd on Awards*, 53, 54, 2d edit

(c) *Com. Dig. Arbitrament* (D 1); 1 Bac. Abr. 204. (D).

(d) *Truth is the daughter of time.*

merchants and others desiring to end any controversy, (for which there is no remedy, but by personal action or suit in equity) by arbitration, may agree that their submission shall be made a rule of court; and the same shall be made a rule accordingly; and the parties shall submit to and finally be concluded by such arbitrament. See 13 Hen. Stat. at L. 63.]

† *Vinyor* brought debt against *Wild* upon a bond of twenty pounds of arbitration, in which case three points were resolved; first, that though *Wild* was bound in an obligation to stand to, abide, observe, &c. the rule, &c. arbitrament, &c. yet he might countermand it; for a man may not by his own deed raise such an authority, power or warrant not countermandable; as if I make a letter of attorney to make livery, or sue an action in my name, or assign auditors to take an account, or make a factor, or submit myself to an arbitrament, though they are by express words irrevocable, yet they may be revoked. So if I make my last will and testament irrevocable, yet I may revoke it; for my act, or my words cannot alter the law, and make that irrevocable which is in its own nature revocable; whether it be by bond or otherwise that the submission is made, the authority of the arbitrator may be revoked or countermanded: But then in the one case he forfeits his bond, though in the other he loseth nothing; for *ex nudo*, &c. 2. It is not material to the plaintiff to aver, that the arbitrator had notice of the countermand, for it is implied in the words *revocavit et abrogavit omnem autoritatem*, &c. (e) for *sans* notice it is no revocation or abrogation of the authority; and therefore if there was not notice, the defendant might join issue *quod non revocavit*, &c. and if there was not notice it shall be found for the defendant, &c. 3. It was resolved, that by this countermand or revocation of the power of the arbitrator, the obligee shall take advantage of the obligation; for two causes, first, because the

(e) That he revoked and abrogated all authority, &c.

obligor hath broken the words of the condition, which are, *that he should stand to and abide, &c. the rule, order, &c.* and when he countermands the authority of the arbitrator *he doth not stand to and abide, &c.* which words were put in the condition with intent that no countermand should be, but that it should be finished by the arbitrator, and that his power should endure till he had made an award. And when the award is made, then are these words to compel the parties to perform the same, viz. observe, perform, fulfil, and keep the rule, order, &c. Secondly, the other reason is, that the obligor, by his own act, hath made the condition of his bond, which was made to save him from the penalty thereof, impossible to be performed by him. *Vinyor's Case, 8 Co. 80, 81, 82.*

[110] *Six things to be regarded in an arbitrament.*

1. That it be made, according to the very submission touching the things submitted, and every other circumstance.
2. That it be a final end of all controversies submitted.
3. That it appoint either party, to give, or do, unto the other, something beneficial, in appearance at least.
4. That the performance be honest and possible.
5. That there be means by the law by which either party may attain what is thereby awarded to him.
6. That every party have a part of the award, delivered to him.

For if it fail in any of these points, the whole arbitrament is void, and of no effect.

Examples thereof.

1. An award that the parties shall obey the arbitrament of *A. M.* is void, for power cannot be assigned.
An award that any of the parties shall be bound or do

any other act by the advice of the arbitrator, is not good, except it be in the submission so; but that the parties shall be bound, or make assurance by the advice of counsel, is good.

[111]

2. An award, that the parties shall be nonsuited, is not good; because it is no final end, for the party may begin again: That the party do withdraw his suit, is good.

If the submission be of many things, and the award only of some of them, yet is the award good for that part; as if the submission be of all actions real and personal, and the award be of personal only, or if it be only *de possessione*. (f)

3. If two submit themselves to the arbitrament of all trespasses, and it is awarded that the one shall make amends to the other, and nothing is awarded for the other's benefit; this award is void.

So, if it were that one of them should go quit against the other, if the submission were not by bond; for an award must be final, obligatory, and satisfactory, to both parties.

An award, that either party shall release to the other all actions, and that because one has trespassed more than the other, he shall pay money to the first, is good.

In debt or trespass for goods taken, that the defendant shall retain part, and the plaintiff to have the rest, is not good.

[112]

4. An award that one of the parties shall do an act to a stranger, the award is void, if the parties be not bound.

Or if it be that he shall cause a stranger to enfeoff, or be bound to the other party, because he has no means to compel the stranger.

5. An award is void if it be neither executed, or there are no means by law for the execution thereof: As if it should be awarded, that one should pay the other ten pounds, this is good; for he may recover the same by an

(f) *Of the possession.*

action of debt. But if it were awarded, the one should deliver to the other an acre of land, or do such like act executory, it were void, if it be not delivered straight way, or provision made by bond or otherwise, to compel the payment thereof according to the award, if the submission be not by specialty.

6 Indentures of arbitrament, must be made of so many parts as there are parties, that every person may have a part.

Arbitramentum æquum tribuit cuique suum. (g)

[113] An award is commonly made by laymen, and shall be taken according to their intent, and not in so precise a form as grants or pleadings, but as verdicts; yet the substance of the matter ought to appear either by express words, or by words equivalent, or by those which amount thereto.

But it is advisable that awards be drawn by some person who is skilful, to avoid controversies, which otherwise might arise about the same.

AGREEMENT.

An agreement to terminate a difference, is made between the parties themselves: There must be a satisfaction made to either party immediately, or a remedy given for the recompense agreed on, or else it is but an endeavour to agree. (h)

Tender of money without payment, or agreement to pay money at a day to come, is not any satisfaction before the day be come, and the money be paid. It cannot be pleaded in bar, in an action of trespass; for as one party has no

(g) *Arbitrament awards to each person his right.*

(h) [By the stat. of frauds, 29 Car. 2. c. 3 every agreement, not to be performed within a year, must be in writing, and signed by the parties. Same law enacted in Virginia, in 1785, See 12 Hen. Stat. at L. 160; 1 Rev. Code of 1819, p. 372 § 1.]

means to compel the other to pay the money, so he may refuse it at the day, if he will. It is otherwise in an arbitration: But money paid at a day, before the action is brought, is a good plea.

FINIS.

INDEX

TO

NOY'S MAXIMS.

	<i>Page</i>		<i>Page</i>
ACCESSARY.		ADMINISTRATION	
None in trespass	151	Of husband, on wife's estate	38 <i>note (b)</i>
ACQUITTANCE		Belongs of right to husband	39
By acquittance of the last payments, all other arrearages are discharged	47	ADMINISTRATORS	
Acquittance a good bar, though nothing paid	137	Definition of	164
ACTIONS.		When and how appointed	164
Where they die with the person	18, 19	Power and charge, equal to executors	164
What <i>personal actions</i> die, what not	19 <i>note (f)</i>	Whether, and in what acts they must all join	164
No actions arise from a naked contract	21	Actions against	165
Or; on a promise for a thing past	21	Administration during minority of executors	165
But it lies on a bond or obligation without proving a consideration	21	AGENCY	
Action must be brought on highest security	22	Of wife, servant, attorney, how far binding on principal	151, 152
Action personally suspended against one, a discharge to all	33	AGES	
Actions by and against husband and wife	35	Diversities of, in men,	87, <i>and note (a)</i>
Release of all actions, effect of	120, 121 <i>note (c)</i>	In women	87
Actions for legacies, in what courts	155, <i>note (b)</i>	AGREEMENTS	
ACT OF GOD.		In writing can only be discharged by writing	15, 16
Excuses, from necessity	29	Otherwise in equity,	15, 16, <i>note (a)</i>
Objections to the expression	29	Matters in writing determine an agreement by words	21
<i>note (f)</i>		Rules as to the validity of agreements, and the alteration of the property	144, 147 & <i>notes</i>
ADDITION.		Agreements to terminate a difference, legal effect of	174
If no addition to a name, the elder shall be intended	98	ALIEN	
<i>Noy's Maxims.</i>	23	Wife of, not dowerable	23

<i>Page</i>	<i>Page</i>
AMBASSADORS,	
How far inviolable, from necessity of obedience	29
ANTECEDENT.	
Rule of construction, as to rela- tive and antecedent	4
APPORTIONMENT	
Of rent, when	89
APPURTEANCES.	
What passes, by this word	111
ARBITRAMENT.	
What things are arbitrable, what not	169
Three things to be regarded in the submission	170
Submission may be made a rule of court	170
May be countermanded	171
But the obligation forfeited there- by	171
Six things to be regarded in an ar- bitrament	172
Examples thereof	172
When an award good, when not	173
Construction of an award	174
Agreement, to terminate a differ- ence	174
ASSIGNEES	
Of lands, estates for life, term of years, &c.	114, 115
Liability of assignee for rent	115, 142
Remedy by distress, and by action	115, and notes
Privileges of assignees	117
Assignees in law and in fact	117
The latter preferred	117, note (x)
When assignees bound by cove- nants, when not	142
ASSIGNMENT.	
(See <i>Assignees.</i>)	
Things in action may be assigned	117
But not a condition	117
Nor office of executor or admin- istrator	117
ASSUMPSIT	
Will not lie, if there be a <i>deed</i> , evidencing the same contract	22
ATTORNMENT,	
Definition of, and how made	109
Effect of statutes on this doctrine	109, note (a)
ATTORNEY,	
Power of, to be strictly pursued	27
Must act in name of his princi- pal	106
Proper mode of executing instru- ments	106, note (i)
Power of, though irrevocable, on the face of the instrument, may be revoked	171
AUTHORITY.	
Matter of authority construed lib- erally	26, 27
AWARDS.	
(See <i>Arbitrament.</i>)	
When good, when not	173
Construction of awards	174
BAILMENTS.	
Liability of borrower	148
Of deposits; finder of goods; car- riers; innkeeper; ostler; sheep- herd	149, 150, and notes
BARGAIN AND SALE	
Of lands, <i>with all trees</i> , if lands do not pass, because deed not re- corded, neither do the trees	23
Bargain and Sale, without consid- eration, nothing passes	27
By husband and wife	37
Bargains and sales, how executed and inrolled	102
Within what time	102
How date computed,	102, note (b)
Rules as to bargains and sales of personal chattels, and the alter- ation of the property	144, 147, and notes
BARON AND FEME.	
(See <i>Husband and Wife.</i>)	
BASTARDS,	
Incapacities of.	158, note
When a limitation to, in a will, good, when not	Ibid.
BEASTS.	
Liability of owner, for injuries done by his beasts	151
BEQUEST.	
Distinction between <i>devise</i> and <i>be- quest</i>	155, note (a)

Page	Page
BONDS,	
Action lies on, without proving a consideration	21
Bonds with conditions, against law are void	123
Specification	123, note (a)
VARIOUS INSTANCES:	
1. Bonds restraining trade	123, note
2. Bonds of resignation	125, note
3. Marriage brocade bonds	126, note
4. In restraint of marriage	128, note
5. To a kept mistress	128, note
6. Bonds for gaming debts	134, note
7. Of relief at law and in equity, on an illegal transaction, where the claimant is particeps criminis	134, note
Executors bound, in bonds and covenants, though not named	140, note (f)
BORROWING.	
Liability of borrower	148
When responsible for accidents	148, note (a)
CARRIERS,	
Liability of,	149, and notes
CHARITY.	
The law favours works of charity	39
CHATTELS PERSONAL.	
What survive to wife	71, note (f)
Definition of chattels personal	96
How personal chattels may be bargained for, sold, exchanged, lent, and restored	144
Limitation of, after estate for life	159
Whether he in remainder must give security	159, note (f)
CHATTELS REAL.	
What survive to wife	71
Definition of chattels real	95
CHOSES IN ACTION.	
Of what they consist	71, note (f)
Marriage a qualified gift to husband of wife's choses in action	Ibid.
Modern determinations on this subject	Ibid.
COAL MINES.	
Lessee opening, on land demised to him and assigning his term, assignee cannot work the mines	13
If mines have been used, tenant may work them	111
If not, to open them, is waste	111
COMMON,	
Definition of,	93
Surcharging common	93
COMMON LAW,	
Jurisdiction of, has precedence of a franchise	23
COMMONWEALTH.	
Necessity does not excuse acts against the commonwealth	30
The law favours things for the good of the commonwealth	32
CONDITION.	
Conditions are express or implied	122
And are in deed, or in law	122
Effect of grant of an estate, upon a condition against law	122
Bonds with conditions against law are void	123
Specification	123, note (a)
1. Bonds restraining trade	123, note
2. Bonds of resignation	125, note
3. Marriage brocade bonds	126, note
4. Bonds in restraint of marriage	128, note
5. To a kept mistress	128, note
6. Bonds for gaming debts	134, note
7. Of relief at law, and in equity, on an illegal transaction where the claimant is particeps criminis	134, note
Conditions repugnant	123
Conditions impossible	124
Pleading a condition, to defeat a freehold or a chattel	125
Proviso,—a condition or qualification	127
Who may perform a condition	128
Difference between performance of a condition by parties and a stranger	130
When obligor discharged, by act of obligee, and by act of God	131
When first act is to be performed by obligee, and he fails to do it	132
Where no time is set, when it is to be performed	133
Word immediately, effect of	134
When obligor must seek obligee	135
But tender of rent, on the land, is good	135

<i>Page</i>	<i>Page</i>		
When to the executor	136	With or without deed	98
At what time of day, tender may be made	136	In modern conveyances, covenants have superseded warranties	139;
CONFIRMATION,		<i>note (a)</i> 140, <i>note (f)</i>	
Definition of.	121	COVENANTS	
How it operates generally	121	In modern conveyances, have su- perseded warranties	139, <i>note (a)</i>
Its operation upon estates void and voidable	121, <i>note (a)</i>	140, <i>note (f)</i>	
What the deed should express	122	Usual covenants, on sales & leases	143, <i>note (f)</i>
CONSIDERATION.		Executors & administrators bound by every covenant, and in a bond, though not named	140, <i>note (f)</i>
Natural love or affection a good consideration to raise an use	23,	Covenants are express or implied	141
	24, 27	What words create a covenant in law	141, <i>note (a)</i>
But it must be to a child, or near relation, or marriage	23, <i>note (bb)</i> , 27 <i>note (b)</i>	How covenants express and im- plied are construed	141, <i>note (a)</i>
A promise, without consideration, cannot be enforced	27	Express covenant to pay the rent, the tenant bound, notwithstanding the destruction of the demis- ed premises	141, <i>note (a)</i>
Nor will it raise an use	27	So, on a covenant to repair	<i>Ibid.</i>
Bargain and sale, without consid- eration, nothing passes	28	Implied covenants confined to land	<i>Ibid.</i>
Valuable and legal consideration essential to the validity of a con- tract	144, <i>note (a)</i> , 145 <i>note (d)</i>	When assignee bound, when not	142
CONSTRUCTION.		Covenants, when qualified	143, <i>and</i> <i>notes</i>
The law expounds with equity and moderation	42	CURTESY	
Rules in construction of deeds,	43,	In trust estates and mortgages	9, <i>note (d)</i> , 70
Of statutes	44, 45	CUSTOMS.	
CONTINUAL CLAIM,		Custom is another law	52
Definition of,	84	Customs are general or special	52
Fear of person, but not of <i>property</i> , will excuse making	25	General customs, is common law	52
Equal to entry, where entry pre- vented, from necessity	29	Special customs, what	53
CONTRACTS		DAMAGE FEASANT,	
Must be dissolved by matter of as high a nature as made	16	Distress for, in the night, lawful	31, 14
Definition of a contract	144	DATE	
Rules as to the validity of con- tracts, and the alteration of the property	144, 145, 146, 147, <i>and</i> <i>notes</i>	Of deeds, how ascertained	100
How far contracts of others bind us	151, 152	Time of recording, how compu- ted	102
CONVEYANCES.		DEBTS.	
Who may convey, and what may be conveyed	97	Dignity of debts	163
Void and voidable	97	Of every kind, to be paid before legacies	163, <i>note (e)</i>
To whom conveyances may be made	98	Executor may pay debts with his own money, and retain so much of testator's goods	163
		What words will create a debt, so as to charge executor	163
		But not the heir, unless named	163

<i>Page</i>	<i>Page</i>
DEEDS.	
Things which cannot be granted without deed, cannot be surrendered without deed	16
Assumpsit will not lie, if there be a deed evidencing the same contract	22
Idiot, <i>non compos mentis</i> , or lunatic cannot avoid their own deed	25
Menace of a person, but not of goods, will avoid a deed	25
Writing, sealing and delivery, essential to a deed	99
Properties of a deed	99
Sealing, delivery	100
Delivery as a deed, or escrow	101
Deed untruly read to an illiterate man	101
Or, to a blind man	101, note (m)
Two kinds of deeds, deed poll, and indenture	101
Bargain and sale, how executed and inrolled	102
Within what time	102
Date, how computed	102, note (b)
DELIVERY	
Deed takes effect by	100
DEMANDS.	
Release of all Demands, effect of and note (b)	121
Demand of rent must be made on the land	138
How the demand must be made	138
DESCENTS.	
Rule in as between heirs on the part of the father, and of the mother	9
Blackstone's table of descents controverted	10 note (e)
Descents which take away entries	12, 83
If, at all times, from disseisin to descent cast, the claimant be not privileged; the descent binds	12
So, if at any time, he might have entered	12
Persons privileged, on account of legal disabilities	24
How lands shall descend	57
Law of descents altered in Virginia	57, note (a)
How Gavelkind lands descend	59
DEVISE	
When a devise takes effect	155
Distinction between <i>devise</i> and <i>bequest</i>	155, note (a)
A legatee cannot enter into a term for years, or take a chattel personal, but by assent of the executor	155
In what court he may sue for it	155, and note (b)
But a devisee may enter into freehold or inheritance	156
Devisees are purchasers	156
When, "heir", a name of purchase in devise	165
A reversion passes, by a devise of lands	165
Whether a lease for years will pass by devise of lands	156 and note (c)
By a devise of <i>goods</i> , what passes	157
Or, of moveables	157
Or, of immoveables	157
Devise to an infant in the mother's womb	157
Difference between the devise of the property and the occupation of it	158
Devise of a chattel in remainder	158
So, of a chattel for a limited period	158
Whether he in remainder must give security	159, note (f)
Devise of leaseshold lands	159
Devise to wife, by implication	159
Fee-simple may pass by devise, without the word "heirs"	160
So, fee-tail created by will, without the word "body"	160
Difference between <i>authority</i> to, and an <i>interest</i> in, executors to sell lands	160, and note
When one executor may sell	160
Of emblements, after a recovery by superior title	160
Devise of <i>all his goods and chattels</i> , what passes	160
DEVISEE.	
Distinction between <i>devisee</i> and <i>legatee</i>	155, note (a)
DISABILITIES,	
Persons labouring under, favoured by law	24, 25
DISCONTINUANCE.	
Definition of	82
What is not a discontinuance	82
DISSEISIN.	
Of rent, what	92

<i>Page</i>	<i>Page</i>
DISTRESS.	ESCAPE.
Damage-feasants in the night, lawful	Breaking jail, from necessity, not an escape
31	28
Cannot be made of things in a place, by authority of law	ESCROW,
32	What, how to be delivered 101 note (k)
Nor of instruments of trade or profession	EXCEPTIONS,
32	In leases, effect of
Nor of things in the custody of the law	114
For what, when and where a man may distrain,	EXCHANGE.
89, 90, 91	Doctrine of exchange of lands 107, and notes
What may not be distrained	Of personal property, rules concerning
90	147
Distress, after end of term	
116	
DIVORCE.	EXECUTORS.
What goods the woman shall have on a divorce	Power of, before probate
5	7
What interest in her lands aliened	Recovering a judgment and dying intestate
5, note (e)	17
DOWER.	Who may sue out execution
Of what a woman shall be endowed	Assenting to legacy upon condition, when legatee takes absolutely
70 to 74	17
In trust estates and mortgages	Distinction between interest and authority, in devise of lands to
70, to 79, note (d)	26
Provision, until dower assigned	Executors bound by covenants and in bonds, though not named
70, 71	140 note (f)
Cannot be assigned reserving rent	Must be named in a will of goods; otherwise of lands
17	154
Wife of alien not entitled to	If no executor named
25	154
By whom assigned; how demanded, damages	Difference between authority and interest as to sale of lands
71	160
Her interest in her chattels real, and bonds	When one executor may sell
71	160
Bar of dower	Definition of an executor
73, 74 and notes	161
Dower in Gavelkind lands	Two executors named, and one refusing to qualify
74	161
Jointure in lieu of dower	When he may qualify
74	161
DRUNKARDS	All must be named in actions, as plaintiffs
Not excused, in case of felony	161
31	
EARNEST.	When he may renounce 161, note (a)
Its effect, in binding a bargain	The one not administering, not charged
145 and note (c)	161
EMBLEMMENTS,	After acting as executor, he cannot refuse
After a recovery, by superior title, cannot be gathered	But he may do acts of charity, as to provide for the funeral, feed the cattle, &c.
160	161
ENTRY,	Actions must be brought in name of all, though some refuse
Into lands, effect of	161
137	
When a demand necessary	But only against those who qualify
138	161
Effect of distress, and acceptance of rent	Executor of executor, is executor to first testator
138	162
Entry into part, good	But only where first executor proves the will 162, note (b)
138	
ERROR.	When administration with, the will announced must be granted
Common error becomes right	<i>Ibid.</i>
32	

<i>Page</i>		<i>Page</i>
Power of executors, before probate	162	FRAUD.
What property executor shall have	162	The law abhors fraud
For what duties of testator, the executor chargeable	163	FREEDOM.
For wasting goods of testator, liable out of his own	163	A villain set free for an hour, will be always free
Dignity of debts	163	FUNERAL EXPENSES,
Debts to be paid before legacies	163	Payment of, being matter of necessity, does not amount to an administration
Executor may pay debts, with his own money, and retain so much of testator's goods	163	GAMING.
What words will create a debt, so as to charge the executor	163	Bonds, for gaming debts, void
Infants, executors, administrators during minority	165	GAVELKIND.
Such infant executor may make an acquittance	165	How Gavelkind lands descend
		Tenant by the courtesy of Kent in
		Dower in
		Guardianship in
		Capacities of infants in
		GRAMMAR.
EXTINGUISHMENT		Rules of, as to the relative and antecedent, applied to legal constructions
Of rent, what	89, 113	GRANTS.
		Must be certain
		What may be granted
		In what manner
		Construction of grants
		GUARDIAN
		Infant must answer by
		GUARDIANSHIP
		Who entitled to
		A personal trust, and not assignable
		5, 26, 86, 87 5, note (b)
		HEIR.
		In covenants concerning the inheritance, the heir shall have an action, though not named
		142, note (b)
		When "heir" a name of purchase
		Not charged for debt of ancestor, unless named
		156 163
		Lands, not disposed of by will, descend to the heir at law
		166 166
		What fixtures pass with the land
		The law relaxed, in this particular
		166, note (d)
		How far charged for debts of his ancestor
		168, and note (g)
		FIXTURES,
What tenant may remove	81, note (c)	
The law relaxed, in favour of tenants	166, note (d)	

<i>Page</i>	<i>Page</i>
HUSBAND AND WIFE.	
When husband liable for wife's debts, when not	6, 35, 39
Wife's term leased by husband	17
Husband may take his wife from adulterer, with the clothes he put on her	23
Wife not punishable for entertaining her husband, guilty of treason	24
Nor for waste, during the marriage	24
Felony committed by husband and wife, the law intends it the act of the husband	29
But not in case of treason	30
Husband and wife are one person	33
Consequences of this maxim	33 <i>et seq.</i>
They cannot sue one another, (at law) nor make a grant one to the other	33
But the husband may give to a trustee to her use, &c.	33 <i>note (a)</i>
Woman marrying with obligor	33
Bond given before marriage to intended wife, conditioned to leave her certain sum at her death	33 <i>note (c)</i>
Joint estates to	34
Devise to wife	35
Liability of husband for her contracts	35
For her debts before marriage	35
Joinder in action	35
Trespasses by wife, slander by and against	35
Injuries to person of wife, by others	36
By her husband; security for the peace	36
His interest in her personal chattels, in possession	36, 38
In her real estate; how it must be pleaded	36, <i>note (f)</i>
His interest in her things in action	36, 38
When they survive to the wife	36, 38
Husband, as administrator, may recover them	38 <i>note (b)</i>
Obligation to wife, falling due, during coverture	36
Her term for years, devised or charged by husband, survives to her, discharged	37
But he may grant it absolutely	37 <i>note (g)</i>
Bargain and sale by husband and wife	37
IDIOTS	
Favoured by law	24
Cannot avoid their own deed, but not punishable for felony or murder	25
IMPOSSIBILITIES	
The law compels no man to do	41
INCIDENTS	
Cannot be severed	18

<i>Page</i>	<i>Page</i>
Reversion granted, the rent passes 18	
INFANTS.	
Wills made by 13, 154	
Favoured by law 24	
Diversities of ages in 87, 88	
Must sue by next friend and answer by guardian 88	
Devise to infants <i>en ventre sa mere</i>, or the mother's womb 157, <i>and note (e)</i>	
Capacities of such infants 157, <i>note (e)</i>	
Infant executor, when he may act 165	
INN-KEEPER,	
Liability of 150, <i>and notes</i>	
INTENDMENT.	
Common intendment shall be taken to be the intent of the parties 50	
Intendment of parties ordered according to law 50	
INTEREST.	
Matter of interest construed liberally 26	
JAIL	
Breaking, from necessity, no escape 28	
JOINT-TENANTS.	
When joint-tenant shall have the reversion by survivorship, but not the rent 17	
Estate in joint-tenancy, what, how severed, right of survivorship 63	
Exception as to joint-merchants 63, <i>note (a)</i>	
Partition between 65	
JOINTURE.	
Not good to bar dower, unless takes effect immediately after death of husband 15	
Jointure in lieu of dower 74, <i>and notes</i>	
JURISDICTION.	
Common law has precedence of a franchise 23	
JUSTIFIABLE HOMICIDE,	
From necessity 28	
Noy's Maxims.	24
So to kill a person, who attempts to rob, or commit a rape 31	
KEPT MISTRESS,	
Bonds to, how considered 128, <i>note</i>	
LANDS,	
Pass by will in writing, but not nuncupative 153, 154	
Origin of conveying lands by will 154, <i>note (c)</i>	
Whether by a devise of lands, a lease for years passes 155, <i>note (c)</i>	
Powers of executors, as to sale of lands 160	
Difference between authority and interest 160, <i>and notes</i>	
LAW.	
Of what the laws of England consist 1	
What the law favours 24, 25, 28, 32, 33, 39	
Necessity dispenses with the letter of the law 29	
Things in a place, by authority of law, not distrainable 32	
Nor things in the custody of the law 33	
The law favours charity, &c. and abhors fraud, &c 39	
Construction of law 42, 43, 44, 45	
The construction may be altered by special agreement of the parties 49	
LEASES.	
Two leases of the same land, on the same day 14	
Though the first be surrendered or forfeited, yet the second not good, because the lessor had nothing but the reversion 14	
But lands let, and afterwards purchased, pass to lessee 15	
This an exception to the rule 15, <i>note (d)</i>	
Leases for years should have a time certain to begin 27	
Leases for years, how made 110	
From year to year 111	
When said to commence 111	
Effect of word "appurtenances" 111	
Coal mines, quarries, &c. on land 111	
When they may be worked, when not 111	

<i>Page</i>	<i>Page</i>
Lands let, without impeachment of waste	111
Interest of tenant, in the trees	111, 112
Interest of lessor, if trees severed	112
Lease by husband of wife's lands	112, 113
Right of tenant to remove fixtures	113
Extinguishment of rent	113
Reservations and exceptions	114
Whether by a devise of <i>lands</i> , a lease for years passes	156, note (c)
LEGACY	
Assented to, upon condition, when legatee may take absolutely	17
Assent of executor necessary to	155
In what courts, legatee may sue for	155, note (b)
Legacy to wife to be paid to hus- band	156, note (b)
But not without a settlement	<i>Ibid.</i>
Unless wife consent	<i>Ibid.</i>
Or, is the subject of a foreign state, where the law is different	<i>Ibid.</i>
Debts of every kind to be paid be- fore legacies	163 note (e)
LEGATEE.	
Distinction between <i>devisee</i> and <i>le- gatee</i>	155, note (a)
LENDING & RESTORING	
Legal obligations as to	148
LIBERTIES	
Definition of	94
LIFE,	
Estates for, incidents to	75, 76
LIMITATION.	
Persons labouring under legal dis- abilities, exempted from sta- tute of	25
LIVERY OF SEISIN.	
In what conveyances essential	104
How made	104
LOGIC.	
Rules of, applied to law	5, 23
LUNATICS.	
Cannot avoid their own deed; but not punishable for felony or mur- der	25
MAD-MEN,	
Favoured by law	24
MANSLAUGHTER	
Excused, in case of felony	31
By pardon of murder, manslaugh- ter is pardoned	22
MARRIAGE.	
Marriage brocade-bonds, how considered at law, and in equity	126 <small>note</small>
Bonds, in restraint of marriage	128 <small>note</small>
MARRIED WOMEN.	
(See <i>Husband and Wife</i> .)	
Wills made by	13, 154
If made before marriage, and she survive her husband	13 note (bb)
Favoured by law	24
MASTER & SERVANT.	
Liability of master for acts of his servant	151, 152
MERCHANTS.	
Joint-merchants excepted from rule of survivorship, as between joint-tenants,	68 note (a)
MISDEMEANORS, how far other's bind us	151
MONTHS.	
How computed, in recording deeds	102 note (b)
MORTGAGEE.	
Legal estate of mortgagee in fee, protected from his judgments and incumbrances	9, note (d)
And from dower and courtesy	<i>Ibid.</i>
Dower in trust estate	70
Personal representatives entitled to money secured by mortgage	117 note (v)
MURDER.	
The first motive principally re- garded, in constituting	11
By pardon of murder, manslaugh- ter is pardoned	22
NATURAL AFFECTION.	
Good consideration to raise an use; or to exempt from legal disabil- ties	23, 27, and notes
NECESSITY.	
The law favours things of nec- essity	28, 31

<i>Page</i>	<i>Page</i>
Various degrees of necessity, and what acts thereby justifiable 28, 29, 30	Cannot be altered by parol 15, note (a) Matters in writing determine an agreement by words 21
Necessity dispenses with the letter of a statute 29	
NEXT FRIEND,	PARTICEPS CRIMINIS,
Infant must sue by 88	How far relieved at law, and in equity 134, note
NON COMPOS MENTIS,	
Not punishable 8, 25	
Shall not avoid his own deed 25	
NON RESIDENTS,	PARTITION,
Favoured by law 24	Between parteners, joint-tenants, and tenants in common 61, note (e), 60, 64, 68
NOTICE TO QUIT,	
In tenancies for years, and at will 77, note (a)	
NUDUM PACTUM,	PARTNERSHIP.
No action arises from 21, 27	Right of survivorship, between joint-merchants, does not hold 63, note (a) How far between other partners <i>Ibid.</i>
NUISANCE,	
Master answerable for family 151	
NUNCUPATIVE	PAYMENT.
Will, definition of 153	Payment of part at the day, not a satisfaction 137
Pass chattels only, not lands 153, 154	But before the day, at the request of the obligee is 137
OBLIGATION.	So, acceptance of a collateral thing 137
(See <i>Bonds.</i>)	Acquittance a bar, though nothing paid 137
In writing, can only be discharged by writing 15	Who may direct application of payments 137
Otherwise in equity 15, 16, note (a)	When tender amounts to payment 137
Action on, without proving consideration 21	If no time limited, when payment to be made 137
Obligations, with conditions against law 123, note (a)	
PARAPHERNALIA,	PERSONAL ACTIONS.
Of the wife or widow 168	When they die with the person, when not 19, note (f)
Power of husband over 168, and note (i)	
How far privileged 168, note (i)	
Preferred to legacies <i>Ibid.</i>	
PARCENERS	PERSONAL PROPERTY.
Who, the properties of their estate 60, 61, 62	Limited in fee-tail, vests absolutely in first tenant in tail 56, note (a) 80, note (c)
Partition, how made 60, 61, note (e)	How personal property may be bargained for, sold, exchanged, lent, and restored 144
PAROL.	Limitation of, after estate for life 159
Obligation or agreement in writing, how discharged by parol 15, note (a)	Whether he in remainder must give security 159, note (f)
PHILOSOPHY.	
Maxims of law founded thereon 23	
PLEASURE.	
Matter of pleasure construed strictly 26	
POLITICAL	
Maxims founded on policy 27	

	<i>Page</i>		<i>Page</i>
POSSESSION.		REMAINDER.	
Right of, draws with it, right of property	23	Limited to A. the son of B., who has no such son, one of afterwards born, named A. remainder void	15
Difference between possession and seisin	55	Definition of remainder	79
PRISONERS,		When good, when not	80
Favoured by law	24	Created by will	80, note (b)
PROFIT.		Not of chattels personal	80
Matter of profit construed liberally	26	But personal property may be limited in tail	80, note (c)
PROMISE.		And will be the absolute property of first tenant in tail	<i>Ibid.</i>
For a thing past voidable	21	Personal property, limited in remainder after an estate for life	159
Without consideration, cannot raise an use, nor is a person bound to perform	27	Whether remainder-man must give security	159, note (f)
Rules as to validity of promises, and the alteration of the property	144, 147, and notes	REMITTER,	
PROSTITUTION.		What it is	84
Bonds, as the price of prostitution, how considered	128, note	RENTS.	
RAPE.		Pass with reversion, as incident	18
To kill a person attempting, justifiable	31	Different kinds of rents	88
RELATIVE.		How rents reserved	89
Rule of construction as to relative and antecedent	4	Apportionment and extinguishment	89, 113
RELEASES.		By grant of reversion, the rent passes	89
Definition of	119	Distress for rent, when, where and how	89, 90, 91
What estate in lands may be released	120	What may not be distrained	32, 90
Whether a release can be made upon condition	120	Disseisin of rents, what	93
How a release shall operate	120	Liability of assignees for rent	115, and notes
Release of all actions, effect of	120	Recovery of rent, after end of term	116
So, of all demands	121, and notes (b)	Tender of rent on the land, good	135
Release of a possibility	121, and note (b)	When to the executor	136
RELIGION.		At what hour of the day	136
Respect paid to it, by the laws of England	1, 2, 3	Distress for rent, bars entry	138
REMEDY.		When acceptance of rent a bar, when not	138
Must be taken on highest security, as on a <i>deed</i> , instead of <i>assumption</i> , for the same cause of action	22	Demand of rent, must be made on the land	138
RESERVATIONS.		How demand must be made	138
In leases, effect of	114	On express covenant to pay the rent, the tenant bound, notwithstanding the destruction of the demised premises,	141, note (a)
REVERSION.		When the heir shall have the rent, when the executor,	142, note (c)
Definition of the estate	80		

<i>Page</i>	<i>Page</i>
REVOCATION	SUNDAY,
Of powers of attorney, wills, &c. though made irrevocable	Profanation of, prohibited No day in law Legal proceedings on, void Exceptions
171	2 2 2, 3 3
ROBBERY.	SURRENDERS.
To kill a person attempting, justifiable	Definition of Who may surrender and to whom Surrenders are in <i>deed</i> or in <i>law</i> How surrenders shall be made
31	118 118 118 119
SALES.	SURVIVORSHIP,
Rules as to sales of personal chattels and the alteration of the property	Right of, between joint-tenants Exception as to joint-merchants <i>note (a)</i>
144, 147, and notes	63 63, <i>note (a)</i>
SEALING,	TENANT AT SUFFERANCE,
Essential to a deed	Who, and incidents to tenure
100	79
SECURITY.	TENANT AT WILL.
Whether remainder-man, of personal property, must give security	Incidents to that estate Courts, of late, have leaned a. against tenancies at will Notice to quit
150, note (<i>f</i>)	77 77 <i>Ibid.</i>
SE DEFENDENDO.	TENANT FOR LIFE.
From necessity	Incidents to that estate
28	75, 76
SEISIN.	TENANT FOR YEARS.
Difference between possession and seisin	Incidents to that estate Tenancy from year to year Notice to quit
55	76, 77 77, <i>note (a)</i> <i>Ibid.</i>
SERVANTS.	TENANTS IN COMMON.
Liability of master for acts of his servant	Effect of possession, of personal goods Tenancy in common, what How created Partition between
151, 152	26 66 66 <i>note (a)</i> 68
SETTLEMENT.	TENDER.
Legacy to wife, not to be paid to husband, without a settlement	If a man tender more money than he ought to pay, it is good enough Tender of rent on the land, good When to the executor At what hour of the day When tender a discharge
155, note (<i>b</i>)	22 135 136 136 137
Unless, by consent of wife 156 note (<i>b</i>)	
Or, the wife be a subject of a foreign state, where the law is different	
<i>Ibid.</i>	
SOCAGE	TENURES.
Tenure, what; its incidents	Ancient tenures Abolished in England, and never existed in America <i>notes</i>
86	85 85, <i>notes</i>
STATUTES,	
Are general or special	
Distinction between public and private acts	
Rules of evidence in relation to them	
Rules of construction of statutes	
STRANGERS,	
Favoured by law	
SUFFERANCE.	
Tenancy at, incidents to	
24	
79	

	<i>Page</i>	<i>Page</i>
TESTAMENTS.		
(See <i>Wills.</i>)		
Definition of a testament	153, note (a)	
THEOLOGY,		
Maxims and laws grounded on	1, 2, 3	
TRADE.		
Bonds, in restraint of trade, when good, when not	123, note	
TRESPASS.		
Who deemed trespassers from the beginning	8	
Trespass by command, or consent	151	
No accessories in	151	
TRUST.		
Matter of trust construed liberally	26	
Dower in trust estates	70	
Effect of uses restored in doctrine of trusts	105, 106	
TRUSTEE.		
Legal estate vested in trustee in fee, protected from his judgments and incumbencies	9, note (d)	
And from dower and curtesy	<i>Ibid</i>	
Dower in trust estates	70	
USES.		
Effect of statute of uses	104	
Introduction of trusts	104	
VILLAIN.		
A villain set free for an hour, will be always free	25	
WARD, MARRIAGE, AND RELIEF.		
Incidents of ancient tenures, but now abolished	85, and notes	
WARDSHIP.		
Who shall have it	5, 86, 87	
WARRANTY.		
Warranties are lineal, collateral and by disseisin	139	
Definition of each kind	139	
Warranty descends and follows the estate	139	
Superseded, in practise, by covenants	139 note (a) 140 note (f)	
Opinion of lord chancellor <i>Cooper</i>, as to collateral warranty	139, note (b)	
WASTE.		
No action lies, if thing wasted be repaired before action commenced	6	
Wife not chargeable for, during marriage	24	
What waste is, and for and against whom the action lies	81	
Mortgages in fee, restrained in equity	81 note (a)	
What fixtures tenant may remove	81, note (c)	
When waste to open coal mines, when not	111	
WAYS.		
Highways, private ways, distinction	93, 94	
WIDOW.		
What apparel, &c. she shall have after her husband's dea'h, not subject to his debts	168, 169, and notes	
WIFE.		
(See <i>Husband and Wife.</i>)		
WILLS.		
Made by infants and married women	13	
If made before marriage, and the wife survive the husband	13, note (bb)	
Of wills and testaments	153	
Wills are either written or nuncupative	153	
Definition of a nuncupative will	153	
Of a will in writing	153	
Lands pass by will in writing, and not by nuncupative wills	153, 154	
Origin of conveying lands by will	154, note (c)	
Of executors to a will	154	
Where no executor named	154	
Of wills by <i>feme covert</i>	154	
By infants	154	

<i>Page</i>	<i>Page</i>
Wills construed, according to the intent of the testator 154	But, in equity, may be <i>discharged</i> , though not <i>altered</i> , by parol 15, 16, <i>note (a)</i>
Of devises; distinction between <i>devises</i> and <i>bequests</i> 155, <i>note (a)</i>	Matters in writing determine an agreement by words 21
WRIT.	Writing essential to a deed 99
Defendant not bound to answer to any other matter than that contained in the writ 12	WRONG.
Writ erroneous, all proceedings void 18	No man can take advantage of his own wrong 40
WRITING.	YEARS.
Obligation or agreement in writing, can only be discharged by writing 15	Tenancy for, incidents to 76, 77 By construction, from tenancy at will 77, <i>note (a)</i> Notice to quit <i>Ibid.</i>

MAXIMS OF EQUITY,

COLLECTED FROM AND PROVED BY CASES,

OUT OF THE BOOKS OF THE BEST AUTHORITY

IN THE

HIGH COURT OF CHANCERY:

TO WHICH IS ADDED,

THE CASE OF THE EARL OF COVENTRY,

CONCERNING

THE DEFECTIVE EXECUTION OF POWERS;

LATELY ADJUDGED

IN THE HIGH COURT OF CHANCERY.

BY RICHARD FRANCIS,

OF THE MIDDLE TEMPLE, ESQ.

FIRST AMERICAN EDITION,

WITH REFERENCES TO MODERN AUTHORITIES,

BOTH BRITISH AND AMERICAN;

BY WILLIAM WALLER HENING,

COUNSELLOR AT LAW,

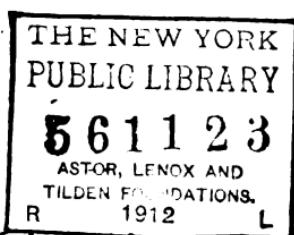
Author of the Virginia Justice, the Lawyer's Guide, &c. and Editor of the Statutes at Large of Virginia.

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1823.





District of Virginia, to wit:

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PREFACE

TO THE

FIRST AMERICAN EDITION.

FRANCIS'S MAXIMS have long held a distinguished rank among books of authority. They were first published in London, in 1728, in a thin folio volume; and although the *title pages* of 1739 and 1746, purport to be the *second* and *third editions*, yet, all the books are of the same impression.* In 1791, an octavo edition was published in Dublin, said, in the title page, to be the *third*; but, on comparison, it will be found to be printed, page for page, with the *first* London edition, and not only to have preserved all the errors of that edition, but to have added a considerable list of its own.

The editor of the present edition had prepared a copy for the press, before the publication of the *second American editions* of *Nonblanque's Equity*, and *Maddock's Chancery*, in which he had introduced a variety of matter, now to be found in those works. Although he is well aware of the correctness of the position, that every book should be as complete in itself, as possible, yet, as *these books* are presumed to be, and certainly *ought to be*, in the hands of every lawyer, he has deemed it sufficient to refer to them, where they treat of analogous subjects, and has expunged the correspondent matter from his own copy. Nothing is more easy than to make a large book, by *transcribing* from others, but nothing more difficult than to digest, and comprise, in a small compass, much useful information.

The matter introduced by the present editor is distinguished by being printed within crochets, thus []. Some few heads of doctrine are inserted in the Appendix, which could not be so fully treated of in the body of the work.

WILLIAM WALLER HENING.

Richmond, Nov. 13th, 1828.

* See Clarke's *Bibliotheca Legum*, or Law Catalogue, pa. 275.

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193 - 6. 1

TO THE READER.

[PREFIXED TO THE FIRST EDITION.]

It is a common objection against our courts of equity, that their power being absolute and extraordinary, their determinations must consequently be uncertain and precarious : That not being bound by any established rules or orders, nor circumscribed within the limits of positive laws, the unhappy suitor must enter into a court of equity with doubts and fears ; and if he has succeeded once, 'tis great chance but he may fail upon a second trial, either the humour of the judge, or the judge himself being changed ; and that this is true in fact, for that after the most solemn arguing of causes in all their niceties and circumstantialis, decrees made thereon have been frequently reversed by the same, and more often by succeeding chancellors. It is pity that *Englishmen*, who are so wont to boast of that invaluable blessing of freedom of property, should be heard to give themselves so broad a lye, as to say, that those courts of justice, where matters of property of the greatest value are daily determined, are arbitrary and precarious in their determinations. It is surely as consistent to say, that there is freedom of property in *Turkey* as well as in *England*, if the courts of justice, in which such properties are determined, are arbitrary in both places.

But, to this objection it may be answered in general, that where conscience is to direct the judge, that court cannot with any propriety of sense or speech, be said to be arbitrary. The judge knows and is sensible, that he sits there, not to dictate according to his will and pleasure, but to be guided by that infallible monitor within his own breast ; and surely he, who is bound to determine according to the original and eternal rules of justice, is no more arbitrary, than he that is bound to judge according to positive laws and statutes ; since the one has no more power to alter his own conscience, than the other has to change the law.

But, if it should then be asked, why are not all our judges to determine according to conscience ? And why are positive laws made, since it must be confessed, that many times the rigour of them is oppression and injustice ? To this it may be answered, that it were to be wished, that such men could be always found, that would judge according to conscience ; but, as the depravity of human nature is too apparent,

and the precepts of conscience too often disregarded, it is absolutely necessary to restrain judges to determine according to positive laws, and to annex even punishment to a breach of duty in determining contrary thereto.

Since then human providence is too weak, to make laws, which shall prove just in all cases ; and human nature is too corrupt to be left solely to the guidance and directions of conscience ; from hence will appear the excellency of our *English* polity, which has so wisely obviated the inconveniences arising from both these extremes, either of having no positive law at all, or too strictly adhering to it.

The judges in our courts of law, are bound by their oaths to observe the strict rules of law ; and therefore as upright judges, they must determine according to the known customs and statutes of the realm, although they are sensible, that even in so judging, they do an act of manifest injustice. On the other hand, the judge in a court of equity is bound not to suffer an act of injustice to prevail, tho' it be warranted by the forms and proceedings of law ; and therefore he moderates the rigour of several penalties ; relaxes the strict ties of unreasonable conditions ; aids against unavoidable losses, clandestine frauds, and the like ; and thence it is, that judgment shall be given in the same case against a man on one side of *Westminster-Hall*, and quite contrary for him on the other ; and yet both these agreeable to justice. The narrow-minded person, who labours under his great affection for form and order, cannot see the beauty of this contrivance, whereby justice is produced from such jarring jurisdictions ; and what neither strict form and order, or absolute latitude in judging, can separately produce, is effected by the excellent temperature of both together. This hath been judiciously compared to the mingling of two herbs, which of themselves are poison, but together make a wholesome medicine.

But, the great difference between a court of law and a court of equity, is this ; that the court of law rigidly adheres to its own established rules, be the injustice arising from thence, ever so apparent ; whereas the court of equity will not adhere to its own most established rules, if the least injustice arises from thence ; for the same reason, that enforces it to supersede the rules of law will enforce it to supersede its own rules also. But it cannot from thence be infer'd that it is governed by no rules at all : Besides, such an inference is easily to be disprov'd from matter of fact ; for it is certain that many of the rules of equity, have yet been preserved inviolable in all cases, because they have never been found to be unjust. I believe there is no man but would think himself as secure in laying out his money in taking an assignment of a mortgage in fee from an executor, as he would in taking a conveyance from an heir at law. So a third mortgagee without notice, by buying in the first, (if it be not worth the while of the second mortgagee to redeem him,) will think himself as secure of that estate, as he would of any other purchase from a tenant in tail under a sufficient common recovery. Many other inviolable rules of equity might be instanced to the same purpose ; so that from the whole we must conclude, that a man, if he be just and honest, may

as safely depend upon a rule of equity for a security of his property, as upon any rule of law; but if he intends fraud and deceit in his dealing, no rule of equity, no more than of law, can protect him in it.

Some of the principal of those rules of equity, are attempted to be shown in the following work. If the imperfectness of it should be objected; to that it is answered, that the intent was only to lead the young student into a proper method of his enquiries into this science of equity; and therefore he is at liberty, either to find out additional rules, or to add cases, under those he finds ready prepared for him. As to the design itself, (for the manner of executing it, is wholly left to the judicious reader,) I may make bold to say, I have one of the best human authorities for it; * who thought, that he could not confer so profitable an addition unto the science of the law, as by collecting the rules and grounds, dispersed throughout the body of the same laws; for hereby no small light will be given in new cases; wherein the authorities do square and vary, to confirm the law, and to make it received one way; and in cases where the law is cleared by authority, yet nevertheless to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them, for the decision of other cases more doubtful; so that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will by this new strength laid to the foundation, be somewhat the more settled and corrected; neither will the use hereof be only in deciding of doubts, and helping soundness of judgment, but further in gracing of argument, in correcting unprofitable subtlety, and reducing the same to a more sound and substantial sense of law; in reclaiming vulgar errors, and generally the amendment in some measure of the very nature and complexion of the whole law; and therefore the conclusions of reason of this kind are worthily and aptly called by a great civilian, *legum leges*, laws of laws, for that many *placita legum*, that is, particular and positive learnings of laws, do easily decline from a good temper of justice, if they be not rectified and governed by such rules.

* Bacon's preface to the *Elements of the Common Law*.

A LIST

OF THE FOLLOWING

M A X I M S.

1. <i>He that will have equity done to him, must do it to the same person,</i>	pa. 1
2. <i>He that hath committed iniquity, shall not have equity,</i>	7
3. <i>Equality is equity,</i>	11
4. <i>It is equity that should make satisfaction, which received the benefit,</i>	23
5. <i>It is equity that should have satisfaction, which sustained the loss,</i>	25
6. <i>Equity suffers not a right to be without a remedy,</i>	29
7. <i>Equity relieves against accidents,</i>	32
8. <i>Equity prevents mischief,</i>	35
9. <i>Equity prevents multiplicity of suits,</i>	42
10. <i>Equity regards length of time,</i>	45
11. <i>Equity will not suffer a double satisfaction to be taken,</i>	48
12. <i>Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made,</i>	52
13. <i>Equity regards not the circumstance, but the substance of the act,</i>	62
14. <i>Where equity is equal, the law must prevail,</i>	72

MAXIMS OF EQUITY.

MAXIM I.

He that will have equity done to him, (a) must do it to the same person.

1. The plaintiff mortgaged his estate to the defendant, and (b) afterwards the (c) defendant advanced and lent more money to the (d) plaintiff on his bond; the plaintiff brought his bill to redeem: the defendant insisted to have the bond-debt, as well as the mortgage-money paid him.
Per Cur.: Although there is no special agreement, that the land should stand as a security for the bond-debt; yet the mortgagor shall not redeem without paying both.
1 Vern. 244; S. P. 3 Salk. 84; (e) and in case the heir is

[2]

(a) This is called a *rebutter* in equity. *Vide 2 Ch. Ca*, 194, 195.

(b) If the money due on the bond was lent first, and the mortgage made afterwards; yet there is the same equity for the mortgagee to have both debts paid him. 2 Ch. Rep. 247.

(c) The defendant need not be originally both mortgagee and bond-creditor; for if he lends the money on the bond, and hath the mortgage by assignment, there is the same equity for him to have both debts paid him. 2 Ch. Rep. 360.

(d) The act for which the defendant is to pray equity against the plaintiff, must be done to the plaintiff himself, (or to his representative, as appears afterwards,) for, if the mortgagor mortgage the equity of redemption, and the second mortgagee brings a bill to redeem, he shall not be obliged to pay the bond-debt, since the money was not lent to him. 3 Salk. 84. So where a lunatic, before he became such, made a mortgage of good part of his estate for 50*l.* the committee took up 3 or 400*l.* more upon it; the court declared, the mortgage should stand as a security for the 50*l.* only. 1 Vern. 262.

[(e) Modern cases, it is said, by *Mr. Powell*, have altered the law on this subject, and that the mortgagee cannot tack his bond in any case, but as against

Francis's Maxims.

2

bound in the bond, he must pay the bond-debt, as well as the mortgage-money, before he can redeem. 2 Ch. Ca. 164; S. P. 1 Vern. 245. And where there are two mortgages, and one is defective, if the (*f*) heir will redeem, he must take both. 1 Vern. 245; S. P. 2 Ch. Ca. 23.

[From these *early* decisions arose the *modern* doctrine of *tacking*, which has become a technical term; and as to which, see *Pow. on Mort.* 398; 1 *Madd. Chan.* 526, 527, and the cases there cited. See also, 6 *Munf.* 550.]

[A distinction exists between a bill to *redeem* and a bill to *foreclose*; for in the latter case, the mortgagee cannot insist on tacking his subsequent debt, as he may do on a bill for a redemption. 1 *Madd. Chan.* 525.]

2. If a mortgage be made as a counter-security for entering into a bond of 4000*l.*, and afterwards the mortgagor prevails upon the mortgagee, to enter into a further bond for 2000*l.*; although there is no agreement, that the mortgage shall stand as a counter-security for entering into the bond for the 2000*l.*, yet the heir of the mortgagor shall not redeem without paying that also. 1 Ch. Ca. 97.

3. The defendant purchased lands in his own name in trust for the plaintiff, and became engaged for other debts of the plaintiff; the bill was, to have the lands on payment of what the defendant paid for them; but the plaintiff could not have a decree, but must pay the one monies, as well as the other. 2 Ch. Ca. 87.

the heir, to prevent circuity of action; not even against the mortgagor or creditors. 1 *Pow. on Mort.* 398, 399. In note (3) to 1 Vern. 20, *Raiithby's ed.* it is said, "by the later cases, the mortgagee cannot tack a bond to his mortgage, as against the mortgagor or creditors, but only as against the heir of the mortgagor, or devisee, within the statute of fraudulent devises."]

(*f*) But he must be heir; for where tenant for life (remainder to his son in tail) mortgaged the lands, and the son after borrowed money of the mortgagee, and gave the same lands as a security; yet he was not decreed to redeem his father's mortgage, as well as his own; because he is a stranger to his father, and is all one as a stranger. 2 Ch. Ca. 23; which implies, that had he been heir, he must have redeemed both or none.

4. Two several estates were conveyed to the defendant, upon trust for payment of several and distinct debts; the plaintiff, heir at law, by his bill prayed an account upon both estates; but at the hearing, would have had his bill dismissed, as to one of the estates, and have the account taken for the other only; but it was decreed, that an entire account should be taken of both estates. 1 *Vern.* 29.

5. If the husband sues in the ecclesiastical court for a portion due to his wife, the court of chancery will order an injunction to stay proceedings there, 'till he make a competent jointure. *Toth.* 114. And if a man marries a feme, whose estate is in trustees, if he comes into equity to compel the trustees to convey the estate, he shall not have such equity, without doing equity to his wife, by making a suitable settlement or provision for her. 1 *Vernon*, 40.

[It has long been a settled rule of equity in *England*, that where the husband's claim to the wife's personal property must be asserted in a court of equity, and he cannot reach it without joining her with him in the suit, the court will compel him, thus seeking for equity, to do equity, and make provision for her by an adequate settlement. See 1 *Madd. Chan.* 481; 1 *Fonb. Eq.* 94, note (k), and the cases there cited. In *New York*, the same principle has been adopted. See 2 *Johns. Chan. Rep.* 206, *Howard v. Mef-fatt*, in which the leading English cases are referred to, and ably reviewed. In *Virginia*, the point has been often mooted at the bar, and incidentally mentioned on the bench, but it has received no solemn decision, by the supreme court of appeals. See the opinions of Judges GREEN and COALTER, 1 *Rand.* 372, 385.]

6. If lands are extended on a statute or judgment, at much less than the real value, and the convisor will come into equity, to make the conusee account according to the real value, he shall not be relieved without paying the conusee all that is due to him, for principal, interest and

[8]

costs, though they exceed the (g) penalty. 1 *Vernon*, 350.

[4] 7. The plaintiff, a young gentleman in want of money, employed J. S. to borrow 500*l.* J. S. employed J. D.

(g) This is one case, where equity will carry the debt beyond the penalty of the security; as it will do also, where the party has been delayed by the injunction of this court, or the like. 1 *Vern.* 350. So where the plaintiff came to be relieved against the penalty of a bond; it was so decreed; but upon the payment of principal, interest and costs; and though the principal, interest and costs exceeded the penalty, yet the decree was affirmed upon an appeal to the House of Peers. *Sh. P. C.* 15. But observe from these cases, that whenever the debt is carried beyond the penalty of the security, it is always for a defendant; but there is no precedent, where a court of equity will carry the debt beyond the penalty for a plaintiff. 1 *Vern.* 350. As where the vendor of lands entered into a recognisance of 1000*l.* penalty, for the quiet enjoyment of the vendee; the court declared, they could not go beyond the penalty of the recognisance. 1 *Ch. Rep.* 95. So where a trustee in a recognisance released it without any consideration; upon a bill by the *cestui que trust* against the trustee, the court decreed him to pay the principal and interest, but not to exceed the penalty. 1 *Vern.* 348. So where the master of the ship covenanted with the *East India Company*, to pay a certain mulet for every cloath, &c. carried in the ship; the master took the defendant as his mate, who made the like agreement with the master, *mutatis mutandis*, and gave a bond in 50*l.* penalty, that he should not carry cloaths, &c.; but the defendant, without the knowledge of the master, carried so many cloaths, that the mulet came to 70*l.* which the company deducted out of the master's wages; and therefore the master in a court of equity prayed the defendant might repay him; the defendant demurred, for that relief, for, more than the security by bond, was not proper in equity; the demurrer was allowed. 1 *Ch. Ca.* 226. So if a settlement or devise is made of lands for payment of debts, and there is a bond-debt, the interest of which hath out-run the penalty; altho' such conveyances for payment of debts are construed favourably, yet the creditor on a bill brought by him, was decreed to no more than the penalty. 1 *Salk.* 154. And the reason why the court, on a bill brought by such creditor, will not carry the debt beyond the penalty, seems to be, because he has chosen his own security; and has made himself judge what recompence he shall have, in case the debtor pays him not, or performs not his agreement; and there is no equity, that his security should be enlarged or bettered for him: But when he is defendant, he hath this *Maxim* on his side. So note the difference. [As a general rule, the debt cannot be carried beyond the penalty; but under circumstances, it may. See 2 *Fonb. Eq.* 430; 1 *Vern.* 350, *Raithby's edd.* note (1) and the cases there cited; 6 *Ves.* 92; *Ibid.* 411, *Clarke v. Seton*; from the cases referred to in which case, it seems that at law as well as in equity, in the case of a bond, the penalty is the debt; that under particular circumstances, equity will carry the debt beyond the penalty; and that, at law, there is a distinction between an action on a bond, and a judgment, as to a recovery beyond the penalty. See also, 17 *Ves.* 106; 4 *Dallas*, 149; 1 *Johns. Rep.* 343; 5 *Munf.* 494.]

who took up of the defendant (a silk-man) silks to the value of 500*l.* as the defendant charged them to be worth ; the plaintiff gave his bond and judgment to the defendant for the 500*l.* J. D. sold the silks for 250*l.* and gave the plaintiff 200*l.* of the money, but kept the other 50*l.* for his pains ; the plaintiff was relieved against his bond and judgment, but upon payment of the 200*l.* and (*b*) interest. 1 Ch. Ca. 276. So where three young gentlemen, heirs to good estates, borrowed money of the defendant, to be paid (*i*) five times as much, after the death of their fathers ; and for that purpose the defendant had gained securities from them, for payment of great sums of money ; one of them brought his bill to be relieved, and the court decreed his security to be delivered up, on payment of what the defendant really and *bona fide* paid to him alone, and for his own proper use. 1 Vern. 467. [2 Vern. 77, 78. See also, 1 Fonb. Eq. 135, 142. 1 Madd. Chan. 117, 121.]

8. If a man prays an injunction to stay proceedings at law upon a bond, he shall not have it ; except he will give

(*b*) A *quere* is made in the book, as to interest ; and note in the following case, 1 Vern. 467, there is no mention made, that the defendant should have interest.

(*i*) These hazardous bargains (to be paid double or treble, or to have an estate of double or treble the value of what is at present advanced, after the death of a tenant for life ; but if such tenant for life outlives the person to whom the money is lent, then the whole to be lost) are not always set aside in a court of equity ; for such bargains may be fair, and there must be circumstances of fraud to overthrow them. *Vide the case of Nott and Hill, 2 Ch. Ca. 120 ; 1 Vern. 167 ; Barney and Beak, 2 Ch. Ca. 136 ; Batty and Lloyd, 1 Vern. 141. [Raithby's edi. and the cases cited in the note there. See also, 1 Fonb. Eq. 133 ; 1 Madd. Chan. 119, 270.]* But always where they are set aside, though for fraud, the plaintiff must do equity to the defendant, by paying him what was really lent. But if such fraudulent person comes as plaintiff into a court of equity, to have what was really and *bona fide* lent, he shall not have it, because he has committed *iniquity*. *Vide Maxim 2, c. 4. [See also, 1 Fonb. Eq. 140 ; 1 Ves. jun. 214.]*

judgment, and be bound by (j) order to bring no writ of error. 1 *Vern.* 120. (k)

[5] 9. The wife joined with her husband in a mortgage, and levied a fine with intent to bar her dower; and in consideration thereof, the husband agreed the wife should have the redemption of the mortgage; and the husband afterwards mortgaged the estate twice more; the subsequent mortgagees brought their bill to set aside the agreement as fraudulent against them; which was decreed; but in regard the wife, in confidence of this agreement, had barred her dower, (*which was not intended to be barred as against the plaintiffs*) the court decreed, that if she survived her husband, she should enjoy her dower, and that she should not be put to her writ of dower, because they might convey away the estate, and she not know against whom to bring her writ of dower, and therefore decreed her dower to her. 1 *Vern.* 294.

(j) An offer to give a release of errors is not sufficient; for he may, notwithstanding, bring a writ of error, and put the defendant to plead such release, and so delay time, as long as if no release of errors had been given. 1 *Vern.* 120.

[(k) The usual conditions on which injunctions to judgments, at law, are awarded in *Virginia*, are, bond and security in a penalty equal to double the amount of the judgment, or the sum enjoined, with such condition as the law requires, (See 1 *Rev. Code of 1819*, pa. 218) and a release of errors at law; for the form of which, see *Journal of Law School by Chan. TAYLOR*, vol. 1, p. 334. If it be to stay proceedings at law, upon a *bond*, a *confession of judgment*, is one of the conditions. If for any other matter, the court, or chancellor in vacation, prescribes the penalty of the bond, if one is directed, by the order, awarding the injunction.]

MAXIM II.

He that hath committed (a) iniquity, shall not have equity.

1. If the lessor will avoid the lease for non-payment of the rent at the day, equity will relieve against such (b) forfeiture. But if the lease were gained by fraud, or granted upon a false suggestion, equity in such case will not relieve the lessee; for that were to relieve fraud in chancery. *Car. 45.*

2. By a marriage agreement, the intended wife was to have more than her father, (indebted) and the mother and two daughters unpreferred would have left; the court would not decree the (c) agreement, but left the plaintiff to (d) law. *2 Ch. Ca. 17.*

[6]

(a) But it seems, the iniquity must have been done to the defendant himself; for where the plaintiff had, to avoid a sequestration in the time of the great rebellion, sworn in an answer that he was satisfied the debt; and after the restoration, brought a bill for it; tho' such answer was objected to him, yet the court would not suffer it to be read, but decreed the plaintiff his debt. *1 Ch. Ca. 154.*

(b) *Vide Max. 12.*

(c) Though it is a common equity to decree specific performances of agreements; *Vide Max. 13, c. 1;* yet by this case it appears that where they are extremely unreasonable and iniquitous, the court will not decree them. So in a late case since the year 1720, a bill was brought in the Exchequer for a specific performance of articles for a purchase made in that year, whereby it was agreed that forty years purchase should be paid for the lands; there was a decree in the Exchequer for a specific performance, but it was reversed in the House of Peers. And though the doubtfulness of equity may be here objected, since no rule is settled, how many years purchase is a reasonable price for lands, yet it may be answered, that no certain rule can be drawn from the price of lands, whether the articles for a purchase shall be performed or not; because the iniquity of the bargain does not depend always upon the price; for what may be a reasonable price in one case, may not be so in another. But it is a certain rule, that where the bargain is plainly iniquitous, and it is against conscience to insist upon it, (as in the case of forty years purchase) equity cannot support it; for that would be to decree iniquity.

(d) Here the agreement was not fraudulent, or gained by surprize, and therefore not to be set aside; and the court not being willing to decree the whole, and not being able to decree part, (for a court of equity cannot assess damages) it must necessarily go to law.

3. The plaintiff tenant for life of a copy-hold estate, *durant' viduitat'*, felled trees; which at a court-baron was presented, and found a waste by the homage, and consequently a forfeiture; the bill was to be relieved against the forfeiture, offering that if it did appear to be waste, to make satisfaction; the court decreed an issue to try, *whether the primary intention in felling the timber was to do waste*, declaring that in case of a (e) wilful forfeiture, it would not relieve. 1 Ch. Ca. 96.

4. The plaintiff for 90*l.* lent, got a bond of 800*l.* from the defendant when he was drunk, and had judgment thereon; the defendant in right of his wife was entitled to certain lands, that were estated in other persons in law, in trust for her; the bill was to have those lands subjected to the plaintiff's satisfaction here, inasmuch as the defendant was entitled to the trust in right of his wife: But the court would not give the plaintiff any relief, not so much as for the principal he had (f) really lent; and the bill was dismissed. 1 Ch. Ca. 202. [See 1 Fob. Eq. 140; 1 Ves. jun. 214.]

5. The defendant by a trick, got the deed into his hands, and burnt or cancelled it. *Per Cur:* Where deeds are suppressed, *omnia præsumuntur*, and would not direct a trial at law, which had not been denied, had not the defendant been guilty of the fraud. 1 Ch. Ca. 298.

[7] 6. The plaintiff having debauched the defendant, to whom he made false addresses of marriage, and got her with child, gave bond of 500*l.* conditioned for the payment of 50*l.* there was no place appointed in the bond, where the money should be paid; and therefore he brought

(e) It must be intended wilful waste; and that was the issue tried, though the other was directed, and being found for the plaintiff, he was relieved. *Vide Max. 12, c. 1.*

(f) But if the defendant in this case had come into equity, to set aside the judgment for fraud, equity would have obliged him to pay the present plaintiff what was really lent. *Vide Max. 1, c. 7.*

his bill and offered to (g) bring the 50*l.* into court; but the court would not grant an injunction. 2 Ch. Ca. 15.

7. It was decreed, that the husband should pay the wife 300*l. per ann.* for alimony, until they cohabited by consent; he brought an original bill, praying that the alimony might cease, offering to be reconciled and to cohabit with her; though it was insisted for the wife, that the decree was 'till cohabitation *by consent*, which was to be understood *mutual consent*; yet *per Lord Keeper*, I will not continue the alimony, if she will not cohabit. But she shall immediately return; and she shall have no benefit of the alimony, 'till she do, but take her remedy in the court ecclesiastical. 1 Ch. Ca. 250.

8. The husband granted some rents, in trust for the sole use of the wife; and after bought in some of that tenant's estates, whereby the rents could not be recovered at law: She brought her bill to have these rents made good to her by the decree of this court; but the husband swearing in his answer, that she had eloped from him, and that she was a very lewd woman, the court would make no order in it; but only that the husband should stand in the place of the tenants, and should admit the rents payable by the tenants to be still in being, and then she might proceed at law, and recover the rents there, if she could. 2 Ch. Ca. 102; S. C. 1 Vern. 53. See 3 P. Wms. 269.

9. The plaintiff and defendant having married two daughters of J. S., upon his decease there were some loose papers, that concerned the account between the plaintiff and his father-in-law, put up together in a bundle, and covered with a paper tied up with a tape, and sealed by two persons then present, and delivered to the defendant

[8]

(g) But a court of law will relieve against the penalty, upon bringing the principal, interest and costs into court; and that being the rule there, no consideration can be had of this Maxim. Vide 6 Mod. 101, and Stat. 4 Anne, for amendment of the law. [The same law in Virginia; see 1 Rev. Code of 1819, p. 509.]

to be safely kept, being then told they were matters of concern: And there being now an account directed of the estate of J. S. which was to be equally distributed between the plaintiff and defendant; the defendant demanded as due from the plaintiff to his father-in-law for diet, &c. 2300*l.* But upon proof made that the defendant had altered the bundle of papers so sealed up, and displaced them, and that it could not be known what papers might have been taken out; and the master having reported, that the defendant had suppressed the evidences; the court for that reason disallowed the defendant's whole demand against the plaintiff, though the defendant swore he had produced all the papers, and though the papers produced, appeared to be half-yearly accounts, and related one to the other, and not one missing; but the account was thereby carried down within a little time before the testator's decease; and tho' the Lord *Chancellor* declared himself satisfied that all the papers were produced; yet for the reason aforesaid, wholly disallowed the said demand.
1 *Vern.* 452. [See 1 *P. Wms.* 731; 2 *P. Wms.* 748.]

MAXIM III.

[9]

Equality is Equity.

1. Where an (a) heir buys in an incumbrance for less than is due upon it; he shall be allowed no (b) more than what he really paid for it, as against other incumbrancers upon the estate. 2 *Vern.* 353; *S. P.* 1 *Vern.* 49; 1 *Salk.* 155; *for the taking away one man's gain, to make up another's loss, is making them both equal; and here the gain the heir would have made, if the whole money due on the incumbrance should be allowed him, shall be taken from him, to make up the loss of the other incumbrancers upon the estate.* So also as against younger children, who have portions charged upon the estate; as where the estate was settled upon trustees to pay the heir 100*l.* *per ann.* in the first place, and then to make a provision of 100*l.* a piece for younger children; the heir purchased in a statute, which was an incumbrance upon the estate; it was decreed, that in case of deficiency to pay the younger childrens' portions, he should be allowed no more than what he really paid for it. 1 *Vern.* 335. So also as against legatees. 1 *Salk.* 155. So also as against a real purchaser, that purchased without notice of the incumbrance so bought in. 1 *Vern.* 464.

2. A stranger, who buys in a prior incumbrance, shall be allowed (c) only what he really paid, as against other

(a) So it is in case of an executor or trustee. 1 *Vern.* 49; *S. P.* 1 *Salk.* 155.

(b) Except he bought it in to protect an incumbrance to which he himself is entitled. So likewise in case of an executor or trustee. 1 *Vern.* 49; 2 *Vern.* 66; *Vide Maxim 14, c. 2.*

(c) *Vide 1 Salk.* 155; which seems contrary, that he shall be allowed all that is due upon it, even against other incumbrancers and legatees; which I take not to be well reported; for as against other incumbrancers, by this rule of equality, his gain should be taken from him to make up their loss; and tho' there may be more doubt as to legatees, who cannot be strictly said to be losers, tho' they are not paid their legacies; yet there seems the same reason to take such gain from a stranger in their favour, as from an heir, as by the same case is admitted.

incumbrancers. 1 Vern. 476. [But see 2 Atk. 54; 5 Ves. [10] jun. 620.] So also as against areal (*d*) purchaser, who purchased without notice of such incumbrance. 1 Vern. 336; S. P. Ibid. 464.

3. The testator devised two several estates for the payment of his debts, and devised also an annuity out of one of them; the trustees sold that estate out of which the annuity was payable; equity decreed the other estate to stand charged with the annuity. 1 Ch. Ca. 295. *For by charging the other estate with the annuity, the heir will not gain the accidental advantage of having his estate discharged of the annuity; nor the annuitant lose his annuity, and so both will be equal.*

4. The testator having a daughter by his first wife, voluntarily charges his lands at B. with 3000*l.* for her portion; and afterwards upon his second marriage, settles a moiety of those lands upon his wife for her jointure, without taking notice of the charge of 3000*l.*, and apprehending the charge of 3000*l.* would be good against the jointure, (which it would not, being voluntary against a purchaser, which a jointress is,) and taking notice thereof, he devises other lands at Y. to his wife in lieu of her jointure; the heir and the wife agree together after his death, that she should adhere to her jointure, whereby the daughter would lose her portion, and the heir hold the lands discharged of the devise; but it was decreed, that the daughter should hold such part of the land at Y. as should be equal in value to such part of the land at B. as were comprised within the jointure until her portion was raised. 1 Vern 219; S. C. 2 Ventr. 363. [See 2 Atk. 447.] *For hereby the heir will not gain by having his estate discharged of the devise, nor the daughter lose her portion; so both will be equal.*

(*d*) But as against the owner of the estate, who made the incumbrance, or his heir, he shall be allowed the whole that is due upon it. 1 Vern. 336; S. P. 1 Vern. 476. *For the owner is no loser, when he pays the whole money due, and therefore, no equality to take away one man's gain for the benefit of another, who is no loser.*

5. The testator being seised in fee, entered into a statute; and devised a legacy of 500*l.* The conusee took all the personal estate in execution, so that nothing was left to pay the legacy; equity decreed the real estate to stand (e) charged with the legacy. 2 Ch. Ca. 4. And that though the land was not charged with the legacy originally; yet since there was enough of the personal estate to pay the legacy, if it had been so employed; and that the personal estate is employed for payment of debts in case of the heir and lands; so much of the real estate as is eased by the personal estate, shall be liable to the legacy. 2 Ch. Ca. 117. *For by charging the real estate with the legacy, the heir will not gain the accidental (if not fraudulent) advantage of having his estate discharged of the statute, nor the legatee lose his legacy, and so both will be equal.*

(e) Note. The real estate is here charged in favour of a legatee; much rather therefore in case of a creditor; and it is a well known case in equity, that if the creditors who may charge the real estate, will yet take the personal estate for their satisfaction, whereby the simple contract creditors, who could only charge the personal estate, will lose their debts; equity will place such simple contract creditors, in the room of the creditors who could have charged the real estate; and will charge the real estate for their benefit, with as much as the value of the personal estate, taken in execution; for, such advantage shall be taken from the heir, to make up the loss of the simple contract creditors, that both may be equal. [See 1 Madd. Chan. 616, 617.] But here note a diversity in the case of legatees; where the lands descend to the heir, and where they are devised; for H. seised in fee, and indebted by bonds, by will gave legacies to younger children; and devised his land to his eldest son in tail; the eldest son being also executor, paid the bonds with the personal estate, and the legatees brought a bill, to come against the real estate in the place of the bond creditors, and to be paid out of the land: The court seemed to admit, that if the lands had descended, the legatees might have been relieved in this manner; but since the testator had devised them, it was resolved that they ought to be exempted; for, it was as much the testator's intention that the devisee should have the land, as the others their legacies. 2 Salk. 416; Vide Max. 14, c. 13. But in the case of creditors, no such intention of the testator can prevail, to defeat them of their debts, and therefore no such diversity, whether the lands descend, or are devised. [The doctrine contained in this note, is now well understood by the term *marshalling assets*, as to which, see a valuable note in 1 Cox's P. Wms. 679, which is transcribed in 2 Salk. 416, Evans' edit. See also, 1 Madd. Chan. 617.]

[11]

6. (*f*) Pecuniary legatees shall abate in proportion, where (*g*) the estate falls short to pay them all. 2 Ch. Ca. 25. Although it be directed by the will, that one should be paid in the first (*h*) place. 1 Vern. 31. And there is the same equity in case of younger children, who are to have portions raised out of a real estate; as, where the father conveyed his estate to trustees to make a provision of 100*l.* a piece for his (*i*) younger children, to be raised and paid according to their seniority; yet, if there shall happen a deficiency, the eldest shall not have more, and the youngest less, but they shall all be paid in average. 1 Vern. 335.

[12] 7. One legatee shall compel another to refund, where the assets become (*j*) deficient, though there be no

(*f*) But specific legatees shall not abate. 1 Vern. 31; S. P. 2 Salk. 416. What is a specific legacy? *Vide* 2 Ch. Ca. 25.

(*g*) But if the legacy of any one lies on a particular fund by itself, and others upon another fund, each must bear his own loss. 2 Ch. Ca. 132.

(*h*) The Lord Keeper North, seemed of another opinion, as to this point. 2 Ch. Ca. 132.

(*i*) It being said generally for younger children; the children that he had afterwards by a second wife came in for a share. 1 Vern. 335. But money left in trust for the children of J. S. shall be for the benefit only of the children he then had, and not those born afterwards. 2 Ch. Rep. 69. And where the personal estate was given by will among his then children by name, and afterwards the father conveyed his real estate to trustees, to be divided among all his children; a child born after the will, but before the conveyance, had a share of the real estate, but not of the personal. 2 Ch. Rep. 210.

(*j*) There cannot be a deficiency of assets, so as to compel one legatee to refund to another, where the executor is liable to pay the legacy, except he be insolvent; (where the executor is not liable, can only be where he has legally discharged himself; *Vide Post, c. 9, and Max. 7, c. 4,*) for, if an executor pays one legatee, and afterwards there appears not assets to pay the rest; yet the legatee who is paid, shall not refund; but the executor shall pay the others out of his own purse, in proportion to the assets, which came to his hands. 1 Ch. Rep. 133; S. P. 2 Ch. Ca. 132. (Whether the executor can compel the legatee to refund to him. *Vide Post, c. 9.*) But in such case, if the executor is insolvent, the legatee that is paid must refund in proportion, though the legacy was paid as a marriage portion; and though the assets become deficient by accident, bad security, or the like. 1 Ch. Rep. 136, 148, and that the executor must appear to be insolvent, before one legatee can compel another to refund, appears from the executors being always made a party to the bill. 1 Ch. Ca. 136, 248; 2 Vern. 360.

(k) provision made for refunding. [See 1 Vern. 94, *Raithby's edi.* and the cases there cited; 2 *Fonb. Eq.* 375, note (p); 2 *Madd. Ch.* 108.]

8. Creditors shall make (l) legatees (m) refund where the assets become (n) deficient, though there be no provision made for refunding. 1 *Vern.* 94. A legatee shall refund against the creditor of the first testator, that can charge an executor only in equity, viz : upon a wasting by the first executor; 2 *Vent.* 360; as A. being indebted unto B. makes C. his executor, C. wastes the estate, and dies, and makes D. his executor, and by his will devises several legacies; D. pays the legacies; B. exhibits his bill against D. the executor of C. for his debt due from the first testator; and against the legatees in the will of C., to compel them to refund their legacies, there being not now sufficient assets of the first testator. Decreed that the legatees should refund. 1 *Vern.* 162.

(k) If a suit for a legacy be in the ecclesiastical court, they make the legatee give security, because when the legacy is paid, they cannot restore, &c. but the court of chancery decrees a legacy without security; (unless in case of poverty or the like;) for the court can reach the legatee again if there be cause. 2 *Ch. Ca.* 9; 1 *Att.* 491. [The law of Virginia had long declared that an administrator should not be compelled to make distribution of an intestate's estate, until bond and security to refund, had been given by the distributees; (3 Hen. Stat. at Lar. 373; 1 Rev. Code of 1819, p. 389,) but being silent as to executors, the practice was not to require security of legatees, until the court of appeals, in the case of *Stovall v. Woodson*, (Nov. 1811, 2 *Minf.* 503,) reversed a decree of the chancellor, because security to refund had not been required of the legatee. Since that period, the practice had been, to require such security, as well in decrees in favour of legatees as of distributees; and now, by act of 1822, c. 37, § 2, the law expressly places executors and administrators, on the same ground as to bond and security to refund.]

(l) But one creditor shall not make another refund. 2 *Ch. Ca.* 54, (*in margin.*) As where the executor paid a debt upon simple contract, he shall not refund to a creditor of an higher nature. 2 *Vent.* 360, *for the creditor by simple contract is not a gainer by having his debt paid him.*

(m) Much rather therefore shall not a bare assent or release of the executor, bind the creditor. 1 *Vern.* 455.

(n) Here also the deficiency can arise only from the insolvency of the executor; for, if the executor be solvent, the creditor may recover at law, and has no need to make the legatees refund; and in all the cases of such refunding, the executor is made a party. 1 *Ch. Ca.* 256; 2 *Vent.* 360; where it was so decreed, principally upon the insolvency of the executor.

[18] 9. It was admitted by the court, that if executors pay out the assets in legacies, and afterwards debts appear, of which they had no (*o*) notice at the time of payment of the legacies, they by bill in equity may compel the legatees to refund. 1 Ch. Ca. 136.

10. A. agrees with B. the lord of the manor, to purchase a copyhold, and pays 200*l.* in part, and was to pay the remainder in three months, and then to name his lives and take up his copy. A court is held, the three months expire, and B. dies suddenly; and the manor comes to one, who was not bound by the agreement. The executor of B. was decreed to refund the money. 1 Vern. 472. [See 4 Ves. jun. 686.]

(*o*) If the executor had notice, without all doubt he shall not compel the legatee to refund. As where there was a suit for the goods specifically devised, and pending that suit, the executor delivered the goods to the legatee, he could not make him refund. 2 Ch. Ca. 9. But even where there is not notice, the cases seem more strong, that equity will not compel the legatee to refund, for where the creditor and executor joined in a suit to compel a legatee to refund, the bill was dismissed, because the executor was plaintiff, who should not be admitted to undo his own assent, 2 Ventr. 360; and the case of *Noel and Robinson* is more strong; where the executor was defendant to a bill brought against him by the legatees, for an account of the profits of a plantation devised to them; to which devise the defendant, the executor, had assented, only by reserving the rent to himself in trust for the plaintiffs, on a lease made by him of the plantation; and though at the time of such devise, he apprehended there was assets sufficient to pay the testator's debts, which proved deficient wholly by the accident of some merchants breaking; and he had actually sold the plantation to pay the testator's debts; yet it was decreed, that the executor and purchaser should account; for an executor's assent shall be binding to himself; and where he has assented to a legacy, he shall never afterwards avoid it; though a creditor in such case shall compel the legatee to refund. 2 Ch. Rep. 248; S. C. 2 Ch. Ca. 145; 1 Vern. 90, 453, 460; and note, by all the cases precedent it appears, that this equity of equality to take away one man's gain to make up another's loss, holds only, where such loss is occasioned by the act of a third person, or by accident, and not by the act or laches of the party himself, as this case of the executor is, who ought to have taken security for the refunding; 2 Ch. Ca. 132; or had a decree for his indemnity. But where an executor is obliged by law to give security for payment of legacies, and afterwards the assets become deficient by accident, the security shall be made use of no further, than to make good the testator's estate, over and above such losses by accident. Vide Max. 7, c. 4. And where an executor under a revoked will, having no notice of the revocation, pays legacies, and after the revocation is proved, he shall be allowed those legacies. Vide Max. 7, c. 5.

11. A debtor upon bond and simple contract, makes a conveyance of lands upon trust for the payment of his debts. The debts upon simple contract, shall be paid in proportion with the debts by (p) bond. 1 Ch. Ca. 32; and though they are conveyed to some of the creditors; yet they shall not give themselves a preference. 2 Ch. Ca. 54; there is the same equity, where the lands are (q) devised. 1 Ch. Ca. 248; for, a debt without specialty, is as much a debt *jure naturali*, and in conscience, as a debt by specialty; and therefore *there shall be equality where conscience is the judge*.

12. If tenant in fee mortgages his estate, or charges it with a sum of money; and devises it to one for life, remainder to another in fee: Equity will compel the tenant for life, to bear his (r) proportion of the mortgage or charge. 1 Ch. Ca. 223, 224. And if it be a rent-charge,

(p) But debts which in their own nature affect the lands, shall be paid according to their precedency or superiority at law. 1 Ch. Ca. 32. [But see 1 Madd. Chan. 586.] And where a man, indebted by several mortgages of the lands made thrice over, and also by judgments, bonds, and simple contract, conveyed the lands for payment of his debts; although it was insisted, that all the judgments and mortgages, made subsequent to the first mortgage, were not incumbrances upon the lands, because all the estate in law was in the first mortgagee; and therefore the subsequent mortgages and judgments ought to be paid in average with the bond, and simple contract creditors; yet, on account of the confusion it would make, and the impracticability of a payment in such method, it was decreed, that the real securities should be first paid, and then the bonds and simple contract creditors should be paid in average. 1 Vern. 102.

(q) Note here a difference, where the lands are devised, to the executor or to another; for, if they are devised to the executor, they become legal assets, and then debts must be paid according to their precedency or superiority at law. 1 Vern. 63. [But see 1 Vern. 65, note (3) to Raithby's edi. and the cases there cited, in which it is said, the law now appears to be otherwise.] Vide Maxim 14, c. 18. So Quer: What are adjudged assets in equity to pay debts, which is too large to be here inserted. [As to what shall be considered legal, and what equitable assets, see 1 Fonb. Eq. 283, note (i); 1 Madd. Chan. 322, 586, 606.]

(r) Which is usually a third part; 1 Ch. Cq. 271; but if he, in remainder, does not come, in the life of the tenant for life, he shall have a decree against his executor, in proportion only to the time the tenant for life lived. 1 Vern. 404.

[14]

equity will make the tenant for life pay the (s) arrears, that all may not fall upon the remainder-man. 1 Ch. Ca. 223.

13. The husband upon his marriage agreed to settle particular lands to the use of himself for life, remainder to his wife for life, remainder to the issue of the marriage in tail; and afterwards aliened and sold part of these lands; the wife obtained a decree to have the full value of the estate, she was to have for her life, supplied and made good to her out of the lands remaining unsold, and that [15] the inheritance of those lands should be subjected thereto. But the decree was reversed; for the jointress and the children are equally purchasers, and the wife must not have all, and leave nothing for the children, but they must bear the loss in proportion; and so in any case, where the issue and jointress claim by the same settlement, if there be a prior incumbrance, the jointress shall contribute, and bear her proportion, and not hold over and lay the whole burthen upon the heir. 1 Vern. 440. [See 3 P. Wms. 367.]

14. Sureties shall be compelled in equity to contribute towards the payment of a joint bond. Toth. 41. As where three were bound as sureties in a recognisance; one of the sureties was sued at law, another of the sureties and the principal being insolvent, he that was sued brought his bill against the other surety, for a contribution; and he was decreed to pay a moiety. 1 Ch. Ca. 246; S. P. 1 Ch. Rep. 35, 120, 150. [By act of 1785, sureties, in Virginia, have not only a summary remedy, by motion, against their principals, but for contribution between themselves, for their respective proportions. See 12 Hen. Stat. at Large, 269; 1 Rev. Code of 1819, 460.]

15. Lessee of divers lands pays an entire rent; a right of common is recovered by the inhabitants of the town, in part of the lands; this is no eviction of the land, and so

(s) And if it be a mortgage, will make him keep down the interest. [See 1 Ves. jun. 233; 4 Ves. 33; 9 Ves. 554.]

no apportionment can be at law. But equity will (*t*) apportion the rent. 1 Ch. Ca. 32.

16. If a man grant a rent-charge out of all his lands, and afterwards selleth them by parcels to divers persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in equity by a contribution from the rest of the (*u*) purchasers; and the grantee shall be restrained to charge the same upon him (*v*) only. *Car. Rep.* 3.

17. If you sue in chancery an executor of one obligor, to discover assets, you must make all the (*w*) obligors parties, that the charge may be equal. 2 *Vent.* 348. [16]

18. Two executors being decreed to pay legacies and debts; the one paying, the other shall upon a bill be compelled to pay the moiety and costs. *Toth.* 89.

19. The advantage of survivorship is against equity; as where two persons advanced the mortgage-money; and the deed was made to them and their heirs; the one died before payment, yet his executor was relieved. 1 Ch. Rep. 58. So if two joint purchasers pay share and share alike for a purchase; and one dies, his representative shall be relieved for a moiety of the purchase. 1 Vern. 361. So it is as to a stock in trade, the plaintiff, administrator of one partner, sued the co-partner for an account of the in-

(*t*) But it appearing, that, notwithstanding the right of common, the lands were worth the rent and better, the court would not do it. 1 Ch. Ca. 32.

(*u*) But he must make all the rest of the purchasers and tenants, parties. *Car. Rep.* 33. Though in the case of a charity, for which a rent-charge was devised, the court would not allow the objection, that all the tertenants were not parties; for the charity shall not be put to that difficulty; but the tertenants may, if they seek a contribution, undertake to make them parties to the information, or help themselves by such course as they think fit. 1 *Salk.* 163. [See also, 1 P. Wms. 599; 2 Eq. Ca. Abr. 167.]

(*v*) But where the wife had a rent-charge, and the husband devised part of the lands to her, equity would not apportion the rent-charge; for, then she would have had no benefit by the devise. 1 Vern. 347.

(*w*) A *guar* is made, whether you may not sue the principal, and leave out them that are bound only as sureties? But it is clear, that if a judgment be had at law against one obligor, you may sue the executor of him alone, to discover assets, &c.; because the bond is drowned in the judgment. 2 *Vent.* 348.

testate's share, which was accordingly decreed. 1 Ch. Rep. 261. So where two persons jointly (*x*) stock'd a farm, and occupied it as jointenants; though the deceased was informed what the consequence of law was in case he should die; and that he thereupon replied, he was content the stock should survive; yet his executor was relieved; and *per Lord Keeper*, though it is common for traders, in articles of co-partnership to provide against survivorship; yet, that is more than is necessary: And he took the distinction to be, where two become jointenants, or jointly interested in a thing by way of (*y*) gift or the like; (*z*) there the same shall be subject to all the consequences of law: But as to a joint undertaking in the way of trade or the like, it is otherwise. 1 Vern. 217. [See Co. Litt. 182; 3 P. Wms. 158. The right of survivorship was abolished in Virginia, by an act of 1786. See 12 Hen. Stat. at Lar. 350; 1 Rev. Code of 1819, pa. 359.]

[17] 20. Equity will in (*aa*) many cases control the unequal distribution of a trustee or guardian, tho' he had express

(*x*) Note. The *Lord Keeper* said, that if the farm had been taken jointly by them, and proved a good bargain, there the survivor should have had the benefit. 1 Vern. 217; *Vide Winch.* 59; where it was agreed, that if a court of equity will decree against the surviving jointenant for the heir of the deceased, for a moiety of the lands; except there was an agreement in the life of the parties, that there should be no survivorship; a prohibition shall be granted.

(*y*) And accordingly, it has been decreed, that if the testator devises the residue of his estate to his two executors, or make several men executors, the survivor shall carry all. 2 Ch. Ca. 64; S. P. 1 Ch. Ca. 238: decreed *contra*, but to the dissatisfaction of the bar; though *note Lord Chancellor's* expression, why the survivor shall carry all, because the Judges will have it so. 2 Ch. Ca. 63; S. P. 1 Vern. 482, and *Lord Chancellor's* opinion, that it would be the same, if one of the executors had possessed himself of the moiety of the goods, and had died.

(*z*) If A. devises the surplus of his estate to his two nephews, equally to be divided between them, and appoints his executor to lay it out for the benefit of his said nephews; one of the nephews died in the testator's life-time, the surviving nephew shall have the whole; the latter words, by which the surplus is appointed to be laid out for the benefit of the nephews, being joint. 1 Vern. 425.

(*aa*) Devise of all my goods and personal estate to J. S. upon trust to give my children and grandchildren according to their demerits; the trustee gives all to one; the court would not relieve against this unequal distribution de-

power to distribute, as he thought fit ; as the devise of a personal estate was in these words : *I do entrust my wife with the same, during the time she shall continue my widow ; and in case she shall re-marry, I do will and desire her, to give unto my children according as she shall think fit :* She married again, and then by writing appointed very unequally to the children ; the court (bb) set aside the distribution. 2 Ch. Ca. 228. Devise to his wife of his personal estate, upon trust and confidence, that *she would not dispose thereof, but for the benefit of her children* ; she by will gave one but 5s. and all the rest to another ; the court set aside so unequal a distribution. 1 Vern. 66. The will directed, that his lands should descend and come amongst his daughters, in such shares and proportions, as his wife by deed in writing should direct and appoint ; the wife makes an unequal distribution ; the court at first declared the circumstances must be very strong, as something of bribery and corruption, that would take away this power from the wife, by the express words of the will ; but afterwards declared the case was proper and relievable [18]

claring the trustee to be the judge. 1 Ch. Ca. 309. The testator devised his real and personal estate to his executor in trust, therewith to reward his children and grand children according to their demerit ; the court declared that this amounted to a general trust in the executor to reward such of his children and grand children, as they should demerit, and as the executor should think fit, and not to an absolute fixed trust, to create a certainty of right or interest as to any certain proportion in any of the children or grand children ; and therefore as to whatever of the real estate was disposed by the executor in his life-time, or given by his will, the bill which sought to set aside that distribution, was dismissed. 2 Ch. Rep. 141. The testator gave the residue of his personal estate, to and amongst his kindred according to their most need, to be distributed among them by his executor ; and desired that a care and regard should be had to J. S. The court decreed that the executor ought chiefly to consider those that have most need, that so they that have more need, may have more than they that have less ; and as to J. S. who was particularly recommended to the executor, the court declared he had a power, and ordered him to give him somewhat considerably out of the residue of the said estate ; and the master was to see right done. 2 Ch. Rep. 146.

(bb) But note ; one main reason was, that the wife had married a second husband, and being under coverture, her distribution might be influenced by her husband's authority. 1 Vern. 415.

in equity ; for, as she allowed the plaintiff but a small proportion, she might, for any causeless displeasure, have allotted her but one barren acre only, and in such a case the court would have had a jurisdiction, and therefore here also : And declared it was discretionary whether it would relieve or not, and would be attended with precedents. 1 *Vern.* 355, 414.

[As to the proper execution of a power of appointment, and what will be deemed illusory, see 1 *Vern.* 155, *Raithby's edition*; 2 *Ves. jun.* 336; 5 *Ves.* 859; 2 *Fonb. Eq.* 199, note (d); 1 *Madd. Chan.* 315; and *Knight v. Yarborough, Gilm.* 27, and the cases there respectively cited.]

21. If goods are thrown over-board in stress of weather, or in danger or just fear of enemy, in order to (cc) save the ship and the rest of the cargo : That which is saved shall contribute to a reparation of that which is lost, and the owners of the ship shall be contributors in proportion. *Sh. P. C.* 19.

(cc) So that the loss of goods thrown over-board, &c. must contribute to the saving of the other goods, else this rule of average will not hold ; and therefore where the ship, being loaden with oils belonging to the plaintiff, and with silks belonging to the defendant, was pursued into an harbour by enemies ; the master ordered the silks on shore, being the more valuable commodity, though they lay under the oils, and took up a great deal of time to get at them ; the ship and the oils in her being taken, the owner of the oils demanded a contribution from the owners of the silks ; insisting that the salvage of the silk (which had otherwise been lost) deprived the plaintiff of the same opportunity for the salvage of his oils, and that in such adventures, as the danger is common, so ought the loss and damage to be common and equal. But the bill was dismissed, for that the loss of the oils did not actually save the silks, neither did the saving of the silks lose the oils ; for if the silk had not been saved, the oils had been lost ; for they were so bulky that they could not easily be removed without further time ; and if part only be saved, it is to the advantage of the owner. So in case of damage to goods within the vessel, other goods shall not be contributory, but the owner must endure his own loss. *Sh. P. C.* 18.

MAXIM IV.

[19]

It is Equity, that should make satisfaction, which received the benefit.

1. The heir being sued, and having paid a debt of his ancestor by bond ; it was decreed the executor should reimburse him, as far as there were personal assets come to his hands. 1 Ch. Ca. 74 ; and Lord Chancellor declared, that the personal estate in the (a) hands of the executor shall be employ'd in ease of the heir, by whatever means the heir became (b) indebted (c) as heir. 2 Ch. Ca. 5 ; as if the ancestor mortgages the estate, the (d) mortgage-debt, shall be paid out of the personal estate. 1 Ch. Ca. 271 ; S. P. 2 Ch. Ca. 5. Although there be no (e) covenant in the deed for the payment of the mort-

(a) If the personal estate be not expressly devised to the executor, it is then in his hands, as executor, and consequently shall be applied in ease of the real estate ; as where a man conveyed his lands to trustees to pay his debts, and made his wife executrix ; but did not thereby in express terms give her the personal estate ; it was decreed, it should be applied in ease of the real. 1 Ch. Ca. 297. So if the real estate is devised for the payment of debts, and the residue of the personal estate after debts paid, be given to the executor, the personal estate shall, notwithstanding, be applied to the payment of the debts. 2 Vent. 349.

(b) If it be a duty or charge *in equity*, the personal estate shall be first applied. 2 Ch. Ca. 84.

(c) Or if the real estate be charged with the payment of legacies, as conveyed or devised to trustees for payment of legacies ; yet the personal estate shall be first applied, as in case of debts. 1 Ch. Ca. 297 ; S. P. 2 Vent. 349. *Although note, in this case of legacies the personal estate was never benefitted : But this case is governed by another rule, that all legacies shall be paid out of the personal estate.*

(d) But where the ancestor purchased the equity of redemption, which descended to the heir ; there the mortgage-debt was not paid out of the personal estate. 1 Vern. 37 ; S. P. 2 Salk. 440, *for by the purchase of the equity of redemption, the personal estate is not increased but diminished.*

(e) This was formerly decreed otherwise ; that in case, there was not a covenant in the deed for the payment of the mortgage-money and interest, the administratrix was not obliged to discharge the same. 1 Ch. Rep. 275.

gage money. 1 Vern. 436; S. P. 2 Salk. 449; (*f*) for the personal estate received the benefit, by contracting the debt, and therefore should make satisfaction.

[20] 2. In the case of *Cornish* and *Mew*, the court took a difference, that, though in case of an heir, debts affecting the real estate, shall be paid out of personal assets, yet it shall not be so, in the case of a devisee. 1 Ch. Ca. 271. But that difference was rejected in the case of *Pockley* and *Pockley*; where Lord Chancellor declared, that not only the heir, in case he be charged with the debts of his ancestor, but also the devisee of the lands shall be unburdened of the debt, lying upon the lands, by the personal estate in the hands of the executor or administrator; and so shall the devisee of a mortgage. 2 Ch. c. 84; and that not only he who is *hares factus*, shall pray in aid of the personal estate to discharge the real, but even an ordinary devisee shall have that benefit. S. C. 1 Vern. 36.

[For the doctrine respecting the application of the personal estate in case of the real, see 1 P. Wms. 290, *Cox's note to Howell v. Price*; 2 Fonb. Eq. second Amer. edi. 286, note (*a*), 288 note (*b*), in which the American editor has well collected the various authorities on the point.]

3. The testator held the lands subject to a certain rent, and let it run in arrear; though his person was not liable at law, to the payment of the rent, yet it was decreed, the executor, and not the present tertenant, should pay the arrears, as far as he had assets, because by not paying the arrears, the testator's personal estate was augmented. 1 Ch. Ca. 121.

4. The question was, how far the second husband should be charged of his own estate, for a *devastarit* or breach

(*f*) Note; Debts shall be paid out of the personal estate; tho' thereby it is lessened to the prejudice of a widow who claims a third by the custom. 2 Ch. Ca. 84; S. C. Vern. 36; but legacies shall not be paid out of the personal estate, to the prejudice of such a widow. 2 Ch. Ca. 85; for that would be to decree, that the husband could give away his widow's customary share.

of trust committed by the wife and her first husband ; and *per Cur.* Where there is a bond, there is a *lien* by deed, and so the second husband bound ; but where there is only a breach of trust, or debt by simple contract, there in equity, the plaintiff ought to follow the (*g*) estate of the wife in the hands of the executor of the second husband. 1 *Vern.* 309. [See 2 *Vern.* 118, *Toller* 281, 342.]

(*g*) But where there is no such fund, out of which to take satisfaction for the breach of trust, the second husband must pay it, and take his wife, chargeable with that as well as other debts. 1 *Ch. Ca.* 80.

MAXIM V.

[21]

It is Equity, that should have the satisfaction, which sustained the loss.

1. A mortgage in fee is forfeited ; the mortgagor dies ; and the mortgagor comes to redeem ; equity will decree (*a*) the money to be paid to the executor or administrator.

(*a*) This was for a long time an unsettled point ; for, where there was neither bond nor covenant to pay the mortgage, nor no defect of assets to pay debts, and the condition was to pay to the heirs of the mortgagee, or to the heirs or executors, &c. ; in these cases, the court many times doubted, and some times decreed the mortgage-money to the heir. *Vide* 1 *Ch. Rep.* 183 ; 2 *Ch. Rep.* 155, 242 ; 1 *Ch. Ca.* 88 ; 1 *Vern.* 170. But all these doubts are now ousted ; and the mortgage-money in all cases whatsoever, shall be paid to the executor or administrator. *Vide* 1 *Ch. Ca.* 285 ; 2 *Ch. Ca.* 50, 51, 220 ; 2 *Vern.* 348, 361. [But see 1 *Vern.* 4, *Raithby's odi.*, note (1) ; *Ibid.*, 412, note (1) ; 2 *Pow. on Mortgages*, 682, in which the general position here laid down, that the "mortgage-money, in all cases whatsoever, shall be paid to the executor or administrator," is somewhat modified.]

1 Ch. Ca. 283. The mortgaged lands shall be decreed to the executor or administrator, and not to the heir; **1 Vern.** 412; and the heir of the mortgagee shall be compelled in equity to convey to the executor or administrator. **2 Ch. Ca.** 50. But where a man purchased of a mortgagee, apprehending he had an absolute estate; the mortgagor came to redeem; the money was decreed to the heir, and not to the executor; **1 Vern.** 271; *for, as in the first case, the personal estate bore the loss, it being intended only as a security for money; so in the latter case, the real estate bore the loss, it being intended an absolute purchase.*

2. A purchaser takes the fee in his own, and an assignment of a mortgage-term in the name of trustees; though it is not mentioned to attend the inheritance, equity will decree it to be assigned to the heir. **1 Vern.** 1. And where such purchaser made a will of those lands, (but not duly executed by the statute, so as to pass the lands) and devised them from the heir at law, yet the fee descending to the heir, he was decreed to have the term. **2 Ch. Ca.** 49.

[22] **And there is the same equity, if the purchaser takes the (b) mortgage-term in his own name, and the inheritance in trustees; it shall go to the heir, though not mentioned to attend the inheritance. 2 Ch. Ca. 156. And it is not material, whether the fee or the term was purchased first; 2 Ch. Ca. 156; for the inheritance sustains the loss, by keeping the term on foot, and therefore should have it in satisfaction.**

3. When lands are appointed or conveyed to pay debts, the heir is intitled to have the lands after the debts paid. **2 Ch. Ca.** 115. And if a man makes a lease, or de-

(b) Where it is not mentioned to attend the inheritance, there seems some doubt whether it shall not go to the executor to pay debts; and this, although the term is in trustees, and so not assets at law. *Vide 2 Ch. Ca. 49, 152; 1 Vern. 1, 152, 341.* But even in those cases, where it is adjudged to be assets, it is admitted, that after the payment of debts, the surplus shall go to the heir. - [On the doctrine of *terms*, generally, see a valuable note to the case of *Tiffin v. Tiffin*, **1 Vern.**, **2 Raithby's edi.**]

vises an (c) estate for years (he being seised of an estate of inheritance) for payment of debts, if the profits of the land surmount the debts, all that remains shall go to the heir, tho' not so express; and albeit, it be in the case of an executor, 2 *Ventr.* 359, and in all cases where a term for years is created for any particular purpose, as to raise portions, &c. the overplus shall go to the heir. 1 *Salk.* 154.

4. A guardian of an infant having a considerable sum of money in his hands, that was raised out of the infant's estate, (d) lays it out in a purchase for the infant; if when he came of age, he should agree thereto, and allow the guardian that money on account; the infant dies under age; the question was, whether the heir of the infant should have this estate; or the trustees to account to the administrator for the money; the court decreed the latter.

1 *Vern.* 403, 435; *S. C.* 2 *Ch. Rep.* 577.

5. A man purchased a copy-hold for three lives, viz.: [23] of himself, and his two brothers, and dies; his son enjoy'd the lands, and died; and the administratrix of the son being in possession, the uncles disturbed her; she brought her bill to be relieved, as having the title of the first taker, who paid the fine; which was decreed. 1 *Vern.* 415. [See *Amb.* 151; 1 *P. Wms.* 112.]

(c) The testator's will was, that his executor should take the profits of his lands (of inheritance) for 15 years, in trust to pay his debts; and bequeaths the rest of his goods and chattels to his executor; the debts are paid, and there is an overplus of the fifteen years, besides what was sufficient to pay the same; the court decreed the residue of the term to the executor. But a *Quer.* is made by the reporter. 1 *Ch. Ca.* 98.

(d) But if the guardian had come into equity, and shewn that it would be for the benefit of the infant to have had this money so laid out, the court would have decreed it; and though the infant had died under age, the court would have maintained its own decree, and then it would have gone to the heir. 1 *Vern.* 436. [In general, a guardian or trustee shall not alter the nature of an infant's property, so as to change the right of succession to it, in case of the infant's death, unless by some act manifestly for the benefit of the infant at the time. See 1 *Vern.* 437, *Raihby's ed.*, note (2); 2 *Vern.* 192; 3 *I. Wms.* 101, *Cox's note to Witter v. Witter.*]

6. Coparceners make a partition by consent ; and the lands of the one being of greater value than the lands allotted to the other, until an estate for life fell in ; it was agreed that that coparcener who had the least share, should have a rent of 20*l.* per ann. during the life of the tenant for life, to make her share equal ; this rent shall go to the (e) heir. 1 Vern. 133.

7. The plaintiff being part owner of a ship, refused to join with his copartners to fit her out to sea : and there-upon the other partners complained in the admiralty and gave (f) security, that if she perished in the voyage, to make good to the plaintiff his share ; the ship returned, and the plaintiff sued in equity to have his share of the profits of the voyage ; but the bill was dismissed ; for they who must have sustained the whole loss, in case the ship had miscarried, ought to have the whole benefit, now she has returned safe. But if they had not given security in the admiralty, then the bill would have been proper ; for then he must have borne his equal share of the loss, and therefore ought to have his share of the gain. 2 Ch. Ca. 36 ; S. C. 1 Vern. 297.

[24] 8. The factor entered not the goods in the custom books of a (g) foreign king ; and so the duty was not paid : On an account between the employer and the factor, the

(e) But a bond being given to that coparcener, his executors and administrators to pay the rent ; the court decreed the bond to the executor ; because the obligor had his election to pay the rent, or forfeit the bond. 1 Vern. 133.

(f) Upon a motion for a prohibition to a libel against such security, suggesting that the security was given upon land, and that all matter of property is to be ordered by the common law only ; the court seemed strongly inclined that they had such a power ; but the matter being of consequence, and never yet determin'd, they granted a prohibition, and directed them to declare according to their suggestion. 6 Mod. 162.

(g) But in the case of the duty not being paid to our own king, where due to him ; the court declared, that the course of merchants, that the factors should have the benefit of the customs themselves, and not the principals, because the penalty would fall upon the factor, if discovered, could not be called a good custom, being founded upon fraud ; and on a bill brought by the imployer to have an account, the factor was ordered to answer touching the discovery of the payment of the customs. 1 Ch. Ca. 30.

factor insisted on an allowance for the duty, which was decreed ; for, if the non-payment of the duty had been discovered, the principal freight had been forfeited, and the factor must have answered it to the employer ; and as he run the hazard wholly, he ought to have the benefit. 1 Ch. Ca. 25 ; and upon a bill brought by the factor to have an allowance for such customs, it was decreed accordingly. 1 Ch. Ca. 76.

MAXIM VI.

Equity suffers not a (a) right to be without a remedy.

1. A court of equity will compel the lord of a manor, to admit the tenant. *Toth.* 2, 3. As, if the lord will not hold a court, equity will compel him. *Car. Rep.* 4 ; for an action on the case will not lie against the lord ; and there is no remedy but in chancery. *Cro. Jac.* 368 ; *S. C.* 2 *Bulst.* 336. So if an erroneous judgment be given in a copy-hold court, in a *Formedon*, or the like, a bill may be exhibited in chancery to (b) reverse it. 1 *Rol.* 373 ; *pl. 2* ; *Lane* (c) 98.

(a) *Note* ; the rights here intended, are those which the law acknowledges to be such ; and never gives judgment against them, tho' it cannot give a remedy for them ; and not equitable rights, for which equity gives a remedy in the very creation of them.

(b) Or to compel the lord to receive a *plaint* or petition to reverse it ; but where such bill was brought to reverse a common recovery, under which the defendant had purchased, the court would give no assistance. 2 *Ch. Rep.* 387 ; *S. C.* 1 *Vern.* 367 ; for equity ought rather to supply a defect therein, than assist in the annulling it. *Sh. P. C.* 67.

(c) Altho' the king was lord of the manor.

[25] 2. If the lord of the manor will exact fines arbitrary, equity will restrain him. *Car. Rep.* 4; *S. P. Dy.* 164. As in case of a tenant right estate, where the fine is to be paid on the death of the lord, or the death of the tenant, or upon an alienation; the lord was compelled to take a moderate year's value. *1 Ch. Rep.* 34; *S. P.* 1 *Ch. Rep.* 96. And the estates held by the tenants being for 99 years renewable, and the fine being arbitrary at the will of the lord, the court compelled him to renew upon payment of fines of two years value. *2 Ch. Rep.* 134; *for the lord might exact a fine to the value of the estate, and so the tenant lose his estate, without this remedy in equity.*

3. A rent-seck is (d) granted; equity will decree (e) seisin to be given, and the (f) rent to be paid to the grantee. *1 Rol.* 378, *pl.* 22; *S. P. Mo.* 805; *1 Ch. Ca.* 147.

(d) *Vide 1 Rol.* 378. *pl.* 21, 22. A difference where the rent commences by grant, and where by devise; that in case of a grant, equity will not decree seisin; and *1 Rol.* 375; *pl.* 3; where a man had a remedy by distress; and by his own act destroy'd his power of distraining; equity would not relieve him.

(e) Here note a difference; that where there is no remedy at law, (as in this case of a rent-seck) equity will grant one; but where there is one, equity will not grant a further one tho' that at law is not available: As where an annuity was granted out of a rectory; the glebe was but forty shillings *per annum*, and the tithes not being liable to a distress; there was no remedy: Equity decreed the whole rectory to be liable to pay the annuity. *1 Ch. Ca.* 79. So the bill was for payment of a rent of five shillings *per ann.* it being proved that the rent had been constantly paid, till about twelve years last past, and no deed appearing to show the nature of the rent, it was decreed to be paid for the future, whereby the person of the defendant was charged. *1 Ch. Ca.* 120; a like bill and like decree. *1 Vern.* 359. But where the bill set forth that the plaintiff had a rent charge upon the lands; but that the defendant turned all the land to tillage, and left no stock on the ground for the plaintiff's distress, and therefore pray'd payment: The court declared, that unless there appeared a fraud to hinder the plaintiff of his distress, he could not have any relief here. *1 Ch. Ca.* 144. So in a like case it was demurred, for that the plaintiff had seisin, and might bring his *assize*, and that equity ought not to charge the person of the defendant, where there was another remedy at law; the demurrer was allowed. *1 Ch. Ca.* 184.

(f) This seems doubtful; for in the case of *Ferris and Newby*, cited in *1 Ch. Ca.* 147, it appears, that only seisin of the rent was granted; *S. P.* 1 *Ch. Ca.* 184, and note, that in all the cases before mentioned, where the court has decreed payment, and thereby charged the person, no other remedy could be

4. A man cannot sue in the chancery of *Chester*, for a thing which in interest concerns the chancellor there, because he cannot be his own judge ; and therefore in this case he may sue in the chancery in *England* ; for otherwise there shall be a failure of right. 1 *Rol.* 374, pl. 4 ; S. C. 12 Co. 113. [26]

5. If a man hath cause to complain in equity, of a matter arising within the county palatine of *Chester*, if the defendant lives out of the county palatine, he may be sued in the chancery here, or otherwise there would be a failure of justice ; for proceedings in equity binding the person only, if the person lives out of the jurisdiction of the chamberlain of *Chester*, there can be no relief there. 12 Co. 113.

6. Equity gives aid to the jurisdiction of (g) inferior courts. As if the executor of a citizen, who ought, according to the custom of that city, to come and give security for orphans' portions, lives out of the jurisdiction, equity will compel him to come in and give security. 1 Ch. Ca. 203.

7. A purchaser of a reversion shall compel the lessee in *chancery* to attorn where he hath no means to compel him by the common law ; for the grantee hath no remedy, as the (h) conusee of a fine, to enforce an attornment. 1 *Rol.* 377, pl. 12 ; S. P. Mo. 805.

[As to the general jurisdiction of courts of equity, see 1 *Fonb. Eq.* § 3, and note (f) to pa. 9, of 2d Amer. ed. ; also, 1 *Mald. Chan.* 23.]

granted. Besides, as the court would not charge the person, where there was a *seisin* at law, there seems no reason to charge it, at the same time that it deserves *seisin* to be given : Though *Vide Maxim* 9, c. 1 ; that where a court of equity has a jurisdiction as to part only, and can decree and enforce relief as to the whole, it will not send the party to law ; therefore *Quer.*

(g) So where the wife had sued the husband in the ecclesiastical court for alimony, and it was suspected that he would go beyond sea to avoid the sentence ; the court granted a *ne exeat regnum*. 2 *Ventr.* 345.

(h) Altho' the conusee may compel the tenant to attorn at law, yet equity will also compel him. 4 *Leon.* 4, 184 ; yet *quer.* and *Vide ant.* c. 3 ; the notes in the margin ; that equity will not grant a further remedy, where there is one at law.

[27]

MAXIM VII.

Equity relieves against accidents.

1. A bond was given, to pay an annuity out of the profits of an office, which was taken away by the usurpers in the grand rebellion; the office being revived upon the restoration, the obligor was sued on the bond; but upon his bill to be relieved, the court decreed him only to pay the annuity for so many years, as the office continued. 1 Ch. Ca. 72.

2. The plaintiff rented an house, which was seized by the parliament in the grand rebellion, and made an hospital for soldiers; and being sued for the rent, exhibited his bill to be (a) relieved; the Lord Chancellor took time to advise; but declared, if he could, he would relieve the plaintiff. 1 Ch. Ca. 83.

[On the liability of the tenant to pay the rent, notwithstanding the destruction of the demised premises, see 1 *Fonb. Eq.*, second Amer. edi., 374, note, where the cases are well collected by the American editor. To these may be added the case of *Ross v. Overton*, 3 Call, 309. After the decision of that case, the late Chancellor *Wythe*, sustained a bill for an injunction, exhibited by *Ross*; but on an appeal to the supreme court of appeals, the decree was reversed, on the ground, that after a decision by a court of law, it was not competent to a court of equity to interpose, on the same controverted points. See 2 *Hen. & Munf.* 408.]

3. An executor having a bond belonging to the testator, wherein only one person was bound, took a new bond from

(a) Serjeant *Maynard* cited a case, where the plaintiff, being tenant of a wharf, which by an extraordinary flood was carried all away, brought his bill to be relieved against paying of his rent. But all the relief he had, was only against the penalty of the bond; which was broken for non-payment of the rent. 1 Ch. Ca. 84.

the same obligor, wherein another person became bound for better security; though this is a conversion in law, and should go to the administrator of the executor, and not to the administrator *de bonis non*; yet, if the debt be lost, equity will not charge the executor with it, but will decree him only to assign the security. 1 Ch. Ca. 74.

4. An executor having sufficient assets by lease-hold houses, to pay ten thousand pounds to infant legatees, entered into a recognisance, which, by the custom of London, [28] he is (b) obliged to do, (*Vide ant. Max. 6, c. 5,*) for the security of the payment: The testator's estate was after so lessened by eviction of the houses and by fire, that it was doubtful whether what remained would be sufficient to pay the 10,000*l.*; the court decreed, that the recognisance should be made use of no further, than to make good the testator's estate, over and above the losses by eviction and fire. 1 Ch. Ca. 190.

5. An executor under a revoked will, but having no notice of the revocation, pays legacies, and after the revocation is proved; he shall be allowed those (c) legacies. 1 Ch. Ca. 126.

6. Trustee for an infant receives 40*l.* of the infant's money; the trustee is robb'd by his servant of 200*l.*, whereof the 40*l.* was part; he shall be allowed the 40*l.*, for he is only to keep it as his own. 2 Ch. Ca. 2.

7. The testator taking notice in his will that his wife was *enseint*, directed that if the child in *ventre sa mere* were a daughter, she should have 1000*l.*; but if a son, that then his executors should purchase 100*l. per ann.* and settle the same on the son, and the heirs males of his body, with a remainder to the plaintiff: The wife was delivered

(b) *Vide ant. Max. 3, c. 9;* that if an executor voluntarily assents to a legacy, there being at the time of such assent, sufficient assets to pay the legacy; yet, if they after become deficient through accident, he shall be obliged to make it good; for, it was his own folly that he took not security.

(c) *Quere*, whether the legatees shall be obliged to refund? *Vide Max. 3, c. 7;* that if the assets become deficient through accident, (as this case is) one legatee shall refund to another.

of a son, who died in the life of the testator ; then the testator died, leaving his wife *enseint* with a daughter, who had no fortune or provision made for her. The plaintiff exhibits his bill to have the lands purchased and settled on him ; but the court doubted, and ordered that he should make the posthumous daughter a party ; for, if you come to have relief in equity, in case of a will, and there falleth out an unseen accident, which if the testator had seen, he would have altered his will, there it is doubtful, whether relief shall be granted ; and though in this case, there be no such daughter of which the wife was then *enseint*, and to which the words of the will can extend, yet here is the same in effect : And Lord Chancellor said, A. having an only daughter, devised his (d) trustees should convey the land to the daughter in fee ; the testator recovered, and after had a son ; the daughter shall not carry the land from the son. 2 Ch. Ca. 16.

8. A sum of 120*l.* was given with an apprentice ; and by the articles it was provided, that if the master died within a year, 60*l.* should be returned ; the master being sick when the articles were executed, and dying within three weeks after, the bill was to have a greater sum returned ; and although the parties themselves had provided against accidents ; yet it was decreed that one hundred guineas should be paid back. 1 Vern. 460.

9. The obligee in a bond (e) loses it by accident ; the

(d) But if the legal estate is in the testator, and he devises the land, so that the law fixeth the estate, equity cannot help ; as if lands be devised in tail, remainder over ; the devisee dieth without issue, *in the life of the testator*, the remainder shall take place. 2 Ch. Ca. 16.

(e) It is necessary in some cases he make oath of such loss ; as where he seeks to be relieved upon the matter of the deed by a decree ; such an oath is necessary. But where he only prays a discovery, or to have the deed produced ; an oath is not necessary ; for it is not to be imagined he would exhibit a bill in either of the later cases, if he had the deed. 1 Ch. Ca. 11 ; S. P. 1 Vern. 180, 247 ; and the reason given, for that you shall not translate the jurisdiction without oath. But 1 Vern. 59 ; S. P. contra. [The case in 1 Vern. 59, is said to be mistaken by the reporter, being contrary to the uniform doctrine on the subject. See Eq. Ca. Abr. 13 pl. 3 ; 2 P. Wms. 540 ; 3 Atk. 17 ; Ibid. 133 ; Mitf. pl. 53, 113.]

court of (*f*) chancery will give relief. *Lat.* 24, 146, 148; even if the bond was (*g*) voluntary; but a *quer.* is made in the book. 1 *Ch. Ca.* 77; and even against a (*h*) surety. 1 *Ch. Ca.* 77.

(*f*) For the court of requests was prohibited to grant relief in such a case.
1 *Rol.* 375, pl. 1; *Lat.* 24.

(*g*) *Quere*; *Vide Max.* 14, c. 17.

(*h*) *Quere*; *Vide Max.* 14, c. 17.

MAXIM VIII.

[30]

Equity prevents mischief.

1. If there be lessee for life, remainder for life, the reversion or remainder in fee; and (*a*) the lessee in possession (*b*) wastes the lands; though he is (*c*) not punishable

(*a*) Tenant by the courtesy was enjoined from committing waste. *Hardr.* 96. So of a jointress. *Toth.* 144.

(*b*) Waste in woods and houses restrained. *Toth.* 83. So in felling timber. 1 *Ch. Rep.* 57. So in plowing antient pasture. *Toth.* 143, 144. So of antient meadow and pasture. 1 *Ch. Rep.* 14, 106, 116; 2 *Ch. Rep.* 94.

(*c*) Waste done by one who held by covenant, and therefore not punishable by law, yet holpen in equity. *Toth.* 188. But here *note* a difference, where the tenant is dispuishable of waste by the nature of his estate, or by express grant; and also a difference as to the kind of waste; for it appears from this case that the first tenant for life shall be restrained generally, which includes all kind of waste. But tenant with express grant of *without impeachment of waste*, shall not be restrained from cutting timber. 1 *Ch. Rep.* 242; or from plowing. 1 *Vern.* 23; or from opening new mines. 1 *Salk.* 161. But such a tenant shall be restrained from pulling down houses, or defacing a seat. 2 *Ch. Ca.* 23; 1 *Salk.* 161. So that all tenants for life shall be restrained from pulling down houses, or defacing seats. But tenant by express grant of *without impeachment of waste*, may cut down timber, or open new mines, &c. though tenant for life, without such express grant, shall not.

of waste by the common law, yet he shall be restrained in chancery; for this is a particular mischief, and though he is not punishable during the continuance of the remainder, yet he is (*d*) punishable after. 1 *Rol.* 377, pl. 13; *S. P. Mo.* 554; *Toth.* 61; *Car.* 26, 36; 1 *Vern.* 23.

[How far, and in what cases, courts of equity will restrain the opening or working of mines; and what shall be deemed waste, by the tenant, and what not, see *Gibson v. Smith*, 2 *Alt.* 183; *Clavering v. Clavering*, 2 *P. Wms.* 388; *Stoughton v. Lee*, 1 *Taunt.* 402; *Findlay v. Smith*, 6 *Munf.* 134; *Crouch v. Puryear*, 1 *Rand.* 258.]

2. A court of equity hath a jurisdiction to quiet men in their possessions; *per Coke*, 3 *Bulst.* 34; *S. C. Litt. Rep.* 166; 1 *Rol. Rep.* 190. As where the party hath been in possession three years, and another disturbs him in such possession; equity will grant an (*e*) injunction to quiet him in it. *Car.* 66; *S. P.*, 1 *Vern.* 156. So the law patentees had an injunction to restrain the defendants from proceeding in the printing of any law books. 2 *Ch.*

[31] *Cu.* 67. So the company of stationers had an injunction, to stay the books in the custom-house, and hinder the sale of statute-books printed beyond sea. 2 *Ch. Ca.* 76; and where the case requires it, equity will grant a perpetual injunction; as equity granted a perpetual injunction against proving of a will in the spiritual court, it being found upon a (*f*) trial to be no will. 1 *Ch. Ca.* 80. So a perpetual injunction was granted to stay the actions at law of several persons, where the right had been tried and determined by one trial. *Vide Max. 9, c. 7.*

(*d*) From this reason here given, it should seem, that except the tenant in possession be punishable by law, at some future time, though he is not so at present, equity will not enjoin him. But from the cases before it appears, that though he be entirely punishable, he shall be in some cases restrained.

(*e*) An injunction is never granted, before the bill filed. 4 *Inst.* 92; *S. P.* 1 *Vern.* 156.

(*f*) Injunctions are not granted, except a right appears; for otherwise the party prohibited might receive a prejudice, which could never be compensated, and so equity would do a mischief, instead of preventing one. 1 *Vern.* 276.

3. The plaintiff in his bill suggested, that the defendant set up a pretended will, whereof he was executor, and being insolvent, endeavoured to get in the debts, the will being contested in the spiritual court: The defendant demurred, for that the bill contained no equity, and the suggestion of insolvency might be made against every executor; but the demurrer was over-ruled, and upon motion ordered, that the debtors to the deceased's estate, should (g) forbear to pay any money, till the matter settled in the spiritual court. 1 Ch. Ca. 75.

4. Where deeds do concern as well the title of the reversioner, as the title of the tenant for life, who is in possession of the deeds, it is usual to have them brought into (h) court, for avoiding all perils, and the indifferent

[32]

As upon a motion for an injunction to stop the sale of English bibles printed beyond sea; the Lord Keeper declared he could not grant an injunction, but where a man has a plain right to be quieted in it; and directed a trial, wherein the patentees to be plaintiffs, and the defendants to admit they have sold twelve bibles; and when the trial is over to come back again. 1 Vern. 120. So where the University of Oxford had a patent for printing of bibles; the King's printers, being entitled under a patent, brought a bill to restrain them; though the court was of opinion, that the University could not print more than for their own use; yet it being a right determinable at law, would not grant an injunction, but directed a trial. 1 Vern. 275. And where the East-India company pray'd an injunction to restrain the defendant from trading to the East Indies, though the court was far from thinking the company's patent void, which had been confirmed by so many Kings; yet the validity of the patent being triable at law, an injunction could not be granted, till it was determined there; and a trial was directed. 1 Vern. 127; S. C. 2 Ch. Ca. 165. [For more of the jurisdiction of courts of equity in granting injunctions, see 1 Madd. Ch. 125, and *Eden on Injunctions.*]

(g) Debtors, if they have the least notice of such an order, must take care, that they pay not the money to such executor; for, where, by the decree, one of the executors was ordered to receive no more of the testator's estate, a debtor, though he was no party to the bill, nor ever served with a copy of the decree, being present in court when the decree was pronounced, and paying a debt due by mortgage, to such executor, who by law was the hand entitled to receive the debt, was decreed to pay the debt over again. *Harvey and Mounstague*, 1 Vern. 57, 122. [But see note (1) to 1 Vern. 123, *Raithby's edd.*; and *Iveson v. Harris*, 7 Ves. 251, 256.]

(h) But where the plaintiff, as heir at law, brought a bill to have the deeds and writings concerning the estate, the defendant being a jointress, insisted that she ought not to discover or part with her writings, until her jointure was

custody of them. *Car. 25.* And *per Lord Chancellor*, if tenant for life have a deed, whereby the reversion and inheritance is in another, he may at law detain the deed against the reversioner; but ordered that the deed should be bro't into court for its safest custody, and both parties to have the use of it as they have occasion, and both parties, if they please, shall have copies attested. *2 Ch. Ca. 42.*

5. *Inter-pleading bills* are proper in equity; as where the plaintiff by his bill shewed, that there is a controversy between the two defendants, for the reversion of the estate, which the plaintiff holdeth for years, and that he doth not know to which of them to pay his rent; and prayed, that upon payment of his rent into court, he may be discharged and saved harmless from suit and trouble for the same rent by the defendants; an injunction was granted accordingly. *Car. 65.*

6. Suits *quia timet* are proper in equity; as where lands chargeable with 500*l.* to be paid to a daughter at her age of sixteen, were devised to the defendant for life, remainder to the plaintiff in fee; the bill was brought before the daughter's age of sixteen, to compel the defendant to pay (*i*) off the 500*l.*; to which it was objected, that perhaps the tenant for life may live till the daughter is of sixteen, and then the daughter may enter, and so the plaintiff not be hurt. But upon a demurrer, the court declared the bill to be proper. *1 Ch. Ca. 223.* So where the surety has a counter-bond, though he is not troubled or molested for the debt; yet at any time after the money becomes payable on the original bond, equity will decree the principal to discharge the debt. *1 Vern. 190.*

[38] 7. Bills to examine witnesses in (*j*) *perpetuam rei me-*

confirmed; and although the jointure was voluntary and made after marriage, yet, *per Cur.* confirm the jointure, or you shall not see the deeds. *1 Vern. 480;* *Vide Max. 14, c. 12,* the notes there.

(*i*) But the tenant for life shall not be obliged to pay off the whole incumbrance. *Vide Max. 9, c. 12.*

(*j*) In a bill for this purpose, if the plaintiff prays relief, the bill shall be dismissed. *2 Ventr. 366.* [*See 1 Madd. Chan. 187; Coop. Eq. Pl. 52.*]

moriām, are proper in equity. As if a man assumes to J. S. in consideration that he will marry his daughter, that he will pay him 500*l.* after the death of J. D. in this case, because the witnesses are old, and J. D. is as young as J. S. so that the witnesses to prove the promise, may die before J. D. and so J. S. will be without remedy for his promise; he may exhibit his bill in chancery, and examine witnesses to prove it: In which he that made the promise may join in nature of an examination in *perpetuam rei memoriam*. 1 *Rol.* 388, *pl.* 1. So a bill to perpetuate the testimony of witnesses to prove a (*k*) will. 1 *Vern.* 105. So a bill lies to perpetuate the testimony of witnesses to prove a *modus*. 1 *Vern.* 185. So to prove a (*l*) right of common (*m*) 1 *Vern.* 308; or a right to a (*n*) way. 1 *Vern.* 312.

[For the proper frame of bills to perpetuate testimony, see *Coop. Eq. Pl.* 52; 1 *Madd. Chan.* 187.]

(*k*) The testator became lunatic; and a bill was brought to examine witnesses in *perpetuam rei memoriam* touching this will; the defendant demurred, for that it was a bill to prove a man's will in his life-time, which is in truth no will till the testator's death; and although it was insisted, that during the lunatic's life, all the witnesses to the will, that could prove the testator to be then *compos mentis*, might be dead, yet the bill was dismissed. 1 *Vern.* 105.

(*l*) In all cases where such a bill may be brought, the plaintiff must, if nothing hinders, first establish his right at law; as to a bill to prove a will, and perpetuate the testimony of the witnesses, the defendant pleaded himself a purchaser without notice of any such will, and insisted, that unless there had been a verdict in affirmation of such will (nothing hindering the plaintiff, but that if he had a title, he might recover at law) the plaintiff ought not to be admitted to examine his witnesses, thereby to hang a cloud over a purchaser's estate; the plea was allowed. 1 *Vern.* 354, *S. P.* before he can bring such a bill to prove a right of common, 1 *Vern.* 308; or a right to a way, 1 *Vern.* 312; or a title to lands, 1 *Vern.* 441. But where several actions at law have been brought on both sides, concerning a right, there a bill to have such right tried, is proper before the establishment of the right at law, being a bill of peace. *Vide Max.* 9, *c.* 7.

(*m*) The Lord Keeper said, he would not allow examination in *perpetuam rei memoriam*, for such trivial things as right of common, or for ways or water-courses, or at least not till after a recovery at law; for that the examination costs more than the value of the thing. 1 *Vern.* 312.

(*n*) In such a bill to prove a right to a way, the way must be laid in the bill, exactly *per and trans*, as in a declaration at law; else it may be demurred to for uncertainty. 1 *Vern.* 312.

8. Goods were devised to the defendant for life, and after his death to the plaintiff: The bill was to compel the defendant to give security to deliver the goods to the plaintiff after the defendant's death, or the value thereof; which was decreed accordingly. 1 Ch. Rep. 110.

[34] 9. The defendant's testator gave the plaintiff 1000*l.* to be paid at the age of 21 years: The bill suggested the defendant wasted the estate, and prayed he might give security to pay this legacy when due, which was decreed accordingly. 1 Ch. Cu. 121.

10. An apprentice, after he is out of his time, may exhibit a bill to oblige his master to sue the covenants in the indentures within a certain time, (*viz.* a year) or else to deliver up the indentures; for else the master might stay his action as long as he pleased, and till the apprentice's witnesses were dead. 1 Ch. Ca. 70.

11. A common that has been inclosed for thirty years, shall not afterwards be thrown open. 1 Vern. 32, and equity will bind the right of a stranger to prevent such a public mischief; as there being an agreement between the plaintiff and the parson, to inclose a common, in which the parson had some glebe, for which the plaintiff was to give him as good; the court decreed the agreement (*o*) and inclosure, and that the successors of the parson should be bound thereby. 1 Ch. Rep. 41. So where there was an agreement for an inclosure, but all that claimed common, were not parties to it: Although it was insisted, that to decree that agreement, would be to do a manifest wrong; it was decreed nevertheless, that the agreement for the (*p*) inclosure should be performed; and that if any, that had interest, were not parties to the agreement, they could not be bound, and so at no prejudice: But, however, it should not be in the power of one or two wilful persons to oppose

(*o*) It seems there ought to be a commission, to examine the value and quantity of both lands, that the church may receive no prejudice. 1 Ch. Rep. 41.

(*p*) And a commission was awarded to set out each person's title. 1 Ch. Cu. 48.

a public good. 1 Ch. Ca. 48. So where there was a decree for an inclosure twenty years since, to which the husband agreed; but the wife having an estate within the manor, and her husband's agreement not in strictness binding her, she would now disturb the inclosure; it being proved, that she was (r) benefited by the inclosure, the court decreed it should stand. 1 Vern. 456.

[35]

12. It being alledged in the bill, that the defendant, the surviving partner, carrying on a distinct trade for himself with the persons that were debtors to the joint trade, to oblige them, forbore to call in their debts; upon motion, it was ordered, that an able attorney should be appointed to sue for and recover those debts; unless the defendant should give security to answer the moiety of the debts that were standing out. 1 Vern. 118.

(r) But where it was not charged in the bill, that the defendant would be benefited by such inclosure, nor charged that there was any agreement for an inclosure; on a demurrer for that reason, the bill to compel the only freeholder in the manor to consent to an inclosure, was dismissed. 1 Ch. Rep. 259.

MAXIM IX.

Equity prevents multiplicity of suits.

[36]

1. The bill was against an executor to (a) discover assets, and to have satisfaction ; it was insisted for the defendant, that the plaintiff ought not to have relief here, having a proper remedy at law ; but the court being possessed of the cause, and the same being as proper for this court as at common law ; decreed, to avoid circuity of action, that the defendant should come to an account, and pay the plaintiff his debt. *2 Ch. Rep.* 37. And in a bill for the same purpose, the defendant pressed for a (b) dismissal, because the plaintiff had the effect of his suit, *viz.* to have a discovery ; but *per Cur.* as to dismissal to law, because the plaintiff hath discovery here, when this court can determine the matter, it shall not be an handmaid to other courts, nor beget a suit to be ended elsewhere. *2 Ch. Ca.* 200.

2. The obligee in a bond brought a bill against the heir of the obligor, to be relieved touching an error in the bond, *viz.* *quadragint'* instead of *quadrincent' libr'*, though the defendant offered to admit the bond to be for 400*l.* and so try it ; yet the court decreed an account of the profits of the lands, and satisfaction thereout. *2 Ch. Ca.* 225.

3. The plaintiff and defendant being partners in trade, upon settling accounts, they dissolve the partnership, and

(a) A bill was brought against an executor at the suit of a creditor to discover assets ; it was demurred to, because it was brought before any suit commenced at law ; by which means the defendant is doubly vexed ; for perhaps if he were sued at law, he would confess the debt, or pay it, rather than stand out suit. *Hard.* 115.

(b) Even if there had been no prayer for relief, the bill should not be dismissed, because the plaintiff has the end of his suit by the discovery ; as in a bill to examine witnesses *in perpetuam rei memoriam*, the bill cannot be dismissed, and yet the defendant ought to have his costs^t, for an heir at law ought not to pay for his own disinherison ; and therefore the defendant must move to have his costs ; which is never denied.

each had his dividend. But the defendant covenanted to save the plaintiff harmless from all losses and damages due, or which might be due, or brought on, or which might or should happen to the plaintiff in relation to his dividend; the plaintiff being sued for some customs unpaid for goods which belonged to the joint trade, was compelled to pay 60*l.* and costs; and having afterwards received some monies due to the defendant, but no way relating to the partnership; and being sued at law by the defendant for such monies, brought his bill to (c) retain sufficient to pay himself for the 60*l.* and costs: Which was decreed accordingly. 1 Ch. Ca. 311. [For, stoppage is no payment in law or equity. See 1 Vern. 122, *Railby's ed. note* (3).]

4. A. directed B. to pay to C. what sums C. should want; C. accordingly received two sums of money (among others) of B. for which he gave receipts as by the order of A.; A. and C. come to an account, which being stated, they gave mutual releases; but the two sums not being entered in the books of A. were not accounted for by C.; B. not having received any allowance from A. for the two sums, prefers his bill against C. to have the money paid back; C. confessed the receipts, but insisted he ought not to pay the money back, for that they never had any dealings together but upon the credit of A.; and it was to be presumed the plaintiff had an allowance from A.; he never paying the defendant any thing but upon the credit of A.; and the receipts being in writing and so worded. But the court decreed the defendant should return the money, for the plaintiff has a fair claim against the defendant to avoid circuity of suits, for otherwise it would only turn the plaintiff on A.; and A. on the defendant again in equity to set aside the release, and to have an allowance of those sums; which decree was affirmed upon an appeal to the House of Peers. Sh. P. C. 17.

[37]

(c) It is the custom of companies, that if they owe a man 100*l.* they will give him credit for so much; and therefore in respect of a company, stoppage is to be allowed as a good payment. 1 Vern. 122; [2 Vern. 117; 2 P. Wms. 130.]

5. There having been two issues directed ; the one, whether the Lord of the manor had a grant of *free warren* ; and the other, in case he had a grant of *free warren*, whether there were sufficient common left for the tenants : Upon motion for a new trial, the Lord Chancellor said, these matters were properly triable at common law ; and he did not see what jurisdiction the chancery had of this cause : But it was urged, the bill was brought to prevent multiplicity of suits, and was in its nature a bill of peace ; and a new trial was granted. 1 Vern. 22.

6. A bill shewing, that one commoner had recovered one shilling or other small damages against the plaintiff for oppressing the common, or for using the common where he ought not, and therefore that the defendant another commoner may accept of like damages for what is past, to prevent charges at law, is in the nature of a bill of peace, and proper in this court. 1 Vern. 308.

[38] 7. A fair having been held time out of mind, within a manor ; but the pickleage and stallage and other profits, belonging to several tenants of the manor, who claimed several acres of the land, whereon the fair was held ; the Lords of the manor, being a corporation, surrendered their old charter, and got a new one, empowering them to hold the fair any where ; and for their own profit, would remove it to another place, the soil whereof belonged to them ; hereupon several actions being brought on both sides, a bill was brought by the tenants to (d) quiet them in the possession, and to have a perpetual injunction ; which per Lord Keeper, is very proper in this court, being a bill of peace, and in such case, this court ought to interpose and prevent multiplicity of suits. 1 Vern. 266.

(d) *Vide Max. 8, c. 2.*

MAXIM X.

Equity regards length of time.

1. The defendant would avoid an estate for want of livery and seisin, but because the plaintiff enjoy'd 25 years, it was decreed he should enjoy it quietly. *Toth.* 54; *S. C.* cited, 1 *Vern.* 196, where said after such a length of time, this court will presume livery.

[On the doctrine of *presumptions*, at law and in equity, see 1 *Fonb. Eq.* 2nd. Amer. edi. ch. IV. § 27, pa. 329 et seq. where the principal cases, both British and American, are cited in the notes.]

2. The plaintiff had 40 years possession of a piscary; the court decreed the defendants to surrender and release their title to the same, though the surrender made by the defendants' ancestors was defective, *Pencose* and *Trelawny* cited 1 *Vern.* 196; and after 40 years possession of a copy-hold under a will, there appearing no surrender to the use of such will, the court decreed the want of a surrender should be supplied. 1 *Vern.* 195; *S. C.* 2 Ch. Ca. 150.

3. The plaintiff sought to have a conveyance of his father's estate set aside, which was made 20 years since, when the father was 80 years old, and *non compos mentis*; the court declared, that after 20 years, and two purchases, it was not proper for this court, to examine a *non compos mentis*, and dismissed the bill. 1 *Ch. Rep.* 40.

4. The defendant set up an old mortgage made 60 years ago; and no interest appearing to have been paid for 40 years, or any demand made upon account of the mortgage; the court decreed a *vacat* to be entered on the enrolment of it. 1 *Ch. Rep.* 105. [39].

5. A bond of 22 years old came to the hands of an executor, and forasmuch as the obligee, the testator, lived

till about 7 or 8 years past, and never demanded any interest ; the court conceived the bond hath been satisfied, and decreed the same to be cancelled, and if judgment entered thereon, the same to be vacated. 1 Ch. Rep. 78. So a bond entered into by the plaintiff to save the defendant harmless, being 23 years old, was decreed to be delivered up to be cancelled. 1 Ch. Rep. 88. So of an ancient statute. 1 Ch. Rep. 106.

6. The bill was against the executors of the purchaser of lands, to have 500*l.* part of the purchase money paid, which was decreed 33 years ago to be paid for the use of the plaintiff ; the defendants pleaded, that their testator lived in *London* till about 10 years past, and the plaintiff might have had remedy against him ; and no suit having been commenced against him in his life-time, nor any till now ; and the defendants the executors having nothing to shew for the payment ; and all parties concerned therein being dead ; therefore, after all this time, the defendants ought not to be charged therewith ; the court held the plea good. 2 Ch. Rep. 44.

7. Bill of review to reverse a decree made 16 years ago ; the court in regard the decree was made so long since, and nothing done against the same in all this time, would not reverse it. 1 Ch. Rep. 139 ; S. P. 2 Ch. Rep. 48.

[The utmost period allowed for a bill of review in *England* seems to be 20 years. See 5 Bro. Parl. Ca. 466 ; 2mb. 645. The same rule was adopted in *Virginia*, until by act of 1813, such bills were limited to three years. See 1 Rev. Code of 1819, pa. 492.]

8. A common that has been inclosed for 30 years, shall not afterwards be thrown open. 1 Vern. 32.

[40]

9. A bill was exhibited, setting forth, that the defendant in a replevin had avowed for a rent-charge, and issue was taken thereupon, upon the seisin of the grantor ; and it was found for the defendant ; which verdict the plaintiff complained of, alledging that the rent pretended to be granted, had not been paid in 50 years, and other circum-

stances to render the grant suspicious, &c. it was decreed that there should be a new (a) trial. 2 *Ventr.* 351.

10. The testator devised his lands to his executors, upon condition that if any of his name would purchase them for his own use, then his will was, that his executors should sell the same to him for 200*l.* less, than the reasonable value thereof; the executors enjoyed the lands for 10 years, and one dying, the survivor levied a fine of the whole, and 5 years past; the plaintiff 25 years after the testator's death, brought his bill to have a conveyance of the lands, for 200*l.* less than they were worth to be sold. But the court conceived, that the plaintiff's bill being brought so long after the testator's death, what was pray'd thereby, was unreasonable, and therefore dismissed the bill. 1 *Vern.* 362.

(a) *Note*; this could not have been tried again at law, because the verdict in replevin is conclusive. 2 *Ventr.* 352.

[41]

MAXIM XI.

Equity will not suffer a double satisfaction to be taken.

1. The grand-father devised lands to his son, to pay ten pounds *per ann.* to the son's three daughters; the father gives 200*l.* in (a) marriage with one; decreed the ten pounds *per ann.* should be included in the 200*l.* *Tth. 78.*

[On the doctrine of a legacy being deemed a satisfaction of a debt, and of a legatee claiming under and against a will, see 2 *Fonb. Eq.* 2nd Amer. edi. 325, note (l); 2 *Maddl. Ch.* 41.]

2. The husband before marriage became bound to a trustee, in a bond of 3000*l.* to acknowledge a statutie within six months after his marriage, defeazanced, that if he did not within a convenient time after his marriage, convey lands of 500*l. per ann.* for the wife's jointure, then he should leave her 1000*l.* at his death: He by will devised to her lands in fee, worth 52*l. per ann.* the court decreed this to be in (b) lieu of her jointure, and that the bond should be delivered up and cancelled. 1 *Ch. Rep.* 45. So the husband articed before marriage to settle 100*l.*

(a) But if a father bound to pay a legacy to his son and heir, disinherits him, but makes another provision for him, the legacy shall not be included in that provision: As legacies of 50*l.* and 100*l.* being devised to the son and heir, the father received them; and after the father entered into a bond to leave the son 6000*l.* at his death, but by his will disinherited him; although it was insisted, that all the son's demands must naturally be intended to be included in this bond; yet *per Cur.* I will do all I can to help an heir that is disinherited; and the executor shall be allowed no more than what he can prove to have been actually paid towards satisfaction of these legacies, and *eo nomine* as in part of the legacies. 1 *Vern.* 480.

(b) There were some proofs offered, that it was a voluntary gift, and not in respect of the bond or the jointure; but the court being of opinion that they were but conjectures, decreed it to be a satisfaction; which implies, that if the proofs had been sufficient, they would have decreed otherwise. 1 *Ch. Rep.* 45.

per ann. on his intended wife for her jointure. He makes a settlement in pursuance of the articles ; but the conveyance being ill penned, part of the lands thereby intended to pass, did not pass. He afterwards made a voluntary settlement upon her for her life, of lands of 500*l.* *per ann.* if she brings a bill to have the defect of her jointure supplied, the subsequent settlement shall be taken as a (c) satisfaction. 2 Ch. Ca. 68.

[42]

3. Sir W. B. having a son and two daughters by a first venter, upon his second marriage settled the land in jointure upon his wife, and after in case of their having issue female, to raise 3000*l.* for such issue. And having one daughter by such second marriage, he devises the reversion of the settled lands, and all his other lands to trustees, and says, that after the son by a convenient match shall have raised 9000*l.* for his three daughters, that then the trustee should let the son have the estate. It was decreed, that if the heir paid the 9000*l.* the security by the settlement should be discharged ; the will being but cumulative security, and so the daughter by such second marriage was to have but (d) one 3000*l.* and the court cited a case, where a man had secured portions for his children,

(c) But where the husband on the marriage charged the lands with a rent-charge for the jointure of the wife, and devised part of those lands to the wife ; the heir prayed that the lands devised to the wife, might bear their proportion of the rent-charge. But *per Cur.* the grantee of the rent-charge, may distrain in all or any part of those lands for her rent, and there is no reason to abridge her remedy in equity ; and the husband certainly intended her some benefit by this devise, and he has not declared it should be accepted in part of the rent-charge ; and so dismissed the bill. 1 Vern. 347.

(d) Note ; By the settlement, the 3000*l.* was to be paid to the daughter at her day of marriage, so that she married after 16 ; or otherwise at the age of 18 ; and if she died before either, then his heir to have the benefit ; it was decreed, that this one 3000*l.* which she was to have only, should be liable to the same contingencies, 2 Vent. 347 ; but that it ought to be paid in the first place, whether the lands in present possession devised, and the said reversion, which are liable to the said will, be sufficient or not, to raise the whole 9000*l.* 2 Ch. Rep. 165 ; and in the mean time till payment, she was to have a third part of the profits of the land devised. 2 Ventr. 347.

and afterwards by his will devised to each of them a like sum ; it was held that this would not double their portions, unless plainly proved, that (e) intended it so. *2 Ventr. 347 ; S. C. 2 Ch. Rep. 162.*

(e) The court declared, there was no intention of the father to make a double portion for the daughter ; and therefore she ought to have but one 300*l.* *2 Ch. Rep. 165*; and in all these cases of devises, the intention ought to be the rule; as where an uncle owed his niece 300*l.* by bond, and by his will gave her 300*l.*, and after making his will, borrowed 100*l.* more of her; though it was insisted that it was the rule in equity, that where the debtor gives his debtee a legacy greater than the debt, it shall go in satisfaction; *for a man shall be intended to be just before he is kind*; otherwise where the legacy is less, for that is neither to be just nor kind : yet *per Lord Chancellor*, it may be as good equity to construe him to be both just and kind, if he intended to be both ; if any part of this 300*l.* be applied to the payment of the debt, as for so much it is not a gift ; whereas a legacy must be taken to be a gift or gratuity ; and there being assets, and some proofs of the testator's greater kindness to that niece, than his other two nieces, to whom he had given legacies of 200*l.* a-piece by his will, the whole 300*l.* over and above the debt was decreed her, *1 Salk. 155 ; S. P. 2 Salk. 508*; that a legacy shall not be taken as a satisfaction of a debt ; for a court of equity ought not to hinder a man from disposing of his own as he pleases ; and when he says he gives a legacy, we cannot contradict him and say that he pays a debt ; and as to a debt contracted after the making of the will, there is no pretence to make a legacy to be a payment of that. So if a legacy be less than a debt, it was never held to go in satisfaction. So if the thing given was of a different nature, as land, it should not go in satisfaction of the money. So if a legacy be upon condition, for by the breach he may be a loser, whereas the will intended it for his benefit. And in a late case of Sir J. Scudamore, decreed *Trin. 1726* ; the *residuum* of a personal estate, being 8500*l.* was devised to an executrix, in trust to purchase lands to the use of herself for life, remainder to Sir J. Scudamore in fee. She purchased lands to the value of 3500*l.* but it did not appear, that she bought them with the trust money : The only proof that was made, was by a book, where she kept a regular account of the trust money, and it did not appear there, that this purchase was made with part of the trust money. She devised these lands to Sir J. Scudamore in fee, and by her will gave several legacies to the plaintiffs, for which there would not be sufficient assets, if the devise of the lands should not be construed a satisfaction *pro tanto* ; *per Lord Chancellor* : It does not appear, that the money laid out in the purchase of these lands, was part of the trust money. So that the sole question is, whether, when a trustee, being obliged to lay out the trust money in the purchase of lands, purchases lands, but does not declare it to be in pursuance of the trust, and devises those lands to the *cestuy que trust*, and by the will gives also many legacies, which, if this be not construed a satisfaction, can never be paid ; whether in conscience to make the will consistent, and every part of it satisfied, this ought not to be construed to be a satisfaction ; and since it cannot be imagined,

4. By articles made on the marriage of the plaintiff, her father was to pay 50*l.* as her portion, and the intended husband was to have made a settlement; the husband died intestate, before the portion paid, or the settlement made: She takes out administration to her husband, and thereby becomes entitled to the 50*l.* and now brings her bill against the heir of her husband, to have her jointure according to her marriage-articles; *per Cur.* the plaintiff shall not have the money as administratrix, and also the jointure too, which was to be made in consideration of the money, and in expectation that the husband should have received it; and therefore (*f*) dismissed the bill with costs. 1 *Vern.* 463.

that she at the time of her death, intended to amuse the legatees with vain hopes of their legacies, which she knew could never be paid, except this device is to be taken as a satisfaction; therefore, decreed it to be a satisfaction *pro tanto*. [See 3 *Atk.* 65, where it seems, the rule, that where a debtor gives a legacy as large or larger than the debt, it shall be considered as a satisfaction, is fully established. The courts, however, have not approved of it, and always endeavor, if there is any room for it, to distinguish cases out of it. 3 *Atk.* 96; appointing the legacy to be paid at a future day, however near, takes the case out of the general rule. See also 2 *Ves.* 635; 2 *P. Wms.* 555; 2 *Atk.* 300; *Prec. Ch.* 270; 1 *P. Wms.* 409, *Coxe's note.*]

(*f*) But a *querre* is made by the reporter; for she is entitled to these two demands in distinct capacities; and *Vide* the case of *Jason and Jervis*; the husband of the defendant being seized of the land, sold it to the plaintiff; the plaintiff contracted with J. S. to sell him the land for 1200*l.* and entered into a statute, to convey the land free from incumbrances, and to deliver possession; or in default thereof, to repay the 1200*l.* The husband dies, and the defendant set up a settlement, whereby her husband was but tenant in tail, and she was to have the land as her jointure, and so evicted the estate from J. S. who afterwards died, and made the defendant his executrix, whereby she became entitled to the 1200*l.* The plaintiff insisted that it was a case of great extremity, that the defendant should have the land, and the 1200*l.* too; but *per Cur.* there is no weight in that objection, for she has an estate for life in the land by the settlement, and she has the money as executrix to J. S. and quando duo Jura in uno conveniunt, aequum est, 'ac si essent in diversi. 1 *Vern.* 284. [*Q*] The defendant, in this case was the widow of Nathaniel Bacon the younger, who headed the rebellion in Virginia, in 1676; after whose death she married one Jervis, and was his widow when the suit was brought. See the report at large, 1 *Vern.* 284.]

[44]

MAXIM XII.

Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.

1. A copy-holder for life by cutting timber forfeited his estate ; the lord entered, and admitted the defendant who had a verdict at law ; the copy-holder exhibited his bill to be relieved against the forfeiture, offering, if it should appear to be waste, to make satisfaction : Upon an issue directed to try, whether it was the primary (a) intention in cutting the timber to do waste ; it being found for the plaintiff, it was decreed, he should be (b) relieved, and the defendant to deliver possession, and account for the mesne profits. 1 Ch. Ca. 95.

[45] 2. If A. conveys lands to B. &c. and their heirs, upon trust that if C. the son of A. within six months after the death of A. should secure to trustees 500*l.* for the younger children of C. ; then, after such security given, to convey to C. and his heirs ; and until the time for giving such security, in trust for the eldest son of C. and in default of such security, to convey to such eldest son and his heirs ; if C. dies before any such security given, yet this condition (c) precedent being only in nature of a penalty, the intent of the trust shall be regarded, which was to secure 500*l.* to the younger children. 1 Ch. Ca. 89.

(a) For in case of a wilful forfeiture, the court declared, they would not relieve. *Vide ant. Max. 2, c. 3.*

(b) *Vide Toth. 3.* Where the court compelled the lord to admit a tenant copy-holder to sue at law, without any forfeiture of his copy-hold.

(c) Note ; this was a condition *precedent*, and yet the court relieved against it, although it was said by Lord Chancellor, 1 Vern. 83 ; that conditions *precedent* must be literally performed, and that the court will never vest an estate, where by reason of a condition *precedent*, it will not vest at law ; yet it appears by this and the following cases, that relief is given against conditions *precedent*, where compensation can be made.

3. The father seised in fee, devised the lands¹ to his daughter and her heirs ; and his mind is, that (d) if his son pay to her 50*l.* then his son (e) shall have the land ; the money was not paid at the day ; the daughter sold the lands ; it was decreed against the vendee ; the son paying the money ; for the court took it but as in nature of a security. 2 Ch. Ca. 1.

4. It was provided by the marriage-articles, that in case the husband did not, within two years after the marriage, settle such a jointure on the wife, as by the articles was agreed to be settled ; that then the husband should only have interest paid him during his life for the wife's portion ; the wife died within the two years, he not having settled such jointure, as by the articles he was obliged to settle. He brought his bill to be relieved against the articles, insisting that if he had at any time settled such jointure upon his wife, though not within the time prescribed by the articles, he should have been relieved against the articles, and have had the portion decreed him ; but the bill was (f) dismissed ; and colonel *Cheek's* case was cited ; who by articles made on his marriage was to have 4000*l.* portion with his wife ; 1500*l.* down in hand, and 2500*l.* more, if he made a settlement within the space of three

[46]

(d) Note ; the payment of the 50*l.* was *precedent* to vesting the estate in the son ; and yet the court relieved.

(e) The fee simple was decreed to him ; but a *quare* is made by the reporter ; for if he had performed the condition, he could have had but an estate for life, and there is no reason, that his failure should give him a greater estate in equity, than the will in writing gives him on performance of the condition, by the express words of the will.

(f) Note ; no reason is given in the book, why the bill was dismissed ; but a *quare* is made in the margin, whether the husband's making a settlement be not a condition *precedent* to the payment of the portion ? But the reason seems to be, because no compensation could be made after the wife's death, since no jointure could be then settled on her ; and this is more apparent, from the reasoning of the counsel for the husband, *wiz.* that if she had lived, he might have settled a jointure, even after the two years, and been decreed to the portion ; which if so, then it is the settling the jointure, (that is) the making compensation, (which might be done at any time before her death, but not after) that makes the difference.

years : it happened that his lady died within two months after the marriage, he not having in that time made such settlement, as by the marriage articles he was obliged to have made ; and he in that case exhibited a bill to be relieved, and was dismissed. 1 Vern. 68, 69.

5. The father by will gave 2000*l.* a piece to his daughters in case they should release to his heir their right to certain lands ; one of the daughters died before she gave such release, and therefore the heir refused to pay the portions ; the daughters exhibited their bill to be relieved, and were dismissed by Lord Chancellor Nottingham ; but upon a bill of *review*, tho' it was argued that this being a condition *precedent*, and being not performed, there could be no relief ; yet Lord Keeper North inclined to over-rule the demurrer ; and said that in all cases, where the matter lies in compensation, be the condition *precedent* or *subsequent*, he thought there ought to be relief. 1 Vern. 222.

6. A man devised lands to J. S. upon condition to pay 20000*l.* to his heir at law, *viz.* 1000*l.* *per ann.* for the first sixteen years, and 2000*l.* *per ann.* after, till the whole should be paid. The heir entered for non-payment of one of the 1000*l.* *per ann.* J. S. brought his bill and was relieved ; the court declaring, that wherever they can give (*g*) satisfaction, or compensation for the breach of a condition, they can relieve. 1 Salk. 156.

7. If there be a portion of 8000*l.* given to a woman, provided she marries not without the consent of A. and [47] that if she marries without his consent, that she shall have but 100*l.* *per ann.* : yet if she marries without his consent, she shall be relieved ; for the proviso is *in terrorem* only. 1 Ch. Ca. 22 ; S. P. 1 Vern. 20 ; 2 Ch. Rep. 28. But if the portion had been (*h*) limited over, she shall not be re-

(*g*) And accordingly, the court gave the heir interest for every 1000*l.* from the time it became payable, because both the sum and time of payment were certain.

(*h*) Though the *limitation over* is here given as the reason, why there should be no relief ; yet *per Hale, C. B.* (in his argument in the case of *Fry and Porter,*) this is not like the case of a mortgage, where the condition is for

lied. 2 Ch. Rep. 95. [See 1 Vern. 20, Raithby's edi. note (1) 2 Bro. Ch. Rep. 431.] So if A. (i) devises a messuage, &c. to B. his wife, remainder to C. his granddaughter in tail, upon condition that C. marries with the (j) consent of his wife, or the major part of them; and if she marries without their consent, then he devises the same to F. and his heirs; and after C. steals away and is married without the consent of any of them; she shall not be relieved in equity; the great case of *Fry and Porter*, 1 Ch. Ca. 138; S. C. 2 Ch. Rep. 26; 1 Mod. 300. So where the uncle by lease and release settled the lands to the use of himself for life, remainder to the plaintiff for life, remainder to his first and other sons in tail, remainder to the defendant, with a power of revocation to the uncle; provided, that if the plaintiff married without consent of the uncle during his life, and after his death, of A. B. &c. then the uses limited to the plaintiff and his sons to cease, and then to the use of the defendant. He married without consent, having no notice of the conveyance

payment of money, because if the money be not paid at the day, there may be a compensation made by payment at another day with damages. 1 Ch. Ca. 142, and per Lord Chancellor, the reason why there was a forfeiture in that case, was because marriage without consent, was a thing of that nature, that no after satisfaction could be made for it, 2 Ventr. 352; and per Lord Chancellor, the reason of the forfeiture was, because the non-performance of that condition, viz. (marrying with consent) could not be compensated with damages, 1 Vern. 83; and though it may be as well said, that no compensation for such marriage without consent, can be made, where there is no limitation over, any more than where there is; yet note, where there is no limitation over, there is no person to whom the compensation is to be made; which makes the difference.

(i) It was argued, that as in case of a personal legacy, such a proviso would be void by the civil law, because it is a maxim with them, *matrimonium esse liberum*: So it ought to be in case of a devise at law of lands, 1 Mod. 306; and though it was said by Hale, C. B. that if the question were of a legacy, there might be a great deal of reason to question the validity of it, because in those courts where legacies are handled, it would have been void. But this is a case of lands, (devise) 1 Mod. 308; yet it appears, that such a proviso annexed to a legacy, shall not be deemed void in a court of equity. 1 Vern. 20.

(j) What is a sufficient assent? *Vide Max. 13, c. 4.*

[48] or proviso ; but his uncle (who knew not of the marriage) entertained him kindly, and gave legacies to him by his will, and died ; the defendant disturbed the plaintiff because of the forfeiture, who brought his bill to be relieved ; but he was dismest to law. 2 Ch. Ca. 109. So C. devised his lands to trustees for three years ; and if within the three years there happened a marriage between the Lord G. and Mrs. W. who was his heir at law ; then to Mrs. W. for life, remainder to her first son, &c. but if the marriage did not happen, then to the Lord F. in tail ; Lord G. would not marry the lady, but married another person ; and after the lady married the plaintiff, who was urged to be a person equal in all circumstances to the Lord G. and they exhibited their bill to have the lands, for that it ought not to be in the power of the Lord G. to deprive the lady of the lands, by his not marrying her ; and the rather because there was no (*k*) default in her ; but the court of chancery would not grant relief in this case ; though the condition was answered to what the lady was capable of doing ; for that the condition was *precedent*, and though chancery relieves non-performance, it is only upon a forfeiture for which equity can have a valuation made, and give a compensation. 1 Salk. 231.

8. A man devised to each of his daughters 20000*l.* provided, that if they or either of them married before the age of 16, or that if the marriage were without the consent of such persons, then they should lose 10000*l.* of the portion, and that 10000*l.* should go to his other children ; one of the daughters married under the age of 16,

(*k*) This decree was reversed in the House of Peers ; but no reason is given, in the book. But there seems no difference between this case, and that of *Fry and Porter*, except as to the point of disobedience ; for in this case, there was no act of disobedience in the lady, nor any manner of default in her ; but in the other case there was ; and as this was a very great consideration in the court of chancery not to relieve in that case, so it might be the same consideration in the House of Peers to relieve in this ; and *Vide 2 Ch. Rep.* 391 ; where the son being devisee of lands upon good behaviour, for his misbehaviour it was decreed against him.

but with the consent of all the parties, it was urged, that it being with consent it might be at any age; but my Lord *Keeper* was of opinion, that both parts must be observed. 2 *Vent.* 356.

9. The testator devised his estate to the defendants in trust for the use and benefit of the plaintiff, but declared his will to be, that the plaintiff should have no benefit of the devise, unless the plaintiff's father should settle on the plaintiff two full thirds of the estate settled on the father on his marriage; and in default thereof the estate to the (*i*) defendants; the father made no settlement on the plaintiff, but devised all his estate to him (*m*) for life, but subject to the payment of debts; it was admitted and so adjudged by the court, that this estate was executed in the plaintiff by the statute of *uses*, and consequently that this is a condition *subsequent*; yet the court declared, that tho'

[49]

(*i*) Here note, the limitation over, is to the executors and *vide* 1 *Ch. Ca.* 58, where 900*l.* was secured by lease to a feme sole in case she married not contrary to the liking of A. and if she doth, then for such person as A shall nominate, and for want of such nomination, for A; and she marries without the consent of A, yet he cannot dispose of the lease otherwise than for her benefit. So where a feme covert, having power by will to devise lands, devised them to her executors, to pay 500*l.* out of them to her son, provided that if the father gave not a sufficient release of certain goods to her executors, that then the devise of the 500*l.* should be void and go to the executors; and after her death a release is tendered to the father, and he refuses; yet upon making the release after, the money shall be paid to the son; for though a condition is generally binding, where there is a devise over, yet here being to go to the executors, 'tis no more than what the law implies, 2 *Ventr.* 352, though *vide* 2 *Ch. Rep.* 95, where a portion was given to a daughter, but if she should marry without the consent of her father and mother, or one of them, then to be paid to such person, as the mother by writing under her hand should appoint; the wife by deed directed, that if the daughter should marry without the consent of her or her husband, then the money to be paid to her and her husband, or to the survivor of them; the wife died, and the daughter married without the consent or privity of her father, and after he had forbidden her to marry on forfeiture of his blessing; the court decreed the money to the father.

(*m*) Tho' by the will he was tenant for life, but by the condition he was to have a greater estate; yet the court conceived that was well enough. 1 *Vern.* 33. *Vide Max.* 13, c. 4.

conditions (*n*) *subsequent*, which are to devest an estate, need not be literally performed, yet even in such case, if the party cannot be compensated in damages, it would be against conscience to relieve ; and therefore ordered the master to examine the value of the estate devised, and the amount of the debts, which that estate was charged with, and to report to the court, whether after debts paid, there would be two full thirds of the father's estate, which was settled upon him in marriage, left to the plaintiff, 1 Vern. 79, and upon a re-hearing, would not vary the former decree, [50] declaring that the difference was whether this case lay in compensation, or not ; and if a compensation was made, he would relieve against the breach of the condition : But in case a sufficient compensation was not made, he would then consider farther of it. 1 Vern. 167.

10. A man devised his lands called S. to his younger son, and declared that, if he should be any way hindered of enjoying them, then in lieu thereof he should have all the lands at B. A moiety of the lands called S. were evicted from the devisee, who thereupon insisted to have the whole lands at B. But the court decreed, that he should have as much of the lands at B. as were equal in value to those evicted ; for it was a condition that lay in compensation. 1 Vern. 270.

11. The mother limited the lands to John her younger son, he paying unto Katharine her daughter 1200*l.* within six months after the estate should fall into possession ; provided, that if Thomas the elder son died without issue, so as his estate should come to John, then if John did not pay Katharine 1500*l.* within six months, the lands should go to Katharine and her heirs ; Thomas died without issue, whereby his estate descended to John : John would not

(n) As by the former cases it appears, that relief can be given against conditions *precedent*, if compensation can be made ; so by this it appears that relief cannot be given even against conditions *subsequent*, if compensation cannot be made. So that the distinctions taken between conditions *precedent* and *subsequent*, as to relief, seem to be trifling ; and the distinction is only, where compensation can or cannot be made. [Resolved accordingly 2 Vern. 222.]

pay the 1500*l.* for the lands were not worth the money ; *Katharine* dying, the question was between her heir and administrator, who should have the lands ; it was insisted for the administrator, that this was only in nature of a security for money, and that consequently he became entitled to the money : But it was decreed for the heir ; the court declaring, that to make this a redeemable estate, would be to destroy the known difference in the law, between a condition (*o*) and a limitation over. 1 *Vern.* 402, 430. [See note (1) to 1 *Vern.* 403, *Railby's* edi.]

12. A creditor having agreed with his debtor, to take a sum of money less than his debt, so as it was paid precisely by such a day ; he fails of payment, and now brings his bill, suggesting some equitable excuses why he did not pay precisely at the day ; and that he tendered the money within a day or two afterwards ; the court dismissed the bill as containing no (*p*) equity : for *cujus est (q) dare, ejus est disponere.* 1 *Vern.* 210. [See *Amb.* 331.]

[51]

(*o*) Though this is the reason given in the book ; yet it may be observed ; that no *compensation* was made for the non-performance of the condition ; for the party who was to perform it, pray'd not to be relieved, but submitted to the forfeiture ; therefore *quer.* if *John* was willing to pay the money, whether the administrator would not be decreed to the money ? And if so, then it is the making or not making *compensation*, that makes the difference between the heir and administrator, and not the limitation over.

(*p*) It would be impossible to make *compensation* ; for, the damage which the creditor sustained by the non-payment, is not to be known.

(*q*) And so in all cases where the agreement is voluntary, the condition shall be binding, if not strictly performed : As where the mortgagee by will remitted part of the mortgage-money, *provided* the rest be paid within three years ; the mortgagor failing to pay, lost the benefit of the bequest. 1 *Ch. Ca.* 52. So the father made a voluntary settlement on the eldest son, with a *proviso*, that if he did not pay to his younger brother 600*l.* at his age of 21, then the estate of the eldest son, both in law and equity, should cease ; the money not being paid ; the father granted away the estate ; the eldest son was not relieved, in regard the conveyance was purely voluntary, and the father might have put what conditions and restrictions upon his son, he thought fit. 1 *Vern.* 456. But where the agreement is not merely voluntary, it is doubtful, whether equity will not relieve ; as an agreement to take a lesser sum from a debtor, provided he paid it at such a day ; but another became bound with him ; here was a bettering the security, which was part of the consideration of the agreement. 1 *Ch. Ca.* 110.

13. If A. gives a bond of 20*l.* to B. a fishmonger, to behave himself civilly and not disparage the trade of B. and after A. asks a customer of B. whilst cheapening a parcel of flounders, why he would buy of B. and told him those fish stunk ; so that B. lost his customer ; and thereupon B. sues his bond, and gets a verdict at law, A. shall not be relieved in equity, (*r*) for there is no way to ascertain the damages. 1 Ch. Ca. 184.

[52]

14. The plaintiff being employed by the *East India Company*, as their chief agent in *India*, covenanted that he would not trade for himself or any other in several commodities ; or in such case to pay a penalty of so much *per pound*, which sums were some four, some five, some seven times the value of the commodities. But having bought such commodities for himself in *India* to his own use, the company brought debt for 26000*l.* to which sum the penalties amounted ; and the plaintiff brought his bill to be relieved, and though he proved that it was for the benefit of the company, that he so traded, for he bought none, but what he sold to them at a just and market-price, and that if he had not provided such goods, the company could not have been supplied ; and although he had given notice to the company of the want, and he dealt with poor artificers, who could not stay, but must have advance beforehand, or else they would not work at all, but most probably would have been dealt with by the *Dutch* to the loss of the company ; and though it was proved, that such dealings was necessary for the sup-

(*r*) There is another reason given ; for that the penalty of the bond was so small, that the costs here and at law would exceed the penalty. Which seems the better reason ; for the court declared, that this was not to be a precedent in case of a bond of 100*l.* or the like ; and it is a common case, to give relief against the penalty of such bonds to perform covenants, &c. and to send it to a trial at law to ascertain the damages in a *quantum damiscus*. Vide 1 Sid. 442.

ply and benefit of the company; yet the bill was (s) dismissed. (t) 2 Ch. Ca. 198.

15. If a deed of trust is created for payment of such creditors as come in within a year; a (u) creditor will not be excluded, though he doth not come in till after the year. 1 Vern. 260, 319.

[For a general view of the cases in which equity will, and will not, relieve against forfeitures, see 1 Fonb. Eq. 2d Amer. edi. ch. 6, § 4, p. 395, and notes; 1 Madd. Chan. 32, et seq.]

(s) No reason is given in the book, why the bill was dismissed. But it may be observed, that no compensation could be made, for it was impossible to ascertain what damages might arise to the company by such trading, by the encouragement it would give to other people.

(t) Nay it is doubtful, whether equity would not enforce the payment of the penalty; for where the company sued one of their chief factors for an account, and demanded a penalty of five, six and seven times the value of the commodities; upon a plea the defendant was ordered to answer over, though it was a penalty, 2 Ch. Ca. 219; though generally equity will not enable a man to recover a penalty; and if a bill is brought for performance of a thing, for which a penalty is recoverable at law for the non-performatee, the plaintiff must by his bill waive all benefit of forfeiture, else it is good cause of demurrer. 1 Vern. 60; though *wide* 2 Ch. Ca. 241. Where a widow promised, for one guinea, to pay ten when she married; the bill was for a discovery of the promise; it was demurred, for that it was in nature of a penalty; but overruled, on a difference between a bond penal, where the jury can give no less than the penalty, and this case where jury will, as cause is, lessen, &c.

(u) Conditions binding creditors; if they were not intended originally to regard them, are generally relieved in equity; as if a lease is made, upon condition not to assign without license of the lessor; and the lessee dies indebted, and his executors sell it for payment of debts; equity will relieve against the forfeiture. 1 Ch. Ca. 170.

[58]

MAXIM XIII.

Equity regards not the circumstance, but the substance of the act.

1. Equity will enforce the performance of (a) agreements

(a) But if the agreement be extreamly unreasonable, equity will not execute it. *Vide Max. 2, c. 2.* So also if it be not obtained with all imaginable fairness. As where the plaintiff obtained articles from the defendant for the purchase of his estate; but the defendant apprehending, and being informed by the plaintiff at the time of the agreement, that the contract was made for J. S. and under such an apprehension sold the lands somewhat cheaper; the court could not decree a performance of the articles. 1 Vern. 227. So where a purchase was had at an extravagant price from an heir, of a remainder in tail after the death of his father, and there being a covenant for farther assurance, the bill was to have him perform his covenant in *specie*, and to be decreed to levy a fine: The same Lord Chancellor who would not set aside the purchase for fraud, yet would not decree a performance of the covenant, declaring, that he would in no sort countenance the practice of purchasing from heirs in necessity. 1 Vern. 167, 271. But equity seems not much to regard the consideration upon which agreements are entered; as the testator seised in tail of freehold lands, and in fee of copy-hold lands, devised the copy-hold lands to the defendant, who was entitled to the remainder of the freehold lands; and devised the freehold lands to the plaintiff. The defendant apprehending there had been a recovery suffered by the testator agreed without any valuable or other consideration with the plaintiff, that each of them should enjoy the lands respectively according to the will: But discovering after, that there had been no recovery suffered, brought his action to recover the freehold lands: But the plaintiff brought his bill to establish the agreement, which was decreed accordingly. 1 Ch. Cu. 84. So where a man after marriage voluntarily gave a bond to settle a jointure, which he did, and thereupon the bond was delivered up. After his death the jointure lands were evicted; the court decreed that she should recover her dower, and what the same fell short of the value of the jointure, should be retained by her (who was his administratrix) out of the personal estate, for an agreement, though voluntary, under hand and seal, ought to be decreed by this court. 1 Vern. 427; *Vide Max. 14, c. 16;* that a voluntary conveyance shall be binding against the party himself and his heir; because the volunteer has equal equity with either of them and having the law shall prevail; but where there is only an agreement or covenant for such a voluntary conveyance, that shall not be executed against the heir, who has equal equity with a volunteer, (*Vide Max. 14, c. 15,* and the notes there,) though by the foregoing case it appears, that a voluntary bond, delivered up, shall be set up against the next of kin, who by law are entitled to the *residuum*.

in (b) specie ; as equity looks upon *articles* for a purchase of lands, equal to a conveyance ; for, if the purchaser dieth before the conveyance executed, and deviseth the lands, they pass in equity. 1 Ch. Ca. 39. So where the husband, when he proposed the treaty of marriage, offered to settle 500*l.* *per ann.* jointure ; and after the marriage, took notice that the jointure settled was not so much, and talked of making it up so much ; although there was no (c) covenant or agreement proved whereby he bound himself to make a jointure of that value, yet the (d) heir was decreed to make it up. 1 Vern. 17. So where the husband covenanted that the lands settled on the wife for her jointure were 400*l.* *per ann.* whereas there were but 350*l.* the court decreed the heir to perform the covenant *in specie.* (e) 1 Vern. 217. So where the father by letter offered to give 1500*l.* with his daughter in marriage, to be raised out of his lands at C. Upon a bill by the husband for the money, although it was insisted, that the plaintiff had good remedy at law, yet it was answered, that he was proper in equity, to charge the lands, by virtue of the agreement ; which was so decreed. 1 Vern. 201. So where a woman promised the plaintiff, who pretended a title, and threatened to evict her, that if she died without issue she would either give him 500*l.* or leave him the

[54]

(b) The plaintiff assigned some shares of the excise to the defendant who thereupon covenanted to save him harmless, and to stand in his place touching all payments to the king. The plaintiff being sued by the king, brought his bill to have a performance of the covenant *in specie.* And although it was insisted, that the plaintiff might recover damages at law, yet it was decreed, that the defendant should perform his covenant ; and directed it to a *master*, that as often as any breach should happen, he should report it specially, that the court, if occasion should be, might direct a trial in a *quant. damnificat.* 1 Vern. 190.

(c) For a covenant is but an evidence of the agreement, and therefore if there be any other evidence which proves the agreement, it is as good.

(d) For an heir has not equal equity with a purchaser, which a jointress is. *Vide Max. 14, c. 15,* the *notes* there.

(e) But the value of the lands were to be estimated as they were at the time of the jointure settled, and not according to the present value, lands being now fallen every where. 1 Vern. 218.

Lands ; she married, and dying without issue, devised the lands to her husband ; the court decreed the agreement to be executed ; although it was insisted, that a remainder after an estate-tail is so remote, that such an agreement should never be executed in equity ; for if the wife had by deed settled it so in her life-time, she might by a recovery have dockt the remainder. 1 *Vern.* 48. So where A. upon the marriage of his brother, executed a writing by which he promised, that if the wife be worth 160*l.* then if A. dies without issue, he will give his lands to his brother and his heirs ; and for the true performance thereof, binds himself and his heirs : And the wife is worth 160*l.* and A. afterwards marries, and settles the lands in jointure upon his wife, and dies without issue, though the limitation was to take effect after the death of A. without issue, and so if such settlement had been made in the life of A. it had been (*f*) subject to be defeated ; yet because it was proved, the marriage was had in expectation of the performance of this agreement, the lands were decreed to the brother. 2 *Ventr.* 353.

[The cases on the doctrine of the specific execution of agreements in equity, are very numerous, and diversified in their circumstances. They will be found well digested in 1 *Madd. Chan.* 371, *et seq.*; and in 1 *Fonb. Eq.* 2d Amer. edi. 30, note (*o*) and 151, note (*c*).]

2. Defects of (*g*) circumstances in conveyances are frequently supplied in equity ; as in case of a defect of livery

(*f*) So note, an agreement in equity was better than a conveyance at law.

(*g*) Even mistakes in deeds are amended in equity ; as the mistaking of a name of a corporation holpen in equity. *Toth.* 131. So leases made by a dean and chapter, misreciting the name of their corporation ; the Lord Chancellor said, that it was fit to help such cases in chancery. *Car.* 44. So of a *misermer* of a corporation in a will. 1 *Ch. Ca.* 267. So the word *quadrigenit*' instead of *quadragint'* in a bond, was supplied against the heir. 2 *Ch. Ca.* 225. So a counter-bond to save harmless against a bond of 200*l.* Whereas the bond was but for 100*l.* relieved in equity. *Toth.* 131. So where the words (*shall stand and be seized*) were left out in a conveyance made in pursuance of marriage-articles ; these words were supplied against the heir, and the plaintiff decreed to enjoy, as if those words had been inserted. 1 *Ch. Rep.* 162.

and seisin. If a man sells lands in two counties for money, and maketh livery in one only, he shall be compelled in conscience to perfect the assurance, for the conveyance faileth in a circumstance or ceremony. *Cur. 24.* So if a feoffment is made in consideration of marriage, but no livery and seisin thereon given : Equity will decree the (*h*) heir to make livery and seisin. *2 Ch. Rep. 216.* *So in case of a defect of a surrender of a copy-hold estate.* As where the plaintiff contracted for the purchase of a copy-hold estate, and paid the purchase-money ; but the vendor died before a surrender could be had ; his heir was decreed to surrender. *2 Ch. Rep. 218.* So where the surrender was out of court, and the purchaser died before admittance, and devised all his copy-holds to J. S. the court declared it was clear, the copy-holds contracted for passed by the will. *1 Ch. Ca. 39.* So where there was no surrender at all to a mortgagee. *1 Ch. Ca. 70.* So where the surrender was but into the hands of one customary tenant only. *1 (i) Vern. 132.* *So the defect of the trustees joining in the conveyance shall be supplied in equity.* As where a man seised in see of 36 shares of the *New River Company*, conveyed the same to trustees to the use of himself for life, and afterwards, out of the rents and profits to pay daughter's portions, and after to permit J. S. and his heirs to take the profits ; he ascertains the daughter's portions and dies, and J. S. entered into an agreement for the sale of 14 of the shares, the

[56]

But where A. had a term for years, and ordered a scrivener to make an assurance thereof to B. rendering rent, and the scrivener grants the entire term rendering rent, A. shall have no remedy in equity for the rent ; for if the assurance is bad, and yet there is remedy in equity, to what purpose is the common law ? *2 Rol. Rep. 434.* And it was said, that if the scrivener acted contrary to his orders, an action lay against him.

(*h*) For, an heir has not equal equity with a purchaser. *Vide Max. 14, c. 15, the notes there.*

(i) This was in favour of younger children, against the heir, who has not equal equity with younger children. *Vide Max. 14, c. 15, the notes there.*

trustees not joining; although it was insisted, that the trustees were no parties; yet it was decreed the contract should be performed. 1 Ch. Ca. 173, 208. So where *cestuy que trust* in tail, being in possession under the trustees who had the freehold in him, suffers a recovery, in which he himself is the tenant, and so no good tenant to the *præcipe*; yet this shall (*j*) bar the remainder in fee of the trust. 2 Ch. Ca. 63. As where A. convey'd his estate to trustees, in trust that they should convey to such persons, and for such estates as he should by will direct; and then made his will and directed that the trustees should convey to B. his son in tail male, remainder to C. in tail male, remainder to the right heirs of the testator; B. being in possession under the trustees, who had the freehold in them, suffered a recovery to which the trustees were no parties, but the *cestuy que trust* tenant to the *præcipe*; the Lord Chancellor declared, that he was fully satisfied, the said recovery did fully bar the remainders depending upon the estate (*k*) tail of B. who suffered the same. 2 Ch. Ca. 78; S. C. 1 Vern. 13. So if tenant in tail in (*l*) equity levies a fine, this shall bar the trust, 1 Ch. Ca. 49; and equity will decree the disposition good, 2 Ventr. 350; and

(*j*) In the case of *Goodrich and Browne*, it was resolved that the recovery of a *cestuy que trust* should bar and transfer the trust, as it should an estate at law, if it were upon a consideration. 1 Ch. Ca. 49. But in the case of *Lord Dighy and Langworth*, it was doubted, whether tenant in tail of a trust, remainder in tail to another, could by a recovery bar the remainder. 1 Ch. Ca. 68. So in the case of *Washburne and Downes*, the same point was doubted. 1 Ch. Ca. 213.

(*k*) For otherwise, trustees by refusing, or not being capable to execute their trust, might hinder the tenant in tail of that liberty to dispose of his estate, and bar the remainders, which the law gives him as incident to his estate, which would be manifestly inconvenient, and tending to the introducing *perpetuities*. 2 Ch. Ca. 71.

(*l*) It was offered by the *counsel*, that where tenant in tail did bargain and sell his estate, that seeing he had power over it, notwithstanding there were no fine or recovery, a court of equity should decree against the heir. But Lord Chancellor said, he would not supersede fines and recoveries; but where it was a trust and an equitable interest, it was a creature of their own, and disposable by their own rule; otherwise, where the entail was of an estate in the land. 2 Ventr. 350.

where tenant in tail in equity (*m*) agreed to settle the lands; the court inclined to enforce the agreement against the issue. 1 Ch. Ca. 286.

S. Defects of circumstances in the execution of powers are supplied in equity, as in cases of *powers of revocation*. Where a man had a power of revocation, by any writing published under his hand and seal in the presence of three witnesses; he made his will under his hand and seal, wherein he recited his power, and declared that he revoked the settlement, but the will had but two witnesses, though a third present; Lord Chancellor said, here was an (*n*) execution of the power in strictness, though the third witness did not subscribe. 2 Ventr. 350; S. C. 2 Ch. Rep. 212. So in cases of *powers to sell lands*; if a man gives instructions to put his will in writing, and that his messuages, &c. should be sold by A. and B. for payment of his (*o*) debts and (*p*) legacies, and died, and after A. died; B. and the heir were compelled to sell. Hard. 204. So where the will was, that the executors should sell the

(*m*) Note; the court declared it was a general rule, that any legal conveyance or assurance by a *cestuy que trust* shall have the same effect and operation upon the trust, as it should have had upon the estate in law, in case the trustees had executed their trust, 2 Ch. Ca. 78; and therefore the court took a difference, that if there be a *cestuy que trust* of a trust for life before the trust in tail; so that in case the estate in law had been executed according to the trust, and consequently the tenant in tail could not have barred the remainder in fee, if he had suffered a recovery; there the *cestuy que trust* in tail shall not bar the remainder by a common recovery, if there is no tenant to the *præcipe*, 2 Ch. Ca. 64; from whence it should seem, that the agreement even of tenant in tail in equity, should not bind his issue, since it would not bind the estate at law, in case the trustees had executed their trust. Yet the court said, that though tenant in tail in trust cannot bar the remainder by fine, yet if he makes a feoffment or bargain and sale, he may bar his issue, 2 Ch. Ca. 64; and thought a feoffment or bargain and sale would work as a fine. 1 Vern. 14.

(*n*) This was desreed against the heir in tail, under the settlement in favour of a mortgagee; for an heir has not equal equity with a creditor. Vide Max. 14, c. 15, the notes there.

(*o*) For the heir has not equal equity with a creditor. Vide Max. 14, c. 15, the notes there.

(*p*) As to this case of legatees, whether equity will supply a defect in favour of them, who are but volunteers, vide Max. 14, c. 15, the notes there.

lands for payment of his debts ; the executors did not sell ; it was decreed that the heir should sell. 1 Ch. Rep. 168.

- [58] So where no person was named to sell, the heir was decreed to do it. 1 Ch. Ca. 176 ; S. C. 1 Ch. Rep. 283. So where lands were devised to A. for life, and after to his executor to be sold for younger (q) children's portions, and the executor dies, and then A. dies, yet the estate shall be sold. 1 Ch. Ca. 35. So where the time for the sale of lands by the trustees, was elapsed, so that they had no power to execute the trust, the trustees were decreed to proceed with the sale notwithstanding. 1 Ch. Rep. 183. So in cases of powers to (r) charge lands. If a man hath power, by deed or will in writing under his hand and seal, to charge lands with 500*l.* and he by will devises the 500*l.* to (s) younger children, but the will was not sealed ; yet the court decreed the devise good against the (t) heir in tail under the settlement. 1 Ch. Ca. 263. So where a man had power by deed or will to charge lands with 500*l.* he sends instructions for a conveyance to charge them for younger children's portions ; the court decreed the 500*l.* to the younger children against the heir in tail. 1 Ch. Ca. 264. So in cases of powers to (u) limit lands :

(q) For the heir has not equal equity with younger children. *Vide Max. 14, c. 15,* the notes there.

(r) There is a difference where a man has power to charge or incumber a third person's estate ; such powers are to have a rigid construction ; but where the power is to charge a man's own estate, it is to have all the favour imaginable. 2 Ventr. 350.

(s) For the heir has not equal equity with younger children. *Vide Max. 14, c. 15,* the notes there. But such a power so defectively executed, shall not be made good against a purchaser without notice, with whom younger children, being volunteers, have not equal equity. *Vide Max. 14, c. 16,* the notes there.

(t) An heir in tail under a voluntary settlement, was decreed to have equal equity with younger children, who were also volunteers. 1 Ch. Ca. 159 ; but quare, and *vide Max. 14, c. 15,* the notes there ; and *Max. 14, c. 16.*

(u) Feme sole settled her lands on herself for life, remainder in tail, with power for her, being sole, to make leases for three lives in possession. The feme marries, and then she and her husband make leases for twenty-one years, to commence from the date, for payment of debts, &c. as was alledged. *Per Bridgeman, C. J.* the power is not pursued ; for, by the marriage she hath put

[59]

As if a tenant for life has a power to make a lease in possession, but makes it to commence from a future time; this shall be (*v*) good in equity. 1 Ch. Ca. 10; S. C. 1 Ch. Rep. 185. So, if a man hath power to lease for ten years, and he leaseth for twenty, this in equity is good for ten years. 1 Ch. Ca. 23. So where a devise was to J. S. for life, remainder to his first and other sons in tail, remainder to the defendant for life, &c. with power to J. S. to limit and appoint (*w*) particular part of the lands at F. to any wife; J. S. precedent to his marriage with the plaintiff, in consideration of a portion paid, covenanted to settle lands of 300*l.* *per ann.* for her jointure, but no particular lands were specified; he dying before he made the jointure, the question was whether the plaintiff could be relieved out of the power, for else there was not sufficient for the 300*l.*

herself in the power of her husband; and it is the deed of her husband, and not hers; and he took a diversity between a naked power and a power which flows from an interest; for when a bare power is given to a feme by will, to sell lands, although she marry, she may sell, and may sell the lands to her husband, because it was not created by herself out of any interest of her own. But where a feme upon a settlement of her own estate, reserves a power which flows from an interest, that power ought to be executed by the feme sole, and if by baron and feme, it is not good. And yet the said such powers ought to be taken liberally, though formerly they were taken strictly. (Vide 2 Vern. 250, that a power over a third person's estate is to be strictly pursued; not so, if over one's own estate.) Hale doubted; the Chancellor concurred with Bridgman, and the bill was dismissed. 1 Ch. Ca. 17; and vide Max. 14, c. 16. Where a power to convey lands not strictly pursued, though in favour of younger children, not supplied against the heir in tail, though a volunteer.

(*v*) This was against the lessor in favour of a creditor.

(*w*) But where the power was generally to settle a jointure, and not said of any lands or sum in particular; although there is a covenant to settle a jointure, which is not done; yet it shall not be made good against the jointress of the remainder man, who is equally a purchaser with the first; for, being a general power to make a jointure, and not said of what lands in particular, is not such a *lien* upon the lands as will affect a purchaser; though the power had been afterwards executed; much less where it was not executed at all; for, as a man by such general power might make a jointure of 500*l.* *per ann.* so he might make a jointure of 50 or 5*l.* *per ann.* And there is a great difference between a defective execution of a power, and where the power is not executed at all. 1 Vern. 406; vide Max. 14, c. 16, the notes there.

per ann. either out of his real or personal estate ; the court inclined strongly for the plaintiff in regard of the consideration ; for, if he had *de facto* executed his power, and mist in time or other circumstance to have (x) done it well, the defect would have been supplied in equity. 2 Ch. Ca. 29, 30, 87.

[60.]

4. *Defects of circumstances in the performance of conditions are supplied in equity.* As (y) where a devise was of lands to the plaintiff and his heirs male ; but declared his will to be, that the plaintiff shall have no benefit of this devise, unless the plaintiff's father should settle upon the plaintiff two full thirds of his estate, settled on the said father on his marriage. The father devised all his estate to the plaintiff his son ; in the first place for payment of his debts, and then to the plaintiff for life, remainder to his first and other sons in tail, &c. Although by the will, he was tenant for life only, whereas by the condition he was to have a greater estate, viz. either a fee-simple, or a fee-tail, it being in case of a will ; yet the court conceived, that it was well enough, and better answered the testator's intent, than if the condition had been literally performed ; and declared, that if the substance of the condition was performed, it should serve turn. 1 Vern. 79. So where the marriage was to be with the consent of the father under a (z) penalty or forfeiture of the portion ; the father came to a treaty for her marriage, and her jointure was agreed to, and directions given to draw the writings accordingly. But before the assurances were perfected, the young couple married without the knowledge of the father : The court was of opinion, that the marriage having taken effect in such manner, ought in equity and justice to be esteemed a marriage with the consent of the fa-

(x) *Vide Lord Coventry's case*, reported at large, at the end of the book. [As to executions of powers, see 1 Vern. 407, note (2), Raithby's ed., and Sugden on Powers.]

(y) *Vide this case*, Max. 12, c. 9.

(z) *Vide Max. 12, c. 7.*

ther, in respect there was an express consent of the father, both (*aa*) before and after the marriage consummated, and no disagreement or alteration of his good liking in the mean time. 1 *Ch. Rep.* 1. So where the consent was to be had in writing, and it was had only by *parol*, this was deemed sufficient, because it was only a provident circumstance. 1 *Mod.* 310. So where the consent of the overseers of the will was to be had, the consent of the *major* part was decreed to be sufficient. 2 *Ch. Rep.* 24. So where the marriage was to be by consent, and she married by consent; but after married a second husband without consent; this second marriage was no breach of the condition. 2 *Ch. Rep.* 366.

(*aa*) But if she steals away, and is married without the knowledge of the trustees, and all of them, as soon as they heard of it, protest against it; but afterwards consent to it, and by their answers swear that they did not know, but that if their consents had been asked before, there might have been some reasons given, that they might have assented; yet this was not sufficient. 1 *Ch. Ca.* 138; S. C. 1 *Mod.* 300.

[61]

MAXIM XIV.

Where Equity is equal, the Law must prevail.

1. A (a) judgment-creditor exhibited a bill against a prior conusee of a statute, who had extended the lands, to have a discovery of what was due upon the statute ; and on payment thereof, to have the same set aside ; the defendant pleaded, that after he had extended the lands, he came to an account with the conusor ; and in consideration of what was due to him, the conusor made an absolute conveyance to him of part of the lands, and that so he was a purchaser without (b) notice of the defendant's title for a valuable consideration ; the plea was allowed. 1 Ch. Ca. 36. So where a like bill was by a judgment creditor, to discover lands subject, &c. not knowing the place, nor who tenants : The like plea was

(a) It was objected, that the plaintiff's judgment being of record, the defendant ought to take notice of it at his peril ; but it was answered and so ruled, that though judgments were on record, and a purchaser is bound to take notice thereof at law, yet in equity, where the conusee of a judgment comes to be help'd to extend his judgment against a purchaser, he must prove express notice of the judgment in the purchaser, or else shall never be relieved against him, 1 Ch. Ca. 36 ; but a purchaser is bound to take notice of a decree, and why not so of a judgment at law ? Quer. the difference. 2 Ch. Ca. 48. But in what cases a purchaser is to take notice ; in what cases an implied notice shall bind him ; and in what cases notice to the agent shall be notice to the principal, &c. is too large to be here inserted. [But see 2 Madd. Chan. 323, et seq. ; 2 Fonb. Eq. 154, 303, note (b) to second Amer. edi. ; Sugd. on Vend. 592, et seq.]

(b) The notice must be very plainly denied ; for where the defendant denied notice at the time of the purchase, because the word *purchase* might be understood, where the contract for the purchase was made ; and it might be, he had no notice then, and might have notice after, before or at the sealing of the conveyance ; and if there was any notice before the conveyance executed, that should charge him ; therefore the plea was over-ruled. 1 Ch. Ca. 34. So the notice ought to be denied in the answer, and not in or by way of plea. 2 Ch. Ca. 161. Whether notice ought to be denied, although it be not charged, vide 2 Ch. Ca. 252.

allowed. 2 Ch. Ca. 47. So if an (c) assignee of a bankrupt exhibits a bill to discover the bankrupt's (d) goods, the defendant may plead, that he has no goods of the bankrupt, or that ever were his, but what he bought for a full and valuable consideration, *bona fide*, and that at the sale or payment of his money, he had no notice of the bankruptcy. 2 Ch. Ca. 135; S. C. Vern. 27. For it is an infallible rule, that a *purchaser for a valuable consideration without notice, shall never discover any thing to hurt himself.* 2 Ch. Ca. 73.

[62]

2. It is the constant justice of a court of equity, that if a purchaser buys in an *eigne* incumbrance, statute or judgment, and there was a judgment or statute *mesne* between that and his purchase, of which he had no notice at this purchase, he shall (e) protect his purchase with the *eigne* incumbrance so bought in. 1 Ch. Ca. 36; S. P. though he bought in the *eigne* incumbrance after he had notice of the *mesne* incumbrance. 2 Ventr. 339; and it is the same case; if he had first bought in the *eigne* incumbrance, and then having (f) no notice of the *mesne*

(c) 2 Ch. Ca. 156, S. P.; but a discovery ordered, in case the plaintiff would consent to take no advantage thereof at law, but in this court only.

(d) So where to discover the bankrupt's lands, the defendant may plead he is a purchaser, &c. 2 Ch. Ca. 136.

(e) By *protecting* is meant making all advantages of the incumbrance, which the law admits of; as if it was paid off, yet if he can make use of it at law, equity will not hinder him. 2 Ch. Ca. 208. If there has been an extent upon such incumbrance, he shall not account in equity otherwise than at law; and though the lands are extended but at a third part of the value, yet because at law in a *sci. fac. ad computand.* he shall account but according to the extended and not the real value, he shall not in equity be obliged to account otherwise. 2 Ventr. 338. But he shall not be further or longer protected by an incumbrance bought in, than till such time only, as he has received so much of the profits as will satisfy that security, and then the same shall be avoided by a *sci. fac. ad computand.* or by an account to be taken in this court. 1 Vern. 52.

(f) Though in the other case he might have notice of the *mesne* incumbrance, when he bought in the first; yet in this as well as the other case, it seems he ought to have no notice of the *mesne* incumbrance when he purchased the lands; and though by the case, 1 Vern. 49, &c. it seems as if he had notice of the *mesne* incumbrance when he purchased the lands, yet I cannot conceive how he can have equal equity with, or can insist on any advantage at-

incumbrance, purchase the lands; he shall protect his purchase by such *eigne* incumbrance. 1 *Vern.* 52; for it is the purchasing without notice, that gives him equal equity with the mesne incumbrancer, and therefore the buying in the eigne incumbrance before or after the purchase can make no difference. [See *Hard.* 136; *Pow. L. Mortg.* 523.]

[68] 3. A purchaser came into a man's study, and there laid hands on a statute, that would have fallen upon his estate, and put it up in his pocket; and in that case he having thereby obtained an advantage at law, though so unfairly and by so ill a practice, the court would not take advantage from him; Sir John Fagg's case cited by the Lord Chancellor. 1 *Vern.* 52; *Eq. Ca. Abr.* 354, pl. 1.]

4. J. S. surrendered copy-hold lands to the plaintiff by way of mortgage. But there was a failure to present the plaintiff's surrender at the next court; afterwards J. S. surrendered them to the use of his will, and then by will devised them to the defendants, his wife for life, remainder to his daughter in fee, and died; the wife got herself admitted; the bill was, to set aside this surrender and will, being voluntary against a creditor. But the wife proving there was an agreement of the husband in consideration of marriage, to settle the premises on her for life; and thereby having equal equity with the plaintiff; no relief was had against (g) her. 1 *Ch. Ca.* 170.

law against an incumbrancer, of whose debt he had notice at the time of his purchase; for in all the cases, where a purchaser or incumbrancer claims to have equal equity with a precedent incumbrancer, it is always upon the reason of his not having notice of such precedent incumbrance, *vide ant. c. 1, post, c. 6, 7, 8, 9;* and Lord Chancellor's saying in this case, 1 *Vern.* 52, is observable; that it would be a precedent of mischievous consequence, that a man having bought in a prior incumbrance, and having notice of a subsequent statute, should then purchase the land with this notice; and yet have any favour or protection shewn him in it. But if the case be rightly reported as to the point of notice, *a fortiori* he shall so protect his purchase, if he had not notice.

(g) But as against the daughter, who was but a volunteer, and hath not equal equity with a creditor, (*vide post, c. 16,* the notes there) he was relieved; and it was ordered, that unless she would pay the plaintiff his money, he should hold and enjoy the premises as against her.

5. The plaintiff set up a title by an old entail; and complained that the defendant had got the evidences and the settlement, and concealed the same; and to have a discovery of the deed of settlement, and the same to be delivered up, was the end of the bill; the defendant pleaded, *that for 6370l. really paid, he purchased the premises, and demanded judgment, whether he shall further discover his title, or any deeds or evidences to weaken it; the plea was allowed.* (h) 1 Ch. Ca. 68.

6. Tenant in tail mortgaged the lands and married; and to enable him to settle a jointure, suffered a recovery; and after took up more money of the mortgagee upon the same security; the mortgagee shall be (i) allowed against the jointress, the money lent after the recovery and marriage, provided he had no notice of the jointure, when he lent the money. 1 Ch. Ca. 119.

[64]

7. The husband by articles precedent to the marriage, agreed to settle the lands on the wife for her jointure; after the marriage had, he did not make a conveyance in pursuance of the articles, but mortgaged the lands to one who had no notice of the articles; the wife could not have the articles executed against the (j) mortgagee. 2 Ventr. 343.

8. If the estate is first mortgaged to A. then to B. and then to C. without notice of the former mortgages; if C. (k) buys in the mortgage of A. he shall hold the estate

(h) For a creditor has equal equity with the heir in tail. But the heir has not equal equity with him. *Vide post, c. 15, the notes there.*

(i) As by the former cases, c. 1, 2, 3, it appears that a purchaser has equal equity with a creditor; so by this it appears, that a creditor has equal equity with a purchaser.

(j) For a creditor has equal equity with a purchaser, vide the preceding case; but the articles were executed against the heir, who has not equal equity with a purchaser. *Vide Mar. 18, c. 1, and post, c. 15, the notes there.*

(k) It was strongly insisted at the bar, that this trade of buying in incumbrances was in truth a thing against conscience, and contradictory to many established rules of law and equity. But Lord Keeper declared he would not change the rule, that had so long prevailed in this case; but it may be he might do so, where he found a man designing a fraud, and thought to make a trade by cozening by the rules of the court. 1 Vern. 187, 188.

against B. until he be satisfied the money be (*l*) paid to A. as also his own money lent on the last mortgage ; (*m*) *per Hale C. B. 2 Ventr. 338; S. P. 1 Vern. 187.* [And in all these cases it must be intended that the *puisne mortgagee* had no notice of the second mortgagee. See 2 P. Wms. 491; 2 Ves. 571.]

9. If a man is seized of sixty acres, and mortgages twenty to A. and then mortgages the whole to B. and then mortgages the whole to C. and afterwards C. purchaseth in the first mortgage ; that shall not protect more than twenty acres ; but it shall protect those twenty acres, so as B. shall never recover them until he pay C. all the money upon the first and last mortgage ; *per Hale C. B. 2 Ventr. 339.* And if A. is seized in fee of the manors of B. and C. and mortgages part of the manor of B. to D. and after acknowledges a (*n*) statute to D. and after mortgages both manors to E. and then mortgages the manor of B. to F. who had no notice of the prior mortgages ; and after F. having (*o*) notice purchases in both the incumbrances of D. now F. hath both law and equity, and shall hold the lands included in the first mortgage, until he is satisfied not only the money paid D. but also the money lent on the last mortgage ; but the first mortgage can protect no more than what is included in that mortgage ; and as to the statute, F. shall not account in equity, otherwise than he would be obliged to do at law upon a *sci. fac. ad computand.*, which is according to the extended value, unless he hath received enough to satisfy his own mortgage also. (*p*) And if ac-

[65]

(*l*) For he shall be allowed no more on A's mortgage than he really paid, though it is not so much as was really due upon it. *Vide Max. 3, c. 1, and post, c. 10, the notes there.*

(*m*) For one creditor has equal equity with another.

(*n*) *Vide 1 Ch. Ca. 149, 150; 2 Ch. Ca. 20, 35, 213.*

(*o*) For he purchased the two first incumbrances pending a suit in chancery by E. against A. 1 Ch. Ca. 162, 163.

(*p*) But as to the manor of C. in which F. had no estate before he bought in the statute ; the court inclined that so much of B. as was not in D's mortgage, (for he could not extend upon himself,) should be accounted for at the

cording to the extended value, the money upon the statute hath been received, or if E. will pay the residue, or so much as the proportion of the manor of C. will come to, that manor ought to be discharged of the statute : Between *Marsh and Lee*, 2 *Ventr.* 337 ; *S. C. 1 Ch. Ca.* 162.

10. If an heir or trustee buys in a precedent incumbrance, he shall make use of it to protect a (q) subsequent incumbrance of his own. 1 *Vern.* 49. So of an executor. 1 *Salk.* 155.

11. If a man having a defective mortgage from the father who is dead, by contrivance and (r) practice, draws in the son and heir, to give him the same lands as a security by way of mortgage, for a farther sum ; which mortgage from the heir is forfeited ; equity will not compel a redemption of the last mortgage, except the heir will redeem his father's mortgage also. 2 *Ch. Ca.* 23. *For the (s) mortgagee has equal equity with the heir, and having the advantage of law by the forfeiture of the mortgage made by the heir, equity will not take such advantage*

[66]

real value, in order to discharge the manor of C. of the extent ; but not to prejudice the extent in course of law as to the manor of B. But that the statute ought to protect the manor of B. as far as by any course of law it might. 1 *Ch. Ca.* 168.

(q) But if he has no subsequent incumbrance of his own, he shall be allowed no more than what he really paid for it. *Vide Max. 3, c. 1.* And if both his incumbrances may be paid off, then he shall be allowed no more than what he really paid for the first. *Vide ant. c. 8.*

(r) So that the *practice* is not material, being done to secure a just debt. 2 *Ch. Ca.* 23. And Lord Chancellor declared, that where a man has a just debt due and owing to him ; if such a man could by the strict and most precise rules of the court, get *any* advantage of an heir, &c. he would not be instrumental in depriving him of such advantage. 1 *Vern.* 47 ; though *vide* the case of the Earl of Huntingdon and Greenville, where the conusee of a statute having extended the lands, assigned them to the plaintiff, who after purchased the estate ; the defendant having a subsequent statute, procured administration to be taken out to the first conusee, and satisfaction to be acknowledged on the statute by the administrator, which was good at law to discharge the statute ; yet the court relieved against this practice, and put the plaintiff in the same plight, as before satisfaction was acknowledged. 1 *Vern.* 49.

(s) But the heir has not equal equity with a mortgagee, who is a creditor. *Vide post c. 15, the notes there.*

from him, except the heir will take away such equality of equity, and give himself a greater equity, by paying him both mortgages. *Vide* this case under *Max. 1, c. 1.*

12. If baron and feme by fine mortgage the wife's land ; and part of the money is paid, but the mortgagors having occasion again for money, borrow the like sum of the mortgagee, as they had paid off, for which the mortgage was agreed to be a security, and an endorsement made on the deed for that purpose ; although no new fine was levied on the second loan, yet the heir of the wife was decreed to be (*t*) foreclosed, except he paid both sums ; for the mortgagee hath good title in law, and as much equity to the money, as the heir hath to the land. *2 Ch. Ca. 98 ; S. C. 1 Vern. 41.*

13. If A. acknowledges a statute in the penalty of 1500*l.* to B. for payment of 800*l.* and interest, which being forfeited, and the lands extended upon it ; A. for a valuable consideration settles the lands in tail, and after borrows more money of B. and by articles it is agreed, that the statute and extent shall stand as a security for the last money : And after A. dies, and the 800*l.* with interest is satisfied by a perception of the profits ; yet the (*u*) issue in tail shall not be relieved against the penalty of the statute ; for though the heir has an equity by reason of the tail made upon a consideration ; yet the money lent raises an equity for B. so that B. hath both law and equity, whereas the issue in tail hath equity only, till the penalty is satisfied. *Hardr. 318.*

[67]

(*t*) *Note* ; in this case the court of equity did not stand *neuter*, and let the law take its course, which proves that the mortgagee hath greater equity than the heir. *Vide post. c. 15, the notes there, that an heir has not equal equity with a creditor.*

(*u*) As by the two preceding cases, it appears that a creditor hath equity with an heir in fee-simple ; so by this appears he hath equal equity with an heir in tail under a settlement for a valuable consideration. But an heir in tail under a settlement, hath not equal equity with a creditor. *Vide post. c. 15, the notes there.*

14. J. S. having two nephews, the plaintiff and the defendant, who were his heirs at law, and intending to make an equal division of his estate between them, made a conveyance accordingly; but in the enumeration of particular lands to the plaintiff, a farm was left out, which was proved to be intended to be given to him, and so the scrivener swore his instructions were; but it was omitted by the clerk: The bill was to supply this (v) omission. But the court would do nothing in it, but left the farm to descend equally between them. 1 *Vern.* 57.

[It seems to be a principle in equity, that wherever a voluntary deed is not sufficient to pass the estate out of the person making the deed, it never can be carried into execution, without either a valuable, or at least what a court of equity calls a meritorious consideration, as payment of debts, or making provision for a wife or child. See 1 *Ves.* jr. 54; 3 *Bro. Ch. Rep.* 14; 2 *Vent.* 364; 1 *Vern.* 40; 1 *Vent.* 137; 1 *Atk.* 8. And where there are two voluntary conveyances, he that hath the advantage at law ought to keep it. Per *Treby, Ch. J.* in *Bath and Montague's Case*, 3 *Ch. Ca.* 88. And the one being against the other, must be tried at law. *Ibid.* 98. And in wills, where all are volunteers, it is not necessary that the words should be taken as they are penned, but may be varied, in many cases, to effectuate the intent. 2 *Atk.* [582] 598.

[Where there was a conveyance by lease and release, and the lease was lost, it was held that the release should operate as a covenant to stand seized. 1 *Atk.* 191. So, a deed poll containing a disposition of the whole real and personal estate of A. being in consideration of love and affection, but without livery, shall be good by way of covenant to stand seized. 2 *Ves.* 225. A feoffment in fu-

(v) Omissions in conveyances have been many times supplied in equity. *Vide Max. 13, c. 2*, the notes there. But it has always been in favour of a purchaser or creditor, and not in favour of a volunteer against an heir; for an heir has equal equity with a volunteer. *Vide* the next case and the notes there.

ture is void, because livery which is essential to it, cannot give a freehold in future. *Co. Lit.* 216 a, 217 a. *But a man by covenant to stand seized to the use of another may make an estate to commence in future.* *Cro. Jac.* 180; *3 Lev.* 370.]

15. J. S. seised in fee of freehold and copy-hold lands, settled the freehold lands on himself for life, remainder to the heirs male of his body, remainder to the plaintiff his brother in tail; and covenanted to surrender the copy-hold lands to the same uses; and going to make a surrender in pursuance of his covenant, fell sick by the way, but made a letter of attorney to do it, and died before it was done, without issue male; the copy-hold lands descending to daughters, who were his heirs at law; the bill was brought by the brother to have the defect of the surrender supplied in equity: - But the court refused it, for the brother is but a mere volunteer; and *the heir at law (w) has equal equity with a (x) volunteer.* 1 Ch. Ca. [68]

(w) But whether a *volunteer hath equal equity with the heir*, seems doubtful. Where the husband devised the lands to his wife for life; the son suggesting an old entail, under which he was heir, brought his bill against the wife, who had the title deeds in her custody, for a discovery of the deed of entail; although it was insisted for the wife that there was a consideration in the devise, *viz.* to provide for his wife, yet because the devise was a bounty, and the heir having good title in this case, he shall be aided, and decreed the deed to the heir. 2 Ch. Ca. 4. But where the plaintiff as heir brought a bill to have the deeds and writings concerning the estate; the defendant being a jointress, insisted that she ought not to discover or part with the writings, until her jointure was confirmed; although the jointure was voluntary and made after marriage, yet *per Cur.* confirm the jointure, or you shall not see the deeds. 1 Vern. 480. *Vide* farther as to this point, *Max.* 13, c. 1, the *notes* there, and *post*, c. 16, the *notes* there, that a volunteer having a conveyance, the heir cannot set it aside. [See also 3 Atk. 511; 1 Ves. jr. 76; 2 Bro. Ch. Ca. 650.]

(x) Yet to this there is an exception; for the *heir has not equal equity with younger children*, who though they are volunteers, yet if unprovided for, shall be relieved against the heir; for though generally a defect in a voluntary conveyance shall not be supplied in equity, yet if a man voluntarily makes a provision for his children, and for their maintenance, such a voluntary conveyance shall be supported and made good in equity. 1 Vern. 40; S. P. 2 Ventr. 365. [*Prec. Ch.* 84: *Amb.* 251. But a conveyance or surrender, will not be supplied in favour of a grand-child, or a natural child. 1 P. Wms. 60.] As the

243. So where the defendant's mother whose heir he is, being seised in fee, she and her husband levied a fine, under which the plaintiff makes title, *viz.* by the husband's will, the fee being limited to the husband; the bill was for a discovery of the deed. But because the conveyance by the fine, &c. was voluntary and without (*y*) consideration, no (*z*) money being paid, the court would give no

defective surrender of a copy-hold supplied against the heir in favour of younger children. 1 *Vern.* 142; *S. P.* 1 *Salk.* 187. So where lands were devised to A. for life, and after to the executor to be sold for younger children's portions; and the executor dies, and then A. dies, the estate shall be sold. 1 *Ch. Ca.* 35. So a defect in a power to charge lands, was supplied against the heir in favour of younger children. 1 *Ch. Ca.* 263, 264. So also in the case of legatees, *the heir seems not to have equal equity with a legatee.* As a man gave instructions to put his will in writing, and that his messuages, &c. should be sold by A. and B. for payment of his debts and legacies, and died; and after A. died; B. and the heir were compelled to sell. *Hardr.* 204. And where lands were devised to be sold for payment of legacies, but not directed by whom to be sold; the legatees sold their interest to the plaintiff, who exhibited a bill against the heir, to compel a sale; it being upon a special verdict adjudged by the court of law, that the will was void in the very constitution of it: the court of chancery dismiss the bill; but the dismissal was reversed in the House of Peers. 1 *Ch. Ca.* 176; *S. C.* 2 *Ch. Rep.* 283; but if the heir be devisee of the lands, those lands shall not be made chargeable in equity with the legacies, *for one volunteer has equal equity with another.* *Vide post*, c. 16.

(*y*) Marriage even without a portion paid is a sufficient consideration, to give the grantee greater equity than the heir; as articles, or a covenant, or even a bare promise before marriage to settle a jointure, shall be executed in equity against the heir. *Vide Max.* 13, c. 1. So where the words (*shall stand and be seised*) were left out in a conveyance made in pursuance of marriage-articles; those words were supplied against the heir. 1 *Ch. Rep.* 162. So in a feoffment made in consideration of marriage; livery and seisin was supplied against the heir; 2 *Ch. Rep.* 216; but note, a jointress is a purchaser. 1 *Ch. Ca.* 100.

(*z*) For an heir hath not equal equity with a purchaser or creditor: As marriage-articles shall be executed against the heir. *Vide Max.* 13, c. 1, and *ante*, c. 7, the notes there. Defect of words, or mistake in a conveyance supplied against the heir in favour of a purchaser or creditor. *Vide Max.* 13, c. 2, the notes there. Defect of livery and seisin supplied against the heir in favour of a purchaser. *Vide Max.* 13, c. 2. Defect of a surrender of a copy-hold estate supplied against the heir in favour of a purchaser or mortgagee. *Vide Max.* 13, c. 2. Defect of trustees joining in a conveyance, supplied in

relief, but left the defendant wholly to law, to help himself there as he could. 2 Ch. Ca. 133.

[69]

16. The question being between two voluntary deeds; the plaintiff claiming by the latter, the court ordered the plaintiff to produce precedents, where a former voluntary conveyance hath been set aside, as this case is, that a subsequent conveyance, which is also voluntary, may take place; the bill was dismissed. 1 Ch. Rep. 173. [But where there are two voluntary settlements, and the first is gained by fraud, the second shall prevail. 1 P. Wms. 580; 2 P. Wms. 358.] So where the grandfather voluntarily settled the lands on the father for life, remainder to the father's wife for her life, remainder to his first son in tail; and by the settlement a power was to the father at any time during his life, by any writing to convey or appoint the lands to any child or younger children, so as that conveyance or appointment be made to commence *after the death of the wife*. The father had issue two daughters the plaintiffs, and a son the defendant, and having no other way to provide for the plaintiffs, conveyed the lands to a trustee, *habendum* to him and his assigns, for the lives of his daughters, and for their only use and benefit; to remain from the death of *himself* and his wife, whereby the power was not literally pursued; the bill was to supply this defect, but the defendant demurred, for that both the conveyances were voluntary, and therefore the case was the same here as at law: And the court was all of opinion, that the law being against the plaintiffs, equity could not (aa) help. (bb) 1 Ch. Ca. 156. So a man having a

favour of a purchaser. *Vide Max. 13, c. 2.* Defect in the execution of a power supplied against the heir in tail in favour of a mortgagee. *Vide Max. 13, c. 3.* Defect of a devise to sell lands to pay debts supplied against the heir. *Vide Max. 13, c. 3;* but not against a prior volunteer. *Vide post, c. 16.*

(aa) This case seems doubtful; because an heir has not equal equity with younger children. *Vide ant. c. 15,* the notes there. Where a defective execution of a power to charge lands supplied against the heir in tail under a voluntary settlement in favour of younger children. 1 Ch. Ca. 263, 264.

(bb) But if it had been in consideration of money, it was admitted, it had been otherwise; for a volunteer hath not equal equity with a purchaser; and

term in trustees' names, made a voluntary settlement of it upon the defendant, but being afterwards (cc) dissatisfied with the settlement, made his will and devised it to the plaintiff; the settlement prevailed against the will. 1 *Vern.* 100. So where a man in the time of his sickness, made a voluntary surrender of a copy-hold estate, to his nephew, but afterwards recovering and marrying, settled [70] it upon his (dd) wife and (ee) children, there being no fraud

all voluntary conveyances are *prima facie*, to be looked upon as fraudulent against a purchaser, 1 *Ch. Ca.* 100; *S. P.* 1 *Ch. Rep.* 146; 2 *Ch. Rep.* 74; in all which cases, no notice is taken whether the purchaser had notice of the voluntary deed or not. Whereby it seems, that notice in a purchaser is not material against a volunteer; though *sicel* 1 *Ch. Ca.* 264, that a defective execution of a power in favour of younger children shall be made good against a purchaser with notice.

(cc) A voluntary settlement shall bind the party himself, for if you would relieve in this case, you must consequently establish this proposition, viz: *That a man can make no voluntary disposition of his estate, but by his will only, which would be absurd*, 1 *Vern.* 100; and though a voluntary deed is set aside against a purchaser or creditor, yet it shall stand good against the party himself. *Vide 1 Ch. Rep.* 146; 1 *Ch. Ca.* 59.

(dd) But if there be an agreement precedent to the marriage, or a portion paid, then the wife is a purchaser, (*Vide ant. c. 15*, the notes there) with whom a volunteer has not equal equity. As where the husband in the lifetime of his first wife, many years before her death, settled the lands to the use of himself for life, remainder to his first and other sons in tail; the wife died without issue, and upon his second marriage in consideration of a portion paid, he agreed to settle part of the lands as a jointure on his wife; and having issue, the defendant died; the bill was brought by the wife to have the jointure settled, and to set aside the settlement as fraudulent against her; the court, without sending it to a trial at law whether the deed was fraudulent, declared that she was a purchaser, and so decreed the settlement fraudulent against her. 1 *Ch. Ca.* 100. So where tenant for life having power to settle a jointure, covenanted before marriage, in consideration of a portion, to settle a jointure according to his power; but died before execution; equity supplied it against the remainder man, who was a volunteer. *Vide Max. 13, c. 3*, and the notes there. And Lord Coventry's case reported at large at the end of this book.

(ee) Which shews, that the heir of the grantor of a voluntary settlement, has no more equity than the grantor himself. *Vide ant. c. 15*, the notes there; but if the issue be purchasers, there seems the same reason to give them a greater equity, than a volunteer, as well as to a jointress. *Vide 1 Vern.* 440; where said *per Cur.* that a jointress and the issue are equally purchasers, and that they shall equally bear the burden of a prior incumbrance; though *vide* the case of *Holford* and *Holford*. The father made a voluntary

or trust in the case, the surrender to the nephew prevailed. 1 *Vern.* 365. So where a man voluntarily settled his estate on his infant heir in tail, and two days afterwards made his will, and devised the same estate among other things, to his infant heir in tail, but subject to the payment of his debts, in case his personal estate should not be sufficient to pay his debts; as also of a legacy of 250*l.* The personal estate proving deficient, to pay both debts and the legacy; the bill was to have the debts paid out of the land, that so the legacy might be paid out of the personal estate; but the bill was dismissed; [for *per Curiam*, the settlement, though voluntary, is not revocable, and therefore having settled the bonds, the testator had thereby disabled himself to charge the premises by his will.] 1 *Vern.* 464; S. P. 2 Ch. Rep. 265; that under such a devise a (*f*) bond-creditor shall not prevail against

settlement on himself for life, remainder to the heirs male of his body, remainder to his brother the defendant in fee; ten years after, in consideration of a great portion, he agreed to settle the lands upon himself and his wife, and their issue, which issue the plaintiff (a daughter) is; but though he lived some years after, did not execute any conveyance. A trial was directed, whether the deed by which the defendant claimed, was fraudulent; and the defendant to admit the plaintiff a purchaser; it was found against the plaintiff; a new trial was pray'd, and that the defendant might admit the plaintiff had a conveyance, (though not such a one as to bar the estate-tail, but a conveyance by way of lease and release,) for as it stood upon the articles, the defendant's conveyance could not be taken to be fraudulent against the articles, nothing in law passing thereby, and yet it would be fraudulent against a conveyance; but the court denied it, and so dismissed the bill; though in the arguing it was admitted, that every voluntary conveyance, is *prima facie*, fraudulent against a conveyance for a consideration. 1 Ch. Ca. 216.

(*f*) But a creditor by a judgment, though subsequent, shall prevail against a volunteer. 2 Ch. Rep. 265. So of a subsequent mortgagee; the deed being upon a trial found fraudulent against him. 1 Ch. Ca. 59. So the want of a surrender to a mortgage supplied against the devisee. 1 Ch. Ca. 170. Though *vide* the case of *Jenkins* and *Kemis*, where lands were settled in consideration of a marriage, and portion paid; on the father of the intended husband for life, remainder to the husband for life, remainder to the first and other sons of the marriage, remainder to heirs of the body of the husband, with a power for the father by deed or will, to charge the lands with 2000*l.* the father and the husband joined in a mortgage of the estate to the plaintiff's testa-

a volunteer: So where the testator, being indebted by bond devised a legacy of 500*l.* and also devised his real estate to J. S. whom he made executor; the executor paid the debts out of the personal estate, so that nothing was left to pay the legacy; the legatee brought his bill to have the real estate (gg) charged with the legacy; but was dismissed; for it was as much the intention of the testator, that the devisee should have the lands, as the legatee his legacy. 1 *Salk.* 416.

[71]

17. J. S. was indebted to the present plaintiff by bond, and being sued at law, brought a bill in chancery to be relieved; whereupon an injunction was awarded, upon giving security to abide the order on hearing; the present defendant was bound as such security in a recognisance, which was penn'd, to pay what should be reported due by N. H. a master named in the defeasance or condition. But the master died before any report made, and so also did the other obligor, who died worth nothing; by the strict panning of the defeasance, the recognisance was not suable at law, because no report was made by the master; the question was; if the surety, who was not liable in law, should be liable in equity. It was insisted for the plaintiff, that he had good remedy for a just debt, and justly proceeded to recover it, but the court stay'd his suit, and takes ill security; and the debt lost thereby; and therefore the court is bound to do the plaintiff right. And the intent of the court was, that the debt, if due, should be secured; and the intent was not with reference to this or that mas-

tor, with covenant for further assurance; the wife died, and the husband had issue the defendant by a second wife, whose title is by virtue of the remainder to the heirs of the body of the husband; the plaintiff insisted, the mortgage, though a conveyance, ought to be taken as an execution of the power against the defendant, who is a volunteer, not being the issue of the wife, and so not within the consideration of the settlement, yet the court was of opinion, that the plaintiff could not be relieved in equity. 1 *Ch. Ca.* 103; *S. C.* 1 *Ch. Rep.* 275.

(gg) *Vide Max. 3, c. 5.* [How far the wife and issue will be regarded as purchasers, under marriage articles, see 3 *Hen. & Muf.* 399.]

ter's report; for, suppose, the court had, during the life of the parties, transferred the reference to another master, and he had made a report, *that* should have bound; and in case of a (*hh*) bond lost, this court hath made a [72] surety to pay it; yet the Lord *Chancellor contra*; for the party is but a surety, not bound by law. 1 Ch. Ca. 22. So where upon administration granted during the minority of the plaintiff, who was executor and residuary legatee, the defendants became bound as sureties in the spiritual court, in the usual bond: The bill was against the administrator for an account of the testator's personal estate; and as to the defendants the sureties, it was suggested, that by *fraud* and *covin* they had got up their bond, and had procured insufficient security to be accepted by the *prærogative* court in the room therèof. The court upon the first opening declared, they would not charge the sureties, further than they were answerable by law, and dismissed the bill as to that part. 1 Vern. 196.

[But where a bond was signed and sealed by A. as surety, but the name by mistake not inserted, and A. on fresh security being demanded agrees, but afterwards finding the mistake refused, equity will compel him. Prec. Ch. 309. So, where a bond is extinguished at law, a court of equity will, under circumstances, set it up against the surety; as where a bond is burnt, or cancelled by acci-

(*hh*) It was so decreed, in the case of *Underwood and Staney*, 1 Ch. Ca. 77, that if A. lends money to B. and thereupon B. and C. become bound in an obligation to A. If A loses this bond, yet he may have remedy in equity against C. the surety; though it was said he was not bound in law, but in respect of the *lien* of the bond. And the difference seems to be, for that in this latter case, the money was lent upon the credit of the surety, and therefore since the surety was the cause of the loss, he has not equal equity with the obligee; but in the other case the money was lent before, and would have been lost, if he had not been surety, and therefore he being an innocent person, and no way conduced to the loss, hath equal equity with the obligee. In the debate of the case of *Underwood and Staney*, it was said, that if a grantee in a voluntary deed, or obligee in a voluntary bond, lose the deed or bond, they should have remedy against the grantor or obligor in equity; but a quære is made by the reporter; for surely the obligor has equal equity with his own volunteer.

dent or mistake, or the principal procure it to be delivered up by fraud. 3 *Atk.* [91] 80. But where the bond was given up to be cancelled by the obligee, on making a new arrangement with the principal obligor, which proved insufficient to satisfy the debt, the court refused relief against the surety. *Ibid. Skip v. Huey et al.*]

18. If lands are devised to the (ii) executor in trust for the payment of debts, all debts shall be paid in a court of equity; according to their precedence or superiority at law. 1 *Vern.* 65.* So if they are devised to the executor to pay mortgages in the first place, and then legacies; yet all other debts shall be paid before the legacies. 1 *Vern.* 69. So where a man possessed of a term for years, mortgaged it, and then became indebted, first by statute, and then by judgment, and died; the equity of redemption vesting in the executor; it was decreed the judgment should be first satisfied out of it. 1 *Vern.* 293.

(ii) For the lands being devised to the executor, are legal assets; and all creditors having equal equity, there is no reason to take the advantage of the law from one in favour of another. But if they had been devised to trustees, then the assets would be merely equitable, and all creditors having equal equity, and no advantage at law, one more than another, would be paid in proportion. *Vide Max. 3, Ca. 11.*

* But see note to Maxim 3, c. (11) ante, where the law is now held to be otherwise.

END OF THE MAXIMS.

APPENDIX 1.

[BY THE AMERICAN EDITOR.]

OF INTEREST.

Rate of *legal* interest, in the several States, in the Union.

	<i>per cent.</i>		<i>per cent.</i>
Alabama,	8	Missouri,	6
Connecticut,	6	New Hampshire,	6
Delaware,	6	New Jersey,	7
Georgia,	8	New York,	7
Indiana,	6	North Carolina,	6
Illinois,	6	Ohio,	6
Kentucky,	6	Pennsylvania,	6
Louisiana,	5	Rhode Island,	6
Maine,	6	South Carolina,	7
Maryland,	6	Tennessee,	6
Massachusetts,	6	Vermont,	6
Mississippi,	8	Virginia,	6

(P) For the above table of interest, in the several States, the editor is mainly indebted to a very valuable work, recently published, GRIFFITH's ANNUAL LAW REGISTER OF THE UNITED STATES; a book which, it is presumed, will find a place in the library of every judge, lawyer, and private gentleman, in the United States. It will be seen, by a reference to the appropriate heads, that in some of the States, there are strong provisions against usury, in others not; that most of the States have declared the rate of *legal* interest; but that some few have made it a mere subject of contract between the parties, not to

exceed a certain per cent., and distinguished between legal and conventional interest.

(F) Interest must be paid according to the law of the country where the debt was contracted, and not according to that where the debt is sued for. *2 Fonb. Eq. B. 5, c. 1, § 6, p. 443; Ekins v. East India Company, 1 P. Wms. 396; 2 Bro. P.C. 72; Bodily v. Bellamy, 2 Burr. 1094; McGuire v. Warder, 1 Wash. 368; Warder v. Arell, 2 Wash. 295; Fanning v. Consequa, 17 Johns. Rep. 511.* But if, by the terms or nature of the contract, it appears, that it is to be executed in another country, or that the parties had reference to the laws of another country, then the place in which it is made, is, in this respect, immaterial, and it is to be governed by the laws of the country where it is to be performed. *Fanning v. Consequa, 17 Johns. Rep. 511.* The court, however, will not decree interest upon interest, notwithstanding it is warranted by the custom of the country where the contract was entered into. *Boddam v. Riley, 2 Bro. Ch. Rep. 8.*

Of interest in general, and interest payable by executors and trustees.

(F) For the proper mode of calculating interest, and stating accounts, see an excellent treatise by the present Chancellor of the Richmond and Lynchburg districts, (the Hon. CREED TAYLOR, esq.) intituled *Instructions for Commissioners in Chancery, &c.*

In the *Treatise of Equity. B. 5, ch. 1, § 1,* interest is considered the *common measure of damages, where the contract is for money.*

1. As to the cases in which interest is allowed in courts of equity, it is said to be given not only upon a note pay-

able on demand (*6 Mod.* 167;) but even for demands due by covenant, *14 Vin.* 458, *pl.* 16. But this latter position seems doubtful, as the demand is not, in such case, *liquidated*. *See 2 Salk.* 623. A stated account ought to carry interest, especially in cases of mortgages, and more strongly when settled by a commissioner of the court pursuant to order. *Fonb. Eq.* B. 5, ch. 1, § 4; *2 Eq. Ca. Abr.* 529, *pl.* 4; *14 Vin.* 457, *pl.* 4, note. In *Fonb. Eq.* B. 5, ch. 1, § 4, note (r) it is said, “The report of the master will not, however, entitle the creditor, whether mortgagee or otherwise, to interest before it be confirmed; and in support of that point, the case of *Kelly v. Lord Bellew*, 1 Bro. P. C. 202, (4 Bro. P. C. 495, of Tomlin’s edit.) is cited; but the point does not appear to have been in dispute in that case; and the abridgment of the same case, in *14 Vin.* 457, *pl.* 4, note, and *2 Eq. Ca. Abr.* 529, *pl.* 1, states the point thus: “Interest to be made principal from the time of stating the account.” *Mr. Fonblanche* also cites *1 P. Wms.* 377, *Attorney General v. Brewer’s Company*, where interest was allowed from the time of confirming the master’s report; but it is stated that it was so allowed, “and not before; for that, until then, it was no *liquidated sum*.” In *Brown v. Barkham*, 1 *P. Wms.* 659, *Ld. Parker* says, a master’s report computing interest, makes that interest principal, and to carry interest; for a report is as a judgment of the court, and appoints a day for payment, carrying on interest to that day; and the party’s disobedience to the court, in not complying with the time of payment, ought to subject him to interest. And *Mr. Cox*, in his note to that case, cites *Kelly v. Bellew*, 1 Bro. P. C. 202, (4 Bro. P. C. 495, of Tomlin’s edit.); *Bacon v. Clarke*, 1 *P. Wms.* 480, (*and see Ib.* 453); *Burton v. Slattery*, 3 Bro. P. C. 68, (5 Bro. P. C. 233 of Tomlin’s edit.); *Neal v. Attorney General*, *Mosl.* 246; *Astley v. Powis*, 1 *Ves.* 49; and when confirmed, the whole amount will carry interest, though part

of it be in respect of costs, *Bickham v. Cross*, 2 Ves. 471.* But interest is not allowed in *equity*, (though it may be at *law*, in the shape of damages, *Doug.* 361, 376,) on *book-debts*, or *simple contract debts*, prior to the confirmation of the master's report of such debts; though the real estate be devised for the payment of debts. See 3 Ch. Rep. 36; 2 Ves. 363; *Ibid.* 587; 2 Atk. 108; 1 Bro. Ch. Rep. 41; 1 Dallas, 266, 267. But see *contra*, 1 P. Wms. 228; 2 P. Wms. 27; the authority of which cases, says Mr. Cox, has been much doubted. See, however, 1 Ves. jun. 63; *Dick.* 305; 1 Serg. & Rawle 176; 9 Johns. Rep. 71.

2. Though interest is not generally allowed on rents and profits, or on arrears of an annuity, (1 Ch. Rep. 97; *Forrest* 2, 3; 2 P. Wms. 163; 2 Atk. 211; *Dick.* 178; *Ibid.* 278; 1 Ves. jun. 451; 2 Atk. 411; 1 Desaus. Ch. Rep. 496; 4 Desaus. Ch. Rep. 422; 2 Call, 249; 2 Munf. 321; 5 Munf. 21; 1 Bibb 326, 327; 6 Binn. 159) yet it will be allowed on the latter, if secured by a *recognizance* or other specialty. See *Gilb. Rep.* 142; 3 Atk. 579; or if the annuitant has been delayed by injunction from recovering it, *Dick.* 643; and on this principle, it was allowed in case of annual instalments of a debt secured by deed creating a term of years for the payment of debts, and which instalments were not punctually paid. 4 Bro. P. C. (*Tomlins' edit.* 550); *Kildare, &c. v. Hopson*. So, interest on hires of slaves decreed, upon the hires *actually received* by the defendant from other persons, but not on the profits of the slaves while in his own possession without being hired out; the same being unliquidated and merely

But, in Virginia, interest is not to be converted into principal so as to carry interest. See *Granberry v. Granberry*, 1 Wash. 249; *Sheppard v. Starke*, 3 Munf. 41; *Burnley v. Duke*, 1 Rand. 113. The practice as to reports of commissioners in the Richmond and Lynchburg chancery courts is this: after the commissioner of the court has stated the account, calculating the interest according to the rule prescribed by the Chancellor, in his *Manual of Instructions for Commissioners, &c.*, the balance is struck, and the aggregate sum of principal and interest due, reported; with interest on the *principal*, (naming it) part of the said aggregate, until paid.

conjectural, and as to which he was in no default for not paying. *Baird v. Bland*, 5 *Munf.* 492.

3. A difference has been taken, in case of goods sold and delivered, between bare notes and penal securities; because in the former, the parties have not extended the bargain beyond the bare sum in the note; but in the latter, altho' there was a profit in the sale, yet the court will not dispossess him of the security without common amends, i. e. the common interest for the time of his forbearance; for the penalty is presumed, without any agreement for that purpose, to be inserted for that end. But where excessive rates are allowed for the work, in respect of slow payments, there shall be no interest allowed; for interest is only allowed to supply the want of prompt payment. *Fon. Eq. B.* 5, ch. 1, § 2; & *Bro. P. C.* (*Tomlins'* edit.) 539; *Marlborough, &c. v. Strong.*

4. Whenever the debt is carried beyond the penalty of the security, it is always for a defendant, upon the maxim that he who will have equity must do it; as where the party has been delayed by injunction of the court of chancery (1 *Vern.* 349,) or the like; as where an estate has been devised in trust, for creditors, and the trustee neglects to pay in a reasonable time, (1 *Salk.* 154); or, the obligee has obtained a judgment for the penalty, (*Hard.* 136; 3 *Atk.* 517; *Show. P. C.* 15); in all such cases, if the party comes into equity for relief, in the character of plaintiff, he must do equity to the defendant, whom he has brought in. But the debt is never carried beyond the penalty for a plaintiff, any further than the defendant could be charged at law; because the plaintiff has chosen his own security, and therefore must abide by it. Besides, a man can have no more than his debt; and the penalty is the utmost of the debt. See 2 *Vern.* 509; 1 *Vern.* 342; *Dick.* 305; 3 *Bro. Ch. Ca.* 492, 496; 2 *Ves. jun.* 718; 6 *Ves. jun.* 411. Nor will equity ever carry interest beyond the penalty when there has been no demand, of several years. (14 *Vin. Abr.* 249, pl. 2; 2 *Bro. P. C.* 275.)

5. Unless there be some special circumstances in the case, the rule last above stated from *Fonb. Eq. B. 5, ch. 1, § 2,* seems most agreeable to the current of authority. There are, however, cases in which the penalty has been exceeded without special circumstances. (*See Bunb. 23; 2 Term Rep. 388; 17 Ves. 106; 4 Dallas 149; 3 Caines 48, note.*) Of circumstances where the interest is carried beyond the principal, an instance is afforded in the case of *Kirwane v. Blake*, (4 Bro. P. C. (Tomlins' edit.) 532; 14 Vin. Abr. 460, pl. 4) where a bond was given as a collateral security, for the performance of a marriage-settlement, in which the father undertook to pay several sums of money, at different times, to disencumber the estate of his daughter's intended husband of several mortgages, but which he failed to do. So, where advantage was made of money secured by a statute-staple, interest was carried beyond the penalty, (4 Bro. P. C. (Tomlins' edit.) 517. *Dunsany v. Plunkett*; 14 Vin. Abr. 460, pl. 3,) which latter determination is consistent with the principle, that those who retain money in their hands and convert it to their own use, without the consent of the owners, are bound to pay interest, although not demanded, as a punishment for what, under such circumstances, may be considered fraudulent dealing; on which principle courts of equity proceed in charging *executors* and *trustees* with interest on trust property. *See Fonb. Eq. B. 2, c. 7, § 6.*

6. (P) But interest beyond the penalty of a bond may be recovered in a court of *law* in the shape of damages. 2 Term Rep. 388; 2 Bl. Com. 341; *Christian's note* (16); 5 Munf. 594.

7. The old doctrine that an executor or trustee was not bound to lend out money, &c. but if he did, and a loss was incurred, he should bear it, and, on the same principle, was entitled to the gains, if any were made, (2 Ch. Ca. 35; 2 Atk. 106,) has long since been exploded. In *Newton v. Bennett*, 1 Bro. Ch. Ca. 359, the above point was solemnly considered, and denied to be the law of the court; so

that an *executor* or *trustee* may now be considered as chargeable in equity with interest, whenever he appears to have made interest, 1 *Bro. Ch. Ca.* 375; *Ibid.* 384; 13 *Ves.* 402: which is, indeed, agreeable to many former decisions. See 1 *Vern.* 196; 2 *Ch. Ca.* 152; 2 *Vern.* 548. And he shall not only be chargeable with interest, but if he appear to have employed his trust money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of such profits. 10 *Mod.* 21; 2 *Bro. Ch. Ca.* 430; 2 *Ves.* jr. 317; *Ibid.* 36; 1 *P. Wms.* 395, *S. P.*, though not in the case of executors. Or, if the trust fund be employed in trade, without the authority of *cestui que trust*, he may either claim the interest or the profits. 1 *Jacob and Walker*, 122; 1 *Johns. Ch. Rep.* 620; 1 *Serg. and Raw.* 241; 4 *Johns. Ch. Rep.* 303. And it has further been held, that if a trustee or executor retain money in his hands for any length of time, which he might by application to a court of chancery, or by vesting in the funds, have made productive, he shall be charged with interest thereon. 2 *Vern.* 744; 1 *Bro. Ch. Ca.* 375; 3 *Bro. Ch. Ca.* 73; *Ibid.* 433; in which last case the executor kept the money in his hands, without a cause, four years. But an executor investing money in the funds, and appropriating the same, shall not be liable to the fall of stocks. See 3 *Bro. Ch. Ca.* 147; *Ibid.* 434.

8. A distinction, too, was formerly taken between a *solvent* and an *insolvent* executor or trustee: if *insolvent* at the time they placed out the money at interest, the *cestui que trust* should have it, as the executor or trustee, being *insolvent*, run no risk; but if they were *solvent*, then the profits were their own. (*Prec. Ch.* 505.) But this distinction has been long since done away, and quite the contrary doctrine to this is now held; for, it is the principle of the court, that if, in any case, an executor or trustee make any advantage of the trust money, the *cestui que trust* shall have it, and if they incur any loss by undue management or wilful neglect, they must answer for it to

the *cestui que trust*. See 2 Bro. Ch. Ca. 156; 5 Ves. jr. 839; 7 Ves. jr. 152; and, in this last case, the executor, in order to satisfy his own private debt, having transferred stock standing in the name of his testator, shortly after his death, it was held a clear misapplication of assets, and that the funds were liable to general legatees, in the hands of the transferee, although there was no proof of fraud on his part, but only of gross negligence, in not having examined the will of the testator, to see in what manner he had bequeathed his property, instead of taking the representation of the executor himself, that he had power to dispose of it.

9. It is now the constant course of the court to charge executors with interest for balances in their hands. 7 Ves. jr. 124. If they wish to avoid the payment of interest, and not to incur the risk of lending the money out, they may bring it into court, and obtain the direction of the chancellor. See 1 Wush. 246, 249; 1 Binn. 194; 1 Johns. Ch. Rep. 508.

10. Where two trustees joined in an assignment of a trust term, and in a receipt for the *whole* money, but each received only a *moiety*; it was decreed that each trustee be discharged of the trust, by answering for so much only as he had actually received. 1 P. Wms. 81.

11. A distinction has long prevailed between the case of two or more executors, and of trustees joining in a receipt for money. Where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but, if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. Amb. 219. See also Prec. Ch. 173; 21 Vin. 534, pl. 9; 3 Atk. 584. But *Ld. Northington* expressed his strong disapprobation of this distinction between executors and trustees. See 1 P. Wms. (Cox's edit.) 83, note (1). See 19 Johns. Rep. 437,

440; 5 *Johns. Ch. Rep.* 283, 294, 296, and the cases there cited.

12. Where a mortgage is assigned with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest; but it is otherwise, if the assignment be without the mortgagor's consent. 3 *Atk.* 271. *Ashenhurst v. James.*

(P) With respect to the discretion used by courts, in directing, mitigating, or denying interest, see *Fon. Eq. B.* 5, c. 1, § 5.

(P) For much useful information, collected with great research, on the subject of *interest generally, of usury, and of interest payable by executors, administrators and trustees*, see **TATE'S DIGEST OF THE LAWS OF VIRGINIA, ILLUSTRATED BY JUDICIAL DECISIONS**, titles, **EXECUTORS and ADMINISTRATORS, and INTEREST.** This book is just published, is a work of *very great merit*, and will certainly be in the hands of every professional and private gentleman.

Decisions of American Courts, on the subject of Interest.

To the foregoing adjudications of the English courts, it may be useful to add some of the decisions of the courts of the United States, on the subject of interest.

IN VIRGINIA.

1. In debt upon a note for the payment of a certain sum *with interest* from the date, if the declaration do not claim *interest*, judgment on *non sum informatus*, must be entered for the principal only. 1 *Wash.* 70. (P) But the law is now otherwise. See 1 *Rev. Code of 1819*, p. 508, § 80; 2 *Munf.* 334; 4 *Munf.* 76.

2. So, in debt upon a note simply, not expressing to pay *interest*, if the declaration does not demand *interest*, and the defendant *waives his plea*, the court cannot give judg-

ment for the interest. 2 *Call*, 212. (C) But the usual practice in such cases, was, for the jury to find interest by way of damages; which, indeed, could not be carried further than the rendition of the judgment. But now the law authorises the jury, in actions founded on contract, to fix the period from which interest shall commence, and judgment shall be entered, carrying on interest till paid. See *Act of 1804, ch. 8, § 2*; 1 *Rev. Code 1819*, p. 508, 680; 2 *Munf.* 334; 4 *Munf.* 76.

3. An officer of a court having in his possession money raised by the sale of attached effects, which the court had forbid him to pay over, shall pay interest, unless he kept the principal by him. 1 *Wash.* 145.

4. On the plea of payment, in an action on a bond, evidence may be given to the jury that the plaintiff was absent in foreign parts beyond seas, in order to extinguish the interest. 1 *Call*, 133.

So, in a court of equity, interest during the war was deducted from a debt due a British subject, resident abroad. 3 *Call*, 22; 2 *Dall.* 102, 133, *S. P.* as to interest.

6. It is natural justice, that he who has the use of another's money should pay interest for it; and, therefore, an executor, who was in advance for the estate of his testator, was allowed interest on his balance. 2 *Call*, 106.

7. Interest was allowed upon the arrearages of rent, under particular circumstances. 2 *Call*, 249.

8. Interest on rents refused, (there being no special circumstances in the case,) on the ground that the lessor might distrain, and ought not to suffer interest to accumulate. 2 *Call*, 253.

9. So, it was held by two judges against one (Judge *Roane* dissenting) that interest, by way of damages, was not recoverable in an action of debt for rent a year. 3 *Hen. and Munf.* 463, 470. *Contra*, in New York. &c. 4 *Johns.* 183.

10. Interest is not demandable on an unliquidated account. 2 *Call*, 358; 2 *Hen. and Munf.* 603, *S. P.*

11. A court of chancery, on debts not bearing interest *in terms*, could not carry interest down below the decree. **2 Call**, 415. (C) But this is now remedied by statute, which authorises the courts of chancery to award interest on decrees, till paid. See *1 Rev. Code of 1819*, p. 208, § 58.

12. It is not usurious to take a bond for a balance due on an account, including interest then due, and to receive interest thereupon. *1 Hen. and Munj. 4*; *Ord on Usury, 42, 3d edi.*

13. Interest, on a debt due from the Commonwealth, not stopped by an act of Assembly's directing the auditor to issue a warrant on a particular fund, which was not sufficient to pay it. *1 H. & M. 90.*

14. Not to be allowed from a period antecedent to the time of payment of the principal, without an *express* stipulation. *1 H. & M. 211.*

15. Where a mortgage is given to secure the payment of a sum of money, with interest annually, *if lawfully demanded*, a demand of the interest must precede the commencement of a suit to recover possession of the mortgaged premises, on an alleged forfeiture for non-payment of the interest. *2 H. & M. 95.*

16. A fair sale of a bond for much less than its nominal amount, is not usurious. *2 H. & M. 14*; *1 Dall. 217*; *2 Dall. 92, S. P.*

17. In the case of *Miller v. Beverleys* (*4 H. & M. 417*) the present chancellor of the Richmond district, laid it down as a general rule, "that in all cases whatsoever, a trustee (such as *Miller*,) is liable to pay interest for the trust money in his hands, unless he can shew, that it was necessarily kept in hand for the purposes of the trust; and this he may do upon oath, subject to be controlled by other testimony, and the circumstances of the case."

18. Under the act of 1804, (*1 Rev. Code of 1819*, p. 508, § 80,) the clerk ought to issue the execution for interest, although not mentioned in the writing, nor de-

manded by the declaration. *Wallace v. Baker*, 2 Munf. 534; *Baird v. Peter*, 4 Munf. 76. This construction of the act renders the cases of *Hubbard v. Blow & Rarksdale*, 1 Wash. 70, and *Brooke v. Gordon*, 2 Call, 212, no longer applicable.

19. Interest allowed on a legacy (no certain time for payment being appointed) from the end of one year from the testator's death; and to a legatee in remainder, from the end of the year in which the tenant for life died. *Shobe's execs. v. Cave and wife*, 3 Munf. 10.

20. An executor is not chargeable with interest on a legacy payable to an infant, until a guardian has been appointed, and he has received notice of such appointment. *Cavendish v. Fleming*, 3 Munf. 198.

21. Interest not recoverable, of course, in an action for rent in arrear, but may be given under circumstances. *Dow v. Adams*, 5 Munf. 21.

22. A legatee entitled to interest on the hires of slaves, actually received by the executor. *Quarles v. Quarles*, 2 Munf. 321.

23. Decree for a slave and profits; the defendant to pay interest on the hires *actually received* by him, but not on the profits, while the slave was in his own possession, and not hired out. *Baird v. Bland*, 5 Munf. 492.

24. If a bond be given in the usual form, with a penalty, conditioned to be discharged by the payment of the principal at a future day, "with interest from the date if not punctually paid," such back interest is to be considered an additional penalty, and not recoverable. *Waller v. Long*, 6 Munf. 71. *Contra in New York and Kentucky.*

25. Where a legacy is left in trust, and the trustee refuses to act, the executor is not bound to pay the legacy, until a new trustee is appointed by the court of chancery; and it not appearing affirmatively that the executor or his testator's estate received interest on the fund out of which the legacy was payable, he is not chargeable with interest before the decree. *Johnson v. Mitchell*, 1 Rand. 209.

(~~C~~) As to the proper mode of computing interest, where partial payments had been made, a great contrariety of opinions existed. The late chancellor of Virginia, (*Mr. Wythe*) in the case of *Ross v. Pleasants, Shore & Comp., and others*, (*Wythe's Chancery Decisions*, 162,) finally adopted the mode, "whereby so much of the payments as "is equal to the interest being applied to the discharge "thereof, the remainder, unless the *debitor* at the time of "payment, or before, directed otherwise, is applied to- "wards discharging the principal debt; or, from the sum "of principal and interest upon it, computed to the time "of payment, the payment is subtracted, and upon the re- "mainder of the principal debt, as a new capital, interest "is computed from the time of payment, but with this "caution that the new capital be not more than the for- "mer capital; so that if the payment be less than the "interest due at the time of payment, the surplus of inte- "rest due must not augment the *fænerating* capital, be- "cause thereby the creditor would receive compound inte- "rest, or interest upon interest, which is generally sup- "posed to be unlawful."

The above are the words of chancellor *Wythe*: The present chancellor (CREED TAYLOR, Esq.) has adopted the same principle. (See the case of *Lightfoot v. Price*, 4 H. and M. 431.)

Mr. Wythe, after laying down the above rule, proceeds to investigate the objections to it, where payments have been made *before the end of a year*, in a quaintness of style peculiар to that great and good man. "To the mode now recommended, says *Mr. Wythe*, its illegality, in a case "where the payment hath been made before the end of a "year from the term when the interest commenced, hath "been objected. But the objection is founded in a misin- "terpretation of the act to restrain the taking of exces- "sive usury, the words of which (Acts of 1748, cap. 30, "edit. 1769. sect. 2) are, 'no person shall take above the "value of five pounds for the forbearance of ONE HUN-

" ' DRED pounds for a YEAR, and so AFTER THAT RATE
 " ' for a greater or lesser sum, or for a longer or SHORT-
 " ' ER TIME,' and which do not prohibit him, who had
 " lent 7,300 pounds, to take every day one pound for inte-
 " rest, more than they prohibit him to take, at the end of
 " the year, 365 pounds; the law not requiring a year,
 " more than a day, to mature the lender's right to that in-
 " terest which is in the compound ratio of the capital
 " and the time it is forborne; although a new bond daily
 " by the lender for the daily interest, perhaps would be
 " deemed an usurious shift, condemned by the third section
 " of that act. Interest taken or secured for a less time
 " than a day would undoubtedly be criminal; fractions of
 " a day, in legal supputations of time, which are gene-
 " rally rejected, being in no instance more exceptionable
 " than in dealings between a griping usurer and a needy
 " borrower. A judgment in an action of debt on an obliga-
 " tion awards interest until payment, whether before or
 " after expiration of the year: which would not be award-
 " ed if the receipt of interest computed upon the whole
 " debt unto the time of payment were unlawful, unless
 " with that payment the period of a year coincided. That
 " a creditor without the sentence of a judge, may lawfully
 " receive that which the judge, the *lex loquens*, (*a proso-*
"popæia confessed universally to be proper) would award
 " to him, is assumed as a true proposition. The creditor,
 " who receives his interest half-yearly, quarterly, month-
 " ly, weekly, or daily, although he hath indeed a profit
 " greater than he who doth not receive his interest before
 " the year's end, is not culpable, more than the landlord,
 " who receives his rent half-yearly or quarterly, the hire-
 " ling who receives his wages monthly or weekly, and the
 " like, is culpable."

IN KENTUCKY.

 The mode of calculating interest in Kentucky,
 where partial payments have been made, so far as the

courts have yet settled the question, is thus stated : "Interest, when allowed on a covenant, in the discretion of a jury, should be calculated on the whole demand up to the first payment, and the payment subtracted from the aggregate ; interest should then go on the balance to the second payment ; and this process should be used up to the judgment." *Guthrie v. Wickliffe*, 1 Marshall, 684.

1. In a judgment for interest, the rate of interest should be stated. *Troxwell v. Fugate*, Hardin, 2 ; *Cotton v. Reavill*, 2 Bibb, 101, S. P.

2. On a note given out of this State, the rate of interest should be stated. *Russell v. Shepherd*, Hardin, 44 ; *Cotton v. Reavill*, 2 Bibb, 101, S. P.

3. Interest is not a matter of right, in ascertaining damages on a bond for the payment of property ; it depends on circumstances proper for the consideration of the jury. *Henderson v. Stainton*, Hardin, 119.

4. Interest is not to be allowed upon an unliquidated account for goods sold and delivered. *South v. Leavy*, Hardin, 518, and the authorities cited in the margin. *Harrison v. Handley*, 1 Bibb, 446, S. P.

5. Nor in *assumpsit*, on a *quantum meruit* for work and labour. *Murray v. Ware's admr.* Hardin, 519, note ; 1 Bibb, 325, S. C.

6. A bond with condition to bear interest from the date, if not punctually paid, is good, and interest shall be given accordingly. *Rumsey v. Matthews*, 1 Bibb, 242.

7. After tender and refusal, interest not decreed in equity. *January v. Martin*, 1 Bibb, 590.

8. The rate of interest is matter of law, and ought to be expressed in the judgment. *Cotton v. Reavill*, 2 Bibb, 101 ; *Harper v. Bell*, Ibid. 223 ; *Hardin v. Major*, 4 Bibb, 105. But the rate of *foreign interest* is matter of fact, and must be found by the jury by way of damages. *Davidson v. Gohagin*, 2 Bibb, 634.

9. In debt on a judgment bearing interest, if the plaintiff, by his declaration, demands only principal and inter-

rest accrued at the commencement of the suit, he cannot have judgment for the accruing interest. *Caldwell v. Richards*, 2 Bibb, 332.

10. Interest on a note payable on demand, does not run until demand made; the writ is a demand, but interest before suit cannot be given without the intervention of a jury, to ascertain the demand previous to the date of the writ. *Barilett v. Marshall*, 2 Bibb, 471.

11. Interest is not decreed, in general, on improvements or rents. *Patrick v. Woods*, 3 Bibb, 31.

12. It is not discretionary with the jury to give, or not to give, interest upon the consideration given in the sale of lands, in estimating damages for a breach of covenant; interest from the time when the consideration was paid is to be given, according to uniform decisions. *Robards v. Netherland*, 3 Bibb, 529.

13. Interest cannot be decreed on a mortgage made to secure a judgment at law, where the judgment did not bear interest. *Heyde v. Hazlehurst*, 4 Bibb, 19.

14. On an obligation to pay money on *demand*, no interest accrues until demand made; and a judgment cannot be given for it, unless a jury find the fact of a demand previous to suit brought; a verdict for the debt, with interest thereon from a certain time, does not amount to the finding of the fact of a demand, no demand being averred. The jury may ascertain the amount of interest due, and find it in damages, but not for interest that might afterwards accrue. *Patrick v. Clay*, 4 Bibb, 246.

15. A vendee who enjoys the estate, and withholds the purchase money, until a dispute in the title is adjusted, ought to pay interest. *Breckenridge v. Hoke*, 4 Bibb, 273.

16. A note for money, without specifying the time of payment, bears interest from the date. *Francis v. Castlemann*, 4 Bibb, 283.

17. In an action of covenant to pay property, it is discretionary with the jury to give interest, and it is error to instruct the jury to give damages to the full amount

of interest. *Guthrie v. Wickliffe*, 1 Bibb. 541; *Brown v. M' Clelland*, 1 Marshall, 43, S. P. In debt upon a judgment not bearing interest, the jury may give interest in damages, or not, at their discretion. *Guthrie v. Wickliffe*, 4 Bibb, 541.

18. On a note payable on demand, it is error to allow interest before the demand. *Dillon v. Dudley*, 1 Marsh. 66.

19. If payment or tender is prevented by the act of the creditor, the debt shall not bear interest. *Hart v. Brand*, 1 Marsh. 159.

20. The *lex loci* where the debt was contracted, should govern the courts of this country in questions relating to interest. *Cocke v. Conigsmacker*, 1 Marsh. 254. See ante pa. 90, S. P.

21. The rate of interest on a note is to be regulated by the law existing at the date of the note, and at the place where the contract was made, not by the law when the note falls due, or the place where remedy is sought. *Lee v. Davis*, 1 Marsh. 397.

22. On a verbal contract for lands, where possession is taken by the vendee, and part of the purchase money paid, no interest is chargeable on the advance, until the vendor asserts his title; the possession is an equivalent for the interest. *Fox's heirs v. Longley*, 1 Marsh. 388.

23. A chancellor will not decree interest, except where he relieves against a penalty, or in a case where the law gives interest. *Cobb v. Thompson*, 1 Marsh. 514.

24. Interest should be allowed on all *liquidated demands*, whether the same be evidenced by writing or not. *Cartmill v. Brown*, 1 Marsh. 576.

25. When a mortgagee or trustee manages the estate himself, no allowance is made for his trouble; interest on the mortgage money is all chancery will decree. *Breckenridge v. Brooks*, 2 Marsh. 339.

26. Compound interest is not forbidden by the statute against usury, but it is held to be iniquitous, and chancery will not decree it, though agreed to by the parties. *Ibid.*

27. Interest is a compensation for the use of money ; rents a compensation for the use of lands ; compound interest (though agreed to by the parties) will never be allowed : so neither will interest be allowed on rent in arrear. *Ibid.* p. 340.

28. A mortgagee in possession is liable for rents received, but as he can receive no compensation for services, he shall not pay interest on the rents received ; the interest will be set off against the trouble. *Ibid.* p. 341.

IN CONNECTICUT.

(C) The rule for computing interest in Connecticut, where one or more payments had been made, was established in one of the courts of that State, in the year 1784, as follows : " Compute the interest to the time of the first payment, if that be one year or more from the time the interest commenced ; add it to the principal, and deduct the payment from the sum total. If there be after payments made, compute the interest on the balance due, to the next payment, and then deduct the payment as above ; and, in like manner, from one payment to another, till all the payments are absorbed ; provided the time between one payment and another be one year or more. But if any payment be made before one year's interest hath accrued, then compute the interest on the principal sum due on the obligation for one year, add it to the principal, and compute the interest on the sum paid, from the time it was paid, up to the end of the year ; add it to the sum paid, and deduct that sum from the principal and interest added as above. If any payments be made of a less sum than the interest arisen at the time of such payment, no interest is to be computed, but only on the principal sum for any period." See *Kirby's Rep.* 49 ; *Ibid.* 335.

1. Interest recovered in an action of book-debt, for which there is either an express or implied contract.

Kirb. 207. But afterwards, in the county court, disallowed in similar cases. *See 1 Root, 248; Ibid. 814.*

2. Interest allowed on a note not expressed to be on interest. *1 Root, 412.*

3. Interest allowed on a judgment on an administration bond, subjecting the proper goods of the administrator, on the ground that he had had the use of the money. *1 Root, 423.*

4. Interest allowed on the consideration paid for land, in an action for breach of covenant of seisin in the vendor. *2 Root, 46.*

5. Interest given in an action for money had and received, where the defendant was bound to refund. *2 Root, 156.*

6. So, where the defendant retained the plaintiff's money through mistake. *2 Root, 405.*

7. A. being indebted to B. by bond, was arrested in New York, and to secure the payment of the bond, made a mortgage of his lands in Connecticut to B.; after which, C., who had become his bail, paid the bond, and took an assignment of the mortgage: Held, that A. could not redeem without paying the sum *actually advanced* by C., and 7 per cent. the *legal* interest of New York. *2 Day, 280.*

IN MASSACHUSETTS.

1. Interest beyond the penalty of a bond may be recovered in the shape of damages, even against a surety: *Harris v. Clap et al. 1 Mass. Term. Rep. 308.*

2. Assumpsit held to lie for the interest on a promissory note, by which the interest was payable annually, although the principal was not yet payable; and interest allowed upon each year's interest unpaid. *2 Mass. T. Rep. 568; 3 Mass. T. Rep. 221; Taylor's Rep. (N. C.) 236, S. P.*

3. A judgment debtor, who has disclosed the judgment as effects, and become liable as trustee, is not liable to pay

interest on the judgment to the attaching creditor. Interest is allowed in an action of *debt* on a judgment, as the measure of damages, for unjustly detaining the debt. In this case, the judgment debtor, being obliged by law to detain the debt from the judgment creditor, cannot be answerable to the attaching creditor for damages for the detention. *Prescott v. Parker*, 4 Mass. T. Rep. 170.

4. A vested legacy does not carry interest, but from the time when it is payable, except in the case of a legacy bequeathed to an infant, whom the testator was under a moral obligation to support, and no maintenance was provided until the legacy was payable. In this case, the legacy shall carry interest from the death of the testator, because it is presumed his intention was to fulfil a moral obligation. *Dawes v. Swan*, 4 Mass. T. Rep. 208.

IN NEW YORK.

(C) The rule for casting interest, in New York, when partial payments have been made, is, to apply the payment in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the *former* principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance of principal as aforesaid. *Connecticut, State of, v. Jackson*, 1 Johns. Ch. Rep. 17. See *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209.

1. Interest declared to be recoverable beyond the penalty of a bond. 3 *Caines*, 49.

2. So, interest recovered under a count for money had and received. 3 *Caines*, 266; *rejecting as authority, the*

English decisions to the contrary in 1 *Bos. and Pull.* 307, and 2 *Bos. and Pull.* 472.

3. Interest not recoverable for arrears of rent, payable in *wheat*. 1 *Johns. Rep.* 276. (P) But interest allowable in an action of covenant, for a certain sum due for rent, and payable in *money*. 4 *Johns. Rep.* 183.

4. Nor for unliquidated damages, or for an uncertain demand; though juries, in many cases, have a discretion to allow interest by way of damages. 1 *Johns. Rep.* 915.

5. In an action of *trover*, interest on the value of the chattels, from the time of the conversion, allowed by way of damages. 2 *Johns. Rep.* 280.

6. Interest not recoverable in an action of *debt*, for the escape of a debtor in custody on a *ca. su.* (because the statute fixes the extent of the sheriff's liability); but, in an action on the *case*, the jury may allow interest by way of damages, so as to give the plaintiff all that he has lost by the escape. 2 *Johns. Rep.* 454.

7. If a party accepts the principal of his debt, he cannot afterwards sue for the interest. 3 *Johns. Rep.* 229.

8. A bill of exchange being drawn in England, and payable there, the holder can only recover *five* per cent. interest (the legal interest in England) and not *seven* per cent., the legal interest in New York. 4 *Johns. Rep.* 183.

9. *Interest* is not considered as part of the debt, so as to sustain a suit for it separately. 5 *Johns. Rep.* 268.

10. No interest recoverable on an open running account, where there are no circumstances from which an agreement to allow interest can be inferred. 6 *Johns. Rep.* 45.

11. Interest is recoverable on a balance of accounts only, from the time the party against whom the charge is made, had notice of the balance due from him. 12 *Johns. Rep.* 156.

12. Interest is payable according to the laws of the country where the contract is made; but if, by the terms or nature of the contract, it appears, that it is to be exe-

cuted in another country, or that the parties had reference to the laws of another country, then the place in which it is made, is, in this respect, immaterial, and it is to be governed by the laws of the country where it is to be performed. *17 Johns. Rep.* 511.

13. Interest upon interest, or *compound interest*, is never allowed, unless in special cases ; as, where there is a settlement of accounts between the parties, after interest has become due, or there has been an agreement for that purpose subsequent to the original contract ; or a master's report, computing the amount of principal and interest, has been confirmed. *Connecticut, State of, v. Jackson*, 1 Johns. Ch. Rep. 13. See *Lewis's execr. v. Bacon's legatee*, 3 H. & M. 89, 116.

14. An agreement made at the time of the original contract, to allow interest upon interest, as it should become due, is not to be supported. *Connecticut, State of, v. Jackson*, 1 Johns. Ch. Rep. 14, 16.

15. An executor, administrator, or trustee, is not allowed to make any gain, profit, or advantage of the trust funds. If he negligently suffer the trust monies to lie idle, he is chargeable with simple interest. If he convert the trust monies to his own use, or employ them in his business or trade, he is chargeable with *compound interest*. Where an administrator employed the monies belonging to his intestate's estate, in trade, for his own benefit, and refused to give any account of the profits thereof, the master in stating the account, after allowing a reasonable time for the settlement of the estate, charged *compound interest*, making annual *rests* in the accounts for that purpose, which was confirmed by the court. *Schieffelin v. Stewart et al.* 1 Johns. Ch. Rep. 620.

16. The correct and legal mode of computing interest, on an account between debtor and creditor, where partial payments are made, is, first to carry the payment to the extinguishment of the interest due, and if such payment exceeds the interest due at the time, then to deduct the surplus only from the principal, and compute interest on

the balance to the next payment. *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209.

17. Whether the practice prevailing among merchants, in settling their accounts, to state an *interest account*, in which interest is charged on each item of principal on the debit side, and credited on each item on the credit side of the account, and a balance of such interest account struck, and added to the balance of principal, is to be adopted in the settlement of accounts between merchant and merchant? *Quere. Ibid.*

18. But where a master, under an order of reference to him, in stating an account between the parties who were partners in trade, adopted this mercantile usage, the amount was allowed to stand, there being evidence before the master that, from the books of account, and otherwise, the parties themselves had followed this usage, and the calculation was so made by an eminent merchant, to whom the accounts were referred, with consent of the parties, who did not question the statement, when it was brought in to the master. *Ibid.*

19. A legacy payable at a future day, does not carry interest until after it is payable, unless it is given to a child, and the parent, by the will, has made no other provision for its maintenance. *Lupton & Pearsall v. Lupton and others*, 2 Johns. Ch. Rep. 614. But this exception, it seems, does not extend to grand children. *Ibid.*

20. A partner who draws out money from the copartnership funds is not chargeable with compound interest, but with simple interest only on the sum drawn out, unless it appears that he has traded or speculated with the money, and made a profit on it, and refused, on being called on for the purpose, to disclose the profits. *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209.

21. Unsettled accounts do not bear interest. *Consequa v. Fanning and others*, 3 Johns. Ch. Rep. 587.

22. Where a balance of an account is paid without any charge of interest, interest cannot afterwards be demanded. *Ibid.*

23. Interest is payable according to the laws of the country where the debt is contracted, and is to be paid. *Ibid.*

24. Where a *Chinese* merchant consigns goods to a merchant in *New York* for sale; which are delivered at *Canton* to the agent of the *New York* merchant, who neglects to remit the proceeds to the consignor, the latter is entitled to interest on the amount, according to the law and custom of *China*, being twelve per cent. *Ibid.*

25. On a bond conditioned to pay with *interest* at six per cent. for the security of which a mortgage is taken, the obligee, after a forfeiture of the bond, is not entitled to seven per cent. the lawful interest, but interest is to be paid according to the contract, until it ceases to operate, by being merged in the decree. *Miller v. Boroughs*, 4 Johns. Ch. Rep. 436.

26. Compound interest is not allowed, unless on a special agreement in writing, after the lawful interest has become due. The agreement, to be valid, must be prospective in its operation; as, that the interest then due and payable, shall carry interest thereafter. *Van Benschooten v. Lawson*, 6 Johns. Ch. Rep. 313.

27. An agreement, made at the time of the original contract or loan, that interest shall begin and run upon the lawful interest, from the period stipulated for its payment, is not valid. *Ibid.*

28. Where land is devised, charged with the payment of a legacy, and the devisee accepts of the devise, he is personally and absolutely liable for the legacy; and he has no right to require of the legatee, before payment, a security to refund, in case of a deficiency of assets, to pay debts, &c. The devisee, in such case, is liable to pay *interest* on the legacy, from the time it was payable, tho' the payment was not demanded by the legatee. *Glen v. Fisher*, 6 Johns. Ch. Rep. 33.

29. Where a legatee is compelled to sue for the legacy, he is entitled to interest and costs. *Ibid.*

30. Where an agent or attorney is authorised to sell land for the plaintiff, and to collect money, on a bond and mortgage, &c., it is sufficient, if he keeps the money received by him safely, and is ready to pay it over on demand, to the party entitled to it. He is not chargeable with *interest* on the monies of his principal, unless in default, or unless he has employed the money for the purpose of gain to himself. *Williams v. Storrs*, 6 Johns. Ch. Rep. 353.

31. Where the plaintiff had offered to pay, on being indemnified, and that being refused, had filed his bill of interpleader, with reasonable diligence, he was not charged with *interest* on the money paid into court. *Richards v. Salter*, 6 Johns. Ch. Rep. 445.

IN PENNSYLVANIA.

1. (C) The rule of computing interest where there have been partial payments, is, first to apply the money paid towards discharging the interest due at the time of payment, and the residue, if any, must be credited towards satisfaction of the principal. *See 1 Dallas*, 379, 124.

2. Where money was received, as well as paid, in a mistake, and neither fraud nor surprise can be imputed to either party, no interest will be allowed. *1 Dall.* 52.

3. In the case of promissory notes, where a day certain is fixed for payment, interest is allowed from the day of payment; and where no day is fixed, it is payable from the time of demand. *1 Dall.* 52.

4. A fair purchase may be made of a bond or note, or other security, even at 20 or 30 per cent. discount, without incurring the danger of usury. *1 Dall.* 217; *2 Dall.* 92; *2 H. & M.* 14, *S. P.*

5. It was formerly held, that interest was not payable for goods sold and delivered. *1 Dall.* 265. Or, upon an open account, except by express agreement, or general

usage, or where there has been a vexatious or unreasonable delay of payment. 1 *Dall.* 315, 316. But, it has been said, by one of the judges, that the authority of that decision had frequently since been over-ruled. See 4 *Dall.* 289, note (2.) The court there say, "whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement, upon the subject of interest, to the honest and rational rule, that wherever one man retains the money of another, against his declared will, the legal compensation, for the use of money, shall be charged and allowed." One of the judges said, "for my own part, I am prepared to say with the book cited, that *interest ought to follow a debt, as the shadow does its substance.* Even, in the case of goods sold and delivered, I would think it right to allow interest, as soon as the express, or the implied term of credit had elapsed, and a demand of payment was made." 4 *Dall.* 289.

6. Where one man has received money belonging to another, and has retained it without the consent of the owner, it is to be considered in the same light as money lent, and ought to carry interest. 1 *Dall.* 349.

7. Where more than legal interest is included in any note, bond, or specialty, the whole amount cannot be sued for and recovered: but the plaintiff is entitled, in such case, to a verdict for the just principal and lawful interest. 2 *Dall.* 92.

8. If a man, directly, or indirectly, actually receives more than six per cent. he incurs a forfeiture equal to the money lent; but, if an action is brought to recover the amount of the loan, a verdict ought not to be given for the defendant, as that would, in effect, be putting the money into his pocket, instead of working a forfeiture to the Commonwealth. 2 *Dall.* 92.

9. Where a person is prevented by law, from paying the principal, he shall not be compelled to pay interest during the prohibition, as in the case of a *garnishee*, in a foreign attachment. 2 *Dall.* 103.

10. A British subject not entitled to recover interest on a debt, during the war. *2 Dall.* 102, 3, 4; and 133; *1 Call,* 133; *3 Call,* 22, *S. P.*

11. Interest is not to be paid by a mere trustee, for the money which he holds for the use of another, unless he neglects to pay it on demand. If no proof of a demand, interest must be calculated from the commencement of the action only. *2 Dall.* 182.

12. If the defendant is informed at the time of the sale of goods, that it is the course of the trade to give six months credit, or if cash is paid, to discount five per cent.; this is a part of the contract, and interest shall be paid after the six months credit. *2 Dall.* 193.

13. The jury may give interest, by way of damages, beyond the penalty of a bond, for the performance of a contract. *2 Dall.* 255.

14. Interest, generally speaking, is a legal incident of every judgment. *4 Dall.* 252.

15. Where the condition of a bond is for the payment of interest annually, and the principal at a distant day, the interest may be recovered before the principal is due, in an action of debt on the bond. But no interest can be recovered upon such interest. *Sparks v. Garrigues,* 1 Binn. 165.

16. An administrator is chargeable with interest after twelve months from the intestate's death, where he has been guilty of neglect in not putting out the money, or where he has used it himself; and it lies upon him to shew what has been done with it. *Fox v. Wilcocks,* 1 Binn. 194.

17. It is now a settled rule, that interest is recoverable for money lent and advanced; and this rule applies to loans made when the law was held to be otherwise. *Lessee of Dilworth v. Sinderling,* 1 Binn. 488.

18. A trustee is entitled to interest for advances made to supply the deficiencies of the trust fund, although the interest and advances nearly absorb the equitable interest. *1 Binn.* 488.

19. The late proprietaries of *Pennsylvania* were in the habit of receiving the arrears of their ground rents without interest; and with respect to those rents, the law has been taken for granted, that interest upon them is not recoverable. *Banlieon v. Smith*, 2 Binn. 154.

20. *Quare*, whether interest on rent is recoverable in any case? 2 Binn. 146. See *Obermyer v. Nichols*, 6 Binn. 159.

21. Interest cannot be recovered upon the arrears of a ground rent, where the landlord resorts to the land for payment. *Ibid.*

22. An agreement was made between two contending claimants for money in the sheriff's hands, that the sheriff should deposit the amount in bank, until the question should be decided. The sheriff deposited it, but took it out soon after. *Held*, that the sheriff was bound to pay interest to the successful party, from the time the money was thus taken out of bank. *Commonwealth v. Crevor*, 3 Binn. 121.

23. In cases where interest is not of course, but depends on the conduct of the parties, if the defendant, before suit, offers to pay as much as is due, and the plaintiff refuses to receive it, the defendant is not liable to pay interest. But, if the plaintiff insists on too much, and the defendant offers too little, there is a necessity for the suit, and the defendant must pay interest. *Delaware Ins. Co. v. Delaunie*, 3 Binn. 295.

24. Whether *debt* or *scire facias* be brought on a judgment, interest is recoverable; though in *scire facias* it is usual to give judgment only that the plaintiff shall have his execution, and the act of 1700 gives interest without a special direction. *Berryhill v. Wallace*, 5 Binn. 56.

25. The testator bequeathed to his daughter *R.*, the interest of 400*l.*, to be paid her *annually*, during her natural life. *Held*, that the first payment was to be made at the end of the first year from the testator's death. *Eyre v. Golding*, 5 Binn. 472.

26. There is a difference between a legacy of a sum of money to one for term of life, and a bequest of a sum to be paid annually for life. In the former case, the legacy, not being payable till the end of a year from the testator's death, carries no interest for that year. But in the latter, the first payment of the annuity must be made at the end of the first year, or the legatee will not receive the annuity annually during his life. *Eyre v. Golding*, 5 Binn. 472.

27. The testator bequeathed to the four children of his nephew *J. M.*, the sum of 400*l.* to each of them ; which sums he directed to be put out at interest at the expiration of two years after his decease, for the benefit of the said legatees respectively, and the principal *and interest* to be paid as they should respectively attain twenty-one ; but if any of them should die in his or her minority without issue, the share of such child so dying, should be equally divided among his or her brothers and sisters. *Held*, that no interest was recoverable by the legatee during minority ; but that it must accumulate, and in case of the legatee's death under age, form a part of the share to be divided among the survivors. *Miles v. Wister*, 5 Binn. 477.

28. *Rent* carries interest from the time it is due, unless from the conduct of the landlord it may be inferred that he means not to insist on it, or unless he acts in an oppressive manner by demanding more than is due, where the tenant is willing to do justice, or there are other equitable circumstances making the charge of interest improper. *Obermyer v. Nichols*, 6 Binn. 159.

29. Upon all balances due by defaulting revenue officers, the *United States* are entitled to interest from the time of receiving the money, although the secretary of the treasury has not issued his warrant ordering the payment of the balance into the treasury. In practice, payments are made without such warrant ; and the intention of the act of 2d September 1789 in requiring it, was, that the secretary might be advised of the proceedings of the treasurer. It is a matter between the officers of government. Pay-

ments without warrant are good. *Commonwealth v. Lewis*, 6 Binn. 266.

30. A judgment upon which it is agreed that no execution shall issue until the plaintiff has perfected the title to certain land for which the bond that supported the judgment was given, carries interest. *Shaller v. Brand*, 6 Binn. 435.

31. An administrator having suffered a just debt to remain unpaid for several years, though there were assets in his hands, he was not allowed to charge the estate with interest and costs. *Callaghan v. Hall*, 1 Serg. and Raw. 241.

Held to be entitled to interest on his advances, and not chargeable with it on account of furniture which he did not use, but delivered to the widow. *Ibid.* 241.

His commissions, though not allowed till the settlement of his account, to be deducted from the balance before interest to be computed. *Ibid.* 241.

32. Where a guardian uses the money of his ward, or neglects to invest it at proper times, he is chargeable with interest; and a reasonable rule is, to strike a balance of the money in his hands at the end of every six months, and charge him with simple interest on it, allowing a reasonable sum to remain in his hands, to meet contingent expenses. *Say's execs. v. Barnes*, 4 Serg. and Raw. 112.

A guardian is not entitled to commissions on sums charged against him for interest, beyond what was charged in the settlement made with the ward. *Ibid.*

33. Where a judgment is revived by repeated writs of *scire facias*, the plaintiff has a right to charge interest on the aggregate amount of principal and interest due at the time of rendering judgment on each *scire facias*. *Fries v. Watson*, 5 Serg. and Raw. 220.

IN NORTH CAROLINA.

1. Where the payment of the principal is postponed, and the interest ascertained, and the annual payment of it

forms part of the contract, interest will be allowed on such interest. *Tayl. Rep.* 236; 2 *Mass. Rep.* 568; 3 *Mass. Rep.* 221, *S. P.*

2. Interest is allowed to supply the place of prompt payment, and indemnify the creditor for his forbearance. *Tayl. Rep.* 236.

APPENDIX 2.

ABATEMENT OF LEGACIES.

Legacies are either *specific, pecuniary, or general.*

1. Specific legatees shall not be liable to abate with general or pecuniary legatees, but among themselves they must abate proportionably on a deficiency of the specific things bequeathed, or on a deficiency of general assets, for payment of debts; so specific legatees of distinct chattels shall abate in proportion on a deficiency of general assets. *Webb v. Webb*, 2 Vern. 111; *Comyns v. Comyns*, 2 Ch. Ca. 171; *Herne v. Meyrick*, 2 Salk. 416; *Gibson v. Scudamore*, Mos. 7; *Hinton v. Pinke*, 1 P. Wms. 539; *Sleech v. Thorington*, 2 Ves. 563; *Long v. Short*, 1 P. Wms. 403; *Devon, Duke of, v. Atkins*, 2 P. Wms. 382.

2. A legacy given to executors, for care and pains, must abate in proportion, on a deficiency of assets. *Fretwell v. Stacy*, 2 Vern. 434; *Heron v. Heron*, 2 Atk. 171.

3. Charity legacies, though preferred by the civil law, shall abate in proportion, for they are but legacies. *Tate*

v. *Austen*, 1 P. Wms. 264; *Masters v. Masters*, 1 P. Wms. 422; *Att. Gen. v. Hudson*, 1 P. Wms. 675; *Att. Gen. v. Robins*, 2 P. Wms. 25.

4. Personal annuities given by will, are general legacies; and a devise of an annuity for life, charged on the personal estate, shall abate in proportion with other legacies, where there is a deficiency of assets. *Hume v. Edwards*, 3 Atk. 693. But an annuity, by will, to a wife, unprovided for, shall not on a deficiency, abate with other legacies upon the intention of the testator. *Lewin v. Lewin*, 2 Ves. 415.

5. Pecuniary legatees shall abate in proportion, notwithstanding a direction that they shall be paid in the first place or at the time specified; but it may be otherwise on a strong intent; or if it be a purchase of dower, and the wife is entitled to dower. *Blower v. Morret*, 2 Ves. 420. See also *Burridge v. Bradyl*, 1 P. Wms. 127.

6. A legacy and annuity were given to a wife in lieu of dower; on a deficiency of assets to pay legacies, she shall not abate. *Davenhill v. Fletcher*, Amb. 244.

7. A. devised his real estate in trust, to pay several persons 1000*l.* each, and if any of them should die in his lifetime, in case of a deficiency, the others must abate; but if the devise is a trust to pay testator's debts and legacies, and he gives several legacies, and one of the legatees die, the fund is a trust for the benefit of all the legatees if necessary. *Currie v. Pye*, 17 Ves. 466.

8. The testator devised his estate to trustees in trust to sell, but not for less than 10,000*l.* He then bequeathed several legacies, amounting to 7,800*l.*, and the rest of the supposed 10,000*l.* he gave to A. The estate not producing 10,000*l.*, the legatees were decreed to abate in proportion, and the residuary legatee was held liable to the extent of 2,200*l.* *Page v. Leapingwell*, 18 Ves. 468.

9. Testator directs his executors, after payment of debts and funeral expenses, "in the next place to pay three pecuniary legacies;" and afterwards to raise and set apart

three other legacies. There is no intention that the three first legatees should be paid in full to the prejudice of the three next; but, in case of a deficiency of assets, all must abate equally. *Beeston v. Booth*, 4 Madd. Rep. 161.

10. A widow taking a legacy under her husband's will, shall abate in proportion with the other legatees, in case of a deficiency of estate to pay the legacies. *Jett v. Bernard*, 3 Call, 11.

APPENDIX 3.

REFUNDING OF LEGACIES.

1. If an executor pays one legatee, and there is, afterwards, a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. *Mbel v. Robinson*, 1 Vern. 94; *Anonymous*, 1 P. Wms. 494; *Howel v. Price*, 1 P. Wms. 294; *Lupton and Pearsall v. Lupton and others*, 2 Johns. Ch. Rep. 614; or, if the executor be solvent, and he voluntarily paid a legacy, an unsatisfied legatee may call on him personally. *Vintner v. Pix*, 1 Ch. Rep. 133; *Tilsy v. Throckmorton*, 2 Ch. Ca. 132; and therefore the executor is always to be made a party in the suit. *Nellhorpe v. Hill*, 1 Ch. Ca. 136; *Hixon v. Witham*, Ibid. 248; but if the deficiency of assets has been occasioned by the waste of the executor, the legatee who is paid, may retain the advantage he has gained by.

his legal diligence, as against his co legatees, but not against a creditor. *Anonymous*, 1 P. Wins. 494; *Lupton and Pearsall v. Lupton and others*, 2 Johns. Ch. Rep. 614.

2. Where legatees are paid before creditors, and the assets fall short, the legatees shall refund in favor of the unsatisfied creditors. *Anonymous*, 1 Vern. 162; and any creditor may make legatees refund, on a deficiency of assets, though no provision be made for refunding. *Noel v. Robinson*, 1 Vern. 94; *Hodges v. Waddington*, 2 Vent. 360, S. P.; *Newman v. Barton*, 2 Vern. 205. S. P.

3. If an executor pays legacies out of the assets, and afterwards debts appear, of which he had no notice, he may in equity compel the legatees to refund. *Nelthorpe v. Hill*, 1 Ch. Ca. 136: So if he were compelled by a decree to pay legacies, *Newman v. Barton*, 2 Vern. 205. But if an executor voluntarily pays a legacy or assets to it, he cannot compel the legatee to refund, either in favor of another legatee or a creditor. *Newman v. Barton*, supra; *Hodges v. Waddington*, 2 Ch. Ca. 9; *Noel v. Robinson*, 2 Ch. Rep. 248; 2 Ch. Ca. 145; 1 Vern. 90, 453, 460, S. C.

4. Where there is a proviso in a will, that what is left to one daughter, shall exceed in value what is given to another, the former shall refund *pro tanto*; what is given to either of the daughters' children, is to be looked upon as given to the daughter. *Thomas v. Bennet*, 2 P. Wms. 343.

5. Where an executor pays beyond assets, he cannot make the legatees refund. *Coppin v. Coppin*, 2 P. Wms. 296.

6. A legatee voluntarily paid by the executor is not obliged to refund; unless the executor becomes insolvent. *Orr v. Kaimes*, 2 Ves. 194.

7. Where the vendor of an estate, as a creditor for the purchase money, would have absorbed the personal assets of the vendee in the payment of it, a rateable contribution was decreed, as between the devisee of the estate and the legatees, and annuitants under the purchaser's will. *Headley v. Redbread*, Coop. 50.

8. On refunding sums, paid under an erroneous construction of a will, a legatee entitled to other funds in court, at interest, will be charged with interest; but not so as to a legatee who has no farther property in the estate. *Gittins v. Steele*, 1 Swanst. 190.

(P) By the laws of Virginia, neither an administrator is bound to distribute the estate of his intestate, nor an executor to pay over or deliver a legacy, until bond and security is given to refund. See 1 Rev. Code of 1819, pa. 389; act of 1822, ch. 37. § 2; see ante pa. 15, note (k.)

9. After the assent of the executor to a specific legacy, the legal property is completely vested in the legatee; and a creditor obtaining a judgment against the executor, cannot levy an execution upon the property in the hands of the legatee. He may bring his action at law against the executor for the *devastavit*; (in which case the executor has his remedy in equity against the legatees to compel them to refund;) or he may, in equity, pursue the property in the hands of the legatees; and, in either case, all the legatees must be made parties, that the charge may not fall upon one, but may be equally borne by the whole. *Burnley v. Lambert*, 1 Wash. 312.

10. An executor is not bound, by the order of a county court directing the division of his testator's estate among the legatees, to deliver up the slaves, without reserving a sufficiency to pay the debts, or without taking bonds to refund. *Walden v. Payne*, 2 Wash. 7.

(P) Every decree against an executor for a legacy should provide, that before the legatee should have the benefit of it, bond and security should be given to the executor, to refund due proportions of any debts or demands which might thereafter appear against the estate of his testator, with the costs attending the recovery of such debts. This was settled in the case of *Stovall v. Woodson*, 3 Munf. 303, before the act of 1822, ch. 37, § 2.

[*¶*] The following Case having been originally subjoined to *Francis's Maxims*, and frequently referred to by the books of authority, as more fully reported here, than elsewhere, is retained in this edition.]

THE
ARGUMENTS

OF THE

**Lord Chancellor Macclesfield, the Master of the
Rolls, Mr. Baron Price, and Mr. Baron Gilbert,**

IN THE CASE OF

THE EARL OF COVENTRY,

CONCERNING

THE DEFECTIVE EXECUTION OF POWERS.

*Die Sabbati 16° Maii 1724, Countess Dowager of Coventry, See 2 P.
against the Earl of Coventry & al.*

*Wms. 223,
S. C. ; 1
Stra. 596,
S. C. ; 9
Mod. 12,
S. C.*

THE CASE.

Thomas Earl of Coventry, being seised in fee of several manors, &c. some in possession, and others in reversion expectant upon lives, by will dated March 24, 1698, devised part thereof to his elder son Thomas for his life, remainder to his first and other sons in tail male, and other part to his younger son Gilbert for his life, remainder to his first and other sons in tail male, with cross remainders; remainder of the whole to his uncle Francis Coven-

try, for his life, with like remainders to his issue male; remainder to his cousin William Coventry, (the present Earl, and one of the defendants,) for life, with like remainders to his issue male; remainder to Henry Coventry, (another defendant,) with like remainder to his issue male, with other remainders over. In which will, there is this proviso:

*Provided also, and it is my will, that notwithstanding any thing in this my will contained, it shall and may be lawful to and for any person and persons who by force or virtue of this my will, or any codicil or codicils to be added to this my will, shall at any time or times hereafter be seised of any of my manors or lordships, messuages, lands or tenements, by any writing or writings indented under his hand and seal, or hands and seals, to limit and appoint any such manors and lordships, (except, &c.) and any of the said lands, tenements, tithes and hereditaments, not exceeding in the whole 500*l.* per ann. to any wife or wives which such person or persons shall happen to marry, for her or their respective life or lives, for her or their jointure or jointure; so as such person or persons shall have with such wife or wives, upon such marriage, a portion equivalent for such a jointure.*

Thomas, the elder son, died without issue male.

Gilbert, the younger son, died without issue male, but left a daughter by a former wife, the wife of Sir William Carew, both defendants.

Francis Coventry died without issue male; whereby the whole estate vested in William Coventry, now Earl of Coventry.

*But, Earl Gilbert being seised of the estate by virtue of the will, upon a treaty of marriage with the plaintiff (his second wife) and Sir Strensham Masters, her father, by articles of agreement dated June 24. 1715, made between Earl Gilbert, of the first part, Sir Strensham Masters, and the plaintiff Anne, his only daughter, of the second part, in consideration of the intended marriage, and of 10,000*l.**

which was actually paid by Sir *Strensham Masters*, as the plaintiff's marriage-portion. Earl *Gilbert* covenanted with Sir *Strensham Masters*, his heirs, &c.

*That he, or his heirs would, after the marriage, at his own costs and charges, according to the power given him by his father's will, or otherwise by good conveyances, settle manors, messuages, lands, &c. of 500*l.* per ann. upon the plaintiff for her jointure, to commence in possession immediately after his death, if she survived.*

Soon after the marriage, Earl *Gilbert* going down to his country-seat, delivered the articles to his steward and his court-keeper, and directed them to look over the rentals, and find out a fit part of the estate to settle according to the articles. Great difficulty there was, to find out a part of it, which was clear of all incumbrances. At length the manor of *Woolsey*, was found to be the only clear part of the estate, but that was not above 400*l.* per ann. During the consultation, where to find another clear part of the estate of the value of 100*l.* per ann. the old steward was removed, and another was put in, who was entirely ignorant of the estate, which occasioned a farther delay : At length an estate called *Woolston* was pitched upon, but that being in mortgage, and the Earl not having the counterpart of the mortgage, whereby to know what part of that estate was not included in the mortgage, and the mortgagee refusing for some time to take his money, or to shew his mortgage deed, it gave the Earl great uneasiness. At length the mortgagee took his money, and the Earl an assignment of the mortgage, and thereupon part of that estate, not included in the mortgage, was pitched upon ; and a particular thereof being made, the Earl ordered instructions to be drawn for counsel, which he intended to carry himself very suddenly to *London* ; but was prevented by an account of the raging of the small pox there.

Some time after Sir *Strensham Masters* came to visit the Earl at his country-seat, and being very dissatisfied

that the settlement was not made, the Earl, delivered him the instructions to carry to *London* to have a settlement drawn ; but Sir *Strensham*'s memory failing him, he entirely forgot that such instructions were delivered to him ; and upon the Earl's sending to him to know what he had done upon the instructions, and such an answer being returned, that no such instructions were delivered to him, the Earl shewed great uneasiness and anger at it.

Then new instructions were drawn, and sent to *London* by the Earl's Chaplain, who returned with the advice and opinion of counsel, after what manner the settlement was to be drawn ; and thereupon it was drawn and actually ingrossed, and left with the Earl's steward for execution, whose business it was to carry all deeds to be executed by the Earl ; but the steward dying just after, this caused another delay.

The Earl being suddenly taken ill with the gout, was advised by his physicians to go to the *Bath* ; and after his return, being still ill of the gout, his physicians directed, that he should not be troubled with any manner of business whatsoever ; but about a week before he died being then in good health, though his gout upon him, the settlement was ordered to be brought up to be executed ; but a neighbouring gentleman came to make him an untimely visit, at which the Earl shewed great uneasiness, because it prevented the execution of the deeds for that time.

About four days before his death, his physician giving him great assurances of his recovery, he sent his steward about forty miles distant about some business, who carried the key of his office along with him, where the settlement was locked up. Two days after, the Earl being taken suddenly with the gout in his stomach, called for the settlement to be executed, but not being to be had, a messenger was immediately dispatched to the steward to come back with the key ; but his lordship died in two days, before the steward's return.

But the Earl a little before his death made his will, and thereby gave the plaintiff a legacy of 3000*l.* besides what is settled upon her by our marriage-articles; and made lady Carew his only daughter and heir, executrix of the will.

The bill was brought against the present Earl of Coventry, and Thomas and Henry Coventry, who were all the remainder-men behind him; and against Sir William Carew and his lady, being heir and executrix of Earl Gilbert; and thereby the plaintiff insisted, that the articles alone ought in a court of equity to be construed as an execution of the power; and that the deeds engrossed were a good appointment of the particular lands; but in case the articles and deeds engrossed should prove defective, or not amount to a sufficient appointment thereof, then in such case by virtue of the covenant in the articles, the heir at law of Earl Gilbert ought to set out other lands to her for her jointure, of the like yearly value; or ought out of the real and personal assets to make her satisfaction.

Mr. Baron Gilbert. The questions which, as I apprehend, will be necessary for the decision of this case, at least such as I shall break it into, will be these two.

First, Whether any acts done by Earl Gilbert will be binding and a real *lien* upon the defendant, who is in remainder?

Secondly, If that should be so, whether he has any right to be relieved against the heir or executor of Earl Gilbert, touching his real or personal estate? These two questions being first settled, will take in that, which will be the resolution, touching the decree to be made in this cause.

Now as to the first of these questions; I am of opinion that those acts done by Earl Gilbert, will be a real *lien* upon the noble Lord in remainder; and for that purpose would gladly consider these powers in general; and why particularly in this case, the power ought to affect the remainder-man.

Powers taken too strictly at Common Law.

These powers, when they first came over into the common law, upon the statute of 27 H. 8, for transferring uses in possession, were, by the joint resolutions of the common law, taken too strictly in point of circumstances. As they went to defeat that very estate which was raised by the covenant, and actually settled by the covenantor who had the inheritance, they were looked upon as odious, and what merited no favour whatsoever: And therefore it was held necessary, that every circumstance that was appointed in the execution of them should be complied with, before they could divest an old estate, or create a new one.

This, I say, was at common law; but as it was contrary to natural justice, so this court hath always interposed, and supplied such defects wherever there appeared to be a valuable consideration, as in cases of marriage, jointures, and other like settlements: And of late the courts of law have considered them in a more favorable light than heretofore; for this power may be looked upon more properly, as part of the old dominion, which the owner of the inheritance reserved to himself upon the creation of the estate for life, to which he annexed it; and I think, it would be contrary both to natural reason and the intention of the parties, that any other construction should prevail. It is surely in every man's power to limit and dispose of his own estate upon such terms as he pleases.

The next question will be upon the articles, whether they do bind this estate, so as to be a real charge and *lien* upon the remainder. As to that, I think they are. Where there is a price paid, and there comes a subsequent marriage, which are the consideration of marriage-articles, I

Jointress a purchaser. look upon the jointress to be, *co instanti* that the price is before legal paid, and the articles executed, a purchaser for a valuable conveyance, is looked upon in equity, to be owner of *that* is performed, it is but justice and conscience, that the estate.

purchaser should have an immediate right and ownership in what he hath so purchased: And therefore a

court of equity, before the execution of any legal conveyance, looks upon the party to be in immediate possession of such estate, and to have a power of devising and giving it away ; nor have I heard of any case, which in any degree impeaches this doctrine, but the single case of *Powell*, and *Powell*, where a tenant in tail had articled to levy a fine and suffer a recovery, but afterwards refusing, in the court of chancery decreed, that his heir should not be held to a specific performance ; but the reason of that resolution will appear to turn upon another foundation ; it was because the heir in tail came in under the statute *de donis* and is in by virtue of that statute singly ; and not any way deriving from the ancestor who contracted : But if it had been an entail in equity, this court would have forced the heir to comply with any bargain made by his ancestor.

Articles for a sale by tenant in tail shall not bind his issue.

Articles for a sale by tenant in tail in equity shall bind his issue.

There have been other cases mentioned to the same purpose, but I think they all fall under this general reason, that the persons, who came into this court for relief, were volunteers ; and there was no bargain made, no price paid, nor the party any way damaged ; and therefore he could not hope to recover any damages at law, for the breach of such covenant.

Volunteer shall not have a specific performance of covenants against an heir.

And as to the other set of cases, that this is not a *legal lien* upon the estate, I cannot see what weight that can have in a court of equity, since that is the very reason, that obliges the party to come here for relief.

There is one case, I think, has not been mentioned ; that of *Smith and Wooley*, which was a power to limit and appoint lands by will, so as the same was signed and sealed ; although it was not signed and sealed, yet a paper which purported to be a will, and was really such before the statute of frauds and perjuries, amounted to a good declaration of such power : But I question, whether it may be so since that statute, unless there had been something signed and sealed by the party ; and, therefore, I cannot lay any stress upon the draught of the will, which was prepared in this case, so as to make the same amount

Power to limit lands by will, signed and sealed, whether it must be signed and sealed since the statute of fraud and perjuries.

to an actual execution of the *power*: But my present opinion is, upon all the circumstances, that this is such a defect, as is proper for the relief of this court.

As to the second question, whether the plaintiff has any right to be relieved against the heir or executor of Earl *Gilbert*, touching his real or personal estate? The covenant is, as I have observed, that the Earl or his heirs, or his executors, should settle lands in pursuance of that *power, or otherwise*. It has been said at the bar, that the words, *or otherwise*, at the end of the covenant, should be lookt upon as meer *technical* words in the draught; and that they should have no operation to charge the real or personal estate of the Earl. That, in my opinion, is cramping the articles too much: For, to reject any words out of wills or conveyances, it must appear exceeding plain, that nothing could be meant or intended by them. This hath been a sacred rule in all expositions, and what, if once departed from, may introduce the greatest inconveniences, and by degrees cancel and defeat the end of all written agreements whatsoever.

Words not to be rejected out of wills or conveyances, except exceeding plain, that nothing could be intended by them.

My apprehension is, that the words, *or otherwise*, are auxiliary to the real *lien* upon the estate by the former words. That I take to be the natural and general construction, as I look upon it, that the marriage was had, and the portion paid, in contemplation of the *power*; and if the Earl had not had such a *power*, the marriage had never taken effect; and, therefore, the dominion he had over the estate, by virtue of the *power*, must be reckoned to be the consideration of the marriage, and the original foundation of this jointure; but the words, *or otherwise*, make the obligation he was under of providing for this lady still stronger than it was before. The power was a *lien* only upon the heir, and he alone in execution of the *power* could have been obliged to make good the jointure: But as the estate was loaded with many incumbrances, which must have been previously satisfied and discharged before such jointure could take effect, it was but a pru-

dent provision, to bring the assets, which were to come to the hands of the executor, in aid of the provision he intended for his lady, and to make the executor auxiliary, in case the land proved defective.

This exposition is grounded upon a principle of equity, that whosoever there is a debt charging the real estate, the executor should assist the heir in paying it, because Debts by mortgage to be paid out of the personal estate. the assets are the proper and natural fund for satisfying such a debt, since if the testator himself had in his life-time discharged it, the assets would be by so much the less considerable; and that as mortgages, which are due to the deceased, go in increase of the personal estate, so it seems to be just, that the same fund should be applied towards satisfying them: and therefore it is, that courts of equity do every day settle proportions and contributions in these cases between heirs and executors; but, here it cannot be presumed, that parties had it in their intention to subject any thing but the *power*; and, therefore, to bring in the personal estate would be creating an original *power*, that is no where taken notice of, nor does it appear to have been intended in the whole negociation. This, I say, would be substituting a new *power* instead of an old one.

Mr. Baron Price. This *power*, I take to be a *power* coupled with a trust, which runs through the whole estate; so that any of the remainder men, who shall at any time take an estate under this will, is to be considered but as a trustee, in respect of any jointress, who shall take in pursuance of the *power* reserved by the will. Now, if notwithstanding any defect in the non-observance of circumstances, the legal estate should not be conveyed in virtue of this *power*; yet as she paid a valuable consideration, for what was intended to be passed under this *power*; there is the same foundation for considering her as a *cestuy que trust*, as the other a trustee: And what can be a more proper case for this court to decree relief in, than when such a person demands a conveyance of the legal estate, and an account of the profits?

Difference
between
powers of
revocation
and powers
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There is a wide difference between these kind of powers, and powers of revocation. The latter being generally annexed to voluntary settlements, and always tending to overthrow and defeat estates, have therefore been looked upon as odious both in law and equity: But I have never known it otherwise, but that powers like this in question, have always had a liberal sense and construction put upon them. It is the honour and glory of a court of equity, to reduce all acts into execution as near as possible to the intention of the parties: And hence it is, that we see constant application made to such courts, for a specific performance of articles and other incomplete agreements, which the parties at law could have no compensation for but in damages. They go always upon this, that where the substance of the agreement is performed, they will supply any defect in the form. So that this would amount to a good execution of the power, had there been no other transaction, but that of the articles only; but this case goes a great deal further; for after the marriage, Earl *Gilbert* declares his intention in the strongest and most effectual manner: He orders a deed to be drawn, and a draught was accordingly prepared, where certain lands were actually set out, and appointed to be vested in trustees for the use of the plaintiff; and the conveyance had been executed, if death, which is the act of God, had not prevented it.

But it may be further observed, that although the designation and appointment of these lands, was to come from Earl *Gilbert*, yet the estate was to move in reality from another: For as according to the resolution in Sir *Edward Clere's* case, in the 6th report, if a feoffment is made to the use of a will, the estate in such case is derived not from the will, but the feoffment; so the articles which interposed in this case, are only directory of the will, which first created the power.

But it is objected, that the particular lands are not specified in the articles; to which it may be answered, that

certum est, quod certum reddi potest; for there is a relation to such estate, as is comprised in the will; and he cannot settle any, but what is part of the estate so referred to.

There have been other objections made in this case, and *first*, that he covenants for himself, his heirs, executors and administrators, that he would settle, or would procure to be settled lands of 500*l. per ann.* pursuant to the power reserved to him, *or otherwise*; it is said, that this is not a perfect declaration or execution of such power, because the words, *or otherwise*, leave it loose, and he was thereby at liberty to have settled another estate for the plaintiff's jointure. I don't know that in common understanding, any great stress is to be laid upon the words, (*or otherwise*) and that they are of any great weight, being generally inserted in all covenants by conveyancers. But granting them the strongest import and signification, I think they have this obvious and natural meaning, that Earl *Gilbert* might be at liberty to make a provision for his lady out of another fund, or that if the estate to which the power extended, should prove short or defective, he should be obliged to assign another fund for supplying such deficiency.

So that without descending minutely into the several authorities which have been cited, I take it to be manifest from the reason and natural justice of this case, that it is incumbent upon a court of equity to execute the intention of the parties; to supply the defect of any circumstance in the execution of this marriage-agreement, and to let the lady enjoy the benefit of that provision which her husband intended for her, and her friends, who carried on the treaty of marriage, had in their view: And though it has been said, that this is the case of an heir at law, who is to support the honour and dignity of a noble family; yet it ought not to be forgotten, that it is also the case of a jointress, who has been at least equally the favourite of a court of equity.

Muster of the Rolls. This case, in my apprehension, may be reduced to one question only, viz : Whether the plaintiff, by virtue of her marriage-articles, hath a specific *lien* upon the lands in question ? Although, in the course of this argument, a second question has been made, viz : Whether she ought not to take her remedy against the real or personal estate of her deceased lord ? But the determination of the first question will, I take it, put an end to the second ; for, if she hath, by virtue of these articles, a specific *lien* upon this estate, I don't see that she is bound, in favour of the remainder-man, to depart from it, and take her remedy either against the real or personal estate : As she need not do it, so, I conceive, she is not bound to do it, but, on the contrary, she having that which was intended for her, made good to her, she must abide by it.

I shall in the first place consider, under what qualifications the plaintiff stands before the court. She is a purchaser for a valuable consideration, and unprovided for, unless this court shall think fit to relieve her ; at least not provided for in such manner, as was agreed to, between her husband and her father, who treated this marriage on her behalf : And in both these circumstances, as well in regard that she is a purchaser, as that otherwise she will be unprovided for, she is intituled to have the benefit of these Marriage articles. When I say she is a purchaser, I must take notice, that she is so, not only in respect of the marriage, which alone would be a sufficient and meritorious consideration, but likewise in regard of a very great fortune, which she brought into the family. It has been said, indeed, that the noble Earl, the defendant, stands in very favourable circumstances, as he is the representative of the family ; and, therefore, this charge ought more properly to be laid on the personal estate, the better to enable him to support the honour of it ; but if there is any weight in this, it ought to be considered, that the plaintiff's matrimonial right of participating in the honour, gives her no less a claim to the indulgence of the court.

Marriage articles. When I say she is a purchaser, I must take notice, that she is so, not only in respect of the marriage, which alone would be a sufficient and meritorious consideration, but likewise in regard of a very great fortune, which she brought into the family. It has been said, indeed, that the noble Earl, the defendant, stands in very favourable circumstances, as he is the representative of the family ; and, therefore, this charge ought more properly to be laid on the personal estate, the better to enable him to support the honour of it ; but if there is any weight in this, it ought to be considered, that the plaintiff's matrimonial right of participating in the honour, gives her no less a claim to the indulgence of the court.

I think it proper in the next place to take notice, that although the plaintiff is thus qualified, she has nevertheless brought her bill, not only against the present Earl of *Coventry*, but also against the executrix of the late Earl: In which, I think, she was very properly advised, lest if the court should be of opinion, that she was not relievable against the present Earl, they might do her justice against the other defendant the executrix of the late Earl; besides it was proper, to make the executrix a party, because of the plaintiff's demand of her legacy of 3000*l.* which she bath against the personal estate.

Here I think it proper to mention an objection, viz: That as the present Earl is but tenant for life, the plaintiff, if she would have bound the whole inheritance, ought to have made his eldest son, who has the next remainder in tail, party to a cause, where a charge is set up, which may affect the estate after the present Earl's death: But I think, the defendant was well advised, not to take notice of this, since if the plaintiff would put off the cause, and in order to make her decree more conclusive, would make the Earl's eldest son a party, it would only create more expense to the parties: But thus far, the not having brought the remainder-man before the court, will influence the relief, which the plaintiff can have at this time, that it will not be so extensive, as if he had been made a party; for then she might have had a decree to hold and enjoy during her life, and have bound the whole inheritance, whereas now she can only have a decree to bind the estate of the tenant for life, and of the subsequent remainder-men, who are before the court.

Having premised thus much, I cannot but observe, that *uses and powers arising out of uses*, did originally belong to courts of equity only. Before any of the statutes relating to *uses*, courts of law could neither judge of the consideration of *uses*, nor of any conveyance to *uses*; nor consequently had any jurisdiction concerning *powers*, which arose out of them; but they appertained solely in point of

uses and powers arising out of them belonged to courts of equity only before the statute of uses.

jurisdiction to courts of equity : Now indeed those statutes and particularly that of the 27 H. 8, hath by transferring uses into possession, incorporated them together ; they are become legal estates, and belong to the courts of law to judge of : But still were this a conveyance to uses executed, or a common law conveyance, the consideration of any equitable interest in the estate conveyed, belongs to courts of equity by virtue of that original power which they had before the making of those statutes, and which is not taken away by any of them ; and consequently, I think, the present case, comes before the court as properly, and in the same light, as it would have done before the statute of uses.

Before the statute of uses, cestuy que use in fee had a power to make an appointment of the use, or of any part of it ; and this would have enured by way of direction to the trustee to stand seised to such use, or to convey ; and the judgment and construction of such appointment belonged to a court of equity, which alone could compel the trustee to convey ; and since the statute, if cestuy que use for life, with a power, covenants for a valuable consideration to execute his power, and in the execution it proves defective, this court aids the execution of it, and makes it effectual. Nay further, if he doth not execute his power at all, this court, I conceive, ought to decree an execution of that covenant, as it would of any other covenant for a consideration, and compel him to execute his power ; for as the justice of the court makes good a defective execution against the remainder-man, so if the tenant for life dies before the execution, I conceive there is the same justice due to the purchaser against the remainder-man, after his remainder takes place, as there was before, for by the covenant the purchaser has a lien upon the estate, into whose hands soever it comes.

The aiding an imperfect conveyance, and the carrying into execution a covenant to convey, stand upon the same foot in all respects. If tenant in fee makes an imperfect

Tenant for life with a power, covenants for a valuable consideration to execute his power; this court will supply a defective execution or a non-execution against the remainder-man.

conveyance for a valuable consideration, this court will supply that defect, and decree an effectual conveyance to be made. So in like manner will this court decree a conveyance, if he covenants for a valuable consideration to convey. To come nearer to the present case: A man Tenant in fee covenants to settle 500*l.* per ann. seized in fee of lands of 1000*l.* per ann. covenants to settle part of them worth 500*l.* per ann. though the lands be not specified; there can be no doubt but such covenant would be carried into execution by this court.

As to the case, that has been mentioned, of a tenant in tail, who, without levying a fine or suffering a recovery, makes a conveyance to a purchaser for a valuable consideration; I agree, the court would not decree it to be made good against the issue in tail, or the remainder man, for the reason that hath been given by *Mr. Baron Gilbert*: And I would add this further observation, that a common recovery being held to be absolutely necessary, to take the estate tail out of the statute *de donis*, then only it is, that the conveyance is substantiated: Nothing can deliver the estate out of that statute, but such a particular form of conveyance, and therefore if the party hath not used it, it remains still within the restraint of that statute. Indeed I don't know any case whatsoever, wherein the form of conveyancing is so essential, as in the case of tenant in tail; for a common recovery must be had, to let him into the absolute dominion of the estate; unless it be of an estate-tail without any remainder; and then a fine by the particular provision of the statute of 4 H. 7, is sufficient.

To come to the present case: In order to determine it, it is necessary to consider the articles upon the plaintiff's marriage, as they are relative to the will of Earl *Thomas*: And here I must say, I differ from the counsel as well of the one side as the other, in some particulars. I think, that Earl *Gilbert* had his election to make this conveyance either by way of appointment according to the power, or to convey or procure to be conveyed an es-

tate in fee-simple. Notwithstanding what the plaintiff's counsel have objected, that the word, *heirs*, ought to be rejected, as inconsistent with the provision, which was to take effect immediately after the death of Earl *Gilbert*, which it is impossible it should do (*say they*) in case such provision was to be made after his death by his heir; yet here are words, whereby he hath a liberty to execute those articles, by appointing the *use* pursuant to the *power*, or by conveying lands in fee-simple; (though I don't think he would deliberate long upon that point, whether he should charge lands, which were already settled upon the remainder-man, or those which he had absolutely in his power;) but that which shews he was to have an election is the words, *or procure to be conveyed*, which must necessarily have relation to lands in fee-simple only, because the *power* of appointment under the will, being personal to the Earl himself, he could not transfer it to, or procure it to be executed by, another.

Taking this exposition then to be right, there is no reason, that because Earl *Gilbert* thought fit to contract for lands which were in his power, and also for lands which were not in his power, that the party with whom the contract was made, should thereby be prejudiced as to the lands which were in Earl *Gilbert's* power: And the question coming to be, whether within the view and intention of the parties, these articles ought to be considered as a charge upon the lands, which he might charge by virtue of the *power* in the will, I must be of opinion, that they are a charge upon that estate, and that the alternative was but auxiliary, and put in as a provision, in case of a default of sufficiency of the estate comprised within the *power*; and therefore that the present lord cannot deliver himself from the execution of that *power*, which was certainly within the intention of Earl *Gilbert* to have executed, and was as clearly within the intention of Sir *Strensham Masters*, who must be thought to expect and depend upon a provision out of those lands, which

he knew the Earl had a power to settle, rather than out of lands, which it did not appear he had then purchased, nor was it certain he ever would : And accordingly instructions for counsel to draw a settlement of lands within the *power* were delivered to Sir Strensham Masters, which is a sufficient evidence of his concurrence, if that were necessary : And I take it, that the articles are a *lien* upon the estate, notwithstanding particular lands are not mentioned, but only a general covenant to settle lands of the value of 500*l. per ann.*; for in the case I just now put of a covenant to convey, if a man seised in fee of lands of 1000*l. per ann.* covenants to convey part of those lands of the value of 500*l. per ann.*, the covenantor hath an equal right to have 500*l. per ann.* of the 1000*l. per ann.* as much as if the lands had been specified : That being certain, which may be reduced to a certainty, and this court having always exercised a power of setting out lands.

Now, although I am of opinion that the plaintiff, the ^{Whether} countess, would have been entitled to relief, had there ^{preparato-} ^{ry steps to-} ^{wards do-} ^{ing an act,} ^{which a} ^{man is} ^{bound to} ^{do, but is} ^{prevented} ^{by death,} ^{shall be aid-} ^{ed by a} ^{court of} Earl *Gilbert*, with great advice, upon inspecting his writings, and consulting his agents ; nor doth it seem to be of much consequence to either party, whether 500*l. per ann.* be set out by commissioners appointed by this court, or equity. ^{the lands already specified be taken at that value (for it is not suggested that those lands do exceed 500*l. per ann.*, but, on the other side, the contrary hath been alleged, that they rather fall short than exceed that value, and this hath not been disputed by the defendant's counsel,) I say, notwithstanding all this ; yet the plaintiff's counsel having laid a great weight upon this point of the designation of the lands by Earl *Gilbert*, I must say, that where a man may do or forbear to do an act, and resolves to do it, and makes some steps towards it, and is prevented by death from carrying that resolution into execution, I cannot}

think that a foundation for relief in this court. It is true, there has been a difference taken between acts a man is bound in conscience to do, and those he is under no obligation to do: It is said, where he is bound in conscience, there death will not prevent the effect of his resolution; and the case of *Smith and Ashton*, 1 Ch. Ca. 264, hath been cited for that purpose; but when that case comes to be considered, it doth not warrant that doctrine: Tenant for life, with power to charge his estate, by deed or will, with 500l. by way of provision for his younger children, sent instructions for the draught of a deed for that purpose, but before the conveyance was prepared, died. The court did not think that accident a sufficient foundation for relief; but having directed a trial, whether those notes were part of his will, it being found they were, the court decreed accordingly for his children: Now, if the court could at first have relieved in that case, they had no need to direct that issue.

This case is cited by the two *Chief Justices* in argument of the case of *Bath and Monique*, and is there taken, stript of that matter of the notes found to be a will, and represented in this manner: That if a man hath it in his intention to execute a power for the benefit of his younger children, and is surprised by death, a court of equity ought to aid: But this not being an original opinion of those very learned persons, but relative to the case cited, it can be carried no farther than that case doth warrant: I don't say, but in the case of a provision for younger children, some solemn act done by the parent, the nature of which the court will judge of; and though it be ineffectual, it may be reasonable that a court of equity should aid it; and these defective executions of powers are frequently aided; but where a man is only preparing to do an act, and he may or may not do it, it seems pretty difficult to make those preparatory steps to amount to such an execution of his power, as this court would make effectual.

Indeed, no one can say in this case, but that the late Earl was bound in honour and conscience to execute this covenant ; and it appears fully by the proofs, that he thought himself under that obligation : It appears that he had the greatest anxiety upon him concerning it, and, therefore, it would have been an hard case if the plaintiff should lose her jointure, had it gone only upon the foot of accident ; but from what I have already observed, it may be absolutely rested upon the articles ; and, therefore, I think it altogether unnecessary to deliver any positive opinion, how far independent of the *lien* by the articles, all that followed, would have amounted to such an execution of the power, as this court would have made effectual : But, upon the whole, I am clearly of opinion, that the complainant is entitled to be relieved.

Lord Chancellor. Many cases having been cited, which were alleged to be parallel to the present one ; I was desirous, in a question of so great importance, that they might be first looked into, and that I should be afterwards assisted by my lords the judges, before I came myself to any resolution upon it : And they have set this whole matter in so very clear a light, that as it gives me no manner of difficulty in giving my judgment, so it would be vain to go about to repeat the many reasons, that they have been pleased to ground their opinions upon.

I shall, however, touch upon some few particulars, and that very briefly. It will give a great light to this matter, to consider what was probably the intention of the noble Earl, who first created this power. He is providing, that whilst the estate should, as much as in him lay, attend and accompany the honour, (which could be best effected by making every person that was likely to succeed, tenant for life only,) it should, notwithstanding the narrowness of such estate, be in the power of every such person, to make an ample provision, by way of jointure, for his lady : And that noble lord, as he had the honour of being first created Earl, might well have thought himself under

the greater obligation to the crown, not only to provide for the support of the honour in the male line, but likewise for the subsistence of every lady, every such remainder-man should happen to intermarry with.

A power, which the person conveying reserves, is part of the old dominion. But not only in regard to this reasonable intention of the party who first created this power, but also as the power which a tenant for life reserves to himself over an estate which he departs with, has been very properly called a *dominion* which he has over it, and is part of that ancient estate, which he had before such settlement; I think the opinion and advice that has been offered to me is perfectly right; viz. that the execution of this power ought to have a liberal construction; and, therefore, it is to me exceeding plain, that this land is bound and affected by the articles.

The only material objection that I have heard mentioned, was by way of distinction between cases, where there is another remedy to which the party may resort, and where there is none. It has been laboured indeed, that in this case there is another remedy; but I apprehend, that all that has been offered, amounts to no more, than that there might have been one. But whether there was, or was not; I take the principal question here to be, whether, when the other part of the covenant so much insisted upon, is unperformed, nay unattempted to be performed, (for any proof that has yet been offered,) the complainant shall be deprived of a remedy, expressly granted and provided for her, and to which she is entitled, without injuring any third person whatsoever. I cannot but look upon it, that if the Earl had any other lands of which he was seised in fee, Sir Strensham Masters knew nothing of it; and if the Earl had no other lands in fee-simple, then the covenant lays an absolute *lien* upon this land: But it is true, the disjunctive words left a latitude to my lord to have made another settlement, which would have delivered the estate from this *lien*; but would it not be a most extraordinary exposition of this covenant, and what must

tend entirely to defeat the intention of the lady and her friends, that because his lordship had a liberty to settle other lands, (if any he then had, or should purchase hereafter,) therefore she should lose her *lien* upon that estate which was first bound and contracted for, when he hath made no other settlement? That the principal covenant should be tripped up and defeated by that which was only auxiliary?

As to the other objection, that this is not to be considered an execution of the power, because no particular lands have been specified; I do admit, it doth not amount to an execution of such *power* at law; neither possibly would it, had he specified the particular lands, in case they had exceeded or fallen short of the value the *power* was restrained to; but though the parcels are not ascertained, it cannot be contended, but that they may be in a court of equity; and therefore had the case rested solely upon the articles, it had been very proper for relief.

But, I think, the several steps that were after taken, have been sufficient to ascertain what those particulars are; for all the acts subsequent to the articles were not voluntary, but proceeding after the greatest deliberation, upon a covenant which he was bound to perform: The deceased Earl, after examining his papers, and enquiring into his rentals, agrees and directs that these lands should be conveyed over, and appropriated to the use of this lady. Before the statute of *frauds and perjuries*, signing and sealing were thought so little essential, that even the defect of any writing at all hath been supplied; so that tho' the statute of H. 8, enabled a tenant in fee to devise his lands by will in writing, yet if such person gave directions to have his will wrote, but died before it was done, it was well: But here are not only instructions sent, but a draught actually prepared and engrossed after counsel had been consulted with; and in this writing, which was intended to be executed, are contained all the denominations of the lands intended to be set out for the plaintiff's joint-

ture ; but the person dies before the conveyance is executed : This alone may be considered as a very proper circumstance for relief in this court ; for, it is plain by the fullest proofs in the cause, that he never altered his mind, never came to any new resolution, but always expressed the greatest uneasiness, that he had not put the last hand to the conveyance.

But though this is a sufficient appointment of the particular lands, yet I cannot think that any thing that hath been done, is so conclusive, but that his lordship may still insist that the lands set out do exceed the yearly value of 500*l.* and that the complainant on the other hand may insist they fall short of it. But it must be decreed,

That the defendant the Earl of Coventry, do deliver to the plaintiff the possession of the lands comprised in the deeds of appointment of the 5th and 6th of July, 1719, and that the plaintiff do hold and enjoy the same during her life, against the said defendant the present Earl of Coventry, and the other defendants Thomas Coventry and Henry Coventry, and all claiming under them ; and that the defendant, the Earl of Coventry, do account for the rents and profits from the death of Earl Gilbert, &c.

FINIS.

A

TABLE

OF THE

PRINCIPAL POINTS

CONTAINED UNDER

THE FOREGOING MAXIMS.

A	<i>Page and Case.</i>	<i>Page and Case.</i>
ABATEMENT.		
Of legacies, rules concerning	14, 119	Where equity regards not the consideration 62, c. 1
		Though voluntary to be enforced in equity 63, c. 1
		Agreement in equity, better than conveyance at law 64, c. 1
ACCIDENTS.		
Relief in equity against	52, 53, 54	
Executor relieved, where assets deficient by accident	34, c. 4	
ACCOUNT.		
No allowance to be made to him, who contrary to directions, opened papers	9, c. 9	Equity will controul unequal distributions, under powers to appoint 20, c. 20
Bill for account proper in equity; and after discovery, court will not send the parties to law, but make an end of the case	42, c. 1	What will be deemed illusory 22
AGREEMENT.		
If extremely unreasonable, equity will not enforce it	7, c. 2, and note (c)	
For a purchase, if iniquitous, not to be decreed	7, c. 2	Apprentice may in equity compel the master to sue the indentures within a year 40, c. 10
For purchase of a copy-hold, lord dies before admittance, the new lord not being bound by the agreement; the executor shall refund	16, c. 10	
Where equity will enforce the performance of it <i>in specie</i>	62, c. 1	
APPOINTMENT.		
APPORTIONMENT.		
APPRENTICE.		
ASSETS.		

<i>Page and Case.</i>	<i>Page and Case.</i>
Abatement of legacies, where assets deficient	119
Refunding of legacies, on deficiency of assets	121
ATTORNEY.	
Where compellable in equity	31, c. 7
B	
BANKRUPT.	
Purchaser of his goods without notice not bound to discover	72, c. 1
BARON AND FEME.	
<i>Baron</i> shall not be decreed to <i>feme's</i> equitable estate, without making a provision for her	3, c. 5
(<i>This</i> is the settled rule of equity in England, and the same adopted in New-York 3, c. 5. See also <i>Glen v. Fisher</i> , 6 Johns. Ch. Rep. 33, where the former decision, in <i>Howard v. Moffatt</i> (2 Johns. Ch. Rep. 206) is recognized.)	
<i>Feme</i> , though her agreement with the <i>baron</i> , to have the equity of redemption, be fraudulent against subsequent mortgagees, yet she shall have dower against them	6, c. 9
<i>Feme</i> , her equitable estate liable to satisfaction of <i>baron's</i> debts	8, c. 4
<i>Feme</i> , her alimony suspended, till she went back to her husband; he offering to co-habit with her	9, c. 7
<i>Feme</i> eloping shall have no favour from a court of equity	9, c. 8
<i>Baron</i> , how far to be charged with a <i>devastatio</i> or breach of trust, committed to <i>feme</i> and her former husband	24, c. 4
<i>Baron</i> , where he is to have a portion, on condition of making a jointure; and the <i>feme</i> dies before jointure made, he shall not have the portion 53, c. 4	
<i>Feme</i> trustee to sell lands, where may sell to the <i>baron</i>	68, c. 3, note (u)
<i>Baron</i> and <i>feme</i> mortgage the wife's land by fine, and after borrow more money of the same person; the heir of the wife shall pay both debts	78, c. 12
<i>Feme</i> sole has power to make leases; she marries; whether she and her husband can make 'em—68, c. 3, note (u)	
BOND, (<i>Vide Penalty.</i>)	
Where interest will be carried beyond the penalty, where not	4, c. 6, note (g.)
BOOKS.	
Injunction to stay sale of books, in violation of rights of patentees	36, c. 2, note (f)
C	
CHARITY.	
Rent-charge devised to charity; all the tenants need not to be made parties	19, c. 16, note (u)
COMMON.	
Bill to prove a right to it, <i>in perpetuum rei memoriam</i>	38, c. 7
Common enclosed for thirty years, not to be thrown open	40, c. 11
Agreement to enclose it, where to be enforced in equity, and whom to bind	40, c. 11
Issue out of chancery directed to try whether sufficient left	44, c. 5
One commoner, having recovered damages for oppressing the common or the like; the other shall be obliged to accept of the same damages	44, c. 6
COMPENSATION.	
Equity will relieve against a penalty or forfeiture, where compensation can be made	52, et seq.
CONDITION (<i>Vide Penalty.</i>)	
Condition precedent, where equity will relieve against it	53, c. 2—53, c. 3, 4
Condition subsequent, where equity will relieve against it	54, c. 5—57, c. 9
Condition of marriage with consent, where it is <i>in terrorem</i> only	54, c. 7
Condition binding, where the agreement voluntary	59, c. 18
Circumstances in the performance of it, not to be regarded in equity	70, c. 4

Page and Case.	Page and Case.
Condition of good behaviour to parent, not relieviable in equity	66, c. 7
CONTRIBUTION.	
Contribution by sureties	18, c. 14
by all the tenants, to a rent-charge	19, c. 16
by all the executors to payments of debts and legacies	19, c. 18
Contribution by the goods saved, to those that are lost	22, c. 21
COPARCENERS.	
Rent granted for owelty of partition shall go to the heir; but if bond given for payment, the bond shall go to the executor	28, c. 6
COPY-HOLD.	
Copy-hold for three lives, shall go to the administrator	27, c. 5
Lord compellable in equity, to hold courts, &c.	29, c. 1
An erroneous judgment in court-baron, where chancery will reverse it, or compel the lord to admit a plaint for that purpose	29, c. 1
Where fines are arbitrary, equity will moderate them	30, c. 2
Copy holder, where relieviable in equity, against the forfeiture	32, c. 1
Defect of surrender supplied	64, c. 2
	74, c. 4—80, c. 15
COUNTY PALATINE.	
A matter concerning the chancellor there, may be sued for in the chancery of England	31, c. 4
Defendant living out of that jurisdiction, to be sued in the chancery in England	31, c. 5
COVENTRY.	
Earl of Coventry's Case, on the defective execution of powers, supplied in equity	125, et seq.
CREDITORS.	
Fraudulent agreement set aside in fa- vour of	4, c. 9
Where legatees shall refund to	15, c. 8
One creditor shall not refund to another	15, c. 8, note (1)
	Creditor agrees to take a less sum, if paid at a day, no relief against a for- feiture
	59, c. 12
	Trust to pay such, as come in, within a year, they may come in after
	61, c. 15
	Lease may be sold for payment of cre- ditors
	61, c. 15, note (u)
	Creditor has more equity than the heir
	67, c. 3—78, c. 18
	Defect in execution of power to limit lands, supplied in their favour
	67, c. 8
	Defect in a will supplied in their favour
	67, c. 8
	Whether purchaser bound to take no- tice of a judgment-creditor
	72, c. 1
	Creditor without notice to be allowed both debts
	75, c. 6
	Creditor has equal equity with purcha- ser
	75, note (i)—75, c. 7, note (j)
	Creditor shall never have any advantage taken from him in a court of equity
	77, c. 11
	D
	DEBTS.
	Where real estate to be charged with
	13, c. 5
	Debts, where the assets are equitable, to be paid in proportion
	17, c. 11
	Whether term to attend the inheri- tance, shall be applied towards pay- ment of them
	26, c. 2
	Residue of lands appointed for pay- ment of debts, shall go to the heir
	26, c. 3
	Debtors, if they have any notice of or- der not to pay debts, shall pay them over again
	37, c. 3, note (g)
	DEED.
	Burning or cancelling it, bars the perpe- trator of all equity
	8, c. 5
	Where to be brought into court for safe custody
	37, c. 4
	Where mistakes in it corrected in equity*
	64, c. 2, note (g)
	DEVISE.
	Diversity between devisee and heir, as to charging the real estate with lega- cies
	13, c. 5
	Devisee, the personal estate to be ap- plied in ease of the real in his hands
	24, c. 2
	Devise of lands in trustee's hands, to be construed equitably; after where the legal estate was in the testator
	33, c. 7
	Devise of goods for life; the devisee must give security
	40, c. 8

<i>Page and Case.</i>	<i>Page and Case.</i>
Devises of copy-holds agreed to be purchased, good	64, c. 2
DISCOVERY.	EXECUTOR.
Not from a purchaser without notice	72, c. 1
Discovery of deeds, from a devisee, to an heir	80, c. 15
DISTRIBUTION.	EXECUTOR.
Of intestates' estates, not without security to refund	15, c. 8, note (k)
So, of assets, by executor	<i>Ibid.</i>
Equity will control unequal distributions in executing powers of appointment	20, c. 20
E	F
EQUITY.	FACTOR.
In what cases equity to be denied to him who has committed iniquity	7, c. 1
Equity controls unequal distribution	20, c. 20
Equity gives aid to the jurisdiction of inferior courts	31, c. 6
Inter-pleading bills proper in	38, c. 5
Suits <i>qua timet</i> proper in	38, c. 6
Bill to perpetuate testimony proper in	38, c. 7
Equity will not beget a suit to be ended elsewhere	42, c. 1
Equity will make a man refund, to avoid circuity of suit	43, c. 4
Equity enforces the performance of agreements <i>in specie</i>	62, c. 1
Equity supplies the defects of circumstances in conveyances	64, c. 2
EQUITY OF REDEMPTION.	FORFEITURE. (See Penalty.)
<i>(See Mortgage.)</i>	FORFEITURE. (See Penalty.)
ESTATE.	FRAUD.
Two estates being to be sold for payment of debts; and an annuity being out of one of them; the other shall stand charged with the annuity	12, c. 3
Estate being voluntarily charged with a daughter's portion, and afterwards settled in jointure; husband devised another estate in lieu of the jointure, which the wife would not accept; the portion shall be charged upon the estate devised	12, c. 4
Estate real, where to be charged with debts and legacies	13, c. 5
Estate real, where personal estate to be applied in aid of it	28, c. 1—24, c. 2
G	GUARDIAN. (See Trusts.)
His power to dispose of, or alter the infant's estate	27, c. 4, note (d)
H	HANDMAID.
Equity will not be a handmaid to other courts, nor beget a suit to be ended elsewhere	42, c. 1

Page and Case.

HAZARDOUS BARGAINS.

Not always set aside in equity	5, c. 7
<i>note (i)</i>	

Rule in granting relief *	5, <i>note (i)</i>
---------------------------	--------------------

HEIR.

Heir disinherited, favored in equity	48, c. 1
<i>(note a)</i>	
Fraud in gaining security from him at extravagant interest	4, c. 7
Fraud in gaining unreasonable bargain from him	62, c. 1, <i>note (a)</i>
Diversity between him and devisee, as to charging the real estate with legacies	13, c. 5
Heir has not equal equity with a jointress	63, c. 1, <i>note (d)</i>
Heir has not equal equity with a purchaser	65, c. 2, <i>note (h)</i>
Heir has not equal equity with a creditor	67, c. 3, <i>note (o)</i>
Heir decreed to sell, where the person is dead, or no person appointed	67, c. 3.
Heir has not equal equity with younger children	68, c. 3, <i>note (q)</i> —80, c. 15, <i>note (x)</i>
Personal estate applied to ease the heir	23, c. 1

Heir shall have residue of lands appointed for payment of debts,	26, c. 3
Heir hath equal equity with a volunteer	79, 80, c. 14, 15

HUSBAND AND WIFE.

(See *Baron & Feme.*)

Husband, suing with his wife, for her personal property, must make a settlement on her	3, c. 5
See also <i>Glen v. Fisher</i> , 6 Johns. Ch. Rep. 83, in which the case of <i>Howard v. Moffat</i> (2 Johns. Ch. Rep. 206) is recognized, as the settled rule of equity in New York.	

I

INCUMBRANCE.

Bought in by heir, executor or trustee, he shall be allowed no more than he really paid, except it be to protect an incumbrance of his own	11, c. 1
<i>77, c. 10</i>	
Bought in by a stranger, in what cases to be allowed no more than paid	11, c. 2

Incumbrancer, third without notice buys in the first; he shall protect himself by it	75, c. 8—76, c. 9
--	-------------------

Page and Case.

INFANT.

Rents of his estate laid out in lands; where they shall go to the heir, where to the administrator	27, c. 4
--	----------

INJUNCTION.

Not to stay proceedings at law, except bound by order to bring no writ of error	5, c. 8
Conditions on which injunctions are usually granted in Virginia	6, <i>note (k)</i>
Injunction to prevent mischief in various instances	35, 36
Injunction to stay waste	35, c. 1
Injunction to quiet possession, in what cases grantable, and where right at law to be first determined	36, c. 2
Injunction not grantable till bill filed	36 c. 2, <i>note (e)</i>

INTEREST.

Rate of legal interest in the several States in the Union	p. 89
Interest payable according to the laws of the country where the contract was made, or to be performed	90
Adjudged cases on the doctrine of interest	<i>App. 1, p. 90, et seq.</i>
Where interest will be carried beyond the penalty of a bond, where not	4, c. 6, <i>note (g)</i>
See also p. 93 94, 107, 108, 115.	
Whether a fraudulent person shall have it	4, c. 7
Interest of incumbrance to be kept down by tenant for life	18, c. 12, <i>note (s)</i>

INTERPLEADER.

Bills of, proper in equity	38, c. 5
As where there is a controversy for the same subject, between two persons, the third may apply to a court of equity for protection	38, c. 5

J

JOINTENANTS.

Jointtenancy, in what cases survivorship shall take place	19, c. 19 and notes.
Coparceners, rent granted in ownership of partition shall go to the heir; but if bond is given for payment, the bond shall go to the executor	38, c. 6

JOINTURE.

Jointress and issue are equally purchasers	18, c. 13
--	-----------

<i>Page and Case.</i>	<i>Page and Case.</i>
Jointure, articles for it enforced against the heir 62, c. 1	LEASE.
Jointress, heir hath not equal equity with her 63, note (d)	Power to make leases in possession ; if made to commence <i>in futuro</i> , where good 69, c. 8
Where articles for it enforced, how the lands to be estimated 62, c. 1	Lease, power to make one for ten years, made for twenty, good for ten 69, c. 8
Jointress, defect of executing power supplied in her favor 67, c. 3, note (dd)—83	Lease, power to make one by feme sole, who marries ; whether she and her husband can make one 69, c. 8
JURISDICTION.	
Person living out of jurisdiction of inferior court, suable in chancery 31, c. 5, 6	Lease for years, being mortgaged, and equity of redemption vested in the executor ; debts to be paid according to superiority at common law 87, c. 18
Jurisdiction of ecclesiastical court aided in chancery 31, c. 6	But see note (q) to pa. 7
Equity will aid jurisdiction of inferior courts 31, c. 6	LIVERY AND SEISIN.
▲ court of equity having possession of a cause will end it ; it will not be a hand-maid to other courts ; nor beget a cause to be ended elsewhere 42, c. 1	Livery and seisin presumed, after twenty-five years possession 45, c. 1
L	
LEGACY.	
Husband joining his wife with him, in suit for her legacy, must make an adequate settlement on her 3, c. 5	Livery and seisin compelled in equity 64, c. 2
Q This is the settled rule of equity in England ; and the same adopted in New York. 3, c. 5. See, also, <i>Glen v. Fisher</i> , 6 Johns. Ch. Rep. 33, where the former decision in <i>Howard v. Moffatt</i> , (2 Johns. Ch. Rep. 206) is recognized.	M
Where real estate to be charged with it 13, c. 5	MANOR.
Legatees, which, and in what cases to abate 14, c. 6, 119	Issue out of chancery, to try whether the lord had a grant of free warren 44, c. 5
Legatee, where one to refund to another 14, c. 7	MARRIAGE.
Legacy, sued for in ecclesiastical court ; security must be given ; <i>aliter</i> in chancery, 15, note (k). But, now security, to refund, must be given, by the laws of Virginia. <i>Ibid.</i>	Promise of a portion on marriage by letter, enforced in equity 63, c. 1
Legatee, in what cases to refund to creditors 15, c. 8—121, <i>et seq.</i>	Marriage to be had with consent, where <i>in terrorem</i> 54, c. 7
When he shall refund to executor, when not 16, c. 9, and notes	Marriage to be had with consent, what consent necessary 70, c. 4
Legacies, all, shall be paid out of personal estate 23, c. 1	Marriage, sufficient consideration to make wife a purchaser—80, c. 15, note (w)
Where it shall be taken as a satisfaction of a debt 49, c. 3	MINES.
Legacy given on condition of marriage with consent ; the condition is void by the civil law, not so in chancery 54, c. 7	How far and in what cases courts of equity will restrain the opening of mines 36
Legatee, defect of execution of power to limit lands, supplied in his favour 67, c. 3	MORTGAGE.
Legatee, heir has not equal equity with him 80, note (w)	Mortgagee lends more money to the mortgagor on his bond ; both debts shall be paid him, before redemption ; even by the heir of the mortgagor 1, c. 1
	Q But modern cases have altered the law on this subject, and limited the right of the mortgagee to take 1, c. 1, note (e)
	Where two mortgages, and one defective, if heir will redeem, he must take both 8, c. 1
	Mortgagor, his heir mortgages the lands to the mortgagee ; he shall not redeem his own mortgage without his ancestor's also 2, c. 1, note (f)

<i>Page and Case.</i>	<i>Page and Case.</i>
Origin of the term <i>tacking</i>, in relation to mortgages	2 ors ; the court ordered an able attorney to do it 41, c. 12
Distinction between a bill to <i>redeem</i>, and a bill to <i>foreclose</i>, as to right of mortgagee to tack	2 PENALTY.
Mortgage given as a counter-security ; mortgagee enters into a further bond ; the mortgage shall stand as a security for that also	2 Penalty of a security, in what cases a court of equity will go beyond it 3, c. 6, note (g)
Equity of redemption devised for life ; remainder in fee ; each to bear their proportion of the mortgage ; but tenant for life to keep down the interest	17, c. 12 See, also, pa. 93, 94, 107, 108, 115. Forfeiture for non-payment at the day ; in what cases equity will relieve against it 7, c. 1
Mortgage to be paid out of personal estate	23, c. 1 Forfeiture of copy-holder by cutting timber ; in what cases relievable 8, c. 3—52, c. 1
Mortgage in fee shall go to the executor, and not to the heir	25, c. 1 Penalty of bond, not to be relieved against, if given in satisfaction of an unjust act 8, c. 6
Mortgage-money generally to be paid to executor or administrator	25, c. 1, note (a) Penalty of bond, to pay profits of an office ; if office taken away, relief against it 32, c. 1
Mortgage of sixty years set up, the court ordered it to be cancelled	45, c. 4 Penalty of bond where small, equity will not relieve 60, c. 13
Mortgagor, defect of surrender supplied in his favour	74, c. 4 Penalty in case of trade, no relief against it 60, c. 14
Mortgagee, third buys in the first ; he shall hold the lands till both are paid	75, c. 8 PERPETUAM REI MEMORIAM.
Mortgagee having defective mortgage from the ancestor, procures the son to give another ; he shall be paid both	77, c. 11 Bills to perpetuate testimony, in what cases proper 38, c. 7
Equity of redemption of term for years vesting in executors, debts to be paid out of it, according to precedency or superiority at common law	87, c. 18 PERSONAL ESTATE.
N	
NE EXEAT.	Applied in ease of the real 23, 24 and notes
Ne exeat granted against husband, against whom sentence in the spiritual court for alimony	31, c. 6 Debts to be paid out of personal estate, though it is thereby lessened to prejudice of widows' thirds ; but legacies not to be so paid 24, note (f)
P	
PARTIES.	Tenant for life of personal estate, compellable to give security to remainder-man 40, c. 8
All the tenants must be parties, where contribution to a rent-charge prayed for	19, c. 16, note (u) PORTION.
Where all the obligors ought to be parties	19, c. 17 Portion is charged voluntarily upon an estate, which is after settled in jointure ; the husband devises another estate in lieu of the jointure, which the wife will not accept ; the portion shall be charged upon the devised estate 12, c. 4.
PARTNERS.	
In trade, no survivorship	19, c. 19 POWERS.
Partners in a ship, he that can sustain no loss, shall have no benefit	28, c. 7 Power of revocation, where equity will supply a defect in it 67, c. 3
Partner surviving, not suing the debt	21 Power to sell lands, where equity will supply a defect in it 67, c. 3
	Power to charge lands, where equity will supply a defect in it 68, c. 3
	Diversity where to charge one's own, or another's lands 68 c. 3

<i>Page and Case.</i>	<i>Page and Case.</i>
P Power to limit lands where equity will supply a defect in it 68, c. 3 Power, naked and flowing from an interest; diversity 68, note (n) Difference, where a defective execution, and no execution at all 68, c. 3 Defective execution of powers supplied in equity, Earl of Coventry's Case 125	RENT. Apportionment of it in equity, where right of common recovered in the lands 18, c. 15 Arrears of it to be paid out of personal estate 24, c. 3 Rent-seek, equity will decree seisin 30, c. 3 Rent or annuity, where no remedy at law, equity will charge the person 30, c. 3, <i>and notes</i> Rent for a house taken away by force, being sued for, relief in equity not granted 32, c. 2 Rent for land carried away by floods, being sued for, no relief in equity 32, c. 2, <i>note (a)</i> Liability of tenant to pay the rent, notwithstanding the destruction of the demised premises 32 Rent-charge, non-payment of it for fifty years, makes the grant suspicious 46, c. 9
PRESUMPTION.	RETAINER.
From length of time 45, 46, 47	Retainer of money to pay a man's self 48, c. 5
PURCHASE.	REVIEW.
Iniquitous agreement for it, not to be enforced in equity 7, c. 2 Purchaser, as against him, an heir, or trustee, or executor, or stranger, buying in incumbrance for less than is due upon it, to be allowed no more than paid 11, c. 1, 2 Purchaser of copy-hold, equity will not reverse an erroneous judgment in court-baron against him 29, c. 1 Purchase, enjoyment under it for twenty-years; the validity of the title under a will, not to be contested, 45, c. 3 Purchaser being decreed above thirty years ago, to pay his purchase money, payment shall be presumed 46, c. 6 Purchase, articles for it, not to be enforced in equity, except gained with all imaginable fairness 62, note (a) Purchaser has equal equity with creditor 72, c. 1 Purchaser without notice, where plea good 72, c. 1, <i>and notes</i> Purchaser without notice, shall protect his purchase by <i>eigne</i> incumbrance bought in 73, c. 2 Purchaser seized a statute, which would have fallen upon his estate; yet the advantage not to be taken from him in equity 74, c. 3	Bill, to reverse decree made sixteen years ago, not to be allowed 46, c. 7
Q	REVOCATION. (<i>Vide Power.</i>)
QUIA TIMET.	S
Bills <i>qua timet</i> proper in equity, and in what cases sustained 38, c. 6	SATISFACTION.
R	A marriage-portion, given by the father decreed a satisfaction of a legacy, which the father was to pay 48, c. 1 Devise by the husband, where to be a satisfaction of a covenant for a jointure 48, c. 2 Where a settlement is made, but not sufficient according to articles; a voluntary settlement after, shall be taken to be a satisfaction 48, c. 2 Where there is a provision for daughters by the marriage-settlement, and the father gives them by will a like sum; whether that shall be taken to be a satisfaction 49, c. 3 Where a devise to a debtee shall be a satisfaction 50, note (e) Where a devise shall be a satisfaction 49, c. 3 Satisfaction, not where they are claimed by different rights 51 c. 4, note (f)
REAL ESTATE.	SECURITY.
Personal estate applied in case of real 23, 24	Tenant for life of chattels, compelled to give security 40, c. 8
REFUNDING.	
Of legacies, rules concerning 15, 16, <i>and notes</i> ; 121 <i>et seq.</i>	

<i>Page and Case.</i>	<i>Page and Case.</i>
So, executor on suggestion of wasting the estate 40, c. 9	Trustee of two estates, shall not be obliged to account for one estate only 3, c. 4
So, distributees and legatees, to refund 15, note (k)	Trustee, where his unequal distribution shall be set aside in equity 20, c. 90
SETTLEMENT.	Trustee, executor taking better security though this be a conversion at law; yet, shall only assign the security, 32, c. 3
Husband, suing with wife, for her personal estate, bound to make a settlement on her	Trustee, executor relieved against his security to pay legacies, if assets become deficient through accident, 33, c. 4
SURETY.	Trustee robbed, not accountable 33, c. 6
Contribution by 18, c. 14	Executor must give security for a legacy, payable <i>in futuro</i> 40, c. 9
Surety once discharged at law, equity will not charge him again 85, c. 17	Trustee bound to purchase lands, does so, but it does not appear, whether with the trust-money, and devises them to the <i>cestuy que trust</i> ; where this shall be a satisfaction 50, note (e)
SURRENDER. (Vide Copy-hold.)	Trustee, where the defect of his joining in a conveyance supplied in equity 65, c. 2
Surrender presumed after forty years' possession 45, c. 2	<i>Cestuy que trust</i> in tail, where can suffer a recovery to bar remainders 65, c. 2
SURVIVORSHIP.	<i>Cestuy que trust</i> can make a conveyance in equity in such manner, as if the trustees had executed their trust 65, c. 2
Relieved against in equity 19, c. 19	
No survivorship between traders 20	
T	
TACKING.	V
Origin of the term, in relation to mortgages 2	
Distinction between a bill to <i>redeem</i> , and a bill to <i>foreclose</i> , as to the right of tacking 2	
Modern cases have altered the law, and restricted the right of the mortgagee to tack 2, note (e)	
TAIL-TENANT.	
Tenant in tail cannot bar his issue in equity, by a bargain and sale 66, c. 2	Defect of surrender of copy-hold to a mortgagee, supplied against a volunteer 74, c. 4
Tenant in tail in equity can bar his issue, by fine, or bargain and sale, but cannot bar the remainder without a recovery 66, c. 2	Whether hath equal equity with heir 80, c. 15
Tenant in tail suffers a recovery, it shall enure to make good former incommittances 75, c. 6	One volunteer hath equal equity with another 82, c. 16
TERM FOR YEARS.	Volunteer hath equal equity with grantor or his heir 82, c. 16
Term for years, where to attend the inheritance 26, c. 2	Volunteer hath not equal equity with a purchaser 82, c. 16
Term created for a particular purpose, shall afterwards attend the inheritance 26, c. 3	Volunteer hath not equal equity with a creditor 84, note (f)
TRUSTS.	
Trustee of lands becomes engaged for debts of the <i>cestuy que trust</i> , he shall not convey the lands till debts paid 9, c. 3	
W	
WASTE. (Vide Injunction.)	
Equity will restrain the commission of waste 35, c. 1	
Even where the tenant is not punishable at common law <i>ibid</i> , note (c)	
WAY.	
Bill to prove a right to a way, and how the bill must be framed 39, c. 7, note (n)	
WILL.	
An accident in it, not foreseen by testator, relivable in equity 33, c. 7	

<i>Page and Case.</i>	<i>Page and Case.</i>
If contested, equity will order the debtors not to pay to the executor, till determined	37, c. 3
Bill to examine witnesses to prove a will	38, c. 7
On bill to prove it, the heir must have his costs	42, c. 1, note (b)
Where instructions to draw it, sufficient	80, note 'x)
	Y
	YOUNGER CHILDREN.
Heir, executor or trustee, to be allowed no more against them, for an incumbrance bought in, than what was really paid	11, c. 1
Devises to them, who to take	14, c. 6
Heir hath not equal equity with them	68, note (g)—82, note (aa)

Principia Legis et Aequitatis:

BEING AN

ALPHABETICAL COLLECTION

OF

MAXIMS,

PRINCIPLES OR RULES, DEFINITIONS,

AND

MEMORABLE SAYINGS,

IN

Law and Equity;

INTERSPERSED WITH SUCH LAW TERMS, AND LATIN WORDS AND PHRASES AS MOST FREQUENTLY OCCUR, IN THE STUDY AND PRACTICE OF THE LAW.

BY THOMAS BRANCH, Esq.

This work contains more Law, and more useful matter, than any one book of the same size which can be put into the hands of the student. Preston's Abstracts, Vol. 1, page 214.

FIRST AMERICAN,

From the Fourth London Edition, with Additions and Corrections.

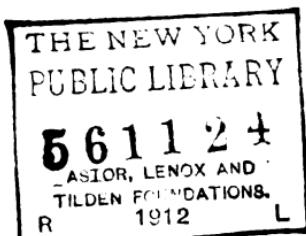
BY WILLIAM WALLER HENING,
COUNSELLOR AT LAW,

Author of the Virginia Justice; the Lawyer's Guide, &c.; and Editor of the Statutes at Large of Virginia.

RICHMOND:

PRINTED BY T. W. WHITE.

1824.



ESTRICT OF VIRGINIA, TO WIT:

***** Be it REMEMBERED, That on the twenty-third day of Au-
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PREFACE

TO THE

FIRST AMERICAN EDITION.

BRANCH's *Principia Legis et Æquitatis* have been rising in reputation, in a ratio with the progress of legal science. The first edition was published in 1753; the second in 1810; the third, enlarged in 1818;* and the fourth in 1822, with a translation of the Latin Maxims, for the first time attempted. Thus we perceive that, between the publication of the first and second editions, there was a period of *fifty-seven* years; between the second and third, of *eight* years; and between the third and fourth, of *four* years only. The high encomiums bestowed on the work by Mr. Preston,† a late writer of much celebrity, (as may be seen in the title page,) no doubt, contributed in a great degree to this rapid multiplication of editions.

In preparing the present edition for the press, the editor has had to encounter a degree of labour far beyond what he had anticipated, when he commenced the work.—Accustomed, as we had been from the period of our colonial state, to look up to England for perfection in the arts and sciences, it was presumed, of course, that the last *London* edition would be free from errors; and that the editor would have nothing to do, but to expunge those parts which related exclusively to the civil and ecclesiastical polity of England, and substitute matter peculiar to the institutions and laws of the United States.—But while engaged on this part of the work, he discovered that a few of the references to authorities were incorrect, that although the greater part of the maxims were as well translated as they possibly could be, yet that there were some translations perfectly unintelligible, and others absolutely false. Hence resulted the necessity of a careful revision of the whole work, and of consulting the originals in every case.

A few examples only, will be given, by way of illustration.

* See CLARKE's *Bibliotheca Legum*, or Law Catalogue, page 274.

† See Preston's *Abstracts*, vol. 1. page 214; CLARKE's *Bibliotheca Legum*, or Law Catalogue, page 274.

LONDON EDITION.

Pa. 2. A summo remedio ad inferiorem actionem, non habetur ingressus, neque auxilium. *Fleta, l. 6, c. 1.*—*From the highest remedy to the lowest action there is neither ingress nor assistance.*

Pa. 31. Cujus est dare ejus est disponere. *2 Co. 71.*—*He who has power to give, has power to disposes.*

Pa. 57. Factum unius alteri nocere debet. *Co. Lit. 152.*—*The deed of one should hurt another.*

Pa. 189. Receditur a placitis juris potius quam injuriæ et delicta maneant impunita. *Bacon.*—*It is receded more from pleas of right, than injury and crimes may remain unpunished.*

Pa. 216. Summum jus, summa injuria.—*The higher the law the greater the injury.*

Many other instances might be adduced in which the sense of the maxims has been misunderstood by the translator of the fourth London edition. In the present edition, the editor has gone to the fountain head, and ascertained the sense appropriated to the maxims by the writers in whose works they are found. This he has endeavoured to express, in the idiom of the English language: and where the maxim would not admit of translation, he has given

AMERICAN EDITION.

Pa. 2. After having pursued a writ of right, *the highest remedy* known to the law, there can *neither be reopurse to, nor assistance derived from, an inferior action.* [Or, in the words of Blackstone, “After issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.” *3 Bl. Com. 193.*]

Note. The author of *Fleta*, in the sentence from which the extract in the text is taken, is speaking of the *writ of right*; and the above *paraphrase* evidently conveys the true sense.

Pa. 32. *He who has power to give, has power to prescribe the terms of the gift; to annex what conditions soever he pleases.*—*Wing. 53.*

Pa. 47. Factum unius alteri nocere non debet. *Co. Lit. 152, b.*—*The deed of one should not injure another.*

Pa. 128. *The law will dispense with maxims which are placita juris (pleas of right) and not regulæ juris (rules of right) rather than injuries and crimes should go unpunished.*

Pa. 142. *The rigour of the law is the height of injury.*

a *paraphrase*, as sanctioned by the authority of the most eminent judges in *England* and the *United States*. Wherever, from the generality of the expression, the *maxim* might *mislead*, he has explained its peculiar application. Examples of this kind may be found under the articles *Actio personalis moritur cum persona*; *Actus non facit reum*, &c.

In this edition, a variety of *Law Terms* are introduced, which with the other additions of the present editor, are generally distinguished by being printed within crotchets thus [].

At the end of the volume, a few select quotations, from the *Latin*, *Greek*, *French*, and *Italian*, not properly maxims, are inserted. Among them will be found a paraphrase of a celebrated line of Horace, *Scribimus indocti*, &c. which may safely be put in competition with any thing of the kind ever attempted in the English language.

WILLIAM WALLER HENING.

Richmond, August 21st. 1824.

ADVERTISEMENT

TO THE

FOURTH EDITION.

IN the Edition now offered to the profession, it may be proper to state, that the additions consist of numerous references to books of authority; some, therefore, now for the first time collected together; and a translation of the Latin Maxims and Rules faithfully given.

The whole has been carefully corrected; the punctuation (which in many instances was very defective) has been supplied where it was deficient; and it is therefore hoped, that the work will, in its present state, continue to preserve its character, and be found not unworthy of public patronage.

PREFACE

TO

THE FIRST EDITION.

COLLECTIONS, though more peculiarly serviceable to the makers, are also of general utility, when they conduce to save time, where every part of it hath full employment. This motive, joined with a desire of having the present collection made more complete, that a vade mecum so useful and entertaining, may accompany the common lawyer when absent from his books, will, I hope, excuse the publication.

By an alphabetical order, such who are familiarized with the Maxims, will more readily find what they want, and the student may hence, for his use, with equal ease, collect such as are analogus, or relate to the particular title of law, or case, under his contemplation.

Those rules which are in English, and without reference, were taken from “Grounds and Rudiments,” &c. where they are warranted; and those Latin ones adopted from the civil, canon, and feudal, into the common law, and not here distinguished, are restored by the authors cited.

A variety of uses which might be made of a perfect work of this kind, under proper sanction, in the course of study, suggest themselves, but those must be submitted, as this manual is, with all becoming deference to the wisdom and authority of those who preside over our renowned colleges or houses of court and chancery ; all of which taken together, with Serjeant's-Inn, Lord Coke observes, (Pref. 3. Rep.) do make the most famous university for profession of law only, or of any one human science, that is in the world, and advances itself above all others *quantum inter viburna cupressus*. Whose increasing fame is the most zealous and dutiful wish of the meanest of its votaries.

T. B.

AN
ALPHABETICAL COLLECTION
OF
MAXIMS,
PRINCIPLES, RULES,
DEFINITIONS,
AND
MEMORABLE SAYINGS,
IN LAW AND EQUITY.

A vel ab, est dictio significativa primi termini, a quo, sicut dictio *usque*, termini ad quem; et *a vel ab*, accipitur exclusive. 5 Co. 94.—*A or ab* is an expression signifying the commencement of a term, “from which,” in the same manner as *usque*, is of the termination “to which;” and *a or ab* is to be taken exclusively. [Thus, a lease dated “28th July” to H. B. to have and to hold from the day of the making thereof, &c. “the said 28th of July itself is without question excluded, and the demise cannot begin, nor the lessee enter, before 29th July.”]

[*Abatement* is a term which has various significations in the law: as, 1. Into lands, 3 Bl. Com. 167; T. L. 4; 2. Of a writ, count, or suit, 3 Bl. Com. 302, *Christian's n.* (3), T. L. 2, 3;—3. Of nuisances, 3 Bl. Com. 5:—4. Of an indictment. 4 Bl. Com. 334:—5. Of legacies. *Fran. Max.* 119.]

[*Ab inconvenienti*.—*From the inconvenience*.—Thus, *Argumentum ab inconvenienti*, &c. An argument to shew the inconvenience which would result from the proposed measure is good in law. *Co. Lit.* 258.]

[*Ab initio*.—*From the beginning*. Trespassers *ab initio*. 8 Co. 146; 3 Bl. Com. 15.]

[*Ab origine*.—*From the origin*.]

Branch's Principia, &c.—2

[Abet.—To *abet* is, to encourage or set on. An *abettor* is an instigator, one who promotes or procures a crime to be committed. *Abetment* is the encouraging or instigation. *Jacob L. D.*]

A communis observantia non est recedendum. *Wing.* 752. et minime mutanda sunt quae certam habuerunt interpretationem. *Co. Lit.* 365.—*Common observance [or opinion] is not to be departed from; and things which have had a certain interpretation are in no wise to be changed.*

A digniori fieri debet denominatio et resolutio. *Wing.* 265.—When a thing (of which there are various degrees and qualities) is indefinitely mentioned, *the principal and most worthy thing shall be intended.*

A principalioribus seu dignioribus est inchoandum. *Co. Lit.* 18.—*We are to begin with the most worthy and principal parts.*

A scriptis valet argumentum. *Co. Lit.* 11 a.—*An argument drawn from original writs, in the register, is good.*

A summo remedio ad inferiorem actionem, non habetur ingressus, neque auxilium. *Fleta, l. 6, c. 1.*—After having pursued a writ of right, *the highest remedy known to the law, there can neither be, recourse to, nor assistance desired from, an inferior action.** [Or, in the words of *Blackstone*, “After issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.” *3 Bl. Com.* 193.]

A verbis legis non est recedendum. *5 Co. 118.*—*The words of the law are not to be departed from.*

Ab assuetis non fit injuria. *Jenk. Cent. Introd.* p. viii.—*From things to which we are accustomed no injury arises.*

Abbreviationum, ille numerus et sensus accipiendus est, ut concessio non sit inanis. *9 Co. 48.*—*In abbreviations, that number [whether singular or plural] and that sense is to be taken by which the grant is not rendered void.*

[Abearance.—Behaviour.—Good abearance, means good behaviour. *4 Bl. Com.* 256; *1 Hen. Stat. at Lar.* 535.]

[Abeyance.—Expectation, remembrance, or contemplation of law. *T. L. 6;* *2 Bl. Com.* 106.—Whether a freehold can be in abeyance, has been a much controverted point. See *2 Bl. Com.* 107, *Christian's note (2); Fearne's Cont. Rem.* 441, 5th edit.]

[*The author of *Fleta*, in the sentence from which the extract in the text is taken, is speaking of the *writ of right*; and the above paraphrase evidently conveys the true sense.]

Absoluta sententia expositore non indiget. 2 *Inst.* 533.—
An absolute sentence [without any saving] requires no expositor.

[**Absque hoc.**—*Without this.*—The technical words used in pleading a *traverse*. 1 *Saund.* 22.]

Absurdum est affirmare, (re *judicata*) *credendum esse, non judici.* 12 *Co.* 25.—*It is absurd to affirm that confidence is to be placed in the record of a judgment or sentence of a court, and not in the Judge.*

Abundans cautela non nocet. 11 *Co.* 6.—*Abundant caution does no injury.*

Accessories, there are none in treason, trespass, or petit larceny. 4 *Bl. Com.* 35.

Accessoriū non dicit, sed sequitur suūm principale. *Co. Lit.* 152.—*That which is accessory does not lead, but follows its principal.*

Accessoriū sequitur naturam sui principalis. 3 *Inst.* 139.—*An accessory follows the nature of his principal.*

Accord with satisfaction is a good plea, in personal actions, when damages only are to be recovered, but not so in real actions. 4 *Co.* 1. [*Yet an arbitrator may award a conveyance or a release of land; and it will be a breach of the arbitration-bond to refuse compliance.* 3 *Bl. Com.* 16.]

Accusare nemo se debet, nisi coram Deo. *Hard.* 139.—*No one is bound to accuse himself except before God.*

Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit. *Moor*, 817.—*An accuser ought not to be heard after the expiration of a reasonable time, unless he can account satisfactorily for not having made his accusation within such time.*

[**Ac etiam.**—*And also.*]

Acquittance for the last payment, all other arrearages are discharged. *Noy. Max.* 40.

[**Act of God shall do neither party an injury.** 10 *Vin. Abr.* 407, 410.]

[**Act of the law doth wrong to no man.** 11 *Vin. Abr.* 26.]

Act of repeal being repealed, the first act repealed is thereby revived. 1 *Bl. Com.* 90. [*Otherwise in Virginia, see act of 1789, c. 9. § 2; 13 Hen. Stat. at Lar. 9; 1 Rev. Code of 1819, p. 138.*]

Acta exteriora indicant interiora secreta. 8 *Co.* 146.—*The secret intentions of the mind are manifested by the outward actions.*

Actio est jus prosequendi in judicio quod alicui debetur.

3 Bl. Com. 116.—An action is the right of prosecuting to judgment that which is due to any one.

Actio non datur non damnificato. Jenk. Cent. 69.—No action is given where no injury is sustained.

Actio personalis moritur cum persona.—A personal action dies with the person. [i. e. An action merely personal, arising ex delicto, for a tort, but not an action arising ex contractu, from contract. 3 Bl. Com. 302. See also Noy's Max. 14, and notes for illustrations.]

Actio pœnalis in hæredem non datur, nisi forte ex damno locupletior hæres factus sit. Vin. Comm. 756.—A penal action lies not against the heir, unless he is benefitted by the wrong.

Actio quælibet it sua via. Jenk. Cent. 77.—Every action proceeds in its own peculiar course.

Action, for a common nuisance, lies not. It is indictable only. 4 Bl. Com. 167.

Action personal, once suspended, is extinct. Hob. 10. [i. e. An action personally suspended. See Noy's Max. 29.]

Actionum quædam sunt in rem, quædam in personam, et quædam mixtæ. Co. Lit. 284.—Some actions are for the recovery of the thing, some against the person and some mixed.

Actor sequitur forum rei. Home's L. T. 232.—The plaintiff follows the court of the defendant. [i. e. The plaintiff must sue in that court which has jurisdiction over the defendant.]

Actori incumbit onus probandi. Hob. 103.—Probatio.—The burden of proof lies on the plaintiff.

Actus curiæ neminem gravabit. Jenk. Cent. 118.—The act of the court hurts no one.

Actus { Dei } nemini facit injuriam. 5 Co. 87.—The act { legis } of God, or the act of the law, does injury to no one.

Actus { Dei } nemini est damnosus. 2 Inst. 287.—The act { legis } act of God, or the act of the court, is injurious to no one.

Acts restrictive of common law are to be strictly taken in the point of restraint. 10 Mod. 282.

Acts in pari materia (relating to the same subject) are to be taken together as if they were one law. Doug. 30; 2 Vent. 246; [2 Cranch 399.]

[Acts authorising summary convictions are always strictly construed. 3 Caines 259.]

[Acts creating new jurisdictions ought to be construed strictly. 6 Bac. Abr. 392.]

[See further as to the construction of statutes. *6 Bac. Abr. STATUTE (I) p. 379. et seq.*]

Actus incepitus cuius perfectio pendet voluntate partium, revocari potest; si autem pendet ex voluntate tertiae personæ, vel ex contingentibus, revocari non potest. Bacon.—An act already begun, the completion of which depends on the will of the parties, may be recalled; but if it depends on the will of a third person, or on a contingency, it cannot be recalled.

Actus legitimi non recipiunt modum. Hob. 153.—Authorities given by law must be executed in the mode prescribed by law, and admit of no qualification. 17 Vin. Abr. 354.

Actus me invito factus, non est meus actus.—An act which I am compelled to do against my will is not my act.

Actus non facit reum, nisi mens sit rea. 3 Inst. 107.—The act itself does not make a man guilty, unless it be done with a criminal intent. [Q.F.] This maxim is exclusively applicable to criminal cases; for a man would be liable to consequential damages, in a civil action, for an act, for the perpetration of which, under the influence of this maxim, he could not be punished criminally. See 5 Vin. Abr. 404, pl. 9, and the cases there cited.]

Additio probat minoritatem. 4 Inst. 80. Wing. 211.—An addition proves minority.

[*Addition.—The title or estate and place of abode given to a man besides his name.*]

Ad ea quæ frequentius accident jura adaptantur. 2 Inst. 137. Wing. 716.—The laws are adapted to those cases which most frequently occur.

[*Ademption.—The taking away of a legacy, by the testator's appropriating it during his life-time.*]

[*Ad finem.—To the end.*]

[*Ad infinitum.—Without end.*]

Adjournamentum est ad diem dicere, seu diem dare. 4 Inst. 27—An adjournment is to appoint a day, or to give a day.

[*Ad libitum.—At pleasure.*]

[*Administration granted in a foreign country will not entitle the executor or administrator to sue in this. 1 Cranch 259; 3 Cranch 319, 323.*]

Admiralty.—Not to hold plea of matters cognizable at law. 3 Bl. Com. 106.

Ad officium justiciariorum spectat, unicuique coram eis placitanti justitiam exhibere. 2 Inst. 451.—It is the duty of justices to administer justice to every man seeking it from them.

Ad proximum antecedens fiat relatio, (nisi impediatur sententia.) Jenk. Cent. 180. Noy. Max. 4.—Let the antecedent relate to that which follows next to it, (unless a sentence intervene.)—[Or, “Words in construction must be referred to the next antecedent, where the matter itself doth not hinder it. Wing. Max. 10. p. 15.]

Ad quæstiones facti non respondent judices; ad quæstiones legis non respondent juratores. Co. Lit. 295.—The judges answer not to matters of fact; the jury answer not to questions of law.

[Ad quod damnum.—A writ which issues to ascertain, by a jury, to what damage it will be to condemn private property, for public purposes.]

Ad recte docendum oportet primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet. Co. Lit. 68. In order to be properly instructed, it is necessary first to ascertain the etymology and meaning of words: for the knowledge of things depends on the names of things.

[Ad valorem.—According to the value.—Thus, ad valorem duties are a per centage on the invoiced price of certain articles.]

Ædificare in tuo proprio solo non licet quod alteri noceat. 3 Inst. 201.—A man must build on his own land in such a manner as not to injure another.

[Æquior est dispositio legis quam hominis. 18 Vin. Abr. 321, pl. 23, note; 8 Co. 152.—The disposition of the law is more equal than that of man.]

Æquitas est convenientia rerum quæ cuncta coæquiparat, et quæ, in paribus rationibus paria jura et judicia desiderat. Co. Lit. 24 b.—Equity [of a statute] is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief, shall be within the same remedy.

Æquitas est correctio legis generaliter latæ, qua parte deficit. Plow. 375.—Equity is a correction of the law, when too general, in the part where it is defective. 6 Bac. Abr. 386.

Æquitas est correctio quædam legi adhibita, quia ab ea abest aliquid, propter generalem sine exceptione comprehensionem. Plow. 467.—Equity is a certain correction applied to law, where, on account of the general comprehensiveness of the law, particular exceptions not being provided against, something is wanting to render it perfect.

Æquitas est perfecta quædam ratio, quæ jus scriptum interpretatur et emendat, nulla scriptura comprehensa, sed

solum in vera ratione consistens. *Co. Lit. 24.*—*Equity is a sort of perfect reason, which interprets and amends the written law; it is not contained in any code, but consists in right reason alone.*

Æquitas est quasi æqualitas. *Co. Lit. 24.*—*Equity is as it were equality.*

Æquitas est verborum legis sufficiens directio, quæ unares, solummodo, caveter verbis, ut omnis alia in æquali genere, iisdem cavetur verbis.—*Equity is the proper and efficient application of the words of the law, so that although only one thing is guarded against by the words of the law, yet every thing else being of the same nature, is also guarded against by those same words.*

Æquitas sequitur legem. *Gibl. 136.*—*Equity follows law.*

Æquum et bonum, est lex legum. *Hob. 224.*—*What is equal and good, is the law of laws.*

Æstimatio præteriti delicti, ex postremo facto, nunquam crescit. *Bacon.*—*The estimation of a crime, already committed, never increases from a subsequent fact.*

[A facto ad jus non datur consequentia.—*An inference from the fact to the law is not admissible. A general law is not to be controlled by a particular precedent.*]

Affectio tua nomen imponit operi tuo. *Gibl. Uses 57.*—*The party's own words may declare the intent of the act.*

Affectus punitur licet non sequitur effectus. *9 Co. 57.*—*The intention is punished, although the consequence follows not.* [This relates to an illegal confederacy.]

[Affidavit.—*An oath in writing.*—Affidavits differ from depositions, in this: that they are generally voluntary; do not require a commission to authorise the taking of them; and are generally used on motions; as to dissolve injunctions and the like.]

Affinitas dicitur, cum duæ cognationes, inter se divisæ, per nuptias copulantur, et altera ad alterius fines accedit. *Co. Lit. 157.*—*It is called affinity, when two families divided from each other are united by marriage, and one of them approaches the confines of the other.*

Affirmativum, negativum implicat.—*An affirmative implies a negative.*

[A fortiori.—*With greater reason.* *4 Bl. Com. 292.*]

Agentes et consentientes, pari poena plectentur. *5 Co. 80.*—*The parties acting, and the parties consenting, are liable to the same punishment.*

[Agistment.—*The taking in of horses or cattle to pasture.* *2 Bl. Com. 452.*]

Agreements and contracts must be on good consideration, or mutual recompense. Noy. Max. 24; 2 Bl. Com. 445.

[*Alias.—Otherwise.*]

[*Alibi.—In another place.* A defence frequently resorted to in criminal prosecutions.]

[*Alias dictus.—Otherwise called.*]

[*Alien.—To alien (alienare) is to transfer lands to another.—An alien (alienus) is a person of another nation, or allegiance.* Cowel Int.]

Alienigena, est alienæ gentis, seu alienæ ligamentiæ, qui etiam dicitur peregrinus, alienus, exoticus, extraneus, &c. 7 Co. 16.—An alien is of another nation, or allegiance; he is also called a stranger, foreigner, &c. &c.

Alienatio, i. e. alienum facere; vel, ex nostro dominio in alienum transferre; sive, rem aliquam in dominium alterius transferre. Co. Lit. 118.—Alienation is to make alien, or to transfer from our dominion into a foreign one, or to transfer any thing into the power of another.

Alienatio licet prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri; et, quilibet potest renunciari juri pro se introducto. Co. Lit. 98.—Although alienation be prohibited, yet by the consent of all those in whose favour it is prohibited, it may take place; for it is in the power of every man to renounce a law made in his own favour.

Alienatio rei præfertur juri accrescendi. Co. Lit. 185.—Alienation is preferred to the right of survivorship.

Alimentorum appellatione venit victus, vestitus et habitatio. 2 Inst. 17.—The word “aliment” includes food, clothes and habitation.

[*Alimony.—The maintenance allowed to a wife, in case of separation from her husband.*]

Aliquid conceditur ne injuria remaneat impunita, quod alias non concederetur. Co. Lit. 197.—Something is conceded which otherwise would not be conceded, lest an injury should remain without remedy.

Aliter puniuntur ex eisdem factionibus servi, quam liberi; et aliter qui quidem aliquid in dominum, parentemve commiserit, quam in extraneum; in magistrum, quam in privatum. 3 Inst. 220.—Slaves and children are punished differently for the same action; actions committed against persons in the capacities of masters or parents, are punishable differently from actions committed where such a connexion exists not; there is a difference also observed where the party offended is a magistrate, and where only a private person.

Aliquis non debet esse judex in propria causa; quia non potest esse judex et pars. *Co. Lit.* 141.—*No one should be judge in his own cause, because he cannot be both a party and a judge.*

Aliud est possidere, aliud esse in possessione. *Hob.* 163.—*It is one thing to possess, another to be in possession.*

[Aliunde.—*From some other person or place. From a different source.*]

All argumentation is a notioribus. *Hob.* 163. [i. e. from things comparatively but not fully known.]

All the term but one day in law. 1. *Wils.* 37; *Jacob. L. D.* tit. *TERMS.*

Allegans contraria non est audiendus. *Jenk. Cent.* 19.—*A party offering evidence, repugnant to his plea, is not to be heard.*

Allegans suam turpititudinem non est audiendus. 4 *Inst.* 279.—*He who alleges his own infamy is not to be heard.*

Allegari non debuit quod probatum non relevat. 1 *Chan. Cas.* 45.—*That which if proved would not be relevant, ought not to be alleged.*

[*Allegata et probata.*—*Alleged and proved.* *Hob.* 163.]

[*Allocatur.*—*It is allowed.*—*Non allocatur.*—*Not allowed.*—*Overruled.*]

[*Allodial.*—*Free lands, held of no superior.* 2 *Bl. Com.* 47, 60. *Jacob's L. D.*]

[*Alluvion.* The gaining of land from the sea. 2 *Bl. Com.* 262. *Harg. L. Tracts.* 28; 2 *Johns Rep.* 313; 3 *Mass. T. R.* 352.]

[*Almanac.*—Received as evidence by inspection. 3 *Bl. Com.* 333.]

Alternativa petitio non est audienda. 5 *Co. 40.*—*The demand of a thing [in a writ] in the disjunctive, is not to be heard.*

Ambigua responsio contra proferentem est accipienda. 10 *Co.* 59.—*An ambiguous answer, [or plea] is to be taken [most strongly] against him who offers it.*

[*Ambiguitas latens.*—*A latent ambiguity. Not apparent on the face of the deed.*]

[*Ambiguitas patens.*—*A patent ambiguity, apparent on the face of the deed.*—See *Noy's Max.* 148 note (h).]

[*Ambiguum pactum contra venditorem interpretandum est.*—*An ambiguous deed or contract, is to be expounded against the seller or grantor.* See *Noy's Max.* 36 & notes.]

Branch's Principia, &c.—3

Ambiguum placitum interpretari debet contra proferentem. *Co. Lit.* 303 b.—*An ambiguous plea is to be interpreted [most strongly] against the party tendering it.*

Ambiguitas verborem latens, verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur. *Bacon.*—*A hidden ambiguity of the words is supplied by the verification; for whatever ambiguity arises concerning the deed itself, is removed by the verification of the deed.*

[*A mensa et thoro.*—*From bed and board.* A partial divorce, as distinguished from *a vinculo matrimonii*, a total divorce. 1 *Bl. Com.* 440.]

[*Amicus curiae.*—*A friend of the court.* One who gives his advice to the court, when not counsel in the cause.]

Angliae jura in omni casu libertatis dant favorem. Fortesc. c. 42.—*The laws of England in all cases of liberty are favourable.*

[*Auglice.*—*In English.*]

Animalia fera, si facta sint mansueta, et ex consuetudine eunt et redeunt, volant et revolant, ut cervi, cygni, &c. eosque nostra sunt, et ita intelliguntur quamdiu habuerunt animum revertendi. 7 *Co. 16.* (*the case of swans.*)—*Wild animals, if tamed, and accustomed to go out and return, fly away and fly back, as stags, swans, &c. are so far our property, and considered to belong to us, as they possess the intention when they leave us of returning to us again.*

[*Animo furandi.*—*With a felonious intent.* 4 *Bl. Com.* 232.]

Animus hominis est anima scripti. 3 *Bulst.* 67.—*The intention of a man is manifested by his writing.*

[*Animus revertendi.* 2 *Bl. Com.* 392.—*The intention of returning.*]

[*Anno Domini*, (abbreviated *A. D.*)—*In the year of our Lord.* The computation of time from the incarnation of our Saviour.]

[*Anno Mundi.*—(abbreviated *A. M.*) *In the year of the world.* From the creation.]

[*Anno Reipublicæ Conditæ.*—(abbreviated *A. R. C.*)—*In the year of the foundation of the republic.*—In the year of the Commonwealth.—So denoted in the margin of the Revised Code of the laws of Virginia, edi. 1819.]

[*Anno Urbis Conditæ.*—(abbreviated *A. U. C.*)—*In the year of the building of the city.* The initials *A. U. C.* are

used in the Roman Chronology to denote the period of time from the building of the city.]

A non posse ad non esse sequitur argumentum necessarie negative, licet non affirmative.—*Hob. 336.*—*If a thing is impossible, an argument in the negative may be deduced, viz. that it has no existence; but an argument in the affirmative cannot be deduced, viz. that if a thing is possible, it is in existence.*

Annuas, aut debitum, judex nec separat ipsum. 8 *Co. 52.*—*The judge makes not annuity or debt, divisible.*

[Antecedent general words shall be restrained by particular words following, but not e contra. 14 *Vin. Abr.* 61 pl. 40; *Carth.* 120; *Co. Lit.* 154 b.]

Apices juris non sunt jura. *Co. Lit.* 304.—*Points of law are not laws.*

[A posteriori.—*From the latter.*]

[A priori.—*From the former.*]

Appellatione fundi, omne ædificium et omnis ager continetur. 4 *Co. 87.*—*The word "fundus" includes every building and portion of ground.*

Applicatio est vita regulæ. 2 *Buls.* 79.—*The application [of the principle] is the life of the rule.*

Arbitramentum est boni viri, arbitrium. 3 *Buls.* 66.—*Arbitrament is the award of a good man.*

Arbitrium est judicium. *Jenk. Cent.* 137.—*In award is a judgment.*

Arbitrium est judicium boni viri, secundum æquum et bonum; and therefore to be favourably construed. 3 *Buls.* 64.—*An award is the judgment of a good man, according to truth and justice.*

Arbor, dum crescit; lignum cum crescere nescit. 2 *Buls.* 82.—*A tree is so called whilst growing; when it ceases to grow, it is called wood.*

Argumenta ignota et obscura ad lucem rationis proferrunt et reddunt splendida. *Co. Lit.* 395.—*Arguments bring hidden and obscure things to the light of reason, and render them lucid.*

Argumentum ab impossibili, plurimum valet in lege. *Co. Lit.* 254.—*An argument drawn from an impossibility avails greatly in law.*

Argumentum ab autoritate est fortissimum in lege. *Co. Lit.* 254.—*In argument from authority is strongest in law.*

Argumentum ab inconvenienti est validum in lege quia lex non permittit aliquod inconveniens. *Co. Lit.*

258.—*An argument from what is inconvenient is good in law; for the law will not permit an inconvenience.*

Argumentum a divisione, est fortissimum in jure. 6 Co. 60. Wing. 260.—*An argument drawn from a division is strong in law.*

Argumentum a majori ad minus, negative non valet; valet e converso. Jenk. Cent. 281.—*An argument drawn from the greater to the less is of no force negatively; affirmatively it is.*

Argumentum a simili, valet in lege. Co. Lit. 191.—*An argument from a similar case is good in law.*

Arma in armatos sumere jura sinunt. 2 Inst. 574.—*The laws permit arms to be used against armed men.*

Armorum appellatione, non solum scuta et gladii et galeæ continentur sed et fustes et lapides. Co. Lit. 162.

—*Under the word arms, are included not only shields, swords and helmets, but also clubs and stones.*

Ars fit quod a teneris primum conjungitur annis. 3 Inst. Epil.—*That becomes an art which is taught us in our infancy.*

[Assumpsit—*He assumed:—An action founded on a contract express or implied by law.*]

Attornament may be on a condition precedent. Pres. Shep. Touch. 116.

Aucupia verborum sunt judice indigna. Hob. 343.—*A catching at words is unworthy of a judge. [i. e. the forming an opinion, from a word, instead of the context.]*

[Audita querela.—*A remedial writ, by which, after judgment, the complaint of the defendant being heard, he is relieved, on account of some matter of discharge which has happened since the judgment. 3 Bl. Com. 405.]*

[Auterfoits acquit.—*A former acquittal. 4 Bl. Com. 335.]*

Authoritates philosophorum, medicorum et poetarum, sunt in causis allegandæ et tenendæ. Co. Lit. 264.—*The authority of philosophers, physicians and poets, is to be alleged and respected, in legal proceedings.*

[Averment is vain if the law judge the contrary. Hob. 156.]

[A vinculo matrimonii.—*From the bond of marriage.—A total divorce. 1 Bl. Com. 440.]*

[Baron and Feme.—*Husband and Wife.]*

Bastardus dicitur a Græco verbo Bassaris, i. e. meretrix seu concubina. Co. Lit. 243 b.—*A bastard is so called from the Greek word "basaris," a strumpet or concu-*

bine. [But this derivation is rejected by Sir Henry Spelman, who holds it to be a pure Saxon word *Bastart*, that is, sprang from a base or spurious origin; as an *upstart*, is *homo novus* [*a new man*] a person suddenly emerging from a mean or obscure extraction. See *Harg. Co. Lit.* 243. b. note (2).]

[*Bastard* is *filius nullius*, (*the son of nobody*) or *filius populi* (*the son of the people*) 1 Bl. Com. 459.]

Benedicta est expositio quando res redimitur a destructione. 4 Co. 26.—*That exposition is commended by which any thing is saved from destruction.*

Benigne faciendae sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat. Co. Lit. 36.—*Interpretations are to be favourably made, on account of the simplicity of the laity, that the thing may rather be good than void.*

Benignior sententia in verbis generalibus seu dubiis, est præferenda. 4 Co. 15.—*In general and doubtful words the most favourable sense is to be preferred.*

Bigamus seu trigamus, &c. est qui diversis temporibus et successive duas seu tres uxores habuit. 4 Inst. 88.—*A bigamus or trigamus, &c. is one who at different times and successively has had two or three different wives.*

Bis idem exigi bona fides non patitur; et in satisfactoribus, non permittitur amplius fieri quam semel factum est. 9 Co. 53.—*Good faith does not permit the same thing to be demanded twice, nor will it suffer a man to receive more than one satisfaction, for the same debt or demand.*

[*Bona fide. In good faith. Without fraud.*]

[*Bona notabilia.—The goods and chattles of a decedent.*]

2 Bl. Com. 509.]

Boni judicis est ampliare jurisdictionem. Chan. Prec. 329.—*It is the duty of every court to extend the arm of justice further than usual, when otherwise there would be a failure of justice.*

Boni judicis est judicium sine dilatione mandare executioni. Co. Lit. 289.—*It is the duty of a good judge to cause judgment to be executed without delay.*

Boni judicis est causas litium dirimere. 2 Inst. 304.—*It is the duty of a good judge to remove the causes of litigation.*

Boni judicis est lites dirimere. 4 Co. 15.—*It is the duty of a good judge to put a stop to litigation.*

[*Boni judicis est lites dirimere, ne lis ex lite oriatur.* 8 Vin. Abr. 557, pl. 5 note; 5 Co. 31 a. *It is the duty*

of a good judge to put an end to litigation, and not to suffer one suit to beget another.

[*Boni legislatoris est lites dirimere.* 19 *Vin. Abr.* 53 *pl. 1. note*; 2 *Inst.* 322.—*It is the duty of a wise legislator to discourage law-suits.*]

Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. *Co. Lit.* 24.—*A good judge decides according to justice and right, and prefers equity to strict law.*

Bonum defendantis ex integra causa, malum ex quolibet defectu. 11 *Co.* 68.—*The success of a defendant depends on a perfect case, his loss arises from some defect.*

Bonum necessarium, extra terminos necessitatis non est bonum. *Hob.* 144.—*Expediency beyond the bounds of necessity, becomes an evil.*

[*Bonus.*—This word is pure latin, signifying primarily *good*; but it has been *anglicized*, and is applied to the consideration paid by banks, and other corporate bodies, for their charters.]

Breve judiciale debet sequi suum originale, et accessoriū suum principale. *Jenk. Cent.* 291.—*A judicial writ ought to follow its original, and an accessory its principal.*

Breve judiciale non cadit pro defectu formæ. *Jenk. Cent.* 43.—*A judicial writ does not fail through defect of form.*

Brevia, tam originalia quam judicialia, patiuntur Anglica nomina. 10 *Co.* 133.—*Both original and judicial writs are susceptible of English names.*

Brevis via per exempla, longa per præcepta. *Co. Lit.* 230.—*The way by examples is short, by precepts long.*

Breve ita dicitur, quia rem de qua agitur, et intentionem petitionis, paucis verbis, breviter enarrat. 2 *Inst.* 39.—*A writ [breve] is so called because the subject matter of it and the intention of the party seeking relief are told [breviter] in few words.*

[*Brutum fulmen* } *Hob.* 156. *Harmless thunder and*
[*Bruta fulmina* } *lightning.* Loud ineffectual menace. Full of noise and fury, and nothing else. Applied, in England, to the pope's bulls, by way of derision. *Hobart's Rep.* ubi supr.a.]

[*Capias.*—From one of the initial words, while legal proceedings were in Latin, is a *writ* which issues either before judgment, or an *execution* which issues afterwards.

commanding the sheriff that *he take* the defendant, &c.
T. L. 109.]

[Capias ad respondendum.—A writ commanding the sheriff to take the body of the defendant, *to answer* the plaintiff's demand. 3 Bl. Com. 281.]

[Capias ad satisfaciendum, (abbreviated—*Ca. Sa.*) An execution, by which the sheriff is commanded to take the body of the defendant, *to satisfy* the plaintiff's judgment. 3 Bl. Com. 414.]

[Capias pro fine.—A process which issues, *for a fine*. 3 Bl. Com. 398.]

[Capias utlegatum.—A process against an outlaw. 3 Bl. Com. 284.]

[Capita.—Distribution or succession *per capita*, is when the estate goes to every person in an equal degree, claiming in their own rights, and not in right of representation. 2 Bl. Com. 517, 218.]

Carcer ad homines custodiendos, non ad puniendos, dari debet. Co. Lit. 260.—*A prison is for the safe custody, not for the punishment of men.*

Casus fortui- { sperandus } et nemo tenetur divi-
tus non est { supponendus; } nare. 4 Co. 66.—*A for-
tuitous event is neither to be foreseen nor expected; and no
one is to be considered as having the power of divination.*

[Casus omissus.—*An omitted case. Chiefly applied to statutes.*]

Casus omissus et oblivioni datus, dispositioni communis juris relinquiter. 5 Co. 37.—*A case omitted and given to oblivion is left to the disposal of the common law.*

Causa dotis, vitae, libertatis, fisci, sunt inter favoribilia in lege. Jenk. Cent. 284.—*Causes of dower, life, liberty, of fiscal concern, are among the things favoured by the law.*

Causa et origo est materia negotii. 1 Co. 99.—*The cause and origin are the essential parts of the act.*

Causa vaga et incerta non est causa rationabilis. 5 Co. 57.—*A vague and uncertain cause is not a reasonable cause.*

Catalla reputanter inter minima in lege. Jenk. Cent. 52.—*Chattels are esteemed, in the law, among the lowest species of property.*

[Caveat.—A process which operates as a *caution* to the proper officer; and is issued to prevent the emanation of a grant, &c. In England it issues from the *spiritual courts*, to stop the probate of a will, &c. 1 Burn. E. L. 264.]

[*Caveat emptor.—Let the purchaser beware.*]

Caveat emptor; qui ignorare non debuit quod jus alienum emit. Hob. 99.—*Let the purchaser beware; who ought not to be ignorant of what right he buys of another.*

[*Cepi corpus.—A return made by the sheriff that he has taken the body of the party.* T. L. 116.]

Certa debet esse intentio, et narratio, et certum fundatum, et certa res quæ deducitur in judicium. Co. Lit. 303.—*The declaration ought to contain certainty and verity, for that is the foundation of the suit; and the question to be decided, ought to be certain.*

[*Certiorari.—A writ directing the record of a cause to be brought before a superior court.*]

Certum est quod certum reddi potest. 9 Co. 47. Co. Lit. 6. a.—*That is certain which can be rendered certain.*

Cessante causa, cessat effectus. 11 Co. 49. Wing. 29.—*The cause ceasing, the effect ceases.*

Cessante primitivo, cessat derivativus. Co. Cop. § 34.—*The primitive ceasing, the derivative ceases.*

Cessante ratione legis, cessat ipsa lex. Co. Lit. 70.—*The reason of the law ceasing, the law itself ceases.*

Cessante statu primitivo, cessat derivativus. 8 Co. 34.—*The original estate ceasing, that which is derived from it also ceases.*

Chancery controllable only by parliament.

In chancery every case stands on its own particular circumstances.

Three things are to be judged in court of conscience: covin, accident, and breach of confidence. 4 Inst. 84.

Charity to pursue the intent of the founder.

[*Cestui que trust,—is he for whose benefit the trust of an estate is committed; the person to whom it is committed is called the trustee.* Sand. U & T. 61, 62; 1 Cru. Dig. 492; Sugd. Vend. 401.]

[*Cestui que use,—is he for whose use an estate is conveyed to another; the person to whom it is conveyed is called the feoffee.* Sand. U. & T. 27; 1 Cru. Dig. 429; 2 Bl. Com. 328.]

[*Cestui que vie,—is he on whose life any lands are held.* 2 Bl. Com. 123.]

Charta de non ente non valet. Co. Lit. 36.—*A charter of a thing not in existence is of no avail.*

Charta est legatus mentis. Co. Lit. 36.—*A charter is the representative of the mind.*

Charta non est nisi vestimentum $\left\{ \begin{array}{l} \text{donationis,} \\ \text{orationis.} \end{array} \right\}$ Co.

Lit. 36.—A charter is nothing but the vestment [or reducing to writing] of the gift, or the words spoken.

Chartarum super fidem, mortuis testibus, ad patriam de necessitudine, recurrentum est. Co. Lit. 6.—*Where witnesses are dead, the truth of charters must necessarily be referred to a jury.*

[Charters.—*Writings.* Deeds, instruments, &c. chiefly relating to lands. T. L. 131.]

Charters sont appell *muniements*, a *muniendo*, quia muniunt et defendunt *hæreditatem*. Shep. Abr. tit. *Charters*.—*Charters are called muniements [defences] from muniendo [defend,] because they fortify and defend the inheritance.*

[*Chimin—A way, or road.* T. L. 135. Comy. Dig. tit. *Chimin.*]

[*Chose—A thing.*]

[*Choses in action—Things in action.* See Noy's Maxims 71 note (f) for specification, and the modern determinations as to the husband's right to the wife's choses in action.]

Choses in action, or a right of entry, cannot be granted or transferred to a stranger. Co. Lit. 266.—[But see 2 Bl. Com. 442.]

Circuitus est evitandus; et boni judicis est lites dirimere, ne lis ex lite oritur. 5 Co. 31.—*Circuity of action is to be avoided; and it is the duty of a good judge to put an end to litigations, lest one law-suit arise out of another.*

Clam delinquentes, magis puniuntur quam palam. 8 Co. 127.—*Secret offenders are more severely punished than open ones.*

Clausula generalis.—See *Generalis clausula.*

Clausulæ inconsuetæ semper inducunt suspicionem. 3 Co. 81.—*Unusual clauses always excite suspicion.*

Clausula vel dispositio inutilis, per præsumptionem remotam vel causam ex post facto, non fulcitur. Bacon.—*A clause or disposition that is useless, is not supported by a remote presumption, or an ex post facto cause.*

[*Clausum fregit—He broke the close.*—Thus trespass quare clausum fregit, wherefore the defendant broke the close of the plaintiff. 3 Bl. Com. 209.]

[*Clerk.*—*A clergyman, or minister;* also those who by their functions use their pen, in court or otherwise. T. L. 150. *Cowel Int.*]

Branch's Principia, &c.—3

[*Cocket*.—In old statutes, a warrant, delivered by the officers of the custom-house, to a merchant, certifying that the goods are duly entered. T. L. 150, *Cow. Int.*]

[*Codicil*.—A supplement to a will. 3 Bl. Com. 500.]

Cogitationis pœnam nemo meretur. 2 Inst. Jur. Cir.

658.—No one deserves punishment for his thoughts.

[*Cognizance*, or *Conusance*.—Is sometimes the acknowledgment of a fine, or confession of a thing; sometimes the acknowledgment of making a distress; and sometimes the hearing of a matter judicially, as to take cognizance of a writ, &c. *Cowel. Int.*]

Cognomen majorum est ex sanguine tractum, hoc intrinsecum est; agnomen extrinsecum, ab eventu. 6 Co. 65.—Our cognomen is derived to us through the blood of our ancestors, and is intrinsic to us; our agnomen arises from some event, and is extrinsic.

[*Cognovit actionem*,—is the defendant's confessing the plaintiff's action. 3 Bl. Com. 304, 397.]

Cohæredes sunt quasi unum corpus, propter unitatem juris quod habent. Co. Lit. 163.—Co-heirs are considered as one person, on account of the union of their rights.

Collegium est societas plurium corporum simul habitantium. Jenk. Cent. 229.—A college is a society of many persons living together.

[*Colloquium*—A talking together.—Thus, for words spoken, it must be laid in the declaration, that the defendant, speaking of and concerning the plaintiff, &c. So, in actions on the case it is said a certain discourse was had and moved, &c.—See *Carth.* 90; *Lill. Ent.* 17, 18, 19, 22; *Coupl.* 672.]

[*Colour of office*.—Is always taken in the worst part, and signifies an act wrongfully done by the countenance of an office. But, by reason of the office, and by virtue of the office, is always taken in the best sense. T. L. 156.]

Commercium jure gentium commune esse debet, et non in monopolium et privatum paucorum quæstum converendum. 3 Inst. 181.—Commerce, by the law of nations, ought to be open to all, and not turned to monopoly and the private gain of a few.

Commissioners may have priority, but no superiority among them. 4 Inst. 279.

Commodum ex injuria sua nemo habere debet. Jenk. Cent. 161.—No one ought to be a gainer by his own wrong.

Communis error facit jus. 4 *Inst.* 240.—*Common error becomes right, [or, law.]*

Communis lex est magis digna. 13 *Vin. Abr.* 513, pl. 2. *The common law has the pre-eminence,—[where jurisdictions conflict.]*

Communis opinio, common opinion, is good authority in law—A communi observantia non est recedendum. *Co. Lit.* 186.—*Common observance is not to be departed from.*

[*Compos mentis—A person of a sound mind;—one qualified legally to execute a deed.*]

[*Compendia sunt dispendia, and melius est petere fontes quam sectari rivulos.* *Co. Lit.* 305 b.—*Time saved in consulting abridgments, is often time lost; and it is better to search the fountains, than follow the rivulets.*—“Therefore it is ever good to rely upon the book at large.” *Co. Lit.* 305 b.]

Compromissarii sunt judices. *Jenk. Cent.* 128.—*Arbitrators are judges.*

Conatus, quid sit, non definitur in jure. 2 *Bulst.* 277.

6 Co. 42.—What an “endearouring” is, is not defined in law.

Concessio versus concedentem latam interpretationem habere debet. *Jenk. Cent.* 279.—*A grant ought to be broadly interpreted against the grantor.*

Concordia parvæ res crescunt, et opulentia lites. 4 *Inst.* 76.—*Poverty makes concord, opulence strife.*

Conditio beneficialis quæ statum construit, benigne, secundum verborum intentionem est interpretanda; odiosa, autem, quæ statum destruit, stricte, secundum verborum proprietatem, accipienda. 8 *Co. 90.*—*A beneficial condition, which creates an estate, ought to be construed favourably, according to the intention of the words; but a condition which destroys an estate is odious, and ought to be construed according to the letter of the words.*

Conditio dicitur, cum quid in casum incertum, qui potest tendere ad esse aut non esse, confertur. *Co. Lit.* 201.—*A condition is a quality annexed by him that hath estate, interest or right to the same, whereby an estate, &c. may either be defeated or enlarged, or created upon an uncertain event.*

Conditio præcedens adimpleri debet priusquam sequatur effectus. *Co. Lit.* 201.—*A condition precedent must be fulfilled before the effect can follow.*

Condition—None but parties or privies may take advantage of it. 8 Vin. Abr. 113.

Condition to avoid a freehold cannot be pleaded without deed, but of a chattel it may. Doct. and Stud.

Condition dispensed with, or extinct in part, is wholly gone. Hob. 313.

Condition, words in, shall be taken out of their proper sense, that the matter in question may rather stand than fall. Co. Lit. 213.

Conditions against law, and such as are repugnant or impossible, are void. See Noy. Max. p. 123 note (a).

Conditions which go to the defeasance of an estate, ought to be taken strictly. 20 Vin. Abr. 14.

Conditions precedent must be literally performed; not so of subsequent ones, when the court can make compensation.

Confessio facta in judicio, omni probatione major est. Jenk. Cent. 102.—A confession made in judgment, or a confession of a judgment, is superior to all proof.

Confessus in judicio pro iudicato habetur, et quodammodo sua sententia damnatur. 11 Co. 30.—A man confessing a judgment is considered in the same light as if judgment had been given against him, and, as it were, is condemned by his own sentence.

Confirmare est id quod { firmare. prius infirmum fuit, { firmum facere. } Co. Lit. 295.

To confirm is to strengthen what was before weak.

Confirmare nemo potest priusquam jus ei acciderit. 10 Co. 48.—No one can confirm before the right is in him.

Confirmat usum qui tollit abusum. Moor, 764.—He confirms an use who destroys an abuse.

Confirmatio omnes supplet defectus, licet id quod actuum est ab initio non valuit. Co. Lit. 295 b.—Confirmation supplies all defects, although what had been done was not valid from its commencement.

Confirmatio est nulla ubi donum præcedens est invalidum. Co. Lit. 295 b.—There is no confirmation where the preceding gift is invalid.

[**Congeable—Lawful.**—So, entry congeable. Lit. sec 410; T. L. 181.]

Consanguineus est quasi eodem sanguine natus. Co. Lit. 157.—A relation by consanguinity is, as it were, a person sprung from the same blood.

Conscience must always be founded on some law, and never resisteth the law of man, or addeth to it, but when

such law would be against reason, or the law of God.
Doct. and Stud.

Conscientia dicitur a con et scio, quasi scire cum Deo.
1 Co. 100.—*Conscience is so called from con and scio, to know, as it were, with God.*

Consensus est voluntas multorum, ad quos res pertinet simul juncta. Dav. 48.—*Consent is the will of the many, to whom the thing jointly belongs.*

[*Consensus facit legem—Consent makes the law.*]

Consensus non concubitus facit matrimonium; et consentire non possunt ante annos nubiles. 6 Co. 22.—*The consent, and not the mere junction of the parties, makes the marriage; and the parties cannot consent before marriageable years.*

Consensus tollit errorem. Co. Lit. 126. Wing. 481.—*Consent takes away error.*

Consentientes et agentes pari poena plectentur. 5 Co. 80.—*See Agentes.*

Consilia multorum requiruntur in magnis. 4 Inst. 1.—*The advice of many is requisite in great things.*

Consortio malorum me quoque malum facit. Moor, 817.—*Evil company makes me evil.*

Constructio legis non facit injuriam. Co. Lit. 183.—*The construction of the law works no injury.*

Construction of law may be altered by the agreement of the parties. Noy. Max. 44.

Constructions to be according to what was the beginning, and the cause and subject matter.

Constructions to be according to equity and moderation, to moderate the rigour of the law. Noy. Max. 35.

Consuetudo, contra rationem introducta, potius usurpatio quam consuetudo appellari debet. Co. Lit. 113.—*A custom against reason is rather an usurpation.*

Consuetudo debet esse certa; nam incerta pro nulla habentur. Dav. 33.—*A custom should be certain; uncertain things are held as nothing.*

Consuetudo est altera lex. 4 Co. 21.—*Custom is another law.*

Consuetudo est optimus interpres legum. 2 Inst. 18.—*Custom is the best expounder of the laws.*

Consuetudo et communis assuetudo vincit legem non scriptam si sit specialis, et interpretatur legem scriptam si lex sit generalis. Jenk. Cent. 273.—*Custom and common*

usage overcome the unwritten law, if special, and interpret the written law if the law is general.

Consuetudo ex certa causa rationabili usitata, privat communem legem. *Lit. sect. 169.—A custom grounded in a certain and reasonable cause takes away the influence of the common law.*

Consuetudo præscripta et legitima, vincit legem. *Co. Lit. 113.—A prescriptive and legitimate custom overcomes the law.*

Consuetudo, licet sit magnæ autoritatis, nun quam tamen præjudicat manifestæ veritati. *4 Co. 18.—Custom, though of great authority, must never prejudice manifest truth.*

Consuetudo manerii et loci observanda est. *6 Co. 67.—The custom of the manor and place is to be observed.*

[**Consuetudo pro lege servatur.**—*Custom is held for law.*]

[**Consuetudo regni est communis lex.** *1 Vin. Abr. 216 pl. 8; Cro. Eliz. 10 pl. 5.—The custom of the realm is the common law.*]

Consuetudo regni Angliæ est lex Angliæ. *Jenk. Cent. 119.—The custom of the kingdom of England is the law of England.*

Consuetudo semel reprobata, non potest amplius induci. *Dav. 33.—Custom once disallowed can be brought forward no more.*

Consuetudo volentes dicit, lex nolentes trahit. *Jenk. Cent. 274.—Custom leads the willing, law drags along the unwilling.*

Consuetudo non trahitur in consequentiam. i. e. *Custom is not to be extended to consequences beyond the custom; but within, it may.* *Per Twisden, 3 Keb. 499.*

Contemporanea expositio est optima et fortissima in lege. *2 Inst. 11; 6 Bac. Abr. 386.—Contemporaneous exposition is the best and strongest in law.*

Contestatio litis eget terminos contradictarios. *Jenk. Cent. 117.—The evidence in a law-suit wants contradictory terminations.*

Contingency may not depend on a contingency.

[**Continuando. By continuation.**—Applied to actions of trespass. *3 Bl. Com. 212.*]

[Contra bonos mores—Against good morals.]

[*Contracts are to be judged according to the law of the place where such contracts are made.* *5 Vin. Abr. 511.*]

Contracts to be taken according to the intent of the parties expressed by their own words: Noy. Max. 45, 46.

Contractus est quasi actus contra actum. 2 Co. 15.—
A contract is as it were an act against an act.

Contractus ex turpi causa, vel contra bonos mores, nullus. Hob. 167.—*A contract founded in evil, or against morality, is void.*

Contra negantem principia non est disputandum. Co. Lit. 343.—*Against a man denying principles there is no disputing.*

Contra veritatem lex nunquam aliquid permittit. 2 Inst. 252.—*The law never suffers any thing contrary to truth.*

Contraria allegans, &c. See Allegans contraria.

Contrariorum contraria est ratio. Hob. 344.—*The reason of contrary things is contrary.*

Contrectatio rei alienæ, animo furandi, est furtum. Jenk. Cent. 132.—*The laying hold of a thing not your own, with an intention of stealing it, is theft.*

[*Conventio privatorum non potest publico juri derogare.* Co. Lit. Wing. 746.—*[The agreement of individuals cannot annul the public law.]*]

Convicia si irascaris, tua divulgas, spreta exolescunt. 3 Inst. 198.—*You divulge your own affair if you become enraged enough to vent reproaches. Things despised soon decay of themselves.*

Convitium convitio tegere, est lutum luto porrigerere. 1 Buls. 86.—*To cover reproach with reproach, is to lay mud upon mud.*

Copulatio verborum indicat acceptationem in eodem sensu. Bacon.—*The coupling of words shows their acceptance in the same sense.*

[*Coram nonjudice.*—*Before a tribunal which has no jurisdiction of the cause.]*

[*Coram vobis.*—*A writ of error to correct errors in fact, in the same court, in which the judgment is rendered.* Jacob L. D. tit. ERROR; Lill. Ent. tit. ERROR; and Tidd's App.]

[*Corpus delicti,*—*The whole nature of the offence.]*

Corpus humanum non recipit aestimationem. Hob. 59.—*A human body cannot be valued.*

Corruptio optimi est pessima.—*Corruption of the best is worst.*

[*Costs*—*When payable by executors and administrators.* 3 Bl. Com. 400, Christ. note (5).]

Counsellor nest destre oye, que parle envers presidents.

13 H. 7, 23 a.—A counsellor ought not to be heard who speaks against precedents.

Crescente malitia, crescere debet et poena. **2 Inst. 479.**
—*Punishment ought to increase with increasing crime.*

Crimen falsi dicitur, cum quis illicitus, cui non fuerit ad haec data authoritas, de sigillo regis rapto vel invento, brevia, cartasve consignaverit. **Fleta, l. 1 c. 23.**—*The crimen falsi, is when a man illicitly and without authority for that purpose, signs writs or charters with the king's seal, which he has either found or stolen.*—[But, in a larger sense, *crimen falsi* is taken for *forgery* of any kind.]

[Crimen læsæ majestatis.—*High treason.*]

Crimen læsæ majestatis omnia alia crimina excedit quoad poenam. **3 Inst. 210.**—*The crime of treason exceeds all crimes in its punishment.*

[Crux—*A cross. Cruel punishment.*]

[Cui in vita. A writ, for a widow against him to whom her husband aliened her lands in his life-time; which must contain in it, that *during his life* she could not withstand it. **Reg. Orig. 232;** F. N. B. 193; Jacob L. D.]

[Cui licet quod majus, non debet quod minus est non licere.—*He to whom the greater thing is lawful, has certainly a right to do the lesser thing.*]

Cuilibet in arte sua perito est credendum. **Co. Lit. 125.**—*Every man is to be considered skilful in his own profession.*

Cujusque rei potissima pars est principium. **10 Co. 49.**
—*Of every thing, the chief part is the principle.*

Cujus est dare, ejus est disponere. **2 Co. 71.**—*He who has power to give has power to prescribe the terms of the gift; to annex what conditions soever he pleases.* Wing. 53.

Cujus est divisio, alterius est electio. **Co. Lit. 166.**—*Where one party makes the division, the choice lies with the other party.*

Cujus juris (i. e. jurisdictionis) est principale, ejusdem juris erit accessorium. **2 Inst. 493.**—*The accessory is amenable to the same jurisdiction as the principal.*

Cujus est solum, ejus est usque ad cælum. **Co. Lit. 4.**
—*He who has the property in the soil, has it up to the sky.*

Cuicunque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit. **11 Co. 52.**—*Whoever grants any thing to a man, is supposed also to grant that, without which his grant would be void.*

Cui licet quod majus, non debet quod minus est non licere. 4 Co. 23.—*He to whom the greater is granted, should have the lesser granted to him.*

Cui plus licet quam par est, plus vult quam licet. 2 Inst. 464.—*He to whom more is granted than is just, wants more than is granted.*

Cui pater est populus, pater est sibi nullus et omnis—
Whose father is the people, has no father, and yet every man is his father.

Cui pater est populus, non habet ille patrem. Co. Lit. 123.—*He whose father the people are, has no father.*

Culpa est immiscere se rei ad se non pertinenti. 2 Inst. 208.—*It is culpable in a man to meddle in things not concerning him.*

Culpæ poena par esto. Poena ad mensuram delicti statuenda est. Jur. Civ.—*Let the punishment be proportionate to the crime. Punishment is to be measured by the extent of the offence.*

Cum adsunt testimonia rerum, quid opus est verbis? 2 Buls. 53.—*When the testimony of facts is present, what avails words?*

Cum confidente sponte, mitius est agendum. 4 Inst. 66.—*The behaviour ought to be kind to one confiding willingly.*

Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est. Co. Lit. 112.—*When two things repugnant to each other are found in a will, the last is to be considered good.*

[Cum onore—*With the burden.*—Thus a man takes a wife cum onere, with her debts.]

[Curia advisare vult.—*The court wishes to deliberate.*]

Curia Cancellariae officina justitiae. 2 Inst. 552.—*The court of Chancery is the workshop of justice.*

Curia Parlamenti, suis propriis legibus substitut. 4 Inst. 50.—*The court of Parliament is governed by its own particular laws.*

Curiosa et captiosa interpretatio in lege reprobatur. 1 Buls. 6.—*A curious and captious interpretation of the law is to be reprobated.*

Cursus curiae est lex curiae. 3 Buls. 53.—*The practice of the court is the law of the court.*

Custos statum hæredis in custodia existentis meliorem, non deteriorem, facere potest. 7 Co. 7.—*A guardian may Branch's Principia, &c.—4*

benefit the estate of an heir under his guardianship, but he cannot make it worse.

Custome est un reasonable act—Custom is a reasonable act, iterated, multiplied, and continued by the people;—de temps dont memory ne court—from time to which memory does not reach. Dav. 32.

Custome serre prise stricte. Jenk. Cent. 83.—*Custom is to be construed strictly.*

[*Custos morum.—The guardian of morals.—Every judge and magistrate is custos morum.*]

[*Custos rotulorum.—Keeper of the rolls or records.*]

Customs, particular, must be pleaded.

Customs and prescriptions against reason are void. Co. Lit. 140.

Customs are to be construed strictly. Jenk. Cent. 83.

Da tua dum tua sunt, post mortem tunc tua non sunt. 3 Buls. 18.—*Give what is yours whilst it is yours, after death it is not yours.*

[*Damage feasant—Doing damage.—As to distrain cattle damage feasant.* 3 Bl. Com. 6.]

[*Damnum absque injuria.—A loss without an injury.*—Thus in a fair competition in any business or profession, though the success of the one may produce a loss to the other, it is nevertheless *damnum absque injuria*; as, in the establishment of a school in the same neighbourhood, where one before existed by which the scholars are drawn away. 3 Salk. 10; 11 Vin. Abr. 86.]

[*De bene esse.—To be good for the present; but not if the party has it in his power to proceed by the ordinary method.* 3 Bl. Com. 383, Tidd's Pract. 222.]

[*Debet et detinet.—He owes and detains.* If an action of debt be brought against the *contracting party*, or the *heir*, where the heir is *expressly bound*, it must be in the *debit et detinet* (1 Esp. N. P. 216). So, debt *may* be brought against an executor, suggesting a *devastavit*, in the *debit and detinet*; *Ibid.* 217, but if it be brought in the *detinet* only, it is good, at least, after verdict; but the judgment must be *de bonis testatoris* (3 East. 2). So, where the executor sells goods of the testator, and brings debt for the money; or takes a bond in his own name calling himself executor, &c. the action must be in the *debit and detinet*, (1 Esp. N. P. 218). But if it be brought by *or against an executor or administrator* for a debt due to or from the testator or intestate, it must be in the *detinet* only. (1 Esp. N. P. 217, 218; 3 Bl. Com. 156.)]

Debet esse finis litium. *Jenk. Cent.* 61.—*There ought to be an end of law-suits.*

Debet quis juri subjacere, ubi deliquit. *3 Inst.* 34.—*Every one ought to be amenable to the law of the place where he commits the offence.*

Debitum et contractus sunt nullius loci. *7 Co. 3.*—*Debt and contract are of no place.*

Debitor non præsumitur donare. *Jur. Civ.*—*A debtor is not presumed to give.*

Debile fundamentum fallit opus. *3 Co.* 231.—*A weak foundation destroys the superstructure.*

[Debitum in præsenti, solvendum in futuro.—*A present debt, to be paid in future.* *18 Vin. Abr.* 220.]

[*De bonis propriis.*—*Of his own proper goods.*]

[*De bonis testatoris.*—*Of the goods of the testator.*]

Decretum est sententia lata super legem.—*A decree is a sentence pronounced upon the law.*

[Dedimus potestatem.—Usually applied to a commission to take depositions; so called from the initial words of the writ, while all the proceedings were in Latin.]

[*De facto.*—*In fact;* as contra-distinguished from *de jure, of right.*]

Deficiente uno sanguine, non potest esse hæres. *3 Co.* 41.—*The blood failing, there can be no heir.*

De fide et officio judices, non recipitur quæstio; sed de scientia, sive error sit juris sive facti. *Bac. Max. Reg.* 17.—The law doth so much respect the certainty of judgments, and the credit and authority of the judges, that it will not permit any error to be assigned, that impeacheth them in their trust and office, and in wilful abuse of the same; but only in ignorance and mistaking either of the law or of the case and matter of fact. *Bac. Law Tracts* 82.

Delegata potestas non potest delegari. *2 Inst.* 597.—*A delegated power cannot be again delegated.*

Delegatus debitor est odiosus in lege. *2 Buls.* 148.—*A delegated debtor is hateful in law.*

Deliberandum est diu quod statuendum est semel. *12 Co.* 74.—*What is resolved once for all, should be long considered.*

Delinquens per iram provocatus, puniri debet nitius. *3 Inst.* 55.—*A delinquent provoked by rage ought to be punished with less rigour.*

[*De mediatate linquæ.*—*Jurors, where aliens are parties, are to be, the one half aliens, the other half citizens or subjects of the country where the fact is tried.* 3 *Bl. Com.* 360; 4 *Bl. Com.* 352.]

[*De melioribus damnis.*—*The election given the plaintiff, in an action of trespass, to take judgment of the greater damages, where there is judgment against two or more defendants.* 1 *Wils.* 30.]

De minimis non curat lex. *Pl. Com.* 329.—*The law doth not regard trifles.*

De morte hominis nulla est cunctatio longa. *Co. Lit.* 134.—*In an affair of life and death, no delay is to be considered long.*

[*De mortuis nil nisi bonum.* *Wing.* 498.—*Let nothing but good be said of the dead.*]

Denominatio fieri debet a dignioribus.—*See a dignioribus.*

De nomine proprio non est curandum cum in substantia non erretur; quia nomina mutabilia sunt, res autem immobiles. 6 *Co. 66.*—*Where there is no error as to the thing itself, an error in the name of it is not regarded; for names are changeable, whereas the things themselves are immutable.*

De non apparentibus, et non existentibus, eadem est ratio. 5 *Co. Caudrey's Case.*—*The same rule applies to things which do not appear, as to those which do not exist.*

[*De novo.*—*Anew. Over again.*]

De nullo, quod est sua natura indivisible, et divisionem non patitur, nullam partem habebit [vidua] sed satisfaciat ei ad valentiam. *Co. Lit.* 32.—*The widow shall have no part of that which is in its nature indivisible, and will not undergo division; but let her be satisfied with something of equal value.*

[*De quarentina habenda.*—*A writ given to a widow, who is ejected from the mansion-house of her deceased husband, before her dower is assigned her.*]

Derivativa potestas non potest esse major primitiva. *Noy. Wing.* 66.—*A derivative power cannot be greater than the power whence it is derived.*

Descent after seisin takes away entry. *Noy. ch. 16.*

[*Descriptio personæ.*—*A description of the person.*]

Designatio unius personæ est exclusio alterius, et expressum facit cessare tacitum. *Co. Lit.* 210 a.—*The de-*

signation of one person is the exclusion of another, and what is expressed excludes what is not expressed.

De similibus ad similia eadem ratione procedendum est.
—*From things similar to things similar we are to proceed by the same rule.*

De similibus idem est judicium. 7 Co. 18.—*In similar cases the judgment is similar.*

Deus solus haeredem facere potest, non homo. Co. Lit.

7.—*God only can make an heir; man cannot.*

[*Devastavit.*—*Waste, by an executor or administrator.*

Jacob L. D.]

[*Devisavit vel non.*—*The technical term for an issue to try the validity of a will, whether the pretended testator devised or not.*]

[*Dies datus.*—*The day given, or time appointed for the appearance of the defendant.*]

Dies dominicus non est juridicus. Co. Lit. 135.—*Sunday is no day in law.*

Dies non, (*juridicus* being understood). *The day on which no legal proceedings can be had, as Sunday generally in the United States, and some other festivals in England, as well as Sunday.*]

Difficile est ut unus homo vicem duorum sustineat. 4 Co. 118.—*It is difficult for one man to fill the place of two.*

Dilatones in lege sunt odiosae.—*Delays in the law are odious.*

Discontinuare, nihil aliud significat quam intermittere, desuescere, interrumpere. Co. Lit. 325.—*To discontinue, signifies nothing else than to intermit, interrupt, &c.*

Discovery draws with it relief. Gilb. Rep. 227.

Discretio est scire per legem quid sit justum. 10 Co. 140.—*Discretion is to know by law what is just.*

Disparata non debent jungi. Jenk. Cent. 24.—*Things unequal ought not to be joined.*

Dispensatio est vulnus, quod vulnerat jus commune. Dav. 69.—*A dispensation is a wound which wounds the common right.*

Dispositio interesse futuri est inutiles. See Licet dispositio, &c.

Distinguenda sunt tempora; distingue tempora, et concordabis leges. 1 Co. 24.—*Times are to be distinguished; distinguish as to time, and you will make the law agree.*

Distinguenda sunt tempora; aliud est facere, aliud per-

ficere. 3 *Leon.* 243.—*Times must be distinguished; it is one thing to do, another to perfect.*

Disseisin est un personnel trespass de tortious ouster del seisin. Co. Lit. 153.—Disseisin is a personal trespass of tortious ouster of seisin.

Disseisinam satis facit, qui uti non permittit possessorem, vel minus commode, licet omnino non expellat. Co. Lit. 331.—He sufficiently disseises, who, though he does not completely expel from possession, hinders the enjoyment thereof, or renders it incommodious.

Dissimilium dissimilis est ratio. Co. Lit. 191.—Of things dissimilar the rule is dissimilar.

[*Distringas.—A writ directed to the sheriff, &c. to distrain the defendant by his lands and chattels. Reg. Brev. 92 a; Tidd's Prac. Forms.*]

Divide et impera, cum radix et vertex imperii in obedientium consensu rata sunt. 4 Inst. 35.—Divide and govern, for both the root and sum of government consist in the obedience of the governed.

Divinatio, non interpretatio est, quæ omnino recedit a littera. Bacon.—It is guessing, and not interpretation, which totally differs from the letter.

. *Divisio. See De nullo, &c.*

Divortium dicitur a divertendo vel divertendo, quia vir divertitur ab uxore. Co. Lit. 235.—Divorce is so called, because a man is diverted or turned from his wife.

[*Dolosus versatur generalibus—2 Co. 34; Wing. Max. 636.—A deceiver, or fraudulent person deals in general terms.*]

Dolus circuitu non purgatur. Bacon.—Fraud is not purged by circuity.

Dolus est mahinatio cum aliud dissimulat, aliud agit. Lane, 47.—Fraud pretends one thing and means another.

[*Dolus versatur in generalibus.—Fraud lurks in generalities.*]

[*Dominium a possessione cepisse dicitur.—Right is said to have its beginning from possession.*]

Domus sua est unicuique tutissimum resugum. 11 Co. 82.—A man's house is his safest refuge.

Dona clandestina sunt semper suspiciose. 3 Co. 81.—Clandestine gifts are always suspicious.

Donatur nunquam desinit possidere antequam donatorius incipiat possidere. Dyer, 281.—The giver never ceases to possess until the receiver commences to possess.

Donationum alia perfecta, alia incepta et non perfecta; ut si donatio lecta fuit et concessa, ac traditio nondum fuerit subsecuta. *Co. Lit.* 56, 57.—*Some gifts are perfect, some only in a state of commencement; as if a deed of gift was only read and agreed to, but delivery thereof had not followed.*

Donatio perficitur possessio accipientis. *Jenk. Cent.* 109.—*A gift is perfected by the possession thereof by the receiver.*

[Dormitur aliquando jus, moritur nunquam.—*A right sometimes sleeps, but never dies.*]

Dormiunt aliquando leges, nunquam moriuntur. *2 Inst.* 161.—*The laws sometimes sleep, but never die.*

Dos rationabilis vel legitima, est cuiuslibet mulieris de quocunque tenemento tertia pars omnium terrarum et tenementorum, quae vir suus tenuit in dominico suo ut de feodo, &c. *Co. Lit.* 33 b.—*Reasonable and legitimate dower belongs to every woman, of a third part of all the lands and tenements of which the husband was seised in his demesne, as of fee.*

Dos de dote peti non debet. *4 Co.* 122.—*Dower ought not to be required of dower.*

Doti lex favet; premium pudoris est, ideo parcatur. *Co. Lit.* 31.—*The law favours dower; it is the reward of modesty, therefore, it is favoured.*

Dower shall be recovered from the heir, if he is vouched in the same county, and hath assets, and not against the tenant. *Winch.* 89.

Droit ne done pluis que soit demande. *2 Inst.* 286.—*The law gives not more than is demanded.*

Droit ne poet pas morier. *Jenk. Cent.* 100.—*Right cannot die.*

[*Duces tecum.—See subpoena duces tecum.*]

Duo non possunt in solido unam rem possidere. *Co. Lit.* 368.—*Two cannot possess one thing exclusively of each other.*

Duo sunt instrumenta ad omnes res aut confirmandas aut impugnandas, ratio et authoritas. *8 Co.* 16.—*There are two things instrumental to both the confirmation or impugning of all things; viz. reason and authority.*

Duplicationem possibilitatis lex non patitur. *1 Rol. R.* 321.—*The law does not allow a double possibility.*

[*Durante absentia.—Administration during the absence of the executor.* *2 Bl. Com.* 503.]

[*Durante minore ætate.—Administration during the minority of the executor.* 2 Bl. Com. 503.]

[*Durante viduata.—During widowhood.*]

Duress renders feoffments, leases, gifts, grants, &c. thereby made voidable. Perk. § 16.

Ea est accipienda interpretatio quæ vitio caret. Bacon.

—*That interpretation to be received which is free from evil.*

Ea quæ in curia nostra rite acta sunt debitæ executioni demandari debent. Co. Lit. 289.—*Those things which in our courts are rightly done ought to be duly executed.*

Ecclesia est domus mansionalis omnipotentis Dei. 2 Inst. 64.—*The church is the mansion-house of the omnipotent God.*

Ecclesia non moritur. 2 Inst. 3.—*The church never dies.*

Effectus sequitur causam. Wing. 226.—*The effect follows the cause.*

[*Eigne.—The eldest or first born.* T. L. 320.]

[*Elegit*—A writ by which the sheriff is to deliver, to the plaintiff, *all* the defendant's goods, by appraisement of a jury (except oxen and beasts of the plough) and *half* his lands, in satisfaction of the judgment. 3 Bl. Com. 418. Tidd's Prac. 938. Tidd's Prac. Forms 223—*Hen. Just.* 635, 3rd edi.]

Electiones fiant rite et libere sine interruptione aliqua. 2 Inst. 169.—*Let elections be just and free without interruption.*

Electio semel facta, et placitum testatum, non patitur regressum. Co. Lit. 146.—*Election once made, and plea witnessed, cannot be recalled.*

Electio est interna, libera et spontanea separatio unius rei ab alia, sine compulsione, consistens in animo et voluntate. Dyer, 281.—*Choice is an internal, free and spontaneous separation of one thing from another, without compulsion existing in the intention and will.*

Ei nihil turpe cui nihil satis. 4 Inst. 53.—*To whom nothing is sufficient nothing is base. The avaricious man regards not the means by which he acquires wealth.*

Einitia pars semper præferenda est propter privilegium ætatis. Co. Lit. 166.—*The part of the elder sister is always to be preferred, on account of the privilege of age.*

[*Embleinents*—*The annual produce of lands.* Co. Lit. 55 a. b; 2 Bl. Com. 122, 403.]

En eschange il covient que les estates soient égales.
Co. Lit. 50—In an exchange the estates should be equal.

[Eodem modo quo oritur, eodem modo dissolvitur. 5
Vin. Abr. 516—By whatever means a thing originates, by the same means it is destroyed.]

Eodem modo quo quid constituitur, eodem modo dissolvitur,—destruitur, 6 *Co. 53—A thing is destroyed by the same means by which it is constituted.*

[*Eo instanti—At that moment.*]

[*Eo nomine—By that name, or, under that description.*]

Error, qui non resistitur, approbat. *Doct. and Stud. c. 40—An error, .not resisted, is approved.*

Errores ad sua principia referre, est refellere. 3 *Inst. 15—To refer errors to their principles, is to refute them.*

Error scribentis nocere non debet. *Jenk. Cent. 325—The mistake of the writer [in grammar] ought not to injure.*

Error siccatus, nuda veritate in multis est probabilius; et saepenumero rationibus vincit veritatem error. 2 *Co. 73—Error disguised, is in many instances more probable than naked truth; and frequently error prevails against truth by reasoning.*

Erubescit lex filios castigare parentes. 8 *Co. 116—The law blushes when children correct their parents.*

Eschaeta derivatur a verbo Gallico *eschier*, quod est accidere, quia accidit domino ex eventu et ex insperato. *Co. Lit. 92—Escheat is derived from the French word eschier, which signifies to fall, because it falls to the lord from some unforeseen and unhoped-for event.*

Eschaetae vulgo dicuntur quæ decadentibus iis quæ de rege tenent, cum non existit ratione sanguinis hæres, ad fiscum relabuntur. *Co. Lit. 13—Those things are vulgarly called escheats which come into the Exchequer, from the falling away of those who hold of the king, when no heir, by reason of want of blood, remains.*

[*Escrow—A deed delivered to a third person, to be the deed of the party making it, upon a future condition, when a certain thing is performed; and then it is to be delivered to the party to whom made. Jacob L. D.; T. L. 350; Co. Lit. 31, 36.]*

[*Essoin—An excuse for a party's non-appearance at court. Jacob L. D.]*

Est aliquid quod non oportet etiam si licet; quiçquid Branch's Principia, &c.—6

vero non licet certe non oportet. *Hob.* 159—*There are some things not proper, even though permitted; whatever is not permitted, however, is not proper.*

Est ipsorum legislatorum tanquam viva vox, rebus et non verbis legem imponimus. 10 *Co.* 101—*We enforce law to actions not to words; this is the living voice of very law-givers.*

Est boni judicis ampliare jurisdictionem. *Reg. Jur. Civ. Gilb.* 14—*It is the duty of a good judge to amplify jurisdiction.*

[*Estoppel*—Is where a person is concluded and forbidden by law, to speak against his own act. *T. L.* 350; *Co. Lit.* 352 a. b.—*Estoppels are to be taken strictly.* 20 *Vin. Abr.* 14.]

Est quiddam perfectius in rebus licitis. *Hob.* 159—*There is something more perfect in things allowed.*

Estoveria sunt ardendi, arandi, construendi et claudendi. 13 *Co.* 68—*Estovers are firebote, housebote, ploughbote and hedgebote.*

[*Et sic de similibus.* *Co. Lit.* 2—*And so of the like.*]

[*Et sequitur*—*And what follows.*]

Eventus est qui ex causa sequitur; et dicitur *eventus* quia ex causis evenit. 9 *Co.* 81—*The event is that which follows from the cause, and is so called because it arises from the cause, (causa evenit.)*

Eventus varios res nova semper habet. *Co. Lit.* 379. *Wing.* 756—*A new matter always produces various events.*

[*Ex abuso non arguitur ad usum*—*No argument can be drawn from the abuse of a thing against its use.*]

Ex antecedentibus et consequentibus fit optima interpretatione. 2 *Inst.* 317—*The best interpretation is made from what precedes and from what follows.*

[*Excambium naturaliter vult in se warrantiam.* 22 *Vin. Abr.* 26—*An exchange necessarily creates a warranty.*]

Exceptio ejus rei cuius petitur dissolutio, nulla est. *Jenk. Cent.* 37—*There is no exception of that thing of which the dissolution is sought.*

Exceptio nulla est versus actionem quae exceptionem permit. *Jenk. Cent.* 106—*There is no exception against an action which entirely destroys an exception.*

Exceptio probat regulam, de rebus non exceptis. 11 *Co.* 41—*An exception proves the rule, in things not excepted.*

Exceptio quæ firmat legem, exponit legem. 2 *Buls.*
189—*An exception which confirms the law expounds the law.*

Exceptio semper ultima ponenda est. 9 *Co.* 53—*An exception is always to be put last.*

Excessus in re qualibet jure reprobatur communi. 11 *Co.* 44—*Excess in any thing is condemned by the common law.*

[*Ex consequentia—Consequently.*]

[*Ex contractu—From contract.*]

Excusatur quis quod clameum non apposuerit, ut si toto tempore litigii fuit ultra mare quacunque occasione. *Co. Lit.* 260—*A man is excused who does not exhibit his claim, if, during the whole period in which it ought to have been litigated, he has been beyond sea.*

[*Ex debito justiciæ—From what is due to justice.*]

[*Ex delicto—From tort.*]

Ex diuturnitate temporis omnia præsumuntur esse sollemniter acta. *Jenk. Cent.* 185—*Where a great length of time intervenes, all things are presumed to have been done with due solemnity.*

Executio est finis et fructus legis. *Co. Lit.* 289—*Execution is the end and fruit of the law.*

Executio juris non habet injuriam. 2 *Rol. Rep.* 301—*The execution of law does no injury.*

Executio est executio juris secundum judicium. 3 *Inst.* 212—*Execution is the execution of the law according to the judgment.*

Exempla illustrant, non restringunt, legem. *Co. Lit.* 24 a—*Examples illustrate, but do not restrain, the law.*

Ex facto jus oritur. 2 *Inst.* 49—*The law arises out of the fact.*

[*Exigent—A writ which issues previously to an outlawry. T. L. 367; 3 Bl. Com. 283; 4 Bl. Com. 319; Tidd's Pract. 127.*]

Exilium est patriæ privatio, natalis soli mutatio, legum nativarum amissio. 7 *Co.* 20—*Exile is a deprivation of our natal soil and country, and a loss of our native laws.*

Exitus acta probat; finis, non pugna, coronat—*The conclusion proves the fact; the termination of the fight, and not the fight, gives the victory.*

Ex frequenti delicto augetur poena. 2 *Inst.* 479—*Punishment increases with increasing crime.*

Ex malis moribus bonæ leges natæ sunt,—oriuntur. 2
Inst. 161—Good laws arise from evil manners.

Ex multitudine signorum colligitur identitas vera. *Bacon—True identity arises from the number of signs.*

Ex nudo pacto non oritur actio. *Pl. Com. 305—No action arises on a naked contract.*

[**Ex officio—By virtue of his office.** The power which an officer has to do certain acts without being particularly applied to. *Dalt. 270.*]

[**Exoneretur—The entry of the discharge of the bail.** *Tidd's Pract. 241.*]

Ex parte—On one side.—An act done or proceeding had, by one party only.]

Ex paucis dictis intendere plurima possit. *Lit. sect. 384—From a few words expressed, much may be intended.*

Ex paucis plurima concipit ingenium. *Lit: sect. 550—From few words the mind conceives more.*

Expedit reipublicæ ut sit finis litium. *Co. Lit. 303—It is for the public good that there should be an end of litigation.*

Experientia per varios actus legem facit. *Magistra rerum experientia.* *Co. Lit. 60—Experience by various acts makes law. Experience is the mistress of things.*

[**Ex post facto—Laws are so called, when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.** *1 Bl. Com. 46.*]

Expositio, quæ ex visceribus causæ nascitur, est aptissima et fortissima in lege. 10 *Co. 24—That exposition which springs from the bowels of a cause is the fittest and best in law.*

Ex præcedentibus et consequentibus optima fiet interpretatio. 1 *Rol. Rep. 375—The best interpretation is made from what precedes and what follows.*

Expressa non prosunt quæ non expressa proderunt. 4 *Co. 73—Things when expressed do no good, if when not expressed they do no hurt.*

Expressio [designatio] unius personæ est exclusio alterius. *Co. Lit. 210 a.—The mention of one person is the exclusion of another.*

Expressio eorum quæ tacite insunt nihil operatur. *Hob. 170—The expressing of what is implied operates not at all.—This rule is to be understood as having respect to it-*

self alone, and not having relation to other clauses. Hob. 170. 2 P. Will. 259. Bacon's Law Tracts, 93.

Expressum facit cessare tacitum. Co. Lit. 210 a.—What is expressed makes what is silent to cease.

[Extent—A writ directed to the sheriff, &c. by which he, with the aid of an inquest, is to value the lands of the defendant, to their utmost extent, and deliver them to the plaintiff in satisfaction of his debt. *Jacob L. D.*]

Extortio est crimen quando quis colore officii extorquet quod non est debitum, vel supra debitum, vel ante tempus quod est debitum. 10 Co. 102—Extortion is when by colour of office, any thing not due, or above due, or before coming due, is extorted.

Ex tota materia emergat resolutio. Wing. 238—Let the resolution be founded on the whole case.

Extra territorium jus dicenti non paretur impune. 10 Co. 77—Beyond his territorial boundaries it is not safe to obey a party commanding.

Extranus est subditus qui extra terram, i. e. potestatem regis, natus est. 7 Co. 16—A foreigner is a subject born out of the power or government of the king.

Extra legem positus est civiliter mortuus. Co. Lit. 130—An outlaw is civilly dead.

Ex turpi causa non oritur actio.—(Elegantly paraphrased by Lord Mansfield thus:) Justice must be drawn from pure fountains. 1 Wheaton's Selwyn's N. P. 52.

Entry or re-entry can be reserved or given to none but the feoffor, donor or lessor, or their heirs. Lit. sect. 347.

Entry by the demandant hanging his writ will abate it. Doct. and Stud.

Equality is equity, which judges according to what is good and equal. Hob. 224; Fran. Max. 3.

Equity is part of the law of England.

[Equity follows the law. 17 Vin. Abr. 119.]

Equity favours assent to legacies, attornment, livery and seisin, republication of wills, and younger children.

Equity is to enforce the execution of agreements.

Equity hath power, upon circumstances, to relieve against penalties, judgments and executions; and to abate, moderate, and sometimes discharge damages and costs.

Equity is a creature of Chancery; and, as such, to be governed as conscience directs by that court.

Equity is to moderate the rigour of the law, and relieve where no remedy at law.

Equity will not suffer a double satisfaction to be taken.
Fran. Max. 11.

Equity relieves not where there may be relief at law, or a good defence there.

Equity, where equal between the parties, and one hath the law with him, the law will prevail.

Equity suffers not a right to be without a remedy. Fran. Max. 6.

Equity looks on that as done which is to be done.

Equity may, on circumstances, carry the debt beyond the penalty. Fran. Max. p. 4 note (g).

Equity a proper interpreter of statutes.

Equity a proper place to relieve legatees.

Equity is to execute the intent of the parties; rectify mistakes, supply defects, and relieve against accidents.

Equity regards substance, not ceremony.

Equity to prevent multiplicity of suits, or circuity of action. Fran. Max. 9.

Equity will not decree a suit where it may decree a remedy. Fran. Max. p. 42.

Equity will prevent or redress wrongs and mischief, and relieve against fraud.

Equity to relieve where the matter lies in compensation.

Equity will relieve against one's own act, according to circumstances.

Equity will not vest an estate, where, by reason of a condition precedent, it will not vest at law; but of conditions subsequent, to divest an estate, it is otherwise.

Equity requires that a gift, to defeat others, should be made upon as high and valuable consideration as those to be defeated thereby.

Equity will not aid new inventions in derogation of the common law, tending to introduce perjury, forgery or fraud.

Equity requires that should receive satisfaction which sustained the loss; and that should make satisfaction which hath received the benefit. Fran. Max. 4, 5.

Error and attaint go with the land.

Estoppels and conditions go with the land.

[*Estoppels shall be taken strictly.* 20 Vin. Abr. 14.]

Estoppel against estoppel puts the matter at large. Co. Lit. 352.

Every man's deed or covenant shall be taken most strongly against himself.

Every one must recover by his own strength, not by the weakness of his adversary's title.

Every man ought so to use his own as not to hurt another.

Every man's house is his castle. 11 Co. 82.

Every issue ought to consist of an affirmative and negative. 11 Co. 10.

Execution must be of estates exchanged, by entry or claim, in the life of the parties. Co. Lit. 51.

Execution must be according to the judgment. 3 Inst. 211.

Extent is a real burthen inherent in the bosom of a free-hold. Moor, 662.

Executor de son tort, there can be none, where a right-ful one is appointed. 1 Ch. Ca. 33.

Facinus quos inquinat æquat—Guilt makes equal those whom it stains.

Facta tenet multa quæ fieri prohibentur. 12 Co. 125—*Deeds contain many things prohibited.*

Factum a judice quod ad ejus officium non spectat, non ratum est. 10 Co. 76—*Any thing done by a judge, which has no relation to his office, is of no force.*

Factum non dicitur quod non perseverat. 5 Co. 96—*It is not called a deed which does not persevere.*

Factum unius alteri nocere non debet. Co. Lit. 152 b.—*The deed of one should not injure another.*

Facultas probationum non est angustanda. 4 Inst. 279—*The faculty of proving is not to be narrowed.*

Falsa orthographia, sive falsa grammatica, non vitiat concessionem. 9 Co. 48—*False spelling, or false grammar, do not vitiate a grant.*

Fama, fides et oculus non patiuntur ludum. 3 Buls. 226—*Fame, faith, and eye-sight are not to be played with.*

Fama quæ suspicionem inducit oriri debet apud bonos et graves, non quidem malevolos et naledicos, sed providas et fide dignas personas, non semel sed saepius, quia clamor minuit et defamatio manifestat. 2 Inst. 52—*Report, which leads to suspicion, ought to arise from good and grave men, not from malevolent and malicious men, from provident and credible persons, not only once, but frequently; for clamour diminishes, and defamation makes manifest.*

Fatetur facinus qui judicium fugit. 3 Inst. 14—*He confesses his guilt who flies from judgment.*

Fatuus, apud jurisconsultos nostros, accipitur pro non compos mentis; et satuus dicitur qui omnino desipit. 4 Co. 128—"Fatuus," among our jurisconsults, is a man not in his right mind, also one altogether foolish.

Favorabilia in lege sunt fiscus, dos, vita, libertas. Jenk. Cent. 94—Things favourably considered in law are things relating to revenue, dower, and life.

Favorabiliores sunt executiones aliis processibus quibuscunque. Co. Lit. 289—Executions are preferred in law to all other processes.

Favores ampliandi sunt; odia restringenda. Jenk. Cent. 186—Favours are to be enlarged; things hateful restrained.

[Feigned issue—Is usually directed by the court of Chancery to try some disputed fact by a jury.—It is called a *feigned issue*, because, in *form*, the parties try the point by charging that a wager was laid. 3 Bl. Com. 452; Tidd's Prac. Forms 172.]

[*Felo de se*—A felon of himself. A person who commits suicide.]

Felonia implicatur in qualibet proditione. 3 Inst. 15—*Felony is implied in all treasons.*

Felonia, ex vi termini, significat quodlibet capitale crimen selleo animo perpetratum. Co. Lit. 391—*Felony, by force of the termination, signifies some capital crime perpetrated with a malignant mind.*

[*Feme covert*—A married woman.]

[*Feme sole*—A single woman.]

Feodium est quod quis tenet ex quacunque causa, sive sit tenementum sive redditus, &c. Co. Lit. 1—*A fee is that which a man holds from whatever cause, whether tenement or rent, &c.*

[*Ferae naturae*—Animals of a wild nature, in which a person cannot have an absolute, but only a qualified property. 2 Bl. Com. 390.]

Feodium simplex, quia feodium idem est quod hæreditas, et simplex idem est quod legitimum vel purum; et sic feodium simplex idem est quod hæreditas legitima vel hæreditas pura. Lit. sect. 1—*Fee simple, so called because fee is the same as inheritance, and simple is the same as legitimate or pure, and thus fee simple is the same as a legitimate or pure inheritance.*

Feodium talliatum, i. e. hæreditas in quandum certitu-

Legis et Equitatis.

dinem limitata. *Lit. sect. 18.*—Fee tail is an inheritance limited to certain bounds.

Festinatio justitiae est noverca infortunii. *Hob. 97.*—Delay of justice is the step-mother of misfortune.

Feudum. Fidelis ero vere domino vero meo.—A fee. I will be faithful to my true lord.

[Fiat—Let it be done—A peremptory order.]

Fiat prout fieri consuevit; nil temere novandum. *Jenk. Cent. 116.*—Let it be done according to custom; no rash innovations.

[Fiction shall not take away right. *17 Vin. Abr. 386.*]

[Fictione juris. *11 Co. 50.*—By fiction of law.]

Fictio legis inique operatur alicui damnum vel injuriam. *2 Co. 35.*—Fiction of law works the loss or injury of any one iniquitously.

[Fictions of law hold no place against rights. *11 Vin. Abr. 134.*]

Fidelitas. De nullo tenemento quod tenetur ad terminum, fit homagii, fit tamen inde fidelitatis sacramentum. *Co. Lit. 67 b.*—No homage for a tenement held for a term, only the oath of fidelity.

Fides est obligatio conscientiae alicujus ad intentionem alterius. *Bacon*—Faith is an obligation of conscience binding one man to follow the will of another.

[Fieri facias—An execution directed to the sheriff, &c. commanding him that of the goods and chattels of the defendant, he cause to be made, the amount of the debt or damages recovered. *3 Bl. Com. 417.*]

Filiatio non potest probari. *Co. Lit. 126.*—Filiation cannot be proved.

Filius in utero matris est pars viscerum matris. *7 Co. 8.*—A son in the mother's womb is part of the mother's bowels.

{ Filius nullius—The son of nobody. } A bastard.
 { Filius populi—The son of the people. }

1 Bl. Com. 459.

Finis rei attendendus est. *3 Inst. 51.*—The end of a thing is to be attended to diligently.

Finis finem litibus imponit. *3 Co. 78. 13 Vin. Abr.*

245.—The end puts an end to strife.

Finis unius diei est principium alterius. *2 Buls. 305.*—

The end of one day is the beginning of another.

Finis. Talis concordia finalis dicitur, eo quod finem imponit negotio, adeo quod neutra pars litigantium ab eo

Branch's Principia, &c.—7

de cætero potest recedere. *Co. Lit.* 121.—*A final concord is that by which an end is put to the business, so that neither litigating party can recede therefrom.*

Firmior et potentior est operatio legis quam dispositio hominis. *Co. Lit.* 102.—*The operation of the law is firmer and more powerful than the will of man.*

[Flagrante delicto—*The crime being manifest; as, where a thief is taken with the mainour, that is, with the thing stolen upon him in manu, in his hand.* 4 *Bl. Com.* 307.]

Flumina et portus publica sunt, ideoque jus piscandi omnibus communе est. Quoad restrictio, Vide Da. Rep. 55.—Rivers and ports are public, therefore the right of fishing is common to all. As to the restriction, see Da. Rep. 55.

Fœlix qui potuit rerum cognoscere causas. Co. Lit. 231, 232.—Happy is he who can see the causes of things.

Fœminæ non sunt capaces de publicis officiis. Jenk. Cent. 237.—Women cannot hold public offices.

[Forfeitures should be taken strictly. 20 *Vin. Abr.* 14.]

Forma legalis forma essentialis. 10 Co. 100.—Legal form is essential.

Forma non observata infertur adnullatio actus. 12 Co. 7.—Where form is not observed a nullity of the act is inferred.

Forisfacere, i. e. extra legem seu consuetudinem facere. Co. Lit 59.—Forisfacere, i. e. to do something beyond the law or custom.

[*Forma pauperis—In the form of a poor person.* When a person is too poor to bear the expenses of a law suit he is permitted to sue *in forma pauperis*, free from costs. But he may recover costs; for the counsel and clerks are bound to give their labour to *him*, but not to his antagonist. 3 *Bl. Com.* 400.]

Forstellarius est pauperum depressor, et totius communitatis et patriæ publicus inimicus. 3 Inst. 196.—A fore-staller is an oppressor of the poor, and a public enemy of the whole community and country.

Fortior est custodia legis quam hominis. 2 Rol. Rep. 325.—The custody of the law is stronger than the custody of man.

Fortior et potentior est dispositio legis quam hominis. Co. Lit. 234 a.—The disposition of the law is of greater force and potency than that of man.

Fortunam faciunt judicem. *Co. Lit.* 167.—*They make fortune judge.*

Frangenti fidem, sides frangatur eidem. *Jur. Can.*—
Let faith be broken to him who breaks it.

[*Fraud is odious and not to be presumed.* *Cro. Car. 550.*]

Fraus meretur fraudem. *Plow.* 100.—*Fraud merits fraud.*

Fraus est celare fraudem. *1 Vern.* 240.—*It is a fraud to conceal a fraud.*

Fraus est odiosa et non præsumenda. *Cro. Car. 550.*
—*Fraud is odious and not to be presumed.*

Fraus et dolus nemini patrocinari debent. *3 Co. 78.*—
No one should encourage fraud and deceit.

Fraus et jus nunquam cohabitant. *Wing.* 680.—*Fraud and justice never agree together.*

[*Frieght is the mother of wages.* *15 Vin. Abr.* 146.]

Frequentia actus multum operatur. *4 Co. 78. Wing.* 719.—*The frequency of an act operates much.*

Frustra est potentia quæ nunquam venit in actum. *2 Co. 51.*—*The power which never acts is vain.*

Frustra expectatur eventus cuius effectus nullus sequitur. *5 Co. Eccl. L.*—*An event is vainly expected whose effect never follows.*

Frustra fit per plura, quod fieri potest per pauciora. *Jenk. Cent.* 68. *Wing.* 675.—*That is done vainly by many things, that might be done by less.*

Frustra petis quod statim alteri reddere cogeris. *Jenk. Cent.* 256.—*Vainly you beg what you may immediately force to be restored.*

Frustra legis auxilium quærit qui in legem committit. *Vide Merito.*

Frustra feruntur leges nisi subditis et obedientibus. *7 Co. 13.*—*Laws speak in vain to those not subject and obedient.*

[*Fugam fecit—He has taken to flight.*]

Fundatio est quasi fundi datio; et appellatione fundi, aedificium et ager continentur. *10 Co. 33.*—“Fundation” is, as it were, the giving of the revenues or fund; and by the term “fundus,” lands and buildings are contained.

Furiosus absentis loco est. Non multum distant a brutis qui ratione carent. *4 Co. 126.*—A “furiosus” i. e. a man furious by loss of reason, or a madman, is like a man

who is absent, and differs little from the brutes which want reason.

Furiosus solo furore punitur. Co. Lit. 247 b.—A madman is only punished by his madness.

Furiosus stipulare non potest, nec aliquid negotium agere, qui non intelligit quid agit. 4 Co. 126.—A madman cannot make a bargain nor transact any business, because he knows not what he does.

Furtum est contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cuius res illa fuerat. 3 Inst. 107.—See Contrectatio.

Furtum non est ubi initium habet detentionis per dominum rei. 3 Inst. 107.—Theft cannot be where the commencement of the detention of the article arises from the act of the owner.

Feme covert can be bound only by fine, or consent in court.

Forfeiture for crimes is of such estates only as might have been alienated by consent. Vide, Omne magnum exemplum.

Freehold in deed is called naturalis possessio seu seisinæ, as freehold in law is called civilis, &c. Co. Lit. 266.

Of every land there is a fee-simple in somebody, or the fee is in abeyance. Lit. sect. 648.

Every land of fee-simple may be charged with a rent-charge in fee. Lit. sect. 648.

[*Garnishment*—A term used in an action of detinue, when the defendant alleges that the property was delivered to him by the plaintiff and another person upon certain conditions; and prays that the other person may be warned to plead with the plaintiff, whether the conditions be performed, or not; in this petition he is said to pray garnishment. *Jacob's L. D.*]

[*Garnishee*—A third person in whose hands property is attached.]

[*General words shall be taken in MPTIORI SENSU. 8 Vin. Abr. 319.*]

[*General words subsequent shall be restrained by precedent particular words. 14 Vin. Abr. 61.*]

Generale dictum generaliter est interpretandum. Generalia verba sunt generaliter intelligenda. 3 Inst. 76.—A general saying is to be interpreted generally. General words to be understood generally.

Generale nihil certi implicat,—ponit. 2 Co. 33.—*A general expression implies nothing certain.*

Generale tantum valet in generalibus quantum singulare in singulis. 11 Co. 59.—*What is general prevails as much amongst things general as what is particular amongst things particular.*

Generalia præcedunt, specialia sequuntur. *Reg. Br.*—*Things general precede, things special follow.*

Generalia specialiabus non derogant. *Jenk. Cent.* 120.—*Things general affect not things special.*

Generalibus specialia derogant—*Things special affect things general.*

Generalia sunt præponenda singularibus.—*General things are to be placed before particular things.*

Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa. 8 Co. 154.—*A general clause does not extend to those things which are previously provided for specially. But such a construction is to be made as will make the whole consistent.* 8 Vin. Abr. 182. pl. 16. 14 Vin. 62. pl. 56.

Glossa viperina est quæ corrodit viscera textus. 11 Co. 34.—*It is a vicious gloss which corrupts the vitals of the text.*

Grammatica falsa non vitiat chartam. 9 Co. 48.—*False grammar vitiates not a deed.*

Gravius est divinam quam temporalem lœdere majestatem. 11 Co. 29.—*It is heavier to hurt divine than temporal majesty.*

Gift or grant made of uncertain things, election belongs to him for whose benefit it was made. *Perk. § 73.*

Grant or charge cannot be of that which one hath not. *Perk. § 65.*

Grant can be made to him only who is party to the deed, unless it be by way of remainder. *Doct. and Stud. lib. 2 c. 20.*

Grantee, if no estate or limitation of time be expressed in the grant, shall have an estate for life. *Perk. § 104.*

[Guardian ad litem—A guardian, appointed by the court, to defend a suit brought against an infant. 3 Bl. Com. 426.]

Guardian in socage shall be the next of kin to whom the inheritance cannot descend. *Co. Lit. 87 b.*

Habeas corpus—A writ, so denominated, from the initial words while all legal proceedings were in Latin. It

is of various kinds; but the great and efficacious writ, and the one most usually resorted to is, *Habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum, to do, submit to, and receive whatever the judge or court awarding such writ shall consider in that behalf.* 3 *Bl. Com.* 131; 1 *Rev. Code* 468.]

[*Habeas corpus ad respondendum*—When a man hath cause of action against one, who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with the action in the court above. 2 *Mod.* 198; 3 *Bl. Com.* 129.]

[*Habeas corpus ad satisfaciendum*—When a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with execution. 3 *Bl. Com.* 130.]

[*Habeas corpus*, upon a *cepi*, where the party is taken in execution, or upon an attachment out of Chancery. *Jacob's L. D.* tit. **HABEAS CORPUS.**]

[*Habeas corpus ad prosecundum, testificandum, deliberandum, &c.* These issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, &c. *Jacob's L. D.*]

[*Habeas corpus ad faciendum at recipiendum, or, habeas corpus cum causa.* This writ lies in civil cases, to remove a suit from an inferior to a superior jurisdiction. 3 *Bl. Com.* 130; 1 *Rev. Code* 237.]

[*Habendum*—That part of a deed which ascertains what estate is granted by it. 2 *Bl. Com.* 298.]

[*Habere facius possessionem*—An execution that lies where one has recovered a term for years, to put him in possession. 3 *Bl. Com.* 412.]

[*Habere facias seisinam*—An execution directed to the sheriff to give *seisin of a freehold.* 3 *Bl. Com.* 412.]

Hæreditas et hæres dicuntur ab hærendo, quod est arcte insidendo, nam qui hæres est, hæret; vel dicitur ab hærendo, quia hæreditas sibi hæret: licet nonnulli hæredem dictum velint, quod herus fuit, hoc est dominus terrarum, &c. quæ ad eum pervenient. *Co. Lit.* 7. **Hæres sanguinis, hæres hæreditatis.** 237.—*Inheritance and heir are called from inheriting, which is to lie in expectancy of, for the heir inherits, or the inheritance is inherited by him:*

some say the word heir comes from "herus," which signifies the lord of the lands, &c. which come to him.

Hæreditas est successio in universum jus quod defunctus habuerat. *Jur. Civ. Co. Lit. 237.—Inheritance is the succession to every right possessed by the late possessor.*

Hæreditas, nest pas tant solement entendue lou home ad terres ou tenements per descent d'enherita^{ge}, mes auxi chescun fee simple ou tail que home ad per son purchase puit estre dit enherita^{ge}, pur ceo que ses heirs luy purront enheriter. *Co. Lit 16.—Inheritance does not only comprehend all the lands and tenements which a man has by descent from his ancestors, but also every fee simple or fee tail which he has by purchase, because his heir can inherit it from him.*

Hæredem Deus facit, non homo. *Co. Lit. 7 b.—God makes the heir, not man.*

Hæres est alter ipse, et filius est pars patris. *3 Co. 12.—An heir is a second self, and a son is part of his father.*

Hæres est aut jure proprietatis, aut jure representationis. *3 Co. 40.—An heir is by right of property, or by right of representation.*

Hæres est eadem persona cum antecessore,—pars antecessoris. *Co. Lit. 22.—The heir is the same person as his ancestor, a part of his ancestor.*

Hæres est nomen collectivum. *1 Vent. 215.—Heir is a collective name.*

Hæres est nomen juris; filius est nomen naturæ. *Bacon.—Heir is a name of law, son a name of nature.*

[Hæres jure representationis—*An heir by right of representation.*]

Hæres minor 21 annis non respondebit, nisi in casu dotis. *Moor, 848.—An heir under 21 years of age is not answerable, except for dower.*

Hæres legitimus est quem nuptiæ demonstrant. *Co. Lit. 7, b.—He is a lawful heir who is born in wedlock.*

Hæres non tenetur in Anglia ad debita antecessoris reddenda, nisi per antecessorem ad hoc fuerit obligatus. *Co. Lit. 386.—In England the heir is not bound to pay his ancestor's debts unless bound by the ancestor.*

Hæredipetæ suo propinquo vel extraneo, periculo^{so} sane custodia, nullus committatur. *Co. Lit. 88 b.—It is a dangerous custody to commit any one to the charge of a man, whether a relation or not, who is seeking to get himself made heir.*

Hæredum appellatione veniunt hæredes hæredum in infinitum. *Co. Lit.* 9.—*By the title of heirs come the heir of heirs in infinity.*

Hæreditas, alia corporalis, alia incorporalis; corporalis est, quæ tangi potest et videri; incorporalis, quæ tangi non potest nec videri. *Co. Lit.* 9.—*Inheritance corporeal is what may be touched and seen; incorporeal can neither be seen nor touched.*

Hermaphroditus, tam masculo quam foeminæ comparatur, secundum prævalentiam sexus incæsentis. *Co. Lit.* 8.—*An hermaphrodite is to be considered male or female, according to the predominancy of the prevailing sex.*

Homicidium vel hominis cædium, est hominis occisiæ ab homine facta. *3 Inst.* 54.—*Homicide is the killing of a man by a man.*

[*Homine repligiando*—A writ to bail a man out of prison. *Jacob's L. D.*—It is now annulled in Virginia. *1 Rev. Code of 1819*, p. 471.]

Homo potest esse habilis et inabilis diversis temporibus. *5 Co. 98.*—*A man may be capable at one time and incapable at another.*

Hostes sunt qui nobis vel quibus nos bellum decernimus; cæteri proditores vel prædones sunt. *7 Co. 24.*—*Enemies are those with whom we are at war, all others are thieves or pirates.*

[*Hostis humani generis*—*An enemy of the human race*
A pirate.]

[*Hustings*—A court held in a corporate town. *T. L. 450.*]

Heir claiming by descent in fee-simple must make himself heir to him who was actually seised.

Heir in fee-simple must be of the whole blood (sanguinem duplicatum.)

Heir is by no law or statute charged with the wrong or trespass of his father. *Lane, 107.*

Heir is greatly favoured in law and equity; whether hæres natus vel factus.

Heir not bound by any express warranty, but where the ancestor was bound by the same. *Lit. sec. 734.*

Heir is not bound unless named. *Bac. L. T. 122.*

Heir's defects are supplied for him, but not against him.

Heir-legacies, &c. sink into the real estate to disburden him.

Heir-money to arise from, or be laid out in, land, is deemed land as to him.

Heir must be of the blood of the first purchaser.

Heir shall be charged for his false plea. Plow. 440.
Bac. Law Tracts 130.

Heir, the personal estate is first liable in case of the real.

Heir-trusts result on him.

Heir is not to be disinherited but by express words or necessary implication.

Heir is to be helped, if by any construction it may be.

Heir is preferred to the executor. 16 Vin. Abr. 448.

"His heirs," these words only make an estate of inheritance in all feoffments and grants. Lit. sect. 1.

He who claims benefit by part of a will must abide by the whole.

He who claims paramount a thing shall neither have benefit or hurt thereby. Noy's Max.

He who derives an estate from another must take it upon those terms on which it is conveyed.

He who doth iniquity shall not have equity as against him to whom he doth it. Fran. Max. 2.

He who enters for a condition broken shall avoid all mean charges and incumbrances, as being in of the prior estate.

He who will have equity must do it. Fran. Max. 1.

Husband and wife are but one person in law. Lit. sect. 291.

{ Ibid. } In the same place.
{ Ibidem. }

Ibi semper debet fieri triatio, ubi juratores meliorem possunt habere notitiam. 7 Co. 1.—*A trial should always be had where the jury can get the best information.*

Id certum est quod certum reddi potest; sed id magis certum est quod de semet ipso est certum. 9 Co. 47.—*That is certain which can be reduced to a certainty; but that is most certain which is certain on the face of it.*

Idem agens et patiens esse non potest. Jenk. Cent. 40.—*The same man cannot be both the agent and patient.*

Idem est facere et non prohibere cum possis, et qui non prohibet cum prohibere possit in culpa est. 3 Inst. 158.—*To commit, and not prohibit the commission when in your power, is the same thing; he who in such case does not prohibit is in fault.*

Branch's Principia, &c.—8

Idem est nihil dicere et insufficienter dicere. *2 Inst.* 178.
—It is the same thing to say nothing, and not to say sufficient.

Idem est non esse et non apparere. *Jenk. Cent.* 207.—
Not to be and not to appear are the same.

Idem semper antecedenti proximo refertur. *Co. Lit.* 385.—*The same is always referred to its next antecedent.*

Identitas vera colligitur ex multitudine signorum. *Bacon*—*True identity is collected from the number of signs.*

Id perfectum est quod ex omnibus suis partibus constat;
et nihil perfectum est dum aliquid restat agendum. *9 Co.* 9.—*That is perfect which is complete in all its parts; and nothing is perfect whilst any thing remains to be added to it.*

Id possumus quod de jure possumus. *Lane*, 116.—*We may do what the law allows us to do.*

Id quod est magis remotum, non trahit ad se quod est magis junctum, sed e contrario in omni casu. *Co. Lit.* 164.—*That which is most remote does not draw to itself that which is nearest, but the reverse in every case.*

[**Id quod licitum non est, necessitas facit licitum.** *15 Vin. Abr.* 534.—*That which is not lawful in itself, necessity makes lawful.*]

[**Ignoramus—We are ignorant.**—*Not a true bill, returned by a grand jury on an indictment.*—*The term is sometimes applied to a blockhead.*]

Ignorantia facti excusat; ignorantia juris non excusat. *1 Co.* 177.—*Ignorance of the fact excuses; but not ignorance of the law.*—*It excuses in civil, though not in criminal cases.* *Mosely*, 364, 365.

Ignorantia judicis est calamitas innocentis. *2 Inst.* 591.
—The ignorance of the judge is the misfortune of the innocent.

Ignoratis terminis ignoratur et ars. *Co. Lit.* 2.—*Where the terms of art are unknown, the art itself is unknown.*

Illud quod alias licitum non est necessitas facit licitum;
et necessitas inducit privilegium quod jure privatur. *10 Co.* 61.—*That which is not otherwise lawful, necessity permits; and necessity gives a privilege superseding law.*

Illud quod alteri unitur, extinguitur, neque amplius per se vacare licet. *Godolph. Rep. Can.* 169.—*That which is united to another, is merged in it, nor can it any more be employed by itself.*

[*Imparlace* (*licentia loquendi*, abbreviated *li. lo.*)—Time allowed to plead. 3 *Bl. Com.* 299; *Tidd's Prac.* 417; *Jacob's L. D. tit. Imparlace.*]

Imperitia culpæ annumeratur. Jur. Civ.—*Ignorance is a fault.*

Imperitia est maxima mechanicorum poena. 11 *Co.* 54.—*Ignorance is the greatest fault of mechanics.*

Impersonalitas non concludit nec ligat. *Co. Lit.* 352.—*Impersonality neither concludes nor binds.*

Impius et crudelis judicandus est qui libertati non favet. *Co. Lit.* 124.—*He is to be adjudged impious and cruel who does not favour liberty.*

Impotentia excusat legem. *Co. Lit.* 29.—*Impotency excuses the law.*

Improbi rumores dissipati sunt rebellionis prodromi. 2 *Inst.* 226.—*Wicked rumours spread abroad are the for-runners of rebellion.*

Impunitas continuum affectum tribuit delinquenti. 4 *Co.* 45.—*Impunity holds a continual bait to a delinquent.*

Impunitas semper ad deteriora invitat. 5 *Co.* 109.—*Impunity always invites to greater crimes.*

In ædificiis lapis male positus non est removendus. 11 *Co.* 69.—*A stone badly placed in buildings is not to be removed.*

In æquali jure melior est conditio possidentis. *Plow.* 296.—*In equal right the condition of the possessor is best.*

In alta proditione nullus potest esse accessorius, sed principalis solummodo. 3 *Inst.* 138.—*In high treason there is no accessory, only principals.*

In casu extremæ necessitatis omnia sunt communia. *H. P. C.* 54.—*In cases of extreme necessity every thing is in common.*

Incerta pro nullis habentur. *Dav.* 33.—*What is uncertain is reckoned as nothing.*

Incerta quantitas vitiat actum. 1 *Rol. Rep.* 465.—*An uncertain quantity vitiates the act.*

Incivile est nisi tota sententia inspecta de aliqua parte judicare. *Hob.* 171.—*It is against law to judge from one part of a sentence without examining the whole.*

Inclusio unius est exclusio alterius. *Vide Designatio.*—*The including of one is the exclusion of the other.*

In conjunctivis oportet utramque partem esse veram. *Wing.* 13.—*In things conjunctive it is necessary that every separate part be true.*

In consimili casu, consimile debet esse remedium. *Hard.* 65.—*In similar cases the remedy should be similar.*

In consuetudinibus non diurnitas temporis sed soliditas rationis est consideranda. *Co. Lit.* 141.—*In customs, not so much the length of time as the strength of the reason on which they are founded, should be considered.*

In contractibus, benigna; in testamentis, benignior; in restitutionibus, benignissima interpretatio facienda est. *Co. Lit.* 112.—*In contracts, the interpretation is to be favourable; in wills, more favourable; in restitutions, most favourable.*

In criminalibus, probationes debent esse luce clariores. *3 Inst.* 210.—*In criminal cases the proof ought to be as clear as light.*

In criminalibus sufficit generalis malitia intentionis cum facto paris gradus. *Bacon.*—*In criminal actions a general malice of intention, keeping equal pace with the fact committed, is sufficient.*

Inde datæ leges ne fortior omnia posset. *Dav.* 36.—*Laws are made lest the stronger party should rule all.*

Indefinitum equipollit universali. *1 Vent.* 368.—*What is indefinite equals what is universal.*

Indefinitum supplet locum - universalis. *4 Co.* 77.—*What is indefinite supplies the place of what is universal.*

In disjunctivis sufficit alteram partem esse veram. *Wing.* 13.—*In things disjunctive it is sufficient if either part be true.*

In dubiis non præsumitur pro testamento. *Jur. Civ. Cro. Car.* 51.—*In doubtful things the presumption is not for the will.*

In dubiis magis dignum est accipiendum—*In doubtful things that which is most worthy is to be received.*

In dubio hæc legis constructio quam verba ostendunt. *Jur. Civ.*—*In doubtful points, that construction of the law which the words point out.*

[In esse—*In being.*]

In esse potest donationi, modus, conditio sive causa; *ut*, modus est *si*, conditio; *quia*, causa. *Dyer,* 138.—*In a gift there may be, modus, viz. the word *ut*; conditio, viz. *si*; causa, viz. *quia*.*

[In expositione instrumentorum, mala grammatica, quoad fieri potest, vitanda est. 14 *Vin. Abr.* 22; 6 *Co.* 39.—*In the exposition of instruments, bad grammar, as far as possible, is to be avoided.*]

In facto quod se habet ad bonum et malum, magis de bono quam de malo lex intendit. *Co. Lit.* 78.—*In a deed in which are both good and bad, the law looks more to the good than the bad.*

In favorabilibus, magis attenditur quod prodest quam quod nocet. *Bacon.*—*In things favoured, what does good is more regarded than what does harm.*

[In favorem libertatis. 21 *Vin. Abr.* 124.—*In favour of liberty.*]

[In favorem vitae. 4 *Bl. Com.* 338.—*In favour of life.*]

In fictione juris semper æquitas existit. 11 *Co.* 51.—*In the fiction of law there is always equity.*

Infinitum in jure reprobatur. 9 *Co.* 45; 12 *Co.* 24; 4 *Vin. Abr.* 534.—*The law abhors endless litigation.*

[In forma pauperis—*In form of a poor person.*—See forma pauperis.]

[In foro conscientiae—*Before the tribunal of conscience.*]

[In fraudem legis. 5 *Vin. Abr.* 223.—*In fraud of the law.*]

[In futuro—*In future.*]

In hæredes non solent transire actiones quæ poenales ex maleficio sunt. 2 *Inst.* 442.—*Penal actions arising from any thing of a criminal nature do not pass to the heir.*

In his quæ de jure communi omnibus conceduntur, consuetudo alicujus patriæ vel loci non est alleganda. 11 *Co.* 85.—*In those things which by common right are conceded to all, the custom of a particular district or place need not be alleged.*

[In infinitum. 2 *Bl. Com.* 217.—*Without end.*]

Iniquum est alios permittere, alios inhibere mercatram. 3 *Inst.* 181.—*It is iniquitous to permit trade to some, and to prohibit it to others.*

Iniquum est aliquem rei sui esse judicem. In propria causa nemo judex. 12 *Co.* 13.—*It is iniquitous for a man to be judge in his own cause. No one should be judge in his own cause.*

Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem. *Co. Lit.* 223. *Hob.* 87.—*It is bad*

for free men not to have the free disposal of their property.

In judiciis minori succurritur. Jenk. Cent. 146.—In judicial affairs the minor is protected.

In judicio non creditur nisi juratis. Cro. Car. 64.—In judgment, credit only given to things sworn.

Injuria fit ei cui convictum dictum est, vel de eo factum carmen famosum. 9 Co. 60.—An injury is done to him against whom a reproachful thing is said, or an obscene song made.

In jure non remota causa, sed proxima spectatur. Bacon.—In law the proximate, and not the remote cause, is to be looked to.

Injuria non præsumitur. Co. Lit. 232.—Injury is not to be presumed.

Injuria propria non cadet in beneficium facientis. Vide Nemo ex dolo—A man's wrong shall not help him.

Injustum est nisi tota dege inspecta, de una aliqua ejus particula proposita judicare vel respondere. 8 Co. 117.—It is unjust to judge of an answer to a particular part where the whole is not examined.

In majore summa continetur minor. 5 Co. 115.—The highest minor is contained in the major.

In maxima potentia minima licentia. Hob. 159.—In the greatest power the smallest licentiousness.

[*Innovations, judgments of the sages of the law against. Jenk. Cent. Introduc. pa. viii.*]

In novo casu, novum remedium apponendum est. 2 Inst. 3.—A new remedy is to be applied to a new case.

[*Innuendo—A word used in legal proceedings (especially in actions for slander) to ascertain the meaning of any doubtful word or expression, by averring that the sense appropriated to it, is its true meaning. 3 Bl. Com. 126.*]

In odium spoliatoris omnia præsumuntur. 1 Vern. 19.—All things are presumed in odium of a despoiler.

[*In odium spoliatoris. 8 Vin. Abr. 545; 13 Ibid. 101; 15 Ibid. 420; 16 Ibid. 156.*]

In omni re nascitur res quæ ipsam rem exterminat. 2 Inst. 15.—In every thing the thing is born which destroys that thing itself.

[*Inops consilii—Wanting counsel.*]

[*In perpetuam rei memoriam—To perpetuate the memory of the thing. Usually applied to bills to perpetuate the testimony of witnesses. Coop. Eq. Pl. 52.*]

In præparatoriis ad judicium favetur actori. 2 *Inst.* 57.

—*In things preceding judgment the plaintiff is favoured.*

In præsentia majoris cessat potentia minoris. *Jenk. Cent.* 214.—*In the presence of the major, the power of the minor ceases.*

[In presenti—*At the present time.*]

[In propria persona—*In his own person.*]

In quo quis delinquit, in eo de jure est puniendus. *Co. Lit.* 233.—*Every one is to be punished by law for that offence of which he is guilty.*

In rebus manifestis errat qui authoritates legum allegat: quia perspicua vera non sunt probanda. 5 *Co.* 67.—*In things manifest, he errs who alleges the authorities of laws: because obvious truths need not be proved.*

In rebus, que sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extensio statuti. 10 *Co.* 101.—*In things that are favourable to the spirit, though repugnant to the letter, an extension of the statute should sometimes be made.*

In re dubia magis inficiatio quam affirmatio intelligenda. *Godb.* 37.—*In a case of doubt, the negative is understood before the affirmative.*

In republica maxime conservanda sunt jura belli. 2 *Inst.* 58.—*The laws of war are greatly to be preserved in the republic.*

In restitutionem non in poenam, hæres succedit. 2 *Inst.* 198.—*The heir succeeds to the restitution, not to the penalty.*

In restitutionibus benignissima interpretatio facienda est. *Co. Lit.* 112.—*The most benignant interpretation is to be made in restitutions.*

In satisfactionibus non permittitur amplius fieri quam semel factum est. 9 *Co.* 53.—*In receiving recompense, i.e. damages, more must not be received than is received at one time.*

[*Insimul computassent*—A count used in a declaration, charging that the plaintiff and defendant had accounted together. 3 *Bl. Com.* 164.]

Instans est finis unius temporis et principium alterius. *Co. Lit.* 185.—*An instant is the final period of one space of time, and the beginning of another.*

[*Instanter*—*Immediately.*—To plead instanter; See *Tidd's Prac.* 508, note (y)].

In suo quisque negotio hebetior est quam in alieno.

Co. Lit. 377.—*Every one is more dull in his own business than in the business of another.*

Intentio cæca, mala. 2 *Buls.* 179.—*A hidden intention is bad.*

Intentio inservire debet legibus, non leges intentioni.

Co. Lit. 314.—*Intention ought to be subservient to the laws, not the laws to the intention.*

Intentio mea imponit nomen operi meo. *Hob.* 123.—

The intent gives the name to the act.

Inter cuncta leges et percunctabere doctos. *Co. Lit.*

232.—*Among so many things you will question learned men and laws.*

Interest (imprimis) reipublicæ ut pax in regno conser-

vetur et quæcunque paci adversentur provide declinetur. 2 *Inst.* 158.—*It benefits the state, that peace be preserved in the kingdom, and that whatever is against peace be declined.*

Interest reipublicæ ne maleficia remaneant impunita.

Jenk. Cent. 31. *Wing.* 501.—*It concerns the state, that crimes remain not unpunished.*

Interest reipublicæ quod homines conserventur. 12 *Co.* 62.—*It concerns the state, that men be preserved.*

Interest reipublicæ res judicatas non rescindi. 2 *Inst.* 359.—*It concerns the state, that things adjudicated be not rescinded.*

Interest reipublicæ suprema hominum testamenta rata haberi. *Co. Lit.* 236.—*It concerns the state, that mens' last wills be confirmed.*

Interest reipublicæ ut carceres sint in tuto. 2 *Inst.* 569. *Vide Solent.*—*It concerns the state, that prisons be in security.*

Interest reipublicæ ut quilibet re sua bene utatur. 6 *Co.* 37.—*It concerns the state, that every one uses his property in a proper manner.*

Interest reipublicæ ut sit finis litium. *Co. Lit.* 303.—*It is important to the state, that there be an end of litigation.*

[*Inter pares, non est potestas.* 19 *Vin. Abr.* 343.—*Among equals, there is no superiority.*]

[*Interpleader*—*When, in the progress of a cause, it becomes necessary to discuss the rights of some other party, before the principal cause can be determined, the parties are said to interplead.* It is a proceeding usual in both courts of law and equity, and in the latter chiefly cou-

fined to actions of detinue. 3 *Bl. Com.* 448; *Mitf. Pl.* 125; *T. L.* 335; *Rast. Ent.* 213; *Jacob's L. D.*]

Interpretare et concordare leges legibus est optimus interpretandi modus. 8 *Co.* 169.—*To interpret, consistently with law, is the best mode of interpretation.*

Interpretatio fienda est ut res magis valeat quam pereat. *Jenk. Cent.* 198.—*That interpretation is to be made, that the thing may rather stand than fall.*

Interpretatio talis in ambiguis semper fienda est, ut evitetur inconveniens et absurdum. 4 *Inst.* 328.—*In ambiguous things, such an interpretation is to be made, that what is inconvenient and absurd is to be avoided.*

[In terrorem—*In terror.*—As a warning.]

Interruptio multiplex non tollit prescriptionem semel obtentam. 2 *Inst.* 654.—*Frequent interruption does not take away a prescription.*

[Intestatus et improles—*Proem. to Co. Lit.*—Without will and without child.]

In testamentis ratio tacita non debet considerari, sed verba solum spectari debent, ideo per divinationem mentis a verbis recedere durum est. *Vide Divinatio*—*In wills, a silent meaning ought not to be considered, but the words ought only to be looked to; so difficult it is to substitute mere conjecture for the words of the testator.*

[In toto—*In the whole.*—Altogether.]

In traditionibus scriptorum, non quod dictum est sed quod gestum est inspicitur. 9 *Co.* 137.—*In the tradition of writers, not what is said, but what is done, is to be looked to.*

[In transitu—*On the passage.*—As to the stoppage of goods in transitu, see *Paley on Agency, chap. 4 § 5, pa.* 268; *2 Selw. N. P. ch. 37, p. 979, Wheaton's edi.* in both of which the cases are well collected and distinguished.]

Inveniens libellum famosum et non corrumpens punitur. *Moor, 813.*—*He who finds a notorious libel and does not destroy it is punished.*

In verbis non verba sed rés et ratio quærenda est. *Jenk. Cent.* 132.—*In words, not the words but the thing and the meaning is to be inquired into.*

In vocibus videndum non a quo sed ad quid sumatur. *Ellesm. Postn.* 62.—*In voices it is to be seen, not from what but to what is received.*

Inutilis labor, et sine fructu, non est effectus legis. *Co. Lit.* 127. *Wing.* 110.—*Useless labour, and without fruit, is not the effect of law.*

Branch's Principia, &c.—9

Ipsæ [etenim] leges cupiunt ut jure regantur. *Co. Lit.* 174. *Foster*, 38.—*The laws themselves require that they should be governed by right.*

[*Ipsò facto—In very deed.—Absolutely.*] [*Ipsò jure—By the law itself.*]

Issue—*An issue is the end of pleading* (3 *Bl. Com.* 314).—*Issues are the profits of the defendant's lands taken on a distingas.* 3 *Bl. Com.* 280.]

[*Ita lex scripta est—Thus the law is written. A phrase used to put an end to argument, against the express letter of the law.*]

Ita semper fiat relatio ut valeat dispositio. 6 *Co.* 76.—*Let the relation be such that the disposition may stand.*

[*Jeofail—I have failed.—An oversight in pleading.* *Cowel. Int.*]

[*Journies—accounts—A term used for renewing a suit, within a reasonable time, after it has abated by death.* T. L. 468; 6 *Co.* 9 b; *Tidd's Practice* 267.]

Judex ante oculos æquitatem semper habere debet. *Jenk. Cent.* 58.—*A judge ought always to have equity before his eyes.*

Judex æquitatem semper spectare debet. *Jenk. Cent.* 45.—*A judge ought always to look to equity.*

Judex bonus nihil ex arbitrio suo faciat, nec propositio domesticæ voluntatis, sed juxta leges et jura pronunciet. 7 *Co.* 27.—*A judge may do nothing from his own private will or pleasure, but he must decide according to law and justice.*

[*Judex damnatur cum nocens absolvitur—The judge is condemned when the guilty is acquitted.—This is alone applicable to a sentence dictated by prejudice or corruption.*]

Judex est lex loquens. 7 *Co.* 4.—*A judge is the law speaking.*

Judex habere debet duos sales, salem sapientiæ, ne sit insipidus, et salem conscientiæ ne sit diabolus. 3 *Inst.* 147.—*A judge ought to have two salts; the salt of wisdom, lest he be insipid; the salt of conscience, lest he be devilish.*

Judex non potest esse testis in propria causa. 4 *Inst.* 279.—*A judge cannot be witness in his own cause.*

Judex non potest injuriam sibi datam punire. 12 *Co.* 113.—*A judge cannot punish an injury done to himself.*

Judex non reddit plus quam quod petens ipse requirit.

2 Inst. 286.—*A judge does not render judgment for more than is demanded.*

Judicandum est legibus non exemplis. **4 Co.** 33.—*Judgment must be given according to the laws, not from precedents.*

Judices non tenentur exprimere causam sententiae suae. **Jenk. Cent.** 75.—*Judges are not bound to explain the reasons of their sentence.*

Judici officium suum excedenti non paretur. **Jenk. Cent.** 139.—*A judge exceeding his office is not to be obeyed.*

Judici satis poena est quod Deum habet ultorem. **1 Leon.** 295.—*It is punishment enough for a judge that God is his avenger.*

Judicia in curia regis non adnihilentur, sed stent in robore suo quoisque per errorem aut attinctum adnullentur. **2 Inst.** 539.—*Judgments in the king's courts are not annihilated, but remain in force, until annulled by error or attainant.*

Judicia in deliberationibus crebro maturescunt, in accelerato processu nunquam. **3 Inst.** 210.—*Judgments become matured by deliberations, but never by hurried process.*

Judicia posteriora sunt in lege fortiora. **8 Co.** 97.—*The latter decisions are the strongest in law.*

Judicia sunt tanquam iuris dicta, et pro veritate accipiuntur. **2 Inst.** 573.—*Judgments are, as it were, the dicta of the law, and are taken for granted to be true.*

Judiciis posterioribus fides est adhibenda. **13 Co.** 14.—*Credit is to be given to the latest decisions.*

Judicis est judicare secundum allegata et probata. **Dyer,** 12.—*A judge ought to decide according to what is alleged and proved.*

Judicis officium est opus diei in die suo perficere. **2 Inst.** 256.—*It is the duty of a judge to do the work of each day within that day.*

Judicis officium est, ut res, ita tempora rerum, quaerere, quaesito tempore tutus eris. **Co. Lit.** 171.—*It is the duty of a judge to inquire as well into the time of things as into things themselves; by inquiring into the time, you will be safe.*

Judicium a non suo judice datum nullius est momenti. **10 Co.** 76.—*A judgment given by the improper judge is of no moment.*

Judicium est quasi juris dictum. *Co. Lit.* 168.—*Judgment is a sort of dictum of the law.*

Judicium non debet esse illusorium. *2 Inst.* 341. suum effectum habere debet.—*A judgment ought not to be illusory, it ought to have its effect.*

Judicium redditur in invitum, in præsumptione legis. *Co. Lit.* 248.—*Judgment in presumption of law is given against the party contrary to his own inclination.*

Judicium semper pro veritate accipitur. *2 Inst.* 380.—*Judgment is always taken to be true.*

Juramentum est indivisibile, et non est admittendum in parte verum et in parte falsum. *4 Inst.* 279.—*An oath is indivisible; one part is not to be received as true and the other part false.*

Jura naturæ sunt immutabilia—*The laws of nature are unchangeable.*

Jura publica, anteferenda privatis. *Co. Lit.* 130.—*Public rights are to be preferred to private.*

Jura publica ex privato promiscue decidi non debent. *Co. Lit.* 181 b.—There is a diversity between authorities created by the party, for private causes, and authority created by law for execution of justice. *See the examples.* *Co. Lit.* 181 b.

Jurato creditur in judicio. *3 Inst.* 79.—*In judgment, credit is given to the oath of the witness.*

Juratores debent esse vicini, sufficietes, et minus suspecti. *Jenk. Cent.* 141.—*Jurors ought to come from the neighbourhood, be of sufficient estate, and free from suspicion.*

Jurare est Deum in testem vocare, et est actus divini cultus. *3 Inst.* 165.—*To swear is to call God to witness, and is an act of religion.*

Jura sanguinis nullo jure civili dirimi possunt. *Bacon.*
—*The right of blood no laws can take away.*

Juratores sunt judices facti. *Jenk. Cent.* 68.—*The jury are the judges of the fact.*

[*Jure belli—By right of war.*]

[*Jure humano—By human law; founded on the rights of man, and deriving its obligation from the assent of the people.*]

[*Jure divino—By divine right.*—The tenure by which the tories of Great Britain contended that the kings held their crowns, in opposition to the whigs, who supported the principles of the revolution.]

Juri non est consonum quod aliquis accessorius in curia regis convincatur, antequam aliquis de facto fuerit attingens. 2 Inst. 183.—*It is not consonant to justice that an accessory should be convicted in the king's court before the principal.*

Jurisdictio est potestas de publico introducta, cum necessitate jurisdicendi. 10 Co. 73.—*Jurisdiction is a power introduced for the public good, on account of the necessity of expounding the law.*

Juris effectus in executione consistit. Co. Lit. 289.—*The effect of the law consists in the execution.*

Jurisprudentia legis communis Angliae est scientia socialis et copiosa. 7 Co. 28.—*The jurisprudence of the common law of England is a social and copious science.*

[*Jus—Law, or right, authority and rule.*]

[*Jus accrescendi. Co. Lit. 180 a.—The right of survivorship, between joint-tenants.*]

Jus accrescendi, inter mercatores locum non habet, pro beneficio commercii. Co. Lit. 182.—*The right of survivorship (jus accrescendi,) does not exist among merchants, for the benefit of commerce.*

Jus accrescendi præfertur oneribus. Co. Lit. 185.—*The right of survivorship is preferred to incumbrances.*

Jus accrescendi præfertur ultimæ voluntati. Co. Lit. 185 b.—*The right of survivorship is preferred to the last will.*

[*Jus civile—The civil law.*]

Jus descendit et non terra. Co. Lit. 345.—*The right descends and not the land.*

Jus est norma recti; et quicquid est contra normam recti est injuria. 3 Buls. 313.—*Law is a rule of right; and whatever is contrary thereto is an injury.*

[*Jus et norma loquendi. 6 Bac. Abr. 392.—The legal acceptation of words,—is governed by usage.*]

[*Jus gentium—The law of nations.*]

Jusjurandum inter alios factum nec nocere nec prodesse debet. 4 Inst. 279.—*An oath made by other persons ought to have no effect.*

Jus naturale est quod apud omnes homines eandem habet potentiam. 7 Co. 12.—*Natural right is that which has the same force among all men.*

Jus nec inflecti gratia, ne frangi potentia, nec adulterari. pecunia potest: quod si non modo oppressum, sed desertum aut negligentia asservatum fuerit, nihil est quod

quisquam se habere certum, aut a patre accepturum, aut liberis esse relicturum, arbitretur. Cic.—Favour ought not to be able to bend justice, power to warp it, nor money to corrupt it; for not only by oppression, but by neglect and want of proper care, justice becomes so abused, that it seems as if no man held his rights secure, neither receiving the inheritance transmitted by his ancestors, nor being able to transmit his own estate to his children.

Jus non habenti, tute non paretur. Hob. 146.—It is not safe to obey him who has no right.

[*Jus postliminii—The resumption of an original inherent right, to a re-captured vessel, by the legal owners.*]

Jus publicum et privatum quod ex naturalibus præceptis aut gentium, aut civilibus est collectum, et quod in jure scripto. Jus appellatur id in lege Angliæ rectum esse dicitur. Co. Lit. 158.—Public and private law, collected from natural or civil institutes, and which in written law is called jus, by the law of England is called rectum.

Jus respicit æquitatem. Co. Lit. 24.—Law respects equity.

Jus vendit quod usus approbat. Ellesm. Postn. 35.—The law dispenses what use approves.

Justitia debet esse libera, quia nihil iniquius venali justitia; plena, quia justitia non debet claudicare; et celebris, quia dilatio est quædam negatio. 2 Inst. 56.—Justice ought to be unbought, because nothing is more hateful than venality; large in its operation, for it ought not to shut out suitors; quick, for a delay of justice is to a certain extent a denial of it.

Justitia est duplex, viz. severe puniens et vere præveniens. 3 Inst. Epil.—Justice is double; punishing with severity, preventing with lenity.

Justitia est virtus excellens et Altissimo complacens. 4 Inst. 58.—Justice is excellent virtue, pleasing to the Most High.

Justitia nemini neganda est. Jenk. Cent. 178.—Justice is to be denied to none.

Justitia non est neganda, non differenda. Jenk. Cent. 93.—Justice is neither to be denied nor delayed.

Justitia non novit patrem nec matrem, solam veritatem spectat justitia. 1 Bulst. 199.—Justice knows neither father nor mother, it looks to truth alone.

Jus triplex est; proprietatis, possessionis, et possibili-

tatis—*Right is threefold; of property, of possession, of possibility.*

Justum non est aliquem antenatum, mortuum facere bastardum, qui pro tota vita sua pro legitimo habetur. 8 Co. 101.—*It is not just to make a man, who all his life has been accounted legitimate, a bastard after his death.*

[*Jus venit, quod usus comprobavit.* 15 Vin. Abr. 46.

—*That becomes a right which is sanctioned by usage.]*

Ignorance of one's right ought not to prejudice.

Incidents adhere to their superiors or principals. Wing.

Incidents may not be severed. Noy.

Iniquity bars equity.

Intendment of parties shall be ordered according to law.
Noy.

Intent without act not punishable.

Intention being clear, all means to perform it must be solicited by courts of justice.

Intention, secret, must give way to the legal intent.

Joint-tenancy { *favoured in law.* } { *odious in equity.* } See Fran. Max. pa. 19, § 19.

Joint-tenant is seised per my et per tout; et sic totum tenet et nihil tenet. s. totum conjunctim, et nihil per se separativim: and thus he holds all and holds nothing, all conjunctively, nothing separately. Co. Lit. 186.

Joint-tenants hold by one title; tenants in common by several titles. Co. Lit. 180.

Jointress—*A term may be set aside to let her in; not so as to a doweress.*

Jointress—*Agreements to be performed in specie, in her favour.*

Jointress not obliged to discover or part with writings till her jointure is confirmed.

Jointress, there may be a resulting trust to her; as in case of redemption of a mortgage.

Jointure of women favoured in equity.

Issue doit estre joine sur le plus material chose alleagded en count ou barr. Jenk. Cent. 326.—*Issue ought to be joined on the most material matter alleged in the count or in bar.*

Judges are to make such exposition of laws and statutes as not to suffer them to be illusory. Hob. 97.

Judges have always suppressed new and subtle inventions in derogation of the common law.

Judgment, the best construction is to be made for supporting it. 2 Saund. 96.

Justice is to be preferred to charity.

[*Laches—Negligence.*—1 Bl. Com. 465.]

Laudaturque domus longos, qui prospicit agros. 9 Co. 58 b.—*The house is admired, which looks over extensive fields.*

[*Legis constructio non facit injuriam.* Co. Lit. 183 a.

—*The construction of the law works no injury.*]

[*Legitima concubina.* Bract.; Noy. Max. 129 note—*Lawful cohabitation.*]

[*Levant and couchant,* are terms applied to cattle, that have been so long on the ground of another, that they have *lain down* and are *risen again* to feed; which in general is supposed to have been *a day and a night.* 3 Bl. Com. 9.]

[*Levari facias,* is a writ of execution, commanding the sheriff to *levy* a sum of money upon the lands, tenements and chattels of a person who has forfeited a recognizance (T. L. 479)—It is also founded on judgments generally; and affects the goods and *profits* of a man's land, whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. (3 Bl. Com. 417)—It is also a proper process after the returns of the writ of *capias ut legatum.* Tidd's Prac. 136.]

Lex Angliæ est lex misericordiæ. 2 Inst. 315.—*The law of England is a law of mercy.*

Lex Angliæ non patitur absurdum. 9 Co. 22.—*The law of England admits no absurdity.*

Lex Angliæ nunquam matris sed semper patris conditionem imitari partum judicat. Co. Lit. 123.—*The law of England adjudges that the offspring shall follow the condition of the father, not of the mother.*

Lex Angliæ nunquam sine parlimendo mutare non potest. 2 Inst. 218.—*The law of England cannot be changed but by parliament.*

Lex est ab Æterno. Jenk. Cent. 34.—*Law is from the Eternal.*

Lex æquitate gaudet. Jenk. Cent. 36.—*Appetit perfectum,—est norma recti—Law rejoices in equity; it covets perfection; it is a rule of right.*

Lex aliquando sequitur æquitatem. 3 Wils. 119.—*Law sometimes follows equity..*

Lex beneficialis rei consimili remedium præstat. 2 Inst. 689.—*A beneficial law affords a remedy in a similar case.*

Lex citius tolerare vult privatum damnum quam publicum malum. Co. Lit. 152.—*The law will rather tolerate a private loss than a public evil.*

Lex deficere non potest in justitia exhibenda. Co. Lit. 197.—*The law cannot be defective in dispensing justice.*

Lex dilationes semper exhorret. 2 Inst. 240.—*The law always abhors delays.*

Lex est dictamen rationis. Jenk. Cent. 117.—*The law is the dictate of reason.*

Lex est exercitus judicum tutissimus ductor. 2 Inst. 526.—*The law is the safest leader of the army of judges.*

Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet. Co. Lit. 319 b.—*Law is the highest reason, which commands what is useful and necessary, and forbids what is contrary thereto.*

Lex est sanctio sancta, jubens honesta, et prohibens contraria. 2 Inst. 587.—*Law is a sacred sanction, commanding what is honourable, and forbidding what is contrary.*

Lex est tutissima cassis, sub clypeo legis nemo decipitur. 2 Inst. 56.—*Law is the safest helmet; under the shield of the law none is deceived.*

Lex et consuetudo parlamenti: ista lex est ab omnibus quaerenda, a multis ignorata, a paucis cognita. Co. Lit. 11 b.—*The law and custom of parliament: this law is sought by all, unknown to many, known to few.*

Lex fingit ubi subsistit æquitas. 11 Co. 90.—*The law feigns where equity subsists.*

Lex intendit vicinum vicini facta scire. Co. Lit. 78.—*The law presumes one neighbour to know the actions of another.*

Lex judicat de rebus necessario faciendis, quasi re ipsa factis—The law judges of things which must necessarily be done, as if actually done.

[**Lex loci**—*The law of the place. The lex loci contractus*, where a *contract* is made, or is to be executed, is the law of the contract, by which it is to be expounded. 2 Fonb. Eq. B. 5, c. 1, § 6; 1 P. Wms. 396; 2 Burr. 1094; 1 Wash. 368; 2 Wash. 295; 4 Dall. 327, 419; 3 Johns. Ch. Rep. 190; 5 Johns. Rep. 239; 8 Johns. Rep. 189; 17 Johns. Rep. 571; 2 Bibb. 634; 1 Marsh.

Branch's Principia, &c.—10

254; 2 Mass. T. R. 84; 3 Mass. T. R. 77; 5 Cranch 289, 298, 302; 6 Cranch 221; 3 Wheat. 101, 146; 4 Wheat. 209.—The *lex loci rei sitæ* (*the law of the place where the property is situate*) and not the *lex loci contractus, governs in the disposal of real property.* 7 Cranch 115; 3 Wheat. 212, 218; 6 Wheat. 577.—Rights to personal property are regulated by the laws of the country where the deceased was domiciled; but the suits for those rights must be governed by the *lex fori*, the laws of the country in which the *tribunal* is established, where they are prosecuted. 1 Cranch 259; 3 Cranch 319, 324; 2 Mass. T. R. 84; 3 Mass. T. R. 77.—See also Co. Lit. 79 b. note (1) *Day's edi.*]

Lex necessitatis est lex temporis, i. e. instantis. Hob. 159.—The law of necessity is the law of the time present.

Lex neminem cogit ad vana seu inutilia peragenda. 5 Co. 21; Co. Lit. 197; Wing. 600.—The law forces no one to do vain or useless things.

Lex nemini operatur iniquum; nemini facit injuriam. Jenk. Cent. 22.—The law works injustice to no one; does injury to no one.

Lex nil facit frustra. Jenk. Cent. 17.—Nil jubet frustra. 3 Bulst. 279.—The law does nothing vainly; commands nothing vainly.

Lex non curat de minimis. Hob. 88.—The law cares not about trifles.

Lex non cogit ad impossibilia. Hob. 96.—The law compels no man to do impossibilities.

Lex non deficit in justitia exhibenda. Jenk. Cent. 31.—The law is not defective in justice.

Lex non præcipit inutilia; quia inutilis labor stultus. Co. Lit. 197.—The law commands not useless things; for useless things are folly.

Lex non favet delicatorum votis. 9 Co. 58.—The law favours not the vows of the squeamish.

Lex non intendit aliquid impossibile. 12 Co. 89.—The law intends nothing that is impossible.

Lex non patitur fractiones et divisiones statutum. 1 Co. 87.—The law suffers no fractions and divisions of statutes.

Lex non requirit verificari quod apparent curiae. 9 Co. 54.—The law does not require that which is apparent to the court to be verified.

[*Lex non scripta*—The unwritten, or common law. 1 Bl. Com. 63.]

Lex plus laudatur quando ratione probatur. Lit. Epil.—*The law is the more praised, when it is approved by reason.*

Lex prospicit, non respicit. Jenk. Cent. 284.—*The law looks forward, not backward.*

Lex punit mendacium. Jenk. Cent. 15.—*The law punishes a lie.*

Lex rejicit superflua, pugnantia, incongrua. Jenk. Cent. 133. 140. 176.—*The law rejects superfluous, contradictory, and incongruous things.*

Lex reprobat moram. Jenk. Cent. 35.—*The law dislikes delay.*

[*Lex scripta*—The written, or statute law. 1 Bl. Com. 63.]

Lex scripta si cessen id custodiri oportet quod moribus et consuetudine inductum est, et si qua in re hoc defecerit tunc id quod proximum et consequens ei est, et si id non appareat, tunc jus quo urbs Romana utitur servari oportet. 7 Co. 19.—*If the written law is silent, that which is drawn from manners and custom ought to be observed; and if in that any thing is defective, then that which is next and analogous to it; and if that does not appear, then that law which was in use in the city of Rome.*

Lex semper dabit remedium—*The law will always give a remedy.*

Lex semper intendit quod convenit rationi. Co. Lit. 78.—*The law always intends what is agreeable to reason.*

Lex spectat naturæ ordinem. Co. Lit. 197.—*The law respects the order of nature.*

Lex succurrit ignoranti. Jenk. 15.—*Minoribus, 51.*—*The law assists the ignorant, viz. minors.*

[*Lex talionis*—*The law of retaliation. 4 Bl. Com. 12.*]

[*Lex terræ*—*The law of the land; in contradistinction to the civil law.*]

Lex uno ore omnes alloquitur. 2 Inst. 184.—*The law speaks to all with the same voice.*

Legatos violare contra jus gentium est—*It is contrary to the law of nations to injure ambassadors.*

Legatum, morte testatoris tantum confirmatur; sicut donatio inter vivos traditione sola. Dycr, 143.—*A legacy*

is confirmed by the death of the testator, in the same manner as a gift from a living person is by delivery.

Legatus, regis vice fungitur a quo destinatur, et honorandus est sicut ille cuius vicem gerit. 12 Co. 17.—*The ambassador of a king fills the place of him by whom he is sent, and is to be honoured like him whose place he fills.*

Legem terræ amittentes perpetuam infamiae notam inde merito incurunt. 3 Inst. 221.—*Destroyers of the law of the land incur the note of perpetual infamy.*

Leges Angliæ sunt tripartitæ : jus commune, consuetudines, ac decreta comitiorum—*The laws of England are threefold: common law, customs, and decrees of parliament.*

Leges communes si nescit foemina, miles—*If a woman is ignorant of the laws, her husband is presumed to know them, and instruct her.*

Leges figendi et refigendi consuetudo periculosissima est. 4 Co. ad Lect.—*To make and unmake laws is a most dangerous custom.*

Leges naturæ perfectissimæ et immutabiles : humanae vero juris conditio semper in infinitum decurrit, et nihil est in eo quod perpetuo stare possit. Leges humanæ nascentur, vivunt, et moriuntur. 7 Co. 25.—*The laws of nature are most firm and immutable: human law has always a tendency to multiply to infinity; there is nothing therein that will continue perpetually. Human laws are born, live, and die.*

Leges non verbis sed rebus sunt impositæ. 10 Co. 101.—*Laws are imposed on things, not words.*

Leges posteriores priores contrarias abrogant. 2 Rol. Rep. 410. 11 Co. 62 b. 63 a.—*Later laws abrogate prior laws contrary to them.*

Legibus sumptis desinentibus, lege naturæ utendum est. Cicero. 2 Rol. Rep. 298.—*Laws imposed by the state failing, we must act by the law of nature.*

Legis constructio non facit injuriam. Co. Lit. 183.—*The construction of law does no injury.*

Legis interpretatio legis vim obtinet. Ellesm. Postn. 55.—*The interpretation of law obtains the force of law.*

Legislatorum est viva vox, rebus et non verbis legem imponere. 10 Co. 101.—*The voice of legislators is a living voice, to impose laws on things, not on words.*

Legis minister non tenetur, in executione officii sui, fugere aut retrocedere. 6 Co. 68.—*The minister of the law*

is bound, in the execution of his office, neither to fly nor retreat.

Legitime imperanti parere necesse est. *Jenk. Cent. 120.*—*It is necessary to obey one legitimately commanding.*

Le ley de Dieu et le ley de terre sont tout un, et l'un et l'autre preferre et savour le common et publique bien del terre. *Keil. 191.*—*The law of God and the law of the land are the same, and both preserve and favour the common good of the land.*

Le ley voit plus tost siffer un mischiefe que un inconvenie. *Lit. Sect. 231.*—*The law will suffer a mischief sooner than an inconvenience.*

Liberata pecunia non liberat offerentem. *Co. Lit. 207.*

—*The money being restored, does not set free the party offering.*

Libertas est naturalis facultas ejus quod cuique facere libet, nisi quod de jure aut vi prohibetur. *Co. Lit. 116.*

—*Liberty is that rational faculty which permits every one to do what he is not restrained from doing by law or force.*

Libertas est res inestimabilis. *Jenk. Cent. 52.*—*Liberty is an inestimable thing.*

Libertinum ingratum leges civiles in pristinum servitutem redigant; sed leges Angliae semel manumissum semper liberum judicant. *Co. Lit. 137.*—*The civil laws reduced an ungrateful freedman to his original slavery; but the laws of England regard a man once manumitted, as ever after free.*

Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio praecedens quae sortiatur effectum, interveniente novo actu: *Bacon.*—*Although a disposition concerning what is to take place in future is useless, yet a precedent declaration may be made, which will be of effect, a new act intervening.*

Licita bene miscentur, formula nisi juris obstet. *Bacon.*—*Things permitted are well mingled, lest the form of law should be an obstacle.*

Ligeantia est quasi legis essentia; est vinculum fidei. *Co. Lit. 129.*—*Allegiance is, as it were, the essence of law; it is the chain of faith.*

Ligeantia naturalis, nullis claustris coercetur, nullis metis refrænatur, nullis finibus premitur. *7 Co. 10.*—*Natural allegiance is restrained by no barriers, reined by no bounds, compressed by no limits.*

Linea recta semper præfertur transversali. *Co. Lit. 10.*
—A right line is always preferred to a transverse.

Linea recta est index sui et obliqui; lex est linea recti.
Co. Lit. 158.—A right line is always an index of itself and of its oblique; law is a line of right.

[*Lis pendens—A suit depending.*]

[*Litera scripta manet.* 5 *Vin. Abr.* 516. *The written letter remains.*—Thus contrasted with words spoken: *vox emissa volat, litera scripta manet.* While words spoken may fly away and be forgotten, what is written remains as evidence.]

[*Literatum—Letter by letter.*]

Litis nomen, omnem actionem significat, sive in rem, sive in personam sit. *Co. Lit. 292.—A lawsuit signifies every sort of action, whether for the recovery of any thing, or against the person.*

Locus pro solutione reditus aut pecuniæ secundum conditionem dimissionis aut obligationis est stricte observandus. 4 *Co. 73.—The place appointed in a lease or bond, for the payment of rent or money, is to be strictly observed.*

[*Locum tenens—Holding the place of another.—A deputy, or substitute.*]

[*Locus sigilli—The place of the seal.—Designated by the initial letters, thus L. S.*]

Longa possessio est pacis jus. *Co. Lit. 6.—Long possession is the law of peace.*

Longa possessio parit jus possidendi, et tollit actionem vero domino. *Co. Lit. 110.—Long possession produces the right of possession, and deprives the rightful lord of his action.*

Longum tempus, et longus usus, qui excedit memoria hominum, sufficit pro jure. *Co. Lit. 115.—A time, and a custom, so long as to exceed the memory of man, are sufficient in law to establish the right.*

Loquendum ut vulgus, sentiendum ut docti. 7 *Co. 11.*
Jenk. 282.—Speak in common language; think learnedly.

Lou le ley done chose, la ceo done remedie a vene a ceo. 2 *Rol. R. 17.—Where the law gives a right, it gives a remedy.*

Lubricum linguae non facile trahendum est paenam.
Cro. Car. 117.—A light expression (or, a slip of the tongue) is not ordinarily subjected to punishment.

[*Lunar months—See month, and 2 Bl. Com. 141. Chris. note (1).]*

Land, and rent going out of the same, coming into one man's hands, of like estate and title, the rent is extinct.—Doct. and Stud.

Land of every man is, in law, inclosed, though in an open field; he may therefore have trespass quare clausum fregit.—Doct. and Stud.

Lands descending to him who had right to the same before, he shall be remitted to his better title, if he will.—Doct. and Stud. 37.

Lands descend lineally, but may not lineally ascend. (Otherwise in Virginia.)

Lands shall not be inalienable.

Law and equity shall prevail against equity alone.

Law favoureth justice and truth; but abhors falsehood, variance, contrariety, unnecessary circumstances, delay, folly, negligence, circuity of action, and matters of uncertainty, infiniteness, and vexation.

Law favoureth life, liberty, and dower.

Law is the perfection of reason.

Law more respecteth a lesser estate by right, than a greater by wrong.

Law prefers the public good to private.

Law regards the interests of parties.—Plow. 140.

Law regards the person above his possessions,—life and liberty most,—freehold and inheritance above chattels,—chattels real above personal,—and a matter in right more than one in possession.—Finch.

Law respects matters of record, and conveyance by livery.—Wing.

Law will not require a man to make proof of that which he cannot be intended to know.

Law rejects all fractions of a day, term, or session.

Law requires order and decency; but principally respecteth the substance.

Law respecteth the ties of nature and its order.

Law respecteth persons according to their worthiness.

Law respects possibility; therefore nothing to be void which can possibly be good.—Finch.

Law tendereth the weakness and imperfections of men.

Law will admit no proof against its own presumptions.

Law will rather endure a particular mischief than a general inconvenience.

Law will rather suffer things against its own principles, than that a man shall be without a remedy.

Law to bind all must be assented to by all.

Law utterly abhors infiniteness and delay of suits. 6 Co. 9.

Law will not do or suffer wrong.

Whatever was at common law, and is not taken away by statute, remaineth still. Co. Lit. 115.

Legacies to be paid out of the personal estate.

Length of time no objection, in equity, to redemption.

Lesser estate merges in the greater.

Limitation of prescription, generally taken, is, from time whereof no man's memory runs to the contrary.

Limitation over to another, where restraint of marriage makes the restriction binding; otherwise it is only in terrorem.

Magister rerum usus. Co. Lit. 229.—*Magistra rerum experientia.* Ibid. 69.—*Use is the master of things; experience is the mistress of things.*

Magna charta et charta de foresta, sont appelle les deux grand charters. 2 Inst. 570.—*The magna charta, and the charter of the forest, are called the two great charters.*

Magna fuit quondam magnæ reverentia chartæ. 2 Inst. Proem.—*Reverence for the great charter was formerly great*

Maihemium est inter crimina majora minimum, et inter minora maximum. Co. Lit. 127.—*Mayhem is the least of great crimes, and the greatest of small.*

Maihemium, est membra mutilatio; et dici poterit, ubi aliquis in aliqua parte sui corporis effectus sit inutilis ad pugnandum. Co. Lit. 126.—*Mayhem is the mutilation of a limb; and is so called, when any person is so injured in any part of his body, that a member used in fighting is rendered useless.*

Maihemium est homicidium inchoatum. 3 Inst. 118.—*Mayhem is incipient homicide.*

•[Mainour—When a thief is taken with the thing stolen in his hand, in manu, he is said to be taken with the mainour. 4 Bl. Com. 307.]

Major hæreditas venit unicuique nostrum a jure et legibus quam a parentibus. Cic. 2 Inst. 56.—*A greater inheritance comes to every one more by the laws and right than by parents.*

Majore poena affectus quam legibus statuta est, non est infamis. 4 Inst. 66.—*A man affected with a greater punishment than the laws appoint, is not infamous.*

[Majus continet in se minus. 19 Vin. Abr. 379.—*The greater includes the less.*]

Majus dignum trahit ad se minus dignum. 5 Vin. Abr. 584. 586.—*The more worthy, draws to itself the less worthy.*

Majus est delictum seipsum occidere quam alium. 3 Inst. 54.—*It is more criminal for a man to kill himself than to kill another.*

[*Mala fide—In bad faith.*]

Mala grammatica non vitiat chartam. 9 Co. 48. Wing. 18.—Sed in expositione instrumentorum mala grammatica quoad fieri possit, evitanda est. 6 Co. 39.—*Bad grammar does not vitiate a deed, or writing; but in the exposition of instruments, bad grammar, as far as possible, is to be avoided.*

Maledicta expositio quæ corrumpit textum. 4 Co. 35.—*It is a bad exposition which corrupts the text.*

Maleficia non debent remanere impunita; et impunita continuum affectum tribuit delinquenti. 4 Co. 45.—*Evil deeds ought not to remain unpunished; and impunity affords continual excitement to the delinquent.*

Maleficia propositis distinguuntur. Jenk. Cent. 290.—*Evil deeds are distinguished from evil purposes.*

Militia est acida; est mali animi affectus. 2 Inst. 42. 2 Buls. 49.—*Malice is sour; it is the quality of a bad mind.*

Militia supplet ætatem. Dyer, 104 b.—*Malice supplies the want of age.*

Malitiis hominum est obviandum. 4 Co. 15.—*The malice of men is to be avoided.*

[*Malum in se—A thing evil in itself,—as contradistinguished from Malum prohibitum, a thing evil only because forbidden.*]

Malum non habet efficientem, sed deficientem causam. 3 Inst. Proeme.—*Evil has not an efficient but a deficient cause.*

Malum non præsumitur. 4 Co. 72.—*Evil is not presumed.*

Malum quo communius eo pejus—*The more common an evil is, the worse.*

Malus usus abolendus est. Lit. sect. 212.—*Quia in Branch's Principia, &c.—11*

consuetudinibus, non diuturnitas temporis, sed soliditas rationis est consideranda. *Co. Lit. 141.*—*A bad custom [one contrary to reason] is to be abolished; for in customs, not the length of time, but the reasonableness of the custom, is to be considered.*

[**Mandamus**—A writ issuing from a superior court directed to any person, corporation, or the judges of an inferior court, commanding them to do justice according to the powers of their office.—And it issues in all cases, where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. *3 Bl. Com. 110.*]

Mandata licita, strictam recipiunt interpretationem; sed illicita, latam et extensam. *Bacon.*—*Lawful commands are, strictly interpreted, unlawful, broadly.*

Mandatarius terminos sibi positos transgredi non potest. *Jenk. Cent. 53.*—*A person commanding cannot pass bounds restraining himself.*

Manerium dicitur a manendo, secundum excellentiam, sedes magna, fixa et stabilis. *Co. Lit. 58.*—*A manor is so called from "manendo," a being fixed; because, by its excellency, it is a great seat or dwelling, fixed and firm.*

Manifesta probatione non indigent. *7 Co. 40.*—*Things manifest require no proof.*

Manseribus scortum, notho mœchus dedit ortum—*A harlot gives birth to bastards; adultery produces bastards.*

Ut seges e spica, sic spurius est ab amica. *Co. Lit. 244.*—*As corn comes from the ear, so a bastard comes by a mistress.*

Manumittere, idem est quod extra manum vel potestatem ponere. *Co. Lit. 137.*—*To manumit, is the same as to let from under the power of your hands.*

Manus mortua, quia possessio est immortalis, manus pro possessione, et mortua pro immortali. *Co. Lit. 2.*—*Mortmain, because an immortal possession; manus for possession, immortalis for immortal.*

Maris et fœminæ conjunctio est de jure naturæ. *7 Co. 13.*—*The connexion of male and female is by the law of nature.*

Matrimonium subsequens tollit precatum præcedens. *Jur. Civ.*—*Subsequent marriage cures preceding criminality.*

Matter in ley ne serra mise in boutche del inrors. *Jenk.*

Cent. 180.—Matter of law shall not be put in the mouth of the jurors.

Maturiora sunt vota mulierum quam virorum. 6 Co.

71.—*The vows of women are mature before those of men.*

Maxime, ita dicta quia maxima est ejus dignitas et certissima authoritas, atque quod maxime omnibus probetur.

Co. Lit. 11.—*Maxim, so called because its dignity is the highest, and its authority the most certain, and because greatest of all.*

Maxime paci sunt contraria, vis et injuria. Co. Lit.

161.—*Force and injury are the most averse to peace.*

Maximus erroris populus magister. Bacon.—*The people the greatest master of error.*

Melior [metalla] dabit nomen rei. Bacon.—*The better (amongst metals) gives the name to the thing.*

Melior est justitia vere præveniens, quam severe puniens. 3 Inst. Epil.—*That justice is better which prevents, than which punishes with severity.*

Melior est conditio possidentis, et rei quam actoris. 4 Inst. 180.—*The condition of the possessor is the best, and of the defendant than of the plaintiff.*

Melior est conditio possidentis, ubi neuter jus habet. Jenk. Cent. 118.—*Where neither party has any right, the condition of the possessor is the best.*

Meliorem conditionem suam facere potest minor, detiorem nequaquam. Co. Lit. 337.—*A minor can improve, but not injure his condition.*

Melius est omnia mala pati quam malo consentire. 3 Inst. 23.—*It is better to suffer every evil, than consent to ill.*

[Melius est petere fontes, quam sectari rivulos. Co. Lit. 305 b.—*It is better to seek the fountain, than to follow the rills.*—Better to rely on the case at large, than to consult abridgments.]

Melius est recurrere quam male currere. 4 Inst. 176.—*It is better to recede than proceed badly.*

Melius est in tempore occurrere, quam post causam vulneratam remedium querere. 2 Inst. 299.—*It is better to come in time, than to seek a remedy after the mischief is done.*

[Melius inquirendum—A writ which issues for a further or better inquiry, after an inquisition returned, on which it is suggested the valuation is too low. Tidd's Pract. 136.]

[*Mensa et thoro*—A divorce *a mensa et thoro*, is a separation from bed and board. 1 *Bl. Com.* 440.]

Mens testatoris in testamentis spectanda est. Jenk. Cent. 277.—The testator's intention is to be seen in his will.

Mensis—A month.—See Month.

Mentiri est contra mentem ire. 3 Buls. 260.—To lie, is to go against the mind.

Merito beneficium legis amittit, qui legem ipsam subvertere intendit. 2 Inst. 53.—He justly loses the benefit of law, who means to overturn the law itself.

[*Mesne—Intermediate. 3 Bl. Com. 279.*]

Meum est promittere non dimittere. 2 Rol. Rep. 39.—Mine is to promise, not discharge.

[*Minae inermes. Hob. 156.—Harmless threats.*]

Minatur innocentibus, qui parcit nocentibus. 4 Co. 45.—He threatens the innocent, who spares the guilty.

Minima poena corporalis est major qualibet pecuniaria. 2 Inst. 220.—The smallest bodily punishment is greater than any pecuniary one.

Minime mutanda sunt quæ certam habuerunt interpretationem. Co. Lit. 365. Wing. 748.—Things, which have a certain interpretation, are in no wise to be changed.

Minimum est nihilo proximum—The smallest is next to nothing.

Minor ante tempus agere non potest in casu proprietatis, nec etiam convenire; differetur usque ætatem; sed non cadit breve. 2 Inst. 291.—A minor cannot act in a case of property, nor can he appoint; it must be deferred till he is of age: but the writ does not fall.

Minor jurare non potest. Co. Lit. 172 b.—A minor cannot swear.

Minor, 17 annis, non admittitur fore executorem. 6 Co. 67.—A minor, under 17, cannot be an executor.

Minor, meliorem conditionem suam facere potest, detiorum nequaquam. Co. Lit. 337.—A minor can improve his condition, but he cannot by any means render it worse.

Minor minorem custodire non debet; alios enim præsumitur male regere qui seipsum regere nescit. Co. Lit. 88.—A minor cannot be guardian; for he is presumed incapable of directing others, who is incapable of directing himself.

Minor non tenetur respondere durante minori ætate; nisi in causa dotis, propter favorem. 3 Bulst. 143.—A minor is not bound to reply during his minority, except in dower, by favour.

Minor, qui infra aetatem 12 annorum fuerit, utlagari non potest, nec extra legem poni, quia ante talem aetatem, non est sub lege aliqua, nec in decenna. *Co. Lit.* 128.—*A minor, under 12 years, cannot be outlawed, because before that age he is bound by no law.*

Misera est servitus, ubi jus est vagum aut incertum. 4 *Inst.* 246.—*It is a miserable servitude, where the law is vague or unknown.*

[*Misnomer—A misnaming.* 3 *Bl. Com.* 302.]

Mitius imperanti melius paretur. 3 *Inst.* 24.—*He is obeyed best who commands leniently.*

[*Mittimus.—A warrant from a justice to commit an offender to jail.* 4 *Bl. Com.* 300.]

Modus et conventio vincunt legem. 2 *Co.* 73.—*Agreement and convention overrule the law.*

Modus legem dat donationi. *Co. Lit.* 19 a.—*The manner gives law to the gift.*

[*Molliter manus imposuit.—A plea in an action of trespass, assault and battery, that the defendant gently laid his hands on the plaintiff.* 3 *Bl. Com.* 121.]

Moneta dicitur a monendo, quia impressione monet nos cuius sit moneta. *Dav.* 18.—*Money (moneta,) so called from monendo, a being warned; for by the impression we are warned whose it is.*

Moneta est justum medium et mensura rerum commutabilium, nam per medium monetæ fit omnium rerum conveniens et justa aestimatio. *Dav.* 18.—*Money is the just medium and measure of all commutable things; for, by the medium of money a convenient and just estimation of all things is made.*

Monopolia dicitur, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens. 11 *Co.* 86.—*Monopoly is so called, when a single person buys up the whole of one species of commodity, fixing a price at his own pleasure.*

[*Monstrans de droit—A manifestation of right.—A claim in opposition to an inquest of escheat.* 3 *Bl. Com.* 256.]

[*Month—Months are either calendar or lunar—Calendar months consist of 30 or 31 days, (except February 28, and in leap year 29,) according to the calendar, or common almanac.* 2 *Bl. Com.* 141; *Jacob. L. D. tit.* *Calendar.—Lunar months consist of 28 days, and are the months in law, and in statutes, unless it appears to be*

clearly intended a calendar month. But in bills of exchange and notes, a month is always a calendar month.
2 Bl. Com. 141. Christ. note (1.)]

Monumenta, quæ nos recorda vocamus, sunt veritatis et vetustatis vestigia. **Co. Lit. 118.**—*Those monuments which we call records, are the vestiges of truth and antiquity.*

Mora reprobatur in lege. **Jenk. Cent. 51.**—*Delay is blamed in law.*

Mors dicitur ultimum supplicium. **3 Inst. 212.**—*Death is called the last punishment.*

Mors omnia solvit. **Jenk. Cent. 160.**—*Death dissolves all things.*

Mos retinendus est fidelissimæ vetustatis. **4 Co. 78.**—*A custom of the truest antiquity is to be retained.*

Multa conceduntur per obliquum quæ non conceduntur de directo. **6 Co. 47.**—*Many things are obliquely conceded, which are not conceded directly.*

Multa ignoramus quæ nobis non laterent si veterum lectio nobis suit familiaris. **10 Co. 73.**—*We are ignorant of many things, which would not be hidden from us if we were acquainted with the readings of old authors.*

Multa in jure communi contra rationem disputandi, pro communi utilitate introducta sunt. **Co. Lit. 70.**—*Many things, contrary to the rules of argument, are introduced into the common law, for common utility.*

Multa multo exercitamento facilius quam regulis percipies. **4 Inst. 50.**—*You will perceive many things, more by practice than rules.*

Multa transeunt cum universitate quæ non per se transeunt. **Co. Lit. 12.**—*Many things pass in the whole, which would not pass separately.*

Multi multa, nemo omnia novit. **4 Inst. 348.**—*Many men know many things; no one knows every thing.*

Multiplex et indistinctum parit confusionem; et quæstiones quo simpliciores, eo lucidiores. **Hob. 335.**—*Multiplicity and indistinctness produce confusion; the more simple things are the plainer.*

Multiplicata transgressione crescat pœnæ inflictio. **2 Inst. 479.**—*Let punishment increase when crimes are multiplied.*

Multitudinem decem facient. **Co. Lit. 257.**—*Ten make a multitude.*

Multitudo errantium non parit errori patrocinium. **11**

Co. 75.—The multitude of those who err gives no encouragement to error.

Multitudo imperitorum perdit curiam. 2 Inst. 219.—A multitude of ignorant persons destroys the court.

Multo utilius est pauca idonea effundere, quam multis inutilibus homines gravari. 4 Co. 20.—It is more useful to pour forth a few useful things, than to oppress men with a multitude of useless things.

Marriage is the highest consideration in law. Co. Lit. 9 b.

Marriage is to be determined by the law of the country where contracted.

Marriage contracts, made in all countries, to be performed.

Marriage of the wards of the court of Chancery, without its leave, a high contempt.

Matters of profit or interest are by law taken largely, and therefore cannot be countermanded; but matters of pleasure, ease, trust, authority, or limitation, are to be strictly taken, and may be countermanded before they are done.
Finch.

Mispleading, in equity, shall not prejudice.

Mortgage, once so, always remains so.

Mortgage, none can come to redeem where the other side cannot compel payment; for, to make it a mortgage, the remedy must be reciprocal.

[*Multitude of judicial precedents make law. 16 Vin. Abr. 502.*].

[*Mutatis mutandis.—After making the necessary changes.—Thus, in law, what applied to A, will equally apply to B, only altering the terms according to the circumstances.*]

Natura appetit perfectum; ita et lex. Hob. 144.—Nature desires perfection, and so does law.

Naturale est quidlibet dissolvi eo modo quo ligatur. Jenk. Cent. 66.—It is natural for a thing to be unbound, in the same way in which it was bound.

Natura non facit saltum, ita, nec lex. Co. Lit. 238 b.—Nature proceeds in regular order, so does law.

Natura non facit vacuum, nec lex supervacuum. Co. Lit. 79.—Nature makes no vacuum, law no supervacuum.

Naturæ vis maxima. Natura bis maxima. 2 Inst. 564.—The force of nature is greatest. Nature is doubly greatest.

Necessarium est quod non potest aliter se habere. Bacon.—That is necessary which cannot be dispensed with.

Necessitas est lex temporis. 8 Co. 69.—*et loci.* H. H. P. C. 54.—*Necessity is the law of a particular time and place.*

Necessitas excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. Bacon.—*Necessity excuses or extenuates delinquency in capital cases, but not in civil.*

Necessitas facit licitum quod alias non est licitum. 10 Co. 61.—*Necessity makes that lawful which otherwise is not so.*

Necessitas inducit privilegium quod jure privatur. Ibid.—*Necessity gives a privilege denied by law.*

Necessitas non habet legem. Plow. 18.—*Necessity has no law.*

Necessitas publica major est quam privata. Bacon.—*Public necessity is greater than private.*

Necessitas quod cogit, defendit. H. H. P. C. 54.—*Necessity, what it compels, defends.*

Necessitas sub lege non continetur, quia quod alias non est licitum necessitas facit licitum. 2 Inst. 326.—*Necessity is not restrained by law, since what otherwise is not permitted, necessity permits.*

Necessitas vincit legem,—legum vincula irridet. Hob. 144.—*Necessity overcomes law; it breaks the chains of law.*

[*Necessity dispenses with the direct letter of a statute.* 15 Vin. Abr. 534.]

[*Necessity is excepted out of all law.* 22 Vin. Abr. 540.]

Ne curia deficeret in justitia exhibenda. 4 Inst. 63.—*Lest the court should be deficient in showing justice.*

[*Ne exeat.*—A writ to restrain a person from going out of the state. Jacob's L. D. tit. NE EXEAT REGNO; Mif. Pl. 46.]

Negatio conclusionis est error in lege. Wing. 268.—*The negative of a conclusion is error in law.*

Negatio destruit negationem, et ambæ faciunt affirmativum. Co. Lit. 146.—*A negative destroys a negative, and both together make an affirmative.*

Negatio duplex est affirmatio.—*A double negative makes an affirmative.*

[*Negative pregnant*—In pleading, is when the defendant pleads a negative plea, which is not so special, but that it includes also an affirmative; as if a man be charged with doing an act on a particular day, &c. and he pleads that he did not do it in manner and form as stated

in the declaration, it may be implied that he did it in some other manner. T. L. 511.]

Negligentia semper habet infortuniam comitem. Co. Lit. 246. Wing. 669.—*Neglect always has misfortune for a companion.*

Neminem opportet esse sapientiorem legibus. Co. Lit. 97.—*No man ought to be wiser than the laws.* Proem. to Co. Lit.

Nemo admittendus est inhabilitare seipsum. Jenk. Cent. 40.—*Nobody is to be admitted to incapacitate himself.*

Nemo agit in seipsum. Jenk. Cent. 40.—*No one acts upon himself.*

Nemo aliquam partem recte intelligere potest, antequam totum, iterum atque iterum perlegit. 3 Co. 59.—*No one can properly understand any part of a thing, till he has read the whole over and over again and again.*

[Nemo allegans suam turpitudinem, audiendus est. 4 Inst. 279.—*No man alleging his own infamy or turpitude, is to be heard.*]

[Nemo bis punitur pro eodem delicto. 2 Hawk. P. C. 377.—*No man can be twice punished for the same crime.*—No man ought to be twice brought in danger of his life for one and the same crime. 4 Bl. Com. 336.]

Nemo cogitur rem suam vendere, etiam justo pretio. 4 Inst. 275.—*No one is obliged to sell his property, even for the full value.*

Nemo contra factum suum venire potest. 2 Inst. 66.—*No one can come against his own deed.*

Nemo dat qui non habet. Jenk. Cent. 250.—*No one gives who possesses not.*

Nemo debet bis puniri pro uno delicto; et, Deus non agit bis in ipsum. 4 Co. 43.—*No one should be punished twice for one fault; God punishes not twice.*

Nemo debet bis vexari, si constet curiae quod sit pro una et eadem causa. 5 Co. 61.—*No man ought to be twice punished, if it appear to the court that it is for one and the same cause.*

Nemo debet esse judex in propria causa. 12 Co. 113.—*No one should be judge in his own cause.*

Nemo debet immiscere se rei alienæ—ad se nihil pertinenti. Jenk. Cent. 19.—*Nobody should interfere in what no way concerns him.*

Nemo debet locupletari ex alterius incommodo. Jenk. Branch's Principia, &c.—12

Cent. 4.—No man ought to be made rich at the expense of another.

Nemo debet rem suam sine facto aut defectu suo amittere. *Co. Lit.* 263. *Wing.* 592.—*No one should lose his property, but by his own act, or negligence, or fault.*

Nemo duobus utatur officiis. *4 Inst.* 100.—*No one should fill two offices.*

Nemo est hæres viventis. *Co. Lit.* 8.—*Hæres apparenz, dicitur—No one is the heir of a living man; he may be heir apparent.*

Nemo ex dolo suo proprio relevetur, aut auxilium capiat. *Jur. Civ.*—*No one is relieved, or gains an advantage, from his own deceit.*

Nemo inauditus nec summonitus condemnari debet, si non sit contumax. *Jenk. Cent.* 8.—*No man should be condemned unheard and unsummoned, unless for contumacy.*

Nemo militans Deo implicetur secularibus negotiis. *Co. Lit.* 70.—*No man engaged in a Christian warfare entangleth himself with the affairs of this life.* St. Paul, 2 Tim. ch. 2. v. 3, 4.—*Clergymen are exempted from military service.* *Co. Lit.* 70.

Nemo nascitur artifex. *Co. Lit.* 97.—*No one is born an artificer.*

Nemo patriam in qua natus est exuere, nec ligeantiae debitum ejurare possit. *Co. Lit.* 129.—*No one can disclaim the country in which he was born, nor abjure the bond of allegiance to it.* [But see 1 Rev. Code of 1819, pa. 66.]

Nemo potest contra recordum verificare per patriam. *2 Inst.* 380.—*No one can verify by a jury against a record.*

Nemo potest esse tenens et dominus. *Gilb. Ten.* 142.—*The same man cannot be both tenant and lord.*

Nemo potest facere per alium, quod per se non potest. *Jenk.* 237.—*No one can do that by another which he cannot do in person.*

Nemo potest habere duas militias nec duas dignitates; quia difficile est ut unus homo vices duorum sustineat. *4 Co.* 118.—*No one can fill two offices, for it is difficult for one man to fill the place of two.*

Nemo potest plus juris ad alium transferre quam ipse habet. *Co. Lit.* 309. *Wing.* 56.—*No one can transfer a greater right to another than he has himself.*

Nemo præsumitur alienam posteritatem suæ prætulisse. Wing. 285.—*No one is presumed to have preferred another's posterity to his own.*

Nemo præsumitur esse immemor suæ æternæ salutis, et maxime in articulo mortis. 6 Co. 76.—*No one is presumed forgetful of his own eternal welfare, and more particularly in the act of death.*

Nemo prohibetur plures negotiationes sive artes exercere. 11 Co. 54.—*No one is restrained from exercising several sorts of business or several arts.*

Nemo prohibitetur pluribus defensionibus uti. Co. Lit. 304. Wing. 479.—*No one is restrained from using several defences.*

Nemo prudens punit ut præterita revocentur, sed ut futura præveniantur. 3 Buls. 173.—*No wise man punishes that things done may be revoked, but that in future they may be prevented.*

Nemo punitur pro alieno delicto. Wing. 336.—*No one is punished for the crime of another. Quis pro alieno facto non est puniendus. 2 Inst. 442.—Who is not to be punished for another's act.*

Nemo punitur sine injuria, facto, seu defalto. 2 Inst. 287.—*No one is to be punished unless for some injury, deed, or default.*

Nemo redditum invito domino percipere, et possidere potest. Co. Lit. 323.—*No one can take and enjoy the rent without consent of the lord.*

Nemo tenetur ad impossibile. Jenk. Cent. 7.—*No one is bound to an impossibility.*

Nemo tenetur armare adversarum contra se. Wing. 565.—*No one is bound to arm his adversary.*

Nemo tenetur divinare. 4 Co. 28.—*No one is bound to guess or foretell.*

Nemo tenetur informare qui nescit, sed quisquis scire quod informat. Lane, 110.—*No one is bound to give information on a subject with which he is unacquainted; but every one who does give information, is bound to be acquainted with his subject.*

Nemo tenetur seipsum insortuniis et periculis exponere. Co. Lit. 253.—*No one is bound to expose himself to misfortunes and dangers.*

Nemo tenetur seipsum accusare. Wing. 486.—Prodere. 3 Buls. 50.—*No one is bound to accuse himself.*

Nemo utatur duobus officiis. 4 *Inst.* 100.—*No one should fill two offices.*

Nemo unquam vir magnus fuit, sine aliquo divino affectu. *Cic.*—*No one ever was a great man without a certain portion of the divine spirit.*

Nihil dat qui non habet. *Jur. Civ.*—*He gives nothing who has nothing.*

Nihil de re accrescit ei qui nihil in re quando jus accresceret habet. *Co. Lit.* 188.—*Nothing accrues to him, who when the right accrues has nothing in the subject matter.*

Nihil facit error nominis cum de corpore constat. 11 *Co.* 21.—*An error in the name is nothing when there is certainty as to the person.*

Nihil infra regnum subditos magis conservat in tranquillitate et concordia quam debita legum administratio. 2 *Inst.* 158.—*Nothing preserves peace and tranquillity amongst those subjected to the government more than a due administration of the laws.*

Nihil in lege intolerabilius est, eandem rem diverso jure censeri. 4 *Co.* 93.—*Nothing in law is more intolerable than to apply the law differently to the same cases.*

Nihil magis justum est quam quod necessarium est. *Dav.* 12.—*Nothing is more just than what is necessary.*

Nihil perfectum est dum aliquid restat agendum. 9 *Co.* 9.—*Nothing is perfect while something remains to be done to it.*

Nihil possumus contra veritatem. *Doct. and Stud. D.* 2, c. 6.—*We can prevail nought against truth.*

Nihil quod est contra rationem est licitum. *Co. Lit.* 97.—*Nothing is permitted contrary to reason.*

Nihil quod inconveniens est licitum est. *Ibid.*—*Nothing is permitted which is inconvenient.*

Nihil simul inventum est et perfectum. *Co. Lit.* 230.—*Nothing is invented and perfected at the same moment.*

Nihil tam conveniens est naturali æquitati, quam unumquodque dissolvi eo ligamine quo ligatum est. 2 *Inst.* 359.—*Nothing is so consonant to natural equity, as to dissolve a thing by the same means by which it was bound.*

Nihil tam conveniens est naturali æquitati, quam voluntatem domini rem suam in alium transferre, ratam habere. 1 *Co.* 100.—*Nothing is so consonant to natural equity, as to regard the intention of the owner in making a transfer of his property.*

Nihil tam proprium est imperii quam legibus vivere. 2
Inst. 63.—*Nothing is so proper for the empire as to live according to the laws.*

Nihil habet forum ex scena. *Bacon.*—*The court has nothing to do with what is not before it.*

[Nil debet—*He owes nothing.* The proper plea to an action of debt on simple contract. *Tidd's Prac.* 593.]

[Nil dicit—*He says nothing.*—A judgment, for want of a plea, after appearance. *T. L.* 514.]

[Nil habuit in tenementis—A plea in an action of debt for rent, *that the plaintiff hath nothing in the tenement.* *Esp. N. P.* 232.]

Nil sine prudenti fecit ratione vetustas. *Co. Lit.* 65.—*Antiquity did nothing without a good reason.*

Nil temere novandum. *Jenk. Cent.* 163.—*No innovation should be rashly introduced.*

Nimia subtilitas in jure reprobatur. *Wing.* 26.—Et talis certitudo certitudinem confundit. 5 *Co.* 121.—*Too much subtlety is reprobated in law: and such sort of certainty confounds certainty.*

Nimium altercando veritas amittitur. *Hob.* 344.—*By too much altercation truth is lost.*

[Nisi prius—A term which originated in England, from these words (*nisi prius*) in the writ, which commanded the sheriff to summon a jury to meet at Westminster, on a certain day, *unless before* that day, the judges attended in the country to hold assizes. 3 *Bl. Com.* 354.]

Nobiles magis plectuntur pecunia; plebei vero in corpore. 3 *Inst.* 220.—*The higher classes are for the most part punished in their purses; the lower in their persons.*

Nobiliores et benigniores presumptiones in dubiis sunt praeferendæ. *Reg. Jur. Civ.*—*Where doubt arises the best and most favourable presumptions are to be preferred.*

[Nolle prosequi—A voluntary relinquishment of a prosecution by the attorney for the commonwealth. It is also an acknowledgment by the plaintiff, in a civil action, that he will not further prosecute his suit, as to the whole or a part of the cause of action; or where there are several defendants, against some or one of them. *Tidd's Prac.* 630.]

[*No man is presumed to do any thing against nature.* 22 *Vin. Abr.* 154.]

Nomen dicitur a noscendo, quia notitiam facit. 6 *Co.*

65.—A name is called from the word to know, because it gives a mark of recognition.

Nomen est quasi rei notamen. 11 Co. 20.—*A name is as it were the note of a thing.*

Nomen non sufficit si res non sit de jure aut de facto.

4 Co. 107.—The name is not sufficient if the thing is not by law nor by fact.

Nomina si nescis perit cognitio rerum. Wing. 18.—
Et, nomina si perdas, certe distinctio rerum perditur.
Co. Lit. 86.—If you know not the names of things, the knowledge of the things themselves perishes. And if you forget the names, the certain distinction of the things is lost.

Nomina sunt notæ rerum. 11 Co. 20.—*Names are the notes of things.*

Nomina sunt mutabilia, res autem immobiles. 6 Co. 66.—*Names are mutable, things immutable.*

Nomina sunt symbola rerum. Godb.—*Names are the symbols of things.*

[*Nomine pœnae—A penalty incurred for the non-payment of rent, or the like, at the day appointed.* 2 Lill. Prac. Reg. 283; Hob. 82.]

Non accipi debent verba in demonstrationem falsam quæ competit in limitationem veram. Bacon.—*Words which may be taken to have a true meaning, should not have a false one given them.*

Non alio modo puniatur aliquis, quam secundum quod se habet condemnatio. 3 Inst. 217.—*Non licet felonem pro felonia decollari.—No one shall be punished differently from his sentence. A felon is not to be beheaded for felony.*

[*Non assumpsit—The plea of the general issue, in an action of indebitatus assumpsit, whereby the defendant saith that he did not assume.* Tidd's Prac. 591.]

[*Non assumpsit infra quinque annos—The plea of the statute of limitations, that the defendant did not assume within five years.*] [Non compos mentis—*Not of sound mind.*]

Non concedantur citationes priusquam exprimatur super qua ne fieri debet citatio. 12 Co. 44.—*Summons should not be granted before it is expressed upon what thing the summons ought to be made.*

[*Non constat—It does not appear.*]

[*Non culpabilis—Not guilty.* The plea of the gene-

ral issue, in trespass *vi et armis*, or on the case. *3 Bl. Com.* 305.]

[*Non damnificatus*—A plea to an action of debt upon a bond, to save harmless, that the plaintiff is *not damned*. But if the condition be to *discharge* the plaintiff, &c. then the *manner* of discharging him, &c. ought to be specially pleaded. *Lill. Prac. Reg.* 286.]

Non debet adduci exceptio ejus rei cuius petitur dissolutio. *Jenk. Cent.* 37.—*An exception of the thing, whose abolition is sought, ought not to be adduced.*

Non decipitur qui scit se decipi. 5 *Co.* 60.—*He is not deceived who knows himself to be deceived.*

Non definitur in jure quid sit conatus. 6 *Co.* 42.—*What an attempt is, is not defined in law.*

[*Non demisit*—A plea in an action of debt for rent, that the plaintiff *did not demise* the premises to the defendant. *Tidd's Prac.* 595.]

[*Non detinet*—The general issue in an action of *detinere*, that the defendant *did not detain*. *Selw. N. P.* 596.]

Non differunt quæ concordant re, tametsi non in verbis iisdem. *Jenk. Cent.* 70.—*Those things that agree in substance, though not in words, do not differ.*

Non efficit affectus nisi sequatur effectus. 1 *Rol. Rep.* 226.—*Sed in atrocioribus delictis punitur affectus, licet non sequatur effectus.* 2 *Rol. Rep.* 89.—*The intention is nothing without its effects follow; but in the deeper kind of delinquencies, the intention is punished, although no effect follow.*

Non est arctius vinculum inter homines quam jusjurandum. *Jenk. Cent.* 126.—*There is no stronger link than an oath.*

Non est disputandum contra principia negantem. *Co. Lit.* 343.—*We cannot argue against a man denying principles.*

[*Non est factum*—*It is not his deed.*—A plea to an action of debt on a bond or deed, which is void (and not merely voidable,) or which was never executed by the defendant. *3 Bl. Com.* 305; *2 Lill. Prac. Reg.* 288.]

[*Non est inventus*—The sheriff's return to a writ when the defendant is *not found* within his bailiwick.]

Non est justum aliquem antenatum post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur. *Co. Lit.* 244.—*It is not just to make an elder born*

man a bastard after his death, who, during his lifetime, had always been accounted legitimate.

Non est recedendum a communi observantia. 2 Co. 74.

—*There is no departing from common observance.*

Non est regula quin fallat. *Office of Exec.* 212.—*There is no rule but what sometimes fails.*

Non facias malum, ut inde veniat bonum. 11 Co. 74.

—*You are not to do evil that good may arise.*

[Non infregit conventionem—A plea to an action of covenant, that the defendant hath not broken the covenant. *Tidd's Prac.* 593; 8 *Term. Rep.* 278.]

Non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a qua constituuntur. *Bacon.*—*A derogatory clause does not impede the less when things are dissolved by the same power which created them.*

Non in legendō sed in intelligendo leges consistunt. 8 Co. 167.—*The laws consists in being understood, not in being read.*

Non licet, quod dispendio licet. Co. Lit. 127.—*That which is permitted at a loss is not permitted.*

Non observata forma insertur adnullatio actus. 5 Co. Ecc. L. 98.—*When form is not observed, a failure of the action ensues.*

Non officit conatus nisi sequatur effectus. 11 Co. 98.—*The attempt is nothing without the consequences follow.*

Non omnium quae a majoribus nostris constituta sunt ratio reddi potest. 4 Co. 78.—*A reason cannot be given for all the things which were instituted by our ancestors.*

[Nonpros—Nonsuit.—When the plaintiff does not prosecute his suit with effect, or, upon trial, refuses to stand a verdict, he is said to be *nonpros'd*, or *nonsuited*;—from the words formerly used in entering up the judgment, *non prosequitur sectam*, &c. A nonsuit is not a bar to a subsequent action, as a *retraxit* is. 3 Bl. Com. 295; *Tidd's Prac.* 412; 2 *Lill. Prac. Reg.* 292.]

Non præstat impedimentum quod de jure non sortitur effectum. Jenk. Cent. 162. Wing. 727.—*An impediment from which by law no consequence arises avails nothing.*

Non quod dictum est, sed quod factum est inspicitur. Co. Lit. 36.—*Not what is said, but what is done is to be regarded.*

Non refert an quis assensum suum præfert verbis, an rebus ipsis et factis. 10 Co. 52.—*It matters not, whether*

a man gives his assent by his words, or by his acts and deeds.

Non refert quid ex æquipollentibus fiat. 5 Co. 122.—
That which may be gathered from words of tantamount meaning is of no consequence [when omitted].

Non refert quid notum sit judici, si notum non sit in forma judicij. 3 Buls. 115.—*It matters not what is known to the judge, if it be not known in a judicial form and manner.*

Non refert verbis an factis fit revocatio. Cro. Car. 49.
—*It matters not, whether a revocation is made by words or deeds.*

Non respondebit minor; nisi in causa dotis, et hoc pro favore doti. 4 Co. 71.—*A minor shall only answer in case of dower, in favour of dower.*

Non solum quid licet, sed quid est conveniens considerandum; quia nihil quod inconveniens est licitum. Co. Lit. 66.—*Not only what is permitted, but what is proper is to be considered, for what is improper is illegal.*

[Non sum informatus—When the defendant's attorney declares that he is *not informed* of any thing to say in answer to the plaintiff or in defence of his client. 3 Bl. Com. 396.]

Non sunt longa ubi nihil est quod demere possis. Vaugh. 138.—*There is no prolixity where nothing can be omitted.*

Non temere credere, est nervus sapientiae. 5 Co. 114.
—*Not to believe rashly, is the nerve of wisdom.*

Non valet confirmatio, nisi ille qui confirmat, sit in possessione rei vel juris unde fieri debet confirmatio; et eodem modo, nisi ille cui confirmatio fit, sit in possessione. Co. Lit. 295.—*Confirmation is not valid, unless he who confirms is either in possession of the thing itself, or of the right of which confirmation is to be made; and in like manner, unless he to whom confirmation is made is in possession.*

Non valet impedimentum quod de jure non sortitur effectum. 4 Co. 31.—*An impediment, which does not destroy the force of law, is of no consequence.*

Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit. Bacon.—*He does not appear to have consented, who changed any thing through the menaces of a party threatening.*

[Norma loquendi. 16 Vin. Abr. 503.—*The manner of Branch's Principia, &c.—13*

speaking, is the rule of interpretation in actions for words.]

Noscitur ex socio; qui non cognoscitur ex se. Moor, 817.—He who cannot be known from himself, may be known from those with whom he associates.

Notitia dicitur a noscendo; et notitia non debet claudicare. 6 Co. 29.—Notice is called from a knowledge being had; and notice ought not to be imperfect.

Nova constitutio, futuris formam imponere debet, non præteritis. 2 Inst. 292.—A new institution ought to impose form on what is to follow, not on what is past.

Novitas non tam utilitate prodest quam novitate perturbat. Jenk. Cent. 167.—Novelty disturbs more by its novelty than benefits by its utility.

Novum judicium non dat novum jus, sed declarat antiquum; quia judicium est juris dictum, et per judicium jus est noviter revelatum quod diu fuit velatum. 10 Co. 42.—A new adjudication does not make a new law, but declares the old; for adjudication is the dictum of the law: and by adjudication, the law is newly revealed, which was for a long time hidden.

Noxa sequitur caput. Jur. Civ.—Blame follows the head.

[Nudum pactum—A bare naked agreement, without any consideration. T. L. 518; 2 Bl. Com. 446, Christ. note 4; Fonb. Eq. B. 1. c. 5. s. 1. note (a); 5 East. 10; Comy. on Contr. 103; Noy. Mar. 24.]

Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem. Plow. 309.—A naked contract is where there is no consideration to support the agreement; but where there is a consideration, an obligation exists, and produces an action.

[Nuisance—No action lies for a common. 4 Bl. Com. 167.]

[Nulla bona—The return of the sheriff that the defendant has no goods within his bailiwick.]

Nulla curia quæ recordum non habet potest imponere finem, neque aliquem mandare carceri; quia ista spectant tantummodo ad curias de recordo. 8 Co. 60.—No court which has not a record can fine or imprison, because those powers belong only to courts of record.

Nulla impossibilia aut in honesta sunt præsumenda; vera autem et honesta et possibilia. Co. Lit. 78,—Im-

22

Legis et Equitatis.

possibilities and dishonesty are not to be presumed; but honesty, and truth, and possibility.

Nulla virtus, nulla scientia, locum suum et dignitatem conservare potest sine modestia. Co. Lit. 394.—Without modesty no virtue or knowledge can preserve its dignity.

Nullius hominis authoritas apud nos valere debet, ut meliora non sequeremur, si quis attulerit. Co. Lit. 383.—The authority of no man ought so far to prevail over us as to prevent our receiving improvements when shewn to us.

Nullum crimen majus est in obedientia. Jenk. Cent.

77.—No crime is greater than disobedience.

Nullum exemplum est idem omnibus. Co. Lit. 212.—No example is the same to all purposes.

Nullum iniquum est præsumendum in jure. 4 Co. 71.

—No iniquity is to be presumed in law.

Nullum medicamentum est idem omnibus. Co. Lit. 317.—No medicine is the same to all.

Nullum simile est idem—quatuor pedibus currit. Co. Lit. 3.—No simile is the same, nor runs on four feet.

Nullum tempus [aut locus] occurrit regi. 2 Inst. 273. Jenk. Cent. 83.—No place or time affects the king. [This maxim has been adopted in Virginia, in relation to the Commonwealth. See 9 Hen. Stat. at Lar. 473, § 4; 2 Rev. Code of 1819, pa. 51, § 9; 1 H. and M. 85; 4 H. and M. 57.]

Nullus commodum capere potest de injuria sua propria. Co. Lit. 148.—No one can take advantage of his own wrong.

Nullus dicitur accessorius post feloniam, sed ille qui novit principalem feloniam fecisse, et illum receptavit et comfortavit. 3 Inst. 138.—No one is called an accessory after the fact, but he who knew the principal to have committed a felony, and received and comforted him.

Nullus dicitur felo principalis nisi actor, aut qui praesens est, abettans aut auxilians ad feloniam faciendum. Except in cases of poisoning. Ibid.—No one shall be called a principal felon, except the party actually committing the felony, or the party present aiding and abetting in its commission. Except in cases of poisoning.

Nullus recedat e curia cancellaria sine remedio. 4 H. 7. 4.—Let no one depart from the court of chancery without a remedy.

—Nul charter, nul vente, ne nul done vault perpetual-

ment, si le donor nest seisié al temps de contracts de 2 Droits, sc. del droit de possession et del droit de propriété. *Co. Lit.* 266.—*No grant, no sale, no gift is valid forever, unless the donor, at the time of the contract, is seized of two rights, namely, the right of possession, and the right of property.*

Nul prendra advantage de son tort demesne. 2 *Inst.* 713.—*No one can take advantage of his own wrong.*

[Nul tiel record—*No such record.* 3 *Bl. Com.* 331.]

Nummus quia lege fit non natura. Co. Lit. 207.—Money, because created by law, not by nature.

Nummus est mensura rerum commutandarum. Vide Moneta—Money is the measure of things that are to be changed.

[*Nunc pro tunc—Now for then.* When the court, under certain circumstances, permits a judgment to be entered at a subsequent term. *Tidd's Prac.* 438, 473, 846, 858.]

Nunquam decurrit ad extraordinarium sed ubi deficit ordinarium. 4 Inst. 84.—We are never to recur to what is extraordinary, till what is ordinary fails.

Nunquam nimis dicitur quod nunquam satis dicitur. Co. Lit. 375.—What is never sufficiently said is never said too much.

Nunquam res humanæ prospere succedunt ubi negliguntur divinæ. Co. Lit. 95.—Human things never prosper where divine things are neglected.

Nuptias non concubitas sed consensus facit. Jur. Civ. Co. Lit. 33.—It is not the junction of the parties, but the consent of them, that makes the marriage.

Necessity creates equity.

[*No man shall set up his own infamy as a defence, any more than as a cause of action.* 2 W. Bl. Rep. 364.]

No man can hold the same land immediately of two several lords. Co. Lit. 152 b.

No man can of the same land be at the same time lord and tenant. Ibid.

None shall take by deed but parties, unless in remainder.

None can charge his heir but as part of himself.

No one may be judge in his own cause.

No one can do an act to himself. Wing.

No proof to be of a negative. See, *When the law.*

Nothing a ground to direct a new trial, for avoiding a

judgment at law, which would not have been a ground for a bill of review to reverse a decree in equity.

Obedientia est legis essentia. 11 Co. 100.—*Obedience is the essence of law.*

Ob infamiam non solet juxta legem terræ aliquis per legem apparentem se purgare, nisi prius convictus fuerit vel confessus in curia. Glana. lib. 14. c. 2.—*No one is accustomed, according to the law of the land, to purge himself from infamy, unless he has been convicted in a court of justice, or confessed himself infamous there.*

[Obiter dictum—*An opinion incidentally given; not a solemn adjudication on the point before the court, and therefore not authority.*]

Obtemperandum est consuetudini rationabili tanquam legi. 4 Co. 38.—*A reasonable custom is to be obeyed like law.*

Occultatio thesauri inventi fraudulosa. 3 Inst. 133.—
The concealment of discovered treasure is fraudulent.

Oderunt peccare boni, virtutis amore.—Oderunt peccare mali, formidine poenæ. Vide, Si meliores—*Good men hate sin through love of virtue; bad men through fear of punishment.*

Odiosa et inhonesta non sunt in lege præsumenda; et in facto quod se habet ad bonum et malum, magis de bono quam de malo præsumendum est. Co. Lit. 78.—*Odious and dishonest things are not to be presumed in law; and in an act which partakes both of good and bad, the presumption is in favour of what is good.*

Officia judicialia non concedantur antequam vacent. 11 Co. 4.—*Judicial offices are not granted before they are vacant.*

Officia magistratus non debent esse venalia. Co. Lit. 234.—*The offices of magistrates ought not to be sold.*

[Office—*A function. An employment. An inquisition.* Cowl. Int.; Jacob's L. D. tit. OFFICE.]

Officit conatus si effectus sequatur. Jenk. Cent. 55.—*The attempt becomes of consequence, if the effect follows.*

Omissio eorum quæ tacite insunt nihil operatur. 2 Buls. 131. Vide, Expressio, &c.—*The omission of those things which are silently expressed is of no consequence.*

Omne actum ab intentione agentis est judicandum. A voluntate procedit causa virtutis et vice. Jur. Civ.—*Every act is to be estimated by the intention of the party. The cause of vice and virtue proceeds from the will.*

Omne crimen ebrietas et incendit et detegit. *Co. Lit.* 247.—*Drunkenness lights up and produces every crime.*

Omne magis dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius. *Co. Lit.* 355.—*Every greater worthy draws to it the minor worthy, although the minor worthy be the more ancient.*

Omne magnum exemplum habet aliquid ex iniquo, quod publica utilitate compensatur. *Hob.* 279.—*Every great example has some portion of evil, which is compensated by its public utility.*

Omne majus continet in se minus. *Wing.* 206.—*Minus in se complectitur. Jenk. Cent.* 208.—*The greater contains the lesser. The minor is embraced by it.*

Omne majus dignum continet in se minus dignum. *Co. Lit.* 43.—*The more worthy contains the less worthy.*

Omne sacramentum debet esse de certa scientia. *4 Inst.* 279.—*Every oath ought to be grounded on certain knowledge.*

Omnis prudentes illa admittere solent quæ probantur iis qui in arte sua bene versati sunt. *7 Co. 19.*—*All prudent men are accustomed to admit those things which those who are well versed in the art approve of.*

Omnis sorores sunt quasi unus haeres de una hereditate. *Co. Lit.* 67.—*All sisters make but one heir to one inheritance.*

Omne testamentum morte consummatum est. *3 Co. 29.*
—*Every testament is completed by the testator's death.*

Omni exceptione majus. *4 Inst.* 262.—*Above all exception.*

Omnia delicta in aperto leviora sunt. *8 Co. 127.*—*All crimes done openly are lighter.*

Omnia presumuntur legitime facta donec probetur in contrarium. *Co. Lit.* 232.—*All things are presumed to be legitimately done, till the contrary is proved.*

Omnia presumuntur solemniter esse acta. *Co. Lit.* 6.
—*All things are presumed to have been done solemnly.*

Omnia quæ sunt uxoris sunt ipsius viri; non habet uxor potestatem sui, sed vir. *Co. Lit.* 112.—*All things which belong to the wife, belong to the husband; the wife has no power of her own, the husband has it all.*

Omnis actio est loquela. *Co. Lit.* 292.—*Every action is a complaint.*

Omnis conclusio boni et veri iudicij sequitur ex bonis et veris præmissis et dictis juratorum. *Co. Lit.* 226.—*Every*

Conclusion of a good and true judgment arises from good and true premises, and the verdicts of juries.

Omnis consensus tollit errorem. 2 Inst. 123.—*Every assent removes error.*

Omnis innovatio plus novitate perturbat quam utilitate prodest. 2 Bulst. 338.—*Every innovation disturbs more by its novelty than benefits by its utility.*

Omnis interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietates amoveantur. Jenk. Cent. 96.—*In instruments, if they will admit of it, such interpretation is to be made, that all contradictions may be removed.*

Omnis nova constitutio, futuri temporibus formam imponere debet, non præteritis. 2 Inst. 95.—*Every new institution should give a form to future times, not to past.*

Omnis privatio præsupponit habitum. Co. Lit. 339.—*Every privation presupposes former enjoyment.*

Omnis querela et omnis actio injuriarum limitata est infra certa tempora. Co. Lit. 114.—*Every plaint, and every action for injuries, are limited to be brought within a certain time.*

Omnis ratihabitio retro trahitur et mandato æquiparatur. Co. Lit. 207. Wing. 485.—*Every consent given to what has been already done, has a retrospective effect, and equals a command.*

Omnium rerum quarum usus est, potest esse abusus, virtute solo excepta. Dav. 79.—*There may be an abuse of every thing of which there is an use, virtue alone excepted.*

[Once a fraud, always a fraud. 13 Vin. Abr. 539.]

[Once a mortgage, always a mortgage.]

[Once a recompense, always a recompense. 19 Vin. Abr. 277.]

[Onus probandi—The burden of proof.]

Opinio est duplex: scil. opinio vulgaris, orta inter graves et discretos, et quæ vultum veritatis habet; et opinio tantum orta inter leves et vulgares homines, absque specie veritatis. 4 Co. 107.—*Opinion is of two kinds; to wit, common opinion, proceeding from grave and discreet men, and which has the appearance of truth; and mere opinion which springs up among light and ignorant men, without any appearance of truth.*

Oportet quod certæ personæ, terræ, et certi status, comprehendantur in declaratione usuum. 9 Co. 9.—*Cer-*

tain persons, lands, and estates, must be comprehended in a declaration of uses.

Oportet quod certa res deducatur in judicium. *Jenk. Cent. 84.—A thing certain must be brought to judgment.*

Opposita juxta se posita magis elucescunt. *Bacon.—Things opposite are more conspicuous when placed together.*

Optima statuti interpretatrix est, (omnibus particulis ejusdem inspectis,) ipsum statutum. *8 Co. 117.—The best interpreter of a statute is, (all the separate parts being considered,) the statute itself.*

Optimus interpres rerum usus. *2 Inst. 282.—Use is the best interpreter of things.*

Optimus interpretandi modus est sic leges interpretare ut leges legibus concordant. *8 Co. 169.—The best mode of interpretation, is to interpret that the laws may accord with the laws.*

Optimus legum interpres, consuetudo. *4 Inst. 75.—Custom the best interpreter of the laws.*

Ordine placitandi servato, servatur et jus. *Co. Lit. 303.—The order of pleading being preserved, the law is preserved.*

Origo rei inspici debet. *1 Co. 99.—The origin of a thing ought to be inquired into.*

Orta est quæstio, si quis ante pater matrem suam desponsaverat, fuerit genitus vel natus, utrum talis filius sit legitimas hæres, cum postea matrem suam despontsaverat: et quidem, licet secundum canones et leges Romanas, talis filius sit legitimus hæres; tamen secundum jus et consuetudinem regni, nullo modo tanquam hæres in hæreditate sustinetur vel hæreditatem, de jure regni petera potest. *2 Inst. 96.—A question arose, whether any one born before his father married his mother, could become a legitimate heir, if he married her afterwards; and indeed, by the canon and Roman laws, such a son would be a legitimate heir: but, by the law and custom of this kingdom, such person could by no means be considered as heir, or succeed to the inheritance. [By the laws of Virginia, "When a man having by a woman, one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated." 12 Hen. Stat. at Lar. 139.]*

[*Ouster le main—The judgment on a monstrans de droit, when the right is found, on a traverse, to be against the Commonwealth. A writ of amoveas manus then issues*

to the escheator, that the Commonwealth's *hands be amoved*, &c. T. L. 522.]

[Outlawry—The putting of a *man* out of the protection of the law. A *woman* is said to be *waived*. 3 Bl. Com. 283; T. L. 663.]

[Oyer—*To hear*.—As to its application in pleading, see *Tidd's Prac.* 526; 2 *Lill. Prac. Reg.* 336; *Jacob's L. D. tit. OYER.*]

[Oyer and terminer—Courts constituted with power to *hear and determine* treasons, felonies, &c. 4 Bl. Com. 269.]

Officers may not examine the judicial acts of the court.

One may not do an act to himself.

One may not stultify himself.

One may not have the advantage of another's good bargain.

One shall not take advantage of his own wrong, or laches.

One should be just before he is generous.

[Oyez—*Hear ye.*.—A ceremony used by the cryer or sheriff, in opening a court, vulgarly pronounced “O yes.” 4 Bl. Com. 340, note.]

Paci sunt maxime contraria, vis et injuria. Co. Lit.

161.—*Force and injury are the very reverse of peace.*

Pacta privata juri publico derogare non possunt. 7 Co. 23.—*Private compacts cannot derogate from public right.*

Pacto aliquod licitum est, quod sine pacto non admittitur. Co. Lit. 166.—*By compact, something is permitted, which, without compact, was not admitted.*

[Pais—*Country*.—*In pais*—In the country, not in the record.—*Trial per pais*: Trial by the country, or jury.]

Pannagium est pastus porcorum, in nemoribus et in silvis, utpote, de glandibus, &c. 1 Bulst. 7.—*A pannagium is the pasture of hogs, in woods and forests, as upon acorns, &c.*

[Paraphernalia—The apparel, jewels, &c. of a widow, over and above her dower, or jointure, Noy's Max. pa. 168; Toll. law Ex. 178.]

Parens est nomen generale ad omne genus cognationis. Co. Lit. 80.—*Parent is a general name, relating to every kind of relationship.*

Paria copulantur paribus. Bacon.—*Like things unite with like.*

Branch's Principia, &c.—14

Paribus sententiis reus absolvitur. 4 Inst. 64.—*Where the opinions of the judges are equal, the defendant is acquitted.*

Par in parem imperium non habet. Jenk. Cent. 174.
—*An equal has no power over its equal.*

[**Pari materia.** Doug. 30.—*Relating to the same subject.*]

[**Pari passu**—*By an equal pace.*—*Equally.*—*By a similar gradation.*]

Parum eadem est ratio, idem jus—*Of things equal, the reason and law is the same.*

Parochia est locus quo degit populus alicujus ecclesiæ.
5 Co. 67.—*A parish is a place in which the population of a church reside.*

[**Parol**—*Verbal*, or a mere written contract, which is not a specialty. 2 Bl. Com. 446. Christ. n. (4); 7 T. Rep. 350, n. (a).]

[**Parol demurrer**—A privilege allowed to an infant only, when sued as heir, on the obligation of his ancestor, &c.; in which case the proceedings shall be stayed till he come of age. But the parol shall not demur for infancy, in a writ of dower. 2 Lill. Prac. Reg. 354; Tidd's Prac. 589, 1033, 1121. By the laws of Virginia, the parol shall not demur, on account of infancy, in any case whatever. 1 Rev. Code of 1819, c. 128, § 32, pa. 495.]

Partem aliquam recte intelligere nemo potest, antequam totum, iterum atque iterum, perlegerit. 3 Co. 59.—*No one can rightly understand any part till he has read the whole over repeatedly.*

Parte quacunque integrante sublata tollitur totum. 3 Co. 41.—*An integral part being taken away, the whole is taken away.*

[**Particeps criminis**—*A partaker in the crime.*]

Participes plures sunt quasi unum corpus, in eo quod unum jus habent, et oportet quod corpus sit integrum et quod in nulla parte sit defectus. Co. Lit. 164.—*Many partners are only one body, inasmuch as they have one right; and it is necessary that the body be perfect, and that there be no defect in any part.*

Participes, quasi partis capaces, sive partem capientes; quia res inter eas est communis, ratione plurium personarum. Ibid. 146 b.—*Partners, as it were, "partis capaces,"*

or, "partem capientes," because the thing is common to them, by reason of their being many persons.

Partus ex legitimo thoro non certius noscit matrem quam genitorem suum. *Fortescue, cap. 42.*—The offspring of a legitimate bed knows not his mother more certainly than his father.

[*Partus sequitur ventrem. 11 Vin. Abr. 175.—The offspring follows the condition of the mother.*]

Parum differunt quæ re concordant. *2 Bulst. 86.—Things which agree in substance differ but little*

Parum est latam esse sententiam, nisi mandetur executioni. *Co. Lit. 289.—Sentence should be broad, unless in execution.*

Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum. *2 Inst. 503.—It avails but little to know what ought to be done, if you do not know in what manner it should be done.*

[*Passim—Every where. In various places. Throughout the work.*]

[*Patersfamilias—The father of a family.*]

Pater est quem nuptiae demonstrant. *Co. Lit. 123, 244.—He is the father whom the nuptials show to be so.*

Pater et mater et puer sunt una caro. *Vide, Pueri.—The father, mother, and son, are of one flesh.*

Patria dicitur a patre, quia habet communem patrem, qui est pater patriæ. *7 Co. 13.—Country (patria) is called from father (a patre), because he, who is father of his country, has a common father.*

Patria (i. e. jurata) laboribus et expensis non debet fatigari. *Jenk. Cent. 6.—A jury ought not to be fatigued by labour and expense.*

Payment, place of, to be strictly observed. See Locus pro solutione, &c.

Peccata contra naturam sunt gravissima. *3 Inst. 20.—Crimes against nature are the heaviest.*

Peccatum peccato addit qui culpæ quam facit patrocinium defensionis adjungit. *5 Co. 49.—He adds one offence to another, who, when he commits an offence, joins to it the protection of a defence.*

Pecunia dicitur a pecus; omnes enim veterum divitiae in animalibus consistebant. *Co. Lit. 207 b.—Money (pecunia) is so called from (pecus) a flock of sheep or other cattle, because all the wealth of the ancients consisted in cattle.* [And, in Homer's time, it appears that there was

no money, but exchange of cattle, &c. See *Co. Lit.* 207 b.]

[*Pendente lite—While the suit is depending.*] [

Per curiam (abbreviated per cur)—By the court.]

Pereat unus ne pereant omnes. Vide, Reus læsæ majestatis—Let one perish, lest all perish.

Perfectum est cui nihil deest secundum suæ perfectionis vel naturæ modum. Hob. 151.—That is perfect which wants nothing in addition to the measure of its perfection or nature.

Periculorum est res novas et inusitatas inducere. Co. Lit. 379.—It is dangerous to introduce new and unusual things.

Periculorum existimo quod bonorum virorum non comprobatur exemplo. 9 Co. 97.—I think that dangerous which is not warranted by the example of good men.

Perjuri sunt qui servatis verbis juramenti decipiunt aures eorum qui accipiunt. 3 Inst. 166.—They are perjured, who, preserving the words of an oath, deceive the ears of those who receive it.

[*Pernancy—The receipt of profits. Thus, he who receives the profits, is called the pernor of the profits. T. L. 535.*]

Perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit, ab initio non valet. Bacon.—It is an everlasting law, that no positive human law shall be perpetual; and a clause which excludes alteration is not good from its commencement.

[*Per quod—By which.—Words relating to any special damage.*]

[*Per quod servitiam amisit—By which he lost the service.*]

Per rationis pervenitur ad legitimam (legalem) rationem. Lit. Sect. 386.—By reasoning we come to legal reason.

[*Per se—By itself.—The want of possession in the vendee in the case of an absolute bill of sale, is fraudulent per se. 1 Cranch 310.*]

Persona conjuncta æquiparatur interesse proprio. Bacon.—The interest of a person with whom any one is united equals the self-interest of that person.

Perspicua vera non sunt probanda. Co. Lit. 16.—Plain truths need not be proved.

Per varios actus, legem experientia fecit. 4 Inst. 50.—
By various acts experience framed the law.

[Petitio principii. 2 Bl. Com. 8 Christ. note (1)—*A begging of the question.*]

Pirata est hostis humani generis. 3 Inst. 113.—*A pirate is an enemy of the human race.*

[Place for payment of money, mentioned in a lease or bond, to be strictly observed. See locus pro solutione, &c.]

[Placitorum aliud personale, aliud reale, aliud mixtum. Co. Lit. 284.—*Some actions are real, some personal, and some mixed.*]

Placitum aliud personale, aliud reale, aliud mixtum. Co. Lit. 284.—*Pleas are personal, real, and mixt.*

Plena et celeris justitia fiat partibus. 4 Inst. 67.—*Let full and speedy justice be done to the parties.*

[Plene administravit.—A plea by an executor or administrator, that he had fully administered the assets of his testator or intestate.]

Pluralis numerus est duobus contentus. 1 Rol. Rep. 476.—*The plural number is contained in two.*

Pluralitas idem sententium semper superat, quia facilius invenitur quod a pluribus quæritur—*The multitude of persons thinking the same always avails, because, that which is sought by many is more easily found out.*

Plures cohæredes sunt quasi unum corpus, propter unitatem juris quod habent. Co. Lit. 163.—*Several co-heirs are similar to one body, by reason of the unity of right which they possess.*

Plures participes sunt quasi unum corpus, in eo quod unum jus habent. Co. Lit. 164.—*Several partners are like one body, inasmuch as they have one right.*

[Pluries—A third or further writ, after a *capias*, and an *alias*, commanding the sheriff as often before he had been commanded, to take the defendant, &c. *sicut pluries præcipimus.* 3 Bl. Com. 283.]

Plus exempla quam peccata nocent—*Examples hurt more than crimes.*

Plus peccat author quam actor. 5 Co. 99.—*The instigator of a crime is worse than he who perpetrates it.*

Plus valet unus oculatus testis, quam auriti decem. 4 Inst. 279.—*One eye witness is better than ten ear ones.*

Plus valet vulgaris consuetudo quam regalis concessio. Co. Cop. § 31.—*Common custom is better than royal grant.*

Plus vident oculi quam oculus. 4 *Inst.* 160.—*Eyes see more than an eye.*

[Pœna ad paucos, metus ad omnes perveniat. 22 *Vin. Abr.* 550.—Punishment is inflicted on few, the dread of it pervades all.]

Pœna ex delicto defuncti, hæres teneri non debet 2 *Inst.* 198.—*The heir is not bound in a penalty inflicted for the crime of the ancestor.*

[Pœna mori potest, culpa perennis erit. 21 *Vin. Abr.* 271.—*Punishment may have an end, crime is perpetual*]

Pœnæ potius molliendæ quam exasperandæ sunt 3 *Inst.* 220.—*Punishments should rather be softened than aggravated.*

Pœnæ sint restringendæ. *Jenk. Cent.* 29.—*Punishments should be restrained.*

Politiæ legibus non leges politiis adaptandæ. *Hob.* 154.—*Politics are to be adapted to the laws, not the laws to politics.*

Polygamia est plurium simul virorum uxorumve conubium. 3 *Inst.* 88.—*Polygamy is the having many husbands or wives at one time.*

[*Popular actions.*—Those actions which are given to the informer, or the people at large, on a *penal statute.* 3 *Bl. Com.* 161.]

Portus est locus in quo exportantur et importantur merces,—a portando. 2 *Inst.* 148.—*A port is a place whence goods are imported or exported.*

Posito uno oppositorum negatur alterum. 3 *Rol. Rep.* 422. *Wall.* 62.—*One of two opposite positions being affirmed, the other is denied.*

[*Posse comitatus*—The authority which the sheriff has to take the *power of the county* to assist him in the execution of process.]

Possessio est quasi pedis positio. 3 *Co.* 42.—*Possession is as it were the position of the foot.*

Possessio fratis, de feodo simplici, facit sororem esse hæredem. 3 *Co.* 42.—*Possession of the brother in fee-simple makes the sister heir.*

Possessio pacifica pour anns 60 facit jus. *Jenk. Cent.* 26.—*Sixty years peaceable possession gives a right.*

[*Possession is a good title where no better title appears.* 20 *Vin. Abr.* 278.]

Possibilitas post dissolutionem executionis nunquam reviviscatur. 1 *Rol. Rep.* 321.—*Possibility is never revived after the dissolution of the execution.*

Post executionem status lex non patitur possibilitatem.
3 Buls. 108.—After the execution of the estate, the law suffers not a possibility.

[*Postea*—The entry of the verdict, nonsuit, &c. on the back of the record of *nisi prius*; which entry, from the Latin word it began with, is called the *postea* “*afterwards*,” &c. *Tidd's Pract.* 811.]

Potentia debet sequi justitiam, non antecedere. 3 Buls. 199.—*Power ought to follow, not precede justice.*

Potentia est duplex, remota et propinqua; et potentia remotissima et vana est quæ nunquam venit in actum. 11 Co. 51.—*There are two sorts of power, remote and near; that which never comes into action is more remote.*

Potentia inutilis frustra est. *Office of Exec.* 202.—*Useless power is vain.*

[*Potentia non est nisi ad bonum*—*Power is never conferred, except for the public good.*]]

Potestas stricte interpretatur. *Jenk. Cent.* 17.—*Let power be strictly interpreted.*

Potestas suprema seipsum dissolvere potest, ligare non potest. *Bacon.*—*Supreme power can dissolve, but not bind itself.*

[*Præcipe*—The term generally used for the original writ, as a *præcipe quod reddat*, for lands, debt, &c. T. L. 546; 3 Bl. Com. 274. It is also used as the note of instruction given by the plaintiff's attorney to the clerk. *Tidd's Pract.* 81.]

[*Præmium concubinati*—*Noy's Max.* p. 133, n.—*The price of fornication.*]]

[*Præmium pudicitiæ*. *Noy's Max.* p. 128, note.—*The price of virginity.*]]

[*Præmium pudoris*. *Noy's Max.* p. 129, note.—*The price of chastity.*]]

[*Præmium pudicitiæ pellicis*. *Noy's Max.* p. 130, note.—*The price of concubinage with a married man.*]]

[*Præmium prostitutionis*. *Noy's Max.* 134, n.—*The price of prostitution.*]]

Præmuniti, i. e. præmoniti. Co. Lit. 129.—*Forearmed, i. e. forewarned.*

Præpropera consilia, raro sunt prospera. 4 Inst. 57.
Hasty councils are seldom good.

Præscriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis. Co. Lit. 113.—*Prescription*

is a title by authority of law, deriving its force from use and time.

Præscriptio in seodo non acquirit jus. *Doct. and Stud.*
—Prescription in fee, acquires not a right.

Præsentia corporis tollit errorem nominis : et viritas nominis tollit errorem demonstrationis. *Bacon.*—*The presence of the body cures error in the name ; the truth of the name the order of the demonstration.*

Præstat cautela quam medela. *Co. Lit.* 304.—*Prevention is better than cure.*

Præsumptio probabilis, (*probable presumption,*) moveat kittle; levis seu temeraria, (*light or rash,*) not at all. *Co. Lit.* 6.

Præsumptio violenta, plena probatio. *Ibid.*—*Strong presumption is [many times] full proof.*

Præsumptio violenta valet in lege. *Jenk. Cent.* 56.—*Strong presumption avails in law.*

Prætextu liciti non debet admitti illicitum. 10 *Co.* 88. *Wing.* 728.—*Under pretext of legality, what is illegal ought not to be permitted.*

Praxis judicum est interpres legum. *Hob.* 96.—*The practice of the judges is the interpreter of the laws.*

[*Precedents that pass sub silentio are of little or no authority.* 16 *Vin. Abr.* 499.]

Premium succedit in loco rei [*Vide Solutio, &c.*] 2 *Buls.* 312.—*The price succeeds in the place of the thing.*

Primo excutienda est verbi vis, ne sermonis vitio obstruetur oratio, sive lex sine argumentis. *Co. Lit.* 68.—*The force of the words is to be narrowly examined, lest by the fault of the diction the oration is destroyed, or the law be without arguments.*

Princeps et respublica ex justa causa possunt rem meam auferre. 12 *Co.* 13.—*The prince and the republic, in a just cause, cannot deprive me of my property.*

Principalis debet semper excuti antequam perveniantur ad fidei jussores. 2 *Inst.* 19.—*The principals should always be examined before they come to the jussores fidei.*

Principia data sequuntur concomitantia—*Given principles follow their concomitants.*

Principia probant, non probantur. 3 *Co.* 40.—*Principles prove, they are not proved.*

Principiis obsta—*Oppose principles.*

Principiorum non est ratio. 2 *Buls.* 239.—*Of principles there is no rule.*

Principium est potissima pars cujusque rei. 10 Co. 49.
The principle of a thing is its most powerful part.

Privatio præsupponit habitum. 2 Rol. Rep. 419. Actum. Bacon.—*A deprivation supposes a previous enjoyment.*

Privatum commodum publico cedit. Jenk. Cent. 223.
—*Private good yields to public.*

Privatum incommodum publico bono pensatur. Jenk. Cent. 85.—*Private loss is overbalanced by public good.*

Privilegia, quæ revera sunt in præjudicium reipublicæ, magis tamen habent speciosa frontispicia, et boni publici prætextum, quam bonæ et legales concessiones: sed prætextu licti non debet admitti illicitum. 11 Co. 88.—*Privileges, in prejudice of public good, have a specious front, and make a pretext of public good, more than good and legal grants; but under pretext of legality, illegal things ought not to be admitted.*

Privilegium est beneficium personale et extinguitur cum persona. 3 Buls. 8.—*A privilege is a personal benefit, and dies with the person.*

Privilegium est quasi privata lex. 2 Buls. 189.—*Privilege is a sort of private law.*

Privilegium non valet contra rempublicam. Bacon.—*A privilege avails not against public good.*

Prius vitiis laboravimus, nunc legibus. 4 Inst. 76.—*We laboured first with vices, now with laws.*

Probandi necessitas incumbit illi qui agit. Just. Inst. lib. 2, tit. 20, text 4.—*The necessity of proving, lies with him who brings the charge.*

Probationes debent esse evidentes, scil. perspicuae et faciles intelligi. Co. Lit. 283.—*Proofs ought to be evident, to wit, perspicuous, and easily understood.*

[*Procedendo*—A writ directed to judges of an inferior court, commanding them to proceed in a cause, which had been improperly removed from before them by some former writ. *Tidd's Prac.* 346, 466.]

Processus legis est gravis vexatio; executio legis coronat opus. Co. Lit. 289.—*The process of law is a heavy vexation; the execution of the law crowns the labour.*

Processus derivatur a procedendo, ab originali ad finem—*Process is derived from procedendo, proceeding from the beginning to the end.*

[*Pro confesso*—*As confessed.*—Thus, a bill taken *pro confesso.*]

Branch's Principia, &c.—15

[Prochein amy—*The next friend.*—An infant may sue by his next friend, or by his guardian; but must defend by his guardian, who is assigned by the court for that purpose. F. N. B. 63; *Coop. Eq. Pl.* 28, 29.]

[Profert in curia—When the plaintiff declares upon a deed, or the defendant pleads a deed, he must do it by producing it in court. 2 *Lill. Pract. Reg.* 470. But if the deed be lost, it may be pleaded without a profert. *Tidd's Pract.* 395. So, it is usual for executors and administrators, in declarations, to make a profert of the letters testamentary, or of administration. *Tidd's Pract.* 1042.]

[Pro forma—*As a mere matter of form.*]

Prohibetur ne quis faciat in suo quod nocere possit alieno: et, sic utere tuo et alienum non laedas. 9 Co. 59.—*It is prohibited for any to do that to his own property which may injure another's; so use your own as not to hurt another's.*

Prolem ante matrimonium natam, ita ut post, legitimam, lex civilis et succedere facit in hæreditate parentum: sed prolem, quam matrimonium non parit, succedere non sinit lex Anglorum. *Fortescue*, c. 39.—*The civil law permits both the offspring born before, and the offspring born after marriage, to be the heirs of their parents; but the law of England does not suffer the offspring, not produced by the marriage, to succeed.* [See *Arta est quæstio, &c.*]

Propinquior excludit propinquum; propinquus remotum; et remotus remotiorem. Co. Lit. 10.—*He who is nearer excludes him who is near; he who is near, him who is remote; he who is remote, him who is remoter, &c.*

Propositio indefinita æquipollit universalī—*An indefinite proposition is equal to a general one.*

Pro possessore habetur qui dolo injuriave desiit possidere. *Office of Exec.* 166.—*He is counted a possessor, who by fraud or injury prevents a party from possessing.*

Proprietas verborum est salus proprietatum. Jenk. Cent. 16—*Propriety of words is the health of property.*

Proprietates verborum servandæ sunt. Jenk. Cent. 136.—*The properties of words are to be observed.*

Propter jus sanguinis duplicatum, tam ex parte patris, quam ex parte matris, dicitur hæres propinquior soror, quam frater de alia uxore. 3 Co. 41.—*On account of the*

double right of blood, as well on the part of the father as the mother, the sister is called the next heir, rather than the brother by another wife.

[*Pro rata—At a certain rate.—Proportionably.*]

[*Pro re nata—For a special purpose.*]

[*Pro tanto—For so much.*]

[*Pro tempore. (Abbreviated pro tem.)—For the time.*]

A temporary appointment.]

*Protectio trahit subjectionem, et subjectio protectio-
nem. Co. Lit. 65.—Protection begets subjection, subjec-
tion protection.*

*Proviso est providere præsentia et futura, non præte-
rita. 2 Co. 72.—A proviso is to provide for present and
future, not past.*

[*Proximus sum egomet mihi—I am nearest to myself.*]

*Prudentur agit qui præcepto legis obtemperat. 5 Co.
49.—He acts prudently, who obeys the command of the
law.*

[*Publicum bonum privato est præferendum—The pub-
lic good is to be preferred to private advantage.*]

*Pueri sunt de sanguine parentum, sed pater et mater
non sunt de sanguine puerorum. 3 Co. 40—Children
are of the blood of their parents, but the father and mother
are not of the blood of the children.*

[*Puis darrien continuance—Where new matter of de-
fence has arisen since the last adjournment, which the de-
fendant had it not in his power to plead before, the court
will permit him to plead it in this form: but it will not be
permitted if any continuance of the cause has intervened
since the arising of this new matter. 3 Bl. Com. 316.*]

*Parties or privies in estate, or those who justify in their
right, pleading a deed, though part only of the original
estate be claimed, must shew the deed to the court. 10 Co.
92 b.*

Perpetuities, odious in law and equity.

Personal actions die with the person.

Personal estate to go in ease of the real. Fran. Max. iv.

Personal things cannot be done by another.

*Personal things, e. g. matters of trust and authority, or
ease and pleasure, may not be granted over.*

*Plaintiff must recover on his own strength, and not on
defendant's weakness. Vide Melior est conditio, &c.*

Pleading—One of the best arguments or proofs in law is

drawn from right entries, or course of pleading; as if that were the living voice of the law itself. Co. Lit. 115.

Plea shall be taken most strongly against him who pleads it.

Pluralities, odious in law.

Possession of the termor, possession of the reversioner.

Possessor has right against all men but him who has the very right.

Possibility cannot be on a possibility.

Precedents have as much law as justice. Hob. 270.

Prescription, none can make a right in lands. Doct. and Stud.

Prescription of rent and profits, to take (apprendre) out of lands, maketh a right. Ibid.

Protestation is an exclusion of a conclusion which the party pleading might incur. Co. Lit. 124.

Purchaser without notice, not obliged to discover to his own hurt.

Qualitas quæ inesse debet, facile præsumitur. Jur. Civ.

—A quality which ought to form a part is easily presumed.

Quæ ad unum finem loqua sunt, non debent ad alium detorqueri. 4 Co. 14.—*Words spoken of one thing, ought not to be perverted to another.*

Quæ cohærent personæ a persona separari uequeunt. Jenk. Cent. 28.—*Things belonging to the person, ought not to be separated therefrom.*

Quæ communi legi derogant stricte interpretantur. Jenk. Cent. 221.—*Things derogating from the common law are to be strictly interpreted.*

Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam. 12 Co. 75.—*Things introduced contrary to the rule of law, ought not to be used as precedents.*

Quæcunque intra rationem legis inveniuntur, intra legem ipsam esse judicantur. 2 Inst. 689.—*Whatever appears within the reason of the law, ought to be considered as part of the law.*

Quæ dubitationis causa tollendæ inseruntur communem legem non lædunt. Co. Lit. 205.—*Things inserted to remove doubt, affect not the common law.*

Quæ incontinenti vel certo fiunt in esse videntur. Co. Lit. 236.—*Things which are to be done, directly and certainly, appear already in existence.*

Quæ in curia regis acta sunt rite agi præsumuntur. 3
Buls. 43.—*Things done in the king's court are presumed to be rightly done.*

Quæ in partes dividi nequeunt solida, a singulis præstantur. 6 *Co.* 1.—*Solids, which cannot be divided into parts.*

Quæ inter alios acta sunt nemini nocere debent, sed prodesse possunt. *Ibid.*—*Transactions among strangers may benefit, but cannot injure, persons not parties thereto.*

Quælibet concessio fortissime contra donatorem interpretanda est. *Co. Lit.* 183.—*Every grant is to be taken most strongly against the grantor.*

Quælibet hæreditas naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam quidem naturalitur ascendit: descendit itaque jus quasi ponderosum, quod cadens deorsum, recta linea vel transversali, et nunquam reascendit ea via qua descendit post mortem antecessorum; a latere tamen ascendit alicui propter defectum hæredum inferius provenientium. *Co. Lit.* 11.—*Every inheritance naturally descends to the heirs in the manner of an inheritance; it never naturally ascends. The right therefore descends, as being heavy, and falling in a right or transverse line; and it never ascends in the way it descends, after the death of the ancestor: laterally it may ascend, in defect of heirs coming beneath.* [This rule of the common law has been changed in most of the states of the union, by statutory provision.]

Quælibet jurisdictione cancellatos suos habet. *Jenk. Cent.* 139.—*Every jurisdiction has its bounds.*

Quælibet narratio super brevi locari debet in com. in quo breve emanavit. *Cases time of Wm.* 3, 568.—*Every count upon the writ ought to be laid in the same county in which the writ arose.*

Quælibet poena corporalis quamvis minima, major est qualibet poena pecuniaria. 3 *Inst.* 220.—*Every corporal punishment, although the very least, is greater than any pecuniary punishment.*

Quemadmodum ad quæstionem facti non respondent judices, ita, ad quæstionem juris non respondent juratores. *Co. Lit.* 295.—*In the same manner that judges do not answer to questions of fact, jurors do not answer to questions of law.*

Quæ legi communi derogant stricte interpretantur.

Jenk. Cent. 29.—Things derogatory to the common law, are to be strictly interpreted.

Quæ legi communi derogant non sunt trahenda in exemplum—Things derogatory to the common law, are not to be drawn into precedent.

*Quæ mala sunt inchoata in principio vix bono peragan-
tur exitu. 4 Co. 2.—Things bad in the commencement sel-
dom end well.*

*Quæ non valeant [prosunt] singula, juncta juvant. 3
Buls. 132.—Things of no avail, singly, avail when joined
together.*

*Quæ præter consuetudinem et morem majorum sunt,
neque placent, neque recta videntur. 4 Co. 78.—Things
contrary to the custom and usage of our ancestors, neither
please nor appear right.*

*Quæras de dubiis, legem bene discere si vis—Inquire
into doubtful points, if you wish to understand the law
well.*

*Quærere dat sapere quæ sunt legitima vere. Lit. sect.
443.—To inquire into, is the way to know what is really
true.*

*Quære de dubiis, quia per rationes pervenitur ad legiti-
timam rationem. Lit. sect. 377.—Inquire into doubtful
points; for by reasoning we come to the real reason of a
thing.*

*Quæ rerum natura prohibentur, nulla lege confirmata
sunt. Finch, 74.—Things prohibited by their very nature
are confirmed by no law.*

*Quæritur ut crescent tot magna volumina legis—It is
complained, how law books increase.*

*In promptu causa est, crescit in orbe dolus. 3 Co. 82.
—The reason is plain, crime increases.*

*Quæ sunt minoris culpæ sunt majoris infamiae. Co.
Lit. 6.—Things of the smaller guilt are of the greater in-
famy.*

*Quam longum debet esse rationabile tempus, non defini-
natur in lege, sed pendet ex discretione justiciariorum.
Co. Lit. 56.—Law defines not reasonable time; it is left
to the discretion of the judges.*

*Quam rationabilis debet esse finis, non definitur, sed
omnibus circumstantiis inspectis, pendet ex justiciariorum
discretione. 11 Co. 44.—A reasonable termination is not
defined, but is left to the discretion of the judges, from a
view of all the circumstances.*

[*Quamdiu se bene gesserit—As long as he shall conduct himself well.—During good behaviour.]*

Quamvis aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum. 2 Inst. 564.—*Although a thing in itself may not be bad, yet, if it holds out a bad example, it is not to be done.*

Quamvis lex generaliter loquitur, restringenda tamen est, ut cessante ratione et ipsa cessat; cum enim ratio sit anima vigorque ipsius legis, non videtur legislator id sensisse quod ratione careat estiamsi verborum generalitas prima facie aliter suadeat. 4 Inst. 330.—*Although the law speaks generally, it is to be restrained, when the reason on which it is grounded fails; for, as the reason of a law is its very soul and gist, it cannot be meant by the legislature to be contrary to that reason; although, at first sight, the generality of its wording would induce us to think so.*

[*Quando abest provisio partis, adest provisio legis.* 6 Vin. Abr. 49—*A defect in the provision of the party is supplied by the provision of the law.]*

Quando aliquid prohibetur ex directo, prohibetur et per obliquum. Co. Lit. 223, b. Wing. 618.—*When anything is prohibited directly, it is prohibited indirectly.*

Quando aliquid prohibetur, prohibetur omne id per quod devenitur ad illud. 2 Inst. 48. Sic de Mandatis. 5 Co. 115.—*When any thing is prohibited, every thing relating to it is prohibited.*

Quando charta continet generalem clausulam posteaque descendit ab verba specialia quæ clausulæ generali sunt consentanea, interpretanda est charta secundum verba specialia. 8 Co. 154.—*When a charter contains a general clause, and afterwards descends to special words, which are consentaneous to the general clause, the charter is to be interpreted according to the special words.*

Quando de una et eadem re, duo onerabiles existunt, unus, pro insufficientia alterius, de integro onerabitur. 2 Inst. 277.—*When there are two persons liable to a joint burthen, if one makes default the other must bear the whole.*

Quando dispositio referri potest ad duas res, ita quod secundum relationem unam vitiatur, et secundum alteram, utilis sit, tum facienda est relatio ad illam ut valeat dispositio. 6 Co. 76.—*When the intention may be made to have reference to two things, by one of which it would be*

vitiated, and the other by which it would be preserved, it is to be referred to the latter.

Quando diversi considerantur actus ad aliquem statum perficiendum, plus respicit lex actum originalem. 10 Co. 49.—*When different acts, to the forming of an estate, are considered, the law looks to the original act.*

Quando duo jura concurrent in una persona, æquum est ac si essent in diversis. 4 Co. 118.—*When two rights concur in one person, it is the same as if they were in separate persons.*

Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest. 5 Co. 47.—*Per quod devenitur ad illud.* 2 Inst. 309.—*When the law gives a man any thing, it gives him the means of obtaining it.*

Quando lex aliquid alicui concedit, omnia incidentia tacite conceduntur. 2 Inst. 326. Hob. 234.—*When the law gives any thing, it tacitly gives what is incident to it.*

Quando lex est specialis, ratio autem generalis, generaliter lex est intelligenda. 2 Inst. 83.—*When the law is special, and its reason general, it is to be understood generally.*

Quando plus fit quam sieri debet, videtur etiam illud fieri quod faciendum est. 8 Co. 85.—*When a man performs more than he ought, he nevertheless is considered to have performed that which he ought to have performed.*

Quando verba statuti sunt specialia, ratio autem generalis, generaliter statutem est intelligendum. 10 Co. 101.—*When the words of a statute are special, but the reason general, the statute is to be understood generally.*

[*Quantum meruit.*] [*Quantum valebant.*] are counts on an implied as-

sumpsit; the former properly signifying *as much as the plaintiff deserved to have*, for his services, &c. rendered; the latter *as much as the goods, &c. were worth*, when there was no stipulated price agreed on. 3 Bl. Com. 162.]

[*Quarantine*—The term of forty days.—It is generally applied to the time the widow is permitted to occupy the mansion house, before dower is assigned; or, to the time vessels coming from infected places must remain, before they can enter a port. 2 Bl. Com. 135.]

[*Quare clausum fregit*—See *Clausum fregit.*]

Qui accusat integræ famæ sit et non criminosus. 3 Inst. 26.—*Let him who accuses a person of unblemished reputation, be free from vice himself.*

Qui adimit medium derimit finem. *Co. Lit.* 161.—*He who takes away the middle destroys the end.*

Qui aliquid statuerit, parte inaudita altera, æquum licet dixerit, haud æquum fecerit. 6 *Co.* 52.—*He who decides, one party being unheard, if he should decide right, does wrong.*

Qui bene interrogat bene docet. 3 *Buls.* 227.—*He who questions well, learns well.*

Qui bene distinguit bene docet. 2 *Inst.* 470.—*He who distinguishes well, learns well.*

Qui concedit aliquid concedere videtur et id sine quo concessio est irrita—sine qua res ipsa esse non potuit. 11 *Co.* 52. *Jenk. Cent.* 32.—*He who concedes any thing, is considered as conceding that without which his concession would be idle.*

Qui contemnit præceptum, contemnit præcipientem. 12 *Co.* 96.—*He who contemps the precept, contemns the the party giving it.*

[**Quicquid acquiritur servo acquiritur domino.** 15 *Vin. Abr.* 327.—*Whatever is acquired by the servant, is acquired by the master.*]

Quicquid est contra normam recti est injuria. 3 *Buls.* 313.—*Whatever is against the rule of right is an injury.*

Quicquid in excessu actum est lege prohibetur. 2 *Inst.* 107.—*Every excess is prohibited in law.*

Quicquid judicis autoritati subjicitur, novilati non subjicitur. 4 *Inst.* 66.—*Whatever is subject to the authority of the judge, is not subject to novelty.*

Quicquid plantatur solo, solo cedit. *Off. of Exec.* 57.—*Whatever is affixed to the soil belongs to the soil.* [This rule has been greatly relaxed. See *Noy's Max.* p. 166, note (d).]

Quicquid solvitur, solvitur secundum modum solventis. 2 *Vern.* 606.—*Whatever is dissolved, is dissolved according to the manner of the party dissolving.*

Quicunque jussu judicis aliquid fecerit, non videtur dolo malo fecisse, quia parere necesse est. 10 *Co.* 70.—*Whoever does any thing by the command of a judge, is not reckoned to have done it with an evil intent, because it is necessary to obey.*

Qui destruit medium, destruit finem. 10 *Co.* 51.—*He who destroys the middle, destroys the end.*

Qui eorum vestigia insistant eorum exitus per horres-
Branch's Principia, &c.—16

cant. 4 *Inst.* 487.—*Let those dread their fate who tread in their steps.*

[*Qui melius probat, melius habet.* 9 *Vin. Abr.* 235; 12 *Ibid* 94; 21 *Ibid* 19.—*He who proves most, recovers most.*]

Quid sit jus, et in quo consistit injuria, legis est definire. *Co. Lit.* 158, b.—*What right is, and what injury is, it is the business of the law to declare.*

[*Qui tam* actions, are those on a penal statute, where part of the penalty is given to one, and the other to another. They are called *qui tam* from some of the initial words, while legal proceedings were in Latin; the suit being brought for a person “*qui tam*” who as well for the commonwealth, “*quam pro seipso*” as for himself, sues. 3 *Bl. Com.* 162]

[*Quid pro quo*—*An equivalent for value received.*]

Qui evertit causam, evertit causatum futurum. 10 *Co. 51.*—*He who overthrows the cause, overthrows the future consequence.*

Qui ex damnatio coitu nascuntur inter liberos non competentur. *Co. Lit.* 8.—*Those born out of wedlock are not counted children.*

Qui facit per alium facit per se. *Co. Lit.* 258.—*What a man does by another, he does by himself.*

Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi. 12 *Co. 59.*—*He who has the jurisdiction to loosen, has the jurisdiction of binding.*

Qui hæret in litera hæret in cortice. *Co. Lit.* 283 b.—*He who sticks to the letter, sticks to the bark. He gets the shell, without the kernel; the form without the substance.*

Qui jure suo utitur, nemini facit injuriam. *Reg. Jur. Civ.*—*He who conducts himself according to his own legal rights, can do an injury to nobody.*

Quilibet potest renunciare juri pro se introducto. 2 *Inst.* 183. *Wing.* 483.—*Every man can renounce the benefit of a law introduced for his own convenience.*

Qui molitur insidias in patriam, id facit quod insanus nauta perforans navem in qua vehitur. 3 *Inst.* 36.—*He who betrays his country, is like the insane sailor, who bores a hole in the ship which carries him.*

Qui non cadunt in constantem virem, vani timores sunt æstimandi. 7 *Co.* 27.—*Those fears are vain which do not affect a man of firm mind.*

Qui non habet in ære, luat in corpore: [ne quid pec-

cetur impune.] 2 *Inst.* 173.—*What a man cannot pay with his purse he must suffer in his person, lest any one should sin with impunity.*

Qui non habet potestatem alienandi, habet necessitatem retinendi. *Hob.* 336.—*He who has not the power of alienating, is obliged to retain.*

Qui non libere veritatem pronunciat, proditor est veritatis. 4 *Inst. Epil.*—*He who does not willingly speak truth, betrays truth.*

Qui non obstat quod obstarre potest, facere videtur. 2 *Inst.* 146.—*He who does not prevent what he can prevent, commits.*

Qui non improbat, approbat. 3 *Inst.* 27.—*He who does not blame, approves.*

Qui non prohibet quod prohibere potest, assentire videtur. 2 *Inst.* 305.—*He who does not forbid what he can forbid, assents.*

Qui non propulsat injuriam quando potest, infert. *Jenk. Cent.* 271.—*He who does not repel an injury when he can, induces it.*

Qui obstruit aditum, destruit commodum. *Co. Lit.* 161.—*He who obstructs an entrance, destroys a convenience.*

Qui omne dicit, nihil excludit. 4 *Inst.* 81.—*He who says all, excludes nothing.*

Qui parcit nocentibus, innocentibus punit. *Jenk. Cent.* 126.—*He who spares the guilty, punishes the innocent.*

Qui peccat ebrius, luat sobrios. *Cary's Rep.* 133.—*Let him who sins when drunk, be punished when sober.*

Qui per alium facit per seipsum facere videtur. *Co. Lit.* 258.—*He who does any thing by the instrumentality of another, is considered as doing it himself.*

Qui per fraudem agit, frustra agit. 2 *Rol. Rep.* 17.—*What a man does fraudulently, he does in vain.*

Qui periculum amat in eo peribit—*He who loves danger will perish by it.*

Qui potest et debet vetare, jubet. *Gilb.* 85.—*He who is able and ought to forbid, commands.*

Qui primum peccat ille facit rixam. *Godb.*—*He who sins first makes the strife.*

Qui prior est tempore potior est jure. *Co. Lit.* 14.—*He who is first in time is most powerful in law.*

Qui pro me aliquid facit, mihi secisse videtur. 2 *Inst.*

501.—*He who for me does any thing, appears to do it by me.*

Qui rationem in omnibus quærunt rationem subvertunt.
2 Co. 75.—*He who seeks a reason for every thing, subverts reason.*

Quisquis præsumitur bonus; et semper in dubiis pro reo respondendum. Jur. Civ.—*Every one is presumed good; and always in doubt, presumption is in favour of the defendant.*

Qui semel actionem renunciaverit, amplius repetere non potest. 8 Co. 59.—*He who renounces an action once, cannot repeat it.*

Qui semel malus, semper præsumitur esse malus in eodem genere. Cro. Car. 317.—*He who is once bad, is presumed to be bad always in the same degree.*

Qui sentit commodum, sentire debet et onus; et e contra. 1 Co. 99. 1 Vern. 298.—*He who derives the advantage ought to bear the burden; and on the contrary.*

Quisquis est qui velit juris consultus haberi, continuet studium, velit a quoconque doceri. Jenk. Cent.—*Whoever wishes to be a juris-consult, let him continually study, and learn from every thing.*

Qui tacet consentire videtur. Jenk. Cent. 32.—*He who is silent appears to consent.*

Qui tacet consentire videtur ubi tractatur de ejus commodo. 20 H. 6, 13, b. 9 Mod. 38.—*He who is silent is considered as assenting, when his own convenience is the subject matter.*

Qui tardius solvit, minus solvit. Jenk. Cent. 58.—*He who releases slowly, releases little.*

Qui timent carent et vitant. Office of Exec. 162.—*They who fear, are wary and avoid.*

[*Quoad hoc—As to this.*—In law pleadings and arguments, this expression is often used to signify, *as to the thing named, the law is so and so, &c.*]

[*Quo animo—With what mind.*—The *quo animo*, the intention with which any act was done.]

Quod ab initio non valet, in tractu temporis non convalescit. 4 Co. 2.—*That which is bad in its commencement, improves not by time.*

Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur. 3 Co. 78.—*What otherwise is good and just, if sought by force and fraud, becomes unjust.*

Quod constat clare, non debet vereficari—*That.. which is clearly apparent need not be verified.*

Quod constat curiae opere testium non indiget. 2 Inst. 662.—*What appears to the court, does not require the aid of witnesses.*

Quod contra legem fit, pro infecto habetur. 4 Co. 31.—*What is done contrary to law is not considered as done at all.*

[Quod cum—In the commencement of a declaration, while the proceedings were in Latin, generally translated “for that whereas.”]

Quocunque aliquis ob tutelam corporis sui fecerit, jure id fecisse videtur. 2 Inst. 590.—*That which any one does in defence of his person, he is considered to do legally.*

Quod demonstrandi causa, additur rei satis demonstratæ, frustra fit. 10 Co. 113.—*What is added to a thing sufficiently palpable, for the purpose of demonstration, is vain.*

Quod dubitas, ne feceris; especially in cases of life. H. H. P. C. 300.—*Where there is doubt, do nothing ; especially in cases of life.*

Quod est ex necessitate nunquam introducitur, nisi quando necessarium. 2 Rol. Rep. 502.—*What is introduced of necessity, is not introduced, except in case of necessity.*

Quod est inconveniens, aut contra rationem, non permisum est in lege. Co. Lit. 178.—*Whatever is inconvenient, and contrary to reason, is not permitted in law.*

Quod est necessarium est licitum. Jenk. Cent. 76.—*What is necessary, is lawful.*

Quod fieri non debet factum valet. 5 Co. 38.—*What ought not to be done avails when done.*

Quod inconsulto fecimus, consultius revocemus. Jenk. Cent. 116.—*What is done without counsel is revoked with counsel.*

Quod in jure scripto “jus” appellatur, id in lege Angliæ “rectum” esse dicitur. Co. Lit. 158.—*What in written law is called “jus,” in the law of England is called “rectum.”*

Quod in minori valet, valebit in majori; et quod in majori non valet nec valebit in minori. Co. Lit. 260.—*What avails in the minor, will avail in the major; and what does not avail in the major will not avail in the minor.*

Quod in uno similium valet valebit in altero. Co. Lit.

191.—*What avails in one of two things similar, avails in the other.*

Quod meum est sine me auferri non potest. Jenk. Cent. 251.—*What is mine cannot be taken away without my assent.*

Quod necessarie intelligitur id non deest. 1 *Buls.* 71.—*What is necessarily understood, is not wanting.*

Quod necessitas cogit, defendit. H. H. P. C. 54.—*What necessity compels, it justifies.*

Quod non apparet non est; et non apparet judicialiter ante judicium. 2 *Inst.* 479.—*That which appears not does not exist; and it appears not judicially before judgment.*

Quod non habet principium non habet finem. Co. Lit. 345. Wing. 79.—*That which has no beginning has no end.*

Quod non legitur non creditur. 4 *Inst.* 304.—*What is not read is not believed.*

Quod non valet in principalia, in accessoria seu consequentia non valebit; et quod non valet in magis propinquuo, non valebit in magis remoto. 8 Co. 78.—*That which is not good in its principal, will not be good as to consequences and accessories; and what is not of force in regard to things near it, will not be of force in things remote from it.*

Quod nostrum est, sine facto sive defectu nostro, amitti seu in aliud transferri non potest. 8 Co. 92.—*That which is ours cannot be transferred to another without our own act, or our own fault.*

[*Quod nullius est, id ratione naturali occupanti conceditur.* 2 Bl. Com. 258.—*That which belongs to nobody, becomes, by natural right, the property of the first occupant.]*

Quod per me non possum, nec per alium. 4 Co. 24.—*What I cannot do in person, I cannot do by proxy.*

Quod per recordum probatum, non debet esse negatum—What is proved by the record should not be denied.

Quod primum est in intentione, ultimum est in operatione. Bacon.—*That which is first in intention, is last in operation.*

Quod prius est verius est; et quod prius est tempore potius est jure. Co. Lit. 347.—*What is first is truest; and what comes first in time is best in law.*

Quod pro minore licitum est, et pro majore licitum est.

8 Co. 43.—*That which is lawful as to the minor, is lawful as to the major.*

Quodque dissolvitur eodem modo quo ligatur. 2 Rol.

Rep. 39.—*In the same manner that a thing is bound, in the same manner it is unbound.*

Quod quisquis norat in hoc se exerceat. 11 Co. 10.—*Let every one employ himself in what he knows not.*

Quod remedio destituitur ipsa re valet, si culpa absit. Bacon.—*That which is without remedy avails of itself, if without fault.*

Quod semel meum est, amplius meum esse non potest. Co. Lit. 49.—*What is entirely mine, cannot be mine more completely.*

Quod semel placuit in electione, amplius displicere non potest. Co. Lit. 146.—*Where choice is once made, it cannot be made again.*

Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem seu compensationem. Bacon.—*What is given or reserved under a certain form, is not to be drawn into a compensation or valuation.*

Quod tacite intelligitur deesse non videtur. 4 Co. 22.—*What is silently understood does not appear to be wanting.*

Quod vanum et inutile est, lex non requirit. Co. Lit. 319.—*The law requires not what is vain and useless.*

[Quo jure—*By what right.*]

Quo ligatur, eo dissolvitur. 2 Rol. Rep. 21.—*By the same power by which a man is bound, by that is he released.*

Quomodo quid constituitur eodem modo dissolvitur. Jenk. Cent. 74.—*In the same manner by which any thing is constituted, by that is it dissolved.*

[Quorum.—This word was anciently used in commissions of justices of the peace. Thus a commission issued to certain persons, authorizing them to hold courts, &c. of whom (*quorum*) such and such particular persons are always to be one.—The persons so specified are called justices of the *quorum*.—The term *quorum* is also used for a sufficient number to proceed to business.]

Quorum *prætextu*, nec auget nec minuit sententiam, sed tantum confirmat *præmissa*. Plow. 52.—*The words “quorum prætextu,” neither increase nor diminish a sentence; they are only things sent before.*

Quoties dupli jure defertur alicui successio, repudiatio novo jure, quod ante defertur supererit vetus. Reg. Jur.

Civ.—As often as a succession comes to a man by a double right, the new right being laid aside, the old one which brought it first will overcome.

Quoties in verbis nulla est ambiguitas, ibi nulla expositione contra verba fienda est. *Co. Lit.* 147. *Wing.* 24.—*When in the words there is no ambiguity, no exposition contrary to the words is to be made.*

[*Quo warranto—By what authority.—A writ lying against a person who has usurped an office, &c.*]

Quam quod ago non valet ut ago, valeat quantum valere potest. 1 *Vent.* 216.—*When what I do is of no force, as to the purpose for which I do it, let it be of force to as great a degree as it can.*

Ratio est legis anima, mutata legis ratione mutatur et lex. 7 *Co. 7.*—*The reason of a law is its soul; change the reason, and the law is changed.*

Ratio est radius divini luminis. *Co. Lit.* 232.—*Reason is a ray of the divine light.*

Ratio est formalis causa consuetudinis—Reason is the formal cause of custom.

Ratio legis est anima legis. *Jenk. Cent.* 45.—*The reason of law is the soul of law.*

Ratio potest allegari deficiente lege. *Co. Lit.* 191. *Sed ratio vera et legalis, et non apparens—Reason may be alleged when law is defective. But it must be true and legal reason, and not apparent.*

Ratio et authoritas, duo clarissima mundi lumina. 4 *Inst.* 320.—*Reason and authority the two brightest lights of the world.*

Receditur a placitis juris, potius quam injuriæ et delicta maneant impunita. *Bac. Max. Reg.* 12.—*The law will dispense with maxims which are placita juris (pleas of right) and not regulæ juris (rules of right) rather than injuries and crimes should go unpunished.**

Recorda sunt vestigia vetustatis et veritatis. 2 *Rol. Rep.* 296.—*Records are vestiges of truth and antiquity.*

* The words of lord Bacon are the following: "The law hath many grounds and positive learnings, which are not of the maxims and conclusions of reason; but yet are learnings received with the law set down, and will not have called in question; these may be rather called *placita juris* than *regulae juris*; with such maxims the law will dispense, rather than crimes and wrongs should be unpunished, *quia salus populi suprema lex*; and *salus populi* is contained in the repressing offences by punishment." Then follow the illustrations of the maxim, which see, *Bac. Law Tracts*, pa. 73, *Max. Reg.* 12.

Rectum, vide *Jus publicum, &c.*

[*Rectus in curia—Right in court.*]

Recuperatio, i. e. ad rem, per injuriam extortam sive detentam, per sententiam judicis, restitutio. *Co. Lit.* 154.—*Recovery*, i. e. *restitution by legal sentence to any thing wrongfully taken or detained.*

Recuperatio est alicujus rei in causam alterius adductæ per judicem acquisitio. *Evictio. Leg. Civ.*—*Recovery is the acquisition, by sentence of the judge, of any thing from the possession of another.*

Recurrendum est ad extraordinarum quando non valet ordinarium. *Vide, Nunquam decurritur, &c.*—*We must have recourse to what is extraordinary only when what is ordinary fails.*

Reddendo singula singulis. 5 *Co. 7, b.*—*By rendering to each respectively.*

[*Redendum*—A clause in a deed, whereby the grantor reserves some new thing to himself out of what he had before granted, as *rendering rent, &c.*]

Reddere, nihil aliud est quam acceptum restituere: seu, reddere est quasi retro dare; et redditur dicitur a redeundo, quia retro it. *Co. Lit. 142.*—*To restore is to make restitution, or to give back again; and it is called from returning, because it goes back again.*

Redditus cæcus est siccus. 6 *Co. 58.*—*Rent that is uncertain is dry.*

Resert a quo fiat per quisitum. *Co. Lit. 12.*—*Reference must be made to him by whom the purchase was made.*

Regula peccatis quæ poenas irrogat æquas. *Gilb. 213.*—*The rule which sets equal penalties on sins.*

Regulariter non valet pacium dere mea non alienanda. *Co. Lit. 223.*—*Regularly, a compact not to alienate my property, is not binding.*

[*Rejoinder*, is the defendant's answer to the plaintiff's replication, and ought to follow and enforce the defendant's plea; otherwise it is a departure which the law will not allow. *Co. Lit. 304, a.*]

Relatio est fictio juris et intenta ad unum. 3 *Co. 28.*—*Reference is a fiction of law intent to one thing.*

Relatio semper fiat ut valeat dispositio, et quando ad duas res referri potest dispositio, ita quod secundum unam vitiatur et secundum alteram utilis est, tunc facienda est relatio ut valeat dispositio. 6 *Co. 76.*—*Let reference be*

Branch's Principia, &c.—17

made always in such a manner, that the disposition may avail; and when the disposition may be referred to two things, so that by one it may be vitiated, and by the other it may stand, then let the reference be made to that by which the disposition may avail.

[*Relation never defeats collateral acts.* 18 Vin. Abr. 292.]

[*Relation shall always be ut sententia non impediatur. (that the meaning of the sentence be not obstructed) and not to the last antecedent.* 16 Vin. Abr. 211; 18 Vin. Abr. 292.]

[*Relation shall never make a void grant or devise of the party, good.* 18 Vin. Abr. 292.]

Relativorum cognito uno, cognoscitur et alterum. Cro. Jac. 539.—*Of things relating to each other, one being known, the other is known.*

[*Rem in re—In the act of coition.*]

[*Remedies for rights are ever favourably extended.* 18 Vin. Abr. 521.]

Remissius imperanti melius paretur. 3 Inst. 233.—*A man commanding not too strictly is best obeyed.*

Remoto impedimento, emergit actio. 5 Co. 76. Wing. 38.—*An impediment being removed the action lies.*

[*Repleader*, is where the pleadings have not brought the matter in issue which was to be tried (2 Lill. Prac. Reg. 564). Or, where issue is joined upon a fact totally immaterial or insufficient to determine the right; in which case, the court, after verdict will award a *repleader*, that is, that the parties plead again. 3 Bl. Com. 395; 1 Burr. 304.]

[*Replication*, is the exception or answer made to the defendant's plea. For if the plea made by the defendant doth not amount to an issue, or total contradiction of the declaration, but only evades it, the plaintiff may reply either traversing the plea, that is denying it, or allege new matter in contradiction to the defendant's plea. (3 Bl. Com. 309.) But the replication must pursue the plaintiff's cause of action stated in his declaration. Co. Lit. 104 a.]

Reppellitur a sacramento infamis. Co. Lit. 158.—*An infamous person cannot take an oath.*

Reprobata pecunia liberat solventem. 9 Co. 79.—*Money refused frees the debtor.*

Reputatio est vulgaris opinio ubi non est veritas. Et *vulgaris opinio est duplex, scil. Opinio vulgaris orta inter*

graves et discretos homines, et quæ vultum veritatis habet; et opinio tantum orta inter leves et vulgares homines, absque specie veritatis. 4 Co. 107.—*Reputation is vulgar opinion, in which there is little truth. And common opinion is of two kinds; to wit,—common reputation arising among grave and sensible men, and which has the appearance of truth; and mere opinion arising among light and ignorant men, without any appearance of truth.*

Rerum ordo confunditur, si unicuique jurisdictione non servetur. 4 Inst. Proem.—*The order of things is confounded if every one preserves not his jurisdiction.*

Rerum progressus ostendunt multa, quæ in initio præcaveri seu prævideri non possunt. 6 Co. 40.—*The progress of time shows many things which, at the beginning, could not be guarded against, or foreseen.*

Rerum suarum quilibet est moderator, et arbiter. Co. Lit. 223.—*Every one is the moderator and arbiter of his own affairs.*

Res denominatur a principaliori parte. 5 Co. 47.—*The thing is named from its principal part.*

Res est misera ubi jus est vagum et incertum. 2 Salk. 512.—*It is a miserable state of things where the law is vague and uncertain.*

Reservatio non debet esse de proficuis ipsis quia ea conceduntur, sed de redditu novo extra proficia. Co. Lit. 142.—*A reservation ought not to be of the profits themselves, because they are granted, but from the new rent out of the profits.*

Res, generalem habet significationem, quia tam corporea, quam incorporea, cuiuscunq; sunt generis, naturæ sive speciei, comprehendit. 3 Inst. 182.—*Res, (things), have a general signification, which comprehends corporeal and incorporeal objects, of whatever nature, sort, or specie.*

Resignatio est juris proprii spontanea resolutio. Godb. 284.—*Resignation is a spontaneous relinquishment of a man's own right.*

Res inter alios acta alteri nocere non debet. Co. Lit. 152. Sed prodesse potest. 6 Co. 1.—*Things done between strangers ought not to injure those not parties. They may benefit them.*

Res judicata pro veritate accipitur. Co. Lit. 103.—*A thing adjudicated is taken for granted to be true.*

Res per pecuniam æstimatur, et non pecunia per res. 9 Co. 76.—*The value of a thing is estimated according to*

its worth in money; but the value of money is not estimated by reference to the thing.

Rescipiendum est judicanti, ne quid aut durius aut remissius constituatur quam causa depositum; nec enim aut severitatis aut clementiae gloria affectanda est. 3 Inst. 220.

—It is a matter of import to one adjudicating, that nothing either more lenient or more severe should be done than the cause itself warrants; and that the glory neither of severity nor clemency should be affected.

[*Respondeas ouster*, is the judgment that the defendant answer over, in some better manner, after a dilatory plea overruled. 3 Bl. Com. 303.]

Respondeat raptor, qui ignorare non potuit quod pupillum alienum abduxit. Hob. 99.—*Let the ravisher himself answer, for he cannot be ignorant whose pupil he has taken away.*

Respondeat superior. 4 Inst. 114.—*Let the superior answer.*

Res profecto stulta est nequitiae modus. 11 Co. 86.—*The measure of wickedness is a thing truly foolish.*

[*Retraxit*, is where the party, in his proper person, comes into court, and saith he will not proceed further with his cause. This is a bar to the action forever. But a retraxit cannot be before a declaration is filed, for it would then be but a nonsuit. An attorney cannot enter a retraxit. 2 Lill. Prac. Reg. 582.]

Re, verbis, scripto, consensu, traditione, junctura vestes sumere pacta solent. Plow. Com. 161, b.—*Compacts are accustomed to be clothed by the thing itself, by words, by writing, by consent, by delivery.*

Reversio terræ, est tanquam terra revertens in possessione donatori, sive hæredibus suis, post donum finitum. Co. Lit. 142.—*A reversion of land is as it were the return of the land to the possession of the donor, or his heirs, after the termination of the estate granted.*

Reus læsæ majestatis punitur, ut pereat unus ne perirent omnes. 4 Co. 124.—*A traitor is punished, that, by the death of one, all may not perish.*

Rogationes, quæstiones, et positiones, debent esse simplices. Hob. 143.—*Demands, questions, and positions, ought to be simple.*

Reasonable time, quam longum debet esse, non definitur in jure, sed pendet ex discretione justiciariorum. Co.

Lit. 56.—What reasonable time is, is not defined in law, but rests with the judges.

Recovery in one action, a good bar to another of equal or inferior nature; but not to one of an higher nature.

Release shall be made void when there is suppressio veri, or suggestio falsi. 1 Vern. 20.

Remainder can depend on no estate but what beginneth at the same time the remainder doth.

Remainder must vest eo instante that the particular estate determines. 1 Co. 130.

Remainder ought to pass out of the grantor at the time of livery made. Co. Lit. 378.

Remainder to a person not of a capacity to take at the time of appointing it, is void. Plow. 27.

Remedies ought to be reciprocal.

Rent must be reserved to him from whom the state of the land moveth. Co. Lit. 143.

Rent service may be reserved without deed. Co. Lit. 142.

Rent—when no place is appointed for paying it, tender or demand should be on the land. 4 Co. 73.

Residence of persons—construction to compel it cannot be too liberal. Gilb. 228.

Want of right and want of remedy are often said to be the same, but vide 3 Co. 3, a; contra Co. Lit. 349, b.

Right of entry, or a chose en action, cannot be granted or transferred to a stranger. Co. Lit. 266.

Right where double, it shall be presumed a person took in that which was most favourable for him.

Rights—are intrandi, recuperandi, habendi, recipiendi, et possidendi. Plow. Com. 487. Hob. 335.

Rights never die. Jenk. Cent. 100.

Rights or titles to lands or tenements of inheritance or freehold, may not be barred by collateral satisfaction, but by release or confirmation, or some act tantamount. 4 Co. 1.

Rules and maxims of law must be observed; and, therefore, though the will of the giver is in other respects to be observed according to the form of it manifestly expressed in his deed of gift, yet that will and intent must agree with the rules of law. Co. Lit. 20, b.

Sacramentum, a sacra et mente—quia jurare est Deum in testem vocare, et est actus divini cultus. 3 Inst. 165.—*An oath, sacramentum, so called from sacra, sacred, and*

mente, with a mind, because to swear is to call God as a witness, and is an act of divine worship.

Sacramentum habet in se tres comites, veritatem, justitiam et judicium; veritas habenda est in jurato; justicia et judicium in judge. 3 Inst. 160.—*An oath has in it three component parts, truth, justice, and judgment: truth is requisite in the party swearing, justice and judgment in the judge administering the oath.*

Sacramentum si fatuum fuerit, licet falsum, tamen non committit perjurium. 2 Inst. 167.—*A foolish oath, though false, makes not perjury.*

Sacrilegus omnium prædonum cupiditatem et scelera superat. 4 Co. 106.—*Sacrilege surpasses all other theft in cupidity and wickedness.*

Sæpenumero ubi proprietas verborum attenditur, sensus veritatis amittitur. 7 Co. 27.—*Where the propriety of words is attended to, the meaning of truth frequently is lost.*

Sæpe viatorem nova non vetus orbita fallit. 4 Inst. 34.—*A new road, not an old one, often deceives the traveller.*

Salus populi est suprema lex. 13 Co. 139.—*The public good is the supreme law.*

Salus ubi multi consiliarii. 4 Inst. 1.—*Where there are many counsellors there is safety.*

Sapiens incipit a fine: et quod primum est in intentione, ultimum est in executione. 10 Co. 25.—*A wise man begins with the last; and what is first in intention, is last in execution.*

Sapiens omnia agit cum consilio. 4 Inst. 4.—*A wise man does every thing advisedly.*

Sapientia legis nummario pretio non est aestimanda. Jenk. Cent. 168.—*The wisdom of the law cannot be valued by money.*

Sapientis judicis est cogitare tantum sibi esse premissum, quantum commissum et creditum. 4 Inst. 163.—*A wise man should consider as much what he premises as what he commits and believes.*

Satius est petere fontes quam sectari rivulos. 10 Co. 118.—(Elegantly paraphrased by Judge ROANE.) It is better to drink at the fountain head, than to sip the streams.

Scientia sciolorum est mixta ignorantia. 8 Co. 159.—*The knowledge of smatterers is mixed ignorance.*

[*Scilicet (Sc.)* The same as *Videlicet (viz.)* “to wit” or “that is to say.” See Hob. 171–2.]

[*Scire facias*, is a judicial writ, founded on some matter of record, as a recognizance, judgment, &c. and issues to shew cause why execution should not be obtained. It also lies for other purposes, as to repeal letters patent, hear errors, &c. *Tidd's Pract.* 982; *T. L.* 606; *Cow. Int.*]

Scire proprie est, rem ratione et per causam cognoscere.
Co. Lit. 183.—*To know properly is to know the reason and cause of a thing.*

Scito, quod [ut] modus est [si] conditio, [quia] causa. *Dyer, 138.—Know that the word [ut] relates to measure, [si] to condition, [quia] to the reason.*

Scribere est agere. *2 Rol. Rep.* 89.—*To write is to act.*

Scriptæ obligationes scriptis tolluntur, et nudi consensus obligatio, contrario consensu dissolvitur. *Jur. Civ.*—*Written obligations are dissolved by writings, and obligations of naked assent by similar naked assent.*

Secta est pugna civilis: sicut actores armantur actionibus, est quasi gladiis accinguntur, ita rei muniuntur exceptionibus, et defenduntur quasi clypeis. *Hob. 20.—A suit is like a civil warfare: the plaintiffs are armed with actions like swords, and the defendants are protected with exceptions, like shields.*

Secta “producit sectam” accipitur pro probatione per testes. *Dyer, 185.—The words “and therefore he brings his suit,” are taken as his proof by witnesses.*

Secta quæ scripto nititur a scripto variari non debet. *Jenk. Cent.* 65.—*The secta in the writing ought not to vary from the writing.*

Securius expedientur negotia commissa pluribus: et plus vident oculi quam oculus. *4 Co. 46.—Business entrusted to many speeds best; and many eyes see more than one eye.*

[*Se defendendo—In self defence.*]

Seisina facit stipitem. *Hale's Hist. C. Law,* 241.
Wright's Tenures, 185.—*The seisin makes the heir.*

Semel malus semper præsumitur esse malus in eodem genere. *Cro. Car.* 317.—*Whatever is once bad, is always presumed to be bad in the same degree.*

Semper ita fiat relatio ut valeat dispositio. 6. *Co. 76.—*

Let the reference always be so made, that the disposition may avail.

Semper præsumitur pro legitimatione puerorum : et filiatio non potest probari. *Co. Lit.* 126.—*It is always to be presumed that children are legitimate, for filiation cannot be proved.*

Semper præsumiter pro sententia. *3 Buls.* 42.—*Presumption is always in favour of the sentence.*

Sensus verborum est anima legis. *5 Co. 2.*—*The meaning of the words is the spirit of the law.*

Sensus verborum ex causa dicendi accipiens est : et sermones semper accipiendi sunt secundum subjectam materiam. *4 Co. 14.*—*The sense of words is to be taken according as the words are used ; and discourses are always to be interpreted according to the nature of the subject-matter under discussion.*

Sensus verborum est duplex, mitis et asper, et verba semper accipienda sunt in miore sensu. *4 Co. 13.*—*The meaning of words is two-fold, mild and disagreeable ; and words are always to be taken in the milder sense.*

Sententia contra matrimonium nunquam transit in rem judicatam. *7 Co. 43.*—*A sentence against marriage never passes in a matter adjudged.*

Sententia facit jus, et legis interpretatio legis vim obtinet. *Ellesm. Postn.* 55.—*The sentence gives the right, and the interpretation of the law has the force of law.*

Sententia facit jus, et res judicata pro veritate accipitur. *Ellesm. Postn.* 55.—*Sentence creates the right, and what is adjudicated is taken for granted to be true.*

Sententia interlocutoria revocari potest, definitiva non potest. *Bacon.*—*An interlocutory sentence may be recalled, but not a final.*

Sententia non fertur de rebus non liquidis ; et oportet quod certa res deducatur in judicium. *Jenk. Cent.* 7, 84.—*Sentence is not given on things not liquidated ; and something certain ought to be brought to judgment.*

Sequamer vestigia patrum nostrorum. *Jenk. Cent.* in princ.—*Let us follow the footsteps of our fathers.*

Sequi debet potentia justitiam, non præcedere. *2 Inst.* 454.—*Power should follow justice, not precede it.*

Sermo index animi. *5 Co. 118.*—*Speech, an index of the mind.*

[*Seriatim—Separately.—In order.—According to place or seniority.]*

Sermo relatus ad personam, intelligi debet de conditione personæ. 4 Co. 16.—*A speech relating to the person, is to be understood as relating to his condition.*

Sermones semper accipiendi sunt secundum subjectam materiam, et conditionem personarum. 4 Co. 14.—*A discourse is to be understood according to the subject-matter of it, and the condition of the persons.*

Servile est expilationis crimen; sola innocentia libera. 2 Inst. 573.—*The crime of theft is slavish; innocence alone is free.*

Servitus est constitutio jure gentium, qua quis domino alieno contra naturam subjicitur. Co. Lit. 116.—*Slavery is by the law of nations; by it a man is subjected to a master, contrary to the law of nature.*

Sex horas somno, totidem des legibus æquis—*Six hours to sleep, and you may give as many to equal laws.* Quatuor orabis, des epulisque duas—*Four hours you shall pray, you may give two to eating.* Quod superest ultra, sacris largire camœnis. Co. Lit. 64.—*What remains over, bestow on sacred musick.*

Si a jure discedas vagus eris, et erunt omnia omnibus incerta. Co. Lit. 227.—*If you depart from the law you will wander without any guide, and every thing will be in a state of uncertainty to every body.*

Si assuetis mederi possis nova non sunt tentanda. 10 Co. 142.—*Novelties are not to be introduced by way of experiment, although it is conceded that the things to which we are accustomed are susceptible of improvement.*

Sic interpretandum est ut verba accipientur cum effectu. 3 Inst. 80.—*Such an interpretation is to be made that the words may be received with effect.*

Sicut actor, una actione debet experiri, saltem ill durante, sic oportet tenentem una exceptione, dum tamen peremptoria, quod de dilatoriis non est tenendum. Co. Lit. 304.—*In like manner as a plaintiff ought to proceed with one action whilst pending, so in like manner a tenant, with one peremptory exception for dilatoriness, is not to be encouraged.*

Sicut, ad quæstionem facti, non respondent judices, ita ad quæstionem juris, non respondent juratores. Co. Lit. 295.—*Inasmuch as the judges do not decide on questions of fact, the jury do not decide on questions of law.*

Sicut beatius est, ita majus est, dare quam accipere. 6

Branch's Principia, &c.—18

Co. 57.—Inasmuch as it is a more pleasant task, so also is it a more magnanimous one, to give than to receive.

Sic utere tuo ut alienum non laedas. 9 Co. 59.—Use your own rights and property so as not to injure that of another.

Sicut natura nil facit per saltum, ita nec lex. Co. Lit. 238.—In the same way as nature does nothing by a bound, so also does the law nothing.

Sigillum est cera impressa, quia cera sine impressione non est sigillum. 3 Inst. 169.—A seal is a piece of wax, with an impression on it; if it has no impression it is not a seal.

Silentium in senatu est vitium. 12 Co. 94.—Silence in the senate is bad.

Silent leges inter arma. 4 Inst. 70.—The laws are silent amidst arms.

Si meliores sunt quos dicit amor, plures sunt quos corrigit timor. Co. Lit. 392.—If love leads the better, fear restrains the many.

Similitudo legalis est, casuum diversorum inter se collatorum, similis ratio; quod in uno similium valet, valebit in altero. Dissimilium, dissimilis est ratio. Co. Lit. 191.—Legal similarity is the similar reason which governs different cases; for what avails in one case will avail in the other. Of things dissimilar, the reason is dissimilar.

Simplicitas est legibus amica; et nimia subtilitas in jure reprobatur. 4 Co. 8.—Simplicity is favourable to the laws; too much subtlety in law is to be reprobated.

[*Simul cum—Together with.*]

[*Sine die—Without day.—Indefinitely.*]

Si plures conditiones ascriptæ fuerunt donationi conjunctim, omnibus est parendum; et ad veritatem copulative requiritur quod utraque pars sit vera; si divisim, cui libet vel alteri eorum satis est obtemperare; et in disjunctivis, sufficit alteram partem esse veram. Co. Lit. 225.—If several conditions are conjunctively written in a gift, the whole of them must be complied with; and, for the establishment of truth, it is required that every part taken together shall be true: if the conditions are separate, it is sufficient to comply with either one or the other of them; and in disjunctive things, it is sufficient that each separate part be disjunctively true.

Si quis custos fraudem pupillo fecerit, a tutela removendus est. Jenk. Cent. 39.—If a guardian behaves frau-

dulently to his ward, he shall be removed from his guardianship.

Si quis prægnantem uxorem reliquit, non videtur sine liberis decessisse. Reg. Jur. Civ.—If a man dies, leaving his wife pregnant, he shall not be considered as having died childless.

Si quis unum percutserit, cum alium percutere vellet, in feloniam tenetur. 3 Inst. 51.—If a man kills A, meaning to kill B, he is held guilty of felony.

Si suggestio non sit vera, literæ patentes vacuae sunt. 10 Co. 113.—If the suggestion of a patent is false, the patent itself is void.

Sodomie est crime de majestie vers le Roy celestre. 3 Inst. 58.—Sodomy is high treason against the King of heaven.

*Solemnitas intervenire debet in mutatione liberi tene-
menti, ne contingat donationem deficere pro defectu pro-
bationis. Co. Lit. 48.—Solemnity ought to intervene in an
exchange of free tenement, lest the gift should fail through
want of proof.*

*Solemnitates curiæ. 2 Inst. 470.—The solemnities of
the court.*

*Solemnitates juris sunt observandæ. Jenk. Cent. 13.—
The solemnities of law are to be observed.*

*Solent præsides in carcere continendos damnare, ut in
vinculis contineantur, sed hujusmodi interdicta sunt a lege,
quia carcer ad continendos, non ad puniendos haberi de-
beat. Cum autem taliter captus, coram justiciarios est
procudendus, produci non debet ligatis manibus, (quam-
vis interdum gestans compedes propter evasionis pericu-
lum) et hoc ideo, ne videatur coactus ad aliquam purga-
tionem suscipiendam. 3 Inst. 34.—It has been a practice
to condemn persons confined in prisons to be bound in fet-
ters; but commands of this sort are contrary to law: for a
prison is meant as a place of confinement, not of punish-
ment; therefore, when a prisoner is brought before his
judges his hands should not be fettered (although his feet
may be, to prevent his escape); lest, by their being so, it
should appear that he was already in a state of punish-
ment.*

*Solo cedit, quicquid solo plantatur. Office of Exec. 57.
—What is planted in the soil belongs to the soil.*

*Sol sine homine generat herbam. Ibid. 68.—The sun
makes the grass grow, without man's assistance.*

Solus deus facit hæredem, non homo. *Co. Lit.* 5.—
God alone makes the heir, not man.

Solutio pretii, emptionis loco habetur. *Jenk. Cent.* 56.
—*The payment of the price stands in the place of the sale.*

[*Solvit ad diem—He paid it at the day.*]

[*Solvit post diem—He paid it after the day.*—When it must be pleaded. *See Tidd's Pract.* 20.]

[*Son assault demesne*, is a justification in assault and battery, that it was the plaintiff's own original assault. *3 Bl. Com.* 120, 306.]

Spes est vigilantis somnium. *4 Inst.* 203.—*Hope is the dream of the vigilant.*

Spes impunitatis continuum affectum tribuit delinquendi. *3 Inst.* 236.—*The hope of impunity holds out a continual temptation to crime.*

Spoliatus debet ante omnia restitu. *2 Inst.* 714.—*Spoil ought to be restored before any thing else.*

Sponsalia dicuntur futurarum nuptiarum conventio et re promissio. *Co. Lit.* 34.—*A betrothing is the agreement and promise that a future marriage shall take place.*

Sponsalia, inter minores contracta, ante 7 annos, nulla sunt. *Jenk. Cent.* 95.—*Betrothlings, between parties under 7 years of age, are void.*

Sponte virum fugiens mulier, et adultera facta. Dote sua careat, nisi sponsi sponte retracta. *Co. Lit.* 37.—*A woman leaving her husband of her own accord, and committing adultery, loses her dower, unless her husband takes her back of his own accord.*

Stabit præsumptio donec probetur in contrarium. *Hob.* 297. *Wing.* 712. *4 Co.* 71, a. b.—*A presumption will stand good till the contrary is proved.*

[*Stare decisis, et non quieta movere*—*It is best, to adhere to decisions, and not to disturb questions put at rest.*]

Statuta pro publico commodo late interpretantur. *Jenk. Cent.* 21.—*Statutes made for the public good ought to be liberally construed.*

Statutum affirmativum non derogat communis legi. *Jenk. Cent.* 24.—*An affirmative statute does not take from the common law.*

Statutum generaliter est intelligendum, quando verba statuti sunt specialia, ratio autem generalis. *10 Co.* 101.
—*When the words of a statute are special, but the reason of it general, it is to be understood generally.*

Statutum speciale statuto speciali non derogat. Jenk. Cent. 199.—*One special statute does not take from another special statute.*

[**Stirpes**—Distribution or succession *per stirpes* is where the estate goes in right of representation. 2 Bl. Com. 217.]

[**Stricti juris**—Of strict right.]

[**Sub judice**—Before the judge.—Undecided.]

Sublata causa tollitur effectus. Ibid. 303.—*Remove the cause and the effect will cease.*

Sublata veneratione magistratum, respublica ruit. Jenk. Cent. 43.—*The commonwealth perishes, if respect for the magistrates is taken away.*

Sublato fundamento cadit opus. Jenk. Cent. 106.—*Remove the foundation and the superstructure falls.*

Sublato principali, tollitur adjunctum. Co. Lit. 389.—*If the principal is taken away, its adjunct is also taken away.*

Sub nomine mulieris continetur quaelibet foemina. Proprie sub nomine mulieris, continetur virgo. Appellatione mulieris, in legibus Angliæ continetur *uxor*; et sic filius natus, vel filia nata ex justa uxore, appellatur in legibus Angliæ, filius mulieratus, seu filia mulierata. Co. Lit. 243.—*Under the word mulier (a woman), foemina (a woman, not a maid) is sometimes meant. Sometimes virgo (a maid) is meant; and the word mulier, in the English law, also comprehends *uxor* (a wife). Thus a son or daughter, born in lawful wedlock, is called by the laws of England filius mulieratus (a son born of a married woman), or filia mulierata (a daughter born of a married woman).*

Subornare est quasi subtus in aure ipsum male ornare, unde subornatio dicitur de falsi expressione, aut de veri suppressione. 3 Inst. 167.—*To suborn is to adorn subtilly to the ear what is bad; and thence to express what is false, or suppress what is true, is called subornation.*

[**Subpœna**, is a process to appear, and give testimony, or a defendant in chancery to answer a bill (*sub pœna*) under a penalty for disobedience.]

[**Subpœna duces tecum**—A mandate of a court, by virtue of which a special clause is inserted in a subpoena for a witness commanding him to bring with him, some deed or writing necessary to be produced at the trial. But if deeds, &c. be in the possession of the adverse party, notice should be given to produce them. Tidd's Pract. 734.]

[*Sub potestate viri—Under the power of the husband.*] [

Subsequens matrimonium tollit peccatum præcedens.

Reg. Jur. Can. Vide, Matrimonium subsequens, &c.—A subsequent marriage removes the previous criminality.

[*Sub silentio—In silence.—Precedents that pass sub silentio are of little or no authority. 16 Vin. Abr. 499.]*

[*Substantia prior et dignior est accidente—The substance is considered prior to, and of more weight than the accident.*]

Succurritur minori : facilis est lapsus juventutis. Jenk. Cent. 47.—A minor is to be assisted ; the faults of youth are easily committed.

Summa charitas est facere justitiam singulis, et omni tempore quando necesse fuerit. 11 Co. 70.—The greatest charity is to do justice to all whenever required.

Summa ratio [lex] est, quæ pro religione facit. 5 Co. 14.—The highest law is that which supports religion.

[*Summons and Severance, is where a writ of error is brought in the name of several parties, and some refuse to appear and assign errors, they must be summoned and severed before the writ of error can proceed. Tidd. Prac. 1054.]*

Summum jus, summa injuria. Hob. 125. 1 Chan. Rep. 4.—The rigour of the law is the height of injury.

Super fidem chartarum, mortuis testibus, erit ad patriam de necessitate recurrendum. Co. Lit. 6.—The truth of charters is necessarily to be referred to a jury, when the witnesses are dead.

Superflua non nocent. Jenk. Cent. 184.—Surplusage does not vitiate.

[*Supersedeas, is a writ that lies in a great many cases, and signifies in general a command to stay proceedings, on good cause shewn, which ought otherwise to proceed. F. N. B. 537.]*

Suppressio veri, (suppression of truth), aut suggestio falsi (a suggestion of falsehood). 3 Inst. 238.

Suprema potestas seipsam dissolvere potest. Bacon.—Supreme power can dissolve itself.

Surplusagium non nocet. 9 H. 6. 26.—Surplusage does not vitiate.

Sale of lands directed by a trust for payment of debts generally, a purchaser shall not be affected by misapplication of the money.—But if the debts are particularly mentioned in a deed or schedule, the purchaser must at his pe-

ril see the money rightly applied in discharge of them. 1 Vern. 260, 301.

Sale of lands directed, but no mention by whom, he must do it who hath the estate.

Statutes in the affirmative take not away customs. Co. Lit. 115.

[*Statutes in the affirmative, without any negative expressed or implied, do not take away the common law.* 16 Vin. Abr. 185.]

Statutes, introductory of new law, made in the affirmative, imply a negative of all that is not in the purview. Hob. 298.

Statutes made against fraud shall be liberally and beneficially expounded to suppress it. 3 Co. 82.

Statutes made in imitation or supply of common law, shall be expounded according to law. Hob. 97.

Statutes penal are to be construed strictly.

Statutes. *The preamble is to be taken for truth, as it cannot be supposed the legislature would recite a thing not true.* Co. Lit. 19, b. [But see the opinions of the judges, in *Crespiigny v. Wittenoom*, 4 Term. Rep. 790, as to the use to be made of the preamble of a statute, in expounding it.]

Statutes to be always so construed that the innocent, or he in whom there is no default, may not be damned. Co. Lit. 11, b.

Strangers to the plaint shall not be received to allege error in the process.

Surplusage shall not abate the count. 9 H. 6, 26.

Suspicion, which will justify an arrest for felony, must be one's own, not that of another. 2 H. H. P. C. 79.

Tacita quædam habentur pro expressis. 8 Co. 40.—*Things silent are sometimes considered as expressed.*

[*Tales de circumstantibus*—is the supplying the place of those jurors who are summoned on an inquest, and either make default of appearance, or are challenged, as not being indifferent. In this case, the sheriff is authorized to make up the number of such men there present as are equal in reputation to those empanelled. T. L. 628.]

Talis interpretatio semper fienda est, ut evitetur absurdum, et inconveniens, et ne judicium sit illusorium. 1 Co. 52.—*Interpretation is always to be made in such a manner, that what is absurd and inconvenient is to be avoided, so that judgment may not be illusory.*

Talis non est eadem; nam nullum simile est idem. 4 Co. 18.—*What is like is not the same; for nothing similar is the same.*

Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite, sed tantummodo est et consistit in consideratione et intelligentia legis, dixerunt talē rem vel tale rectum fore in nubibus, i. e. *Abeyance*. *Hereditates Jacentes*. Co. Lit. 342. 1 P. Wms. 516.—*A thing or right not vested, but which exists only, in consideration and contemplation of law is said to be in the clouds. i. e. Abeyance.*

Tantum bona valent, quantum vendi possunt. 3 Inst. 305.—*Things are worth what they will sell for.*

Tenor est pactio contra communem feudi naturam a rationem, in contractu interposita. Wright's Tenures, 21.—*Tenure is a compact contrary to the common nature and reason of the fee, put into a contract.*

Tenor investituræ est inspiciendus. Ibid.—*The tenor of an investiture is to be searched into.*

Terminus annorum, certus debet esse et determinatus. Co. Lit. 45.—*A term of years ought to be certain and determinate.*

Terminus et feodium non possunt constare simul in una eademque persona. Plow. 29.—*The term and the fee cannot both be in the same person.*

Terra manens vacua occupanti conceditur. 1 Sid. 347. Sed nullum tempus occurrit regi.—*Land lying waste is given to any occupant; but no length of time bars the king.*

Terra sterilis, ex vi termini, est terra infœcunda, nullum ferens fructum. 2 Inst. 665.—*Sterile land is vi termini, unfruitful and barren.*

Terra transit cum onere. Co. Lit. 231.—*Land passes with its incumbrance.*

Testamenta, cum duo inter se pugnantia reperiuntur, ultimum ratum est. Co. Lit. 112. Sic est, cum duo inter se pugnantia reperiuntur in eodem testamento—*When two conflicting wills are found, the last prevails; so it is when two conflicting clauses occur in the same will.*

Testamenta latissimam interpretationem habere debent. Jenk. Cent. 81.—*Wills ought to have the broadest interpretation.*

Testamentum, i. e. testatio mentis, facta nullo præsente metu periculi, sed cogitatione mortalitatis. Co. Lit.

322.—*A will, i. e. the witnessing of the mind made under no present fear, but in expectancy of death.*

Testamentum omne morte consummatum. Ibid.—Every will is completed by death.

Testatoris ultima voluntas est perimplenda secundum veram intentionem suam. Ibid.—The last will of the testator is to be fulfilled according to his real intention.

Testes qui postulat, debet dare eis sumptus competentes. Reg. Jur. Civ.—Whoever demands witnesses must find them in competent provision.

Testibus deponentibus in pari numero, dignioribus est credendum. 4 Inst. 279.—Where the number of witnesses is equal on both sides, the most worthy are to be believed.

Testis de visu præponderat aliis. Ibid.—An eye-witness is best.

Testis lupanaris sufficit ad factum in lupanari. Moor, 817.—A strumpet is a sufficient witness to a fact committed in a brothel.

Testis nemo in sua causa esse potest. Reg. Jur. Civ.—No one can be a witness in his own cause.

Testis oculatus unus plus valet quam auriti decem. 4 Inst. 279.—One eye-witness is worth ten ear-witnesses.

Testis should be able to say from his heart, non sum doctus nec instructus, nec curo de victoria, modo ministeretur justitia. Ibid.—A witness should be able to say from his heart, I am neither taught nor instructed what to say, I am indifferent as to the event of the cause; I am only anxious that justice be administered.

Testium numerus si non adjicitur, duo sufficiunt. Ibid.—If the number of witnesses is not prescribed, two are sufficient.

Testmoignes ne poent testifie le negative, mes l'affirmative. Ibid.—Witnesses cannot testify to a negative, but only to an affirmative.

Theftbote est emenda furti capta, sine consideratione curiae domini regis. 3 Inst. 134.—Theftbote is the paving money to have goods stolen from you returned, without having any respect for public justice.

Thesaurus inventus [treasure-trove] est vetus dispositio pecuniae, &c. cuius non extat modo memoria, adeo ut jam dominum non habeat. 3 Inst. 132.—Treasure-trove is where money has been formerly hid, of which no recollection exists, so that the owner of it cannot now be found.

Branch's Principia, &c.—19

Timores vani sunt aestimandi qui non cadunt in constantem virum. 7 Co. 17.—*Fears, which have no fixed person for their object, are accounted vain.*

Titulus est justa causa possidendi quod nostrum est; dicitur a tuendo, quia per illum possessor defendit terram; et plerumque constat ex munitis, quae muniunt et tuerentur causam. 8 Co. 153.—*A title is the just right of possessing that which is our own; it is called from defence, because by it the possessor defends his land; and it principally consists of bulwarks, which defend and protect the cause. It is also used for a right or interest, for which no action lies, e. g. for a condition broken, or an alienation in mortmain, &c.*

Tort a le ley est contrarie. Co. Lit. 158.—*Tort is contrary to law.*

[*Torts—Wrongs.*]

[*Totidem verbis—In so many words.*]

[*Toties quoties—As often as.*]

[*Totis viribus—with all his strength.*]

[*Toto caelo—They differ by the whole heavens; they are as opposite as the two poles.*]

Totum præfertur unicuique parti. 3 Co. 41.—*The whole is preferable to any single part.*

[*Tout temps prist*, is a plea to an action, whereby after tender and refusal of a debt, the defendant acknowledges the debt, and pleads the tender; adding that he has always been ready (*tout temps prist*) and still is ready (*uncore prist*) to discharge it. 3 Bl. Com. 303.]

Tracent fabrilia fabri. 3 Co. Epist.—*Let smiths perform the work of smiths.*

Traditio loqui facit chartam. 5 Co. 1.—*Delivery makes the charter speak.*

Transferuntur dominia sine titulo et traditione, per usucaptionem, s. per longam continuam et pacificam possessionem. Co. Lit. 113.—*Rights of dominion are transferred without title or delivery, by "usu captionem," to wit, long and quiet possession.*

Transgressio est cum modus non servatur nec mensura, debet enim quilibet in suo facto modum habere et mensuram. Co. Lit. 37.—*Transgression is when neither mood nor measure is preserved, for every one in his act ought to have a mood and measure.*

Transgressione multiplicata, crescat poenæ inflictio. 3

Inst. 479.—Where transgression is multiplied, let the infliction of punishment be increased.

[*Traverse*, is a denial in pleading. But it is more particularly applied to a denial of a matter of fact found by office or inquisition. 3 Bl. Com. 260.]

Tria sequuntur defamatorem famosum: pravitatis incrementum: bursæ decrementum: conscientiæ detrimen-
tum. 5 Co. 126.—*Three things follow a noted defamer; the increase of crime; the decrease of purse; and the injuring of conscience.*

Triatio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam. 7 Co. 1.—*Trial ought to be had always where the jury can have the best knowledge.*

Turpis est pars quæ non convenit cum suo toto. Plow. 161.—*That part is bad which accords not with its whole.*

Tuta est custodia quæ sibimet creditur. Hob. 340.—*That guardianship is secure which trusts to itself alone.*

Tutius erratur ex parte mitiore. 3 Inst. 220.—*It is safer to err on the side of mercy.*

Tutius semper est errare acquitando quam in puniendo, ex parte misericordiæ quam ex parte justitia. H. H. P. C. 290.—*It is always safer to err in acquitting, than in punishing, on the side of mercy than of strict justice.*

Tenant by the curtesie of England, must have issue born alive of a wife actually seised in fee-simple or fee-tail, so that such issue might inherit such estate. 8 Co. 34.

Tenant for life or years, granting a greater estate than he hath, forfeits his estate. Noy's Max.

Tenant in tail, his confirmation or release to his lessee for years, no discontinuance.

Tenant in tail lets for years, and grants the reversion by deed to another, no discontinuance. Lit. sect. 606, 607, 608.

That shall have the benefit which hath or would have sustained the loss.

That shall make satisfaction which received the benefit.

That which I may defeat by my entry, I may make good by my confirmation. Co. Lit. 300.

Things in abridgement or restraint of the common law, shall be taken strictly and not favoured in construction. 20 Vin. Abr. 14.

Things must be done by him who hath most skill.

Things of an higher nature determine things of a lower nature. Noy's Max.

Things shall not be void which may possibly be good.

Traverse of office, whereby any one is amoved from his possession, must be in that court where the office is returned.
2 Inst. 695.

Traverse—a disseisin pleaded in a bar, replication, &c. is always traversable. Dyer, 366.

Trust is a creature of equity, and to be governed and disposed by its rules.

Trust of a term governed by the same rules in equity, as the limitation of the legal estate at law. And must be limited in the same manner, as the term itself would bear a limitation.

Trusts survive.

Ubi aliquid impeditur propter unum, eo remoto, tollitur impedimentum. 5 Co. 77.—*Where any thing is impeded by some one particular cause, that cause being removed, the impediment is taken away.*

Ubi cessat remedium ordinarium ubi decurrit ad extraordinarium. 4 Co. 93.—*Where a common remedy ceases to be of service, recourse must be had to an extraordinary one.*

Ubi eadem ratio ibi idem lex—Jus. 7 Co. 18. *Et, de similibus idem est judicium—Where there is the same reason, there is the same law. Of things similar, the judgment is similar.*

Ubi culpa est ibi poena subesse debet. Jenk. Cent. 325.—*Where there is culpability, there punishment ought to be.*

Ubicunque est injuria ibi damnum sequitur. 10 Co. 116.—*Where there is an injury there a loss follows.*

Ubi damna dantur, victus vitori in expensis condemnari debet. 2 Inst. 289.—*Where damages are given, the losing party should pay the costs of the victor.*

Ubi factum nullum ibi sortia nulla. 4 Co. 43.—*Where there is no deed committed there can be no consequences.*

[*Ubi jus incertum, ibi jus nullum—Where the law is uncertain, there is no law.*]

Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima. 2 Inst. 269.—*Where the law compels a man to show cause, the cause ought to be just and legal.*

Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est. 2 Inst. 43.—*Where the law is special, and the reason of it general, it ought to be taken as being general.*

Ubi lex non distinguit, nec nos distinguere debemus. 7
Co. 5.—*Where the law distinguishes not, we ought not to distinguish.*

Ubi major pars est ibi totum. *Moor*, 578. *Dav.* 48.—*Where the greater part is, there the whole is.—The majority must govern.*

Ubi non est condendi authoritas, ibi non est parendi necessitas. *Dav.* 69.—*Where there is no authority to enforce, there is no necessity to obey.*

Ubi non est directa lex, standum est arbitrio judicis, vel procedendum ad similia. *Ellesm. Postn.* 41.—*Where there is no direct law, the opinion of the judge is to be taken, or reference to be made to similar cases.*

Ubi non est lex ibi non est transgressio, quoad mun-
dum. 4 Co. 16.—*Where there is no law there is no trans-
gression, as far as relates to society.*

Ubi non est principalis non potest esse accessorius. 4
Co. 43.—*Where there is no principal there is no accessory.*

Ubi nullum matrimonium ibi nullum dos. Co. *Lit.* 32.
—*Where there is no marriage there is no dower.*

Ubi quid generaliter conceditur, in est hæc exceptio, si
non aliquid sit contra jus fasque. 10 Co. 78.—*Where a
thing is conceded generally, this exception arises, that there
shall be nothing contrary to law and right.*

Ubi quis delinquit ibi punietur. 6 Co. 47.—*Let a man
be punished where he commits the offence.*

[*Ubi supra—At the place above referred to.*]

Ultima voluntas testatoris est perimplenda secundum
veram intentionem suam. Co. *Lit.* 322.—*The last will of
a testator is to be fulfilled according to his true intention.*

Ultra posse non est esse: et vice versa. *Wing. Max.*—*What is beyond possibility cannot exist: and what cannot
exist is not possible.*

Una persona vix potest supplere vices duarum. 4 Co.
118.—*One person can scarcely supply the place of two.*

[*Uncore prist, in a plea of tender, means that the de-
fendant is still ready to pay.*]

[*Unde nihil habet, in a writ of dower, is where a wi-
dow claims dower of lands, whereof she hath nothing.*]

Universalia sunt notiora singularibus. 2 *Rol. Rep.* 294.—*Things universal are better known than things parti-
cular.*

Universitas vel corporatio non dicitur aliquid facere nisi

id sit collegialiter deliberatum, etiamsi major pars id faciat. *Dav. 48.—An university or corporation is not said to do any thing unless it be deliberated upon collegiately, although the majority should do it.*

Uno absurdo dato, infinita sequuntur. 1 Co. 102.—One absurdity being allowed, an infinity follows.

Unumquodque eodem modo quo colligatum est dissolvitur—quo constituitur destruitur. 2 Rol. Rep. 39.—In the same manner in which any thing is bound it is loosened by that which constitutes it, it is destroyed.

Unumquodque est id quod est principalius in ipso. Hob. 123.—That which is the principal part of the thing is the thing itself.

Unumquodque principiorum est sibi metipsi fides: et, perspicua vera non sunt probanda. Co. Lit. 11.—Whatever is accounted as a principle, is taken for granted to be founded in truth; and plain truths are not proved.

Usura dicitur quia datur pro usu aeris. 2 Inst. 89.—Usury is so called, because it is given for the use of money.

Usura est commodum certum quod propter usum rei mutuatæ recipitur. Sed, secundario, spirare de aliqua retributione, ad voluntatem ejus qui mutuatus est, hoc non est vitiosum. 5 Co. 70.—Usury is a certain benefit received for the use of a thing lent. But secondly, to agree for a certain return to be given at the option of the party borrowing, is not vicious.

Usus est dominium fiduciarum. Bacon. Read St. Uses.—Use is a fiduciary dominion.

Usus et status sive possessio, potius differunt secundum rationem fori, quam secundum rationem rei. Idem.—Use, estate, and possession, differ more in the rule of the law, than in the subject-matter.

Utile per inutile non vitiatur. Dyer, 292.—The useful is not vitiated by the useless.

Utlagatus est quasi extra legem positus: caput gerit lupinum. 7 Co. 14.—An outlaw is, as it were, put out of the protection of the law. He carries the head of a wolf.

Utlagatus pro contumacia et fuga, non propter hoc convictus est de facto principali. Fleta. 2 Salk. 494.—An outlaw, by contumacy and flight, is not on that account convicted of the principal fact.

Ut poena ad paucos, metus ad omnes perveniat. 4 Inst. 63.—Though few are punished, the fear of punishment affects all.

Uxor furi desponsata non tenebitur ex facto viri, quia virum accusare non debet, nec detegere furtum suum, nec feloniam, cum ipsa sui potestatem non habet, sed vir. 3 Inst. 108.—*A woman married to a thief shall not be bound by his actions, for she cannot accuse her husband, nor discover the robbery or felony, having no power of her own, but being under the government of her husband.*

Uxor non est sui juris, sed sub potestate viri. *Ibid.*—cui in vita contradicere non potest—*A wife has no power of her own, but is under the government of her husband, whom in his life-time she cannot contradict.*

Usury is odious in law.

[**Vadium mortuum**—*A dead pledge, or mortgage.* 2 Bl. Com. 157.]

[**Vadium vivum**—*A living pledge.* 2 Bl. Com. 157.]

Vana est illa potentia quæ nunquam venit in actum. 2 Co. 51.—*That power is nugatory which never comes into action.*

Vani timores sunt æstimandi, qui non cadunt in constantem virum. 7 Co. 27.—*Those fears are to be counted vain which affect not a valiant man.*

Vendens eandem rem duobus, falsarius est. Jenk. Cent. 107.—*It is fraudulent to sell the same thing to two persons.*

[*Venditioni exponas*, a writ commanding a sheriff to expose to sale, property which remained in his hands for want of bidders.]

Veniæ facilitas incentivum est delinquendi. 3 Inst. 236.—*Facility of pardon is an incentive to crime.*

[*Venire facias*, is either a process by which a jury is awarded, or that which issues in the nature of a *summons*, to cause the party to appear and answer an indictment or presentment. 3 Bl. Com. 352; 4 Bl. Com. 318, 351.]

[*Ventre inspiciendo*, a writ *de*, is a writ issued at the instance of the presumptive heir, to ascertain whether a widow be with child, who affects to be so, in order to produce a supposititious heir to the estate. 1 Bl. Com. 456; 2 P. Wms. 591.]

[*Ventre sa mere*, an infant *in*, is a child in the mother's womb. 1 Bl. Com. 130.]

[*Venue*, is the place where the cause of action accrued which must be stated in the pleadings and is called laying the venue.]

Verba accipienda sunt cum effectu,—ut sortiantur ef-

fectum. *Bacon.*—*Words are to be taken according to their consequence, that their consequence may appear.*

Verba æquivoca ac in dubio sensu posita, intelliguntur digniori et potentiori sensu. 6 Co. 20.—*Equivocal and doubtful words are to be taken in their best and most effective sense.*

Verba aliquid operari debent,—debent intelligi ut aliiquid operentur. 8 Co. 94.—*Words ought to operate some effect; they ought to be interpreted in such a way as to operate some effect.*

Verba chartarum fortius accipiuntur contra proferentem. Co. Lit. 36. *Bac. Mar.* 42.—*The words of charters are to be received strongly against him who offers them.*

Verba currentis monetæ, tempus solutionis designat, Dav. 26.—*The time of payment designates the words “current money.”*

Verba dicta de persona, intelligi debent de conditione personæ. 2 Rol. Rep. 72.—*Words spoken of the person are to be understood of the condition of the person.*

Verba generalia generaliter sunt intelligenda. 3 Inst. 76.—*General words are to be generally understood.*

Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ. *Bacon.*—*General words must be narrowed to the nature of the subject-matter, or the aptitude of the person.*

Verba intentioni, non e contra, debent inservire. 8 Co. 94.—*Words ought to be made subservient to the intent, not contrary to it.*

Verba ita sunt intelligenda ut res magis valeat quam pereat. *Bacon.*—*Words are to be understood in such a manner, that the subject-matter may be preserved rather than destroyed.*

Verba posteriora propter certitudinem addita, ad priora quæ certitudine indigent, sunt referenda. Wing.—*Words added for the purpose of certainty are to be referred to preceding words, in which certainty is wanting.*

Verba relata hac maxime operantur per referentiam ut in eis inesse videntur. Co. Lit. 359.—*Words referred to by other words operate chiefly by the reference which appears to be implied towards them.*

Verba semper accipenda sunt in mitiori sensu. 4 Co. 17. Wing. 705.—*Words are always to be taken in their milder sense.*

[*Verbatim et literatim—Word for word, and letter for letter.]*

Veredictum, quasi dictum veritatis : ut judicium, quasi juris dictum. Co. Lit. 226.—The verdict is as it were the dictum of truth, in the same manner as the judgment is the dictum of law.

Veritas, a quocunque dicitur, a Deo est. 4 Inst. 153.—Truth, by whomsoever pronounced, is from God.

Veritas demonstrationis tollit errorem nominis. 1 Ld. Raym. 303.—The truth of the demonstration removes the error of the name.

Veritas nihil veretur nisi abscondi. 9 Co. 20.—Truth fears nothing but concealment.

Veritas nimium altercando amittitur. Hob. 344.—By too much altercation truth is lost.

Veritas quæ minime defensatur, opprimitur ; et qui non improbat, approbat. 3 Inst. 27.—Truth not sufficiently defended is oppressed. He is for it who is not against it.

Veritatem qui non libere pronunciat, proditor est veritatis. 4 Inst. Epil.—He who does not truly speak the truth is a betrayer of truth.

[*Versus—Against.]*

[*Veto—I forbid.—He put his veto on it.]*

[*Vetustas pro lege semper habetur.—Ancient custom is always held as law.]*

Via trita est tutissima. 10 Co. 142—The beaten track is the safest.

Vicecomes dicitur, quod vicem comitis suppleat. Co. Lit. 168.—Vicecomes, so called, from supplying the place of the comes, [or earls who originally had the custody of counties in England. See Co. Lit. ubi supra.]

Vicini viciniora præsumuntur scire. 4 Inst. 173.—Persons living in the neighbourhood are presumed to know the neighbourhood.

[*Vice versa.—The terms being changed.]*

[*Vide—See.]*

[*Vicontiel, are such writs as are triable in the county, before the sheriff. Cowel. Int.]*

Videbis ea sæpe committi quæ sæpe vindicantur. 3 Inst. Epil.—You will see those things frequently committed which are frequently vindicated.

[*Vi et armis—With force and arms.]*

Vigilantibus et non dormientibus jura subveniunt. Hob.

Branch's Principia, &c.—20

347. *Wing.* 672.—*Laws come to the assistance of the vigilant, not to the sleepy.*

Villa est ex pluribus mansionibus vicinata, et collata ex pluribus vicinis: et sub appellatione villarum continentur burgi et civitates. Co. Lit. 115.—*Villa is a neighbourhood of many mansions, a collection of many neighbours; and under this term boroughs and cities are contained.*

Vim vi repellere licet, modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad populsandam injuriam. Co. Lit. 162.—*It is lawful to repel force with force, but let it be done with the moderation of blameless defence, not for the purpose of revenge, but in order to repel injury.*

[*Vinculo matrimonii, divorce a, is a divorce from the bonds of matrimony.* 3 Bl. Com. 94.]

Violenta præsumptio aliquando est plena probatio. Co. Lit. 6, b.—*Violent presumption is sometimes full proof.*

Viperina est expositio quæ corrodit viscera textus. 11 Co. 34.—*It is a bad exposition which corrodes the bowels of the text.*

Vir et uxor censemur in lege una persona. Jenk. Cent. 27.—*Husband and wife are one person in law.*

Vir et uxor sunt quasi unica persona, quia caro et sanguis una: res licet sit propria uxoris, vir tamen ejus custos, cum sit caput mulieris. Co. Lit. 112.—*Man and wife are as it were one person, because only one flesh and blood; although the property may be the wife's, the husband is keeper of it, being the head of the wife.*

Vir militans Deo non implicantur secularibus negotiis. Co. Lit. 70.—*A man engaged in a christian warfare does not entangle himself with the affairs of this life.* St. Paul. 1 Tim. c. 2, v. 3, 4.—*Clergymen are exempted from military service.*

Vis legibus est iuimica. 3 Inst. 176.—*Force is inimical to the laws.*

Vitium clerici noscere non debet. Jenk. Cent. 23.—*Clerical errors ought not to hurt.*

Vitium est quod fugi debet, ne si rationem non invenias, mox legem sine ratione esse clamis. Ellesm. Postn. 86.—*The error of attributing want of reason to a law, when you cannot find that reason, is to be avoided.*

[*Viva voce—Oral, as opposed to written. Thus, viva voce testimony, instead of depositions.*]

[*Vocabula artis—Words of art.* Proem. to Co. Lit.]

Vix ulla lex fieri potest quæ omnibus commoda sit, sed si majori parti prospiciat utilis est. *Plow.* 369.—*Scarcely any law can be accommodated to all things; but it is a useful law if the major part is benefited by it.*

[*Voir dire*, is where the party is examined upon oath, to make true answer to such questions as the court shall propound to him. *3 Bl. Com.* 332, 370.]

Volenti non fit injuria. *Plow.* 501. *Wing.* 482.—*No injury can be done to a man who willingly receives it.*

Voluntas donatoris in charta doni sui manifeste expressa observetur. *Co. Lit.* 21.—*The will of the donor manifestly expressed in his deed of gift, is to be observed.*

Voluntas in delictis, non exitus spectatur. *2 Inst.* 57.—*In crimes, the will and not the consequences are to be looked to.*

Voluntas reputabatur pro facto. *3 Inst.* 69.—*The intention is to be taken for the deed.*

Voluntas testatoris est ambulatiora usque ad extremum vitæ exitum. *4 Co.* 61.—*The will of a testator is ambulatory, (i. e. not certainly fixed,) until the final close of his life.*

Voluntas testatoris habet interpretationem latam et benignam. *Jenk. Cent.* 260.—*The intention of a testator has a broad and benignant interpretation.*

Voluntas ultima testatoris est perimplenda secundum veram intentionem suam. *Co. Lit.* 322.—*The last will of the testator is to be fulfilled according to his true intention.*

Vulgaris opinio est duplex, viz. orta inter graves et discretos, quæ multum veritatis habet; et opinio orta inter levies et vulgares homines, absque specie veritatis. *4 Co.* 107.—*Common opinion is double, viz. that which arises among grave and discreet men, which has much truth in it; and that opinion which arises among light and vulgar men, without any sort of truth.*

Vendor, on an agreement for the purchase of lands, stands as a trustee for the buyer till the conveyance is executed. *3 Chan. Rep.* 5.

Verdict at law a bar to equity. *1 Vern.* 176.

Warrantizare est defendere et acquietare tenentem, qui warrantam vocavit, in seisinâ sua; et tenens de re warranti excambium habebit ad valentiam. *Co. Lit.* 365.—*To warrant is to defend and ensure in peace the tenant who calls for warranty in his seisin; and the tenant in warranty will have an exchange in proportion to its value.*

Warrantus potest excipere quod querens non tenet terram de qua petit warrantiam. Et quod donum sicut insufficiens. Hob. 21.—*A warrantor may except, that the complainant does not hold the land of which he seeks the warranty. And that the gift was insufficient.*

Wreccum maris, significat illa bona quae naufragio ad terram appelluntur.—A wreck of the sea signifies that property which is driven to shore by a shipwreck. And flotsam, jetsam, and lagan or ligān, become wreck, when cast upon land. 5 Co. 106.

Wager of law may be in an action of debt on contract; but not on a lease of land for term of years or at will. Doct. and Stud. [This doctrine is now obsolete.]

Warranty always descends on the heir at common law. Co. Lit. 329.

Warranty is defeated if the estate to which it was annexed be defeated. Co. Lit. 389.

Warranty shall not bar any estate of freehold or inheritance which is in esse, in possession, reversion, or remainder, and not to be displaced and put to a right before or at the time of warranty made, although afterwards, and at the time of the descent of the warranty, the estate be displaced and divested. 10 Co. 97.

What a man cannot transfer he cannot bind by articles.

When common law and statute law concur, the common law shall be preferred. 4 Co. 71.

When many join in one act, the law says it is the act of him who could best do it: and things should be done by him who hath best skill. Noy.

When no time is limited, the law appointeth the most convenient. Wing.

When the law presumes the affirmative, then the negative is to be proved. 1 Rol. Rep. 83.

*Where ancestors a freehold take,
The words, his heirs, a limitation make.*

Coke in Verse. Shelley's Case.

Where a statute gives a certain penalty, there damages and costs shall be recovered: but not when an uncertain penalty (as treble value) is given. Cro. Car. 559.

Where the foundation faileth all fails.

Where the law giveth any thing, it also gives a remedy for the same.

Wherever there is a suppression of the truth, or a suggest-

tion of falsehood, the release shall be made void. 1 Vern. 20.

Where there is as high and durable estate in the lands out of which a rent, common, or other profit, issues, as the owner hath in the rent, common, &c. unity of possession extinguishes them. 4 Co. 38.

Where there is no purchaser or creditor in the case, but both parties are volunteers, equity will not prevent either of them from enjoying the advantage he hath at law.

Where two rights occur, the more ancient shall be preferred. Caveat Emptor. 2 Inst. 714.

Wife cannot be produced a witness for or against her husband, for they are two souls in one flesh. Co. Lit. 6, b. Lit. sect. 291.

Wife cannot devise to her husband. Co. Lit. 112, b.

Wife. Marriage is a countermand or revocation of any will made whilst she was sole, if she dies under coverture.

4. Co. 60.

Will, a general clause not to prejudice a particular devise.

Will hath relation to testator's death, not to the time of making it.

Will, he who claims a benefit by part, must abide by the whole.

Will is ambulatory until death, and always changeable.

Will, no words in it capable of signification to be rejected.

Will, the last revokes all former wills.

Will, the testator's intent is to govern, and no artificial reasoning to be admitted.

Will to be favourably expounded according to the intent of the testator. Co. Lit. 112.

Will to be made good, if by any construction it may.

Will to be taken as one entire act.

Witnesses cannot testify a negative, but an affirmative.

Co. Lit. 6.

Words are to be taken as they are spoken, together and in one breath. Co. Entr. 22, b.

Words of a deed, or of parties without deed, where they may have a double intendment, one standing with law and right, and the other wrongful and illegal; the intendment with law shall be taken. Co. Lit. 42.

Words, which the common people use, are to be understood according to their intents, and not according to the very definition. 6 Co. 64.

SELECT QUOTATIONS:

CONSISTING OF

LATIN, FRENCH AND ITALIAN

WORDS AND PHRASES.

Ab ovo usque ad mala : (Literally) *From the egg to the apples.* (Metaphorically) *From the beginning to the end;* eggs being the *first* and apples the *last* articles served up at a Roman entertainment—The phrase is generally used simply, *ab ovo*;—*from the beginning.*

Ad captandum vulgus—*To allure the vulgar.*

Aliquando bonus dormitat Homerus—*The immortal Homer sometimes nods.*—Even the greatest genius is subject to human weaknesses and failures.

Alma mater—*A fond mother*—An epithet bestowed by students on the university in which they received their education. *Proem. to Co. Lit.*

Alumni—*Students at a college.*

Amicus humani generis—*A friend to the human race.*—
A philanthropist.

Amicus certus in re incerta cernitur—*In doubtful times, the genuine friend is found.* Prov. 19, 24. Doct. Clarke's notes.

Amor patriæ—*The love of country.*

Animis opibusque parati—*We are ready with our lives and fortunes.*

Ante bellum—*Before the war.*

Arcana imperii—*State secrets.*

Arcanum—*A secret.*

Ardentia verba—*Glowing words.* Forceful expressions.

Argumentum ad crumenam—*An argument to the purse;—to the interest of a person.*

Argumentum ad hominem—*An argument to the man.*—An argument which addresses itself immediately to the feelings of a person, and not to the judgment.

Argumentum baculinum—*An argument to the stick.*—
Club law.

Argumentum ad ignorantiam—*An argument drawn from the ignorance of your adversary.*

Argumentum ad judicium—*An argument to the judgment.*

Argumentum ad verecundiam—*An argument to the modesty.*

Ars est celare artem—*The art is, to conceal the art.*

Audi alteram partem—*Hear both sides.*

Aut Cæsar aut nullus—*Either Cæsar, or nobody.* I will obtain my object or lose all.—When applied to an ambitious aspiring man, it may be thus paraphrased: “Let me rise to the highest dignities in the state, or sink into obscurity.”

Avant courier—*A forerunner.*

Cacoethes loquendi—*A rage for speaking.*

Cacoethes scribendi—*An itch for writing.*

Cætera desunt—*The remainder is wanting.*

Canaille—*The rabble.*

Caput mortuum—*A dead head.* Worthless remains.

Carpe diem—*Enjoy the present.*—A maxim of the Epicurean school.

Carte blanche—*A blank sheet of paper*—Write on it what you please.—Unlimited authority.—Unconditional submission.

Communibus annis—*One year with another.*

Componere lites—*To settle the dispute.*

Consilio et anamis—*By wisdom and courage.*

Constantia et virtute—*By constancy and virtue.*

Corps diplomatique—*Ambassadors.*—The diplomatic body.

Coup de grace—*A stroke of mercy.*

Coup de main—*An assault.*—A sudden or daring enterprise.

Coup d'œil—*A quick glance of the eye.*

Credat Judæus apella, non ego.—*Hor. Sat. lib. 1 sat.*

5. l. 100.—The circumcised Jew may believe it, not I.—A phrase expressive of the highest degree of incredulity; not only from the contempt in which the Jews were held by the Romans, but from their obstinate unbelief in all systems of religion, except their own. Thus was the scripture fulfilled, in the Jews becoming “a proverb and a by-word.” *Deut. 28, 37.*

Cui bono? *To what, or to whose, benefit will it tend?* What good will result from the proposed measure?

Cui malo? *To what evil will it tend? What injury will arise from the proposed measure?*

Currente calamo—*With a running pen.*—Written with great expedition.

Data—*Things granted.*—Premises admitted.

Debut—*First appearance*—on the theatre of life, &c.

De gustibus non est disputandum—*There is no disputing about taste.*

Delenda est Carthago—*Carthage must be destroyed.*—This denunciation of Carthage, the rival city of Rome, so often repeated by a Roman senator, is elegantly applied to individual rivals.

Denouement—*The catastrophe.*—The clearing up of a plot, &c.

Deo adjuvante, non timendum—*God assisting, there is nothing to be feared.*

Deo favente—*With God's favour.*

Deo juvante—*With God's assistance.*

Deo volente—*God willing.*

Depot—A place of deposit for military stores.

Dernier resort—*The last resource.*

Desideratum—*A thing desired.*

Dictum—A mere saying without authority.

Dieu et mon droit—God and my right. The motto of the sovereigns of England.

Digniori detur—*Let it be bestowed according to merit.*

Divide et impera—*Divide and conquer.*

Donatio causa mortis—*A death-bed gift.* 2 Bl. Com.

514.

Double entendre—*A double meaning.*—Usually conveying an obscene allusion.

Douceur—*A bribe.*

Dramatis personæ—*The persons of the drama.*—The performers.—The conspicuous actors.

Dulce et decorum est pro patria mori. Hor.—*It is delightful and honourable to die for our country.*

Dum lego assentior—*While I read I assent.*—I yield to the author's opinions.

Dum spiro, spero.—*While I have life, I have hope.*

Durante bene placito—*During our good pleasure.*—The tenure by which the judges of England once held their offices.—But by Stat. 13, W. 3, c. 2, their commissions are, *quandiu bene se gesserint*; *During good behaviour*; but they may be removed on the address of both houses of parliament. 1 Bl. Com. 267.

Durante vita—*During life.*

Branch's Principia, &c.—21

Select Quotations.

Ecce homo—*Behold the man.*

Ecce signum—*Behold the sign.*

Eclat—*Glory, fame, reputation, brilliancy, &c.*

Eheu fugaces—

Labuntur anni—*Hor. Alas, how the fleeting years pass away!*

En masse—*In a body.*

Entre nous—*Between ourselves. A confidential communication.*

E pluribus unum—*One of many.—United.—The motto of the United States of America.*

Eripuit cœlo fulmen sceptrumque tyrannis—*He snatched the lightning from heaven and the sceptre from tyrants.* A compliment bestowed on Doct. FRANKLIN, while ambassador from the United States to France, in allusion to his discoveries in electricity, and his eminent services in the establishment of American independence.

Esprit du corps—*The spirit of the body.*

Est modus in rebus—*Hor.—There is a medium in all things.*

Esto perpetua—*May it be perpetual.*

Et cætera—*And the rest.*

Ex—*Out.*—Thus, *Ex-president*, a president out of office; and so of any other officer.

Ex curia—*Out of court.*

Excerpta—*Extracts.*

Ex concesso—*From what has been granted.*

Exempli gratia—(Abbreviated, e. g.) *As an example.*

Exegi monumentum ære pereundi. *Hor. carm. liber 3, carm. 30, l. 1.—I have erected a monument more durable than brass.*—A prophetic view taken by Horace of the immortality of his own works.—The phrase is sometimes used in an ironical sense.

Ex necessitate rei—*From the necessity of the case.*

Ex tempore—*Without premeditation or previous study.*

Fac simile—(Literally) *Do the like.* An exact imitation;—usually accomplished by engraving.

Fas est et ab hoste doceri—*It is lawful to derive instruction even from an enemy.*

Faux pas—*A false step.*

Felix qui potuit rerum cognoscere causas. *Virgil.—Happy is he who can trace effects up to their causes.*

Festina lente—*Hasten slowly.—Avoid impetuosity.*

Fiat justitia ruat cœlum—*Let justice be done though the heavens fall.*

Flagrante bello—*While the war is raging.*

Functus officio—*Discharged from official duty.*

Gens d'armes—*Guards.*

Gratis—*Freely.*—For nothing.

Gratis dictum—*Spoken to no purpose.*

Hæc olim meminisse juvabit. *Virg. Æn. lib. 1, l. 203.*

—*It will be pleasing to recount past events.*

Hinc illæ lachrymæ—*Hence these tears.*—This is the source.

Hoc opus, hic labor est—*This is the difficulty, this the labour.*

Hors de combat—*Out of the contest.*—Overthrown, vanquished.

Humanum est errare—*It is the lot of humanity to err.*

Ignis fatuus—*A deceptive fire.*—*A meteor.*—Applied metaphorically to discourses or compositions which tend to mislead, instead of imparting instruction.

J. H. S.—The initials of *Jesus Hominum Salvator, Jesus the saviour of mankind.*—These letters interwoven with the sign of the cross, are prefixed to the decalogue or ten commandments, suspended behind the pulpit in some of the Protestant Episcopalian Churches, and generally in the Roman Catholic Chapels; and are found on most of the tomb stones in the Roman Catholic burying grounds.

Imitatores! servum pecus—*Ye imitators!* a servile flock.

Imperium in imperio—*A government within a government.*

Imprimatur—*Let it be printed.*—A license or authority to publish a work, in those countries in which the press is not perfectly free.—The word is sometimes figuratively used.

Impromptu—*Readily.*—A witticism or composition produced at the moment.

Incognito—(Abbreviated *incog.*) *Unknown.* In disguise.

In dubiis—*In doubtful cases.*

In equilibrio—*In an even poise.*

In extenso—*At large.*

In loco—*In the place.*

In medio tutissimus ibis—*You will travel most securely in the middle.*—The middle way is the safest.—It is best to avoid all extremes.

In nubibus—*In the clouds.*

In petto—Kept back.—Held in reserve.

Instar omnium—The likeness of all.

In statu quo—In the same state in which it was.

Inter nos—Between ourselves. A secret.

In vino veritas—There is truth in wine. During the moments of conviviality secrets are divulged, and the truth told without reserve.

Ipse dixit—He said it. His ipse dixit; his bare assertion.

Jeu d'esprit—A witticism.

Lapsus linguae—A slip of the tongue.

Latet anguis in herba.—A snake lies concealed in the grass. There is danger not perceived.

Laus Deo—Praise be to God.

Le beau monde—The fashionable world.

Lusus naturæ—A freak of nature.—A piece of deformity.

Magna est veritas et prævalebit—Truth is powerful and will prevail.

Magni nominis umbra—The shadow of a great name.—Applied to a person who inherits the name, but none of the virtues of his ancestors.

Major domo. Ital.—He who officiates as the master of the house.—An upper servant.

Maximum—The highest.—The greatest possible.

Mega biblion, mega kakon. Gr.—A great book is a great evil.

Memento mori—Remember death.

Mens conscientia recti—A mind conscious of rectitude.—A conscience void of offence.

Meum et tuum—Mine and thine.—A mere question of property.

Minimum—The lowest.—The least possible.

Minutiæ—Trifles.—Particulars.

Mirabile dictu—Wonderful to tell.

Mirabile visu—Wonderful to behold.

Miserabile vulgus—A wretched rabble.

Miseris succurrere disco—I learn to relieve the distressed.

Modus operandi—The manner of doing the business.

Monstrum horrendum, informe, ingens, cui lumen ademptum. Virg.—A horrid monster, huge, deformed, and deprived of sight. Virgil's description of Polyphemus.

More majorum—According to the custom of our ancestors.

Mors omnibus communis—Death is common to all.

Multum in parvo—*Much in little.*—A compendium.—
Much said in few words.

Nemine contra dicente—(abbreviated nem. con.)—*No one opposing.*—Unanimously.

Nemo me impune lacessit—*No one provokes me with impunity.*

Ne plus ultra—*Nothing more beyond.*—The summit.

Ne sutor ultra crepidam.—*Let the cobbler stick to his last.*—Let every one pursue his own avocation.

Nil desperandum—*Nothing to be despairs of.*

Nolens volens—*Willing or unwilling.*

Non sequitur—*It does not follow.*—A conclusion not warranted by the premises.

Nosce teipsum—*Know thyself.*

Nota bene—(abbreviated n. b.)—*Mark well.*—A reference used to call the attention to some particular object.

Novus homo—*A new man.*—One who by his own exertions has risen to influence.—It is also used to signify an upstart or a person sprung from a mean or obscure origin.
Harg. Co. Lit. 243. b. note (2.)

Nullius addictus jurare in verba magistri. *Hor.*—*Not accustomed to be dictated to by any master.*—Independent in my opinions.

Omne tulit punctum, qui miscuit utile dulci.

Lectorem delectando, pariterque monendo. *Hor. Ars. Poet. l. 343.*—*He has fully succeeded who has mingled the useful with the agreeable, to amuse the reader while at the same time he instructs him.*

Ore tenus—*By word of mouth.*—Verbally.

O! tempora, O! mores—*Oh the times and the manners.*

Otium cum dignitate—*Retirement with dignity.*

Otium sine dignitate—*Retirement without dignity.*

Panacea—*A remedy for all diseases.*

Par nobile fratrum—*A noble pair of brothers.*—Generally spoken ironically.

Parturiunt montes nascitur ridiculus mus. *Hor. Ars. Poet. l. 139.*—*The mountains were in labour, and brought forth a mouse.*—Applied to authors and orators who pompously promise much, but produce nothing of importance.

Pater patriæ—*The father of his country.*

Patria cara, carior libertas—*My country is dear, but liberty is dearer.*

Peccavi—I have sinned.—A confession of guilt.

Per annum—*By the year.*

Per diem—By the day.

Per fas et nefas—By right and wrong.

Perseverando—By perseverance.—The motto on the great seal of Virginia.

Poeta nascitur non fit—A poet is born so, not made.

Postulata—Things required.—Admissions required, before the commencement of the argument.

Prima facie—At first sight.

Primum mobile—The first cause of motion.—The main spring or impulse.

Principia, non homines—Principles, not men.

Pro bono publico—For the public good.

Pro et con—For and against.

Pro hæc vice—For this particular occasion.

Pro patria—For my country.

Promenade—A walk—a pleasure ground.

Quantum sufficit—A sufficient quantity.

Qui capit ille facit—He who takes it makes the allusion to himself.—He whom the cap fits may wear it. (English proverb.)

Quid nunc—What now.—An epithet bestowed on an inquisitive person.

Rara avis in terris—A rare bird on the earth.—Something singular.

Re infecta—The object not having been accomplished.

Requiescat in pace—May he rest in peace.

Ruse de guerre—A stratagem of war.

Rus in urbe—The country in town.—A rural situation in a town.

Sanctum sanctorum—The holy of holies.

Sang froid—Cold blood.—Indifference.

Scribendi recte sapere est et principium et sons. Hor. Ars. Poet. l. 309.—Both the first principle and source of good writing is to think correctly.

Scribimus indocti doctique poemata passim. Hor. Epist. liber 2, epist. 1. l. 117. (Elegantly paraphrased by the late Rev. Thomas Thornton of Fredericksburg.)

**Learn'd and unlearn'd will sail the sea of ink,
Some few may swim, but many thousands sink.**

Secundum artem—According to art.

Semper avarus egit. Hor. Epist. liber 1, epist. 2, l. 56.

—The miser is always in want.

Semper idem } Always the same.

Semper eadem }

Semper fidelis—*Always faithful.*

Semper paratus—*Always ready.*

Sic semper tyrannis—*May this ever be the fate of tyrants.*—The motto of the state of Virginia.

Sic transit gloria mundi—*Thus passes away the glory of the world.* The fashion of this world passeth away. *St. Paul, 1 Corinth. 7, 31.*

Sic volo, sic jubeo—*Thus I will, thus I command.* The mandate of a despot. He has no other reason for his conduct than his *sic volo*.

Simplex munditiis—*Simple in neatness.* No superfluous ornaments.

Sine invidia—*Without envy.*

Sine odio—*Without hatred.*

Sine qua non—*A thing indispensable.*

—*Si quid novisti rectius istis.*

Candidus imperti, si non, his utere mecum. *Hor. Epist. liber 1, epist. 6, l. 67.*

If you know of any thing better than these,

Freely impart it, if not, make use of mine.

Sei-disant—*Self-called.*

Stat nominis umbra—*He stands the shadow of a name.*

Stat pro ratione voluntas—*My will supplies the place of reason.*

Status quo—*The state in which.* They remain in *status quo ante bellum*; in the same condition that they were before the war.

Studiis et rebus honestis—*By honest pursuits and studies.*

Suaviter in modo, fortiter in re—*Gentle in the manner, vigorous in the act.*

Sub rosa—*Under the rose.* Secretly.

Succedaneum—*A substitute.*

Sui generis—*Of his own kind.* Peculiar to himself.

Summum bonum—*The chief good.*

Surgo ut prossim—I rise that I may do good.

Tædium vitæ—*A weariness of life.*

Tam Marte quam Minerva.—(Literally) *As much by Mars as by Minerva.* (Metaphorically) *As much by his courage as by his skill.*

Tempora mutantur, mutamur et illis—*The times are changed and we are changed with them.*

—*Tentanda via est, qua me quoque possim*

Tollere humo. *Virg. Georg. liber 3, l. 8.*

I also must exert my talents, that I may rise from obscurity, and acquire literary fame.

Tertium quid—*A third something.* An opprobrious epithet, bestowed by the two opposite parties in politics on those who are not willing to go all lengths with the one or the other.

Timeo Danaos et dona ferentes — *Virg. Æn. lib. 2, l. 49. I fear the Greeks, even when they offer presents.* I suspect an enemy, notwithstanding his professions of friendship.

Ubi libertas, ibi patria—*Where there is liberty, there is my country.*

Ultima ratio regum—*The last reasoning of kings.*—An appeal to arms. This inscription is on some fine pieces of brass cannon, now at the Virginia armory, which were cast during the reign of Louis XIV. of France.

Unique—*Singular.* Standing alone.

Utile dulci—*The useful with the agreeable.* The highest encomium passed on an author, by that great master Horace, is, that he has combined the *useful with the agreeable*, the *utile dulci*.

Uti possidetis. (In diplomacy.) *Each retaining the possessions acquired during the war,* as contradistinguished from the *status quo ante bellum*, when each surrenders his conquests, and the parties stand in the same condition that they were *before the war*.

Vade mecum—(Literally)—*Go with me.*—(Metaphorically)—A constant companion.

Valeat quantum valere potest—*Let it avail as far as it may.* Let it pass for as much as it is worth.

Veni, vidi, vici—I came, I saw, I conquered. This was Julius Cæsar's official account of a splendid victory. We have met the enemy, and they are ours. Commodore Perry's letter of Sept. 10th, 1813, giving an account of his naval victory on Lake Erie. *Nile's Weekly Register, vol. 5, pa. 60.*

Verbum sat sapienti—*A word to the wise is sufficient.*

Verite sans peur—*Truth without fear.*

Vivat Respublica—*May the Republic long continue.*

Vox et præterea nihil—*A voice and nothing else.* Sound without substance. A mere display of words.

Vox populi vox Dei—*The voice of the people is the voice of God.*

FINIS.

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