W.m Key [illegible]
Chillicothe
Ohio.
Nov. 1814.

Wm. Key. Bond
1814

Lectures
on
Law
delivered
by
the Honble Tapping Reeve
and
James Gould Esquire
at
Litchfield
Connecticut
An. Dom:
1811 & 1812
Vol. IV.

Real Property

[illegible]
[illegible]

By the term "things" in the [illegible] is meant the subject of property or those things in which one may have an interest: hence arises the distinction between the right of persons and the right of things. These things are by the Common law divided viz: Real and Personal. By things Real is not meant the interest that one may have in real property but the subject themselves.

Things Real are defined to be permanent and immoveable [illegible] and when these things are not fixed, permanent and immoveable they are things personal. But things personal include [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

3

Real Property

Introduction. [illegible] is not said to be [illegible] the [illegible]
Things real are usually said to consist of
lands, tenements and hereditaments only.
[illegible] this [illegible] the [illegible]
[illegible] acceptation [illegible] the term [illegible]
[illegible] things real. The word land, in its
legal acceptation, includes all things of
a permanent and substantial nature. The
word "tenement" is of still greater ex-
2 Bl. [illegible] tent, including all things which may
[illegible] be holden, provided they be of a permanent
nature. 2 Bl. Com. 17.
Hereditament, is a still more general
term [illegible] not only the [illegible]
[illegible] may be inherited
[illegible] corporeal or incorporeal
it comes under the word "Hereditament".
Thus an "heir-loom" is an hereditament
[illegible]
2 Blackst. 17. [illegible] The term is comprehensive
[illegible]
[illegible]

Real Property

[illegible] also a conviction. The benefit of [illegible] Introduction may [illegible]

All tenements only are in hereditaments, corporeal and incorporeal.

The former consist of subjects that are substantial and visible; it includes what are included in the word "land" with legal signification: for this includes not only all kinds of earth but water, buildings and structures standing upon it. Hence a conveyance of the land will pass the buildings on it though they are not named. — Kent. 2 Bl. 18. 17

Water being of a transient fluctuating nature no action will lie to recover "so much water"; therefore the action must be brought for so much land covered with water. — 2 Bl. 8.

The word "land" also has an indefinite extent upwards and downwards, according to the legal maxim "cujus est solum ejus est usque ad coelum" and usque ad [illegible] [illegible]

Thus

Real Property.

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
2 Bl. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] as the
[illegible] [illegible] [illegible] [illegible] subsisting.
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] by [illegible] of [illegible] [illegible], [illegible]
concerning the land. There is no [illegible] to
2 [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] by a grant of [illegible] by a
right of [illegible].

An Incorporeal Hereditament is
2 Bl. 20 a right [illegible] concerning an
[illegible] [illegible] exercised within a thing corpo-
real; as a right of way or privilege of
passing over another's land; and this incorpo-
real right is usually called an "easement".
There is a difference to be observed between
the incorporeal thing itself and the profits
or produce; for the latter is a thing corpo-
real; the rent is [illegible] incorporeal [illegible] the
2 Bl. [illegible] [illegible] or [illegible] [illegible] incorporeal: the
right [illegible] incorporeal.

[illegible] [illegible] of Incorporeal Hereditaments

incorporeal

Real Property

to the [illegible] and for the [illegible] Obstruction [illegible] 3 Kent Comm. [illegible]

The navigable rivers will be [illegible] of these [illegible] the Right of [illegible] is a right [illegible] which [illegible] [illegible] The rule [illegible] of the River is [illegible] of the [illegible] is prima facie the rights of the King or in this Country in the State: and the right of fishing is common to all the subject of the State.

On the other hand in the case of Rivers not navigable the right of soil and the fishing right is exclusively the property of the adjoining proprietors. In these cases the adjoining proprietors always own to the center of the River [illegible] it should be a maxim [illegible] it is a rule of Public Policy that the [illegible] should be in the [illegible] state and the individual proprietors [illegible] no further than to low water mark.

4 Burr. [illegible]
1 [illegible]
[illegible]
1 Cal. [illegible]
3 [illegible]
[illegible]
[illegible]

Real Property

Introduction

5 Johns. 19 [illegible]

The rights of soil in a navigable river [illegible] are in the King, or in the State, may be granted to an individual. The earlier distinction, [illegible] in the case of the so called shore (up to the sea line) between high and low water marks, is the soil between high and low water mark [illegible] is the property of the King or State and the right of fishing [illegible] common to all [illegible]

[illegible]

Opp 336

[illegible]

Real (Property)

Of Estates in Lands, Tenements and Hereditaments.

1st. Freehold Estates of Inheritance

An estate in land, tenement and hereditaments is the interest that the tenant has therein. Thus if A. conveys all his estate in lands in Dale to B. and his heirs, then B. has all the interest in the lands of A. It has been said that the word "Estate" comprehends not only the subject but the interest itself. That the word "Estate" includes sometimes not only the subject but also the interest is certainly true: For example "I grant all my real estate to B. and his heirs" then the words "all my estate" is evidently descriptive of the subjects and part of the interest which he is to take. It is true however that the word "estate" does primarily express the quantity of interest. Where there are no words in restriction of the original meaning of the word

2 Bl. [illegible]
1 Co. [illegible]
1 Pr. [illegible]
1 Ves. 228.
3 Pr. [illegible]

2 Bl. [illegible]
2 Mil. [illegible]
1 [illegible]

Real Property

Freehold — It now considers the quantity of interest in the subject, as well as the subject itself. The quantity of interest that the tenant has in lands, tenements and hereditaments is ascertained by the duration of that interest. And the division between the comparative duration of estates occasions that division of estates into freeholds and such as are less than freeholds.

2 Bl. C. 104. Litt. S. 1. 4. &c. — The former is one which requires for its conveyance at common law livery of seisin, or instrument of an incorporeal nature which is equivalent thereto.

An incorporeal hereditament is said not to lie in livery but in grant.

Estates of freehold are either estates of inheritance or estates not of inheritance.

Litt. S. 1. 2 Bl. C. 104. — The former are divided into inheritance absolute, i.e. an estate in fee simple, or an estate to one and his heirs forever generally and absolutely; and inheritance limited.

Fee

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The word "fee" as used in the law signifies the same meaning as the word "feud" or "fief", which is used as contradistinguished from "allodium" which is where a man holds an estate in his own right only, and not of a superior. Blackstone

A fee then is an estate holden ultimately of some superior in whom the absolute property resides; as in England all estates are holden mediately or immediately from the King. So that the King's tenure is strictly allodial for he has no superior. An English subject therefore can have only the usufruct and not the absolute property of the soil. Hence the highest estate that an English subject can have is that seized thereof in his demesne as of fee. 2 Bl. c. 7 p. 104–5

The word "fee" however is generally used to denote the continuance or quantity of the estate, as contradistinguished from an estate of less duration. 2 Bl.

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Freehold The words "fee" and "fee-simple" are in common acceptation used as synonymous terms. A fee then in this sense may be had in any Hereditament Corporeal or Incorporeal. As to the latter, one is said to be seised "as of fee" when he has a fee-simple and not "in his demesne as of fee": for the word "demesne" means nothing more than the subject and the hereditament [illegible] [illegible] out of the subject. It is a natural maxim of the law, that the fee simple or inheritance of land, tenement or hereditament, must at all times be vested in and reside in some person [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] expectancy or [illegible] ; or a [illegible] will be [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the estate [illegible] be [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] estate [illegible] [illegible]

[illegible]

[illegible] of [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] out of the [illegible] — Fea. [illegible] 2 & 6. [illegible] [illegible] 262.

[illegible] are [illegible] estate.

[illegible] possibly [illegible] [illegible] — [illegible]

[illegible] to Blackstone and [illegible]

[illegible] [illegible] the — [illegible]

[illegible] not to be [illegible]

the [illegible] to [illegible] [illegible]

[illegible] contemplation [illegible]

the [illegible] cannot be ascertained [illegible]

the, because [illegible] [illegible] [illegible]

although [illegible] grant to [illegible] heirs [illegible]

the particular being in this case, cannot be

ascertained [illegible] than the [illegible]

[illegible] [illegible] [illegible] another

instance, which [illegible] [illegible] — [illegible]

[illegible] being [illegible] which [illegible]

[illegible] [illegible] the death

[illegible] [illegible] [illegible] the [illegible]

[illegible] [illegible] [illegible]

Real Property

Estates [illegible] [illegible] [illegible] [illegible]
[illegible]

In the creation of a fee simple whether [illegible]
[illegible] of inheritance by means of the [illegible]
[illegible] "heirs" [illegible] [illegible]
[illegible] the word is indispensable: [illegible]
the language of the law it is a word
of limitation [illegible] estate [illegible]
[illegible] interest [illegible] [illegible] it is not
[illegible] because the heirs [illegible] at the time
of the conveyance [illegible] [illegible] the sub-
ject [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] the word "heirs" must
be ascribed [illegible] [illegible] [illegible]
"to A." [illegible] but an estate for life
"to A. and his assigns" or "to A. and his assigns
forever" [illegible] an estate for life

17 [illegible] Blackstone [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

[illegible]

Real Property

personal service: And by the ancient law a greater estate was never supposed to be granted than the words would strictly admit of. — But where the word "heirs" is used, additional words of perpetuity are not necessary for the purpose of creating a fee-simple estate. Thus, if an estate be granted to "A. and his heirs" it will pass the same estate as if it was to "A. and his heirs forever." [illegible] the word "heirs" is necessary to pass an [illegible] not in "Devises". In these there has always prevailed a more liberal rule of construction — This [illegible] proceeds from the respect paid to a dying testator (inops consilii): as he is oftentimes surprised to make them in a hurry and destitute of Counsel. [illegible] "to A. in fee-simple" gives a man only a life estate in a deed: but if in a devise an estate of inheritance passes. Again a grant to "A. forever" passes only a life estate in a deed: but in a Devise the fee passes.

Freeholds

[illegible]

2 Bl. C. 108

Freehold inheritance passes as to "A. and his assigns for ever". The intention governs a devise: if then one devise lands to "A and his assigns" without words of inheritance, the

2 B. & C. 168 intention appears that a life estate only should pass. Devises you will observe are in derogation of the right of the heir: the law therefore favouring the heir requires the intention to be certain.

1 Sal. 236.
Cowp. 157.
1. T.R. 412.
2. T.R. 157.
4. T.R. 93.
5. T.R. 355.
6 T.R. 34.
[illegible] 67. 512
Cowp. 301.

The words "all my estate" pass a fee-simple if the testator has one: and if not, whatever he had passes. It may be asked what is the difference between a devise of "All my lands to A." and one of "all my estate to A." the former passing only an estate for life, while the latter passes an estate in fee-simple? The reason of the difference is one before given: that the word "estate" includes both the subject and the interest.

[illegible]
2 Ves. 27.
2 Atk. 128.
[illegible] 335
2 P.W. 324
2 Ves. 614.

The following distinction has been made by some, viz. That a devise "of all my estate" is [illegible] by words of locality

Real Property

realty passes as well the subject as the interest: but that a devise "of all my estate lying in Litchfield" passes only an estate for life. [illegible] makes this difference is not supported by the current of authorities at present.—

Freehold

It has however been decided by Lord **Hardwicke** that a devise to A. of all my estate in the occupation of B" passes only an estate for life. He argued not from the word description. But he said that the word estate was used in the description of B. and consequently that it could [illegible] a clause.

[illegible] time of Ld. Hardwicke. 1 Ves. 228.

Again it has been several times decided that the words "all my effects real and personal," are equivalent to the words "all my estate" and denote the quantity of interest. So it has been decided by Lord [illegible] and his decision has often been cited with approbation that the words "all my worldly [illegible]" denote the quantity of inte-

[illegible] 343.

[illegible] 656.

rest

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Freehold interest. And it has been held in the
[illegible] construction of devises that the word "Estate"
[illegible] may pass real estate and if the inten-
[illegible] tion be to pass a fee simple will carry the fee.

It has been lately questioned whether the
[illegible] word "hereditament" does of itself carry the
fee. As if A devises all his hereditaments to
[illegible] B. But it has very lately been determined
that the word "hereditament" would
not of itself carry the fee: for "heredita-
ment" denotes only the subject in which
one may have an interest. The doubt
arose from confounding the word "here-
ditament" with that of "inheritance."
So the words "tenement" and "land" de-
note the subject only and not the inte-
rest. Where a devise is in these words
[illegible] I give and bequeath to A. all my lands
[illegible] tenements [illegible] B. & H." [illegible]
[illegible] [illegible] the premises, but if it were "estate"
[illegible] it would be certain that the devisee
[illegible] [illegible] testator [illegible] intent

Estate

Real Property

interest a [illegible] would be a different freehold.
& if he should [illegible] take an estate for
life and die shortly after paying the
[illegible] certainly he would be a loser.
But a devise thus "I devise my
lands to B. he paying [illegible] out of
the rents and profits" gives only an es-
tate for life [illegible] the same land" [illegible]
[illegible] of the subject and the [illegible]
[illegible] paying in the former case does
not prevail in this, for B. is only to pay
out of the rents and profits so that he could
not be a loser. And a devise of lands
"to [illegible]" provided the devisee pay
an annual sum less than the annual
value, will pass only an estate
for life, for the reason given in the last
case. Mr. Fearne [illegible] however [illegible]
the ground of discrimination [illegible]
[illegible], that if the sum to be paid in the
last case had exceeded the annual val-
ue the devisee would take a fee simple

6 Cru. 86.
2 Burr. 583.
[illegible] 233.
5 Burr. [illegible]

1 [illegible]
5 T.R. 13.
2 Burr. 1533.
1618. 1623.
2 Bl. 281.

[illegible]

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[illegible] in fee simple estates. Mr. Preston [illegible] [illegible] of [illegible] [illegible] that he has never seen such a case.

Another exception to the rule that the word "heirs" is necessary to create a fee
[illegible] 154. is in the case of a fine or Common Recovery: for in these conveyances a fee passes by act and operation of law, though the word "heirs" is omitted. There is the like exception in the case
2 Bl. C. 108. of Grants to a "Sole Corporation": for there the word "heirs" is not only unnecessary but improper; the appropriate word is "Successors". And in a Grant to a Corporation
1 Bl. C. 484. 249. Aggregate neither the word "Heirs" or
2 Bl. C. 109. "Successors" is necessary, for in presumption of law a Corporation Aggregate never dies — In this case the word "Heirs" then is improper and the word "Successors" useless — So in England a grant
1 Bl. C. 249. to the King without the word "Heirs" or
2 Bl. C. 109. "Successors" will pass a fee-simple: for the

[illegible] Property

the King, like the Corporation aggregate [illegible] in judgment of law never dies.

Some General Rules.

The word "heirs" is generally descriptive of the quantity of interest, & also not of the persons who are to take. If an estate is limited to A. for life with remainder to his (mediate or immediate) to his heirs" A. takes a fee simple; if remainder to the "heirs of his body" a fee tail. And as to this subject the general rule is, if any freehold is limited to a person for life with remainder mediate or immediate to his heirs a fee simple passes to him. This is called the great rule in Shelley's case". So to A. for life, remainder to B. for life remainder to the heirs of A." will give A. a fee simple but subject to the intermediate estate for life of B. [illegible] being [illegible] [illegible] the intermediate estate.

[illegible]
Shelley's case.
[illegible]
[illegible]
[illegible]
Hargrave
[illegible]
[illegible] the [illegible]
[illegible]

[illegible] Fee simple.

Fee simple — If a devise is made to the heirs of A. the heirs [illegible] an estate [illegible] the death of A.

Lecture 3^d — and [illegible] the testator [illegible] fee estate will [illegible] being [illegible] [illegible] contingent [illegible] the [illegible] the word "heirs" being a word of limitation.

(In limitation purposes) If to A. heirs, & the heirs of A. [illegible] with [illegible] these words, [illegible] the word "heirs" was used as descriptive of the person who is to take & to the heirs of A. (now living) the heir apparent of A. may take [illegible] the intention [illegible] apparent.

It may be observed here generally, that an estate given to "a person and his heirs" cannot be qualified or changed by [illegible] alienation [illegible] of the [illegible]: [illegible] to "A and his heirs," [illegible] alienate or devise the estate [illegible] both alienable and devisable —

[illegible]

Real Property

III Limited Fees: which include 1st Freeholds Base or Qualified Fees and 2. Fee Conditional at Com. Law: afterwards consequent on the stat. "De Donis" 13 Edward I. converted into Fees Tail —

Limited fees are such estates of inheritance, as are clogged with some condition or qualification: and these are of two kinds: viz. Qualified & Base fees and fees conditional at Com. Law. Most of these latter however are now fees-tail under the stat. "De Donis Conditionalibus." A Base fee, is one which has some qualification annexed to it and which must determine, whenever that qualification 2 Bl. C. 109 ceases. E.g. A grant to A and his heirs, so long as they continue tenants of the Manor of Dale" and when they cease to be tenants of that Manor, the estate will determine. A fee conditional at Com. Law is one that is restrained to some par- 2 Bl. C. 110 ticular heirs of the grantee: to a-

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Feudally mean and his heirs male) be called as contradistinguished from an Absolute fee. This is called Conditional by reason of the [illegible] condition which is implied in every such gift that if the grantee should die without such heirs as are specified the estate shall revert to the grantor. In the construction of such gifts however it soon became settled, before the Stat. de donis, that if the grantee had issue, this, for certain purposes, was considered as rendering the estate absolute. But not to all purposes, though in three it did, especially in these, viz. I. If the grantee had issue [illegible] he might alien the estate and thereby he became capable to defeat both the heirs and the grantor of their rights.

II. By the birth of issue the estate was considered as absolute for the purposes of forfeiture for the crime of treason.

III. The birth of issue enabled the grantee to charge or encumber the lands &c

as to bind his issue. But if after having [illegible]
issue the grantee did not alien the
lands and his issue died before him it did [illegible]
after his death revert to the grantor. If
however he died leaving issue the estate
was considered as absolute. Now the
construction put upon this, was a clear
[illegible], evasion of the spirit of the grant
made to protect the rights of the grantor and
for the purpose of destroying the above
rule the Stat. de donis. Westm. 2. 13. Ed.
[illegible] I was made which provided that
the will of the donor should be observed,
and that the lands tenements and her-
editaments should go to the issue if any
and if none revert back to the grantor
so that after this stat. having issue was
not considered as making the estate
absolute. In the construction of this
stat. however the judges divided the estates
into two kinds or particulars one of which
was a fee [illegible] considered [illegible] in the

[illegible] 2 Bl. Ch. [illegible]

[illegible]

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Freeholds — issue or grantee; and that was called fee tail: and the other was left in the grantor called a "Reversion": and thus that species of estate which is now called a "fee tail" originated from the stat. de donis. But by this construction, they created a very different estate from a fee conditional at com. law: for after a fee conditional at com. law, no estate can be limited: but it was strictly considered as a fee simple tho' defeasible on a certain condition.

Eff. Lect. p. 2. 2 Bl. 110. 1 Rev. 110. 2 Cr. Di. 30.

The only word in this stat. which designates the subject of estate is the word "tenement": so that an estate tail may be created as well out of corporeal as incorporeal hereditaments which savour of the realty, i.e. which issue out of corporeal ones, or which concern or are annexed to or are exercisable within the same: e.g. Rent &c. An estate tail can be created out of an annuity: a [illegible] a hereditament [illegible]

[illegible] 20.

[illegible]

charging the person of the grantor only and not the real estate. If then an annuity be granted to a man & the heirs of his body he has in that annuity what is called a fee conditional & continues for it remaining strictly such.

Hence a mere personal chattel can never be entailed: nor can a grant of it to a man and the heirs of his body create a fee conditional at com. law. The grant vests absolutely the interest in the grantee.

But there is here to be observed a distinction: for this is the rule only where the limitation is by strict words. It is not meant that a chattel can be entailed by using words of entailment or by implication.

But on the other hand there is a well settled rule of law that words which in the limitation of real estate by devise would create an estate tail by implication would in an Executory devise create a [illegible] [illegible] chattel interest after

Freeholds

[illegible] 149.
[illegible] 395.
[illegible] 20.

[illegible]
[illegible]
[illegible]
[illegible]
Fearne 3[illegible]
[illegible] 354.

Fearne [illegible]
[illegible]
[illegible]
[illegible]
[illegible]

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Freeholds — a life estate in the first instance. An estate tail may be created by implication this however is in a devise and not in a deed: and this is owing from the regard the law pays to last wills and testaments in the construction of which there is a much greater latitude allowed than in deeds. Thus if one devise lands "to A. and his heirs forever and if he die without heirs remainder to B." Here A. takes an estate tail by implication. So again if a man devise to A. and his heirs forever but if he die without heirs remainder to B. Here A. takes an estate tail provided the remainder man is a collateral heir of the first devisee. Otherwise in a Deed.

2 Bl. 92
1 [illegible] 315
3 [illegible] 336
[illegible]
Cruise 23
5 Bl. 381

1 Bl. 24
Fearne 170
351. 362.

Cruise 33.
5 T.R. 336
3 T.R. 156
5 T.R. 337
[illegible]

As to the different species of estate tail nothing more will be said than that they are either General or Special &c.

It may be observed however that in the case of an estate tail since the descent must be ordered wholly by being made

Litt. Sect.
2 Bl. 15
3 [illegible] 286. 287. 289.
2 Bl. 3
[illegible]

Litt. [illegible]
8. 2.
[illegible] 25
2 Bl. 14

in

Real Property.

and if tail female the descent must be traced wholly through females.

As the word "heirs" is necessary to create a fee of any kind by grant so the word "body" is necessary to create a fee tail by grant: or some other words of procreation. The operative words therefore are "heirs of the body". If the other words of inheritance are found, if procreation are omitted in a grant a fee tail will not be so: As if one grant to A. and the issue of his body" or "to A. and his seed" a fee tail will not be so: for though there are words of procreation there are no words of inheritance. In these cases then the grantee will take only an estate for life. But on the other hand a grant to A. and his heirs male" or "female" passes a fee simple and not a fee tail. for there are no words of procreation. But to this by agreement (in the construction) the word "male" or "female" is more significant for the

issue

4 Lecture.

Inst 20.
2 Bl.
115 [illegible]

2 Bl. [illegible]
Inst. [illegible]

2 Bl. [illegible]
Litt. [illegible]
[illegible]
[illegible]

Real Property

Freehold. [illegible] of an estate [illegible] to the heirs [illegible] female). The rule of construction laid down [illegible] given the rule of construction [illegible] that [illegible] of the grantor. This rule is not
1. [illegible] held [illegible] the King: but if he [illegible] some [illegible] that [illegible], it is construed [illegible].
[illegible] But a devise in the same
[illegible] words, will [illegible] an estate tail: for here the
6. [illegible] 388. intention of the testator is to govern.

And by devise an estate tail may be created without the word "heirs": as before [illegible] devise
1. [illegible] "to A. and his posterity" or "to A. and his
2. Bl. C. 381. seed": In both these a fee-tail passes, and the intention of the testator is always governing, if not contrary to some rule of law.

And the following distinctions are to be observed as to the word "Children", when
6. Co. 17a used in a Devise. If a devise is made to
2. Bl. [illegible] "A. and his children", he having no child
[illegible] born at the time of the devise, A. takes
[illegible]
[illegible]

a.

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a fee tail in A. and he [illegible] [illegible] fee simple if there be no children living at the time of the making of the will [illegible] [illegible] be intended they should take in some way. And

But where a devise to A. and his children, he having children at the time, they take as joint tenants with him an estate for life, but in this case it is to be observed that only such children as are in esse at the time of the devise can take, because if the devise were in fee, children born after have been excluded they would have been [illegible].

On the other hand if one devises to A and after his death to his children, he then having children will take an estate for life and after his death they take an estate for life in remainder; the word "children" in this case being merely the [illegible] [illegible] [illegible]

Cro. Eliz. 313.
6 Co. 16. pl.
1 Saun. 252.

[illegible]
[illegible]

6 Co. 16.
Moore [illegible]
1 Saund. [illegible]
2 Term. [illegible]
Doug. [illegible]

([illegible] [illegible])

Preston — Persons [illegible] are not [illegible] of this [illegible] of [illegible] they are to take

Fearne 382 etc. — And so [illegible] the after born children of A. will take [illegible] with them who were in esse at the time of the devise

The Ch. J. Gould says [illegible] has not been [illegible] [illegible]

And the rule seems to be the same

6 Cr. 590 [illegible] 220 [illegible] 94 — [illegible] testaments if a devise is made to A. and after his death to his children (he having no children) at the time

It may be observed however that [illegible]

Doug. 505 [illegible] — a case [illegible] [illegible] [illegible] in Douglas the Court of Kings Bench [illegible] [illegible] [illegible] [illegible] an estate [illegible] to A. [illegible] however [illegible] [illegible] the [illegible] [illegible] [illegible] and [illegible] of the particular estate [illegible] the contingency

If an estate is limited to A. and the heirs

[illegible] 16th [illegible] 2 [illegible] 2 615 [illegible] 262 — female of his body his female issue will take though they cannot answer the description

Real Property

Reservation of Heirs. And the [illegible] [illegible] have [illegible] and whether the limitation be by deed or devise. But it was formerly holden by Lord Coke and his decision followed by Hargrave that if an estate was limited to the heirs female of A. as purchasers they could not take but it must go to the [illegible]. Ex. to [illegible] [illegible], [illegible] [illegible] to the [illegible] [illegible] [illegible]. This [illegible] [illegible] [illegible] [illegible] [illegible] to be [illegible]: [illegible] he [illegible] the [illegible] of the [illegible] though the authorities are very contradictory but the generally [illegible] taken. This question was twice solemnly argued before Lord Mansfield and decided as laid down. And indeed Hargrave in a subsequent [illegible] [illegible] with he had before said on this subject. They [illegible] [illegible] the manner in which Estates tail may be created.

Preston

[illegible] [illegible]
[illegible] [illegible]
Tho. 29.
Fearne 216
[illegible] [illegible]
[illegible] [illegible]
[illegible] [illegible]
Fearne 274.

[illegible] 36. 5.

[illegible] 16.
[illegible] 2.

Real Property

Freeholds — Next as to the incidents of a Tenancy in tail.

1. The tenant in tail is liable for Waste.

2 Bl. [illegible] / [illegible] — 2d the widow is entitled to Dower in the estate.

3. The Husband of a tenant in tail is entitled to Curtesy of the estate.

[illegible] — 4. And lastly the estate tail may be barred by fine or common recovery, or by a lineal Warranty descending with assets to the issue in tail.

[illegible] — The application of Common Recovery was in the 12 Edward 4. when the Judges declared openly that it was a sufficient bar to an estate tail: The estate was made forfeitable for treason by 26 Henry 8 c. 13 and levying a fine, made a complete bar by 32d Henry 8. c. 36. And here it must be remarked that a tenant in tail's right to levy a fine or suffer a common recovery is inseparable from an estate that comes in the grant of such an estate.

Real Property

estate a restraint of that kind is strictly void: i.e. condition that the same shall not convey.

In Connt there is no such thing as levying a fine or suffering a Common Recovery: hence the estate becomes absolute in the issue of the donee. The quality of an estate tail in Connt resembles that of a Fee Conditional at Common Law.

[illegible] Cont 43.

Real Property

§2. Freeholds not of Inheritance

A Freehold not of Inheritance is an estate for life only.

Estates for life are either Conventional or [illegible] created by deed or act of the parties, or legal as being created by operation of law.

2 Bl. 120 — The [illegible] estate may be for one's own life, or for the life of another, or for more lives than one [illegible] in [illegible] the life of the tenant [illegible]

An estate for the life of some other than the tenant is usually called [illegible] pur autre vie. A conventional life estate [illegible] created [illegible] to a freeholder [illegible] general grant to one without defining or limiting [illegible] estate [illegible] always presumed to be an estate for life. [illegible] When a grant [illegible] [illegible] estate for life [illegible]

[illegible]

Remainder

Real Property.

always construed to be for the life of the grantee. And as a general rule any estate excepting only an estate of inheritance, an estate at will and an estate at sufferance, having no period of its termination and which may by possibility last during the life of the tenant, is an estate for life. E.g. Curtesy, Dower, Estates during her widowhood. So to Wellin[illegible] till he become Governor of the Commonwealth State; in this case [illegible] he would have [illegible] possible.
Lin. 28
2 Bl. 120
1 Cr. 20

Quar. de hoc

There is a distinction as to this between the terms in limitation [illegible] during life and [illegible] during the term [illegible] of life; for in the former case it may be terminated by the death of [illegible] and be [illegible] indefinite. Dower in the latter case.
2 Co. 48
Lin. 98
1 Bl. 5

Real Property

Incidents of a life estate

There are attached as well to estates
[illegible] pur autre vie as to legal estates for life
1st The tenant if not restrained by the
2 Bl. 35 covenant or agreement may of com-
[illegible] mon right take upon the land, rea-
sonable estovers i.e. necessary timber
for repairing buildings, for fuel &c.
2d A tenant for life or his rep-
2 Bl. 122 shall not be prejudiced by sudden determination of his
own estate (unless it happens by his own
act) [illegible] [illegible] uncertain
[illegible] he shall in that case have the
emblements or if it was an estate pur autre
vie" and if he dies [illegible] his Rep-
resentatives shall have them.
2 Bl. 122 Emblements are the crops or profits
of land produced by manual labor.
If the tenant therefore are not entitled
2 Bl. 122 [illegible] to it if the tenant dies before the
time of [illegible] his Representatives
are not entitled to it.

[illegible]

Real Property

Wherever an estate granted to a man is uncertain: and the estate is determined by operation of law (or by [illegible] after the sowing) between the time of sowing and harvest the tenant shall have the emblements. But if the tenant for life determine his estate by his own act before his death he shall not have the emblements. The under tenant or lessees of tenant for life have the same and in some instances even greater privileges: for they shall not be prejudiced by the determination of the estate by the original lessee.—

[illegible]
[illegible]

[illegible]
[illegible]

And here it may be observed that if a tenant for life let for years and dies during the term, the lease is determined by his death unless it has been previously confirmed by the remainder man: and this may be done. If not confirmed it must determine otherwise the remainderman might be injured by bad tenants.

[illegible]

The fee of a contingent estate for life.

Real Property

Life estates created by operation of
law are of three kinds. viz.
1st Tenancy in tail after possibility of
issue extinct. 2. Tenancy by the Cur-
tesy of England: 3 and lastly Tenancy
in Dower. The first is where one is donee in
Litt. Sec. 32 special tail has been created, and the
2 Bl. 124 person from whose body the issue was
to spring is dead without issue or having
left issue that issue has become extinct.
Such a tenant is considered in the law
1 Cr. [illegible] merely a tenant for life. But this estate
can only be created in the manner above
mentioned. Hence if an estate
Litt. Sec. 28. is limited to A. and B. and the heirs of
2 Bl. 125. their two bodies "and they are divorced
"a vinculo matrimonii" neither of
them are tenants in tail after possi-
bility of issue extinct but each of them
have an estate for life. And it may
[illegible] be remarked that the law allows the
[illegible] issue, the possibility of issue to continue

til

Real Property

estate that is liable to determination by the death of the parties.

[illegible] [illegible] [illegible] [illegible] parts being partly [illegible] [illegible] the life [illegible] [illegible] of [illegible] land; they resemble a tenant for life in this respect that he forfeits if he aliens in fee: and in [illegible] in that nothing that he [illegible] after his death. But if he commit waste by cutting timber the property of the timber is in the heir; but also in that person [illegible] as the heir who has the [illegible] estate of inheritance in the land.

The dowress however a tenant of this description is for most purposes [illegible] as to a tenant for life. Hence the doctrine of exchange with a tenant for life. [illegible] an exchange can take place only where the parties have the same quantity of interest.—

2 Bl. [illegible]

2 Bl. 122

2 Bl. [illegible]

Real Property

1st. By the Curtesy of England

which is where a man marries a woman having a fee simple estate and has by her issue born alive and capable of inheriting the land and she dies, he is said to be "Tenant by the Curtesy of England." To the creation of this estate there are four requisites. 1st. Marriage, the Wife's Seisin, Issue born alive & Death of the Wife.

[illegible] The seisin of the wife must have been actual and not merely in contemplation; but the issue need not be [illegible] at the time of her death, because in such case the [illegible] of the [illegible] would [illegible] the [illegible] would not [illegible] the [illegible] [illegible] the [illegible]. It has been decided in Conn. that a child born by Caesarean operation, the [illegible] from the mother dead

Real Property.

in one of their attributes. As by cour-
tesy there must be actual seisin, it
follows that the Husband cannot be ten- 2 Bl. 127.
ant by the curtesy of a reversion or Co. Litt. 29.
remainder. There are indeed some excep-
tions mentioned in the case of Copy-
hold Tenements, but these do not
exist or seldom occur in this country.
If the wife was an Idiot the Husband
cannot be tenant by the curtesy, and Cru. 246.
the reason given by Blackstone is, that Co. Litt. 30.
the property then belongs to the 2 Bl. 127.
king. But this [illegible] tends the [illegible] not to be
satisfactory.

2. [illegible] the issue must be born
alive: and the reason is that if it is still- Co. Litt.
born it is incapable of inheriting, and Dyer. 25.
then the Husband is incapable of taking 8 Co. 34.
by the curtesy. And the issue must be Co. Litt. 29.
born during the wife's life. For if it is 2 Bl. 127.
128.

born

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born one instant afterward it cannot be said that at the moment of her death she had issue by her [illegible] must be capable of inheriting the estate. Moreover [illegible]

Co. Litt. 29 [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] other than descendants [illegible] [illegible] [illegible] be tenant [illegible] the estate.

[illegible] [illegible] or whether the issue

Co. Litt. 29 be born before or after her seizin [illegible] [illegible] [illegible] whether [illegible] or alive at the [illegible]. But it must be born alive [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

By the death of the wife the husband's estate

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] that the wife must

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3. Tenancy in Dower.—

If an husband is seized of an estate of inheritance & dies the wife is entitled to one 2 Bl. 129
third part of all the lands and tene-
ments whereof he was seized at any
time during the coverture to hold to her-
self during the term of her natural
life. This is generally called "ten-
ancy in Dower." There must be actu-
al marriage at the time of the hus-
band's death, otherwise the wife will
not be entitled to dower. therefore if
there be a divorce "a vinculo matrimo-
nii" there can be no dower: for "ubi
nullum matrimonium ibi nulla
dos." Even in case of a divorce "a men-
sa et thoro." The wife of an alien is
not entitled to dower for the same rea- 2 Bl. 130
son that the husband of an alien is
not entitled to curtesy.

By the ancient Common Law the wife's 2 Bl. 130
right of dower was forfeited by the trea-

son

Real Property

because on felony of the Husband the Statute 1 Edw. 6 abates the rigour of the Common law and allows dower in such case: But there again revived by the Stat. 5 & 6 of Edw 6 the former rigour except in the case of felony.

By the Stat. of the United States there can be no forfeiture except for treason and that for the life only of the offender. [illegible] said [illegible] that there can be no treason in the United States except ag.t United States: [illegible] the [illegible] treason ag.t the U. S.

Con. of the U.S. Art. 3 S. 3.

The Action can never be sustained except by special Statute. The widow must be entitled [illegible] above 9 years of age at the Husband's death: In the [illegible] may be [illegible] [illegible] or [illegible] only. To entitle the wife to dower the estate must be such as any issue which she might have had might by possibility have inherited the estate.

[illegible]

Co. Litt. 33.

Litt. Sect.
2 Bl. 131.

So

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To entitle a wife to dower also it is only required that the Husband is seised in law which is a right of present possession. But to entitle the Husband to his curtesy the Wife must have been actually seised. And a momentary seisin of the Husband is sufficient to entitle the wife to dower: for it is sufficient that he has been at any time seised. But on the other hand where the Husband has been used as a mere conduit pipe, so that it merely passed through him the Wife is not entitled to dower.

[illegible]
[illegible]
1 Inst. 31

2 [illegible] 65
9. Co. 64.
2. Bl. 132.
1. Inst. 31.

Here at Com. law it is not in the power of the Husband to bar the wife's dower by Convt. She is not entitled to dower in those lands only of which her Husband was seised at the time of his death. In England the wife is not entitled to dower in the Husband's Equity of Redemption, or a Mortgage in fee or in any equity of Redemption.

Swift. 32.
323. [illegible]
1 Atk. 605
1 P.W. 136.
2 Atk. 161.
[illegible]
9 [illegible] 99.
[illegible] 16. 138.

Real Property

[illegible] this estate has [illegible] by the Courts [illegible] have been [illegible] too well established to [illegible]

It has been determined [illegible] that [illegible] entitled [illegible] to her dower [illegible] in England it has been determined that [illegible] in the [illegible] estate for life [illegible]

If the Dower have never been [illegible] to the widow [illegible] she can't be said to have it: for she can not take as a matter of course. The assignment is [illegible] to be made by the Heir [illegible] or if he [illegible] by the Sheriff [illegible]

The heir at law [illegible] by entry becoming [illegible] of the whole of the [illegible] and the widow [illegible] tenants to [illegible] not [illegible]

Real Property

& her portion. So if the heir or the Terretenant refuse to give her her dower, or not sufficiently in dower as the law [illegible] [illegible] by [illegible] under the Sheriff is ordered to [illegible] out of her dower. There are various ways in which the right of dower may be forfeited by neglect or after some reason. Thus by Stat. Westm 2. 13 Edw 1. elopement and living in a state of incontinency bars, unless until the husband is afterwards reconciled to her. So if there is a divorce a vinculo matrimonii for any before assigned, ubi nullum matrimonium, [illegible] [illegible]. So also if the wife is an alien she cannot be endowed unless naturalized by special statute. In England the wife's dower is forfeited in all cases by the husband's treason. By his felony however this would not bar her dower. So also the wife may bar herself of dower by levying a fine or suffering

[illegible]

[illegible] the [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible] the [illegible]
[illegible]
[illegible]

[illegible] the [illegible]
[illegible]
[illegible] the [illegible]
[illegible] the [illegible]
[illegible]
[illegible]

[illegible]
[illegible]
[illegible] the [illegible] lease of [illegible]
the purchase [illegible]
[illegible]

Real Property

Of Estates less than Freehold.

These are of three kinds:
Estates for years, at will and
by sufferance.

An estate for years is a contract for
lands or tenements for [illegible] 2 Bl. 140
some determinate period of time, as
when a man letteth for "the years"; and in
the construction of the term estate [illegible]
the law does not regard any period of
time less than a year; an estate thus
[illegible] for "a fortnight", an estate for
years in the [illegible] as distinctly
of an estate for less than one year.
He who creates this estate is called the
"lessor" and the tenant is "lessee".

A "year" in law means a Calendar
or Solar year: a "month" however
means a lunar month, or four weeks:
This however does not hold in the "Law
Merchant:" for by that a "Month" is al-
ways a Calendar Month.

[illegible]

Rent (Continued)

By the term "twelvemonth" is meant twelve calendar months, or 12 months. 2 Bl. Co. 141 [illegible] But where the word "twelve months" is used [illegible] "twelve months," [illegible] be construed as 48 weeks. And in general, the law takes no notice of the fraction of a day.

If a lease is made in the middle of the day for one year, the term expires on the last moment of the day preceding the one which ends the year. 1 Inst. [illegible] 2 Bl. C. [illegible]

There are some conflicting decisions which will not be noticed here: [illegible]

And it may be observed that every estate which must expire at a certain period is an estate for years. And therefore an estate for years is usually called a "term." Every estate for years must have a certain beginning and a certain end, but [illegible] distance [illegible] commencement of the estate: the [illegible] 2 Bl. [illegible] 1 Inst. [illegible]

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[illegible] it is not necessary that the commencement & [illegible] of the time of the determining of the lease or life otherwise [illegible] [illegible]: And thus it is said that a life estate must have a certain duration: yet "id certum est quod certum reddi potest": and therefore an estate to A. for so many years as B. shall name," is an estate for years: But a lease "for so many years as A shall live" is void for uncertainty and does not create any estate. Why may this not be a good lease? Because there is no limit of duration.

[illegible] 37
2 Bl. [illegible]

1 Inst. 45

But still a lease "for 20 years: if A. shall so long live," is a good lease for years: for here its duration is fixed, as it must determine at the end of 20 years and perhaps before: this is a lease for 20 years, defeasible on the death of A.

2 Bl. 143
1 Inst. 45

An estate for years is but a chattel & that it is personal estate: and on

the

[illegible] [illegible]

by reason of the limited [illegible] of [illegible], the [illegible] no way to the freehold [illegible] expectation. [illegible] estate for life is esteemed of a
[illegible] higher nature than an estate for 1000
years. And again, but a chattel interest
[illegible] "Term of years" is, [illegible], [illegible] to [illegible]
[illegible] for it is not freehold. And therefore it
[illegible] be made to commence "in futuro"
& the consequence is [illegible] [illegible] the
cannot [illegible] to be [illegible]; but [illegible]
[illegible] before [illegible] the "interesse" of the [illegible] of the
[illegible] itself, and the lessee is only [illegible]
[illegible] of a term or a chattel.

The word "term," however, [illegible] [illegible]
[illegible] at this [illegible] merely the estate
or interest itself. Hence it is possible
that the term [illegible] expire, before
the time for which it is limited.

Cont. Blackst. B. 2.

Incidents of an estate for years.

Tenant for years has the like estovers as tenant for life [illegible] but the emblements between a tenant for life and the emblements there is a distinction; if the tenure of this estate determine at a certain prefixed time and between the time of sowing and harvest the lessee is not entitled to the emblements; for he knew before hand that the estate would expire before he could have the benefit of them, and it was his own folly to sow them (otherwise in the case of a life estate when the tenant dies.) But on the other hand the estate for years is determinable on a contingency and that contingency happens, as that the wife is defeated, now the tenant for years is entitled to the emblements; for he was ignorant of the estate's termination: though if the estate is determined by the tenant himself before the period of determination he shall not have the emblements.

2 Bl. [illegible]
[illegible]

1 [illegible]
[illegible]

Real Property

in Tenements existing by ~~contract~~

Estates at Will

•The estate at will is properly defined to be one holden at the will of the lessor & is determinable at his pleasure. It is however more properly said to be an estate holden at the will of the lessor or lessee & determinable by either party.

Co. Lit. [illegible] [illegible]

For this is holden, that the lessee has an uncertain indefeasible estate for no period of time. If however the lessor determines it between the time of sowing and the crop harvesting, the lessee shall take the crops of the estate so determined by the lessor himself. This estate may be determined by an express declaration of the lessor that the lessee shall hold at his pleasure no longer. This however must be made upon the land or notice sent to the lessee. It may also be determined by acts of ownership: as by entering upon the land and cutting timber

[illegible] [illegible]

[illegible]

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tender if the lessor take a distress on the land and subsequently to these [illegible], determine the estate and also if the lessor make a re-entry: or [illegible] to [illegible] commence [illegible] immediately.

On the other hand it may be determined by the lessee assigning his interest or by [illegible] that he can [illegible] By [illegible] of the covenant broke it determines, when finally the estate may be determined by the [illegible] of either of the parties: the latter [illegible] a [illegible] death. If the rent is payable quarterly or [illegible] annually or [illegible] annually and the lessee determining the lease while any of these payments are accruing, he [illegible] pay up the rent at the end of the current time during which the [illegible] payment of rent [illegible] accruing. But if the lessor determines the estate under these circumstances he shall have no rent of the rent that was accruing

[illegible]

[illegible] 88

[illegible]

[illegible]

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necessary to constitute the agreement [illegible] [illegible] to [illegible] who [illegible] understand [illegible] [illegible] to this estate [illegible] [illegible] [illegible] agreement.

2 Bla: 147 [illegible] Estates at will have of late been treated as if they were tenancies at [illegible]; [illegible] however those which were formerly called "Estates at will" have been construed as estates from year to year.

When [illegible] estates under these estates, [illegible] [illegible] generally [illegible] an estate from year to year or at [illegible]; and there is an essential difference between these estates, for in the one it cannot be determined except at the end of the year, and then not till there has been reasonable notice given which has been generally thought to be "6 months;" whereas a [illegible] [illegible] may be determined at any time. And it has also been [illegible] in the same case that though either of the parties dies, this does not determine

the

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the estate but it results in a tenancy between the Representative of the deceased and the surviving party, unless the notice be given to quit. And as on the one hand the Representative must give notice where they intended to determine the estate, so on the other the surviving party must give notice to the Representative, if he would deter- 3. Wils. 25.
mine the estate. In that result, it does not alter the case. And Courts of Justice in England have gone so far as to extend these cases, to the statute of Frauds 1. Bac. ab. "agt." C. 4.
and Perjuries," for by 11 George 3d it is 8 T.R. 13.
enacted that parol leases, for more than three years, shall be construed as leases from year to year, (i.e., a parol lease for three years is viewed the same as a lease for years: but a parol lease for seven years or any greater number) can only be construed an estate at will, and now a tenancy from year to year.

And

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[illegible] the stat. of Frauds [illegible] Tenancy
[illegible] has been [illegible]
[illegible] [illegible] of [illegible]
[illegible]
to enter. Thus what has been said [illegible]
cannot be [illegible] Estates at Will
[illegible] [illegible] may be
said to exist [illegible] Lord
Mansfield said they were [illegible]
[illegible]. And it has also been deter-
[illegible] mined that notice to quit at any other
time than the end of the year is not good
It is not meant that it must be given at
that time: But it seems that if the [illegible]
[illegible] give notice generally to quit: it
[illegible] shall be considered as notice to quit at
the end of the year [illegible] after notice
[illegible] the [illegible]
[illegible] [illegible] after the end of the year,
[illegible] the notice [illegible]
[illegible] the time [illegible]
[illegible] notice is not good [illegible] the year.

Tenant [illegible]

or otherwise, quarterly, monthly [illegible] for the
next year: [illegible] [illegible] [illegible] [illegible]
[illegible] the [illegible] [illegible] the first [illegible] [illegible] Ch 161
[illegible] [illegible] [illegible] in his [illegible])
[illegible] [illegible] have be [illegible] [illegible]
"want" [illegible] [illegible] [illegible] [illegible]
[illegible] cannot be determined by the [illegible] [illegible] Ch. [illegible]
without giving the [illegible] [illegible]

If there is a lease for [illegible] [illegible] the [illegible]
[illegible] [illegible] [illegible] [illegible] the [illegible] [illegible]
[illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] 2 [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] in this case as in the [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] the [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] the [illegible] being [illegible] [illegible]
[illegible] the [illegible] [illegible] [illegible]

Tenant by Sufferance.

Where [illegible] [illegible] the [illegible] [illegible] 2 Bl. [illegible]
[illegible] [illegible] [illegible] but [illegible] the [illegible] [illegible]
[illegible] [illegible] [illegible] he [illegible]

[illegible]

Real Property

Tenant at sufferance. [illegible] [illegible] lease to the [illegible] [illegible] after the [illegible] of that term, the [illegible] [illegible] without the [illegible] [illegible] tenant at sufferance.

[illegible] And formerly if a lease [illegible] were made to A. [illegible] on the lessor's death the [illegible] [illegible] he was regarded as tenant at sufferance. But this was not [illegible] [illegible] there being [illegible]

[illegible] A tenancy [illegible] at sufferance [illegible] [illegible] at any time [illegible] the [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] tenancy at sufferance [illegible]

[illegible] [illegible] Estate [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible]

Actual Possession

a former [illegible] entry before the act [illegible] [illegible] Ejectment. The [illegible] tenancy [illegible] the Lessee. The [illegible] [illegible] of the [illegible] [illegible] entry

required, that the tenancy having [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] to have a [illegible] — 1 Ad. 1839 [illegible]

No Covent for a [illegible] without entry is now necessary: since now in England by Stat. [illegible] of George IV. Tenancy and Sufferance are almost entirely restricted by the severity with which they were treated. — [illegible]

Real Property.

Of Estates upon

Condition.

Estates upon condition are such whose [illegible] 2 Bl. 152
[illegible] upon the happening or not happening of some uncertain event
by which the estate may be created, enlarged or
defeated. These are of two sorts
1st the estate upon condition implied
2d the estate upon condition expressed, under 2 Bl. 154
which may be included the [illegible] estates
holden in gage.

1 Estates upon condition implied are
those to which there is a condition annexed 2 Bl. 152
inseparable from the essence and constitution of Co. Lit. 233
the estate itself, though no condition be
expressed. As an office [illegible] there is
[illegible] tacitly, annexed that the grantee
shall duly execute the office on for-
feiture of it if not duly executed.

So there is a condition tacitly annexed
to every estate, that the owner shall not 2 Bl. 153
do any act incompatible with the estate Co. Litt. 20
which he holds. As if a tenant for

life

Real Property

Estates upon Condition

life, if feoff or stranger in fee, his estate is forfeited.

2 Bl. 154
Co. Litt. 201

1st An estate upon condition expressed is one to which is annexed an express qualification by which the estate is to commence, be enlarged or defeated.

2 Bl. 154
Litt. § 325
Co. Litt. 217

Conditions of this kind are either precedent or subsequent. Precedent Conditions are such as must happen or be performed before the estate can vest or be enlarged. Subsequent conditions are those by which an estate vested may be defeated. E.g. An estate is granted to A. to vest on the event of his marriage here the condition is precedent. But if an estate is granted to A. to pay a certain rent with condition that if not paid, the grantor may enter and avoid the estate the condition is subsequent. To this head are referable "Base fees" and "Fees conditional" at Com. Law. In the last case if the rent is not paid the grantor can

2 Bl. [illegible]
[illegible] 208
[illegible] 818.

not

not become the estate [illegible] [illegible] [illegible] be avoided [illegible] the rest in the day.

Estates upon Condition.

Implied conditions are always subsequent. There is a distinction to be made between an express condition in deed and a limitation which is called a condition in law. The words "as long as" "while" "until" and other words limiting time are words of limitation and not condition in deed. On the other hand the words "upon condition" "so that" "provided" and similar expressions are words of condition in deed. The consequence of this distinction is important.

2 Bl. 155.
10 Co. 41.
Litt. § 380.
1 Term. 441

If the qualification annexed is a limitation upon the happening of the contingency the estate ceases immediately and of course without any act done by him who is next in expectancy.

2 Bl. 155.
2 Bl. 155.

But if an estate is strictly on condition in deed the law permits it to endure beyond the contingency unless the grantor

2 Bl. 155.
Litt. § 374.

tor

Estates upon Condition

grantor his heirs or assigns, take advantage of the breach of the condition by entry or claim. So the rule however strict, has exceptions. For although words of strict condition are used, still if on breach of the condition the estate is limited over to a third person the qualification is called a limitation and not a condition,

2 Bl. 155.
1 Prest. 285.
Co. Lit. 214.
1 Rol. 411.

because if it were a condition the estate would be avoided only by the grantor or his representatives so that the remainder might be defeated by their neglect. If grant to A. on condition that in one year he marry: remainder on failure to B. — So devise to heir at law on condition, remainder over.

If a lease contains a clause that lessor

Doug. 480.
1 Saun. 287.
[illegible] 257.

may enter for non-payment of rent, actual entry is not necessary to entitle him to ejectment. The fiction of entry confessed by the right in ejectment is sufficient.

Real Property.

It was formerly doubted whether a condition that a lessee for years should not assign it was good: but it is now well settled that such a condition is a good one and an assignment will work a forfeiture. So if a lease is made to lessee, executors &c with condition that his executors &c shall not assign the condition is a good one: this was however doubted until very lately on the ground that the exec'rs take only for the purpose of satisfying claining pf. the estate.

Estates upon Condition

2 Br. 138 &c.
3. T.R. 66 / 157
2. Wils. 2. 9.
3 Atk. [illegible]

2. T.R. 140.
(2 T.R. 425) that it is good

If one holding an estate for life or years on condition that he shall not assign &c attempt to assign by a deed which proves to be absolutely void for want of requisites, the estate is not forfeited. And a proviso or condition that if the lessee becomes a bankrupt the lessor may enter &c is good against the assignees: so a proviso that it shall not be taken in execution ag.st the lessee

3. T.R. 61.

2. Br. 133.
8. T.R. 61
6. T.R. 684
2. Atk. 219.

Estates upon Condition

& grow. If an act, or a condition subsequent annexed to an estate be impossible at the time of its creation, the estate is without condition, i.e. is absolute in the tenant. If a grant is made to be void unless the grantee marries a certain person, & it become impossible by the act of God or of the feoffor, the estate becomes absolute.

2 Bl. 156
Co. Litt. 206
2 id. 214
1 Cru. 251
250.

So, a condition that grantee marries within a year a person who afterwards dies within the year: or where the feoffor himself marries her. So if the condition be against law or repugnant to the nature of the estate the condition is void & the estate absolute — as a condition that grantee "shall kill J. S.": or that grantee in fee simple shall not alien. The conditions in all these cases are void. But if a condition precedent be unlawful or impossible, the condition being void the estate is also void: since it depends on the condition and therefore

2 Bl. 157.
Co. Litt. 206.
see title "Contracts"

[illegible]

Estates upon Condition

[illegible] till the performance. But when the condition subsequent cannot be performed and therefore [illegible] not [illegible] right)

The breach [illegible] of a condition is a matter "in pais" and triable by parol evidence —

Cruise 34-6. Burnett 9[illegible]

Under the head of estates, where the upon condition subsequent are estates held in pledge; and these are of two kinds 1st [illegible] living pledge, [illegible] that his own estate granted to a creditor to hold till the rents and profits shall satisfy the debt. In this case the grant becomes void and the estate determines as soon as the debt is thus satisfied. Hence it is called living pledge. 2d the mortgage, [illegible] the [illegible] in the discharge of its security [illegible] to the [illegible] the debtor.

2 Bl. 157

2 Bl. 157
Co. Litt. 205

Cruise [illegible]

2 Bl. 157
Co. Litt. 205
Kent [illegible]

Real Property

II. Mortuum Vadium, dead pledge

or Mortgage

2 Bl. 157. [illegible] Litt. 3. [illegible]

A Mortgage is an estate granted by a debtor to his creditor with condition that if the grantor (i.e. the mortgagor) pay the debt on a certain day he may re-enter: or that the grantee shall reconvey: or that the grant shall become void. When the money is actually paid on the day it is not necessary that the grantee shall reconvey, in order to revest the grantor's title, although it is safer for the grantor that it should be reconveyed: otherwise his right would rest on parol evidence.

2 Bl. 158. [illegible] 168. [illegible]

This estate is called a dead pledge because if the mortgagor fails to pay the money at the end the estate which he has is gone entirely without a possibility of recovery.

Mortgages

[illegible] mortgagee then [illegible] [illegible] [illegible] [illegible] mortgagor's [illegible] pledge [illegible] [illegible] and being [illegible] pledge.

A Mortgage then [illegible] [illegible] [illegible] by a debtor to his creditor as security for the debt, and is in its nature the same with a former mortgage [illegible] the original [illegible] made the estate [illegible] [illegible] [illegible] [illegible] with mortgage deed.

The grantor is called the mortgagor & the grantee is called the Mortgagee.

The condition of a Mortgage is [illegible] called "defeasance", because it serves to defeat the estate: and this defeasance may be either incorporated with or annexed to the grant or made a distinct instrument. For two instruments executed at the same time and relating to the same subject matter form but one contract. The usual way is to annex it.

Lecture 2d

Co. Lit.

Co. Lit.

Mortgages

annexed with the letters of the deed, nor even if not subsequently ~~it~~ endorsed on the back of the deed. But suppose the grantee give back a bond or covenant to reconvey the land to the grantor on payment of money, the bond not referring to the deed: it is not a Mortgage. Mr. Reeve says he does not know that this has been decided any where except in Connect. where on the trial of the same it was admitted by both parties.

[illegible] Jefferson Sup. Ct. 1819

As soon as the estate is created, the Mortgagee may take possession: though liable to be defeated upon the performance of the condition by payment at the day: for the legal title vests in him immediately, though defeasible at a future day.

2 Bl. 158. Com. Dig. [illegible]

But the usual practice is for the Mortgagor to remain in possession till the day of payment.

2 Bl. 158

There is a distinction to be made at Common Law between a grant made to secure a gift or gratuity and one made

to

Real Property

Mortgages

to secure an antecedent debt. In the latter case tender at the day of the money discharges the mortgagee's claim in the land and revests the mortgagor's title. In the former case it discharges not only the lien but also the personal duty: i.e. the whole obligation. For a tender discharges the estate, the mortgagee can have no claim except on the ground of a debt or personal duty: but here is none.

Pow. Mo. 57.
Co. Litt. 207.a
209.a, b
Litt. § 335. 338.
3 Co. 74.
Cro. J. 244.

The condition of a mortgage deed was formerly considered as a condition precedent because its effect is to reinstate the mortgagor in his inheritance: but it is now considered subsequent because its effect is to defeat the estate of the mortgagee.

Pow. Mo. 4
Co. Litt. 205.a
213.a 206.a
221.b
2 Co. 22.
Cro. C. 204.

Formerly if a mortgage was forfeited the estate being absolute in him the wife of the mortgagee was entitled to dower in the estate and it was subject to all his prior charges: but it was then

Pow. Mo. 9.
2 Bl. 158.
Co. Litt. [illegible]
[illegible]

[illegible]

Real Property.

Morrgage's

entitled. that the right of a mortgagor was not [illegible] to [illegible] the [illegible] of [illegible] for the [illegible]

To remedy this inconvenience it became usual to grant a long term for security of the mortgage: which only conveying a chattel interest would not entitle the wife of the mortgagee to dower. This practice is generally pursued to this day in England though the reason which introduced it has failed. In this country these mortgages have never prevailed but it is always usual to mortgage in fee. because it was never established here that the wife of the mortgagee was entitled to dower before foreclosure. If a bond be given by the mortgagor conditioned for the performance of the covenant agreement &c in the mortgage deed: the payment at the day or breach of the condition is [illegible] was [illegible] otherwise [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible]

Real Property

Mortgages

How are Mortgages now considered in Equity?

How consider-ed in equity

At Common law if the condition was not strictly performed the land vested absolutely in the Mortgagee so that an estate of great value might be lost for a trifling consideration.

Cru. Di. [illegible]

The consequence of this hardship on mortgagors was a contest between the Courts of Law and Equity. The former considered the condition strictly. The latter considered the condition as a mere personal contract for the payment of the loan merely, and the mortgage as a security for the performance of this personal contract. They therefore considered the Mortgagor the real owner even after the time of payment had elapsed and allowed him an equity of redemption. This has been since the time of Sir Thomas More who first considered the penalty of a bond as in terrorem for the payment of the debt.

Cru. D. [illegible]

The

[illegible] Mortgage

[illegible] The cause of the many peculiarities of a mortgage [illegible] in which the principal notion of the mortgage [illegible] is that [illegible] only in equity, where the debt is esteemed the principal and the land pledged [illegible] in the contrary. So that whenever the

Pow. Mort. [illegible] debt is paid, the interest of the mortgagee determines, and the mortgagee as to the legal estate is trustee for the mortga[illegible] will therefore become a [illegible] whenever the debt shall be discharged, and the equitable right after [illegible]

[illegible] is called an equity of redemption and is known only to the law of equity.

But still even in equity until redemp-

[illegible] tion or satisfaction the mortgagee [illegible] continue, in [illegible] as to entitle him to the debt. Hence a mortgage is not

[illegible] Vern. [illegible] [illegible] alienation or selling [illegible] previous [illegible] except to give a [illegible] [illegible] affected by it [illegible] a voluntary conveyance

by

Mortgage
How considered in Equity —

by way of family settlement and afterwards mortgages the estate. Now though the Mortgage be forfeited still the Lessee is entitled to the estate in equity on paying the debt. So if a devise is made to A. of land, afterwards mortgaged to B. the Mortgage is a revocation in equity pro tanto only, though total at Law — therefore the devisee may redeem.

Pow. 2d 1.
1 P. W. 599.
2 Atk. 598.
Pow. M. 151.
1 Atk. 603.

But a Mortgagee to devisee of lands before devised, has been held a total revocation: the two interests being inconsistent, but under the devise he would hold as Mortgagor, and under the deed as Mortgagee. This has been denied in some late cases; but the present Chancellor has supported the last position.

Pow. M. 17. 18.
Pr. Ch. 514.
2 Atk. 49.
3 Ves. J. 414
666
5 Ves. J. 655

3 Ves. J. 414
644
5 Ves. J. 656.
See letter "Devise"

Every contract for the loan of money or for payment of a debt secured by the conveyance of real estate and not intended as a disposition of the estate is in equity deemed a Mortgage —

Pow. M. 18.
2 Atk. 495

Real Property

Mortgage.

[illegible] in Equity.

It is a maxim of the law that "once a Mortgage always a Mortgage."

Pow. Mort. 20. 38. 39.
1 Vern. 33. 190.
2 Ch. R. 148.
1 Atk. 344.
1 Vern. 192.

The meaning of this maxim is that no private agreement made at the time between the parties to prevent a redemption unless the money is paid at the day, is binding: and the conveyance will be liable to all the incidents of a Mortgage. Its original nature cannot be thus altered: for if such agreements were enforced, the Mortgagee might take advantage of the Mortgagor's necessities: Once a Mortgage then, and always a Mortgage.—

So an agreement that if the Mortgagor does not redeem within a given time he shall not claim his equity of redemption, or that the conveyance shall be deemed a sale — Such provisions are void and ineffectual.

Pow. 83.
2 Vern. 8.
Vern. 5. 8.

And it makes no difference as to this point whether the proviso for redemp-

tion

Real Property

Mortgage
How [illegible]
Equity

Redemption as in the agreement made even in a distinct instrument.

Nor will an agreement at the time to make the conveyance absolute in default of payment, if the mortgagee will advance an additional sum, alter the case: the great object of equity is to prevent the mortgagee from taking advantage of the necessities of the mortgagor.

Pow. M. 23. 4
26
1 Vern. 488
2 Vern. 168
520

But to the maxim "once a mortgage and always a mortgage" there are some exceptions: For an agreement that in case of a sale of the equity of redemption the mortgagee should have the right of pre-emption would be good: So a subsequent agreement for an absolute sale executed by the parties is good: So of a subsequent release of the equity with an agreement by mortgagee to reconvey on certain conditions, as if the purchase money be paid in a limited time.

Pow. M. 25. 7
2 Eq. Ca. Ab. 19.

Pow. M. 25. 16.
1 Vern. 268
Salk. 61.
1st Vern. 158.
2 [illegible]
Pr. Ch. [illegible]

This

Real Property

Mortgages How considered in Equity

This is considered a defeasible purchase and the mortgagee is not bound to reconvey unless the mortgagor shall perform the condition.

2d In some cases of family settlements and where the transaction is between members of the same family: and where a bond is [illegible] to a certain period to the mortgagee, the condition is [illegible] to the relation of a mortgagor and [illegible] a mortgage". So where a mortgage to his niece [illegible] consideration by way of family settlement a provision "redeemable during her life only". In this case there was not redeemable after the death of the [illegible] a mortgage to her brother to secure a loan with an agreement that if he [illegible] the mortgagee should have the [illegible]: This agreement is [illegible] but it is admitted that there

is

Cruise Dig. [illegible]
2 Cont. [illegible]
1 Vern. [illegible]
3 P. W. [illegible]
3 P. Wms [illegible]
3

is a beneficial interest, and there is no danger of oppression or imposition on the mortgager.

Mortgages considered in Equity.

From some cases in the books it appears that an absolute conveyance will be considered as a mortgage, where an agreement to redeem is inferable from circumstances, but, which are unknown, and in proving which there is no danger of perjury. As where the party making the conveyance holds in possession without payment of rent, gives his notes and pays interest and taxes and receives the rents and profits of the land to his own use. Such circumstances would constitute a mortgage in the opinion of some of the judges, though there is no judicial decision to that effect. In Conn. the conveyance under the above circumstances was decided by the court, would be a mortgage. But that

[illegible] 2 [illegible] 2 Atk. [illegible]

Decn of Sup. Court [illegible] bound by [illegible]

Real Property

Mortgage

Where received in Equity.

that decisions were reversed by the Court of Errors.

Parol evidence is always admissible to prove the payment of the debt due to the mortgagee. Of course the mortgage security may be defeated by parol evidence, for whatever debt is discharged the interest ceases, the statute of Frauds notwithstanding.

Pow. Mo. [illegible] [illegible] 90.

And if the mortgagee has forgiven the debt parol evidence of his declarations would be admitted to prove the fact. Where a mortgagee said "Take back your writings: I freely forgive you the debt" parol evidence was admitted to show that declaration.

But a parol agreement between the parties to the mortgage, that the whole charge should eventually rest on the land of one of them, is within the Stat. of Frauds, [illegible] and therefore may not be proved by parol testimony.

Pow. Mo. 5th

Real Property

Mortgage. Have considered in Equity.

If land is devised to trustees to raise money out of the rents and profits for payment of debts or portions and no clause empowering them to mortgage still if money sufficient cannot thus be raised the trustees may mortgage or even sell: but if sufficient can be raised they must not mortgage or sell. Or if it were to be raised out of the rents and profits only they cannot mortgage.

Pow. M. 104·5.
Pr. Ch. 294.
2. Vern 310.

Of the interest of the Mortgagor in the premises mortgaged.

As soon as the estate is mortgaged the mortgagee has the legal title and may enter on the lands: such legal title in him, however is defeasible. It is usual however for the mortgagor to remain in possession.

Pow. M. 73. 80.
2. Bl. 158.

But if there be an agreement between the parties at the time that he shall remain in possession for a certain time he is a tenant for years. But if

Pow. M. 6[illegible]
Co. [illegible] 659. 660.

[illegible]

Mortgages
Interest of the Mortgagor.

there be no fixed period in the agreement for which he shall continue in possession he is said to be a quasi tenant at will: And so was it decided by the [illegible] Court in New Jersey [illegible] A mortgagor left in possession is so far as respects the right of possession and even before the day of payment considered at law quasi a tenant at will: though in some respects [illegible] a tenant.

Dec'n of Sup. Court in New Jersey.

[illegible]

Hence he may be sued in ejectment without notice to quit [illegible] tenant at will [illegible] [illegible] This is [illegible] the [illegible] tenant at will for he is not liable for rent as other tenants at will [illegible] [illegible] [illegible] between the terms of [illegible] he is not entitled to the emblements [illegible] as well as the lessee

Cont. [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] estate. But a

Mortgagor in [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Mortgagee, which, to [illegible] [illegible] be

[illegible] by [illegible] the [illegible] either [illegible]

[illegible] [illegible] or not at [illegible] [illegible] the [illegible]

[illegible] of [illegible] [illegible] [illegible] determined

the Mortgagor, estate. [illegible] [illegible] is also

[illegible] in [illegible] [illegible] without notice [illegible]

[illegible] the Mortgagee, not entitled to the [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible]

The Mortgagee [illegible] [illegible] treat [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] notice

[illegible] [illegible] [illegible] the [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] to pay what he has

[illegible] [illegible] of the Mortgagor

The Mortgagor when [illegible] in [illegible]

ment

1 Powl. 3[illegible]
[illegible] 23.
[illegible] 68 [illegible] 40
[illegible] 606
[illegible] 3-[illegible]

Pow. Mo 2.9
2 Bl. 2/15. 310

Real Property

Mortgage. Interest of the Mortgagor.

2 Atk 780
1 Ves 360

[illegible] in the mortgagee [illegible] allege a title in a third person to defeat the mortgagee: because he is estopped by his own deed. The same estoppel applies to the lessee of the mortgagor who cannot deny the right of the latter because he is estopped by accepting the lease under him. The title of each then is good against the mortgagor and the strangers; for the mortgagor is estopped to deny his interest; and as against strangers a lawful possession is sufficient. Therefore [illegible] the [illegible] in trespass [illegible] the [illegible] stranger.

1 Atk 70.
Cro Ch 170.
1 Vern 268.

[illegible]

But with respect to the interest of the mortgagor [illegible] of the [illegible] he is in equity made to [illegible] the real owner of the land mortgaged, while the mortgagee's interest is [illegible] a chattel [illegible] the [illegible] the real [illegible]

[illegible] 778.

[illegible]

[illegible] of the [illegible] to [illegible] [illegible] [illegible]
[illegible] to [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] of [illegible] [illegible] a [illegible] [illegible]
during the mortgagee [illegible] [illegible]
[illegible] a freehold [illegible] mortgagee the re-
ality remaining in the mortgagor. The
giving a settlement by the [illegible]
[illegible] interest [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] the descrip-
tion of "lands" or "real estate"

Likewise the interest of the mortgagor
must be conveyed like any other real
property, and a devise of real es-
tate [illegible] not be altered by these limitations.
But though the equity [illegible] the
mortgagee the owner of the land still if
he [illegible] [illegible] he will [illegible] no
injunction in favour of the mortgagee.
[illegible] this case where the mortgage is [illegible]
a term for years only.

[illegible]

[illegible]
[illegible] litle
[illegible]

[illegible]

[illegible]

Real Property.

Mortgages

1st

Interest of the mortgagee

1st The interest of the Mortgagee in the premises mortgaged.

The interest of the Mortgagee is considered as divided into 3 periods. 1st between the execution of the mortgage and the forfeiture. 2d after the forfeiture and before he takes possession. 3d after he takes possession on the eviction of mortgagor. [illegible] after the decree of foreclosure is nothing will be said hereafter. 1st Before forfeiture, i.e. before the day of payment has elapsed the Mortgagee's interest [illegible] as [illegible] the interference of Chancery. He therefore has the legal title to the whole interest mortgaged defeasible on the payment of the debt on the day. He may take possession [illegible] the freehold [illegible] before forfeiture [illegible] of the [illegible].

[illegible]

[illegible]

Whether [illegible] of the [illegible] by the Mortgagee [illegible] to be [illegible] the Mortgagee [illegible] Mortgage

The Mortgagee though he cannot "oust" [illegible] tenant by [illegible], Mr. Gould thinks, is prevented [illegible] only "repossess" the reversion, that he may [illegible] the purchaser &c. of the premises, by treating him as a wrong doer [illegible]. Hence also the Mortgagee may on notice compel the Mortgagor's lessee to pay him the rent even before forfeiture. This rule holds, even if the lease is prior to the mortgage: for the Mortgagee has the legal title to the reversion and rent is incident to the reversion: i.e. he is entitled to the rent due before notice as well as afterwards: he is not entitled to that however which has been once paid to the Mortgagor. But Mr. Gould conceives, that in the last case he cannot recover rent due before the Mortgage was made. If even a term for years is Mortgaged by the lessee the Mortgagee is in nature of an assignee of the term,

(i.e.,

[illegible]

Gra. [illegible] 60
Doug. 266.

[illegible] 84.

[illegible] 85. 88.
2 Vern. 243. 344.
Doug. 438. 44 n.

Real Property

Mortgagee's interest after Mortgage

is of the whole term mortgaged, but
it [illegible] the Mortgagee [illegible]
the covenants, unless he takes actual poss-
ession: for it is a mere security and
not intended like common assignments
as a disposition. This rule holds though
the Mortgage is forfeited. But if the
mortgagee in such case does take poss-
ession he is liable on all the covenants
which run with the land like other
assignees. For he enjoys the profits.

see title "Covenant"

[illegible]

These rules relate to the rights of the mort-
gagee before the forfeiture.

2. Of the mortgagee after forfeiture.

3.) And even though he becomes in equity
[illegible] [illegible] title, possessing only a chattel
interest according to the rules of equity
this is justified only to hold the lands
as a security, and the mortgagor to be
the real owner, the interest of the mort-
gagee will regularly [illegible] pass in descent
under the canons of inheritance to

[illegible]

[illegible] 1670

the heir

Mortgages.
Interest of the Mortgagee.

and hereditament": But there is an
exception to this rule, when the devisor has
no other property answering that descrip-
tion. He is considered in equity then
as having only a chattel interest till
after foreclosure: and on his death it
goes to his Exec.r and not to his heir.

Pow. M. 92. 170.
Vern. 301.

Hence the assignment of the debt and the
land carries his interest though he do
not assign the mortgage deed: because
that is considered as incident to the debt
which is the principal: and such was
the decision in [illegible].

Pow. M. 358. 534.
1 P.W. [illegible]
[illegible] 243.

"Hence also the covenant before foreclo-
sure he may not commit waste which
will injure or encroach upon the mortgagor's
right: for the Mortgagor brings a bill
to redeem on payment of the debt &c.
Answer: That the Mortgagee has leased
the land and that the tenant has not
hired: Now this defence is insufficient
otherwise the Mortgagee might always
prevent

Pow. M. [illegible]
[illegible]

Mortgages

Interest of the Mortgagee [illegible] in [illegible] before foreclosure

The [illegible] [illegible] [illegible]
in the first case that the mortgagee might
Pow. on M. have [illegible] before foreclosure to restrain
any [illegible] by [illegible] [illegible]
[illegible] an injunction against the latter
[illegible] 2 Ves. 220. 2 Atk. 723. [illegible] [illegible] in all [illegible] before decree
[illegible] [illegible] [illegible] taken [illegible]
injunction though not to [illegible] at
[illegible] [illegible] [illegible] except to the sale
of the [illegible] security [illegible]
[illegible] to the debt, for the [illegible]
[illegible] [illegible] will not be [illegible]
Pow. 98. [illegible] [illegible] made before foreclo-
sure; but [illegible] if he cut timber the value
[illegible] to the discharge of the debt for
the mortgagor's benefit. And even then he
[illegible] [illegible] made [illegible] [illegible]
[illegible] to neither party [illegible] merely
[illegible] [illegible] injurious. And in all
cases he is accountable to the mortga-
ger for the value of [illegible] [illegible], from

the

the [illegible] i.e. the [illegible], [illegible], the discharge of the debt whether the security is adequate or otherwise; first to the interest, then to the principal & the cost, [illegible].

Mortgagee [illegible] [illegible] Mortgagor

[illegible] 95. 2 Atk. 123.

But though the mortgagee cannot encumber or waste the estate before foreclosure to the injury of the mortgagor, yet he is allowed such expences as he incurs in necessary repairs and other costs, for the preservation of the estate; and may add them to his principal to carry interest.

Cru. [illegible] 95. 2 Atk. 218. 1 Wils. 34. 2 Vern. 81.

If a mortgage be made of an estate to which the mortgagor has no title at the time, and afterwards, the true owner conveys to the mortgagor or his representative, the mortgagee in equity will have the benefit of the new conveyance. This is said by the Chancellor to be "feeding the old estoppel" though [illegible] [illegible] thinks the rule obtains

Cru. [illegible] 97. 2 Vern. 11. See title "Covenants" 1 Atk. 160.

from

Of mortgages
Relief of the Mortgagee.

Pre. Ch. 148.
2 Br. P.C. 432.

Hence the doctrine that if [illegible] in mortgage of the Mortgagee for term of years, renewing another one after the expiration of the old, the will be a trust for the Mortgagor, and redeemable by him. This is because almost all leases, there are renewable and therefore the Mortgagor of the first lease can redeem the second although he had no interest in it: but then he might have gotten his own lease renewed. And therefore they consider the Mortgagee attained the second lease merely by his Mortgage.

Pre. Ch. 18.
3 Atk. 518.

A Mortgagee in possession is not bound to spend money except for necessary repairs: though if he has expended money in defence of the Mortgagor's title he may add it to the debt, and it carries interest.

The Mortgagee however takes the estate subject to the same incidents to which

which it is subject in the mortgagor's hands. Therefore if the mortgagor who has an estate for life commit waste it is a forfeiture of his estate and the mortgagee loses his lien. Mortgage. Interest of the mortgagee

Likewise if such tenant for life mortgages in fee: this is ipso facto a forfeiture of his estate. So if a forfeiture afterwards in favour of a remainder man or reversioner be the mortgagee in possession. V. B. Waste. Pow. M. 99. 2 P. Wm. 146. Cr. Car. 07. Plo. com. 542

But in the case of forfeiture to the Crown for treason &c. the mortgagee's estate is not thereby injured: for the King takes only such interest as the person had & since that was the right of redemption so that his Majesty becomes mortgagor. Pow. M. 117.

Real Property

Mortgage.
Equity of redemption & who may redeem &c.

Of the Equity of Redemption and who may redeem &c.

[illegible] 135.

The equitable interest remaining in the mortgagor after forfeiture is called the "equity of redemption."

[illegible]

The mortgagee is considered a trustee: he [illegible] the legal title in the mortgagee who is considered a trustee for the mortgagor of the inheritance till foreclosure. So the mortgagor [illegible] any reasonable time redeem by paying the debt and interest: so may any person claiming an interest under him [illegible] making voluntary deeds to the same afterwards mortgages, to [illegible] the deeds, fraudulent as agst [illegible] good against [illegible] therefore he may redeem it.

[illegible]

So if the mortgagor becomes a "Bankrupt" his assignee shall be entitled to redeem.

[illegible]

So is the tenant of the mortgagor entitled to redeem [illegible] the mortgagee may

also

Real Property

[illegible] [illegible] [illegible]
[illegible] [illegible] after the death of the [illegible]
[illegible] [illegible] of the mortgage [illegible]
[illegible] [illegible] [illegible] interest [illegible] [illegible]
[illegible] [illegible] [illegible]

Again the equity of redemption is go-
verned by the same rules of descent as
the more legal estate [illegible] [illegible]
[illegible] [illegible] [illegible] the [illegible] [illegible]
[illegible] the custom of Borough English & the
[illegible] [illegible] according to the custom
of gavelkind [illegible] all the sons [illegible]
[illegible] [illegible] [illegible] all the [illegible] [illegible]
So the [illegible] of the [illegible] [illegible]
by a [illegible] execution of the mortgage
[illegible] [illegible] [illegible] the [illegible]
[illegible] his estate [illegible] [illegible] [illegible]
[illegible] But there [illegible] executor
[illegible] [illegible] in the [illegible] [illegible]
[illegible] [illegible] the [illegible] [illegible]

[illegible]

Real Property

Mortgage [illegible]

[illegible] [illegible] the [illegible] of [illegible] [illegible] [illegible] [illegible] discharge of [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] The mortgagee [illegible] [illegible] [illegible] [illegible] the mortgagee [illegible] [illegible] [illegible] the creditor. There have been [illegible] decisions [illegible] Duke [illegible] that the [illegible] [illegible] [illegible] [illegible] lien [illegible] [illegible] [illegible] [illegible] decisions are [illegible] [illegible] [illegible] that [illegible] the [illegible] [illegible] the [illegible] property [illegible] [illegible] the creditor [illegible] the creditor [illegible] interest [illegible]

By [illegible] [illegible] the [illegible] [illegible] [illegible] the mortgagee [illegible] forfeited [illegible] [illegible] estate [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

If a Mortgaged estate descend to an infant [illegible] his Guardian [illegible] entitled [illegible] [illegible] [illegible] Bond [illegible] [illegible] the property to the discharge of the debt

The widow of the Mortgagor [illegible] [illegible]

Real Property

A Jointress [illegible] the lands comprised [illegible] in the Mortgage [illegible] have been made to ~~to the~~ redemption of [illegible] premises to the Jointure, but if made after the mortgage [illegible] redemption of the Mortgagee.

Mortgage. [illegible]

Vern. 7.

So though her Jointure is only in part of the land, the rest descending, the whole [illegible] if a jointure be made after the mortgage whether before the Mortgage or after [illegible] to be entitled.

Pow. M. 112, 121, 122. 1 Vern. 33, 63. [illegible] 217.

And in this case if the [illegible] more than one third of the debt, she or her representatives shall have agt. the heir to be reimbursed her when she joins with her Husband in encumbering it. For otherwise she would seem to bear any part of the debt as between herself and the heirs. The husband of the Mortgager may become a tenant by the curtesy. [illegible] mortgage, his estate in fee and then married.

Pow. M. 313, 314. 1 Ch. C. 241. 1 Vern. 191.

Pow. M. 112, 115. 1 Atk. 603.

But the Mortgagee's wife is not tenant

Pow. M. 30.

in

Real Property

Mortgages [illegible] [illegible] in it.

is Dowered of the [illegible] & [illegible] of a Mortgagee in fee.

Cu. in tr. est. — But in order to entitle the husband to curtesy in a trust estate, there must be a seizin of the freehold during coverture, an equitable seizin or that equivalent in equity to an actual seizin of the legal estate at law. Actual possession is sufficient though Mortgagor's possession is only that of a tenant at will at law. But without such equitable seizin the husband is not entitled to his Curtesy. If one devise a freehold of inheritance to trustee to the sole and separate use of a married woman: and the trustee receive the rents during coverture, and the husband have no control over it, but the wife is not thus seized [illegible]; here the husband cannot be said to have had either legal or equitable seizin, and is therefore not entitled to Curtesy. Same as to other

prop.

Real Property

Mortgages
Eq. of Re
and who may
redeem it.

[illegible] creditors when the trust is not to the separate use of the wife?

A subsequent incumbrancer may redeem out of the way of the first Mortgagee: e.g. A. mortgages to B. and then to C. C may redeem of B. for he has an interest [illegible] in the land. So, in England may a judgment creditor of the Mortgager redeem. For his judgt is a lien on the land as agt the Mortgager.

Pow. Mo. 117. 134 &c.
2 Ch. C. 110.
7 Vin. 52.
2 Ven. 663.

But whenever such second mortgagee, creditor or issue of Mortgager redeems the Mortgagee, his heir, devisee or assignee may redeem from such person by paying the debt due to him and likewise the debt which he paid in redeeming from the first Mortgagee. (Gould) says there has been no rule on this, but he thinks it perfectly obvious.

Cases have occurred in which the Mortgager has been allowed to redeem even after a release of his equity of redemption.

Pow. Mo. 119
2 Ch. C. 147

Real Property

Mortgages

by whom and who may claim it. presumption of the release [illegible] from circumstances to have been made upon a secret trust for his benefit. Esp. When it appeared that the debt due was very small compared with the value of the estate.

If there be tenant for life with remainder

Prec. Ch. 120. man or reversioner in fee of an equity of redemption: they are to pay proportionably or reasoning what is

Prec. Ch. 14[illegible] due: i.e. the tenant for life is to pay one third and the remainder man or

Prec. Ch. 120. 1 Eq. Ca. 221. Pr. Ch. 62. reversioner the balance. And if here, the tenant for life is obliged to pay the whole he may have over the thirds in remainder contribute. E.g. Devise of the

Pr. Ch. 44. equity of redemption to A. for life remainder to B. — now it is said that the tenant for life shall bear [illegible] of the debt.

[illegible] And if the mortgage money is payable on a contingency not arrived, [illegible] in the remainderman [illegible] may which

he

Real Property

[illegible] till [illegible]" [illegible] the tenant for life and remainderman [illegible] ever first [illegible] to contribute, i.e., to keep down the interest of the tenant for life pays the [illegible] debt or [illegible] [illegible] take a decree [illegible], and [illegible] [illegible], and then the remainderman or reversioner or redemptioner of his representative [illegible] pays for 2/3 of the [illegible] incumbrance? But no interest is allowed for the money expended: as the tenant for life is bound to keep down the interest accruing his estate, just as if he were in possession and the debt not paid: and the remainderman even in Chancery entitled [illegible] to keep down the interest.

But as to the proportion to be borne by tenant for life and the remainderman or reversioner, vide this particular.

If after the [illegible] by tenant for life the remainderman [illegible] to

Mortgages [illegible] of the [illegible] may claim [illegible]

[illegible]

[illegible]

[illegible]

redeem

Mortgage
eq. of re.
[illegible]
[illegible]

possession of lands during his life, the tenant for life bears one third. But if the debt is extinguished or redeemed after the death of the tenant for life, here his representatives, whoever he may be, bear the debt, only so much as the estate was worth to the tenant if more than one year; the reason of the difference is that in the first case they cannot tell the precise time the tenant will live, and till the event occurs, a good general rule is, that the tenant for life shall bear one third of the debt: but after his death the precise time of his enjoyment is ascertained and his representatives must pay accordingly. — An equity of redemption of a Mortgage in fee is not assets at law, for the estate of the mortgagor is gone at law; therefore to an action brought at law by a bond creditor agt. the Mortgagor's heir he may plead "riens per descent."

Powell 153
3 Atk. 241

But in equity it is assets under Chancery

will

order a sale of it for that purpose: and
if the heir release, or aliens it, he is
liable in his own person for the [illegible] to be
recovered at the value to the credr and
creditors: Being equitable assets only,
all the creditors are paid out of it, pro
rata & "pari passu" without regard to
rank or quality of their debts: as there
is no priority in Chancery as at Com.
Law. In Connect. all equities of redemp
tion are like all other real assets: they
are vest. at law and may be attached
taken in execution and proceeded with
accordingly: Law. If the Mortgagor is
dead, are they sold like all other
real property &c. But in Connect. there is
no priority at law, for the quality of the
debt. And even in England the Mort
gagees reversion expectant on the deter
mination of a Mortgage for years is
legal assets and the creditor may
have judgment agst the heir, with a
"cesset

Mortgages
Eq. of re
demption as
assets.

1. Atk. 123.
2 Vern. 61
1 Vern. 411.
2. Atk. 294
3. Atk. 441

2. Bl. 511.

Pow. M. 355.
1 Vern. 410.
1 Sal. 354

(Real Property)

Devastavit [illegible] [illegible] [illegible] [illegible]

[illegible] the [illegible] tenancy.

Cru. Di. 86 / 1 Vern. 61. And so these are [illegible] [illegible] [illegible] [illegible] when the [illegible] [illegible] [illegible] and the creditors of [illegible] cannot [illegible] [illegible] with the possession, but they must wait till it falls.

Cru. Di. 86 / Vernon 409 / 1 Vern. 411. The equity of redemption is assets for the payment of debts. And the debts

Cru. Di. 86 / 89 / 3 Ch. 10. 412 / 2 Atk. 13 in this case are to be paid "pari passu" the estate devised being but an equity and so equitable assets. Formerly the

Cru. Di. 86 / 86 / 1 Vern. 63 / 69. 101. distinction was taken: that if lands mortgaged were devised, to answer the payment of debts generally, the assets were equitable; but if the devise was made "sub. to" the assets were legal. The be-

ing

being supposed to take, gen! cred.rs in no manner interested. and the exor. is but a naked trustee in this case. It was once holden by Lord Keeper (Wright) that if lands are devised for the payment of simple contract debts and legacies, the debts should have no preference. because the will of the testator alone makes the land liable: and the devise expresses no preference: But Ld. Gould says this is contrary to other decisions and he thinks not law: for as Lord Nottingham used to say "a man ought to be just before he is charitable."

Mortgagee Eq. of Re.. [illegible] may claim it.

3 Atk. 112. 113. 181.

Pre. in Ch. 130. 2 Freem. 270. 2 Eq. C. a. 371.

2 Bl. C. 248. 1 Bro. 114. 1 Ch. R. 245

Though specialty debts have no priority where the fund is an equitable one: yet a second mortgagee shall have his debt out of the equity of redemption in preference to other creditors: tho' his interest is but an equity the legal estate being in the first mortgagee. For

Pre. Ch. 130. 1 Vern. 191.

Real Property

Mortgage. Eq. of Re. & who may claim it.

For his right is a bare right which Chancery will not take away. There is no instance in England in which an equity of redemption has been holden to be liable to an execution in the life time of the Mortgagor. [illegible] vs [illegible].

Pow. on M. 132. ~~2. Atk. [illegible]~~ 292 ~~[illegible]~~ [illegible] 15

It has been doubted in England whether there may be "*possessio fratris*" of an equity of redemption; and it is settled that there may be.

Pow. on M. 132. 1 Atk. 604. 606. Co Litt. 11. 14. 15. 1 Co. 104. Plow. 58. 8 Vin. 214.

In general, however, a person to be entitled to [illegible] equity to [illegible] must be entitled to the legal estate as heir or otherwise.

as to what [illegible] within the [illegible] of General Washington [illegible] Pow. on M. 133. [illegible]

[illegible] equitable owner [illegible] estate in the equity of redemption [illegible] he has [illegible] title to the equity of redemption. [illegible] a deed by Mortgagor's heir general brings his bill to redeem; the Mortgagee [illegible] a deed [illegible] entitling another person as special heir [illegible] is

[illegible] 1 Atk. 180.

good

not permitted to redeem at his peril, but must shew the estate is wasted. But if he who has the title to the equity of Redemption refuses to redeem; any other person interested may do it. E.g. The Mortgager being a Bankrupt, a majority of the creditors prevented the assignees from redeeming: here the other creditors were allowed to redeem.

Eq. of Re.n to whom may claim it.

Eq. Ca. Ab. [illegible] Barnard. 31.

So in common case, if the Mortgager's heir will redeem, the creditors cannot. Secus if the heir will not.

Eq. Ca. Ab. [illegible] Barnard. 31.

The right of redemption being a creature of equity, a Court of equity will always make it subservient to its own rules, (i.e.) to the furtherance of the ends of justice. Hence the rule that he who seeks equity must do equity. Therefore Chancery will decree a redemption in favour of the Mortgager or those claiming under him, either absolutely or under cer-

Eq. Ca. Ab. [illegible] 2 Vent. [illegible] 1 Ch. Ca. [illegible] Sid. 60.

tain

Mortgage

Eq. of Re- & who may claim it. certain conditions, as the justice of the case may require. If the Mortgagor applies to redeem on payment of the amount, he cannot set aside the mortgage at law. Now Chancery will not indulge him in this application: for if he would

2 Vern. 34. have equity, he must do equity: and he must therefore either proceed or abandon his bill before he attempts an avoidance of the Mortgage at law. And it is a general rule, that the interference of the Court of equity in favour of a Pltf. is always discretionary. For if a Mortgagor having previously

[illegible] attempted to avoid the Mortgage at law, afterwards applies to redeem, his application will not be granted unless he will allow the Mortgagee all his costs and charges in defending his title in the Court at law.

[illegible] The Mortgagee can never compel the Mortgagor to redeem before the day of payment

Mortgages
Eq. of Re.
Redemption may
claimed.

payment: yet in case of a hard bargain on the mortgagor he will be permitted in equity to redeem before the time. Q. Where by the increased value of the lands, the rents and profits will satisfy the debt &c. long before the day of payment.

If possession be obtained agt. the mortgagee by fraud, pending a suit or bill in redemption it must be restored before there can be any redemption.

Cov. Ch. 139.
Vin. Ab.
title "Mortg"
page 467.
2 Eq. c. a. 599.

If one mortgages "Black acre" to secure one loan, and afterwards "White acre" to secure another: one of which securities is insufficient and the other more than sufficient: he is not allowed in equity to redeem the one without the other. And the rule is not altered though the heir applies to redeem.

Cov. Ch. 139.
2 Vern. 287.
1 Vern. 29. 245.

1 Vern. 245.

So if one make two mortgages to one person and dies and his heir claiming by descent endeavours to defeat one

Cov. Ch. 139.
2 Vern. 140. 207.
1 Vern. 245.
1 Eq. C. a. 595.

and

Real Property

Mortgages

Eq. of Re. the heir may claim it.

[illegible] afterwards [illegible] the reversion of [illegible] fall between both or neither [illegible] in equity of the devise [illegible] the heir [illegible] equally [illegible] with the [illegible] [illegible] the case is different [illegible] of the [illegible] by purchase, for he is then

Ca. in Ch. 2 Ch. C. 83.

not the heir [illegible] stranger to the father's title [illegible] tenant in fee of Blackacre and [illegible] for life [illegible] remainder [illegible] on the back of "White acre", mortgages to B: [illegible] his heir may redeem the former and avoid the latter.

[illegible] purchaser of the mortgage [illegible] shall hold the lands agst. the mortgagor until he have paid [illegible] though he [illegible] [illegible] though he pay [illegible] because he is to have the advantage and disadvantage of his own bargain. But if one purchase in the mortgage [illegible] at a discount he will hold agst. subsequent incumbrancers [illegible] only to the amount which he

[illegible] 2 Ch. 23.

[illegible]

paid

paid to the Mortgagee although it was less than the sum for which the Mortgage was given. So where the heir, [illegible] purchases [illegible] brances the price of the latter is applied [illegible] of the former [illegible] equally to both either way. Ch. [illegible] however considering this to be an arbitrary rule. And where there are several incumbrances and the heir of the mortgagor purchases the first Mortgage: this first incumbrance shall not stand in the way of the subsequent incumbrancers for any more than the heir gave i.e. they may redeem of him by paying what he gave. May not the heir then redeem of the subsequent incumbrancer for the same price together with his debt? And it is a General Rule that if the heir trustee, executor or agent of the mortgagor purchase in Mortgage or debt, even the last case at a discount

Mortgage [illegible] may [illegible] claimed.

Pow. M. [illegible]
2 Vern. [illegible]
1 Vern. [illegible]
[illegible]
3 Sal. [illegible]

Pow. M. [illegible]
1 Vern. 49.
Salk. 155.
[illegible] 52.

Mortgage.
Eq. of Re. & who may claim it.

agreement that the Mortgagee [illegible] could even his [illegible], shall have the advantage of the Discount: for either of them is subject to the same equity as the Mortgagee whom he redeems.

Cas. in Ch. 2. 1 Vern. 49.

But if a stranger or even the Mortgagor's heir or trustee purchase an incumbrance at a discount, which he himself may hold: he shall be allowed the whole money due though he bought it for less: As where A. mortgages to B. C. and D. and D. purchase in B's Mortgage at a discount he shall hold the same agst. C. for the whole sum of B's Mortgage: for here he is not a mere volunteer: but purchases for his own security. But this does in vary the case in principle from the above case of a volunteer [illegible].

Vide the doctrine of "Tacking"

If the Mortgager is indebted to the Mortgagee otherwise than upon the Mortgage he will not be permitted to redeem on a bill for redemption, unless he pays both debts:

Pow. M. 113. &c. 1 Vern. 3. 5. 41. Salk. 84. 2 Eq. C. A. 603.

debts: he must do equity, it wants equity [illegible] if the mortgagee in this case bring a bill to foreclose the mortgage he cannot compel the mortgagor to pay both debts. The reason is, that equity cannot impose a condition on the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] conform to it; but they cannot [illegible] a different [illegible] defence. There [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] debts [illegible] however [illegible] [illegible].

Mortgagee [illegible] & who may claim it.

[illegible]

[illegible]

And the mortgagor's heir cannot redeem [illegible] without paying [illegible] debt [illegible] to the mortgagee by bond as well as that secured by mortgage. For the heir after the condition will be in the present and the equity is [illegible] for paying bond debts. By this means that circuity of action which the law abhors is avoided: and besides he must do equity, as his ancestor must

[illegible]

Cas. in Ch. 1. 3. 1.
1 Vern. [illegible]
2 Ch. C. 104.
[illegible]
1. Veo [illegible]
[illegible]

case

Real Property

[illegible]
[illegible] 1 P. Ws.
2. who may
claim it.

[illegible] the [illegible] would be discharged the specialty creditors, out of the Rents & profits.

Cow. Ms. 129.
2 Vern. 464
Pr. Ch. 312.
3 Sal. 240.

So if a lease for years is mortgaged and then a new debt contracted by the mortgagor on bond: the Exor. of the [illegible] to redeem, must pay both: the equity of redemption is assets in the hands of the Exor. [illegible] moreover the rule would be the same if the subsequent debt were by simple contract: because the Exor. is bound by such debts, although the heir would not be. But if there are several mortgages or other incumbrances, and the first incumbrancer claims a bond debt also: it will be postponed to all the real incumbrances, whether by mortgage judgment or statute: for a bond is not considered as having a lien: but a mere personal charge: nor has it the same equity agt. an incumbrancer as agt. the heir. And since the statute agt. "Fraudulent Devises" 3 and 4 Wm. & M.

Cow Ms. 148.
2 Atk. 52.
3 Sal. 241.
Ves. 84
2 Atk. 555.
3 Sal. 54.

Cow Ms. 145.
Pr. Ch. 511.
Eq. C. a. 325.

the

Real Property

Mortgage of [illegible] [illegible] claim it.

the owner of the equity of redemption cannot possess without paying the [illegible] debt as well as the Mortgage. [illegible] [illegible] [illegible] that [illegible] in the mortgage to be an affirmance of the Com[illegible]: because such [illegible] is [illegible] [illegible] — If the assignee of a Mortgage for a bond debt he has the same equity agt. the Mortgagor and his heirs as the Mortgagee himself would have in a [illegible] to Redeem.

[illegible] 353. 2 Ch. R. 33.

If the owner [illegible] in land were [illegible]bent and then a Mortgage made: the Mortgagee would have the same equity as above as to both debts.

[illegible] 2 Ch. R. [illegible]

In these cases, i.e. where the Mortgagor or his representative [illegible] debt in equity [illegible] to redeem the land unless by the debt upon the penalty of the principal and interest paid it: the [illegible] of equity or Chancery will not interfere: [illegible] in [illegible] the [illegible]

[illegible] [illegible] [illegible] 578. 3 Bl. 132. [illegible] 135.

[illegible]

Real Property

[illegible] contract for the
parties and [illegible] that the mortgagee [illegible]
[illegible] the property [illegible]
[illegible]
[illegible]
[illegible]
[illegible] the [illegible]
mortgagee to [illegible]
But in all these cases where there is a [illegible]
[illegible] to the [illegible] the
mortgagee [illegible] whom [illegible]
[illegible]
[illegible] concealing
[illegible]
of the mortgage [illegible] only) & the
mortgagee [illegible]
[illegible] latter [illegible]
[illegible] settlement
[illegible] to the mortgagee to [illegible]
[illegible] the latter [illegible] but
these [illegible] settlement, a
[illegible] practised

the wife's father the mortgagee shall not be entitled to the payment of the money on condition of redeeming the mortgage. If part of the mortgage money is paid [illegible] [illegible] the [illegible] over the mortgagee [illegible] [illegible] from the land [illegible] [illegible] the [illegible]

[illegible]

But a purchaser of the equity [illegible] redemption [illegible] may become [illegible] without paying the land [illegible] the [illegible] before: he having no direct interest in the land [illegible] [illegible] [illegible] his claim [illegible] is higher than [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]: but the [illegible] [illegible] [illegible] [illegible] the mortgagor [illegible] [illegible] [illegible] [illegible] the second [illegible] the [illegible] cannot [illegible] in the above case, without paying the land debt: because the estate would then be affects in his hands to pay such [illegible] [illegible] of [illegible] by the mortgagee after forfeiture which of itself

Cro. Eliz. 128.
[illegible]

Pow. Mo. [illegible]

Mortgages
Eq. of Re-
demption
abandoned.

itself and absolutely a bar to the mortgagor's right of redemption: such interest not being embraced by the Stat. of Limitations: because the possession of the Mortgagee is not adverse to the right of the Mortgagor and therefore 20 years possession by the Mortgagee shall not bar the Mortgagor's right of redemption. But still the Court of Chancery in bar "imitates" the Stat. of Limitations and considers 20 years (as in Eject. by analogy) possession by the Mortgagee after forfeiture as "prima facie" a bar to the Mortgagor's right. Presuming from the lapse of time that the Mortgagor has abandoned his right of redemption. So also the difficulty of making up the account is one additional reason. This presumption however may be removed by such circumstances as account for the delay of redemption, as by the existence of infancy,

Str. 21. Sect.
Stat. Ch. 254.
Pow. M. 148.
100.
1 Ch. Ca. 215.
2 Ch. Ca. 284.
2 Atk. 333.
Eq. A. 3.

Pow. M. 97.
22-4.

Pow. M. 99.
100. 151.
2 Vern. 340.
9 years last
cited
Ves. Jr. 62. 194.

Mortgage
Eq. of Re.
Who may claim it.

of those disabilities in the party entitled as occur within the saving of the stat. of Limitations. viz. Infancy, Coverture, Insanity, Imprisonment, Beyond seas at the time of the right accruing. It may also be removed by other circumstances: as by there being the relation of the Mortgagor & Mortgagee recognized by the Mortgagee within the above period: viz if an account had been made up within 20 years in England or 15 in Conn. or that the Mortgagee had accepted interest within that time. And the time allowed for redemption after the disability is removed is said to be the same in equity as that prescribed in the statute of limitations for making entry, viz 20 years in England and 15 in Conn. However if a fraud has been practised upon the Mortgagor to prevent redemption no length of time will bar his right

Pow. Mo. 354.
2 Atk. 333.
2 Vern. 418.

Pow. Mo. 417.
3. P. Wm. 287.

Pow. Mo. 5.
Salk. 63.

Real Property

Mortgages by Stat. Who may claim it

notice, &c. The deed is made absolute by Fraud or Condition annexed to it that the redemption should be with Mortgagees own money."

But if the 20 years (the Stat.) have begun to run the subsequent intervention of any of the Stat. disabilities [illegible] in the person having the right of redemption will not prevent the presumption &c. Forfeiture accrues and the Mortgagee takes possession while the owner of the equity is under no disability. Here the Stat. begins to run. Afterwards the equity descends to an infant. Here as the Stat. has once begun to operate the subsequent disability of infancy shall not interrupt its progress. The 20 years will be a presumptive bar unless the disability existed at the time when the forfeiture accrued: because if it did not exist at that time the Stat. has once begun to run and the Stat. provides tho'

Co. Lit. 247.
2 Vern. 107.
[illegible] 215.
Gilb. Tch. on
[illegible] 183.
1 Atk. 235.

Case

those disabilities only which exist at the time when the right accrued.

Mortgages
Tr. of Title
(Redemption)
claim &c.

But where it is agreed that the mortgagee shall take possession and hold it till he is satisfied, length of time is no bar: for the mortgagee's possession is no evidence of the mortgagor's abandonment; and even 60 years possession under these circumstances, have been held to be no bar, this seems to be in substance a "Vivum Vadium".

Pow. on M. 416.
1 Vern. 418.

So in case of a "Welsh Mortgage" viz. Where the money is to be paid on a given day in a certain year, or on the same day in any following year: length of the mortgagee's possession is no bar even at law. Here there is no assistance needed from equity: for the mortgagor or his heirs may redeem at com. law in any year, as the estate is never forfeited; and possession in the mortgagee without forfeiture is no [illegible] bar.

Pow. on M. [illegible]
4 Cru. 57.
1 Eq. Ca. 91.
2 Vern. 191.
2 Cox 136.
4 Bro. C.C. 149

And

Mortgage.
[illegible]
[illegible]
claim it.

And it is a general rule that any act of the Mortgagee by which he has recognized the Mortgagor's right of redemption within 20 years [illegible] will prevent the bar. Ex. If the Mortgagee should receive the money in case the Mortgage should be redeemed or if he should have filed a bill to foreclose within 20 years or if he should have applied or agreed within that time to purchase the equity of redemption &c. all these are sufficient recognitions of the Mortgagor's right & will of course prevent the presumptive bar.

1 Pow. M. 388a.
1 Br. P.C. 279.
5 Ves. 535.
2 Eq. Ca. Ab. 95.
1 Br. P.C. 194.

And the possession for any length of time is no bar if in a bill to redeem the Mortgagee admits the right or does not insist upon the bar.

Pow. M. 660.
2 P. W. 140.

And where the Mortgagor continues in possession no lapse of time can operate as a bar because possession alone affords the presumption of abandonment: which

Pow. M. 1004.

Real Property

Mortgage [illegible] [illegible]

which cannot be unless done with the Mortgagee's consent, or by the decree.

In England the doctrine of tacking prevails as a charge between the Mortgagees of the equity of redemption, where one is guilty of a fraud or concealing prior incumbrances, and gives a [illegible] legal estate to the Mortgagee — In this case the second [illegible] of another party becomes the second Mortgagee, but the ultimate estate remains in equity.

There is no such Doctrine here.

A subsequent mortgagee of the same person is considered as the assignee of having a right as [illegible] of the equity of redemption [illegible] [illegible] [illegible] and [illegible] the first title to the same as the assigned.

[illegible] 153. [illegible] 130.

Real Property

Mortgage

Of the Owners of [illegible]

(Mortgagees)

[illegible] The interest of the Mortgagee being that of the Mortgagor's [illegible]; and a [illegible] for Conveyance. Formerly it was holden that the words of the Conveyance [illegible] to a Mortgagee in fee [illegible] would not pass an estate unless the words [illegible]: but that the [illegible] would have it would pass an estate for life only. For the [illegible] interest was [illegible] in fee simple. and the words are not [illegible] to carry a fee. It was indeed questioned whether they would carry even an estate for life. But now [illegible] the Mortgagee's interest being [illegible] a [illegible] only the whole fee would pass under such words.

[illegible] But on the other hand the interest of the Mortgagee will regularly [illegible]

Mortgages

Devise of Interest Mortgaged

A devise under the words "lands, tenements and hereditaments" &c. of the Mortgagee's lands or other property, answering the description, his Mortgage may pass by such devise, because though the lands are [illegible] to [illegible] a chattel interest, the intention is manifest and that governs:

See [illegible] Barnard. [illegible] [illegible]

If the Mortgagee devise his interest the devisee must have a decree for foreclosure ag^t the Mortgagor and his heirs. In such case the Mortgagee's heir need not be made a party to the bill. For he has no interest, it being devised away from him. It is said that a devise by the mortgagee of money due on a Mortgage does not carry the interest [illegible] the testator's death. [illegible] devised to wife by Mortgagee [illegible] but it is said [illegible] to carry [illegible] [illegible] certain [illegible] with [illegible] the [illegible] to be con-cerned

[illegible] Ch. C. 82 [illegible]

[illegible] [illegible]

Real Property

Mortgage.

Power of lessee mortgaged — inconsistent more that the mere entire Cowell [illegible] and prohibit the principle in its full extent.

It has been recently a question by some —

[illegible] whether the mortgagee's interest could pass under a devise and a limited [illegible] according to the Stat. of Frauds in England or our Stat. of Devises. But that [illegible] would think there is no reason to doubt but that it will pass although it has never been expressly decided. "Lands and tenements" [illegible] are the words used in the Eng.

[illegible] Stat. [illegible] Stat. [illegible] are "Property" in ours. [illegible] Hence the interests of the mortgagee being a mere chattel [illegible] [illegible] because [illegible] of the estate [illegible] and therefore [illegible] [illegible] [illegible] [illegible] [illegible] is not [illegible] by these [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the Statute [illegible]

Real Property

Mortgage.

Of Priority of successive Incumbrances of Existing Prior and subsequent Incumbrances:

If there are several mortgages or incumbrances on the same land or estate. priority takes place according to the date of the respective liens: the first preferred to the second and the second to the third &c. and the subsequent mortgagee stands in the same situation with judgments statutes and recognizances encumbering the land: "Qui prior est in tempore potior est in jure"

Pow. Mo. 181.
1. Br. C.C. 190. 65.
2. Vern. 594.
1. Eq. C. A. 147.
2. Vern. 81.
2. Ves. 477.
Talb. 68.
Barnard. 407.

Pow. Mo. 190. 284.

But the priority is under some circumstances forfeited: and a prior incumbrance is postponed to a subsequent one. This happens 1st When the prior incumbrancer has been guilty of any fraud or neglect affecting the interests of the latter. 2d When the subsequent incumbrancer purchases in the

Pow. Mo. 15[illegible]8.
2. Atk. 49.
3. P. W. 280
1. Ves. 365
1 Str. [illegible]5.

Pow. Mo. 100.
2. Vern. 187. 8.
2. Ves. 573.
Eq. [illegible] 320.

Real Property

Mortgage

Priority of the 2nd Mortgage — the legal estate & postpone his own.

2. If the first mortgagee by fraud or artifice, or merely if mortgagee is privy [illegible] to induce another to lend money on the same premises, the latter gains priority. 3. The first mortgagee is bound when the mortgagor agrees to give a second mortgage to [illegible] and waives the production of his own.

Ves. Jr. 1804.
[illegible] 101
3 Atk. 49

Powell [illegible]
[illegible] 1825
re title
"Continued"

or if the first mortgagee is a witness to the second mortgage deed, and knowing the contents &c. and informed that the second mortgagee will gain more [illegible] by some other, that he ought to be presumed to know the contents: and that therefore the first mortgagee in this case would [illegible] his priority unless he proved the contrary. But this Rule seems not to be law: and we hope the decisions of Lord Hardwicke and Thurlow [illegible]

Powell 1804
1 [illegible] 832

[illegible]
"[illegible] 35"

Mortgage.

as if the first mortgagee is guilty of any neglect in consequence of which a third person is encouraged to advance money on the same security, the second mortgagee will be preferred. If the first mortgagee in England leave the title deeds in the possession of the mortgagor who makes a second mortgage and delivers them to the second mortgagee, here the maxim where one of two innocent persons must suffer by the neglect of one of them it applies. Leaving the title deeds in England creates a lien on the land which will be enforced in equity by compelling a sale.

One who is about to lend money on a mortgage security applies to a known mortgagee to know if he has a mortgage of the land and the latter denies the fact he loses his priority provided the second mortgagee at the

Priority of Incumbrances & of tacking.

Pow. on M. 874.
Sec. 729
1 Vern. [illegible]
3 P.W. 287
1 Atk. [illegible]
[illegible]
[illegible] 384

2 Ath. [illegible]

1 Br. Ch. 269.
2 [illegible] 146.

Pow. on M. 182.
2 Vern. 554

time

Real Property

Mortgage

Priority of Incumbr. & Tacking

time of applying for information the being that the instrument lends money to the mortgagor.

2d. Though where several equitable interests affect the same estate they have priority according to the periods at which they commenced: yet there are several classes of cases in which this rule admits of exception, & where one of the incumbrancers purchases in the legal title and in this case he may make of it all the advantages that the law will give. He cannot be more protected than equity with it agt. the other incumbrancers; for the maxim here is "where the equity is equal the legal title must prevail."

Pow. [illegible] [illegible]

3. Suppose there are three or more mortgagees: the third having lent his money upon valuable consideration and without notice of the intervening incumbrance, may by procuring the first, the legal estate obtain

See [illegible]
2 [illegible] 908.
1 [illegible]
2 Vern. 337.
Pr. Ch. 260.
1 [illegible] 1878.
2 [illegible] 373
1 [illegible] 241

Real Property

mortgage
Priority of Incumbrances, & Tacking

a priority to the other. This manoeuvring is called "tacking". On the one side there is [illegible] and equitable title, and on the other only an equitable title. The legal estate is called by one of the Chancellors "tabula in naufragio": because any one of the incumbrancers may purchase it [illegible]. The rule supposes the purchaser not to have known of the intervening incumbrance when he contracted his own debt: for if he knew of it he cannot obtain a priority by purchasing in the legal estate. For here the equity would not be equal.

[illegible] 2 Ves. 24. 3 Atk. 132. 2 Vern. 97.

But notice at the time of taking the mortgage is not material, [illegible] notice at the time of purchasing in the prior incumbrances do not affect his right.

[illegible] 1 P. Wms. [illegible] 2 Vern. 188. 2 Ves. 573. 2 Vern. 188.

A subsequent incumbrancer may tack in this way, and [illegible] the prior

[illegible] 2 Vern. [illegible]

mortgage

Real Property

[illegible]

[illegible] the legal estate [illegible] to the legal [illegible] the [illegible] of the [illegible] the [illegible] of the [illegible] by [illegible] the [illegible] the [illegible] of [illegible] in [illegible]. To the [illegible] of the [illegible] of their [illegible] where one of the [illegible] equity to call for the legal estate [illegible] a title the equity to the legal estate) though [illegible] [illegible] estate [illegible] and is

[illegible]

Mortgage
Priority of
Incumbrances
& Tacking

bound to pay first, though it is not assigned nor paid off: till he is preferred: for equity considers as done what ought to be done

But if the prior legal incumbrancer attach upon part only of the lands comprised in the latter mortgage, it will preclude the latter as to that part only. E.g. A seised of 10 acres mortgages 5 to B. then the whole to C. and then the whole to D. D purchases in 1st Mortgage of 5 acres, and tho' he can hold till both debts be paid but his interest in the remaining 5 acres will be postponed to C. But if the first incumbrance bought in contains more than the third Mortgage: the third Mortgagee shall hold the whole till both debts are paid. E.g. The two first Mortgages are of 10 acres the third of 5 only: then the third Mortgagee by buying the first shall hold the whole as tacked.

[illegible]
2 Vent. 337
1 Eq. C. Ab.

[illegible]
[illegible]
[illegible]

Real Property

Mortgage.

Benefit of incumbrance & Tacking.

Pow. Mort. 211. 1 Vern. 184. 2 Vern. 318. 2 Vern. 33. 59. [illegible]

So if an outstanding Mortgage be used as a prior subsisting incumbrance, whether third mortgagee will be able to claim the benefit use of it [illegible] priority as above. By a satisfied incumbrance is meant one which has been discharged and after which there is no other than equitable right; as where the debt is paid by the Mortgagor after forfeiture which payment does not divest the legal estate at law. Now, obtaining such satisfied incumbrance will in Chancery protect the subsequent incumbrancer, because it carries with it the legal estate, which is the ground principle in the doctrine of tacking. The last rule holds though no consideration were paid for the prior incumbrance; for having possession of the prior deed &c is sufficient.

[illegible] 35. 323. [illegible]

It has been determined in the Courts [illegible] in rule contradictions, that altho' the prior incumbrance be obtained by

Pow. Mort. 215. [illegible]

Covenant

Real Property

Mortgages
Priority of [illegible] & [illegible]

Chancellor Kent [illegible] still the subsequent incumbrancer gains a priority, as where the subsequent mortgagee [illegible] without [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] of this [illegible] [illegible] [illegible] thing is justly and well founded: For [illegible] to be a rule "that no man should ever acquire a right or any preference or advantage by the exercise or practice of fraud: but more particularly in Chancery where when fraud comes in at the door the judge leaps out at the window: and where he who seeks equity must do equity."

[illegible] judicial [illegible]

But where the prior incumbrance is deficient in legal requisite it will give no priority to the subsequent mortgagee: because it does not carry the legal estate. E.g. A judgment not docketed as required by the statute [illegible]

[illegible]

[illegible] Tacking &c.

Mortgages

Priority of Incumbrances & Tacking

Whenever there is an incumbrance [illegible] [illegible] the [illegible] does not attach upon the estate. A subsequent mortgagee can tack no other, than the legal estate to his mortgage. As if mortgage be made to A. B. & C. and [illegible] & [illegible] purchases A's first mortgage gains thereby priority to B. & C. but he cannot purchase C's mortgage and thereby gain priority to B. and C. for B's mortgage does not carry the legal estate which he must have to entitle him to priority.

112–113.
2 Ves. 125

So if the subsequent incumbrancer have not equal equity with the incumbrancer he will not gain priority. So a creditor by judgment or statute cannot by purchasing a prior mortgage gain a priority to intermediate mortgagees. For he is in no sense a purchaser as a mortgagee would be: He has only a general lien. He does not lend his money on the credit of the land

Pow. M. 291. &c
2 P. Wm. 491.
2 Ves. 662
Pr. Ch. 494.
1 Eq. Ca. Ab. 325. 310
2 Atk. 324.
Pow. M. 2?6.

as,

Mortgages

as a pledge and so has not equal [illegible] to — A prior mortgage purchased in trust gives no priority unless it is forfeited, (i.e.) [illegible] subsists, at the time of the purchase it must be forfeited and not at the time of the purchaser: for before forfeiture the estate remains as a term and defeasible upon the event of the mortgagor's paying the money so that the legal estate may be divested by him. The estate is not absolute in a m'ee, equity interposes until after forfeiture.

Priority of Incumbces. & Tacking

Pow. M. 228 ?.
2 Vern 155.

So a prior incumbrancer having the legal estate, may tack a subsequent sum advanced by him upon the same security, to his mortgage and gain priority as to the last sum agt. mesne incumbrancer, i.e. bona fide purchaser, if he had no notice of the mesne incumbrance when he advanced the second sum, for otherwise he would have less equity for the last loan than the second

Pow. M. 229.
1 Ch. C. 119.
2 Ch. C. 20.
2 Atk. 352.
1 P.W. 494
2 Ves. 662.

Mortgage

Real Property

Mortgages

Priority of Incumbr. & Tacking

Mortgages. E.g. John Stile, mortgages to A. & then to B. — B. without notice of the first mortgage lends more money upon the same security, having bought A's mortgage then B. shall hold for the two sums agst C. So if there be two Mortgagees, and the first purchases a subsequent [illegible] taking a judgment for the security he may tack this to his mortgage.

Pow. M. 222
3 Atk. 356
1 P. W. 394
2 Ves 662

But if the first Mortgagee in the last case has notice of an intervening mortgage at the time of lending more money upon the same security he cannot tack agst the second mortgagee: for here again the equity is not equal.

Pow. M. 227.
1 Ch. 226
2 Eq. Ca. 594.

The same rule holds where the subsequent Mortgagee purchases in the legal estate to protect his own: he cannot tack if he had notice (ut supra).

Pow. M. 231.
3 Atk. 238.
2 Ch. C. 35
1 Ch. C. 119

There is however an exception to this general rule as to notice where the prior conveyance proves defective. Here a subsequent

Pow. M. 304.
232 &
3 Bro. 644.

Mortgages

Priority of Incumbr. & Tacking

subsequent mortgagee with notice shall have priority. E.g. Mortgage to A. by defective conveyance then to B. who had notice ut supra: Now it is said that B. shall, altho' he had notice &c still have priority over the defective conveyance: for the legal title is in B. "ab initio". But Jud. Gould says he is not ready to admit the propriety of this last principle: because it is contrary to all analogy in equity: for though the Conveyance be defective in law yet it conveys a good title in equity. And it is very clear that the second mortgagee is defective as to his equity. But a defective ~~conveyance~~ security will be enforced in equity against creditors who have only general and not specific liens on the land: as judgment creditors. They did not originally take the land for security: and they come in under the mortgagor

Pr. Ch. 354.
3. Bro. 64.
2. P. W. 491.
1. Eq. ca. 320.
2 Vern. 564.
Salk. 449.

who

Real Property

Mortgages,

Security of incumbered & Tacking

who is bound in conscience to make the conveyance [illegible] They are therefore postponed to the 1st mortgagee though the conveyance is defective for they have not equal equity.

If the first mortgage deed contain a clause making the land a security for future loans: such loans will have relation to and be taken a part of the original contract. Therefore they will be preferred to an intervening mortgage if the first mortgagee at the time of making the subsequent loan had no notice. So the first mortgagee will be preferred though he had notice, when he made another loan of the second mortgagee, but notice of the clause

[illegible] 30.
[illegible] 85
7 [illegible] 51.

Qu. if neither had notice which would be preferred? 1st would exclude the 2nd because he has equal equity and because he has legal title [illegible] where the equity

[illegible]

(Real Property)

Mortgages

Equity of Redemption & Tacking

In the foregoing case where notice of the title [illegible] of third persons [illegible] the rule of priority: if notice is charged by one party it must be positively denied by the other in his answer, otherwise it will be taken pro confesso & he will be taken to have had notice.

Pow. Mo. 253. [illegible] 2 Vent 361 [illegible]

But if these [illegible] facts are charged as amounting to notice they cannot be [illegible] if notice is denied in the answer and proved by one witness only the bill will be dismissed: because there is not sufficient evidence there being only oath agt oath. The case is otherwise however if there are [illegible] corroborating the evidence of the witness.

Pow Mo. 252. 2 Ves 450.

Pow Mo 254. 2 Ves 60. 95. [illegible]

In the last case if the [illegible] circumstances are not satisfactory [illegible] alone is directed as a [illegible] of law. But if [illegible] such circumstances [illegible] the [illegible] without any [illegible] notice in law.

[illegible]

Mortgages Cruise's Digest

According to the foregoing rule, the right of a subsequent encumbrancer depends upon the want of notice in him and would be protected by equity, by the legal estate. It will therefore be necessary to consider what amounts to Notice.

Of Notice

Cru. Di. 23 Notice is of two kinds, viz. Actual and Presumptive.

1. One is said to have actual notice, Cru. Di. 28 when he is party to a deed &c. which shows the fact, or has notice regularly served upon him &c.

But a flying report is not considered Cru. Di. 28 Sugden 494 as giving actual notice. E.g. A being about to lend money on a mortgage, a stranger to the contract says to him that B has a mortgage of the premises. A is not bound to regard this.

Real Property

Mortgage
Notice:
Presumptive

II Presumptive notice is a conclusion of law that one has notice of a fact tho' there is no proof of actual notice

It is a general rule, that when one cannot make a title but by a deed or instrument which discloses a material fact, he is presumed to have notice of the fact. Ex. A. conveys to B. reserving a power of revocation: B. conveys to C. Here C. is deemed to have notice of the power of revocation. So if A. devise land to be subject to legacies, and A.'s devisee mortgage the land to B. B. is deemed to have notice that the land is charged with legacies, because he is guilty of gross neglect if he do not examine into the title of such mortgagor. There is an exception to this rule in case of an assignment or sale of the testator's personal property by an executor. In this case, the assignee or purchaser is not presumed to have notice of the trusts, nor is he bound to examine the

Sugd. [illegible]
2 Fonb. [illegible]
2 Pow. on M. 562.
2 [illegible] 6[illegible]
Gilb. Eq. R. [illegible]

1 Ves. [illegible]

[illegible]
[illegible]
[illegible]
2 P. Wms. [illegible]
2 Pow. on M. [illegible]

the

Mortgage

Real Property.

Notice [illegible] the contents as placed in the [illegible] form of disposition, or the deeds which he will be said to have. The recitals are not notice in the case of a purchaser from an executor of [illegible] with the knowledge; because he may have

[illegible] ascertained that such by resorting to the [illegible] and which that can be given the [illegible] state the notice. This last would seem to be the true rule.

If a deed creating a prior charge, whereas an estate is delivered among

[illegible] other papers to an intended purchaser, he is presumed to have notice of the prior charge. If a mortgage is made by indenture and the mortgagee's duplicate is delivered (among other papers) to a subsequent mortgagee before the lands are conveyed, then the duplicate will be considered as affording sufficient notice to the subsequent mortgagee of a prior existing mortgage.

(Mortgages) [illegible] [illegible]

or a recorded [illegible] stating or necessarily implying that there is an incumbrance on the [illegible] [illegible] [illegible] is [illegible] notice of the [illegible] to the person who has had [illegible] of the [illegible] [illegible].

Pow. M. 569. [illegible]

· [illegible] [illegible] a rule that [illegible] and [illegible] sufficient to put the party charged with notice upon an enquiry are deemed notice in equity. Ex. Where two infants entitled to an estate found a person in possession when they came of age and received rent 10 years afterwards, it was holden to be notice [illegible] by their Guardian and that they had ratified it. Hence it would seem that possession by a prior mortgagee would be sufficient notice of an incumbrance to a subsequent one.

Pow. M. 570.
1 Atk. 190.
392.

· [illegible] [illegible] [illegible] [illegible] that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible]

Real Contracts

Mortgages
Tacking
Presumptive

where about to lend. The presumption in such [illegible] case [illegible] of a present transaction [illegible] the notice of the agent shall be deemed notice to the principal.

Eq. R. [illegible]
[illegible]

The same rule holds where one person is agent for both parties [illegible] the case in [illegible]

But it is [illegible] to be observed that one [illegible], a [illegible] agent [illegible] by [illegible] to a contract [illegible] for the latter without authority.

[illegible]
2 Vern. [illegible]
[illegible]

Cow. Ch. 289-1
Talb. 65
2 Vern. 599.

The notice of an act of Bankruptcy [illegible] shall not be presumed [illegible] notwithstanding, to prevent them from tacking the legal estate because they have not of course means to know of the bankruptcy. So if one lend another money after the borrower has committed an act of Bankruptcy and take a mortgage he may notwithstanding tack it to a prior incumbrance. A subsequent mortgagee may [illegible]

tack [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] subsequent encumbrancer.

In England it is holden that the registry of a subsequent mortgage is [illegible]

[illegible]

ought

Real Property (?)

Mortgage

[illegible] [illegible] the [illegible] [illegible] that the registering of the prior mortgage is the [illegible]

[illegible] [illegible] a [illegible] mortgagee [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] If a subsequent Mortge. [illegible] notice of a prior mortgage, not registered, will not gain priority by registering his own deed, as the Statute requiring Mortgages to be registered intended to give.

Pow. Mo. 247. Prec. ch. 473. 1 Ves. 64. 2 Atk. 49. 2 Eq. Ab. 685. 2 Atk. 275.

Yet a subsequent mortgagee registered is preferred to a prior one not registered if the subsequent mortgagee had not notice. A purchaser for a valuable consideration shall hold agt. a prior voluntary settlement though he had express notice. This is by the Stat. 27 Eliza. c. 4 which however is in affirmance of the Com. Law, and the same rule extends to Mortgages.

Pow. Mo. 28. 287. 1 Ves. 64. 3 Atk. 64. 1 Br. C. C. 45. 2 Atk. 275.

Pow. Mo. 277. 2 Eq. Ca. 124. 280. 7 East 71.

If one purchase with notice of a prior

incumbrance

[illegible]

[illegible]

[illegible]

[illegible] of the grantor [illegible]

grantee [illegible], the latter [illegible]

[illegible] can

[illegible] have

[illegible]

If a person purchase for valuable

consideration and without notice of

[illegible]

[illegible] without notice [illegible]

[illegible] not affected

[illegible] notice [illegible]

E who is without notice [illegible]

[illegible] with notice [illegible] protected [illegible]

[illegible] purchasing [illegible]

[illegible] had no notice

(Mort. Mortgage)

Mortgages

To whom the Mortgage money should on a forfeited mortgage belong on his death.

Formerly the question much was entertained whether the money due should be paid to the heir or to the executor, the mortgage being forfeited. And this distinction was taken. If a bond was given and

Com. on [illegible] whether the money due should be paid to the heir or to the executor, the mortgage being forfeited.

Pow. on M. 297 &c. 1 Ch. Ca. 285. 1 Eq. [illegible] 66. 1 Vern. 170. if the condition of redemption was payment to the mortgagee & his executors, administrators, excluding the heir, the debt was to be decreed to the executor: But if on a mortgage in fee there was no bond or covenant; and the condition of redemption was payment to the heir or executor or heirs, and [illegible] the money was decreed to the heir.

Pow. on M. 298 [illegible] 2 Ch. Ca. 283. [illegible] But since Thornborough v. Baker it has been settled the contract a personal thing so held in all cases, that the money belongs to the executor, the interest being personal: unless the mortgagee be a

was collateral

Trust Property

Mortgages

[illegible] a [illegible] to the [illegible] —
[illegible]
[illegible]
and taken actual possession; he then
not be [illegible] an election to [illegible]
[illegible] And even though
he has obtained a release of the equity
of redemption [illegible]
[illegible] bound to be considered
[illegible] for the purposes of the pre-
sent [illegible]
[illegible] 1st Because the Mortgagee [illegible]
[illegible] 2nd [illegible]
[illegible] the Mortgagee [illegible]
[illegible] therefore the [illegible]
[illegible]

[illegible] payable
to the heirs or executors, the Mortgagee
[illegible] at liberty to [illegible]
[illegible] either [illegible] election for the
[illegible] performance of the [illegible]
[illegible]

Where mortgee [illegible] in a [illegible] after his death.

Cas. in Ch. [illegible]

Cas. in Ch. [illegible]

Mortgage

Real Property

Mortgage

[illegible]

mortgagee. But if he has been brought [illegible]
[illegible] it comes at just [illegible]
[illegible] to the executor.

The money being paid on a forfeited
mortgage to the executor or administrator
only, the heir is compellable to recon-
vey to the next of kin. For the money
had only a trustee and here he has
a forfeited [illegible] though the mortga-
gee [illegible] before forfeiture, in
which case [illegible] money from the
[illegible] to either the heir or executor [illegible]
the [illegible] yet it will belong in Equity
to the executor. If there are several
executors any one of them may re-
ceive the money and his discharge will
be good. The bequest of a specific legacy
by the mortgagee to the executor does not
bar his right to the money. [illegible]

If the mortgagee die intestate the
interest belongs to his administrator
and the heir [illegible] always be come
trustee

[illegible] Ch. 305.
[illegible] 318.

[illegible] Ch. 308.

[illegible] Ch. 305.
[illegible] 18.

[illegible] Ch. 308.
[illegible] 93.

Mortgages

[illegible] bound to convey the land to heirs though there are no debts. The same rule applies where there is an [illegible] by which the legal title and the possession descend to the heirs.

If [illegible] [illegible] a [illegible] mortg. on his estate

Though the [illegible] are [illegible] to the heir of the mortgagee the purchase [illegible] [illegible] [illegible] the [illegible] [illegible] to [illegible] [illegible] the estate of the mortgagee to the heirs of the mortgagor. The [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Part of the [illegible] of the mortgagee apprehend the estate to be real & will be so considered until his death. Ex. If a purchaser under the mortgagee [illegible] [illegible] [illegible] [illegible] of the [illegible] [illegible] [illegible] on his death would go as the estate [illegible] to be purchased would have gone. [illegible] [illegible] [illegible] the way to "realize" [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] real estate [illegible] of the mortgagee. [illegible] [illegible] [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Mortgages

[illegible] [illegible] a [illegible]. [illegible]
[illegible] of the [illegible] will be
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] a [illegible] [illegible]
[illegible] and [illegible]

[illegible] of money [illegible] by [illegible]
[illegible] [illegible] to the [illegible]
[illegible] in land [illegible] [illegible] the [illegible]
of [illegible] [illegible] by the [illegible]
[illegible] [illegible] [illegible] [illegible] the
[illegible] [illegible] take place: and the [illegible]
[illegible]. [illegible] the [illegible] of chancery
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] them and
take a joint mortgage they are not un[illegible]
[illegible] [illegible] a [illegible] [illegible]
chancery [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] and therefore there
will be no jus accrescendi or right of
survivorship of the mortgage. This is pre-
sumed to be the intention of the parties

[illegible] 58.
[illegible] 58.
[illegible] 58.
[illegible] 58.
[illegible]
[illegible] 37

as if they [illegible] the Mortgage into them &c. Does the same intention is presumed.

Of the Interest of the Mortgagor's wife after his death.

A wife by joining with her Husband in a fine may bar her right of dower: so in the same way she may encumber it with a Mortgage: though her right of dower is paramount to that of a Mortgagee under a Mortgage made by the Husband alone during coverture. A Jointress of lands mortgaged may redeem lies of lands mortgaged before the jointure made: and in this case she shall hold over till she or her representatives shall be repaid the whole with interest. For she has a right to hold the land disencumbered (&c) where she has not joined in encumbering it. This rule applies to cases in which (as above stated) the jointure is after the Mortgage.

Pow. M. 311
1 Vern. 294.

Finch 277
Pow. M. 312
313.

Pow. M. 213.
214.
1 Ch. C. 271.
2 Bac. 228.
1 Vern. 213

Pow. M. 305
306
1 Vern. 191.

[illegible]

[illegible] Mortgagee &c of the jointure is [illegible] to [illegible] the Mortgagee. The [illegible] [illegible] settlement not [illegible] [illegible] only the wife [illegible]. If [illegible] the articles made before marriage, the husband mortgages the land to one who has no notice: then after the death of the husband the [illegible] would be entitled to [illegible]. But if a jointress after marriage joins in a fine and mortgage the land she shall [illegible] her [illegible] [illegible] of the principal and though she [illegible] must keep down the interest during her estate [illegible] in proportion — If the first Mortgagee lend more money on his old security without notice of an intervening jointure he shall hold in it agt the jointress: the legal estate being in him and he having equal equity.

Eq. Ab. 315. 316.
1. Ch. C. 119.

A jointure settled is Mortgaged Lands.

Real Property

Mortgages

Interest of the Mortgagor's wife

made after marriage if merely volun-
tary is void agt a second Mortgagee
though he had notice of it by a
purchaser for a valuable consideration

Powell Mortg. 5
Sel. Ch. C. 66.
Cases 280. 11.
1 Vern.

If the husband before Marriage give his
wife a bond conditioned to leave her a
certain sum if she survive him; she
surviving may redeem as a creditor
that is she may redeem a mortgage on
circumstances which entitle creditors to
redeem; and the person who is entitled
to the equity [illegible] refuse

Powell 380.
Pr. Ch. 2
2 Vern. 480.

If the Husband lend his own money,
and take a Mortgage in the name of
himself and wife and die; she is enti-
tled to it by survivorship if there are
assets sufficient to pay the debts without
it; otherwise her being joined will not
avail her. It is now settled in England
that the mortgagor's wife is not entitled
to dower in the equity of redemption of
a Mortgage in fee: and therefore the

Powell 372.
378.
2 Vern. 683
Pre. Ch. 216
2 P. W. 304.

Powell 321.
364.
2 Bro. 123.
5 Ves. 431.
1 Atk. 606.
3 P. W. 229.
Talb. 138.
2 Atk. 520.

[illegible]

Real Property

Mortgages

Interest of [illegible] [illegible] [illegible] [illegible] 1. 108. 11

[illegible]

The Mortgage [illegible]

as [illegible] of [illegible]

[illegible] This rule was settled

Pow. M. 335 336. when the wife of the Mortgagor was [illegible]

3 H. 108 [illegible] entitled to dower [illegible]

Bacon 466. [illegible] 4. have been compelled the [illegible] of both

Mortgagor and Mortgagee [illegible] to have

dower out of the [illegible] subject: And altho

the reason of the rule has ceased still the

law has not been changed.

[illegible] the "Baron and Feme" [illegible] This rule contemplates the case of a

Mortgage in fee before Marriage: For a

[illegible] Coke [illegible] Mortgage by the Husband after Marri-

age will not affect the wife's [illegible] of

Dower — Seen in Connecticut: and the

rule is there established that the wife may

Recover [illegible]

[illegible] [illegible] in the [illegible]

[illegible] the [illegible] of a Mortgage [illegible]

[illegible]

[illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of the Husband before Marriage mortgaged for 500 years.

Of Mortgages by Husband and wife of her freehold and of interest in Mortgage Money due to her.

The Husband obtains by marriage no other interest in the wife's inheritance than a freehold during their joint lives, or at most for his own life by the curtesy. He therefore cannot make a Mortgage [illegible] binding upon her and her heirs fur- ther [illegible] [illegible]. He mortgage on her [illegible] [illegible] [illegible] in the Mortgage [illegible]. The rule is the same [illegible] the [illegible] in the Mortgage unless [illegible] by fine or Recovery. In Conn. the Husband and wife may alienate and Mortgage her freehold by deed. But if the [illegible] is levying a fine or suffering a Recovery in the [illegible] it will bind her and her heirs.

Pow. Mo. 337.
341.
Co. Litt. 351.a
1. Ven. 57.
2. Salk. 107.

St. Conn. [illegible]

Pow. Mo. 338.
Co. Litt. 41.
Id. 345
[illegible] a. 61
[illegible] 6.

Real

Real Property

Mortgages

Mo's by [illegible] & [illegible] of husb. [illegible] & his int. [illegible] [illegible] to [illegible]

But not, if the wife [illegible] [illegible] [illegible] in the [illegible] to a [illegible] [illegible] or in [illegible] will give no [illegible] to a Mortgagee [illegible] by [illegible] or by [illegible] [illegible] Covenant, though the mortgage [illegible] by [illegible] because the deed of a feme covert is void and not [illegible] [illegible] [illegible] [illegible] the [illegible] is [illegible] [illegible] to the Mortgagee, the [illegible] [illegible] in his [illegible] [illegible] with him the balance of rent, [illegible] him (Mortgagee) [illegible] [illegible] in the [illegible] several years. These are equivalent to a [illegible] of the Deed. If the wife [illegible] in a [illegible] to [illegible] a Mortgage on her estate [illegible] mortgage [illegible] [illegible]. The estate will be [illegible] not only for the original sum but [illegible] a [illegible] [illegible] [illegible] and a further sum borrowed: for that reason the Mortgagee has the right [illegible] as much equity to have his [illegible] as the wife or her heirs [illegible] to have the [illegible]. If the wife [illegible] Mortgagee [illegible] [illegible] the Husband's debt his

[illegible] [illegible]
[illegible] 37
[illegible] 20
[illegible]
[illegible]
[illegible] 326.

[illegible]
[illegible]
[illegible] 93

[illegible]
[illegible]
[illegible] 169.

Mortgages.

his personal estate shall be applied in discharge of it though the wife levied a fine. and this even to the exclusion of the legatees; though the wife encumbers her jointure by a fine to secure the Husband's debts: yet she does not by this also totally part with it. When the encumbrance is paid off there results a trust for her in Chancery to save her jointure.

Mo. by H. & w. & fine [illegible] & his int. in mortg. money due to her.

Pow. Mo. 290. 2 Ch. Ca. 71. 1 Vern. 28.

If the wife joins in encumbering her own estate to disencumber the Husband's and he dies: she is considered in Chancery as to his heirs as standing in the place of the mortgagee and is entitled to satisfaction out of his assets. If a feme-sole mortgagee marries and upon the marriage the Husband make a settlement upon her in consideration of her fortune this is considered as a purchase of the mortgage as of her choses in action and if he dies she living it will go to his exec.rs

Pow. Mo. 348. 2 Atk. 281.

Pow. Mo. 348. 2 Vern. 401. 1 Eq. Ca. 68.

But this rule [illegible] [illegible] hold [illegible] in this

2 Atk. [illegible]

case

Real Property

Mortgage

[illegible] Pow. Mo. 464 & [illegible] & is ind. in certif. money due to her — case of a voluntary settlement after marriage. For it is not then considered as a purchase. So a settlement after marriage

Pow. Mo. 343. 380. [illegible] 448. — in consideration of an accession to the wife's fortune is not a purchase of the accession because the wife during coverture cannot bind her estate. And if the settlement

Pow. Mo. 350. [illegible] 62. [illegible] 70. — though made before marriage is expressed to be in consideration of part of the wife's fortune this is not a purchase of the rest. So an executory agreement to settle

[illegible] — a jointure in consideration of the wife's portion is a purchase of the wife's fortune at once though she dies before it is made, he being in no default. "Actus Dei nemini facit injuriam"

Pow. Mo. 352. [illegible] 66. [illegible] 102. [illegible] 108. — "And a settlement by the husband is not a purchase unless it be of the full value of the estate agreed on. The wife will therefore hold the mortgage or other property after his death against his executor.

Pow. Mo. 350. — But the husband is always entitled to the

Real Property

Mortgages

[illegible]

The wife's Mortgages or choses in action of the husband, he may reduce them into possession during coverture [illegible] he make no settlement &c. If he collect the debts, or he may sell the mortgages without being accountable to her. But an alienation or assignment of the mortgage is not reducing it into possession within the rule unless it is for valuable consideration. If it is voluntary, the assignee has no higher claim than the husband himself would have had if it were not assigned. If the husband's creditors get possession of the wife's mortgage so that they are obliged to apply to equity for relief, this Court will not interfere to take their advantage from them &c. If the interest is assigned to the husband's assignees, he being a bankrupt and all the writings being delivered to them [illegible] may consider that the creditors have [illegible] with the wife and so they [illegible]

Pr. Ch. 412.
2 Vern. 501.
1 Eq. Ca. Ab. 68.
1 P. W. 458.

Pro. [illegible] 355.
360.
2 Vern. 401.
Pr. Ch. 418.
2 Vern. 170

[illegible]
1 P. W. [illegible]
3 P. W. [illegible]

[illegible] have the effect of [illegible] with the [illegible] [illegible] [illegible]

But if that [illegible] had been paid [illegible] with [illegible]

[illegible] [illegible] that the Court [illegible] [illegible] their in favour: [illegible] before the [illegible] and the [illegible] [illegible] the wife [illegible] If that Court would not [illegible] interfere in favour of the creditor [illegible] they would require a reasonable provision for the wife. [illegible] that Court would interfere in favour of the husband himself [illegible] this [illegible]

[illegible] [illegible] [illegible] of the wife [illegible] [illegible] for [illegible] [illegible] of the [illegible] for valuable consideration of the wife['s] mortgage [illegible] he gives credit to the property not to the husband, and he has a higher claim [illegible] than the assignees under the commission of bankruptcy, or the wife [illegible] an agreement by the husband to assign the wife's mortgage a [illegible] [illegible] of Mortgages

a debt with a release of the redemption bind the wife as equally [illegible] to [illegible] the remainder of the debt to be cleared.

Fund out of which Mortgages are to be discharged

1. the Mortgagor's death.

It is a general rule in equity that the Estate which has been increased by contracting the debt should be charged in the first instance with the payment of it. Therefore on the Mortgagor's death his personal property is to be first applied to the discharge of the Mortgage. The creditor then if he has applied it [illegible] to [illegible] the redemption money for the benefit of the heir. Unless if the Mortgagor shows a contrary intention. Though there be a bond given by the Mortgagor to secure the debt which binds the heir still he may compel the creditor to have it applied to satisfy the debt [illegible] the [illegible] in here [illegible] the

Pow. Mo. 388
[illegible]
[illegible]
[illegible]
[illegible]
[illegible] 170
[illegible] 258.
[illegible]

[illegible] 350
[illegible]

[illegible]
[illegible]
[illegible]

Mortgage

[illegible] to be redeemed [illegible] death.

Pow. on M. 344 [illegible]

the same claim from the Executor.

If the mortgagor equally his personal estate among his relatives, still it must be applied to the discharge of the mortgage. For the mortgagee claims a credit on the personal & first liable for debts. But, note, [illegible] only among residuary legatees; and that the rule goes, not alone to general & specific legacies, as to the general rule that the debt must be charged which has been beneficially [illegible] with the personal estate of the mortgagor, if otherwise considered as benefitted whether the mortgagor immediately received the money or merely paid the mortgagee to secure a debt, or an increased credit or lengthening the day of payment is considered a new debt. The rule as against residuary legatees even in favour of general and specific was not held if the testator devised the residue & he by will exempts his personal

Pow. on M. 348 [illegible]

Mortgage.

personal fund. Thus though the real estate of the testator or mortgagor is charged with the payment of debts, yet the devisee is liable only for the deficiency of the personal. But if real estate is devised "to be sold" for the payment of debts, the personal fund is not applied in ease of the real. 4. The mortgagor devises his real estate which includes his equity of redemption to A. and his personal estate to B. and charges both with his debts. Here the personal estate will be first applied to all debts. Even if the equity of redemption were devised "to be sold" to pay the mortgage.

Out of what fund to be secured on mortgagor's death.

Pow. Mo. 375-6.
1. Ves. 5.
1 Equ. 203.
2 Vern. 718.
1 Eq. Ca. 27.
Pr. Ch. 431.

And the rule that the personal fund shall be applied to disencumber the real estate is never allowed to operate to the [illegible] of the heir, to the prejudice of [illegible] contract creating a general legacy: though it holds, in favour of the heir as agst. the executor and residuary legatee.

Pow. Mo. 380-6

General

Real Property

Mortgages

[illegible] what held to be a residuary Mortgd. est. General legatees however seem to be on the same footing with specialty cre-ditors: if the specialty creditors resort to the

Pre. Ch. 2nd 480. Salk. 56. 1. P. W. 693. 2. Atk. 24.5. personal estate and exhaust it: the sim-ple contract creditors and general lega-tees may resort in equity to the real es-tate "pro tanto": i.e. they will be allowed in equity as much of the real estate as the personal estate which the speci-ally creditors had taken amounted to. So that simple contract creditors and general legatees are preferred to the heir. The same rule holds in favour of sim-

Pre. Ch. 548. 1. Atk. 53. ple contract creditors and general legatees agst. the mortgagor's devisee: i.e. the resi-duary devisee. It holds in all cases in fa-vour of the creditors and in favour of the general legatees unless the devise is spe-cific: they may resort to the real estate "pro tanto" ut supra. But if one de-

Cook. 807. 1. Atk. 38. 678. 608. vises his real estate e.g. an equity of re-demption specifically and dies, lea-

ing

Real Property

Mortgages.

Out of what fund to be re-deemed on Mortg^rs. Death.

leaving debts and legacies, and the the entity existing only in the personal fund, the general legatee cannot come upon the devisee pro rata: for the devise is specific, and a general legatee never takes from a specific one. A specific devise seems contradistinguished from a residuary one. "All my real estate" is a specific devise: but "the rest of my real estate" is residuary.

Pow. Mo. 385. 386.

Where the descent is broken and the heir at law of the mortgagor is made to take by purchase under a devise, as if the devise is specific with all within the pur-poses: He is then a specific devisee. &c.

Pow. Mo. 380. 3 Atk. 416 1 P. W. 601. 651.

A mortgagor devised in fee simple, to his eldest son in tail, on the other hand the heir of the mortgagor is not entitled to the aid of his personal property, specifically bequeathed. An annuity may be the subject of a specific bequest: but it must be so circumstanced that

Pow. Mo. 386. 1 P. W. 693.

Pow. Mo. 386. 1 Bro. C. C. 438. 1 P. W. 70[illegible]

it

Real Property

Mortgage

One devised [illegible] found to be [illegible] in [illegible] [illegible] [illegible], [illegible] the [illegible] [illegible] [illegible]

from all other monies, of the testator

[illegible] [illegible] [illegible] one [illegible] land

or [illegible] in a certain [illegible]

having previously [illegible] the equity of re-

demption to the land [illegible] entitled

to his heirs to [illegible] by the estate

[illegible] 388. 3 [illegible] 502. 2 Ves. 422. But to render a bequest of real estate

specific it must be clear certain and

exactly defined for if it be a bequest of all

[illegible] any thing more than general

If the mortgagor devise his estate with

Ca. Ch. 292. 293. 2 P. Wms. 386. 1 Br. Ch. 250. 401. the incumbrances thereupon: and there

are no other words [illegible] an in-

tention that the devisee should take

cum onere: [illegible] the [illegible] is

[illegible] to be applied according to the above

distinction to [illegible]

And if there appears in the case of

[illegible] Ch. 335-6. 4 Ves. 398. 2 Atk. 424 the mortgagor will a clear positive

intention that the devisee should hold

the estate [illegible] even the real

estate

Mortgage
Out of what fund to be redeemed on Mort.r Death.

estate in the hands of the heir shall be applied to disencumber it. 4. The Mortgagor devises [illegible] in fee, and [illegible] [illegible] [illegible] to [illegible] [illegible] being [illegible] [illegible] interest the [illegible] from the [illegible] of the [illegible] which [illegible] [illegible] [illegible] [illegible] entitled to disencumber the heir.

But if the Mortgagor wills or assigns the mortgage the devisee of the assignee [illegible] claim from the assignee's death [illegible] personal assets to disencumber the land.

Pow. M. 48
1 Br. Ch. 161.

For the personal estate of the assignee is not increased but diminished by the purchase — but the same rule [illegible] to the assignee's devisee.

1 Br. Ch. [illegible]
Pow. M. 4, 12.

Or if the money due on the mortgage is not properly the debt of the mortgagor, the equity of redemption the estate mortgaged itself shall [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] been benefitted

[illegible]
1 Br. Ch. [illegible]
2 [illegible] 324

Mortgages

Interest of mortgage money [illegible]

3d The mortgagor being Mortgagee [illegible] and [illegible] in possession [illegible] the [illegible] shall not have the use of the premises [illegible].

Of the Interest of money secured by Mortgage

Co. Litt. 12. The lawful interest [illegible] the Stat. 12 Anne [illegible] 5 per cent [illegible]

St. c. 43. [illegible] that Stat. the [illegible] per [illegible] is [illegible]

The [illegible] rule is the law of Usury that

[illegible] receiving more than lawful interest [illegible] the [illegible] security; [illegible] the [illegible] to the security but [illegible] the [illegible]

If Mortgage be given to secure more than lawful interest the Mortgage is void [illegible] the [illegible] void. It was said

Co. Litt. 119. by Lord Hardwicke that if the Mortgagee [illegible] the Mortgagee

[illegible]

[illegible]

[illegible] the [illegible] Mr. [illegible]

Gould [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Hardwicke [illegible]

in England [illegible] of slaves [illegible]

in the [illegible] of [illegible]

[illegible] that [illegible] to be

[illegible] Mr. Gould

[illegible] that the [illegible] these

[illegible] to be [illegible] England.

There is a [illegible]

cy between an agreement to pay [illegible]

[illegible] with a clause of increase [illegible]

[illegible] not [illegible]

and an agreement to pay [illegible] with a

clause of [illegible]

[illegible] to the [illegible] case [illegible]

will not be [illegible] because [illegible]

[illegible] But the [illegible] case

[illegible]

[illegible]

[illegible]

Real Property

Mortgage [illegible] [illegible] [illegible] would be [illegible] to be [illegible]

[illegible] & [illegible] would [illegible] the [illegible].

[illegible] [illegible] though they will

established. But if after the Mortgage

[illegible] [illegible] [illegible] the Mortgagor gives

[illegible] a covenant to pay the additional

[illegible] [illegible] [illegible] because

[illegible] [illegible], [illegible] considered a

[illegible] [illegible] and not in the form of

a [illegible] or penalty) —

[illegible] [illegible] condition or penalty) are

Pow. M. 424. 425. 3 Bro. P.C. 68. 1 P. W. 652 [illegible] [illegible] [illegible] will be in Chancery

[illegible] though a [illegible] the interest from

[illegible] [illegible] in [illegible] payment of an

[illegible] by way of forbearance be [illegible]

[illegible] [illegible] by the Mortgagee to the Mort-

gagor for there is no penalty in this case

but a mere liquidated satisfaction. So

Where on the payment the Mortgagee

[illegible] the account to the Mortgagor who

admitted it and desired forbearance

which was granted [illegible] the Mortgagor

agreement

Mortgage. Interest of money secured by Mortgage)

agreement to pay the additional. the agreement was holden good in Equity)

Compound interest that is interest on interest in arrear though reserved by agreement cannot be enforced either in law or equity): this however is not usury) and does not avoid the Contract or incur the penalty.) But if the Mortgagee assign his Mortgage with the concurrence of the Mortgagor all the money paid by the assignee and which was due to the Mortgagee shall be considered as principal and draw interest. This will be compound interest on the original debt. The case is different where the assignment was made without the consent of the Mortgagor and the reason which is a reasonable one, is that there is a substantial difference between the [illegible] passed as security [illegible] the relation of Contract between himself and the assignee, but the latter shall [illegible]

Cov. Ch. 440. 639.
Pr. Ch. 116.
[illegible]
Atk. 652.

Real Property

Mortgages

Interest— Money secured by Mortgage — But if the assignee has not paid the money, and the assignment is only colourable to bind the Mortgagor with compound interest he will not be bound to pay such compound interest.

[illegible] — An account stated between the Mortgagee and assignee as to the amount of the debt is not conclusive on the Mortgagor: but he may dispute such account unless he was party to it.

[illegible] — But an agreement by the Mortgagor to entitle the assignee to interest on interest, made with the concurrence of the Mortgagor, binds the assignee to the same terms with the Mortgagee.

[illegible] — It was once holden that the Mortgagee, the (Mortgage being) forfeited, should have interest on interest. This rule however was since abolished.

[illegible] — The report of a Master in Chancery computing interest makes the interest principal from the time of the report being

[illegible]

being confirmed by the other creditors, because [illegible] it is not the creature of a judgment.

But the trustee is not to have [illegible] on a bill to foreclose &c. not regularly compute interest on interest. For one reason for allowing [illegible] interest, in [illegible] case of this kind is that the mortgagee [illegible] which is not [illegible] profitable to the infant. But if the infant is Plff. in Chancery on a bill to redeem the account taken by the trustee carries interest on interest: and the Deft. in Chancery in such cases is allowed the full benefit of proceedings into which he has been forced by the infant.

So if an infant agree to pay compound interest and then becomes a beneficiary [illegible] [illegible] on a bill to foreclose the mortgagee [illegible] an account which [illegible] that is [illegible] an interest &c. not [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible]

[illegible]

3. Vern. [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Real Property

Mortgages

[illegible] Interest upon [illegible] not amounting to [illegible] payment for that [illegible]

[illegible] By a subsequent agreement at the time of the mortgage to turn such arrears into principal [illegible] interest [illegible] entered into [illegible] and is therefore not [illegible] that after interest has become due such an agreement [illegible] will be [illegible] in equity [illegible] of the mortgagee in

[illegible] If he has expended money in defence of the mortgage title when impeached he may add it to the principal and it will carry interest. A tenant for life of the equity of redemption is compelled [illegible] for the remainderman to keep down the interest during his estate, and

[illegible] although a remainderman [illegible] cannot compel the tenant for life to redeem, yet if he pays off the mortgage he may compel the tenant for life to [illegible] by paying 1/3 of the debt [illegible]

Real Property

Mortgages

But a tenant in tail in possession of lands mortgaged is not compellable by the remainder man or reversioner or issue in tail to keep down the interest: for his estate may last forever: and besides it would be utterly nugatory as he can at any time destroy the remainder, bar the issue by fine or recovery. Nor are the representatives of the tenant in tail in possession of lands mortgaged compellable to keep down the interest.

Interest of money secured by mortgage

See [illegible] [illegible] [illegible] [illegible]

But if a tenant in tail of mortgaged lands be an infant under guardianship, the guardian is compellable to keep down the interest: for an infant cannot bar the remainderman by fine &c except under the [illegible] of his guardian which will not be permitted, it [illegible] a [illegible].

See [illegible] Sal. [illegible] 3 Atk. [illegible] 1 Ves. 177. 480.

If the tenant in tail does keep down the interest the remainder man shall have the benefit of it, i.e. is not compellable to reimburse the tenant in tail.

See [illegible] [illegible] 1 Bro. Ch. 2[illegible].

[illegible]

is his preference to be lost. If a first Mortgagee ~~[illegible]~~ enters and afterwards [illegible] the mortgagor to take ~~[illegible]~~ the surplus without paying the interest still in arrear of the second mortgagee the surplus shall be applied to the second mortgagee [illegible] [illegible] first mortgagee [illegible] [illegible] [illegible] [illegible] [illegible] longer [illegible] of the [illegible] [illegible] [illegible]. Otherwise the second mortgagee would be defeated.

6c.
6c.

Where a tenant in possession of the mortgagee the holder of [illegible] being [illegible] [illegible] he cannot recover the whole [illegible] [illegible] instead of paying up the interest [illegible] the debt. But the holder of a mortgage deed has not by the possession of the authority to receive more than the interest. Because paying up the [illegible] does not [illegible] the estate but the debt is the principal which is extinguished by paying up the [illegible].

[illegible] Equity

If the mortgagee refuse to receive the money after the forfeiture, tender [illegible] the [illegible] [illegible] the [illegible] provided the mortgagor give notice of his intention to pay [illegible] [illegible] to redeem and tenders the money in the mean time [illegible] [illegible] to [illegible] the [illegible] will be allowed [illegible] under [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible], oath [illegible] has been always [illegible] on the [illegible] [illegible] the tender [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] oath of the Mortgagor may however be contradicted. And in general there must be a strict legal tender to stop the interest. It was once holden that a tender of Bank-Bills was good, where the Mortgagee made no objection to the legality of the tender, and the Mortgagor offered to exchange them for money [illegible]

he

Mortgagee refusing interest [illegible] by the mortg.

[illegible]

Pow. M. 4—
2 Ch. C. 205.
2 P. W. 378

Pow. M. 455.
2 Ch. Ca. 246.
2 Ves. 72. 6, 8
1 Atk. 90.
2 [illegible] 613.

Pow. M. 456.
1 Eq. Ca. 316.
3 Burr. 659.
1 Ves. 339.

Real Property

Mort. p. 71
Tender of
[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] the mortgagor's tendering upon the land, the mortgagee being absent, is not sufficient. But if the time and place of payment are appointed by the parties, tender is at the appointed time and place. [illegible] appointed in the condition [illegible] the mortgagee [illegible] where he will [illegible] tender at that place [illegible] no objection made to it by the mortgagee [illegible]

[illegible] tender at the mortgagee's [illegible] will be sufficient where no place is [illegible] appointed. [illegible] the mortgagee [illegible]

Real Property

Mortgagee
Interest of
mortgagee
by [illegible]

[illegible] of the mortgagee [illegible] would [illegible] to [illegible] [illegible] possession [illegible]) out of the tenancy [illegible] he ought to [illegible] [illegible] he would [illegible] [illegible] before the interest [illegible] [illegible] tender [illegible]. The mortgagee [illegible] [illegible] a deed of reconveyance to be signed by the mortgagee and containing [illegible] [illegible] [illegible] [illegible] a question not [illegible] the equity of redemption [illegible] [illegible] conveyance ought to be [illegible] [illegible] [illegible] is settled.

[illegible] 458
2 453
[illegible]

The interest reserved when a mortgage may be altered by a binding agreement [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] to [illegible] [illegible] incorrectly, in the case [illegible] the mortgagee was [illegible] so that the [illegible] [illegible] [illegible] admitted [illegible] to [illegible] and consequently to [illegible] [illegible] of the [illegible].

Vide [illegible]
Ferm. 6. L.J.

[illegible]
[illegible]

[illegible]

[illegible]

Of the method of accounting

[illegible] mortgagee [illegible] a [illegible] [illegible] the mortgagee [illegible] ought to [illegible] [illegible] the [illegible] that the mortgagee is not bound to account for the profits during his possession [illegible] chargeable for the interest of the debt

[illegible] — That a mortgagee [illegible] account for the profits during his possession, is that [illegible] be applied to the discharge of the debt. He is considered in the nature of a bailiff to the mortgagor. If the mortgagee in possession

[illegible] manage the estate himself, he has no allowance for his care and trouble; for he is only entitled to the actual amount of money disbursed. And the same rule holds, though

[illegible] there is an agreement to the contrary. But if he employs a skilful steward or bailiff, he will be allowed the expense [illegible]

[illegible] If a mortgagee in possession assign to an insolvent person, he will be held [illegible]

[illegible]

Mortgages (Method of Accounting)

Mortgagor's agent: the Mortgagee is still liable for the profit before and after assignment. The Mortgagee is in general to account with the Mortgagor for the actual profit received: not as the case may be for the actual value of the land, unless it appears that he might have made more but for fraud or wilful default: as if he had refused a responsible tenant who would have given more &c.

Pow. M. 461
1. Vern. 45. 47.
1. Ch. C. 258.
1. Eq. C. Ab. 328.
3. Ben. 657.

If the Mortgagor prove that the Mortgagee let the land at a certain price at a certain time: that will be considered as the price during the whole time unless the Mortgagee prove the contrary.

Pow. M. 466-7
Sel. Ch. C. 13.

But if the mortgagee takes possession and keeps other creditors out he will be charged in their favour with all the profits which he might have received after his entry.

Pow. M. 468.
1. Vern. 249.
Pr. Ch. 30.
3. Bac. 658.

2. Having taken possession he is bound to the Mortgagor to take all the profits. Still however in this case he is not bound to account

Pow. M. [illegible]
2 Ves. [illegible]

account

Real Property

Mortgages

Without a covenant even, with subsequent Mortgagee

Accounting of pay for any profits received [illegible] [illegible]

[illegible] [illegible] [illegible] incumbrances for

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

If the mortgagee goes in [illegible] [illegible]

Pow. Mtg. [illegible] / [illegible] / [illegible] — is [illegible] to [illegible] the use of the incumbrance

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]: he will be charged with the profits for

[illegible] from the time [illegible] [illegible]

[illegible] [illegible] [illegible] but for the [illegible]

[illegible]. If the Mortgagee [illegible] the [illegible]

[illegible] [illegible] by incumbrances on the Mort

[illegible] assigned he [illegible] a Bankrupt

[illegible] [illegible] to the Mortgagee; called

in the [illegible] [illegible]: [illegible] [illegible] [illegible]

[illegible] a barrier to the claim of creditors

Though the Mortgagee has assigned and

Pow. Mtg. [illegible]. Eq. Ca. 594. — a bill for redemption is brought against the

assignee and the Mortgagee would be

[illegible] a party that he may account for

what he has received.

[illegible] [illegible] [illegible] [illegible] by Mr. Powell

[illegible]

[illegible]

[illegible] there [illegible] two mortgages, an account stated between the first mortgagee and mortgagor will be conclusive upon all the [illegible] unless fraud or collusion be proved. Mr [illegible] thinks this rule wants modification: and in [illegible] it will [illegible] [illegible] the [illegible] is taken under the [illegible] [illegible] [illegible]

[illegible]

But the account between the mortgagee and assignee will not conclude the mortgagor [illegible] his [illegible] are [illegible] the [illegible] and he should be a party to the account.

[illegible]

A remote assignee, that is, an assignee after several assignments, is not bound to account for the profit before he [illegible] [illegible] [illegible] profits [illegible] not be taken into the account against him but they shall be set off against the [illegible] interest.

[illegible]

There are two modes of taking the account between the mortgagor and mortgagee the [illegible] by [illegible] a [illegible] [illegible] [illegible] [illegible]

Real Property

[illegible] of the rents and profits over the amount
[illegible] of the interest to sink the principal.

The other mode is by bringing all the profits into one aggregate sum, and all the interest into another. Where there is a shifting of rents and profits the former mode is the more advantageous one to the mortgagor: as it keeps down the accruing interest each year.

The rule is that if the yearly rents and profits exceed the interest of the debt,
Cow. [illegible] 2 [illegible] 534. annual rests are to be made: but if small, the latter mode is to be pursued or at least the master is not bound to apply every petty excess to the principal.

Real Property

Mortgages

Of Foreclosure

As a Court of Chancery, after forfeiture will in favour of the Mortgagor decree a redemption: so in favour of the Mortgagee the same Court will decree a foreclosure (i.e., order that unless the Mortgagor pays the debt within a limited time: he shall be forever foreclosed (barred) of his equity of redemption. Which order is irrevocable except under special circumstances of hardship. If the Mortgage is of a reversion a decree may be had for sale of the estate to pay the debt. But in [illegible] generally a sale is never decreed. If a Mortgage is made to several, all must be made parties in a bill for foreclosure. So if a Mortgagee assigns to several all the assignees must be parties. A Court of equity will never decree a foreclosure till forfeiture of the

Pow. 145
2. [illegible] 198

Pow. M. 495. 310.

Pow. M. 145-6.
1. Br. Ch. 368.

Mortgage

Real Property

Mortgages
Foreclosure

Mortgage. For until then the equity of redemption does not exist; and the mortgage is redeemable at law. It is laid down as a rule in the law, that on a bill for foreclosure, the title of the mortgagee cannot be investigated, because this must be settled at law: This Mr Gould says cannot mean that the mortgagor cannot deny that the ~~mortgagee~~ is title of the mortgagee: but that Chancery on such a bill will not aid his legal title but will leave it as it is to be settled at law. The decree only destroys the equity of redemption.

Cow. M. 476.
2 Ch. C. 244.

Cow. M. 477.
Doug. 601.
2 Atk. 344.

The mortgagee may pursue all his remedies at the same time: viz. He may sue for the debt on the bond, sue for the possession in ejectment and sue for foreclosure by his bill in Chancery: And in Eng.t after Judgment on the bond he may levy the execution on the land mortgaged. And the pendency of one of these is no bar to an action on the other. But under special circum-

stances

Mortgages

Foreclosure

circumstances the Court will grant an injunction to stay proceedings on the ejectment [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] relieve a [illegible] for foreclosure [illegible] [illegible] been [illegible] would be the consequence of [illegible] it. Eg. If Mortgagee having notice of a voluntary [illegible] settlement procures the trustee to convey the legal estate to him to protect his Mortgage: in this case therefore he is left to his remedy at law, for there is an unfairness & a breach of trust in the trustees —

Pre. Ch. 477-8.
2 Atk. 344.

Pre. Ch. 934
2 Vern. 271. 478.
Cal. 680.

A [illegible] [illegible] praying "relief" of the Mortgagee is equivalent to praying a foreclosure [illegible] of redemption, the proper relief. And if [illegible] reference to a master to take the account [illegible] [illegible] Mortgagor's bill to redeem [illegible] [illegible] [illegible] by paying the [illegible] according to the report and the Court on the Mortgagee's application [illegible] the bill [illegible] [illegible] [illegible] [illegible]

[illegible]
2 [illegible] 264

[illegible]
2 [illegible]

foreclosed

Mortgages

Foreclosure — as incident to a decree for foreclosure

If the Mortgagee's heir brings a bill to foreclose: it is good cause of demurrer, that the Mortgagee's executor is not a party: he being entitled to the money: And even without the demurrer the Chancellor will of office dismiss the bill if these circumstances appear to him. But on the other hand the Mortgagor's executor need not be made a party to the bill for foreclosure: because the heir and not the executor is vested with the right of redemption: [illegible] though the Mortgagee's heir can not bring a bill to foreclose still if he has obtained a foreclosure it will be good and [illegible] the executor [illegible] to the heir may retain the land in paying the debt to the executor or administrator. But if the heir do not pay the money to the executor of the Mortgagee: the executor may compel him to convey the land to him.

Eq. Ab. [illegible] 1. 36. c. 3.

[illegible] 2. 21. c. 26.

[illegible] 2. [illegible] 230.

[illegible] 263. [illegible] 15.

Eq. Ab. 60. c. 57. 2. Vern. 54. 103. 354. [illegible] 2. c. 511. [illegible] 2. a. 358.

Pur

Real Property

Mortgages

On a decree to foreclose within a certain time the [illegible]

remainder [illegible] the [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

On a [illegible] to foreclose tenant in tail, if an

entry of [illegible]tion will bind the heir

in tail and all those in remainder tho'

they are not parties to the mortgage: and

the [illegible] after foreclosure can

[illegible] the tenant in tail [illegible]

[illegible] they [illegible] all in the power of the

tenant in tail and the mortgagee [illegible]

foreclosure. But where there is tenant for life [illegible]

an entry of [illegible] will [illegible]

that the remainder-men [illegible]

[illegible]

[illegible] the [illegible]

the tenant for life.

If there are several [illegible] incumbrances [illegible]

[illegible] are parties to the bill

[illegible] foreclose [illegible]

[illegible] there [illegible]

[illegible] the first mortgagee [illegible]

[illegible]

[illegible] [illegible] the [illegible] [illegible] to be bound by the
decree. But those who are not [illegible]
[illegible] are not bound by the decree.

When all the [illegible] interested are
parties & decreed among, the decree may
[illegible] [illegible] [illegible] [illegible] the
[illegible] [illegible] [illegible]
[illegible] infants [illegible] until the com-
[illegible] of redemption may be foreclosed: But
[illegible] infants given [illegible] to show
cause ag. the decree [illegible] [illegible]
i.e. within 6 months afterwards. [illegible] form
of the decree in the case [illegible]

"This decree is to be binding on the
"infant [illegible] unless he shall
"within six months after being served
"with process [illegible] show good
"cause to the contrary."

If the infant shows no cause within the 6
months the decree is made absolute [illegible]
[illegible]. But when he shows cause he may
[illegible] [illegible] a new [illegible]

Form of the decree of foreclosure against an infant [illegible]

[illegible] fal

[illegible] Mortgages

unless a mortgagee [illegible] the [illegible] to the

[illegible] on the terms of the decree to be

secured in the infant's covenant, if any, in   3 [illegible] 558.
a judicial sale by way of foreclosure –   [illegible]
But when he comes of age he is not allowed   [illegible]
to go into the accounts and of course nor   [illegible]
is he entitled to the redemption of the   3 [illegible]
estate: he can only show that the decree
is erroneous or unjust: i.e. he may take
advantage of any fraud which existed at
the time of the foreclosure and which if
they had then been raised would have pre-   [illegible]
vented the decree: and in this way he may
free the foreclosure – But it is said that
where an infant owing the equity of redemption   [illegible]
[illegible] the mortgagee's proper remedy is a decree   1 Vern. [illegible]
that the estate be sold for payment of debt: 2 [illegible]
this has been without any alteration: for   3 [illegible]
there is no forfeiture the [illegible] being [illegible]   2 Vern. [illegible]
But even then if he is decreed to join the
conveyance he must have a day [illegible]
[illegible] a decree sale or his ancestor

Mortgage

[illegible] Property

[illegible]

[illegible] Mortgagee [illegible] upon the [illegible] of mortgage [illegible]
[illegible] has [illegible] a [illegible]
[illegible] & [illegible] & the [illegible]
[illegible] to [illegible]
[illegible] it to [illegible]. For the [illegible]
[illegible] to act for herself
but has not [illegible] the [illegible] of
acting for her & her husband will [illegible]
[illegible] it. But though he [illegible]
[illegible] by the terms of the decree: yet it
occurs that after [illegible]
the decree [illegible]: [illegible]
[illegible] unfair [illegible]

If the mortgagee is guilty of any unfair
conduct in obtaining a foreclosure: the
court will [illegible] the [illegible]
[illegible]. E.g. [illegible] mortgagee [illegible]
[illegible] foreclosure [illegible]
[illegible] the [illegible] for
[illegible] it would be [illegible]
[illegible] the mortgagee [illegible]
foreclosure [illegible]

of the mortgagee have run the mortgagee [illegible] an action [illegible] and tendered [illegible]! the foreclosure will be [illegible] alone of the mortgagee [illegible].

[illegible] a foreclosure is [illegible] of creditors & others not [illegible] the mortgagee shall be allowed all the expenses in obtaining the foreclosure. The [illegible] of the payment of the debt on a decree for foreclosure may be enlarged, under special circumstances: & if the estate is of [illegible] greater value than the amount of the debt, in this case it was enlarged some [illegible] times. So where the mortgagor was prevented from paying by a [illegible]: a friend of the mortgagor [illegible] would be enlarged. A decree of foreclosure is never absolute [illegible] [illegible] the mortgagee [illegible] at least equal

equity

Real [illegible]

[illegible]

Foreclosure. [illegible] the [illegible] mortgagee [illegible] there [illegible] [illegible] a foreclosure [illegible] the [illegible] mortgagee [illegible]

[illegible] the [illegible] the second mortgagee obtained [illegible] [illegible]

[illegible] Sale of the mortgage after [illegible] obtained a decree of foreclosure [illegible] [illegible] of the foreclosure [illegible] has been decided in [illegible] foreclosure [illegible] satisfies the debt [illegible]

Foreclosure regularly will not be opened when the mortgagor has acquiesced [illegible] and [illegible] for [illegible] the foreclosure.

[illegible]

[illegible]

[illegible] of the [illegible]

has not paid the debt at the time limited Cruise [illegible] tit.
to make the decree absolute by a further order [illegible] the first decree
becomes absolute of course, if the mortgagor fails to make payment on the day
the reason of the difference, that in [illegible] Chancery [illegible] so that no
circumstances or delay [illegible] could [illegible]
an application for a further order; but in [illegible] the [illegible] only
at particular times.

2d The tenant in tail of an equity of redemption suffering a recovery and [illegible] Cruise [illegible] [illegible] 26.
part of the lands, on which to raise the money
but a sale the part [illegible]
affected [illegible] the residue is sufficient to satisfy
the debt.

1 Powell [illegible] 92

Real Property)

of Title to Things Real by pur-

[illegible]

the Escheat Occupancy Prescription

and Forfeiture and Title by

or for Alienation by matter of Record C.C. [illegible] &c

Devise by Special Custom

1. By Purchase

by

Devise

A Devise is a mode of alienation; and may be defined a testamentary disposition of real property - or a disposition of real property to take effect on the death of the owner. Cru. D. 15 / 1 Cru. 4[illegible]

For a Will and what it is, vide Lec. 8.12.

The right of devising existed among the Anglo Saxons; but was abolished on the introduction of the feudal law, as being inconsistent with the principles of feudal tenure. The right was preserved however in some parts of England by local customs as a privilege, par- 2 Bl. 373.5 / Cru. D. 1.3 / Cru. D. 3.5 / 2 Bac. 155. 7 / Reeve 359. [illegible] / Co. Lit. 111 / Litt. 234 / 2 Bl. 374

tic

Real Property

Devises.

granted by the Conqueror [illegible]

Terms for years were at first interests
Cruise D. 1. 2 Bl. [illegible] 2 Inst. [illegible] generally small and affected in the
particular by the feudal system, being
personal chattels. [illegible]. But the interest
Pow. D. [illegible] 1. [illegible] 18. for years in lands became [illegible]
at com. law.

The conveyance of the right continued
2 Bl. 375. Pow. D. 8. Plowd. 414. for many centuries from the reign of
Henry 2. to the latter part of the reign of
Henry 8.; but the restriction was evaded
by the doctrine of uses: a devise of the
use of land would be sustained in
Chancery by Ecclesiastics.

2 Bl. 375. Pow. D. 13. [illegible] 9. 1 Inst. 111a Dyer 143a [illegible] 1 Rol. [illegible] This practice was checked by the statute
of uses 27 Henry 8. which trans-
ferred the legal estate to the use and
thus consolidated them. And the distinc-
tion between them was also destroyed by
the statute. In the 32d year of Henry 8.
a statute enacted that all persons ha-
ving a sole estate or in fee simple in

Real Property

Devises.

any Freeman or a Tenant of Ma-ny Lands then should have power to dispose of 2/3. of those holden in Chivalry & the whole of Socage lands, by devise. This Stat. was explained by Stat. 34. Henry 8th. The first of these is called the Stat. of Wills. Now in England all tenures except Copyholds being converted into Socage by Stat. 12. Charles 2d. all lands except Copyholds are devisable.

2 Bl. 375.
Pow. D. 9. 101
Co. Litt. 111. 2

Pow. D. 10. 42.
2 Bl. 375. 77.

Further regulations were made as to the mode of making devises, by the Stat. of Frauds &c. 29. Charles 2d. — Our Stat. authorizing devises, is similar to those of Henry 8. except that it extends the privilege further. We have also a Stat. similar to the clause respecting devises in the English Stat. of Frauds &c. 29. Charles 2. Therefore constructions given to those Stats. are generally adopted here.

Pow. D. 9.

Stat. 1793.

Stat. Ct. 1784.

The power of devising then given in England by Stat. 32. Henry 8. extended

Pow. D. 47. 8.
2 Bl. 375.

to

Real Property

Devise

by Statute; Henry 8. The mode of Devi-
sing is prescribed by the Stat. of Frauds
and Perjuries, 29. Charles II.

The capacity or the power of devising is given

Stat. ct. 23. by Stat. entitled "An act relating to the
ability and capacity of devising".

The mode or solemnities of the instru-
ment is prescribed by "An act concern-
ing Devises & Wills"

Of the Instruments under the Sta-
tute of Henry VIII.

A devise is, under the Stat. of Henry 8.
"an irregular instrument in writing";

Dougl. 237.
[illegible] 379.
Cro. [illegible] 13
[illegible]
1 P. W. 528.
[illegible] 95.
3 [illegible]
[illegible]

so that statute having prescribed no
form of words in executing a manifesta-
tion of the testator's intention in testamentary
disposition of lands, and having the forma-
lities required by law well [illegible] to
a devise render them [illegible] such
solemnities as not conforming to the established
rules of law [illegible] instruments in the
form of [illegible] the [illegible]

[illegible]

Real Property

Devises

delivered as deeds. So a devise or will may be written at different times or on different sheets of paper which need not be joined together and they all constitute but one devise, if so intended. E.g. One by one instrument devises Black-acre to one [illegible] by another White-acre to two younger heirs. In the last example the devisor makes several partial dispositions of several parts of his estate as he may do. In this case however the instrument only must not be declared alone as his last will (generally) but particularly as the testator made his last will of such a part of his property.

Pow. D. 15. 106.
108. 182. 3.
1 Show. 69.
Cant. 194.
1 Burr. 348.
Pow. D. 16. [illegible]
1 Ves. 545-553.

Pow. D. 17. 18.

Pow. D. 18.
1 Show. 339.

So also one may make several devises of different interests in the same estate. E.g. Devise of lands to the testator's youngest son and his heirs, afterwards the same lands are devised to the testator's wife for life she paying such a rent to the son. Now both of these stand as if made

[illegible]

Real Property

Devises

[illegible] instrument [illegible] effect
[illegible] interpretation [illegible]

[illegible] instrument [illegible] the same

[illegible] [illegible] principle [illegible] a devise in a former
[illegible] [illegible] revived the former, or
[illegible] condition [illegible] it [illegible]
[illegible] the [illegible] reference [illegible]
[illegible] to another instrument [illegible]
[illegible] [illegible] the purpose [illegible]
the contents of a [illegible]
[illegible] all the [illegible]
[illegible] [illegible] by the [illegible]
[illegible] to [illegible]
[illegible] the [illegible]
[illegible] the [illegible] alter a little
[illegible] published the testator

[illegible] make a [illegible]
[illegible] restraining or enlarging the
[illegible] before [illegible] The [illegible]
[illegible] to the [illegible] both
[illegible] instrument [illegible]
[illegible]

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Devise

[illegible] But a devise
has been held in a devise of something contained
in another instrument is not itself a de-
vise. In the construction of the Statute of
Henry 8. it was holden that every devise of
lands should be entirely in writing.

But the Judges took the word writing in
its most extensive and vague sense; as
including notes, [illegible], memoranda and
even letters, expressing the man's intention.
Hence it was holden unnecessary that
the writing should be made or subscri-
bed by the devisor. A devise written by
an Attorney in pursuance of instruc-
tions by the devisor but in his absence
and not even read to him was good.

So it was holden that if one in extremis
have declared his intended devise by word
and another without any direction or
authority had reduced it to writing, in
the devisor's life time, it would be a good
devise. But these two latter opinions seem

2 Inst. [illegible]
[illegible]

Cru. D. [illegible]
[illegible]

Cru. D. 35 [illegible]
[illegible]
[illegible]
Dyer 72.
[illegible]

Cru. D. 36
Dyer 72.

Cru. D. 36
[illegible]
3 Leon. [illegible]

[illegible]

Real Property

Devises

of the testr. when over ruled. Gwil. D. [illegible] Dyer 72. 3. Rol. Abr. [illegible] Bacon [illegible]
under Stat. Henry 8

Once it was holden that the devise must be completely reduced to writing during the devisor's life otherwise it would be bad.

Gwil. D. 28. 9 Dyer. [illegible] 3. Co. [illegible] [illegible] So if a devise were to be made to J. and he being upon condition and before the condition was written the devisor died, it was all void. But where the devisor directed several distinct devises and after one was completed but before the others were written died, the former was adjudged good. So it was holden that a devise might be good in part and bad in part.

Gwil. D. 29. [illegible] 4. Where a devisor annexed a condition to the devise without writing it, the condition was held void and the devise good.

Gwil. D. 30. Dyer 72. [illegible] [illegible] where the direction was to devise on conditions and the devise was written without condition, [illegible] the devise [illegible] in the testator's life time.

Gwil. D. 31 [illegible] [illegible] [illegible] under these statutes it was not

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[illegible] that signing by the devisor was necessary that his name should appear in the instrument. Cro. D. 30. [illegible] 362. 2 Lev. 86. 3 Lev. [illegible] But [illegible] it was holden that any writing, though neither signed, sealed nor written by the devisor was sufficient and that the evidence of one witness was sufficient to establish it [illegible] to the effect [illegible] the clause relating to Devises in the Stat. of Frauds.

Devises of the Estate during the [illegible] Henry 8.

Gilb. D. [illegible] [illegible] 6. 1[illegible]8. [illegible] [illegible]

Real Property

Devises

Of Interests and Estates not Devisable.

It was formerly held, that contingent interests resting merely in possibility could not be devised under the Stat. of Wills; [illegible] however it is clearly settled that they may be, i.e. possibilities coupled with an interest are devisable before the interest vests. [illegible] of naked possibilities. But an estate which is [illegible] by a mere right of entry within the purview of the Stat. of Henry 8 [illegible] [illegible] continued. A tenant in tail as such [illegible] [illegible] [illegible] a lease for life, [illegible] the Remainderman cannot devise the reversion for it is discontinued. An estate pur autre vie is not devisable under the Stat. of Henry 8, for they are confined to persons having [illegible] in fee simple. [illegible] [illegible] [illegible] [illegible]. [illegible] Pur autre vie [illegible] [illegible] [illegible] [illegible] [illegible] present [illegible] and his

[illegible]

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Devises

Heirs [illegible] cannot devise his interest
Pow. D. 36. Carter 218. 3. Cobb. 3.2 Dy. 2.3.
Estates [illegible] by Stat. 29. Charles 2d estates
pur autre vie are devisable unless there
is a special occupant. Our Statute
it seems, authorizes devises of estates pur
autre vie: The words are "shall have
power to make their Wills, &c. of their
lands and other Estates": which seem to
include all Estates which may continue
after the owner's death and to which no
other person has a claim, which the
owner could not defeat by his own act
or deed, not then include Estates in tail.
Since by the 2nd Sect. of our Stat. it
seems, that one may devise any interest
remaining after his death, which he
might have transferred by deed in his
lifetime. Equities, uses and trusts
[illegible] though they may be devisable
in England are not devisable not be-
ing within the Stat. of Henry 8.

In

Co. D. 5. 8.
2 Bl. 259. &c.

Pro. 2. Sect. of y^e Stat.

St. C. 2.

Pow. D. [illegible]
3. Bl. 35.
1 P. W. 81.

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[illegible]

As regards [illegible] strictly personal [illegible] they must be [illegible] species by Deeds [illegible] neither [illegible] transferable.

[illegible] Agreements which are [illegible] within the Statute of Frauds [illegible] must be [illegible] to be [illegible] Bills. These are not within the Statute of Frauds. A right of [illegible] in lands or premises on the performance of a condition by the grantee is not [illegible] the land till breach of the Condition: He has no estate in the lands strictly speaking.

[illegible] Of the Devise itself or the instrument and of the subject matter of the devise within the English Statute of Frauds.

Devise [illegible].

The clause relating to devises in the English Stat. of Frauds enacts "that all Devises of lands [illegible] shall be in writing and signed by the party so devising, or by some other person in his presence and

by

Devises.

"by his express direction; and subscribed "in his presence by three or more credible "witnesses."

Our Stat. enacts that "no writing where-in there shall be any devise of "real estate shall be held good, &c. if they "are not witnessed by three witnesses, all "of them signing in the presence of the "testator". It is then substantially the same with the English except that there is no express provision made with respect to the testator's signing. The same rule however as to the testator's signing is under-stood (Mr. Swift) adopted by the Courts in Conn. The object of these provisions is to ensure care in testing, and to protect heirs against frauds.

Stat. Ct. 227-8

Pow. D. 47.

"All devises," &c. — No form being prescribed any more than in the Stat. of Henry 8. any writing which would have been good as a devise under the Stat. of Henry 8th will now be valid if the so-

1 Pow. D. 28-9

solemnities

Devises

solemnities prescribed by the Stat. of Fr.ds are observed, i.e. if signed and witnessed as the latter Stat. requires. Hence a[n] [illegible] under the Stat. of W[illegible] a devise executed according to the Stat. of frauds by reference to another instrument make the latter a part of itself, though the instrument referred to is not thus executed. E.g. A. by a devise duly executed under the Stat. charges his land with his legacies, and then by another instrument not thus executed gives legacies. These legacies will charge the land.

Pow. D. 13. 1. 84. 3 Atk. 158. [illegible] 1 Bur. [illegible]

"Of any lands or tenements": These words are descriptive of the subject matter of the enacting part. The words in our Statute are "lands and other estate" and "real estate". It has been decided that the Stat. does not extend to such English Colonies as were planted before the Stat. passed. Devises in [illegible] settled after [illegible] [illegible]. But a devise made in a Co-

Pow. D. 32.

Stat. c. 123. 257.

Pow. D. 32. [illegible]

[illegible]

Real Property

Devise

Devises of lands of any tenure, must be executed according to our statute. Rev. S. 28 [illegible]

Even in case of personal property — 1 P. Wil. 640; 1 Camb. 25

For this has [illegible] these words do not extend to Copyhold lands. — Pow. D. 50; 2 P. 44; 2 H. B. 11; 1 Ves. 298.

Nor do they extend to a bequest of a chattel interest. — Pow. D. [illegible]; Gilb. Reb.; 2 Ves. [illegible].

A trust of an inheritance is within the Stat. and cannot be devised but by an instrument made according to it. — Pow. D. [illegible]; 3 Atk. [illegible]; 2 Ves. [illegible] 8.

An appointment of land under a power or if made by will, must be executed according to the Stat. of Frauds: i.e. the estate be conveyed to trustees to such uses as he shall by will appoint: By "will" is meant such a will as is proper for disposing of land. In which the same — Pow. D. 68. 9; 58. 150; 1 P. W. 440; 2 P. W. 958; 2 Ves. 144

It is a general rule that a writing purporting to be a will if void as such cannot operate as an appointment or [illegible] the principle to be presumed — Pow. D. 58 [illegible]; 2 Ves. 544

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Devise

by the Stat. would accrue. And if money is given originally out of lands the instrument creating the charge must be ex-

Prec. Ch. 54.
2 Atk. 268
285.

ecuted according to law rel. to the Stat. Such a charge is in effect a disposition of part of the land by devise. It is differ-ent from the case of an instrument re-ferred to in the devise, which has been before noticed. Trusts created out of

Prec. Ch. 54.

lands are within the provisions of the Sta-tute. So a will giving a power to Execu-

Prec. Ch. [illegible]
1 Ves. 149.

tors to sell lands must be executed ac-cording to the Stat. For this is indirectly distributing of lands, ie enabling others to do it. The English Stat. of Frauds extends

Prec. Ch. 54.
(a)

to all lands and tenements devisable either by the Stat. of Wills or by custom & the Stat. of Frauds in every devise.

[illegible]

[illegible] been acquired [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] than have been [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

English [illegible]

Of course [illegible]

[illegible]

[illegible]

Real Property

Devise

in England: [illegible] of deeds [illegible] and was used [illegible] of distinction between [illegible]

([illegible] Deed ?- It has been holden that [illegible] alone [illegible] to [illegible] [illegible]. [illegible] however [illegible] were decided. [illegible]). The same point was holden by [illegible] however [illegible] [illegible] the latter to be the better decision [illegible]

[illegible] the [illegible] of the [illegible] [illegible] [illegible] [illegible] Williams [illegible] [illegible] the [illegible] of the [illegible] [illegible]

[illegible]

Devises

was an express intention to sign [illegible] and this intention was defeated. [illegible] the devise being in two sheets the testator signed the two first and attempted to sign the other, but failed.

The "[illegible] presumed" in this case lies upon him who alleges the same. The pre- sumption [illegible] the intent to make being certain, & that the name written at the top or in the body of the instrument was intended to be a Signing. Sm. 9 b. 5.

It has been holden that a devise published by three witnesses and declared by the test. to be either presumed to be his will, though not signed by him, was well executed. Qu. 1 Ves. J. 11.

"Attested and Subscribed" in his pre- sence by three or more credible wit- nesses." The general object of this clause is to prevent the frauds consequent upon the private execution of Devises. Pow. D. 68
1 Burr. 420
Pow. D. 175
116
"Credible"

The attesting witnesses are to attend to that object [illegible] the [illegible] of the te- Pow. D. 68.

tator

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Devise

testator [illegible] at the [illegible] of the devising [illegible]
2. at the [illegible] of the [illegible] [illegible]
[illegible] [illegible] of sanity [illegible]
[illegible] [illegible] which they are to
[illegible] [illegible] in [illegible] not only the physi-
cal act of execution the testator [illegible] but
also the mental power or capacity of [illegible]
[illegible] a legal and effectual [illegible]
[illegible] [illegible] be made).

[illegible] the devise [illegible] placed [illegible]
the testator [illegible] be proved. [illegible]
[illegible] the [illegible] [illegible] [illegible] the [illegible]
[illegible] the [illegible] to have [illegible]
[illegible] sufficient [illegible] the [illegible]
of [illegible] [illegible] attestation as [illegible]
[illegible] the attesting witness [illegible]
[illegible] for the [illegible] [illegible] [illegible]
of the testator's [illegible] [illegible] [illegible]
[illegible] the testator [illegible] the [illegible]
[illegible] [illegible] [illegible] to the [illegible]
[illegible] [illegible] [illegible]
[illegible] probability

[illegible]

[illegible] was to [illegible] the [illegible]
[illegible]
[illegible]
[illegible] [illegible]
[illegible] to them, that
[illegible]
[illegible]
[illegible] But the testat[illegible]
[illegible] [illegible]
[illegible] [illegible] appears
[illegible] over that a [illegible]
[illegible] the [illegible] [illegible]
[illegible]
[illegible] evidence to a jury of the fact
of signing: [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible] before
the [illegible] of [illegible] [illegible]

[illegible] Prop'y

Devise

[illegible] still necessary [illegible]
[illegible] of the necessity of delivering a deed
(Cr. Dig. 6.) [illegible] the publication of a
Cr. D. 6. will is meant, some act by the testator
or memorandum or declaration that the instru-
ment is his will. No particular form of
Cr. D. 6. publication is necessary.

Any act or declaration indicating a
Cr. D. 6. & Ham. 25. [illegible] intent in the testator to dispose of
his estate by the instrument is sufficient.
Cr. D. 6. 8 Ham. 25. Thus delivering the instrument as a
deed has been holden a sufficient publi-
cation. It was so holden in a case
[illegible] & Burr. [illegible] [illegible] where the witnesses were deceived and
believed the instrument to be a deed.

So [illegible] to the [illegible]
[illegible] is sufficient.

The publication [illegible] be inferred [illegible]
[illegible] [illegible] the [illegible] of the testator [illegible]
the testator's handwriting [illegible]
[illegible] [illegible] and
[illegible] [illegible] [illegible]

[illegible]

desire them to take notice" it would be
deemed a sufficient publication.

But the publication must be in the
presence of three witnesses; it seems
at least this is holden necessary as to the
publication. Pow. D. 664 ~~[illegible]~~ [illegible] Com. R. 381

It is necessary that the whole will should
be present at the time of attestation: if it
is in several parts, one of which is attes-
ted by witnesses who never saw the others,
it is not well executed. Pow. D. 84. 3 Mod. 263. 1 Eq. Ab. 403.

But unless there
is a positive proof that the whole was
not present the jury may from the cir-
cumstances of the case presume that it
was present: it is a question for their
consideration. Pow. D. 87-8. 3 Bur. 1773. 1 Bl. R. 407. [illegible] 254.

As to the subscription
of the witnesses: it has been holden that if
a devise is made on three sheets of paper,
not joined, and each witness subscribes
one sheet, the subscription is sufficient
& if the body of the will in the last case were
dispersed [illegible] upon a table, over their
subscription Pow. D. 87. 90. 101. 108. 642. 3 Bur. 1775. 2 Bl. [illegible] 1 Bur. 418. Freem. 486. Pr. Ch. 185. Carth. 2[illegible] [illegible] 53. Pow. D. [illegible] 1823.

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subscription upon that it would seem to be sufficient.

"In the presence of the Testator."

2 Bl. 377. Pow. D. 90. These words are holden synonymous with the words "within the view" &c. If they subscribe within his view, the subscription is sufficient. By the latter word "view" is meant possible view.

Pow. D. 91. Sal. 395. 688. Carth. 81. 1 [illegible] 403. So if the testator might have seen the witnesses subscribe the subscription is in his presence. So where he might have seen into a gallery, thro' a glass-door &c. So if the curtains of his bed are closed; yet a subscription in the same room, tho' it be not seen, is sufficient. Because it is in his power to see them.

[illegible] It is not necessary that the testator and witnesses should be in the same room at the time of subscribing. So where witnesses [illegible] in the adjoining office [illegible] the subscribing, though in a lodging [illegible] apartment [illegible] place [illegible] the testator

testator might have seen it through the window, retired to subscribe) at the testator's request, the above rules apply. Pow. D. 65. 2 Ves. jun. 288. From this clause it seems it is intended to prevent not only fraud but any mistake as to the identity of the instrum.t — Bl. 377. Pow. D. 98. Doug. 232

If then the testator is insensible at the time of the attestation, though personally present, the attestation is not good: "his presence" includes in construction a mental presence or a knowledge of the transaction — Pow. D. 75. Doug. 232 n.

So though the attestation is in the same room with the testator and he be of disposing mind, yet if executed clandestinely it is not sufficient: for it is not in his presence within the meaning of the stat. but he is ignorant of the transaction. — Pow. D. 75. 1 P. Wms. 740 n.

But tho' the witnesses must subscribe in the testator's presence, yet the fact that the subscription was in his presence, need not appear on the face of the instrument. It is a fact for the consideration of the jury. — Pow. D. 78. 2 Wils. [illegible] 3 B. & P. [illegible] Stra 1105. 8 Ves. 428.

Where

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Instead of stated in the instrument, it must be proved. If the witnesses are dead, the jury may presume the fact.

4. "By three or more" credible witnesses.

Pow. D. 180. 680-2. 10. Comb. 35. S.C. Holt 4. S.C. Comb. 171. 3 Mod. 262. 1 Show. 68. Pr. Ch. 279. Under these words it has been decided that if a devise is subscribed by 2 witnesses and afterwards a codicil by 3 witnesses, the devise is not aligned by three witnesses within the statute; and that if the devise is not witnessed as required with three witnesses, a codicil does not make it good.

2 Vern. 594. Pow. D. 680. 2. As to the principle, it does not appear explicitly in the case that

Com. R. 382. Pow. D. 64. 5. Ib. 478. 1. the devise was present when the codicil was executed. The decisions however appear

Pow. D. 159. 686. 1 Ves. 354-6. clearly to have proceeded upon the distinction between a devise and codicil and a devise made at several times and on separate distinct parts, in which last case an attestation of one part is sufficient.

Pow. D. 23. 33. What then is the difference? For the Will and Codicil constitute but one instrument. A codicil ... would publish ...

Continued

Devise

considered as being intended to affect an instrument already complete, and not to complement the instrument, or to give it validity. An attestation of the Codicil therefore is not effectual to the original devise. But an attestation of one part of the original devise is intended to give authenticity to the whole. And where there is a Will and Codicil on one piece of paper the question whether the subscription of the Witnesses belongs to one or both, is a fact to be determined by the Jury. Pow. D. 64-2 Pr. Ch. 2[illegible]. 2. Vern. 5[illegible] Pow. D. 66-7 [illegible]

And as to the question whether a subsequent writing is a Codicil or a distinct part of the original Devise. it seems that if the subsequent part relates to personalty only and is executed according to the Statute; the circumstance furnishes presumptive evidence that it was not intended as a Codicil. It is not necessary that the Witnesses subscribe in each others presence or at the same time. Pow. D. [illegible] Bur. 5[illegible] Pow. D. 110. 3. 2. Atk. [illegible] 3. Bur. 1775 2. Vern. 423. Pr. Ch. [illegible] 2. Atk. [illegible]

But

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But it is not the case; for the death of one [illegible]
[illegible] is sufficient to prove that all signed
[illegible] in the testator's presence, but unless all were
[illegible] present together proof cannot be thus
[illegible] [illegible]. And if one is living the hand-
[illegible] writing of the others cannot be proved. Saving
in such case, proof that the others signed
[illegible] in the testator's presence cannot be had
unless all were together. Note the diffe-
[illegible] rence between proving the execution and
attestation of the devise in a particular
suit at law (which it seems can be
[illegible] done by one witness) – and the establish-
1 Wils. 418. 1 Ves. [illegible] ment or formal probate of it in Chancery
for which purpose all must be examined.
In [illegible] the practice of Judge Reeve
thinks to call but one to prove it.
"Credible Witnesses" the word "credi-
ble" is not used in our stat.–
[illegible] are such? The word "credible"
seems to be synonymous [illegible] the credibility
[illegible] of the witness [illegible] never inquired into.

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If at [illegible] competent." [illegible] expression for competency is implied in the term "witness". (Greenl. [illegible]

It has been decided that a devisee is not such a witness as the stat. requires: it is clear he is not so to his own devise. One who is not entirely [illegible] by a credible witness. He is said to be excluded on the ground of interest. [illegible] 1853

Pow. D. [illegible] Jennings [illegible] Stat. 1853

The rule applies to interested witnesses generally [illegible] is a good witness [illegible] the other devises, in the same instrument.

The credibility of persons rendered incompetent by crimes: they cannot give evidence of their subscription [illegible] where before attestation the witness was convicted of some crime. 2nd: Then a subscribing witness [illegible] released [illegible] interest [illegible] at the time of attestation be [illegible] to establish the same [illegible] the other [illegible] of the witnesses then present [illegible]

Pow. D. [illegible]

tested

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interested at the time of attestation & com-
petent to testify at the time of exami-
nation, can the devise be established?
Is it well attested? 1 Pow. D. 18.

Anstey v. Dowsing 2 Str. 1253 Pow. D. 13 / 19.

It was holden, obiter, by Lord Chief Justice
in Anstey v. Dowsing that the witness
need not be competent at the time of
attestation. The witness who had an an-
nuity charged on lands and which was
not taken, etc. There then the interest was
subsisting as in Hilliard v. Jennings.
Of the case was carried to the Exchequer

1 Pow. D. 101. Carth. 513.

Chamber where there was a difference
of opinions and the case was compro-
mised. The question was directly deci-
ded in favour of a devise under such cir-

Wyndham v. Chetwynd 1 Bl. 95 1 Pow. D. 105

cumstances in Wyndham v. Chetwynd.
There the witnesses were all creditors, the
debts however being discharged on land and
paid before the time of examination).
The devise was held well attested.
The decision however was disapproved

by

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Lord Hardwicke in [illegible] v. Lloyd 1 Wils. 333. 2 Ves. 37. Cru. D. 120.

The case of [illegible] v. Salisbury is in point to the same purpose, cited 1 Burr 427-8. Where the testator, who had legacies charged on land by two wills, [illegible] indifferent to them as the testator's death not before [illegible] was established. There [illegible] however a [illegible] very [illegible]. | Lord Rugeley's case, Cal. D. 1356.

The same point was decided in [illegible] v. Sorsey contrary to the opinion of Pratt Chief Justice — | [illegible] v. [illegible], Cru. D. 312.

See Cruise's statement of the authorities in his treatise on this subject page 153. | Cru. D. 133.

It was decided by the Sup. Court of Conn. in the case of Wadsworth v. Smith in favour of the devisee. This decision was however reversed by the Court of Errors [illegible]. It is questionable indeed whether the [illegible] to the subsequently existing [illegible] [illegible]. So that he brought testify [illegible] the [illegible] release. See next | Decision Sub. Court Conn. | Reversed Ct of Errors 1790 | 1 Burr 428. 1 P. Wms. 554-8. [illegible] 511.

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not [illegible] duly attested, were within the St.
of [illegible] [illegible] [illegible], [illegible] [illegible]
[illegible] before [illegible].

[illegible] 9. 22 The Stat. 25 George II. being declara-
tory, there is no authority in England for the
[illegible] [illegible] 133 opinion that the devise to a [illegible] of a sub-
[illegible] scribing witness [illegible] [illegible] that [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]. [illegible] [illegible] declaratory
[illegible] [illegible] authority. That Stat. provides
[illegible] 126. that devises and legacies to attesting
witnesses, shall be void, and they admitted to testify, and that [illegible] [illegible]
[illegible] [illegible] [illegible] the [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
as [illegible], [illegible] [illegible] [illegible]. [illegible] [illegible]
not re-enacted here.

[illegible] [illegible] It is a general Principle of the [illegible],
[illegible] that a [illegible] by [illegible] [illegible] attested
writing, [illegible] [illegible] [illegible] a [illegible] legacy.
The [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
to Grant [illegible] the heirs of a [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible] [illegible]

[illegible]

[illegible] [illegible] the [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] the
[illegible] of [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] too, that [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] the
[illegible]: Suppose the [illegible] [illegible] [illegible]
[illegible]. [illegible] [illegible] [illegible] objected
that "three Englishmen" are required.
1. The [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

But [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] the [illegible]; [illegible] [illegible] [illegible] [illegible]
[illegible] to be [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] interest [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] under the [illegible],
[illegible] [illegible] [illegible] [illegible] the [illegible] [illegible]
[illegible] [illegible] the [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]

whether

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whether the Will [illegible] or not. If [illegible] by the same being by two wills, to one of which he is attesting. It seems, that the

Cru. D. 48 testamentary exhibition (of Real and Personal [illegible] property) may be good as to the latter, though void as to the former for want of due attestation.

Who may Devise.

The English rule is, that all persons who

Cru. D. 132 may convey, and who are not disqualified [illegible] by the [illegible] of the Stat. of Wills, may devise.

But by the words "all persons" in the Stat.

Cru. D. 114 32 Henry 8 are meant natural persons, [illegible] existing [illegible] single or being [illegible] with Corporations [illegible] this Stat. [illegible] of natural persons there are [illegible] incapable [illegible] [illegible] [illegible] [illegible] [illegible] are [illegible] disability.

[illegible]

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According to the construction of the Statute 32 Henry 8. then those persons who before the Stat. could not devise lands owing their being incapacitated under the Stat. are these. 1. In certain parts of England infants may devise by custom. Full age is completed on the day preceding the 21st anniversary of one's birth.

Pow. D. 141

Pow. D. 141-4.
[illegible]

[illegible] 14. 625.
2 Ray. 480. 1096.
Pow. D. 14; 686
1 Sid. 162.
Ray. 84.
1 Keb. 189.
see "Parent and Child"
1 Vol.

2. An Idiot is one who has no understanding from his nativity: literally, a natural fool. A person is not considered such who has "any glimmering" of reason; [illegible] till his age [illegible]. A person deaf dumb and blind from his birth is deemed an idiot; as wanting those senses which furnish the mind with ideas.

1 Bl. 303.
Pow. D. 144.
Swi. 1376
[illegible] 63

Pow. D. 145.
1 Bl. 303

Pow. D. 145
1 Inst. 42.
1 Bl. 304.

3. A person of non-sane memory (though not an idiot) cannot devise. By these words is meant insanity or mental derangement in general.

Pow. D. 145.
[illegible]
Swi. 1458

A

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It is not sufficient that the testator can remember common events; he must have what is called a disposing memory or understanding sufficient to make a reasonable disposition of his property.

[illegible] 146
[illegible] 23.
[illegible]
[illegible] 761

What is a sane and disposing memory is a question to be determined by the rules of the common law.

[illegible] 146
[illegible] 23.

4. A feme covert cannot devise. For whom her acts are supposed to be done by coercion of her husband. She cannot [illegible] they are specially excepted in the stat. of Henry 8 and it has been holden that a custom for a feme covert to devise is void.

[illegible] 1488
[illegible] 147

It has been decided in Virginia that a feme covert may devise real property under her husband's [illegible] for the power at common law [illegible] what is remarkable, except [illegible] the husband's rights would be [illegible] by the [illegible] [illegible] [illegible] [illegible] and [illegible] [illegible]

[illegible] 1486
[illegible] 135
[illegible] 1434
[illegible] 518
[illegible] 303
[illegible] 315
[illegible] 173
[illegible] 635
[illegible] 409
[illegible] 1486
[illegible] 313

Tf

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It is rejected that tho' she cannot bequeath personalty without the Husband's consent. Perk § 5[illegible]. 2 P.W. 498. Stra. 891.

All [illegible] relate, to passing the personal property belonging to the Husband in Wife's right or which he has a right to control "Because it would be a Will of his goods" So of her "pars rationabilis" anciently. So according to some, of her paraphernalia — Ld. 1. Reeve. H.E.L. 307. 3 Bacon 49.

Bracton 60.
Qu. 2 East 552.
1. Reeve 14[illegible]
2. Inst. [illegible] 307/
4. Inst. 93/111.

So she may appoint an Executor of goods and chattels which she holds as Executrix without the Husband's consent. She cannot bequeath those [illegible] or with his consent for they are not devisable. Hence seeing that there be nothing in the condition of coverture to prevent a wife from devising what is devisable provided the rights of the Husband are not infringed. Real property is here devisable, and as our Stat. does not disqualify femes covert, they stand

2 East 552.
[illegible] 49.
3 Ba. 498.
Plow. 526.
Dan. 3[illegible]0.
1. [illegible] 10[illegible]

when

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upon the same footing respectively [illegible]
with respect to her property [illegible]
[illegible] &c. But even here the courts
adhere to the doctrine of Curtesy [illegible]
[illegible] by the Court
of Errors was approved by the Legislature
[illegible] Revised
[illegible] Titles on Dower [illegible]
But the Husband is [illegible] for life
[illegible] may make a will or devise [illegible]
[illegible] for the same being
[illegible] in all things [illegible]
[illegible]. In England there are ways in
which a feme covert may settle [illegible]
over the same [illegible] her separate
real as well as personal [illegible]
[illegible] the power of alienating
or devising. This may be made either
of three ways, by way of settlement 1st by
way of trust 2d By way of power [illegible]
of use. Such settlement may be made
before or after marriage. If after marriage

Cru. D. 46

[illegible] D. 537

[illegible]

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however it must be by fine or recovery - Since st. of [illegible] that now a fine or recov-ery for either of these purposes would be defective through the settlement being not actually made: i.e. the heir will be compelled in equity to make a convey-ance in pursuance of her appointment. In Eq. the course is, what is re-quired to be done?

2 P.W. 620.
6 Bro. P.C. 156.
2 Ves. 575.
Prec. Ch. 166. 8.

1. By way of trust; as if a woman having real estate convey it before mar-riage or by fine or recovery afterwards to trustee in trust for herself for her sepa-rate use during coverture, and after-wards in trust for such persons as she shall by any writing &c. appoint: in this case a devise by her, will be a good ex-ecution of the trust and sustained in Equity. It is however not called a "devise" but a writing in nature of a devise.

Prec. Ch. 40
2 Bro. 67

2d. By way of power over a use; as if a woman having real estate while sing

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to the use of herself for life, remainder to the use of such persons as she shall by any writing &c. appoint. And a devise making the appointment will be supported in Chancery. Prec. Ch. 234. 1 Vez. 2 Vern. [illegible] 3. Br. P. C. 308. 4 Bro. 168. 3 Atk. 709. 2 Eq. Ca. 157. 752. Pow. on Powers, 50.

[illegible] Sug. Pow. 152. Even now it will be supported in Courts of law in cases, as under a power of uses. The subject thus supposes, in case of lands [illegible] are same as real estate. Every power thus created takes effect as if the limitation in the appointment of it had been contained in the original conveyance or deed creating the power. The disposition is con-

[illegible] sidered as taking place when the power is created, though the nomination of persons be not take place till the execution of the power. The mode of settlement is con-

[illegible] tained in the case of [illegible] [illegible] [illegible]

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be executed in these cases, according to the Stat. of Frauds. [illegible] of the [illegible] [illegible] is an infant, [illegible] [illegible] [illegible] a [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] discretion [illegible] [illegible] matter.

[illegible] [illegible] [illegible] and [illegible] of the persons making are disqualifications. These are [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] at his free will and pleasure". The same rule [illegible] holds in Conn.: the freedom of will which is essential in the making of every contract is wanting. So, it was holden, that a [illegible] man [illegible] induced by undue importunity to make a will that he may obtain quiet, is [illegible] by restraint. But there must be actual proof of undue importunity or restraint [illegible] either of the above disabilities [illegible] at the execution of the [illegible] [illegible] [illegible] [illegible] publication, the will

Swi. D. 140. [illegible]
3. [illegible] 80.
[illegible]

[illegible] [illegible]
[illegible] 134. [illegible]
[illegible] 208. 30.
[illegible] 56.
[illegible] 6[illegible]
[illegible]
see [illegible]
[illegible]

Swi. D. 140.
Dyer. 143.b
Cruise. 334.
Styles. 427.

1 Bl. 136
5. Co. 119.
Swi. 163.

Swi. D. [illegible]
Styles. 427.
1 Ch. R. [illegible]
[illegible] Conn. [illegible]
[illegible]. [illegible] 1.

Swi. D. 170 [illegible]
1 Rep. Ch. [illegible]

Swi. D. 140. 3
Dyer 436
[illegible]
[illegible]
[illegible]
[illegible] 160
[illegible] 5[illegible]
[illegible] 365
[illegible] 355

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will be void, though the disability be removed before its consummation by the testator's death. For the consummation is founded on the inception, which is void. Ex. (Coverture, Infancy &c.)

A joint tenant cannot devise in England. This is the rule as to Devises by custom before the stat. of Henry 8. For the survivor claims the whole by a title paramount. He claims by the death of his cotenant, and the devisee, after his death. "[illegible] and death." [illegible] there cannot be a joint devise.

Pow. D. [illegible]
Litt. [illegible]
1 Inst. 185 a.
Pock. p. 550.

[illegible]

The same rule holds under the Statt. of Henry 8. They are not expressly disqualified by these statutes, but tacitly by the Sts. of Henry which expressly embraces persons seised in severalty. "[illegible] [illegible] [illegible] voluntati [illegible] living." &c. So if a joint tenant makes a devise of his part and afterwards he severs [illegible] will not pass but must be made [illegible] thereof.

Pow. D. [illegible]
[illegible] 5 6. 217.
1 [illegible] 172.

Pow. D. 408.
[illegible]
[illegible] 88
[illegible]

Devise.

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devise. This however was formerly doubted Pow. D. 145. 1 Eq. C. a. 172. Park p. 500.

In Conn.t one joint tenant may devise: for here there is no survivorship: and the words of the Stat. are general.

It is a general rule that a person cannot devise lands which he has not or is not seised of at the execution of the devise i.e. the time of its execution and publication. This indeed is the [illegible] applicable to devises by the custom &c. If the testator devise all his lands and afterwards purchases more: here the latter do not pass. A devise is in nature of a conveyance in praesenti to take effect in futuro. The devisor must have a present interest. There are some exceptions to this [illegible] - livery of seisin is dispensed with in case of a devise from necessity. The rule is otherwise however in case of an after purchased lease for years for this is only a chattel. [illegible] a little after [illegible]

Pow. D. 143. 194. 2 Bac. [illegible] 1 Inst. [illegible] [illegible] Pow. D. 101. [illegible] 237 [illegible] 71

Pow. D. [illegible]

[illegible] D. 85.

Pow. D. 97.

Pow. D. [illegible] [illegible] 3 [illegible] [illegible] 234.

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Personalty is not considered, at law, as given in a will by a general devise, but in the appointment of an heir, his personal estate. [illegible] devise the devisor [illegible] [illegible] [illegible] [illegible] that the devisor should be seised. For the conveyance is not consummated till the testator's death. Therefore if the owner of land after devising it is disseised and continues so till his death the devise is void [illegible] of the devisor [illegible] [illegible] [illegible] [illegible] the devise is [illegible]

The same rule obtains under the statute of Henry 8. If the owner [illegible] disseised after the devise, continues and dies disseised, the devise is good. For he is considered as to have been seised in his estate.

So if the owner is seised at the time of making his devise, but afterwards enters and continues seised till his death, the devise is good. For he is considered to have been seised [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

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in the devised property. It has been doubted whether a Devise of lands not owned at the time by the Devisor but specifically described and afterwards purchased would pass. It has been decided not to be, and there are also contrary opinions. We could conceive, that it is within the same reasons as if not so specifically described. Upon the same principle a Devise by the Mortgagee of the land, mortgaged with [illegible] being the equity of redemption afterwards purchased by him [illegible] in the Devisee [illegible]. Ownership alone is sufficient. The words "Heirs" or "Descendants" are not used in our St. [illegible] in Descent, [illegible] the Right of Representation [illegible] [illegible] [illegible] at Possession. Used in England [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] themselves,

[illegible] 2 [illegible]
[illegible] 1 [illegible]
1 Ray. [illegible]
[illegible]
2 [illegible] 14, 55
[illegible]
[illegible] 4th [illegible]

[illegible] 2d [illegible]
2. Bl. R. 49

[illegible]
[illegible] 541
[illegible]
[illegible]
[illegible]
[illegible]

of

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If a person by an executory agreement bind himself to sell them to A.B.: but before the conveyance of the same, there be a devise [illegible] the devise will be good in equity: for here whatever is agreed to be done, is considered as done. The vendor is treated in Equity as trustee for the vendee: and on a bill by the latter the Court would decree a specific performance. This is not treated as a devise of a future estate: but the land belongs to the vendee from the time of the agreement in equity. But the land will not pass by a devise executed before the executory agreement is made: for there is no present interest even in equity. It was held by the Lord Chancellor to be otherwise if the devise were for the payment of debts.

Pr. Ch. 108.

[illegible] 2d ed. 629.

[illegible] 2 Atk. [illegible] Ves. Jun.

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Of Things devisable: under the Stat. of Henry 8. and our own.

1st. As to the Subject matter.

"All lands," not devisable by custom, are devisable under these Statute, — Cru. D. 220.

the word, "All lands," here denote the subject, not the tenant estate. — Cru. D. 22[illegible]

All estates are not devisable. but all lands are: i.e. if the tenant has a devisable interest in them.

"Tenements and Hereditaments" not be ing considered valuable are not devisable under these Statutes. As personal franchises — Because the words in the Stat. of Henry 8. are "of annual value" things which could [illegible], are not devisable, here for they are not considered as any estate, but [illegible] the words of the Stat. are "lands and other estate." Advowsons are devisable, for they are considered as valuable [illegible] Rent is devisable under

Cru. D. [illegible] 220. 22[illegible]
3 Co. 30 b
10 Co. [illegible]
[illegible]

Cru. D. 22[illegible]
[illegible]

the

Devises the Stat. of Henry 8. as if the owner has a devisable interest in them? Pow. D. 226. Litt. § 585 Co. Lit. 205. 3. Co. 33.

An Annuity in fee is devisable. It is different from a rent in this that it is a yearly sum, charged on the person of the grantor. Pow. D. 226. 1 Inst. 144.

Q. What estate is devisable under the Stat. of Henry 8 and Devises: i.e. what interest the devisor must have in the thing to be devised —

In England no other than a fee simple estate is devisable under the Statute of Henry 8 The words "estate of inheritance", used in the 32. Henry 8. being explained by 34. Henry 8. to include estates in fee simple only. Pow. D. 228 229.

The words of our Stat. being general "lands and other estates," include all estates, free and lesser, but not those chattel interests as terms for years are devisable at Common law. Pow. D. 10. 2 Bl. 344. 1 Inst. 7.

There

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There are several estates of inheritance in lands, called estates in fee simple. 1. Fee simple absolute. 2. Determinable. 3. Base fee. 4. Conditional. Since the Stat. de donis fees conditional are confined to personal hereditaments. E.g. An Annuity descendible.

Pow. D. 231-7
Plowd. 557
2 Bl. 109.110

Pow. D. 232-7
239.
1 Ves. 180
1 Wn. Ch. 326.

All these are devisable by the Stat. of Henry 8. "Fee simple" is used in its most general sense, and as distinguished from estates tail and pur auter vie. Estates in fee simple may be in possession or not in possession. As to the former there has been no contrariety of opinion, but have been always holden devisable. Fee simple, not in possession may be divided into 1. Reversions 2. Vested Remainders. 3. Contingent Remainders, Executory Devises &c. 4. Estates subject to a Condition of re-entry. These interests are all devisable except the last: though it was formerly

Pow. D. 232.
3. Bulst. 164

Pow. D. 232-4.5

Pow. D. 233-4.
Plowd. 57

Pow. D. 233-
2. Bulst. 58

Held

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holden that the 7th class warrant: Pow. on D. 34. & Cro. Eliz. 222. 1 Vent. 33. Cro. C. 281. 283. & 3 Lev. 435. An Estate in Possession & so a devise of Reversions: vide Pow. D. 224. [illegible] 621 [illegible] Ventr. 285.

[illegible] & a Reversion expectant on an estate tail is devisable under these Statutes of Henry 8. So a Remainder expectant on an estate tail is devisable, indeed this is a vested Remainder.

[illegible] In Cheat there can be neither Reversion nor Remainder expectant on an estate tail.

Estates in fee simple may be legal or equitable. These are devisable under the Statutes of Henry 8. and were so Equities of Redemption. So if an estate is granted to A & heirs in trust for B and his heirs, B may devise it. This was so also before the Stat. of Henry 8.

[illegible]

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Q. What estates may be created by Devise. — A. Tenant in fee simple absolute may devise an absolute fee simple. Of course any other fee simple which can be created in the subject by act of the party.

Pow. D. 254.
3 Com. 210.

So one having an absolute fee whether he in possession, remainder or reversion may devise (it) create a fee tail.

Pow. D. 238. 240.
1 Rol. 609. F.2.
1 Inst. 111.

But a devise of a fee after or upon a fee is not good: E.g. To A. in fee and if he die without heir to B. in fee. This rule however is related to devises considered as dispositions in praesenti and not to executory devises: for by these the rule is now evaded. But the case stated by way of example would be void by way of executory devise: for the contingency is too remote. As to remainders created by devise and executory devises, see Estates in Possession &c.

Pow. D. 238. 9
10 Co. 74-8.
Cr. C. 54.
Dal. 231

Pow. D. 250. 4

Pow. D. 238 {margin}

v. i. e. "Estates in Poss."

Pow. D. 248
270.

So a tenant in fee may devise to one,

for

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for his life or pur auter vie, and the devisee may enter in these cases imme-
Cru D. 241 diately on the devisor's death. The rever-
sion in these cases descends to the heir of
Cru D. 241. the devisor. Eo tenant in fee after ha-
ving devised for life or in tail, may
Cru D. 241. devise other estates out of the estate re-
Plowd. 35
1 Sid. 285 maining in him (i.e. the reversion) till
2 Keb. 29. 55 44
1 Lev. 144. his whole fee is exhausted. The latter
to take effect upon the expiration of the
former. Ex. Devise to A. for life — then
to B in tail — then to C in fee.

Cru D. 242 3. And a limitation of the ulterior
see "estates in Poss." estate, remaining in the devisor, (ut
supra), may be either by way of re-
mainder or by devise of the reversion.

Cru D. 243. Eo a term for years [illegible]
[illegible] 78. created [illegible] need be [illegible]

Cru D. 6 [illegible] term for years be created
224
[illegible] 324 [illegible]

Cru D. 245 6 Estates created by devise may [illegible]
Dyer 357 [illegible] C [illegible] A for life [illegible]

(p. [illegible])

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generally [illegible] for life [illegible] paying a certain sum to the heir &c.

Also these Conditions may be precedent or subsequent. There are no technical words to distinguish these two species of Condition. Every condition is to be construed as precedent or subsequent according to the apparent intention of the devisor. But a condition describing the qualification of the devisee to take [illegible] have precedent. E. g. provided the devisee with the consent of the testator's [illegible] (marriage) with their consent is a Condition precedent.

[illegible] see "Estates on Condition"

Cru. Dig. [illegible] Tit. 38 [illegible]

[illegible] 2 [illegible] 543. 546

But a devise to A. and his heirs upon condition that within 3 months after the testator's death he execute a release of all demands to B. is a condition subsequent, for it is a devise of a present interest.

[illegible] Tit. 38 [illegible]

Estates created by devise may be either legal or equitable. A devise of lands &c. where the devisee has the legal estate [illegible]

[illegible]

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Of a use since the Stat. was made, is a devise of a legal estate: for the Statute executes the use by transferring the legal estate into possession.

But a devise of a use before the Stat. of uses was of an equitable estate only, as they say, i.e. a devise of a trust in equity. Pow. D. 27

Property is said to be holden in trust when the legal title is vested in one, in trust for another. They were devisable at common law before the Stat. of uses. Pow. D. 282. Pow. D. 277. 278.

If land is devised to one, no use being limited upon it, it cannot be averred to be to the use of any other, than the devisee: for this would be contrary to the intent upon the face of the instrument. Pow. D. 277. 4 Co. 4.

But if a use is limited it will enure to the devisee and will be executed by the Stat. of uses. [illegible] Pow. D. 277. 2 Saund. 312. Cro. 107. Leon. 258. Popham 4. 2 L. Raym 875.

[illegible] [illegible]

[illegible]

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Trusts

2. For an equitable estate may be derived through the medium of a trust. Pow. 282 Technically, is said to be holden in trust when the legal estate is vested in one and the possession or [illegible] [illegible] in another. Hence such uses as are not executed by the Stat. are called trusts,

Pow. D. 280
2 Bl. C. 337. 8

Pow. D. 285-6
2 Bl. C. 335-6
1 Atk. [illegible] 583
[illegible] 6

. 4. [illegible] Origin of trusts, see 2 Bl. C. 335-6 Pow. D. 285-9. The difference between a use and a trust, is that the former carries the legal estate, but the latter does not. For the distinction between trusts executed and executory see Pow. D. 286 & 1 Atk. 581

Pow. D. 282.

1. Where the trustees are directed in the instrument creating the trust to make a conveyance of the legal estate it is executory. 2. Where no further conveyance is directed it is executed. But the executed trust does not include the legal estate it is still an equitable interest as there is no conveyance of the legal estate, it is [illegible] in the one case and

Pow. D. 286 &
1 Atk. 581

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in the other. Lord Hardwicke says that all trusts are in their nature executory. Ves. 2. 184. 3 Atk. 581. 2 Bro. 327.

Cro. D. 289
200. 292 b
Dyer. 354 b
Cr. El. 648
4 [illegible] 134. 341
4 Leo. 43.

One may devise not only terminable interests, but an authority over such interest. If devise that Williams and [illegible] shall have the disposing selling letting and [illegible] of the testator's lands such a devise however gives the devisee a power only to manage the land, as he pleases, and to lease it at will, not to sell or lease for years, for he has no interest. But if one devise, that his executors shall sell his lands, or orders that his lands shall be sold by them or a [illegible], and empowering them to sell, this gives authority to sell.

Cov. D. 230.
293.
414.
Jenk. 113
1 Rol. 330.

Devise of the personal estate to one's executor, implies that [illegible] authority to sell for payment of debts [illegible] real estate, but in any case the personal estate is sufficient

Comb. 113
2 P. Wms. 132
132

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A. takes all the real estate immediately. Authorities, devised over lands, are of two kinds.

1. Naked authorities, and 2d Such as are coupled with an interest. Powers were unknown at the Com. Law before the Stat. of Uses 27 Henry 8. They were the subject of Conveyancing, and are mere modifications of uses. 1. A naked authority is a bare power to sell &c. and there is no interest devised as in the last ex. supra. In these cases, the freehold descends to the heir till the sale.

Sug. P. 292.
Cruise 4. 5. 35 }
2.7. 80 }

Cruise. 263.
266

Sug. P. 290.
1 Inst. 332
113.
1 Prest. 336.
Cr. E. 382.
Mod. 444.
vide. 1 Inst. 113. a
236. 181. n. 3.
Cruise 465.
3 Cant. 553.
Authorities cited }.

And a release of such authority by the person empowered, and if an executor empowered to sell, release to the heir; this release passes no interest in the Devisee for the same.

Sug. P. 293. 4.
1 Inst. 406.

Such authority must be strictly pursued; and the execution of the power must therefore be construed with free

Sug. P. 30[illegible]
2 Atk. [illegible]
2 Vern. 2[illegible]6
1 Ch. [illegible]
Cruise 23[illegible]
2 [illegible]
1 Will. 7[illegible]

seen

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reference to the power itself.

So the authority is strictly personal & is not transferrable for it is a personal confidence. If there are two and one dies the other cannot [illegible]. So [illegible] left to Executors [illegible] take not as [illegible] but as trustees. [illegible] the power [illegible] to the Executors [illegible] Executor in the last case. So if the testator [illegible] that his lands shall be sold by his Executors or the Executor of his Executor: and the [illegible] Executor [illegible] Executor [illegible] they cannot sell. For they are not Executors to the original Executor.

[illegible]

But a [illegible] the word, if the devise will be good [illegible] [illegible] Executors and [illegible] his lands to be sold by his Executors" [illegible] or sale by the other [illegible]

If a testator devise [illegible] that his lands shall be sold without naming the person by whom the Executors are the persons [illegible]

Real [illegible]

[illegible] debts, if they, are to distribute, or
a [illegible] by the executor. So to pay the
debts by [illegible] of the Executor, has no con-
cern with the [illegible] of the sale, the power
[illegible] person to [illegible] of the money, is
not a [illegible] in the hands of the Executor.
[illegible] in the last case [illegible], the surviv-
ing Executor may sell alone: [illegible]
[illegible] as Executor: [illegible] [illegible]. [illegible]
the same principle it seems, that the
Executor [illegible] might sell.
If the person [illegible], empowered to sell re-
[illegible], [illegible] whose benefit the
sale was intended, [illegible] in Chancery
compel him to [illegible] [illegible] of the person
[illegible] [illegible] [illegible], the Court of Chance-
[illegible] [illegible] a trustee, it seems.
[illegible] [illegible] in [illegible] estate to
[illegible], [illegible] to sell [illegible], a devise of an
[illegible] coupled with an interest
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] to [illegible] [illegible] them, the [illegible]

[illegible]

Powers

Latch. 140
Pow. D. 299
Lev. 304
Lev. 304.

Pow. D. 296
" 301.
2 [illegible] 220.
Dyer 371.

Pow. D. 300

Pow. D. 303

Pow. D. 301. 2 4
[illegible] 236
[illegible] 265
[illegible] 18.
2 36. 18. [illegible] 3.

Pow. D. 301
[illegible] 221.
[illegible] 48.
[illegible] 213

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authority w^ch is coupled with an interest
In these cases the devisee, not the heir
shall have the estate till the expiration
of the term limited; and if the devisee
should die, his representative, will hold
during the term limited for which the
estate [illegible] term.

So the estate of the devisee will continue
till the expiration & [illegible] the effect of
the devise should be deemed a [illegible]
E. If the devisee in a case [illegible]
should die before [illegible]
as to [illegible] authorities

Under a limitation of an estate to [illegible]
"eldest son's children," if A. or B. shall
[illegible], an exclusive appointment to
one of A's children is a good execution
of the power. A power is executed by
devise, if not executed by a mere limitation
or devise. E. A. having a legal estate
in trust with a power to devise to either of
his sons, devises all his estate, [illegible]

Cro. El. 2?? Co. Lit. 3?? 1 Inst. 112. 113. 81. Ibid 235. Cutts [illegible] 2 Lem. [illegible] 3 Lem. [illegible] Bac. [illegible]

Cro. El. 312. 4 Co. 28. Dyer [illegible]

[illegible] 230. 2 Term 5?? Co. 146. 1 Atk. 389.

[illegible]

A. [illegible]

after payment of his debts, and then the trust estate vests in the heirs free from any trust in equity. An appointment by will is an execution of a power to appoint by deed. [illegible] 361

Who may take by Devise.

In general all persons not incapacitated to purchase may be devisees. By the Stat. 32 Henry 8. as explained by Stat. 34 & 35 Henry 8. Corporations [illegible] are not allowed to devise, to corporations [illegible] unless [illegible] the Stat. 43 Eliz. authorizing devises to Corporations for charitable uses but this restriction is much removed by Stat. 9 George 2. [illegible] Corporations [illegible] incapacitated to take by devise. There [illegible] Corporations [illegible] purchase and [illegible] may be devisees.

Co. Lit. 3.b
1 Bl. C. [illegible]
Powell 316
[illegible]

Devisees must then be ascertained or [illegible] persons [illegible] capable [illegible] and [illegible] are [illegible] by the [illegible]

[illegible]

[illegible]

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the Statute: 1. Natural persons capable of taking by devise, may be either in esse or not in esse. Wife or [illegible] may be devisees, unless prevented by some civil disqualification.

Coverture is no disability. The husband indeed may at law defeat the devise by disagreeing to it: but Chancery will interfere to prevent him from [illegible] the devise. So, the wife may be devisee to the husband, though she cannot be grantee, for the devise does not take effect till his death.

• An alien may take a devise but he can hold only till office found; the estate then vests in the King. And hence [illegible] only in the State.

• An illegitimate child in esse may take under [illegible] he has acquired [illegible] reputation. But he may then take [illegible]. A devise to the [illegible] bastard.

Pow. D. 315

Pow. D. 315

Pow. D. 315 [illegible] 144

Pow. D. 315 [illegible] Bolt. 241

Pow. D. [illegible] 2 Bl. 258 [illegible]

Pow. D. [illegible]

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till he has [illegible] [illegible] the definition of [illegible] [illegible] [illegible] that a devise to [illegible] [illegible] [illegible] that [illegible] [illegible] of a Term [illegible] to the children [illegible] [illegible] [illegible] will include his posthumous children. Where such a devise is made by the father [illegible] the [illegible] [illegible]: [illegible] there is no difference [illegible] a posthumous person and one who is children [illegible] [illegible] at the devisor's death. There was formerly a distinction taken between a present devise to an infant in ventre sa mere & a devise in way of remainder. The latter was held [illegible] good if the infant was born when the particular estate determined. [illegible] [illegible] now by Stat. [illegible] 10 & 11 William 3 if an estate is limited to one with a contingent remainder to his unborn children [illegible] posthumous child shall take as if born in the father's lifetime. [illegible] [illegible] [illegible] Stat. [illegible] [illegible] [illegible]

Fearne 3[illegible]
Doug. [illegible]

[illegible]

Under Devisee [illegible] Child [illegible] Estate [illegible]

[illegible]

[illegible]
3 Burr. [illegible]
4 Burr. [illegible]

vide

Devise

Devise to ch. unborn &c.

[illegible] a distinction [illegible] between a devise to a person not in esse [illegible] [illegible] the presumption of her [illegible] to be born. In the latter case [illegible] [illegible] [illegible] the [illegible] takes. Ex. Devise to an unborn [illegible] [illegible] shall be born. The latter is good by way of Executory devise, and the [illegible] descends to the heir in the mean time. The two distinctions are not contemplated [illegible] but [illegible] devise is [illegible] in [illegible] as where [illegible] under a devise of such children as he shall have living at his death, a posthumous child shall take. But whether a devise to an unborn infant, [illegible] to presents, is good [illegible] in the devisor's death, is not settled [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] are [illegible] [illegible] [illegible] Devise to the unborn [illegible] of [illegible] the [illegible] [illegible] [illegible]

[illegible] 2. 300
[illegible]
[illegible] 255
[illegible] 158
[illegible]
Ent. [illegible]
[illegible]
[illegible]
[illegible]

[illegible] 24

[illegible] 575
[illegible]

[illegible]
[illegible]
[illegible] 225
[illegible]
[illegible] 246

[illegible]

[illegible] 304
[illegible] 324
[illegible] 243.0
[illegible]
[illegible] 38
[illegible]
[illegible] 156
[illegible]
[illegible]
[illegible]
[illegible]

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to be in possession of the remainder [illegible]
[illegible]
[illegible]

The objection to the infant[illegible] taking [illegible] is
[illegible] a [illegible] is that [illegible] cannot take
[illegible] to take when the devise take effect the
[illegible] till he
[illegible] of the [illegible] But why does
not the [illegible]
[illegible] hold in the case of a [illegible]
devise to [illegible] an infant which is clear
[illegible] good [illegible] the freehold descends to the
heir in both case till the infant [illegible]
[illegible] the heir is not accountable for the
[illegible] profits at any rate, if
there are [illegible] words used in [illegible]
[illegible] in the devise affirming an infe-
rence that the testator was aware of the
[illegible]
[illegible]
[illegible] the [illegible] child [illegible] when
[illegible]

[illegible]

Cro. [illegible]
[illegible]

[illegible]
Vol. 609

3 [illegible]
3 [illegible]
[illegible]

[illegible]

Devises

shall be born a devise to him is void.

And according to the more modern and better opinion, every Devise to an unborn child [illegible] such an infe[illegible]. Because it [illegible] a Devise to take effect at its birth [illegible] as executory or future disposition.

4 Burr. 2171. 6 Co. 2d. 526. [illegible] Fearne [illegible] 2 [illegible] 1 P. 10. 486.

So is a Devise to an infant in ventre sa mere with a conditional limitation over if no child born. See Authorities.

[illegible] 486.

Civil persons may be devisees as Executors or Administrators. E.g. Devise to the Executors of A. is good: And so of Civil persons not in esse if the intent is clear. E.g. To the Executors of A's Executors.

[illegible]

But Churchwardens are not such civil persons as can take in that character. See Ibid.

[illegible]

Every Devise must be certain [illegible] certain or be ascertainable. But designation may be by either [illegible] description, and though the name

1 P. Wm. 293.

[illegible]

Devises

mistaken still, if he is sufficiently designated by a description he may be known. (This [illegible] however applies to every other person. This position is more, to be taken with qualifications. Par[illegible] evidence may under certain restrictions, may be admitted to explain the ambiguity): of which post

1 Atk. [illegible]
Pow. D. 498 9.
6 Th. 61.

E.g. Devise to the Governor of the State [illegible] the Governor &c. So the "son" of such a person is sufficient.

1 Hob. 32.
Pow. D. 340
1 Rol. 837.
7 Carves 9.

And the description though not strictly applicable may be good by reputation. E.g. to A. the son of B. A. being a bastard. But the rule does not hold in favour of a bastard born after a devise made. For he cannot be entitled (taking it at all) at the time of his birth; but he can not gain the reputation of being which he [illegible] but by continuance

Pow. D. 338.
1 Atk. [illegible]

Pow. D. [illegible]
Cro. El. 5[illegible]
6 Co. 65.
1 Inst. 123
1 [illegible]

[illegible] Devise the birth of [illegible] on "estate [illegible]"

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a child [illegible] [illegible]

Hence also a devise to all the children of A. will extend to the [illegible] in ventre sa mere.

[illegible] 399 [illegible] 230.

A woman may take a devise under the description of the wife of A. if she is reputed such, though she is not his lawful wife.

[illegible] 420

So a devise may be sustained by an erroneous or inaccurate description.

[illegible]

E. Under a devise [illegible] [illegible] "the [illegible] daughter" [illegible] take [illegible] appears to have been [illegible] though prima facie the words designate [illegible]. And a [illegible] would take, notwithstanding [illegible] description to the [illegible] of an elder daughter [illegible] a daughter [illegible] under the description [illegible] [illegible] though the [illegible] perfect [illegible] [illegible] to the elder daughter [illegible] [illegible] the [illegible].

[illegible] 312

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The word "child" or "children" is a sufficient word of description. E.g. "To A. for life and afterwards to his children." Here his children take a life estate in remainder; for the words used are descriptio personarum.

Com. D. [illegible]
6 Co. 17a.
[illegible]

The word "children" is generally used as "descriptio personarum," or a word of description: in which case the persons described take as purchasers: (Wild's case [illegible] in the last case.) E.g. if an estate is devised to A and his children (he then having children) he and they take a joint estate as purchasers. (Wild's case.) [illegible] in the last case, but at the time of the devise no child; "children" is a word of limitation, i.e. the children take as heirs. They cannot take in remainder as purchasers because there are no words of remainder; and they cannot take a present estate as purchasers for they are not in esse.

Com. D. [illegible]
6 Co. 16 b.
Cr. El. [illegible]

Com. D. 535.
6 Co. 17 a.
Doug. [illegible]
1 Bl. R. [illegible]
1 Burr. 219.
[illegible]
[illegible]

Therefore

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Therefore A. takes an estate tail —

The description of a devisee may be ge-
Pow. D. 346. neral or special. By a general de-
scription, is meant, a designation of any
person who may happen to answer the de-
scription. A special: as if one de-
vise to [illegible] in tail, remainder to
Pow. D. 346 the next heir male of the devisor, then
he who happens to be the next heir male
is entitled as devisee. So a devisee may
Cowp. 306. [illegible] Sugd. 331 be constituted by a devise to such a "Stock,"
"family" or "house"; and it will enure to
the "heir principal" of the house or family.
Pow. D. [illegible] If a devise is made to the "posterity of"
[illegible] the lineal heir of the [illegible] shall take,
[illegible] as [illegible] heir of the whole
blood. If a devise is made to the heirs
Pow. D. [illegible] of the [illegible] of the testator, the next
[illegible] [illegible] [illegible]
[illegible] [illegible]

[illegible] So a devisee may be described by the
[illegible] [illegible] of [illegible] to the [illegible]

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Devises

which gave the person answering the de-
scription, by the rules in computing the
degrees of kindred will take
And if a particular relation to another
is referred to, at the time, [illegible]
[illegible] "are construed to include those &
those only who answer the description at
the time of the testator's death—
So the words "the nearest relation of my
name" is a good description. But in
this case "relations" is more [illegible]
[illegible] includes all the testator's
nearest relations in the degree men-
tioned. E.g. all his brothers and sisters
[illegible] [illegible] the nearest rela-
tions [illegible] [illegible] [illegible] where
the [illegible] is "to my nearest relations"; there
[illegible] [illegible] within that descrip-
tion [illegible] take. E.g. [illegible] nearest
relations [illegible] the [illegible] and the
[illegible]" Here the latter thought
[illegible] [illegible] the former shall
take—

1 Br. C. C. 20.
3 Br. C. C. 234.
3 Ves. 248. 464.

[illegible] 464.
[illegible] 355.

[illegible]

take, if one devise to his nearest rela-
tions according to the Stat. of Distribu-
tion; his wife takes nothing, for though
she would be entitled to a part under
the Stat. she is not his relation, but
related by affinity.

Pow. Dev. 35.
494. 198.
2 Sug. C. a. 332.
Talb. 251.
1 Ves. 94.

If one devise his personal pro-
perty, then, "to my poor relations,"
those relations who would take under
the Stat. of Distributions, are the legatees.
So Mr Fonbl. although if the words
were "any relations."

Pow. Dev. 350.
3 East. 478.

But if devises of land were thus des-
cribed, Query, whether the above rule
would hold or whether the devise would
be void for uncertainty?

Mr Fonbl. presumes the
Stat. would ascertain the devisees in
the last case. For this Stat. regulates the
succession as well to the real as to the
personal estate of intestates—

Stat. D. 18.
16

If one devise lands "to the next of his
name,"

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manner; it is a question, whether a Daughter who by Marriage has changed her name can take? According to [illegible] the distinction: if she is unmarried both at the time of the Devise & of the testator's death she may take though married when the question arises. Secus, if she is married either at the time of the Devise or of the testator's death. But Lord Hardwicke seems to be of opinion that if the devise be immediate or by way of future Remainder: it is sufficient if she is unmarried at the time of the devise. & if limited upon a contingency that [illegible] at the time of the contingency happening decides her right.

Pow. D. 352. 3.
2 Atk. 545.
532.

Pow. D. 352
2 Ves. 338.

It is a general rule of construction founded on technical principles that if an estate of freehold is devised to one in an immediate or intermediate remainder [illegible] the heirs of his body

Pow. D. 355 [illegible]
[illegible]
[illegible]
[illegible]
[illegible] 393
[illegible] 38
[illegible]
[illegible]
[illegible] 30
[illegible]
[illegible]

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body or his issue, he takes an inheritance— in the first case a fee-simple— in the two latter an estate tail. See Pidge Powell Devises 2. Fearne 207 C. 4 Dur. [illegible]. Doug. 323. 3 Lev. 437. Stra. 125. 2 Atk. 246 &c

Doug. 321
2 Atk. 330
250

Where the remainder is after an intermediate limitation the devisee takes an estate for life and the inheritance in remainder. The former is not merged—

[illegible]

The words heirs &c are construed in such cases as words of limitation, and not of description: i.e. to ascertain the quantity of interest given to the first devisee and not to designate the persons who are to take after him— And where no previous freehold is limited to the ancestor the word "heirs" is as apt a word of description as any other.

1 [illegible] 372

But as the reason of the rule has ceased with the abolition of feudal tenures, Courts have always been as solicitous to narrow the rule as [illegible] the con-

construction

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intention. The heir would therefore not in any case take a [illegible] as a purchaser under the [illegible] of "heir" though a person [illegible] is limited by the same devise to his ancestor, [illegible] from the devise that the word heir was intended as descriptive here.

Eg. Devise to A. for life remainder to his heir for life only; or, to A. for life and to his eldest issue male. Here A. takes for life only. [illegible] if it had been limited to his eldest heir.

Or to R. for life and to his issue male and his heirs forever. Here R. takes for life only, and [illegible] a remainder [illegible] "Issue" in its more proper sense is a [illegible] but it has been generally construed as a word of limitation except where the intention [illegible] narrower sense has been manifest. [illegible] devised to A. [illegible] and after to the [illegible]

Pow. D. 3[illegible]
Cr. El. 40.
Co. [illegible]
[illegible]
Ld Ray. 203.
[illegible] 267
[illegible]

Pow. D. 358.

Pow. D. 3[illegible]
Cr. El. 40
Co. [illegible]

Pow. D. [illegible]
[illegible] 411
[illegible] Cr. El. 3[illegible]

Pow. D. 3[illegible]
[illegible] 224
Ld Ray. 203.

Pow. D. 3[illegible]
[illegible] 308. [illegible]
[illegible]

Pow. D. [illegible]
[illegible]

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[illegible] body and to the heirs male of his body; heir is a word of description and A. would take for life and [illegible] heir male a remainder by purchase. Otherwise the word heirs [illegible] & the superadded words are nugatory.

2. [illegible] Description of the devisee may be Pow. D. 355 [illegible] i.e. the actual description of a particular person: or [illegible] designation [illegible] the above cases. If a man devises [illegible] to answer the description of [illegible] William the son of [illegible] Richard Bond [illegible] the description [illegible] not merely a designation [illegible]

[illegible] to the heirs male of the body of A now living [illegible] i.e. to the present heir apparent of A. — So also the devise [illegible] is a sufficient description of the devisee [illegible] of birth.

[illegible] 211. [illegible] 633. [illegible] 650.

It is a general rule that it is necessary that the devisee answer in all Pow. D. [illegible]

respects

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testator, the description given him. Hence if the devisee is described as heir of such a person, he must show that he is heir in that sense in which the word is used by the testator. Thus if a devise to "the heir" of B. generally and dies, living B. B's eldest son cannot take. For "nemo est haeres viventis" — So if one devise to "the heir" of B. generally and B. is attainted of felony; B's eldest son cannot take. For B. can have no heir. So if the testator describe any particular heir, as the heir female of B. (without naming the person to take, he must answer the description in both particulars, i.e. he must be heir as well as a female. Ergo if B. have a brother, his daughter cannot take. But if the devise shows by positive words, or necessary implication, that a person not being general heir was intended to take by the description of a particular heir;

Pow. D. 364.
2 Com. 40
Dyer. 99. a
1. Co. 66.

Pow. D. [illegible]
Jenk. 203.
1. S. [illegible] 193.

Pow. D. 379.
382. 385.
Vent. 34
2. [illegible]
Mod. 860. b
1 Fonb. 28.
[illegible] 99. a

Pow. D. 343.
[illegible] 34
Mont. 342.
[illegible]
[illegible]
4 645 [illegible]

such

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such person will take: E.g. "to my heir "who is my brother A. B." there A. B. will take, though not heir general.

So, if the intention is clear (ut supra) one may take under the description of heir in the life time of his ancestor. As if the testator takes notice that the ancestor is living: E.g. "to the heirs male of the body of A. begotten" giving A. also a legacy. Here the word "Heirs" is construed to be heir apparent. Indeed it is a general rule of construction in all questions arising upon devises, that the intention of the testator shall govern if consistent with the rules of law. This is the first and great rule in the exposition of devises.

But there has been much doubt whether if an estate is given to one devisee or to the heirs male or heirs female of the body (the words being words of description) it would be necessary that the one to take is to answer the description of heir

Pow. D. 345. 348
1 P. Wo. 229.
1 Br. P.C. 489.
2 Bl. R. 1010.

Pow. D. 246.
Dep. [illegible]
Foll. 30.

Pow. D. 35. 395
Cr. El. 442.
5 Bur 2 614. 461
1 Mod 184. n. 2.
1 Vent. 372.
[illegible] 228.
1 Sid. 24.
1 Co. [illegible] Cent.

heir

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heir as well as male or female heir, and the question is the same, if an estate is limited to the heirs male &c of the body of a Stranger. E.g. "to the heirs female of the body of William Bond". Now will his daughter take, he having a son? (Which he certainly will have). Doubted. Vide Bell's Anatomy, Art. ——. It seems she will. There is a distinction between this case and that in page "Heir female" (without more) [illegible] heir general. But "Heir female of his body" designates his female issue whether heir general or not.

Pow. D. 387.
1 Inst. 24a

Pow. D. 388.
1 Inst. 164a
7 Co. 35b

A person in no sense answering the description of an heir may take under words importing to constitute an heir. E.g. "I devise, that my wife shall be sole heir of all my real estate." So for mere Stranger. Here the word "Heir" does not designate the devisee but the interest which he is to take. The devisee in this case takes a fee. But if one by devise makes

Pow. D. 395–8.
Hob. 75. 34
[illegible] 48.
Style. 198.
[illegible] 634.
Freem. 293.

Pow. D. 398.
[illegible] 48.

a

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[illegible] the construction of [illegible] [illegible] [illegible] [illegible] [illegible] Cru. D. 298-9. [illegible] 4 Br. Ch. [illegible] [illegible] [illegible]

Cru. D. 344.5 403. 419. Also tho' it is a general rule that if the description of the person be certain, so that the person intended may be distinguished from every other person, the devise shall not fail for trifling mistakes, yet a devise is not to be construed void for uncertainty unless from necessity. Eg. to Cecilia the daughter of Richard Bond, her name being Margery.

Cru. D. 352.3 Ves. 402 [illegible] 335 [illegible] 371 [illegible] 32.

Cru. D. [illegible] Freem. 293. Mod. 34.

Cru. D. [illegible] Or to the wife of J. S. [illegible]: her [illegible] [illegible] and then the testator [illegible] she shall take.

Cru. D. [illegible] So where a testator devises to his first born child, then in ventre sa mere and the child was born before his death it was enquired to take under this description. But if the description is false and not merely defective the devise is void. E.g. to the heirs of J. S. J. S. being

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[illegible] [illegible] of [illegible] the [illegible]
[illegible] of [illegible] the [illegible]
[illegible] the [illegible] of [illegible] Pow. D. [illegible]

When a Devise may fail of taking effect.

A Devise may be ineffectual either from defect of [illegible] where the [illegible] of it [illegible] extreme. — Pow. D. 409

2. Where there is any uncertainty or repugnancy in the words used as to the thing devised or the interest itself or as to the general extent of the devise. [illegible] uncertainties is termed to be latent ambiguities. — Pow. D. [illegible]

The limitations also [illegible] the [illegible] of the [illegible] fall under the [illegible]. — Pow. D. [illegible]

[illegible] objections to the validity of devises are founded on some uncertainty or repugnancy arising out of facts not appearing in the face of the instrument. As [illegible] a [illegible] arises — Pow. D. [illegible] 411

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to whom or of several persons or to which of several things respectively answering the description used the words were intended to apply. Uncertainty or repugnancy of this kind is called a latent ambiguity.

1. As to defects apparent on the face of the devise – or patent ambiguities.

It is a universal rule of construction — Pow. D. [illegible] — that if there is in a devise an uncertainty which cannot be explained or a repugnancy which cannot be reconciled, the devise is void so far as the uncertainty or repugnancy extends and the heir at law shall be preferred. For in this case no parol evidence will be admitted. Such uncertainty (being apparent — [illegible] — on the face of the devise) may be either as to the subject matter or thing devised – the quantity of interest intended to be devised or the person devisee or [illegible]. 1. As to the subject matter

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Eg. "I devise my farm [illegible] the [illegible]."

A devise of a "[illegible] farm" or "house" [illegible] with the "appurtenances" passes [illegible] the land & there is necessary to the enjoyment [illegible] of the house, unless it appears that the words were intended to be used in a more general sense.

1 Pick. 53.
2 Co. 32.
2 C. 34.
4 Ed 76.
34. 113.
2 Mass 498.
1 [illegible] 60.

2. As to the quantity of interest.

Eg. "I devise my freehold [illegible] [illegible] [illegible] years and [illegible] [illegible] [illegible] to be [illegible] the [illegible] years are ended [illegible] freehold, [illegible] to be equally divided &c. What is to be divided? the freehold or the term of [illegible] years? [illegible] [illegible] [illegible] [illegible] [illegible] of which [illegible].

[illegible]
[illegible]
[illegible]

3. As to the person described.

If the person described as devisee is altogether uncertain, the devise is void.

Eg. "To the [illegible] [illegible] [illegible] established."

[illegible] "to [illegible] the [illegible] of [illegible] [illegible]" [illegible] [illegible] [illegible] [illegible] [illegible] relations."

[illegible]
[illegible]

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[illegible] to the [illegible] Pow. D. 430. Hob. 32. [illegible] in none of these cases [illegible] parol evidence be admitted.

But a devise is never construed void for uncertainty but upon necessity: [illegible] it be [illegible] impossible.

2. As to Uncertainty arising from circumstances dehors or latent ambiguity.

If from extrinsic facts, the person of the devisee is rendered absolutely uncertain, the devise is void. [illegible] there being [illegible]. To his William Wallace of Scotland "there being two of that name there." So if from extrinsic circumstances it is absolutely uncertain what land is [illegible] the Manor of [illegible] & [illegible] two Manors of that name. But if the evidence [illegible] of one of these manors [illegible] the devise [illegible] [illegible] [illegible] [illegible]

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• A devise may fail of effect for uncertainty. A devise may fail of effect because the testator's intent is contrary to the rules of law. (Intrinsic effect) Pow. D. 409. E.g. Devise in fee, and if he die without heirs to B.: [illegible] to the [illegible] fee. So if in the draught of the instrument the testator's instructions are not followed. E.g. the testator directed a devise of land to A. for life: but the words carried a fee: here the devise is void in toto: it is not good for life; for there was no devise for life.

Pow. D. 426.
1 Bulst. 63.

3 Mo. 145. 6
Pow. D. 431
Sal. 234.

Pow. D. 426. 7
Mo. 356.
Qu.

But if that which is agreeable to the testator's intention can be separated from that which is contrary, the former is good and the latter void. E.g. the testator directs an absolute devise but the draftsman annexes a condition: here the condition only is void, and the devise absolute.

Pow. D. 427
Leon. 113.

• A devise may fail because it [illegible]

(over)

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operative, it would effect no more than the law would effect without it. If the devisee takes the fee, to his own eldest son or next heir: the Devise is void and he must take by descent.

Cowp. D. 49-13
Dyer 12. 124. 354.
Hob. 295.
[illegible] 17 a 114.
[illegible] 57.
Jenk. 248.
Plowd. 545.
[illegible] 420.
2 P. Wo. 135.
Salk. 590.
233.

1 P. 229. Stra. 487. 2 Bur. 880. Bl. R. 187. 2 Co. 51. 1 Ld Ray. 523. 4. So to what acts will break the line of descent, see [illegible] 1 Show. 92. Salk. 234. [illegible]

Cro. D. 425
4 33. 430.
1 Ld Ray. 728.

And the rule is general: that if one devise to a person who is his heir, the same estate i.e. the same quantity of interest in the subject matter as he would have taken by descent; the devise is void. He shall be in by descent, & not by purchase. The reasons of the rule are: 1st that the Lord may not be defrauded of the fruits of the tenure. 2. That the devisor's creditors may not be defrauded of their debts, as they would have been before the Stat. agt. fraudulent Devises, 3 & 4 Will. and Mary. These reasons have

Cro. D. 355.
430.

Cro. D. 436.
1 Freem. 248.

2 Bl. R. 358.
[illegible]

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[illegible] take [illegible] [illegible] [illegible] [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] [illegible] the [illegible] 221. 223. Pow. D. 1. 352 6. 3 Leon. 24

So. Where it is not important: or neither of the above considerations [illegible] here. But suppose a person having two heirs A. and B. devises half of his estate to A. and dies intestate [illegible] other half. Will not that part which is considered as descending be first applied to the payment of debts? Yes. But this does not seem to render the devise inoperative here in the sense contemplated. For the case is not within the [illegible]. A. is to take the devise according to the distinction in Powell. Pow. D. [illegible]

If one devises to his heir by way of remainder what would descend to him as a reversion, still the case is within the general rule. For the estate is not altered. [illegible] for life, remainder Pow. D. 1. 33. 352 6. Str. 848. [illegible] Str. 491. 2 Lev. 101. 3 Lev. 18. Sal. 236. Com. 82. [illegible] 2 Ray. 308. 1 Lev. 24.

to B.

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6. (8)" [illegible] the devisee's next heir at the devisor's death – So a devise of an estate for life only to the devisor's heir at law & no further disposition is made of the subject matter: So he takes all the interest which he would have taken if there had been no devise – And the fee-simple which descends merges the estate for life – Charging debts or portions on an estate devised to the heir of the devisor does not enable him to take by purchase: the quantity of interest is not altered but the property is only encumbered – But it has been holden that if the charge on the land is by way of condition the heir to whom it is devised takes by purchase – E.g. "To my eldest son and his heirs upon condition that he pay debts or provide [illegible]" But the weight of authority is against the distinction – Cru. D. 432. 434. 438. Com. 42. Sal. 242. 3 Co. Ab. 833. 819.

Cru. D. 131.
132.
3 Leon. 25.

Cru. D. 133-5.
2 B. 833.
319.
3 C. 649.
1 Bl. 35.
Com. 42.
Sal. 241.
Stra. 1240.
3 Bl. R. 22.
1 P. Wm. 423.

Cru. D. 135.
438.
2 C. 161.
2 Mod. 283.
Freem. 248.

Real (Property)

If there be a devise to one's heir which falls within the general rule; & the heir who at the devisor's death happens to be a daughter, the birth of a posthumous son will divest her title. — Things: an alteration by devise and the title of the heir by descent, neither enable him to take the purchase — the quantity of interest being the same.

Pow. D. 428-9.
2 Bl. 218.

Pow. D. 430.
431. 431. 434
Stric. 448
Sal. 234. 241.
Saun. 42.

But if the limitation to the heir by devise produces an alteration in the course of descent, he takes by purchase i.e. as devisee — E.g. If one having two daughters who are his heirs devises to them and their heirs — they take as devisees. For the devise makes them joint-tenants: whereas, if they take as heirs, they are coparceners, each having a distinct moiety — So, if one having two daughters who are his heirs devise all his estate to one: she takes the whole by purchase. For otherwise she would take only half by the devise

Pow. D. 436.
2 Bl. 431.
3 Lev. 124-8.
Kern. 112.
113.

Pow. D. 441.
Inst. 163.
Sal. 242
Cro. 123.
L. Raym. 835.

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devise: the [illegible] would be coparcener with her of the other half, and the intent defeated. And, a devise may, from the peculiar provisions in question, be good in part, and void in part, as where in two things, the devisant in fee devises one half of Black-acre to J.S. & his heirs in fee, the other half to him in tail. Now the devise is void as to the former, and good as to the latter. Lastly, a devise may fail of effect by the death of the devisee (the testator living). E.g. "to A. and his heirs". A. dies, living the testator. Now his heirs cannot take under this, in this case, even though the devise is republished after his death. But if a charge is created on the estate as debts or legacy, the charge remains.

By a late Stat. of Penn. if the devisee or legatee, being a child or grandchild of the testator, die before the testator, and no provision is made of such Contingency, the issue of the devisee shall take as the

Cowp. 440.
2 Bl. Rep. 830.

1 P. Wms. 591
Plowd. 340. 345
2 Bern. 22
[illegible] 25
Doug. 303
[illegible] 305
[illegible] 422
[illegible] 498
[illegible] 261
[illegible] 313
[illegible] 433
[illegible] 113
[illegible] 349
[illegible]

Stat. Pt. 548.

would [illegible]

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would have taken.

Waiver. A Devise may also fail of effect by the devisee's refusing the benefit of it. The waiver may be express or implied. The waiver is express when the devisee verbally refuses to accept the devise. An implied waiver arises from some act of the devisee from which it is inferred that he does not accept. It is a general rule in equity that if a person having a claim upon part of what is devised independently of the devise and a claim to another part under the devise accept the former, he waives the latter. Here there is an implied waiver. E.g. Blackacre is settled on A. for life, remainder to his son B. A devises Blackacre to a stranger and Whiteacre to B. Now if B. insists on having Blackacre under the settlement he cannot have Whiteacre under the devise.

Cru. D. 118.

Cru. D. 119.

Cru. D. 123.

Cru. D. 399

2 Vern. 581.

Salk. 4.

Case of Election

Devises

The doctrine of implied waiver is founded not on the idea of a tacit condition annexed to Devises that the Devisee do not disturb the disposition of the testator [illegible]. And it is not necessary to give effect to the rule that the thing devised be of the same nature or of equal value with that to which the Devisee has a claim independently of the Devise.

Cru D. 456
4534
Salk. 176
2 Ves Jr. [illegible]

Cru D. [illegible]
[illegible]
1 Ves. [illegible]

In such case, equity will require the devisee to make his election.

Cru D. [illegible]
[illegible]
Salk. [illegible]
2 Ves. [illegible]

But, if the Devisee is a Creditor claiming a prior Debenture; the rule does not apply. If one devises a part of his estate for the payment of Debts and devises to J.S. another part, to which a creditor has a higher title than the Devisor; the creditor may assert his title to the latter and at the same time claim his share [illegible] Devise to pay debts, for the estate devised to [illegible] [illegible] to which [illegible] higher claim than the bounty of Devisor

Cru D. [illegible]
658 [illegible]
2 [illegible] 312
2 Ves. [illegible]

to

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& W. by an instrument not executed so as to pass lands and a legacy to A.; he may claim the legacy and the land both. Here the tacit condition does not apply: for the testator has not disposed of the land: there being as to that no devise. But still, if there be an express clause in the devise that a legatee disputing the will shall forfeit his legacy, his claiming the land devised under the first will will defeat his legacy: for there is an express condition annexed to the legacy. If the testator gives a legacy to one in satisfaction or instead of a particular thing supposed; that shall not exclude him from another benefit, though the legatee claiming the latter is contrary to the testator's will. Or the testator's wife is entitled under a marriage agreement to a portion in land and another in money. She gives her a legacy in satisfac-

tion

Pow. D. 453.
1 Ves. 298. 307.

Pow. D. 466. 452.
1 Ves. 12

Pow. D. 455.
2 Ves. 76.

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satisfaction of the money portions [illegible]
devise the [illegible] they may
claim both [illegible]
[illegible]. And in all cases, in order
to oblige the devisee to elect (inter alia), it
must be clearly evident, that the devi-
sees taking both interests, would de-
feat the general intent of the devisor.
[illegible] Real [illegible]
[illegible] individually, [illegible]
[illegible] by way of [illegible]
[illegible] not prevent her from claiming
[illegible]

The wife may claim her [illegible]
[illegible]
[illegible]

A devise may be of effect by the [illegible]
[illegible] life [illegible]
[illegible] the object of the devise [illegible]
[illegible]
[illegible] after
[illegible]

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then that devise [illegible] the devisee [illegible] [illegible] shall not have the benefit of the devise. So a devise may [illegible] effect the conveyance of the Stat. [illegible] [illegible] not [illegible] [illegible] the Stat. all devises are void as agt. the devisor['s] [illegible] creditors: to the creditors are entitled to satisfaction out of the lands of the [illegible] [illegible] in this case the heir and devisee are sued jointly. Before this Stat. devises [illegible] [illegible] before [illegible] [illegible] Courts [illegible] to the exclusion of Creditors, supposing there was no alienation.

Conv. D. [illegible]
3 Bl. C. 378.
3. Bur. 24.
3. Atk. 434.
3. Atk. 175.
1 P. W. 129.

[illegible] 27, 13.

2 Bl. C. 378.
3. Bur. 14.

This Stat. is liberally construed.

The general laws [illegible] to the settlement of the estate of deceased persons, in [illegible], creditors [illegible] [illegible] to devisees. This English Stat. affect the relative rights of creditors & devisees [illegible]. It does not relate to those

Conv. D. [illegible]
2. Atk. [illegible]

[illegible]
[illegible]

[illegible]
2. Atk. [illegible]
3 [illegible]

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of heir and devisee — Therefore lands, descended, are liable to creditors, before lands devised: a Devisee is considered to be a purchaser.

How far parol evidence may be admitted to control or explain a Devise.

Every instrument consists of matter of fact and matter of law. The former may be averred and proved on an issue in fact E.g. Whether the instrument was executed — Whether, after the execution, it was altered &c &c.

Pow. D. 144.
& c. 155.

But, matter of law involved the subject of an averment: nor is it triable by a jury — being not averable as a fact! E.g. Devise "to A. and his heirs" — what estate A. takes, is a question of law to be determined as a matter of legal construction.

Pow. D. 144.
& c. 155.

Pow. D. 157.
158.

In uncertainty of the former kind

is

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Names of S.) Now parol evidence, is admissible to prove which was meant. And this stands well with the words,) 1 Ph. Ch. 419.

No parol evidence has been admitted to prove whether an instrument was intended to be a deed or a devise. So that [illegible] were given to make a Will. So if a devise is made to A.B. (there being father and son of that name) evidence is not admissible to prove the testator did not mean the father.

Cow. P. 90.
3 Wils [illegible]
1 [illegible]

Cow. P. [illegible]
[illegible]
[illegible]

If the devisee is wrongly named, & still is sufficiently described he may be proved by parol to be the person intended. This it is said is not so in deeds, Cow. P. [illegible] [illegible]

Cow. P. [illegible]
[illegible]

If a devise to A.B.'s three children, he having two by C. and one by D., in this case parol evidence is good to show that the two by C. were meant. And the declarations of the testator may be proved.

Cow. P. 494
[illegible]

Cow. P. [illegible]

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Devised. [illegible] a devise [illegible] of [illegible] the [illegible] person [illegible] and [illegible] evidence [illegible] admitted. The ambiguity [illegible] in such case is patent, and [illegible] by parol construction.

[illegible] 185.
[illegible] 45.
[illegible] 27.
2 Vern. 624.
625.

If the name given to the devisee applies [illegible] persons, [illegible] it may be proved by parol that the wrong name was inserted by mistake.
Can any other proof be admitted in such case?

[illegible]

So where the testator gave a legacy to a name which he never [illegible] parol evidence was allowed to prove that the testator knew such a person and used to call him by that name.

[illegible] 240

So where a devise was to the poor [illegible] in the County of [illegible] parol evidence was admitted to ascertain the [illegible].

[illegible]

[illegible]

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not at all described; no evidence is admitted to shew who was intended. "E.g. Devise "to [illegible]." The evidence (the [illegible] supposes) would not stand with the words."

Pow. D. 500.
2 Ves. 217, 218.

Qu. Could it not be proved that the insertion was by mistake?

Pow. 523.

If words of equivocal import are used parol evidence is admitted to direct the application of them. This is done not so much for the purpose of furnishing a construction (i.e. an explanation of the effect and operation of words understood) as an interpretation; i.e. an explanation of terms not certainly understood.

However some of the cases go further. E.g. the devises [illegible] primo: in this case evidence is admitted to shew that the eldest child was intended, so that a daughter might take.

Ibid. [illegible]

Pow. D. 3[illegible]
Dyer 3[illegible].
[illegible] 54[illegible]
ibid. 3[illegible].

[illegible] to the testator

pleased"

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relations" parol evidence is admitted to shew that he knew certain persons answering that description bearing [illegible] [illegible]. These declarations are not prevalent.

[illegible] 498. [illegible] 231.

But in these cases evidence is never admitted to give meaning to a phrase, which this will, not bear on the face of the instrument. The word "Son" is sometimes construed to mean a grandson, (but only if there is no other living)*.

[illegible] 647. Cont.

But if it appear from the devise that the word was intended to apply to a son only, no parol evidence is admitted to shew that the word son was meant to apply to a grandson. This would be to contradict the legal construction. Nor if there is a devise in the same instrument to the grandson.

Cow. Dig. [illegible] 648 [illegible] 310 [illegible] 58. [illegible] 43. [illegible] 03. [illegible] 14.

[illegible] 678.

Parol evidence is not admitted to [illegible] any thing not written. Ex. gr. to [illegible] according to the [illegible] of [illegible] evidence was not [illegible]

Cow. Dig. [illegible] Cow. Dig. 373. [illegible]

[illegible]

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is a latent ambiguity of the latter patent. Hence, a general rule that the testator's declarations cannot be given in evidence to contradict the meaning of the words used in his devise, or to give them an import which upon the face of them the will does not bear. This rule has obtained ever since devises were required to be written and before the statute of frauds. The testator's declarations may apply to the devise or to the person of the devisee. In both cases they are inadmissible, [illegible] when they relate to matters [illegible] of construction upon the face of the instrument. [illegible] to the intent of the devise itself. [illegible] devise [illegible] and the [illegible] of his [illegible] [illegible] [illegible] [illegible] made of his [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Cow. D. [illegible] 8
501. [illegible]
Pow. D. 545.
Cruise [illegible]
5 Co. 68.
[illegible]
1 Vern. [illegible]
2 Ves. [illegible]
3 [illegible] 313.

Cow. D. [illegible]
6 [illegible] 541

Cow. D. 516
487 8
5 [illegible] 68
[illegible] 25
Pow. D. 360
[illegible] 215
[illegible]

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Pow. D. 480
[illegible]
1 Ld. Raym. 438
[illegible]

Pow. D. 482
1. 83.
Sal. 232
2 Atk. 383

Pow. D. 481
485
[illegible] 148
1 Ves. 231

Pow. D. [illegible]
[illegible]
3

It is matter of legal construction, upon the face of the instrument. So, if one devises to his wife for life generally, parol evidence is not admissible to show that it was intended to be instead of dower. So, where a devise was on condition, even letters written by the testator were not admitted to prove, that the events which have happened, were intended by him to amount to a breach of the condition. So, where one having covenanted to settle his estate to his [illegible] [illegible] for 1000 £ [illegible] than it was worth, devised 1000 £ to the [illegible]. Parol evidence was not admitted to prove that the legacy was in satisfaction of the covenant. So, on a devise to the testator's daughter, parol evidence of his intention that the land should not be subject to her husband's debts was rejected.

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2. As to the person of the devisee.

The testator's declarations &c. are not admissible as to matters of construction or law. Ex. Devise to A. who died, testator living. Parol evidence is not admissible to prove the testator's declarations, that C. (A's son) should have what A. would have taken if he had lived. Here there is no ambiguity either patent or latent. But if allowed would be an attempt to contradict the devise. Cro. El. 485. Plowd. 345. Cr. El. 100.

So devise to the heirs of the body of A., and if he die without issue to C. The testator dies, A. living. His issue, cannot therefore take; and parol evidence of the testator's intention to give to A.'s children even during his life, is not admitted. For whether or not his issue can take he living is a question of construction on the face of the devise. Cro. El. 486. 2 Lev. 70. Cr. Jac. 51. Cro. El. 75.

So where the testator having mentioned two women devised to "her" parol evidence Cro. El. 500. 2 Ver. 624.

[illegible]

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was not admitted to shew who of the two was meant. But as to what are called [illegible] of fact, i.e. as to latent ambiguities, the rule is, that parol evidence is admissible to explain them, if the matter averred stands with the words of the devise. Here the rule is the same as to the legal consequences, but it is not allowed to contradict the words. Thus if one devise or give to his son A. [illegible] his son of that name, parol evidence is admissible to shew that the younger son was intended. The evidence stands with the words. Here is a latent ambiguity. So the testator [illegible] the estate to be sold & the [illegible] his [illegible] may be proved [illegible].

So if the devise were to Peter and John of Maryland (there being two of that name there). So a devise to one of the name [illegible] the testator having two [illegible]

Cro. El. 464. / [illegible] 405 / [illegible] 216.

[illegible] 2 684.

[illegible] 498. / [illegible] / Salk. 241. / Cro. El. 591.

Cro. El. 583. / [illegible] 35 / [illegible] 137. / [illegible] 231. / 8 [illegible] 155.

[illegible]

Cro. El. 475. / [illegible] 137. / [illegible] / [illegible] 674

Cro. [illegible] / 6 [illegible]

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admitted to show whose name was in-
tended to fill the blank.
So where the testator gave his executors
to have all his personal estate given
to his executors and it was contended he [illegible]
[illegible] evidence of the mistake was not
admitted. [illegible] [illegible] — and equity
have also permitted proof of a devise
that to a [illegible] was [illegible]
[illegible] as to the quantity of interest devised
i.e. where the [illegible] other with the
[illegible] — So proof of the testator's circum-
stances has been admitted to ascertain
the quantity of interest, the import of
the terms [illegible] is equivocal. Ex. Devise
of testator's "whole estate" to A. B. in
[illegible] the testator's debts &c., [illegible] evidence
was admitted to prove that the perso-
nal estate was insufficient to pay them
and that therefore a fee [illegible] that
the devise might pass.
And it is now settled that the words to
take:

Pow. D. 522.
8 Vin. Ab. 195
2. Ch. Ca. 415

Pow. D. 522
52[illegible]

Pow. D. 5[illegible]-4
5[illegible]-6
Str. 581. 596
3. Atk. 19

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estate passes, a fee unless restrained by other words. 1 T.R. 412. 2 T.R. 657. 4 T.R. 98. 5 T.R. 562. 6 T.R. 34. 8 T.R. 572. 2 Ves. 57.

Cov. D. 548
Pr. Ev. 41.

So, where the question was upon equivocal words, whether a legatee of the testator's personal estate took it absolutely or for life only, ("she being the testator's wife"), evidence was admitted to shew that it was insufficient to support her, unless she took the principal or stock.

Cov. D. 508.
506. 507. 513.

So proof has been admitted for the same purpose, as to the value of the property devised.

Cov. D. 506
507.
510.
Freem. 449
2 Eq. Ca. 298
3 Burr. 1698.
1 Bl. 2

E. Devise of all testator's lands to A; he paying to B. C. 100£ in a year out of the land. Proof is admitted to shew that this being void, the annual propr value of the land, and to shew that a fee was intended. (Now peculiarly a devise of lands charged with the payment of a gross sum passes a fee of course, and such evidence is unnecessary.)

2 T.R. 359
4 T.R. 3.
8 T.R. 503
3 Atk. 34

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3. Proof is admitted as to the condition of the testators family to ascertain the application of a term which may be a word either of purchase or limitation. Ex. Devise to W. R. and his children "or" his issue". In this case proof is admitted as to the fact of his having children or not at the time of the Devise: If not an estate tail is created.

Cru. D. 504, 318.

[illegible] 232.
[illegible]
Dug. 309. 3[illegible].
1. Heats. 227.
1. B. [illegible] 231. 219
1. D. [illegible] 40[illegible]
[illegible] 450 [illegible]

4. Evidence is admitted as to the state of the testators property to ascertain the meaning of words not in themselves ambiguous but which when considered with reference to the state of the property would clearly require a construction different from that which they prima facie import. Ex. "I devise the house called Bell Tavern to A." now Proof is admitted that A. was tenant in tail of the house and that the devisor had only the reversion, in order to shew that an estate in fee was intended.

[illegible] 186
[illegible] 32.
Ham. 83.
7 [illegible]
1. [illegible] 138

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So in Fonnereau vs Poyntz 1 Br. Ch. 472. evidence was admitted to create an ambiguity where there was none on the face of the instrument.

Cas. E. 573 & [illegible] Ch. 472.

Where the proof stands with the words though not with the meaning which prima facie conveys.

But no averment that does not stand with the words can be admitted.

Ca. E. [illegible]
Ca. E. 517
2 Ver. [illegible]

Thus where one devised to 'the children of A.B.' (he having 6) evidence was not admitted to show that 2 only were intended. So where the testator devised the residue of his estate to his executors, one of them being related to him, both—

Ca. E. [illegible]
[illegible]
[illegible]
2 Term [illegible]

evidence was not admitted to show that his intention was to [illegible] the rest from the residuary clause [illegible].

So where the residuum of the testator's property was first [illegible] of, evidence was then admitted to show that the [illegible] intention was that his grand[illegible]

Ca. E. [illegible]
2 Ca. [illegible]

should

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[illegible] & not have it. But parol evidence even of the testator's declarations is admitted to rebut an equity and oust an implication."

"An equity" means in general an equitable claim. But the meaning of the rule as here applied to the case of the devise is this:— That where from the face of the devise equity raises inference which is contrary to the legal conclusion arising from it, parol evidence is admissible to rebut or control the former, which is in effect to establish the latter. Ex. If land is devised to an executor for the payment of debts, the surplus belongs at law to the executor. In equity there is a resulting trust as to the surplus to the heir: i.e. the executor is trustee of it to the heir: In this case evidence is admitted even of the testator's declarations to show that the executor was intended to have the surplus.

Pow. D. 524.

Pow. D. 523-8

Pow. D. 326. 528.

Pow D. 525-7

1 Cox C 196.

2 Vern. 25[illegible]

Tall. [illegible]

[illegible] 566.

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So where the testator bequeathed 250£ a piece to A. and B. — and afterwards by a Codicil directed her Executors to pay them 250£ each, evidence was admitted to show that both sums were intended to be given.

[illegible]

So where the testator gave considerable legacies to his Executors, from which the inference in equity was that he was not to have the residue, evidence was admitted of the testator declaring that the Executor should have the residue upon the ground that the evidence offered only confirmed the rule — for no proof had been admitted to show that a devise was intended as a performance of a previous agreement —

[illegible]

By agreement before marriage — to settle 100£ per annum on the wife — after which her Husband devised to her 100£ per annum. Evidence was admitted to prove that the devise was

[illegible]

[illegible]

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means, as a performance of the agreement. Parol evidence is admitted in all cases to counteract fraud. E. G. One devised his real estate to his Executor and omitted to charge the estate with an annuity devised to M. R. because the Executor promised to pay it. In this case, evidence was admitted &c —

Gav. P. 530 —
2 Vern. 506.

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Of Revocations.

Cru. D. 531. 4. Cru. 2512. Wills and Devises are "ambulatory" till the testator's death: i.e. they are inconsummate until that time: Ergo are revocable by the testator.

Cru. D. 532. Revocations may be considered under two general heads: 1st Revocations at Com. law: i.e. before the English Stat. of Frauds. 2d Revocations since that Statute.

1. Of Revocations at Com. law.

Cru. D. 533. Revocations at Com. law are of two kinds. Express & Implied.

Every revocation [illegible] be by writing or by parol.

Cru. D. 532. First. Of [illegible] As for a Devise or an Instrument duly executed revoking a former.

Cru. D. 533. [illegible] Secondly, A devise [illegible] having devised a house [illegible] declares [illegible] revoke any [illegible] [illegible] [illegible] [illegible] in the case [illegible]

[illegible]

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clear that his words were spoken 'animo revocandi'. Therefore where the testator said that because the devisee had not paid him the [illegible] not have his land, but making no express reference to his devise — the devise was not revoked. So words importing an intention to revoke in future do not work a revocation at Com. law. E.g. 'will shall not stand' or 'I will alter' &c. The same rule holds since the Stat. of a similar intent expressed in writing of the devisor. — Pow. D. 533. Cro. Jac. 113. Cro. E. 57. — Pow. D. 533. Cro. Jac. 49. Moo. 48. Cro. El. 306. — 2 Saund. 488, 495.

2. Revocations at Com. law may be implied: An implied revocation is by some alteration or act furnishing a presumption that the testator intended his devise should be changed. Here the revocation is founded on a presumption in law. E.g. a man having devised to a stranger, [illegible] testament [illegible] his heir. — Pow. D. 533, 53 — Pow. D. 535. 1 Sid. 3 1 Rol. 3

but

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Acts of the Devisor amounting to a revocation in law may be by writing or in pais. Cru. D. 533. 554.

First. By Writing. As if one having made a Devise, afterwards makes another inconsistent with but not expressly revoking it. This is a revocation in law.

Cru. D. 533-5. 3. Mil. 5.1. " 5.2. 3. Mod. 203. As if one devises his land to A. and by a subsequent Will to B. Or he first devise all his estate to two, and afterwards to one of them. It is said, however that if one devise land to A. B. and in a subsequent part of the same instrument devise the same land to C. D. – A. B. and C. D. take jointly, [illegible] as to a

1 Fonb. [illegible] 2. 2[illegible]. 3[illegible]

2 P. W. 5[illegible] specific legacy it seems that the latter prevails. But a subsequent devise (will) containing no words of revocation does not revoke a former one unless inconsistent with it. Ergo the mere fact that a later devise exists, though formally a [illegible] will, [illegible] a [illegible] in de-

Cru. D. 53[illegible] [illegible] 536 [illegible] 40. 3 [illegible] 233 [illegible] [illegible] [illegible] 13 [illegible]

[illegible]

[illegible] [illegible]

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[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] For the second may relate to
a different subject matter [illegible]
[illegible] the former. And though it is — Pow. D. 538.
expressly found that the second is diffe- — [illegible]
rent from the first, yet if it is not as-
certained in what the difference con-
sists the first is not revoked. [illegible] — [illegible]
[illegible] [illegible]. But if it were found
that the second devise was inconsistent
with the dispositions made in the first, — Pow. D. [illegible]
the second would be a revocation. It seems
So a Proviso, inconsistent with the
preceding devise to which it is annex-
ed, works a revocation. E.g. Devise of
[illegible] to A. [illegible] be a subse- — Pow. D. [illegible]
quent clause giving Whiteacre here to — [illegible]
B. Blackacre [illegible] is given [illegible].
But a distinction is taken between the
revoking effect of a Codicil and that of
a subsequent will in this, that a Codi- — Pow. D. [illegible]
cil being part of the will and [illegible] — [illegible]

[illegible]

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its own nature intended as an instru-
ment of revocation does not revoke such
provision in the degree expressed. E.g. Devise
Pow. D. 525. / 1 Ves. jun. 86. / 1 Atk. 444. of land to 3 trustees to a charitable
use, by a codicil it is devised in the
same trust to 5. i.e. to the same 3
and two more. Here the trust is not re-
voked. [illegible] by Devise a
Pow. D. 527. / Ves. [illegible] subsequent will & devise [illegible] a
disposition [illegible] devises [illegible] total
revocation. [illegible] the [illegible]
too general [illegible] the case where
Pow. D. 517. [illegible] one devised land in fee to his son and
by a subsequent devise gave the same
land to his wife for life.

If one make a second devise inconsistent
Pow. D. 726 with a former one, under a false
[illegible] as to a matter of fact which
furnishes the motive to make the second
and the supposed fact is after his death
found not to exist, the [illegible]
of the devised land to A. is not affected.

afterwards by another instrument reciting that A. is dead devise the same to B. In this case if A. is alive he will take. Pow. D. [illegible]

But according to Powell a false suggestion will not avoid the second devise unless it be the consequence of fraud practised upon the testator. Pow. D. 54 [illegible]

[illegible] For no actual fraud is proved. If a misrepresentation is supposed in [illegible] cases - the decision Mr. [illegible] however, seems to me to consider the "fraud" nothing more than misinformation and consequently a misapprehension as to matter of fact. In the case which he distinguishes from the case of fraud is one where the misapprehension is as to matter [illegible] [illegible]. The words of the devise being [illegible] being doubtful whether according to the rule of law [illegible] [illegible] devise any estate to the [illegible] [illegible] therefore. And in this case Pow. D. [illegible]

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[illegible] Revoked (Implied) the devisor's devise)
[illegible]. (1) If a former devise is revoked
by a subsequent one, on the principle
Cru. 6. 449 that the latter is inconsistent with the
4 Burr 2512 Powell p. 449 former: the implied revocation, as well
as the instrument containing it, is
ambulatory, like the testator's will itself
the latter being revoked the former stands.
Cru. 6. [illegible] But it seems if the second devise be
simply revoke the first, a revocation
of the second does not re-establish the
first if it remains in existence. Because
[illegible] Imp. 92 4 Burr. 2512 the revocation is simply an independent
substantive act, by which the former
is at once becoming immediately void.
Cru. 6. [illegible] Secondly, acts amounting to an im-
plied revocation may be by matter in
pais. As (1) By a total alteration in
the relative circumstances of the devisor.
Cru. 6. 544 545 (2) By an actual or intended altera-
tion in the estate devised.
1. An alteration in the devisor's circum-
stances

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circumstances as [illegible] marriage and the birth of a child) have [illegible] been decided to be a revocation of a will [illegible] previously made [illegible] a child). But such an alteration of circumstances is a revocation in. Under special circumstances. [illegible] though the child born is [illegible] a subsequent marriage only or the subsequent birth of a child only is not sufficient to revoke a [illegible] devise. But in Conn. by a late statute the subsequent birth of a child alone is a revocation, if no provision is made in the devise for such a contingency.

The reason of the rule is generally said to be, that from such a change of circumstances the testator is presumed to have changed his intention and the disposition of his property. Hence any revocation [illegible] should

Doug. 2. 354
[illegible]
1 Dall 384
[illegible]
[illegible] 35.
[illegible] 142.
[illegible] 4 [illegible]
[illegible]
1 Mod. [illegible]
[illegible]

[illegible] 13.

Case [illegible]

Stat. [illegible] 548.

See [illegible]
554 [illegible]
Cow. 31.

Devise.

parol is admissible, to prove that his intention was not altered: i.e. to rebut the presumption. E.g. His own declarations.

[illegible] 5. Ves. 44 [illegible] Pow. D. 553-9. 1 Eq. Ca. Ab. 413. Doug. 31. 35. 1 Ld. Raym. 441. 2 East 530. 543-4. Amb. 2. H. Bl. 532.

So, where the testator devised his real

Pow. D. 554. 1 Eq. Ca. Ab. 413. estate in fee, to the person whom he afterwards married and gave only a legacy to her brother; such a change was holden not to be a revocation.

But quaere, whether this is the true reason: For in the case of a subsequent marriage and birth of a posthumous child the devise is revoked, it seems, though the conception was unknown to the testator, and e contra, if he knew of the conception at his death, and an alteration thereto afterwards happened, there would be no revocation;

4 T.R. 18-9. for his intention could not be influenced in the least in the former case, but in the latter it might be, and

what

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[illegible]

which legal effect, are a mere intention to revoke them, & no actual revocation — 2 [illegible] 541. 542.

Where there is the principle of revocation by [illegible] to land [illegible], there is a tacit condition annexed to every devise, that at the time of making it tho' the testator be not then intending, that it shall take effect if such a total change [illegible] happen in his situation. This principle is apparent, [illegible] [illegible] — this idea at any rate [illegible] the authorities.

4 T.R. 55. 63.

2 [illegible] 541. 2

But there has been no case yet decided in which [illegible] have been held to be a revocation [illegible] where the disposition has been of the testator's whole estate. [illegible] it seems that if the testator [illegible] [illegible] only provided for either in the devise itself or by [illegible] giving the estate in part the presumption of a change of intention

[illegible] 6
[illegible] 560.

[illegible] 560.
[illegible] 413.
[illegible] 38 [illegible]

[illegible]

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intention, does not arise from the marriage &c.— or the tacit condition, is not [illegible]. And Marriage &c. will not revoke a devise made in contemplation of such event, and providing for the future wife and children.

[illegible] Doug. 39.

But if a feme sole having made a devise, marries, it is in England revoked, clearly suspended during Coverture, so that if she dies before the Husband it is revoked. For it is of the essence of a will or devise, that it be in the testator's power to revoke or confirm it. But in England a woman during coverture can do neither.

Pow. D. 563. [illegible] 181. 1. Bac. 291. [illegible] 160.

But if the Wife survive the Husband and then become again "sui juris," will it revive by [illegible]? According to Powell's opinion it will.

Pow. D. 574 [illegible] 343

[illegible] 2573 [illegible]

In Conn.t it is clear that the devise is not affected in these two cases any more than that of a man would be.

and

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our law, a woman may make a devise during coverture, vide Conn. Stat. Qu. Prov. For it has been decided that a feme covert cannot devise.

Fitch v. Brainard Ct of Errors Conn. 1805

But an alteration in the personal capacity of the testator (though such as renders him incapable of making or revoking a devise) does not in itself work a revocation. For upon this change he has no will, nor any power of revoking. Therefore there is no presumed change of intent. Qu. Does not the same reasoning apply as well to the case of Coverture?

Pow. D. 554-5. 723. 4. Co. 60. 61. a. b. 1. Andr. 181. 1. Vern. 115. 1. Eq. Ca. A. 34.

2. An act of the devisor which in construction of law operates as a revocation without an actual alteration in the estate devised.

Pow. D. [illegible] 554. [illegible]

First.— Of an implied alteration.

1. There may be the [illegible] of the circumstances of a testator [illegible] — and the intention of the testator [illegible] (Ibid.)

[illegible] 1 Ves. Jr. 594

[illegible] (p. 49)

Devises

[illegible] pronounced changes of intention. Seen in the case of revocation effected by an act or 1 Pow. Dev. 594
alteration. Cru. D. 565. 606. 607. 1 Rol. 615

This doctrine rule is founded on the principle required to [illegible] — That is the devisor must be
Cru. D. 184. 80. 566. 611. seised at the inception of the devise of the estate devised, & the estate must remain in the same plight till the consummation — i.e. it must in con-
1 Pow. D. 577. 1 Ham R. 401 templation of law have been in his seisin and remained so (ut supra)

Cru. D. [illegible] 1 [illegible] [illegible] Hence any alteration in the estate between the inception and consummation of the devise, which puts it in a different plight works an implied revocation. Such alteration in the estate
Cru. D. 5[illegible] may be by act of the devisor or by operation of law or by act of [illegible]

First. By act of the devisor. Sale of
Cru. D. 554 the land devised to a third person, this breaks the devise.

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as, if the testator having an absolute estate in lands &c makes an alteration in the legal estate only, retaining the beneficial interest (or equitable estate) that revokes a prior devise of the land

Ex. One having devised land makes a feoffment of it to a stranger to the use of himself in fee: here the devise is revoked. For he holds the estate by a new limitation as a new purchase

Pow. D. 534-8
1 Ld Ra. 615.
(Con. vide
Dyer 143 b
144.
1 Bos. & P. 592-3
1 Show. 92-3.
7 Vin. 253.)
Sed vide
1 P. Wms. 311.
Pow. D. 580 600
1 Bro. Ch. 546
7 T.R. 3[illegible]
[illegible]
[illegible]

So if one, having devised land conveys it in fee and then takes a reconveyance of the same land the devise is revoked though the conveyance is by lease and release: in which case the actual seisin or possession is not changed. But it was held otherwise by Lord Chief Justice Eyre. So where one having devised land made a marriage settlement limiting it to himself and his children in strict settlement remainder to his own right heirs — it was held a revocation —

Pow. D. 5[illegible]
1 Ld Ra. 615
Dyer 143
8 Co. 90
1 Bos. & P. [illegible]

Pow. D. 583.
1 Atk. [illegible]
1 Bro. Ch. [illegible]

Pow. D. 586
1 Ves. 450
4 T.R. 39[illegible]

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If a recovery suffered of lands to the use of the testator will revoke a prior devise of the same lands. [illegible] 5 [illegible] [illegible] 2 Atk [illegible] 2 [illegible] [illegible] [illegible] 177. [illegible] 401

[illegible] 2 [illegible] [illegible] 411. [illegible] 503. [illegible] 4 [illegible] 154. [illegible] 411. [illegible] 202. [illegible] 1901. [illegible] 422 [illegible]

The doctrine of rules applying as well to equitable as to legal estates, except that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] for [illegible] [illegible] the devise is ~~[illegible]~~ revoked.

[illegible] 88. [illegible] 108. [illegible]

Also an alteration in the estate is deemed to be operated as a revocation even though the alteration made be merely to give effect to the devise. E.g. [illegible] [illegible] [illegible] having [illegible] [illegible] [illegible] for the purpose of [illegible] a recovery suffered to the use of himself [illegible] [illegible] [illegible] [illegible]: but the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] 58. [illegible] 7

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] shall [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible]

[illegible]

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revoked. [illegible] the [illegible] is the same that the alteration made is expressly declared to be done for the purpose of giving effect to the devise – [illegible] the devise is entitled as of a new purchase.

4 Cru. D. 58.
2 Atk. [illegible]
[illegible] 76.
[illegible]
[illegible]
[illegible]

The [illegible] in a [illegible] his devise of a [illegible] and [illegible] a settlement to the use of [illegible], as he had declared by his will "leaving Dale" of the [illegible] as void a revocation [illegible] that the reference of the settlement to the devise gave its effect that operating as a re-publication [illegible]: [illegible] devised in [illegible] an estate tail [illegible] to confirm his will, it is revoked.

4 Cru. D. [illegible] 3
3. [illegible] 8[illegible]
2 [illegible]

[illegible] devise of a lease for [illegible] is revoked by a subsequent [illegible] [illegible]

4 Cru. D. 583.
[illegible]
[illegible]
3 [illegible]
[illegible]

[illegible] the [illegible] devise [illegible] [illegible] [illegible]

4 Cru. D. [illegible]
[illegible]
[illegible]

[illegible]

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devise a lease holden of W.B. and afterwards surrendering and taken a new lease of the same land. But leases for years being chattel interests, words fit by the will notwithstanding a subsequent renewal of further term, are used for that purpose. Eg. I devise all my estate that I shall have in such a lease at my death. Now a subsequent renewal does not revoke. So if the renewed lease is not completed at the testator's death the devise is not revoked by the surrender.

Cru. D. 589. 590. 3. Atk 176. 177. 178. Ch. L. n. 34. 1 P.W. 546.

Cru. D. 590. 591. 2 Atk 593.

And where the revocation depends on the simple fact of an alteration in the estate, independently of any presumed intention to revoke, there must be an actual or substantial alteration or there will be no revocation. Thus it was formerly holden that if one devised land in fee and afterwards covenanted to convey to a stranger, the devise was not revoked by the covenant.

Cru. D. 592. Bl. 85. 3 Rep. 3.a.

Bu

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But as Courts of equity consider an executory agreement to convey land as an actual conveyance: such a covenant or agreement in equity will be deemed a revocation, if the Covenantee has a right to a specific performance.

Pow. D. 594-5. 2 P. W. 324, 621.

But a devise of the equitable interest in a trust estate is not revoked in equity by a change of the trustees. So, testator, the trust being devised, causes his trustees to enfeoff other trustees, to the same uses, this is no revocation in equity: for there is no alteration in the thing devised i.e. the equitable estate. And the having contracted in writing for the purchase of an estate and then completing the purchase is no revocation: for the equitable interest is not altered. It is only "[illegible] the estate home."

Pow. D. 585-6. 1 Ch. R. 143. 2 Ch. R. 19[illegible]

Pow. D. 598. Doug. 721. [illegible]

So, if the mortgagor having devised, pays off the mortgage and the mortgagee reconveys the legal estate to a trustee for

Pow. D. 59[illegible]. Doug. 78[illegible]

him

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The Mortgagor's [illegible] is no revocation.

So it is laid down in several books, that if one having an equitable interest in fee, devises it and then takes a conveyance of the legal estate, the devise is not revoked, for there is no alteration in the estate devised.

Cruise D. 392. Wil. 317. 3 [illegible] 140. 2 Vern. 659. 1 [illegible] 613. 2 [illegible] 1224.

Where several instruments taken together, constitute but one conveyance, a devise made in the intervening time between the execution of the first and the completion of the last is inoperative, for all the parts take effect, by relation, from the first instrument. So conveyance is made to suffer a recovery, then a devise and afterwards the recovery is completed.

Cru. D. [illegible] 1 [illegible] 4. [illegible] 1 Burr. [illegible] 2 Burr. [illegible] 1 [illegible] 1165.

A partition between tenants in common or coparceners of undivided estates is no revocation of a previous devise by one of them, for it works no alteration in the devisor's estate, but only gives him in severalty what before he held in

Cru. D. [illegible]

common

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But if the deed of partition alters in any other respect the [illegible] of partition merely it will perhaps a [illegible] devise &c. If it contains any further disposition of the estate. Note, when one has made an actual alteration in an estate before devised, no parol evidence is admissible to show that he did not intend to revoke. For the revocation is not founded on any supposed intent to revoke: but is an arbitrary conclusion, from positive law "[illegible] juris de jure".

Pow. D. 663.
1 Mod. 309.
3 Atk. 742.
745. 750.

2 H. Bl. 516.
3 Atk. 741.
2 Ves. J. 417
595

Secondly — Acts, in law, amounting to an implied revocation of a prior devise, [illegible] intended alteration in the estate devised. As if the devisor attempt a disposition, which is ineffectual either for want of formality, or of capacity to take in the person to whom the devise is &c. as, one having devised lands, makes a deed of feoffment without livery of seisin, or having devised a reversion

Pow. D. 622.
665

Pow. D. 603
Mo. 129.
Salk. 105.
1 [illegible] 615
3 Atk. [illegible]
803
1 P. W. [illegible]

& makes

Devise

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make a grant of it, but the tenant's never attorning. Cru. D. [illegible] 1 Rol. 615. Or having

Cru. D. [illegible] / Gilb. Dev. [illegible] / [illegible] 18.180. devised, conveying by deed of bargain and sale, not enrolled within 6 months.

Cru. D. 546. The Bush attempting to convey, [illegible] unlikely an intention to revoke.

Cru. D. 504 / 518. Revocations thus effected being founded on a presumed intention to revoke, the inference may be rebutted by parol

Cru. D. 608 / Green. 76 / [illegible] 132 evidence. As where the devisor in executing a deed of feoffment to his own use, declared his intent not to revoke.

1 Rol. [illegible] / 2 [illegible] 35[illegible] / 1 [illegible] 459. / [illegible] Mod. 153. / 10 Mod. 234. Or by an intended alteration which becomes ineffectual through an incapacity to take in the grantee; as where the [illegible], having devised to H. R. afterwards conveys to a Corporation. This will be a revocation, though the Corporation cannot take. So if a conveyance is ineffectual

[illegible] 510 / Salk. 72 grant to one who cannot take the grant [illegible] estate to the use. Or an alteration in the estate devised.

Among

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may be by the act of a stranger. Pow. D. 611. 18. 6. 566. 674. So if one be being devised, is disseised and dies before he entry. Pow. D. 614. 6. 611. 674. 566. 1 Rol. 616. Hob. 496. 1 Co. 11 a.

For the effect of disseisin and the distinctions see Infra.

But a stranger can not revoke a devise by tearing or cancelling it, if it [illegible] privity—

Pow. D. 612. 653
2 Ven. 441.

- Again. An alteration in the estate devised amounting to a revocation, may be by mere operation of law. Devises made but not consummated before the Stat. of uses, were revoked by the Stat.

Pow. D. 612.
Dyer. 142 a.
143 b.
1 Rol. 616
2 Ven. 417.

- A devise may be revoked absolutely or conditionally, in whole or in part. Absolute and total revocations have been already considered.

Pow. D. 614.
Ven. 416

Of Conditional and Partial Revocations. A mortgage in fee, though at

law

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[illegible]

Lands [illegible] absolutely, in exoneration of a [illegible]: [illegible] considered in equity only [illegible] incumbrances [illegible] the lands [illegible] to the amount of the debt secured. So that if the devisee will pay the debt he may take the land.

[illegible]
[illegible]
[illegible] Vern. [illegible]
[illegible]
Sal. 38.
1 Atk. 416
2 Vern. [illegible]
[illegible]

So if the devise be for payment of debts [illegible] absolute conveyance to a creditor that he might sell the land to satisfy the debt and account with the testator for the surplus. But a devise for years only [illegible] the devisee [illegible] the term – the [illegible] passes [illegible] of the lands – so that the devisee [illegible] only on paying the debt.

[illegible]
1 Atk. 418.
[illegible] 132.
2 Vern. 241.
1 P. W. 314.
[illegible]
[illegible]

[illegible]
[illegible]
[illegible] 410
3 Atk. 448.

But a mortgage whether in fee or for years is an absolute conveyance [illegible] in equity [illegible] of a [illegible] if [illegible] to the devisee for the devise and mortgage are so [illegible]. The [illegible] follows

[illegible]

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A devise [illegible] mortgage, of any mortgaged pre- [illegible] [illegible] Very few [illegible] that [illegible] mortgagee in fee is no revocation. 3. Pow. [illegible] "Mortgage" [illegible].

Revocation of devises of lands, may be effected by [illegible] either the quantity of interest in the subject matter devised. Pow. D. 620

Thus if one devise in fee, and afterwards lease to a stranger for life, the devise is revoked only as to the estate for life, i.e. during the life of the lessee: and not as to the fee. So if one devise an estate on condition and afterwards changes the condition; the condition only is revoked [illegible] the estate devised is absolute. Pow. D. 6[illegible] 1 Vol. 61[illegible] [illegible] 23. Pow. D. 6[illegible]

So if one devise to A. in fee, and afterwards by a subsequent instrument make a devise of the same lands to A. in tail; the second devise is a revocation of the former to the extent of the difference between the two. But things in lease to [illegible] charged [illegible] only a revocation pro tanto of Pow. D. 6[illegible] [illegible]

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of a former devise: (suppose) yet a lease to the devisee of the land devised to commence from the devisor's death, is a total revocation. So the devise and lease are inconsistent. As one person cannot be at the same time lessee and devisee. And similar to this is the case of the Mortgagee. ante. page.

Pow. 2. 626. Cro. Jac. 49. Bac. 5. Rev. ff. 655. 3 Ves. Jr. 417. 600. Contra. ante.

But a lease to the devisee, to commence in the devisor's life time is no revocation (for it may determine) before the devisor's death, and so stand with the devise. (In this) for the term) that may [illegible] before the devisor's death and so stand with

Pow. 2. 626 Cro. Jac. 49.

2. As to Revocations by revoking the subject matter. If one devise, 3 [illegible] to A, and then revoke, as to one of them, the devise remaining good as to the other two. The devise, [illegible] to his [illegible] and afterwards [illegible] a part of the same land [illegible]

Pow. 2. 628 [illegible] 1 Term. Rep. [illegible] 268

[illegible]

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In this [illegible] the [illegible] the previous [illegible] remaining.

IV. Of Revocation under the English Stat. of Frauds. 29. Car. II.

This Stat. enacts "that no devise in writing shall be revoked otherwise than by some other will or codicil in writing or other writing declaring the same or by burning, cancelling, tearing or obliterating [illegible] the same [illegible] or until the same be altered by some other will or codicil in writing [illegible] in the presence of 3 or four [illegible] declaring the same [illegible] the requisite formalities [illegible] the foregoing clause.

It has been holden that this clause of the Stat. extends only to revocation of [illegible] also [illegible] of [illegible] land. [illegible] to be provided in the second [illegible]. It does not affect [illegible] revocations [illegible] effected by a [illegible]

alteration

Sim. P. [illegible]

[illegible] 2 Atk. [illegible]

[illegible]

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[illegible]

[illegible]

[illegible] the [illegible]

[illegible] be sufficient [illegible]

[illegible]

Remainder

a construction to the words "limiting" in
the preceding clause in order to be
an [illegible] of [illegible] [illegible]
[illegible] therefore not requiring the following
to be [illegible] in the [illegible] clause.
The first and last branch will be
construed together.)

[illegible] [illegible] [illegible] limitation [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] of the [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] with the
[illegible] [illegible] [illegible] in the [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] Prest. 1.17.8
of the third branch of the [illegible] clause
[illegible] the requisite.)

For it is [illegible] with the preceding words in
the [illegible] clause [illegible] effectual [illegible] Co. P. 631.
[illegible] to the first branch of the [illegible] 1.17.5
clause.

Ibid

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[illegible]

And if it is attended with the necessity in the third ~~clause~~ [illegible] of the [illegible] being claimed it is good according to the clause. Cro. El. 644. & 1 Roll 643. 645. 4 Co. 460. 1 Mod. 461

Cro. 848. 633. 635. [illegible] 258. [illegible] 349. [illegible] 240. [illegible]

But e contra; if the latter instrument is intended to be [illegible] [illegible] said [illegible] instrument; it will [illegible] effect [illegible] to the [illegible] in the testator [illegible] [illegible] the intention is to give to the second [illegible] what is taken from the first, or rather to take from the first [illegible] what is given to the second. But nothing [illegible] given to the second. Therefore it will not be effectual [illegible].

But in [illegible] to the testator here [illegible] [illegible] [illegible] [illegible] [illegible]. But [illegible] [illegible] [illegible] and [illegible] with the [illegible] of both clauses [illegible] [illegible] to the [illegible] [illegible] [illegible]

[illegible]

Devises

[illegible] are effectual [illegible] the [illegible] [illegible] of the [illegible] [illegible] land [illegible] in a [illegible] instrument of [illegible] be effect[illegible] by [illegible] [illegible] [illegible] terms of Revocation [illegible] [illegible] as at Com. law

4. By Revocation by burning, can[illegible] [illegible] tearing, or obliterating:—

Revocation [illegible] effected [illegible] as at Com. law — [illegible]

To effect a Revocation [illegible] of these [illegible] the [illegible] burning & — [illegible] be by the testator or in his presence and by his direction. Otherwise there is no — [illegible] Revocation [illegible] premises [illegible]

Perhaps the devise [illegible]; unless the [illegible] be [illegible] — [illegible] — [illegible] [illegible] to his knowledge [illegible] the [illegible] to [illegible] the [illegible] [illegible] of the [illegible]

Revocation

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Conveyances effected by the will, are in the nature of [illegible] conveyances, and [illegible]. Hence the acts themselves (though done by the testator) are not considered per se as revocations: but as furnishing evidence of a revoking intent. They are considered as visible signs of such intent." If [illegible] [illegible] [illegible] [illegible] cancellation [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] to [illegible] [illegible] the latter instead of the former: there seems to be no revocation. But it is not necessary that the [illegible] be totally destroyed [illegible] the slightest [illegible] [illegible] [illegible] [illegible] [illegible] with a revoking intent to revoke. [illegible] [illegible] slightly tore the [illegible] and [illegible] it [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

Cr. D. [illegible]
[illegible]
[illegible]
3 Mel. 585.

Cr. D. 334.
[illegible] 52.
[illegible] 30[illegible]
3 Mel. 508.
[illegible] 2310

Cr. D. 336
[illegible]

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[illegible]

[illegible] is [illegible] [illegible] [illegible] only, of [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] the other is [illegible]. Pow. R. 677. 634. [illegible] 433. 1 [illegible] 2 [illegible] 742. [illegible] 4. [illegible] 4 [illegible]

There are [illegible] [illegible] certain effect on the testating intention [illegible] in [illegible] instances [illegible] to "representation," [illegible] [illegible] when [illegible] [illegible] [illegible] another, not intended to effect [illegible] [illegible] their [illegible] effect [illegible] upon the efficacy of the other act— Pow. R. 677

Thus where a testator thinking that a new devise of his estate was complete when it was not [illegible] off the seal from his first will and [illegible] being informed [illegible] [illegible] said he was [illegible] [illegible] [illegible] [illegible] in subsequent devise—the first was not revoked— [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] will obliterated in part by the testator animo revocandi may be good— Pow. D. 638. [illegible] Ch. Ca. 165. [illegible] 2 [illegible] 4 [illegible] Com. 415. [illegible] Pow. D. 533 Comp. 817—

Wills Revocation

[illegible]

going on to the last – thus where one having devised all his estate to A. except &c. afterwards

[illegible] struck out the exception the portion not

[illegible] obliterated remained good. And if the

instrument made under the revoking clause of the will is [illegible]

[illegible] though the testator's signature is on the face of the instrument unless it was intended to obliterate the revoking part.

There is no statute in point on the subject of Revocation. The Rules of the Civil law generally apply here. As to Revocation by [illegible]

So also though devises may of [illegible]

[illegible] [illegible] destroyed be revived by a subsequent republication. For being [illegible] taken like the testator's death [illegible] will be [illegible] [illegible] before the will [illegible] if no prior instrument were sufficient to revoke [illegible] were sufficient to [illegible]

[illegible] [illegible] [illegible]

Real Property

Devises

Of Republications.

I. Of [illegible] as bef. [illegible]

II. As they [illegible] since the Stat. of Frauds and Perjuries

III. At Common law republications were much favored: of course, very slight words would effect a republication. — Pow. D. 273

Thus if one having made a devise of his lands, should purchase other lands and then publish his will as his last will, or verbally declare that it was his will; it was to be republished, and the land so purchased pass by it. — Pow. D. 562 &c. / [illegible] / 1 [illegible] 61 / Stra. 344 / 418 / 2 [illegible] 418 / 1 [illegible]

So if one having devised all his land to his Executor and afterwards purchased other lands should he applied to to sell the latter and should reply that they shall go with my other land to my Executor: the devise would be republished and would pass the land, thus purchased. — Pow. D. [illegible] / Cr. El. 493 / [illegible] 413 / 2 Ch. R. [illegible] / 1 Freem. 260 / 2 Vern. 209

And a memorandum of the same [illegible] [illegible] [illegible] the testator, — Pow. D. [illegible] / 2 Vern. [illegible]

[illegible]

Real Property

Devises

saying &c. on an application of cod.
"that will is in a box in my closet"
was holden sufficient. So the words
(this will in the hands of W. B. White)
[illegible] "have been holden sufficient".

Pow. D. 655. 656. Vol. 6. [illegible] Z. 1 — So any act subsequent to the execution
of a devise and shewing an intent
that it should remain would amount
to a republication. E.g. Delivering it to
one in token of such intent.

Pow. D. [illegible] — So though a [illegible] subsequent to the [illegible]
of the testator's will was holden to be a re-
vocation, yet the reference of the [illegible]
of the devise was holden to be a republica-
tion and thus to give it effect.

[illegible] — But the subsequent [illegible] after
[illegible] and paying of a legacy were
holden to be no republication of a devise of
land. And it has been holden that the
mere cancellation of a devise taking no-
tice of the devise would be a republi-
cation [illegible] But [illegible] the [illegible]

not think that the testator contemplated [illegible] the same, as their offspring [illegible] [illegible] [illegible] 1 P. Wms 593. 5 T. R. 518. 3 [illegible] Eq. Ca. 446. In which case the [illegible] related to persons only.

But the better opinion seems to be that the mere description of a devisee or the creation of an [illegible] [illegible] and though applicable to persons [illegible] only will [illegible] the [illegible] of the devise. For this is farther proof of the testator['s] [illegible] whether [illegible] to be so or not and therefore [illegible] conclusive evidence of the testator considering the child as existing [illegible] [illegible] in addition to it is [illegible] [illegible] of it [illegible] [illegible] revoked. At any rate the [illegible] of a devisee in the creation of [illegible] [illegible] [illegible] in the devise would be a [illegible] [illegible] [illegible] [illegible]

[illegible]

Pow. P. 668.
1 Ves. 485.
As to the [illegible] [illegible] the [illegible] of [illegible] [illegible] 669. [illegible] [illegible] 521. 1 [illegible] 680. [illegible] [illegible] [illegible] [illegible]

[illegible] 66.
[illegible] 3.
3 [illegible]
1 Ves. [illegible]
[illegible] 158

Real Property

Devise

So if the devisor, any time, in the presence [illegible] having an intention to confirm will a- mount to a republication. Ex. "I desire that this writing may be a part hereof of my last will and testament."

4 R. 583-4 / 665.
1 Ves. 4?? 2 / 489.

IV. Of Republication, since the Stat. of Frauds –

Neither the English Stat. of Frauds, nor [illegible] any express provision with respect to the republication of wills. But as the effect of a republication is "the same as that of a new devise" it is holden that no codicil in writing can amount to a republication of a devise of lands unless it is completely [illegible] prescribed in the Stat. i.e. unless accompanied with the solemnity of a devise.

[illegible]
[illegible] 548
[illegible]
[illegible]
[illegible] 48.
[illegible] 192.

First. Republication then, since the act [illegible] amount to a republication unless [illegible] with the forms." [illegible]

[illegible] 686.
[illegible] 82.
[illegible]
[illegible] 14.

Real Property

* [illegible] by the [illegible] in the presence of three [illegible] [illegible] the [illegible] [illegible] in the [illegible] [illegible] [illegible] in the [illegible] [illegible] [illegible] [illegible] There the [illegible] [illegible] But such [illegible]

The [illegible] is [illegible] in the presence of the testator. Pow. D. 66.

[illegible] republication is not good

Jak. Courts dicta from the [illegible] 1856. 1 Brod. [illegible] [illegible] 178[illegible]

But the provisions in the Stat. are not extended to implied or constructive republications — as the [illegible] clause was not applied to implied revocations. —

Pow. D. [illegible]

The terms of leasehold estates are not affected by the Stat. i.e. of terms for years — these are not considered as [illegible] nor are they real estates: but they are [illegible] real ~~estate~~ property —

Pow. D. [illegible] 83 [illegible] Stat. [illegible]

[illegible] the Stat. [illegible] [illegible]

Real Property

Devises

no express words of confirmation are neces-
sary [illegible] a Codicil [illegible]
Cro. El. 653. 688. a Devise: It is sufficient if the Devise is vir-
Ves. 189. tually confirmed. (E.g. devise that the
residue [illegible] be a particular part.)
So also by a letter [illegible] every codicil
Prec. Ch. 668-9. 1 Ves. 485. 1 Burr. 554. [illegible] 381. [illegible] 48. 7 T.R. 484. 3 Bro. C.C. 138. 1 Ves. Jr. 485. 7 T.R. [illegible] to a devise (though not actually annexed)
and even though it be of personal
property only, will [illegible] a republi-
cation, if executed according to the Stat.
[illegible] the Devise, [illegible] estate, and then
2 Roll. Ab. 90. 3 [illegible] Vern. 621 [illegible] 681 Amb. 57. contra. merely executes a Codicil giving pecu-
niary legacies, but executed [illegible]
If one having devised [illegible]
[illegible]
[illegible] the same [illegible] the [illegible]
[illegible] and the latter
[illegible]
the Stat. of Frauds, [illegible]
[illegible]
[illegible]
[illegible]

[illegible]

Real Property

Devise

republication is affected by the stat.

The effect of a republication is to give the devise a new date. So that the devise after publication will comprehend all lands & property and all interests therein, as it would have comprehended if originally made at the time of republication.

Cow. D. 54. 583.
Cowp. 1 31. 38.
[illegible] 193.
6 [illegible] 30.

Whereas a devise not republished will extend to no estate which the testator had not at the time of making it.

[illegible] 273.
[illegible] 211.
Bul. 31-2

It is a general rule that wills are to be construed according to the testator's intention at the time of making them. If republished, at the time of republication.

1. [illegible] 470.
Fon. [illegible] 82.
[illegible] 225.

[illegible]

[illegible] 192.
~~[illegible]~~
to [illegible] 54.
[illegible] 8.
[illegible]
7 [illegible]

Real property

Dower.

and the [illegible] of the [illegible] [illegible] the [illegible] [illegible] of the dower [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]. [illegible] 675. [illegible] 375. 2 L.b. 84. 5. C. 61.

By [illegible] dower [illegible] [illegible] daughter, [illegible] [illegible] to any [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] after the [illegible] [illegible] [illegible] [illegible] of the husband's death, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

For the [illegible] of [illegible] [illegible] [illegible] no question [illegible] to [illegible] the [illegible] of the dower the dower [illegible] [illegible] [illegible] [illegible] of [illegible] [illegible] at the time of [illegible] [illegible]. Hence of [illegible] dower [illegible] called [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] having [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] in Virginia [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of [illegible]

Real Property

Devise.

[illegible] warranted by a prior Devise, be made to pass to as words of purchase, a limitation. Thus if a devise to N. P. and the heirs of his body" and after N. P.'s death republishes, N. P.'s [illegible] son and takes [illegible] which one having issue living to his son B. and gives a legacy to his grandson B. republished after the son's death it was decided that the grandson B. could not take the land for the testator having used the word "grandson" showed that he did not intend to designate his grandson by the word "son."

Co. 9. [illegible]
7 T. R. [illegible]
[illegible]
2 Vern. 722.
Plowd. 343.
[illegible]
[illegible]
[illegible] 264.
[illegible]
[illegible]
[illegible]

Pow. D. [illegible]
[illegible]
Jenk. [illegible]
[illegible] 408.
[illegible]
[illegible]

Note. The testator's intention is to be collected in general from a reference to the state of things existing at the time of making the will & not at his death.

Pollex. [illegible]
[illegible]

A devise may republish a devise as to part of the original [illegible] by the devisor having devised his real estate to two [illegible] to each parts of the estate by deleting the parts from one of them and then

Com. [illegible]
2 P. Wm. [illegible]

by

Devises

by devise) conferred is subject to the settlement. It was holden that the other part should go to the heir.

But a Codicil cannot give the original devise any inherent validity it did not before belong to it. Its effect is to set it up in the same condition in which it was at its revocation.

[illegible] of the devise itself is not executed according to the Stat. a Codicil which is duly executed will not confirm it.

Lord Hardwicke once said, that if a man devise thus: all the lands which I now hold and afterwards purchase [illegible]; the codicil would not [illegible] republication [illegible]. But the words have the same effect, as if the devise had been made at the time of republication.

A devise may be republished by [illegible] and parol republication [illegible] [illegible] required [illegible] in [illegible] [illegible]

[illegible]

Real Property

Devise

makes a devise, and after full age re-executes it—

An infant's devise republished in the very day in which he comes of age: There is no Fraction of a day

Pow. D. 685.
1 Sau. 160.
1 Ves. 589.

Nothing which does not amount to a republication at law will amount to it in equity

Pow. D. 684.
Comb. 132.

Devises

Real Property

Of the Jurisdiction of Courts

Ch. 6. Devises

Cru. D. 388

The Ecclesiastical Courts in England have no jurisdiction over devises of land & only there a prohibition lies to prevent them from proceeding in the probate of devises.

Cru. D. 388.
[illegible] 30.
[illegible] 27.
[illegible] 396.
[illegible] 10.
[illegible] 374. 5

But where the same instrument contains a devise of land and a bequest of chattels, it may be proved in the Court so it is necessary as to the personal estate. But the probate as to the real estate upon a will [illegible] is not evidence at law. [illegible] personal property it is conclusive; a prohibition was formerly granted upon the same.

[illegible] 388.
[illegible] 55. 8.
415.
315.
263.
3. 8.
[illegible] 89.
326.
23.

[illegible] 35.
[illegible] 315.

In Conn.t Devises as well as Wills are proved before the Courts of Probate. Persons may appeal to the Sup. Court [illegible] from their decisions in all cases. If the sentence of Probate is [illegible] no further proceedings [illegible] [illegible] the same is [illegible] with [illegible] to the judge is conform to the original

[illegible] 36.

Real Property

Devises

of the Court above. But there is no need of an appeal on any question of title to real estate. For the sentence of the Court is not evidence of the title in such a case. The heir or devisee may immediately [illegible] every sentence of [illegible] [illegible])

The [illegible] of an estate, [illegible] [illegible] under the [illegible] of the estate, settle the [illegible] of those entitled to it unless it is decreed on appeal to be erroneous but has no effect on the question of title.

A Court of Chancery will not set aside a devise upon a suggestion of fraud in the making of it. For if the suggestion is true [illegible] devise. And whether it is a devise or not is a question of fact to be tried at law by a jury on the issue "Devisavit vel non" (Decree of [illegible])

Cru. D. 622. [illegible] 10. 240. [illegible] 235 [illegible] 358. (Per Ch. [illegible] contra) [illegible] particular [illegible] the question [illegible]

Cru. D. 670.

Cru. D. 170
[illegible] 591.
[illegible] 17.
[illegible] 58.
[illegible] 183.
2 [illegible] 324.
[illegible] 424.
2 [illegible] 273.

Real Property

[illegible]

[illegible] of the [illegible]

So whether the testator was compos mentis or not, is a question of fact to be tried at law. Pow. D. 693. 695. 3 Atk 544. 1 Ves 258 &c. If an issue devisavit vel non is sent out of Chancery, and a verdict for the heir, &c, the Court of Chancery in these cases on the issue's being thus found proceed to set aside the devise (the bill being brought for that purpose) — or so the proceedings in equity cease.

Pow. D. 693. 695. [illegible]

But there is a distinction between this case (of fraud) and a devise for fraud, where, taking from the devisee the benefit of a devise thus made is a complete answer, which being the devise in the Court may be said to have the substance of the devise, not the form, — but the Court decrees that the devisee shall stand for the benefit of the party aggrieved — The ground of this interference is that it does not proceed upon the devise itself — but upon the conscience of the devisee —

Pow. D. 695 [illegible]

[illegible] Property

[illegible]

E.g. if a [illegible] to give B. [illegible] in Bank-Bills in consequence of B's [illegible] leave to him [illegible] the Bills are forged; it will be made a trustee for B. heir for the breach of confidence which in equity is a [illegible] — [illegible]

On a similar principle if a [illegible] on the other hand that if one being about to provide by devise for his younger children is dissuaded from doing it by the heir promising to make the same provision: the heir is compellable in equity to perform his agreement: for he has practised a fraud. — [illegible]

And where [illegible] land to be exchanged for College [illegible] the College [illegible] Chancery decreed that [illegible] to have the land [illegible] to be exchanged. — [illegible]

In general [illegible] arising [illegible] in the [illegible] of a [illegible] [illegible] [illegible] Chancery may [illegible] — [illegible]

[illegible]

Real Property

Devise

execution of [illegible] time of those ancient [illegible] concerning [illegible] entails.

Presump- [illegible] — Where the word "Devise" [illegible] or [illegible] that Court will presume the evidence and direct the application of it so that a fair investigation may not be prevented by the fraud [illegible] the [illegible] of the parties [illegible] evidence either oral or in writing that he shall not set up such evidence or circumstantial defence or that he should [illegible] evidence [illegible] [illegible] of the original [illegible].

Real Property

Devises

Of proving a Devise in Evidence at Law.

The best proof of a devise is the production of the instrument itself. And regularly the best evidence is required in all cases. E.g. where one claiming under a devise filed a Bill in Chancery exhibited by the heir, the deft. not setting the devise, it was holden to be no evidence. — Gil. Ev. 108. — Gil. Ev. 102. 2 Keb. 204. 1 Keb. [illegible] Comb. [illegible]

So a devise established under the [illegible] Law is no evidence in a [illegible] ejectment. — Gil. Ev. 50. Comb. 10.

So the probate of a will in the ecclesiastical court is no evidence as to title to land, for the [illegible] are [illegible]. Hence the probate of a devise of land in that court is no evidence even of the validity of the devise, the probate [illegible] a nullity. — Gil. Ev. 108. Comb. 248. — Gil. Ev. [illegible] 2 [illegible]

But if [illegible] of the [illegible] has been [illegible] the [illegible] of the devise is only [illegible] proof. — Gil. Ev. [illegible] [illegible] [illegible]

Proof

Real Property

Devises

But yet it is said that the probate of a devise not entire accompanied with other circumstantial evidence is admissible if the devise is proved to be lost. [illegible] 2, 16.

And it seems that if a devise pertains in Chancery by order of the Court a copy of it is admissible. And in all of the Courts indeed where the Court in which it is lodged has jurisdiction over the subject matter a copy [illegible] official copy may be read. [illegible] 107. [illegible] 117 [illegible]

As was [illegible] the contrary practice in Court. But if proof of the attestation is required the [illegible] must be proved by a subscribing witness if either of them is living. But if it be not possible [illegible] by others. If there has been a trial of the will in Chancery it is [illegible] evidence of the [illegible]. [illegible] 2. 108

At law however one of the witnesses is sufficient to prove what the devise [illegible] [illegible] [illegible] [illegible] [illegible]

only

Wills Probates

[illegible]

[illegible] that the testator executed [illegible]

[illegible] signed [illegible] presence [illegible]

[illegible] that the witnesses are the same. [illegible]

[illegible] the execution

[illegible] testifying the will may be

[illegible] — And though the witnesses are

all present it is unnecessary that they

all testify to the act of the testator [illegible] — [illegible]

[illegible] subscribing. If the witnesses [illegible]

[illegible] testifying [illegible] the will

[illegible] one of the witnesses refuse to swear — [illegible]

it [illegible] necessary to prove the [illegible]

[illegible] — But the subscribing

witnesses are allowed to deny the facts — [illegible]

[illegible] from the face of the instrument — [illegible]

they are presumed to have attested

[illegible] their own attestation. The testator

[illegible] his signing — [illegible]

[illegible] execution —

[illegible] testimony of the subscribing — [illegible]

[illegible] will

[illegible] their own

[illegible]

Devises

[illegible] the devisee may yet be contradicted by other witnesses. The devisee being [illegible]

[illegible] On the other hand their evidence of [illegible] of the devisee is not conclusive against the heir. But he may contradict them.

[illegible] 64.

But a Court of Chancery will direct an issue to try the validity of the [illegible] where the subscribing witnesses [illegible] that he was sane [illegible] the proof to the contrary is [illegible] direct evidence.

[illegible]

Real Property

Of Proving a Devise in Chancery

Devise

It is usual in England when a title to real estate depends upon a will to prove it in Chancery especially if the will is of ancient date. Pow D. 714

The probate of a will in Chancery is in effect conclusive upon all persons and prevents its being disputed afterwards even in a Court of Law: for if the heir or any other should after the decree attempt to controvert it Chancery would issue an Injunction agst him. Pow D. 718. 1 Atk. 216.

The Court of Chancery has no concern with the probate of personalty in wills.

But Chancery will not declare a devise proved unless the heir is "forth coming" i.e. to be found. Pow D. 2 Atk. 20.

It has been holden that such a probate of a devise is not necessary however in order to establish a particular claim under it even in equity. Pow D. 716 3 P. W. 92.

Lu

Proof

Real Property

Devises

And though the heir voluntarily suffers default; yet the devise will not be declared to be well proved of course. But proof must be made as if it were contested.

[illegible] 27.

The probate of a devise in Chancery being thus conclusive, it is an established invariable practice in Chancery never to decree a devise proved unless all the subscribing witnesses are examined. For the heir has a right to claim that all of them testify before he is disinherited.

Com. D. [illegible] 1 Wils. 215 1 P. W. [illegible]

The practice of our Court of Probate is to declare a devise proved on the oath of one of the witnesses. But the probate here is no evidence of title.

And the rule is the same in England though one of the witnesses is beyond sea. His [illegible] evidence cannot be had, for it is not presumed to be out of the power of the party claiming to obtain his [illegible]

[illegible] 1 P. W. [illegible] Chan. 17.

Bond. Probate

[illegible]

Where a [illegible] lies from Chancery to the Prerog. Court to have a Bond, the Bond itself is sometimes delivered out of the proper office on a security given. but in some instances Chancery has refused the Prerogative Court to deliver Bonds on Security.

Vern. 2. 727.
Stra. 701.
1 Atk. 20.
2 Atk. 627.
[illegible] 6. 1.

A bill to perpetuate the testimony of Witnesses to the Bond of a deceased will not lie in his life time. For he may [illegible] be sued.

Pre. Ch. 423.
Vern. 35.
[illegible] 234.

13th [illegible] 18[illegible]

Note. Descents form a part of the Course of Lectures on Real Property. But the manner in which they are treated is more by exemplification than principle and as Judge Reeve intends publishing his Lectures on this branch, until then the reader is referred to 2 Bl. Com. 200.

See, Lectures on the Detail of Descents in Maryland

Fourth Lecture

Estates in [illegible]

Remainders and Reversions.

A consideration of the subject will [illegible] [illegible] as a particular or a general [illegible]. In the one [illegible] [illegible] regard had to the quantity of the tenant['s] [illegible] [illegible] had to the time of enjoyment.

Estates [illegible] the time of their [illegible] [illegible] either in possession or in Expectancy. And Expectancy are of two sorts: One created by act of the parties called a "Remainder" and the other by act of law called a Reversion. 2 Bl. 163

Of estates in possession, or estates executed very little can be said of them. All [illegible] the [illegible] [illegible] [illegible] are supposed to be estates in possession unless the contrary [illegible] [illegible]. Of an estate in possession [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Fearne on Rem.

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Real Property

[illegible] [illegible] [illegible] [illegible] [illegible] an
[illegible] [illegible]. [illegible] [illegible] [illegible]
[illegible] [illegible] the owner [illegible] [illegible] which
a present interest [illegible] [illegible] [illegible] and
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] the right
of enjoyment [illegible] [illegible] the [illegible]
of the [illegible]:

We will now consider the peculiar [illegible]
of the two kinds of estates in expectancy
(viz.) Remainders and Reversions.

II. Of Estates in Remainder.

An estate in remainder is an estate limited
to take effect and be enjoyed after another
estate is determined [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
and after the determination of that estate
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] the determination of [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] from the [illegible]

[illegible]

Real Property

owner of the greater estate. Hence the [illegible] fee simple is [illegible] the estate is [illegible] into parts all the parts put together make but one whole. Hence no remainder can be limited on a fee simple, because a fee simple includes all the interest that can be had: there can be [illegible] remaining to limit. [illegible] Demesne [illegible] to remainder [illegible] of [illegible]: for the [illegible] on another in a certain event, [illegible] entire fee [illegible] (a possibility [illegible])

2 Bl. 164
Plow. 29
[illegible]

[illegible] necessary to create a remainder is the technical word "remainder" itself. [illegible] may be [illegible] other words.

[illegible]
Plowd. [illegible]
[illegible]

General Rules on this subject.

1. To create a remainder there must be some particular estate precedent to the estate in remainder [illegible] the particular estate [illegible]

2 Bl. 165
[illegible]
Plowd. [illegible]
[illegible]

Real Estate

of preceding the particular estate arises from this reason, that a remainder is a relative term and implies that some other particular estate exists or that some part of the thing is previously disposed of.

Co. Litt. 49. Plow. 25. Cru. 6.282. 2 Bl. 165

An estate then created to commence in futuro without a particular estate is not a remainder; it is not a residuary part. Particular estate and remainder are correlative terms; one cannot exist without the other. But a freehold interest cannot at Law be created to commence in futuro. It must take effect immediately as particular or remainder. And the reason of this is that livery of seisin is necessary to create the estate. Exception in the case of a freehold rent. This may be granted to commence in futuro & be done. The object of the law here is to prevent the freehold being in abeyance, which would be to defeat inheritance and so far against principle there

2 Bl. 165

2 Bl. 166 Cru. [illegible] Id. 71

[illegible]

[illegible] [illegible] Cru. 6.2[illegible] 5 Cru. 297 K.

Real Property

must be a tenant of the freehold ready to answer feudal services: it is observed that livery of seisin was one reason why a freehold could not be created to commence in futuro: (for livery of seisin, in its very nature, must operate in presenti, or not at all: therefore a freehold can never be in abeyance). Suppose an estate given to A. for years with remainder to B. in fee: here A. has livery of seisin for B's use in the name of B. and this seisin given to the particular tenant enures to the remainder man B. and here B. is immediately seised of the premises. — 2 Bl. 166.

But a lease at will is not sufficient to support a remainder. For if [illegible] freehold passes, it is the same part of the inheritance [illegible] [illegible] [illegible] [illegible] having determining it [illegible] could not support [illegible] [illegible] [illegible] [illegible] remainder. — 2 Bl. [illegible]

Real Property

As [illegible] there must be a particular estate, in order to support a remainder

2 Bl. [illegible] / [illegible] 298. / [illegible] 115. / [illegible] 58.

if the particular estate is void in its creation the remainder which is to be supported thereby must fail: for there is no particular estate. Eg. An estate for life to one not in esse remainder in fee. And if the particular estate tho' good in its creation is defeated before the remainder vests, the remainder must fail. The rule is given by Blackstone in a different form, but the rule [illegible] the correct one.

2 [illegible] 8[illegible]. / 18[illegible] 18[illegible]. / [illegible] 155[illegible] / [illegible] 16[illegible]. / [illegible] 263. / Fearne 209. / 23-4-24. / [illegible] 261.

Blackstone says, if defeated, the remainder if it ever fails: it would pass [illegible] not if it may vest when the other is determined. Eg. An estate to A. for ten years, and after the expiration of that term remainder to B. (Now A. forfeits his estate at the end of 5 years, the effect the remainder becomes [illegible] vest then. But if [illegible] to A. for ten years

and

and after the expiration of that estate to C for life; here the determination of A.'s estate in two ways viz. accelerates B.'s estate. To be sure there would be no [illegible] — This rule applies in case of Contingent Remainders: But not to Vested Remainders, they being vested at the creation of the estate [illegible] as to Remainder, depending on the [illegible] [illegible] to the particular tenant, if that is defeated by the grantor's entry for a condition broken, the remainder fails. [illegible] that be called a Vested Remainder. Mr Fearne [illegible] that Contingent Remainders are contemplated by the rule.

[illegible] 25. [illegible]

II. 'Tis a general rule that the Remainder [illegible] must [illegible] [illegible] and the grantor at the time of creating the particular estate or the possibility on contingent [illegible] must be [illegible] at that time. The remainder man must have a [illegible] right to [illegible] [illegible]

29th Jan 1802
2d Lecture

[illegible]

consequent

[illegible] Suppose an estate to A. for life remainder to B. in fee: here the [illegible] [illegible]: and B.'s remainder [illegible] by the livery of seisin made to A. So to A. for life remainder to B. in fee on a certain contingency: Here B.'s right to enjoy the estate if the contingency happens, passes from A. instanter. But still the interest thus limited remains in the grantor till the contingency happens. So it will descend to his heirs. Hence it would be [illegible]

Fearne 2d ed. 285 & Cruise 202.

A remainder cannot be limited on an estate already in esse before [illegible] To be sure the interest remaining may be granted as a reversion, and then it should be called a remainder. But it would be a reversion: Hence it seems they must both be created by the same instrument. [illegible] estate [illegible] [illegible] remainder: because

Fearne 258 2 Bl. C.B. 166

remainder

created to vesting [illegible] be created by the same instrument by which the particular estate is created.

The remainder must vest in the grantee during the continuance of the particular estate or eo instante that it determines. The meaning of this rule is that the "interest" must vest during the continuance of the particular estate, for if it vest in interest the [illegible] vest eo instante at which the particular estate determines. E.g. To A. for life remainder to B. in fee: the remainder vests at the creation of the particular estate. So to A. and B. for their joint lives remainder to the survivor: it vests on the death of either. But if to A. for life remainder to B. [illegible] and the present tenant dies before B., [illegible] the remainder fails, [illegible] being but one [illegible] must be [illegible] together. [illegible]

Fearne [illegible]

[illegible]

[illegible] of [illegible] the [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] to take effect [illegible] [illegible] [illegible]. As to that, this is [illegible] only possible, because it cannot [illegible] till after the determination of the particular estate. And upon this General Rule is founded the doctrine of Contingent Remainders—

Fearne 233.
Plow. 234. 235.

Remainders are of two kinds

Vested and Contingent—

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] a present interest passes to the grantee, though to be enjoyed in futuro, the estate is vested in [illegible] present, [illegible] the [illegible] of the [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible] [illegible]

[illegible] to be [illegible] which [illegible]
with it a [illegible] right of [illegible]
[illegible] [illegible] [illegible]
Remainders are likely to be construed as pre- 2 Wood. 11.
sent interests passing to the grantee but 192. [illegible]
which are to take effect when a future [illegible] 250.
event or the uncertain event [illegible] [illegible] 1 [illegible] 225.
like [illegible] the [illegible] of the [illegible] from 2 Bl. 169. 170.
[illegible] [illegible] [illegible] [illegible] 3 [illegible] 201
the [illegible] son of [illegible] [illegible] 208.
the [illegible] from [illegible] his [illegible] [illegible] 250.
the remainder [illegible] to [illegible] life [illegible] 2. 3. 4.
remainder after his death to [illegible] the [illegible]
late to the [illegible] [illegible] before his
death. Mr [illegible] [illegible] that [illegible]
[illegible] definitions [illegible]
[illegible] [illegible] [illegible] of an uncertain
[illegible] in the birth of a child [illegible]
[illegible] an uncertain event [illegible]
an uncertain person [illegible] by the
[illegible] of the remainder were limited
[illegible] to the eldest son of the particular [illegible]

Margin: 2 Bl. 170. / [illegible] 169 / 170. [illegible] / 3 [illegible] / [illegible] 109. / 2 [illegible] / [illegible] 228. / [illegible] 232 / 2 [illegible] / [illegible]

[illegible]

[illegible]

[illegible] his son en ventre sa mere at the time of his death could not take. But by Stat. 10 and 11 William III c. 16 [illegible] posthumous children, are capable of taking in remainder in the same manner as if they had been born during their father's life time. And so [illegible]

[illegible] [illegible] however [illegible] [illegible] [illegible] before the determination of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

But [illegible] [illegible] [illegible] at the time [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Real Property

In a remainder to B. the [illegible]
[illegible] exceptions [illegible]
there are two possibilities, one depending Fearne [illegible]
on the other. Thus when the person [illegible] 2 Bl. [illegible]
able is presumed, [illegible] when the
happening of something [illegible] is
not good: but the law will not presume 2 Bl. [illegible]
that an unlawful event will happen Fearne [illegible]
So the possibility is remote when the Co. Litt. [illegible]
possible etc, that a [illegible] [illegible]
[illegible] happens; which [illegible] "Remote"
[illegible] possible, [illegible]: The [illegible] note.
[illegible] in [illegible] events; and not
to be good because the law considers [illegible]
[illegible] not a remote possibility. [illegible]
[illegible]
[illegible] that [illegible]
[illegible] acquired a right by being of an
unlawful act. [illegible] on the
[illegible] of a preceding limitation; and 1 Cru. 4: [illegible]
of [illegible] contingent [illegible] a rule that
[illegible] the good [illegible] of [illegible]

[illegible]

cannot be limited where [illegible] estate [illegible] has preceded: as a particular estate of freehold in the grantor at the creation of the estate [illegible] the remainder is [illegible]: Until [illegible] vest [illegible]. But it cannot vest in the remainderman for no present interest [illegible] to him: [illegible] in the particular tenant

2 Bl. 171.
1 Co. 134
Hargr. 151
2 [illegible] 146.

Contingent Remainders may be defeated by the determining of the particular estate before the contingency happens by Death. Alienation. Surrender, &c. But a determination of the particular tenancy by Disseisin, &c. [illegible] not defeat the Contingent Remainder. For though he is disseised, yet of the [illegible] a right of entry the remainder is supported. In the above case the estate of the particular tenant [illegible] [illegible] from the land [illegible] [illegible] of [illegible] Trustees to preserve Contingent Remainders

2 Bl. 171.
1 Co. 66 135
[illegible] 244
244. 249 250
254 258 250
[illegible]
[illegible] 30
3

[illegible] 90.
199.
10 [illegible] 144
1 [illegible] 316.
[illegible] 318

[illegible]

Real Property

Remainders: Since the very [illegible] existing the particular estate to prevent a destruction of the remainder. E.g. To A. for life, remainder to B. during the life of A., remainder to C. in tail: Here if A. should forfeit, B's remainder would vest and continue till A's death when C. would take.

The question whether a Remainder is vested or contingent depends not upon the certainty of the limitation, [illegible] of the probability or improbability of its taking place in fact. Where a Grant to A. in tail, remainder to B., this is a vested Remainder. It is the uncertainty whether a remainder will ever vest in interest and not whether it will take effect in possession which renders a remainder contingent. [illegible] the particular [illegible] the remainder [illegible] the particular [illegible]

2 Bl. [illegible]
1 Prest. 378.
[illegible] 55.
[illegible] 57.
[illegible] 140.
2 [illegible] 216.
[illegible]
Fearne [illegible]
[illegible]
[illegible]

2 [illegible] 1812
3 [illegible]

Fearne [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

[illegible]

[illegible]

Contd. Remainders

The Remainder is limited in one of two ways. 1st Vested, 2d Contingent.

☞ The present capacity of taking effect in possession, if the particular estate were vacant, is that which distinguishes whether a Remainder is Vested or Contingent. E.g. An Est. is limited to A. for life, remainder to B. in fee. B. living in [illegible]. Suppose A. dies, can B. take the Remainder — answer, Yes. This therefore is a Vested Remainder because it is limited to an ascertained person. But suppose it to be limited to B's unborn Son; then this is a Contingent Remainder, because if the particular estate be determined B's son [illegible] there would be no one to take. It is then a Contingent Remainder, depending on the event of B's having a son born before the end of the particular estate.

Fearne [illegible]

If an estate is limited to two and

Remainder

Real Property

Remainders in one devised to one, and on another to the other; these latter limitations are called "Cross Remainders."
4. Bac. 339. Cruise 9. [illegible] 33. Dyer 303.

It is said in the Books that Cross Remainders cannot arise where there are more than two devisees: but this is not so. This is always a question of construction, and the Rule is this: (When the Cross Remainders are to be raised by implication between two only) that the presumption is in favour of them. But more than two the presumption is against them. But this presumption may always be rebutted by circumstances of manifest intention.

Cru. 9. 65
4 Bac. 339

Cruise 30. 180
2 [illegible] 409
[illegible]
[illegible]

It is also said in the Books that Cross Remainders cannot be created in Deeds, but by devise only. But this again is incorrect: the true Rule is that Cross Remainders cannot be raised by implication in a deed, but must be

[illegible]
[illegible]

[illegible]

Real Contracts

be expressly created. In a case they may be created either by an express clause in the conveyance.

[illegible] [illegible] Mr Cruise it would seem from the [illegible] of this title that a [illegible] may be created by [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Executory Devise

There is a species of limitation which [illegible] strictly a remainder [illegible] 1. Bl: 172.
[illegible] limitations, and which is called
an "Executory Devise": This is generally
defined to be "a devise of a future interest 2 Bl: 172
"which to take effect when the [illegible] [illegible] 4 Cru. 396
[illegible] future [illegible]" [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] that the
[illegible] is imperfect. [illegible]
[illegible] the [illegible] [illegible] Fearne 386
[illegible] [illegible]
[illegible] [illegible] [illegible] that "An Fearne [illegible]
Executory Devise [illegible] [illegible] [illegible]
limitation of a future interest [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] limitation of a future interest [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible]

Real Property

Contingent Remainder and [illegible]
[illegible] Fearne 237, 282. [illegible]
[illegible] 2 [illegible] 383. [illegible] 409

Executory Devises, are allowed, merely out
[illegible] of indulgence to a man's last will and
[illegible] testament. as being supposed to be
[illegible] "[illegible]" [illegible]
[illegible] well [illegible], where it will be void
be void. The doctrine of Executory De-
vises are wholly unknown to the [illegible]
[illegible] [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

[illegible] An Executory Devise [illegible]
[illegible] [illegible] [illegible]
[illegible] in three particulars. 1st That [illegible]
[illegible] [illegible]
[illegible] [illegible]
[illegible] ~~[illegible]~~ [illegible] Executory Devise

[illegible] [illegible] executable [illegible] [illegible] contingency) be limited after a fee simple. Thus by it a remainder may be limited of a chattel interest after a life estate, in the [illegible] [illegible]. Such limitations in other conveyances are void: They are [illegible] [illegible] in last Will, and [illegible] [illegible] If a contingent limitation, [illegible] by [illegible] to depend on a preceding freehold estate [illegible] [illegible] and remainder and the preceding [illegible] [illegible] before the testator's death, [illegible] the [illegible] [illegible] death the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] it was a contingent remainder" [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Fearne 3?.6
Cro. [illegible]
[illegible]

Fearne 418.
401. 419.
386. 414.

not take a contingent Remainder be-
[illegible] may vest even before the death of
the testator. Thus in the [illegible] "to
the younger [illegible]", [illegible]
one shall take by way of Executory De-
vise because the testator['s] [illegible]
[illegible]
[illegible] not have suffered the [illegible]
[illegible] after the death [illegible] whole life
the [illegible]. But [illegible]
[illegible] after the death of the testator, to be
[illegible] a contingent Remainder [illegible]
[illegible]
[illegible]. This [illegible]
[illegible]
[illegible] by the [illegible]
[illegible]
[illegible] to commence [illegible]
[illegible]
[illegible]
[illegible]
[illegible] to the heir [illegible]

Real Property

[illegible] [illegible] [illegible] [illegible] a grant [illegible] however [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] to the heirs of the grantor will however [illegible] [illegible] by the [illegible] [illegible].

[illegible] A fee or other estate may be limited [illegible] after a fee. [illegible] to A. & her heirs but if he die without heirs [illegible] [illegible] his heirs [illegible] [illegible] [illegible] [illegible] provided that [illegible] [illegible] [illegible] [illegible] then to B. and his heirs. Here [illegible] the last limitation not to take effect after the expiration of the first fee [illegible] a [illegible] absolute [illegible].

[illegible] Remainders may be limited of [illegible] [illegible] interest after a life estate [illegible] [illegible] [illegible] having a term of years [illegible] to A. for life remainder to B. [illegible] [illegible] of a term [illegible] [illegible] a life estate higher than a term of years [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Fearne 2[illegible]

[illegible]

Real Property

Formerly a distinction was taken be-
tween a bequest of the use of a chattel
2 Bl. 398. for life and the thing itself; the former
Fearne 216. [illegible] that a remainder [illegible]
[illegible] the first [illegible] in the [illegible]
[illegible] Now a Remainder is either vested or
contingent. [illegible]
[illegible] to any number of preceding [illegible]

The important distinction between the
Fearne 216. remainders [illegible] contingent relates
to the [illegible] of [illegible] [illegible]
[illegible] to the [illegible] [illegible] of the two
[illegible] estates which create

2 [illegible] The essential difference between them
[illegible] contingent Remainder and that
2 Bl. 173. of an executory devise is that the former
[illegible] 1192. may be barred by [illegible] the
Fearne [illegible] latter cannot: for an executory devise
[illegible] 551. [illegible] a present interest [illegible] of a [illegible]
[illegible] 521. [illegible] part of the [illegible] estate [illegible]
[illegible] 269. [illegible]
Roper 96. [illegible]
[illegible] 318. [illegible]

Real Property.

Hence, a rule is established fixing the period within which the contingency on which the ulterior limitation depends must happen in order to render the limitation good. For as an executory devise cannot be barred or destroyed; it creates so far as it goes a perpetuity: (i.e.) an estate unalienable till the contingency happens or becomes impossible.

Fearne 314.
315.
2 Bl. 174.
12 Mod. 287-8
7 Id. 294.
2 Brown 250.

The rule is, that an Executory Devise to be good must be limited so as to take effect if at all within a life or lives in being and 21 years and the fraction of a year, as 9 or 10 months, afterwards. The period of a life or lives in being is allowed to enable a person to limit an estate to unborn children: the period of 21 years is allowed that a person may be of years of discretion to take & as this can not create any additional inalienability. The fraction of a year is allowed for the benefit of posthumous children. And

2 Bl. 174
Talb. 228.
Pong. 390.
Fearne 314.
320. 336.
7 Ve. 165.
595.

Real Property

And if according to the terms of the devise the contingency cannot happen [illegible] till at a more distant period the limitation is void in its creation: Ex. A devise [illegible] 3 T. R. Wils. [illegible] to the first unborn son of B. when he shall attain the age of 21. This is good. But to C. and his heirs with condition that on a certain event it shall go to the unborn son of B. at his age of 21. But a devise of lands to the unborn son of an unborn son of [illegible] is void. Blackstone and [illegible] others have drawn a different rule with respect to the remainders of an estate [illegible] viz. That all the remainders must be in esse during the life of the first devisee and that the contingency must [illegible] the [illegible] happen during the life of the first devisee. According to this rule a remainder limited to A. for life then to B. for life and then to the unborn son of B. would be good [illegible] to the unborn [illegible] for the [illegible]

Real Property

[illegible] [illegible] in being [illegible] lives in being [illegible]
[illegible] and Security would be deleted that the
period allowed for the happening of the
contingency [illegible] the [illegible] the
three kinds of executory Devises viz.
that the limitation is void, if it is so
framed as to take effect within a life or
lives in being [illegible] [illegible]

It is a general rule that if an Estate
by devise is limited to take effect after a
general failure of issue, or after one
dies without heirs, or without issue, it
becomes subject to [illegible] Restriction
the limitation is void, for the words import
an indefinite failure of heirs at any time
indefinitely distant. E.g. Devise to A.
and his heirs and if he die without heirs
to B. This Rule belongs to all the three kinds
of Executory Devises. Fearne 322. & 341.
(So if a Devise is to A. and his heirs and
if he die without heirs of his body or issue
to B. [illegible] [illegible] the limitation

Fearne 320.
335. 346.
2 [illegible] 80.
7 [illegible] 102.
[illegible] 421.
1 [illegible] 132.
[illegible] 307.
[illegible] 234.
[illegible] 30.
[illegible]

[illegible] 401.
Fearne 335.6.
320.6. 340.6.
2 [illegible] 332.
[illegible] 268.
[illegible]
[illegible] 101.
[illegible]

[illegible]
1 [illegible]
3 [illegible]

Fearne [illegible]
[illegible]

Real Property

Fearne. 352.
Powell. 223.
Sal. 225.
[illegible] 192.
[illegible] 207.
[illegible] 282.
[illegible] 317.
[illegible] 370.
[illegible] 422.
[illegible] 258.
[illegible]
[illegible] 30.
Gen. D. 35.2.
[illegible]

as a remainder [illegible] established [illegible] by limitation – [illegible] words [illegible] "[illegible] without issue" [illegible] from [illegible] dies: is a, belonging to the [illegible] of the [illegible]: tis limitation, [illegible] as an Executory Devise – [illegible] the dev [illegible] as a [illegible] estate: [illegible]

[illegible] 25.2
[illegible]

If one devise to A. for life, remainder to his [illegible] in fee, provided that if A's wife [illegible] a son born, the lands shall go to him [illegible]: the [illegible] [illegible] [illegible] [illegible] [illegible]: and the limitation [illegible] [illegible] the words "if he die without [illegible]" [illegible] [illegible] [illegible] to [illegible] [illegible] [illegible] [illegible] [illegible] may therefore be [illegible] [illegible] Executory Devise.

Mr Fearne however thinks that [illegible] [illegible] shall be [illegible] [illegible] a different [illegible]

Cont

Real Property

Any limitation of a future estate or by way of remainder tending to a perpetuity is void: and this whether it be a devise or a deed. Ex. devise to A for life, remainder to his unborn children for their lives remainder to their unborn children: Here this last limitation is void: For no limitation can be carried farther than to the unborn children of a person in esse. Court however will according to effect the general intent, in devises, construe the limitation over according to the doctrine of cy pres and give the first unborn devisee an estate tail.

Cowp. 39.
1 P. W. 332.
1 Br. C. C. 392
1 T. R. 254.
3 Burr. 1632.

2 Atk. 248.
239.

Where a contingent or other estate is devised over on a condition [illegible] the [illegible] estate and the preceding estate [illegible] never takes effect, the subsequent limitation never takes place. Ex. Devise to A. the son of B. remainder to his eldest son if he should take the testator's name [illegible] of a remainder to the [illegible] of the

Cowp. 163.
3 Atk. 415. 618.
1 Atk. 470.
1 Ves. 268
[illegible] 249.
2 Br. C. C. 316.
3 P. Wms. 340.
1 Ves. 134.
1 Burr. 250

same

sion should not comply with the [illegible] in the words take. Then a [illegible] Here the last limitation is a substitute from the preceding one.

Doug. 323. 326.
Plow. 340.
Cro. E. 432
2 Vern. 422

So, if a devise to A. in tail, and for want of issue to B.: If A. dies, living the testator, B. takes, immediately on the testator's death. As an immediate devise: not as executory.

2 Bl. 301. 345.
2 Atk. 382.
1 Ves. 184.
Fearne. 4[illegible] 418.

It would be otherwise, however, if the preceding estate was void, through the remoteness of the contingency. So, devise of personal property to A. and if he die without heirs, to B. remainder on contingency to C. C. cannot take on failure of the remainder.

2 Bl. 257. 259.
2 Day. 1. 319
2 Lecture.
2 Vern. 184. 213.

So, if the subsequent limitation is so made as to depend on the prior.

Vested remainders are assignable, devisable, transmissible and alienable even before the remainder comes into possession. For the interest is vested.

Second

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[illegible] no contingent [illegible] is now settled no [illegible] ~~Remainders~~ Interest, as Contingent Remainders and Executory devises, except that they are assignable only in equity, and this before the Contingency happens, or before the interest vests. These are called "Possibilities clothed with an interest" and may thus be disposed of, but a Naked "Possibility" cannot. But such a contingent interest when it descends, does not necessarily vest in the person who is heir to him at the time of his death, but often goes to that person who is heir to the remainder man at the time when the Contingency happens. He then is heir to the remainder man who was heir at the time when the Contingency happened and not him who was heir at the time of his death. Formerly a distinction was taken between the Descending Devise of Real and

Fearne 286. 291 & 39. 440. Jac. 117. 1. Bl. R. 29[illegible]. 1. H. Bl. 30. 4. T.R. 248. 1. Term 202.3 209. 7. T.R. 88 93 488. Cow. R. 34. 2.34. 4[illegible]. 2. Moore 2497. 2.1.212. 2.3.214. 1. [illegible] 181. 1. Ves. 46.7. 8. Ves. 112. 2. P.W. 572. 2 New. R. 383

1 Str. 208.9. 2. Wils. 2[illegible].9. Fearne 418

2. Vern. 223. 224

and

case of personal property, & where there are five such limitations, &c.)

2 Prest. 88. 2 Pow. 112. 152. Plowd. 432. Holt 152. 2 Bl. 232. 610. Shep. 238.9. 322.

Contingent Remainders and Executory Devises are not transferrable at law by deed, while they remain contingent. (Because a grant must be of a present interest). But they may be passed away (being a freehold) by estoppel, i.e. by fine or recovery. (When the person entitled is a party to the Fine,) in case of Executory Devise. For these are a bar to the party and all claiming under him.

3 Wood. 186. 187. 2 Pr. 238. 2 Bl. 393. Fearne 310. 323.

2 Wood. 218. 2 Bl. 238. 393. Fearne 310. 323.

Yet though a Contingent Remainder or an Executory Devise, cannot at law be conveyed away by deed, still they may at law be released to the owner of the land, that being in the nature of a waiver or abandonment of a right or Condition. An assignment of such interest is good in Chancery and it will be enforced as an agreement in that Court.

2 Wood. 213. 1 Ves. 411. 11 Mass. 152.

But

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that the assignment cannot be for a valuable consideration, or for a consideration in the second degree)? Assign the advancement of a child: It will not be enforced if purely voluntary. Not because it is a Contingent Remainder or an Executory Devise, but because that Court does not enforce voluntary Agreements.

2 Atk. 28.
1 Ves. 409.
Fearne 440.
441 442.
2 Vern. 250.
9 Mod. 9.
1 Atk. 408.
Dec. Cases of Chancery
3 Vol.

Events happening after the execution of the Devise and before the consummation by the death of the testator may vary the limitation from a Contingent Remainder to an Executory Devise.

Doug 325 n.
Salk 61.
Fearne 4
419. 420.
Doug 473 n.

And it seems, though the event happens after the testator's death, if there is a double contingency. So that limitation which in one event that has not happened would have been a remainder, may in another which does happen be construed an Executory Devise. The limitation in first case is called a limitation "upon a double Contingency" or when

Doug 480
476 n.
2 Ves. 249.

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upon a "Contingency with a double aspect" Carr & Ux., may be included. Doug. 410.

2 Bro. [illegible] 209 Doug. [illegible] For here its operation as an Executory Devise is in one event, & prevented by the terms of the limitation.

[illegible] 478 If the first limitation is an Executory Devise, those which follow are so: & vice versa. If it is [illegible] the first [illegible] Possession, those which follow are in right next and become Vested Remainders.

4 Doug. 58 [illegible] [illegible] [illegible] Lindall [illegible] the [illegible] cannot stand a case in which the subsequent limitations depend upon events which have not happened when the first vests in Possession.

Real Estates

Of Estates in Reversion.

An estate in Reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted by him. (to tenant in fee, grant for life, for years or in tail.)

2 Bl. 175.
1 Cruise 299 &
2 Bl. Com. 72.

The reversion vests in the grantor by act of law, without any reservation, for what he has not transferred remaining with him of course. A remainder can be created only by deed or devise; a reversion only by operation of law. But both are (transmissible when vested) being estates in praesenti to take effect in futuro. It would then seem that a [illegible] cannot have a reversion on the determination of a base fee is not strictly possible. Hence there could be no attornment. If one grants an estate for years, life or in tail, with remainder [illegible] which he then had [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

remainder

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himself as a [illegible] [illegible] the [illegible] estate which he [illegible] of out of [illegible] so if he grants [illegible]

[illegible] the reversion [illegible] with [illegible] [illegible] remainder.

When rent is reserved on a lease, it is incident to the reversion. So that by a general grant of the reversion, the rent will pass. But it is not inseparably incident, for by express words the rent may be granted without the reversion, and the reversion without the rent. [illegible] the reversion [illegible] by a general grant of the [illegible]. It is said that [illegible] a lease the reversion cannot be granted away like the [illegible]. This is [illegible] in the doctrine of Attornment. But since the necessity of Attornment has [illegible] by Stat. [illegible] the [illegible] [illegible] [illegible]

Attornment [illegible] [illegible]

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it being derived from feudal princi-ples, which were never here recogni-zed. — A Reversion may be granted by the word "land": as if the grant is of such a lot of land, in which the grantor has only a reversion. Even before the Sta-tute of frauds, a freehold vested reversion could not be granted except by deed & attornment. There was no livery of seisin, it being incorporeal. Yet a Vested reversion for years might be conveyed without deed. A devise of a reversion was always good without attornment: and a grant of an estate in pro [illegible] without livery. As the whole reversion may be granted away so it may be subdivided into a particular estate & estates created leaving the ultimate reversion in the grantor. Reversions in fee granted, [illegible] as remainders upon the expiration of the pre-existing particular estate.

There may be a reversion of a chattel

2 Bl. [illegible]

2 Bl. Com. 175.
10 Jo. 121
Plow. 43.

2 Bl. Com. 175.
[illegible] 148
[illegible] 3. 344.
[illegible] 8. 147.

2 [illegible]
[illegible]

2 [illegible]

2 [illegible]
[illegible]

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chattel real: if it be for 50 years & more
or 50. The reversion expectant on the
Co. Litt. [illegible] determination of a tenant in tail is so remote
2 T. W. 23. in prospect that the law deems it of no
value: hence the reversion is in the
power of the tenant in tail. Not assets.

Doctrine of Merger. General Rule: When a greater and a
less estate meet in the same person without
an intervening estate, the less is an-
1 Bl. 144 / 3 Cru. 434. nihilated, merged in the greater. E.g. te-
nant for years purchases the reversion
in fee or it descends to him.

2 Bl. 178 / 1 Cru. 312. It is a virtual surrender of the life
estate. But they must meet in one
2 Bl. [illegible] person in one and the same right, other-
[illegible] 338 wise there will be no merger. E.g. one
has the reversion in his own right and the
particular estate as a term for years as
executor. So if he has the particular
estate in right of his wife.

[illegible] If the tenant of an estate tail [illegible] (reversion in)
[illegible] [illegible] there is no merger, for a

tenant

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tenant in tail cannot [illegible] to de-
stroy the estate except by fine or recovery
so as to alter [illegible] [illegible] might defeat
the issue.

Real Property

Of estates in Severalty— Joint Tenancy, Coparcenary Tenancy and Common.

Under former titles, estates are considered with respect to the quantity of interest in the owner and the time of their enjoyment. They are now to be treated of with respect to the number & connexions of their owners. 2 Bl. 179. 2 [illegible]

1. An estate holden in Severalty is one of which there is only one owner during the continuance of his interest. 2 [illegible] 2 Bl. 179

All estates are supposed to be in Several[ty] when titles are laid down unless they are declared to be otherwise. 2 Bl. 179 2 [illegible]

2. An estate in Joint Tenancy is one which in lands or tenements granted to two or more in fee simple, fee tail, for life, for years or at will. 2 Bl. 180 2 Cruise [illegible] [illegible] 2 [illegible] 187

1. In its creation. The estate is always created by purchase i.e. by act of the parties & never created by descent. 2 Bl. 181 2 [illegible]

or act of law. By deed, devise, fine or any other such assurance. 2 Wood. 124.

If an estate is given to two or more without words denoting an intention that it should be in joint-tenancy it will be such. If granted to A and B and their heirs they are joint tenants in fee. But if land is granted to two to be holden half each &c. they are not joint tenants but tenants in common. 2 Bl. 180. Co. L. 180. Litt. § 298.

Of the properties. These are derived from its unity, which is fourfold — unity of interest, title, time and possession. They have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and holden by one and the same possession. 2 Bl. 180. 2 Wood. 128. 2 Cruise 311. 312.

First of unity of interest. One cannot have one quantity of interest and the other another — as for life and years &c. If so they are not joint tenants. So, if the estate of one Co. L. 188. 2 Wood. 124. 1 Inst. 188. 2 Bl. 181. Litt. § 277.

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one is in possession and that of the other in expectancy - If a grant is to A. and B. for their lives; they are joint tenants of the freehold and each has an estate in the whole for the life of his companion and for his own life. If to A. and B. and their heirs, they are joint tenants in fee &c. and the inheritance goes entire to the survivor. If a grant is made to A. and B. for their lives and (~~to have the fee~~ in remainder) to the heirs of A. - they are joint tenants for their respective lives and A. has the fee in severalty -

2 Bl. 181-4
2 Bl. 1[illegible]
2 Bl. 184
2 Cr. p. 251.
2 Bl. 181
Litt. p. 285.
2 Cruise [illegible]

So if a grant is made to two men and the heirs of their bodies - or to two women &c. or to a man and woman who cannot intermarry as brother and sister: they have a joint estate for life, but have severally several inheritances: for no person can be the heir of the bodies of both. The issue of each will have a moiety after the death of both -

2 Bl. [illegible] 191.
Litt. p. 280.

If

If to a man and woman who may inter-marry, and the heirs of their bodies, it was joint estate tail. (See Joint tenants.) — So that the inheritance goes entire to the heirs of the body of the survivor: as in case of the joint tenants in fee, supra.

Litt. s. 283.
1. Inst. 182.

Secondly. Unity of title. —

2 Bl. C. 181.
1 Inst. 188.
2 Cruise 228-229.
310.

Their estate must be created by one and the same act, or the same conveyance or descension. Else they would have different titles — one might be good and the other bad, which would destroy the jointure at unity.

Thirdly. Of Unity of time: —

2 Bl. 181.
1 Inst. 188.
2 Ld. Raym. 1129.
13. Co. 55.
2 Cruise 311.
312.

Their estates must commence at one and the same period. E.g. If an undivided part of an estate is devised to A. to take effect at one time and the other part to B. at another: they are not joint tenants.

E.g. If a remainder is limited to the heirs of A. and B. and A. and B. die at different times: the two heirs are tenants in

Com.

Common. But two may hold a use as joint tenants, though it vest at different times. E.g. Feoffment to A. to the use of himself and his future wife. For the use growing out of the feoffment, has relation to it. 2. Bl. 181-2. Dyer. 340. 1. Co. 101. 13. Co. 56.

Fourthly - Lastly of Unity of possession - They are seised per my et per tout -

Each is seised of an undivided half of the whole. Therefore one cannot in strictness, enfeoff the other. Tho' he may lease to the latter, and a feoffment will enure as a release. But if a fee is granted to husband and wife, they are not strictly joint tenants, nor tenants in common. 2. Bl. 182. Litt. § 288. 5. Co. 10. 2. [illegible] 130. 3 Bay. 256-4. Cro. Jac. 696. Perk. § 143-4. 1. Ventr. 48.

Being considered as one, they are seised per tout only - They take by entireties and not by moieties. Hence the husband cannot by his own act dispose of any part of it, not a moiety - Nor can the wife - But the whole must remain to the survivor unless disposed of by fine 2. Bl. 182. 2. Bl. 182. Litt. § 291. 665. 2 Lev. 39. 1. Inst. 187. 326 b. Perk. § 223. Shep. T. 8. 203. 1. Salk. 388-9. 2. Vern. 120. 3. Bac. 190. 5 T.R. 352.

or

or recovery in which they both join —

The last rule, does not hold as to choses in action and chattels real which are vested jointly in husband and wife. Of these he may dispose at pleasure during coverture tho' not for valuable consideration —

2 Wood. 128. See title "Baron and Feme"

Personal chattels given to Husband and Wife in possession vest absolutely in him alone, & wife is not entitled to Dower in an inheritance holden jointly by the Husband and another — the other tenant has a higher title. But whether the Husband & contra is entitled to Curtesy? — What is the difference?

2 Wood. 128.

2 Wood. 128. Lit. § 45. 3 Bac. 188. 1 Swift. 30. vide [illegible] ead. "Curtesy"

From this intimate union of interest and possession derived the principal incidents of Joint Tenancy: — One of which is that acts by or to one are generally operative as to both — e. gr. If both make a verbal lease, reserving rent to one only: it will enure to both by reason of the joint reversion, & so if their lessee

2 Wood. 130. 2 Bl. 183. 1 Inst. 192.

Surrenders

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survivorship to one it enures to both by reason of the privity of estate —

Livery of seisin to one is to both. So the possession of one is the possession of both. So entry by one is effectual as to both.

So in actions relating to their joint estate they must sue and be sued jointly in Court.—

One cannot have trespass agt. the other in respect to the joint estate. For each has a right to enter on every part.

But regularly one cannot do any act which will defeat the estate of the other. E.g. He cannot lease the whole agt. the other's consent. One may have an action of Waste agt. the other by construction of the Stat. of Westm. 2. — This however was not at Com. law.—

One may make the other bailiff of his moiety and so have account agt. him for the profits. This was not at Com. law. But by Stat. of Anne one may have account agt.

2 Bl. 182.
1 Inst. 49. 319. 364.
[illegible] 20.

2 Bl. 182.
2 Ins. 210. 216.
1 Inst. 180.b 195.
Carth. 358.

2 Bl. 183.
3 Lev. 152.

2 Bl. 183.
[illegible] 234.

2 Bl. 183.
2 Inst. [illegible]

2 Bl. 183.
[illegible]
[illegible]

ing the other from receiving more than his share of the profits.

From this intimate union of interest and possession depends also the grand incident viz. that of Survivorship.

2 Bl. 183 The Right of Survivorship (jus accrescendi) is the Right of the survivor among joint tenants to the whole remaining interest in the tenancy after the Death of his companions. So if A. B and C.

Co. Litt. 180 2 Cruise 105

2 Bl. 183 Litt. s. 280 1 Mod. are jointly seised in fee of an estate on the Death of one the whole interest vests in the two survivors: and on the Death of one of them the whole goes to the last survivor. So if A. B and C. be seised for their lives or for years. For the original interest of all is the same. i.e. an interest in all and in every part; and the survivor is not divested of this original interest by the

2 Bl. 183. Death of his companions. He has then a higher claim to the whole than any other can to any part.

Bl. 184

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This right of survivorship is paramount to the claims of the creditors of the deceased tenant, even of judgment creditors unless, unless execution be sued out at his death. The same rule holds as to chattels personal holden in joint tenancy.

3 Jac. 209. 210.
Litt. S. 286.
1 Inst. 184 b.

Except as to joint stock in trade. As to this there is no survivorship. It wants in pure commerce to allow it, and the law merchant governs.

2 Woodd. 26.
Litt. S. 281.
1 Inst. 182 a.
Watson's Law of Part. 3. 4. 140.
1 Ves. 240. 290.
392. 304.
2 Bay 281. 340.
1 Eq. Ab. 36.
1 Vern. 217.

Parties in trade are not therefore joint tenants to all purposes, tho' called such. Watson's Law of Part. 17. 116. 132. 1 Ves. 242. 252.

Comyns 149
2 Woodd. 914. 25.

So for the encouragement of husbandry of stock on a farm, though occupied jointly.

[illegible]
1 Vern. 217.
1 Inst. 182.

Neither the King nor any other Corporation can be joint tenant with a private person. Why? The reason, says Blackstone, is that the private person has no chance of the benefit of survivorship; [illegible] the jus accrescendi ought to

2 Bl. [illegible]
1 Inst. 190.
Jacob's L.D. 83.
2 Lev. 12.

to

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[illegible] the [illegible] 4th [illegible] [illegible] to be the true reason why two Corporations cannot be joint tenants

Co. Litt. 126. Litt. § 296. that is the chance of survivorship is equal. Besides, it is not necessary that the chance of survivorship should be equal — Ex. A. and B. may be joint tenants for

Co. Litt. 181. a.b. the life of A. — Here B. has no possible chance of survivorship though A. has a chance. The right of survivorship

2 Cruise 18. [illegible] obtain in [illegible] joint tenancy [illegible]

Joint tenancy may be destroyed by destroying any of its unities —

2 Bl. 185 1. Unity of time, it being past, cannot indeed be destroyed.

2. By destroying its unity of possession

2 Bl. 185. Co. Litt. 188. 193. Ex. if they part the land and hold it in severalty they are no longer joint tenants and the jus accrescendi is also destroyed. It has been decided in [illegible] that the declaration in an action for partition

partition, cannot demand the [illegible] portion not in point of quantity but of value taking quantity and quality together — [illegible] 64. 70

By the com. law one could not compel the other to make partition tho' they might do it by agreement because it was originally created by agreement of all & was not otherwise to be destroyed.

But by stat. 31 and 32 Henry 8. they are compellable by writ of partition to divide — so by stat. in Conn. (This stat. however does not extend to joint tenants or coparceners lands) — & guardians are enabled by the Conn. stat. to make partition of ward's lands. — 2 Bl. 185. Litt. [illegible] — Stat. C. 258

2. By destroying the unity of title —

If one alienes & conveys his part to a stranger, then the other and the grantee hold by different titles — tho' unity of possession remains. But a devise by one joint tenant does not sever the estate because it can not take effect till the — [illegible] 55. Litt. [illegible] [illegible] — [illegible] 184. [illegible] 185.

survivor

survivor has a preferable title accruing at the creation of the estate.

2. By destroying the unity of interest. As if there are two joint tenants for life and the inheritance is purchased by a descent upon one of them: it is severed. Secus if an estate is originally granted to two for life and to the heirs of one of them, for these are not separate estates but are only branches of one estate.

2 Bl. 186
Cro. El. 470.

2 Bl. 186
Co. Lit. 182
1 Inst. 182.

So if a joint tenant in fee makes a lease for life of his share: it destroys the jointure — this is a severance of the freehold. If one of three joint tenants aliens his share: the two others hold their parts as before, for as to them there is no severance. So, if one of the three releases his part to one of the other two, the jointure as to the other two parts remains. Whenever the jointure ceases, the jus accrescendi ceases with it.

2 Bl. 185.
Co. Lit. 302-3
1 Inst. 191b

2 Bl. 186
Co. Lit. 294
304

2 Bl. 186
1 Inst. 188

So

in general, it is *advantageous* to *dissolve* the *jointure* — for the jus *accrescendi* being taken away each may *transmit* his part to *his* representatives — Even if two are joint tenants *for life* —

2 Bl. 187.
1 Inst. 55

If two are joint tenants for *life* and one aliens for the *life* of the other: he *forfeits* his interest — For first by the *severance* he has given himself in his own half only an estate for *his own* life; and then he grants it for the life of another —

2 Bl. 187.
4 Rep. 23.
1 Inst. 236.

If one joint tenant ousts his companion, the latter may have ejectment to *obtain possession* — But there must be an *actual* ouster: for the sole possession and *receipt* of the *whole* profits is not *sufficient* —

3. Burr. 9.
1 Inst. 199. 200.

VIII. Of Estates in Coparcenary:—

An estate in Coparcenary is one which has descended to two or more per-
2 Bl. 187. sons—as where at Common law, the right
Litt. § 241. 2 Mod. 113. 1 Inst. 35 b. heirs of a deceased person are two or more females—Here, they all inherit as co-heirs. And are generally called "Coparceners" or "Parceners."

2 [illegible]
2 Bl. 187 So by the Custom of Gavelkind all the
Litt. § 265. sons are Coparceners—[illegible] all the children of the deceased.

2 Bl. 187. All the Coparceners are considered as but
1 Inst. 163. 2 Cruise 113 1 § 118. one heir—having but one estate—

The properties of this estate are in some
2 Bl. 188. respects like those of joint tenancy—There are three unities of interest, title and possession—

2 Bl. 188. They may sue and be sued jointly in
1 Inst. [illegible] 188. [illegible] cases relating to their estate; and the entry
2 Cruise 117, 118 of one is in some cases the entry of all.

2 Bl. 336 b. So an entry by the Guardian of one in-
1 Inst. 243 b. 2 Bl. 138. 200. 228. fant parcener enures to the others.

The

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One cannot have trespass agt the other: nor can one like a joint tenant, maintain an action of Waste agt the other. For one parcener could always prevent waste by compelling partition – which tho' the estates of tenancy [illegible] & joint tenants could, not so. They differ materially from joint tenants in other points

2 Bl. 188.
2 Inst. 403.
2 Wood. 119.
1 Inst. 200 a
174 b

1 Theirs always claim by descent, joint tenants by purchase. Hence no other than estates of inheritance can be holden in Coparcenary. And in general whatever may be inherited may be holden in Coparcenary.

2 Bl. 188.
Litt. § 254
2 Wood. 119
118

2 Wood. 116
1 Inst. 163
163 a

2 There is no unity of time necessary –

Ex. If one of two parceners dies the survivor and the heir of the deceased are parceners tho' the estates vest at different times

2 Bl. 188.
1 Inst. 164.
2 Wood. 118
115

3. Tho' they have a unity they have not an entirety of interest. Each (there being two) is seised of the whole of a distinct moiety, and not of a moiety of the whole.

2 Bl. 188
1 Inst. 163 a

Hence

Hence there is no jus accrescendi. The share of each descends to her (or his) heirs. 2 Bl. 188. 1 Institute 163-164.

The mode of descent is per capita if the
2 Woodd. 15. claimants are in equal degree to the
Inst. 164. a. b. common ancestor and are entitled in their own right. Ex. The ancestor leaves two daughters or two sisters.

But if they are not in equal degree related or are entitled by right of representation they then take per stirpes. Ex. If the ancestor has two daughters one of whom dies leaving issue living the ancestor, the issue take per stirpes. So if
2 Woodd. 175. the heirs are all grand children the issue
Inst. 164. b. of two daughters. And in descents in
2 Woodd. 11. coparcenary males are preferred to females as in other cases of descent.

So long as the land continues in a
2 Bl. 188-9. course of descent, the possession not being
Litt. s. 309. disunited, it is holden in coparcenary.
2 Woodd. 118. 119. Coparcenary of the possession is severed by parti-

partition. So if one aliens her share tho' no partition; for the title is divested and the descent is broken.

So if one disseises the other, the coparcener, it is an ouster; for the possession is severed. So if two coparceners marry and die leaving husbands entitled to curtesy, the husbands do not hold as parceners, but as tenants in common, for they do not claim by descent. 2 Wood. 18, 19.

2 Wood. 9. 1 Inst. 174 b.

So the husband may have curtesy in an estate holden by the wife in coparcenary: so the wife may have dower in lands so holden by the husband and there is no survivorship to prevent it. 2 Wood. 9. Litt. § 45.

Partition may be made among parceners by consent in 4 different ways:—

1. Where they agree as to the division and the part that each shall have.
2. When they choose a third person to make the division.
3. Where the eldest divides and the other chooses first.
4.

Co. Lit. 169. 2 Wood. 120. Litt. § 243. 1 Co. Lit. 165. 1 Inst. 166. 3 Co. 29.

4. Where they cast lots for their shares.

They are all compellable to make partition at Com. law 2 Bl. 189. Litt. § 241.

2 Woodd. 120. Compulsory partition, is by writ of Partition at Com. law or by bill in Chancery.

On a writ of partition, there are two judgments: The first is that partition be made; on which a writ issues to the sheriff to cause partition to be made by a jury. On the return of the jury's inqui-

1. Woodd. 120; 2 Bl. 189. sition & verdict, the second judgment is given viz. that the partition so made, be ratified and forever confirmed.

The common practice formerly, was to

2 Woodd. 120 [illegible] 63 apply to Chancery for a decree to make partition — And it is, now, the practice when the title is complicated, or there is any incumbrance.

When an indivisible thing, is holden in

2 Bl. [illegible] 1. Ins. 164, 165 coparcenary the common practice is for the eldest sister to have it if she pleases, making the others a reasonable compen-

sation

sation in other parts of the inheritance, & they all have the profit or use of it by turns.

IV. Of Estates in Common —

Tenants in Common according to Blackstone are those who hold by several and distinct titles, but by unity of possession. But it must be understood that no other unity than that of possession is existing, necessary to constitute a tenancy in Common. For, they may hold the same quantity of interest vesting at the same time and under the same title or conveyance if the proper terms are used to create a tenancy in Common. But, if the interest and title are the same and do commence at the same time and the possession is united, the claimants will be joint-tenants unless there are apt words used to create a tenancy in Common —

2 Bl. 191

2 Bl. 191.
Litt. §292.
2 Mod. 33

2 Woodd. 132

And

But if there is no other unity than that of possession; then of course tenants in common. 2 Bl. 191.

Co. Litt. 189a. 2 Prest. 133. 2 Bac. 188. 191. Lord Coke defines tenants in common to be those who hold lands by several titles or by one title and by several rights. Hence one may hold in fee, the other in tail or for life; therefore there is no necessity for unity of interest. One by purchase from A. the other by purchase from B.; or one by purchase, the other by descent: so there is no necessity for unity of title. The estate of one may vest at one time, that of the other at another: so there is no necessity for unity of time.

2 Bl. 191. The only necessary unity then is that of possession, neither knowing which part is his.

2 Bl. 192. Tenancy in Com. may be created either by such a destruction of an estate in joint tenancy or coparcenary as does not sever the possession; or by special limitation

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Limitation in a Deed or Devise

1. I. 73. One of two joint tenants aliens his moiety to A. — he and the other joint tenant are tenants in common — for they have several titles — So if one aliens to A. & the other to B. the grantees are tenants in com. for like reason. 2 Bl. 191. Litt. § 293. [illegible] 295. [illegible]. 1 Inst. 167. 3 Cru. 19.

So if one of two parceners conveys her part to A. he and the other parcener are tenants in com. causa qua supra. 2 Bl. 192. Litt. § 309. 3 Cru. 19.

So if an estate is granted to two men or two women and the heirs of their bodies, tho' for life they are joint tenants yet they have distinct inheritances: But as the possession is undivided, their issue shall be tenants in com. as their titles are different. one holds as heir of A & the other as heir of B. — Indeed whenever a joint tenancy or coparcenary is destroyed without a destruction of the unity of possession, it is converted into a tenancy in com. 2 Bl. 192. Litt. § 283. 2 Bl. 193. 3 Cru. 3.

B.

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2. It may be created by express limitation in a deed or devise. 2 Bl. 192.
1. Brooke 192. 3 Bac. Ab. 5.

No care is necessary not to use words creating a joint tenancy.

And, if by deed or devise there is granted or given to two or more an estate which is not a joint tenancy, it must be a

2 Bl. 193. tenancy in com. — It cannot be in coparcenary — being by purchase.

The rule of construction favors joint te-

2 Bl. 193. nancy rather than tenancy in com.

For by the latter the feudal services are & the feudal tenure are divided [illegible]

The most usual and safest way

1 Bl. 194. when a tenancy in com. is intended
1 Cru. 298.
1 Inst. 190.a to be created by deed or devise, is to limit
3 Bac. 193. the estate to A and B. expressly, "to hold as tenants in com. and not as joint tenants".

~~[illegible]~~

2 Bl. 193. But other modes of expression will an-
1 Cru. 298.
Co. Litt. 190.a
3 Bac. 193. swer. E.g. a grant to A and B. equally to

be

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is holden "one half to A, the other to B." For joint tenants do not take by distinct moieties and here the severalty of interest is plainly expressed.

So if one grant half of his land to A & B. A and B are tenants in common; they have different titles accruing at different times. So a deed or devise of land to two "to hold jointly and severally" create a joint tenancy. For a joint estate is implied in the word "jointly," and severally imports perhaps only a power of partition—

2 Bl. 33
Litt. [illegible] 296. b
Co. Lit. 190 b
3. Bac. 194.

2 Bl. 193.
Co. Lit. 52.

An estate devised to two or more "to be equally divided between them" is an estate in common. So to A and B "equally." Cruise 354. 2 Bl. 695. 2 Atk 250. 1 Eq Ca abr. 292. pl. 10.

[illegible]
3 Cr. 39.
1 Vent. 32.
3. Bac. 195
2 [illegible]
2 Vent. 365. 366.

But it has been formerly holden that these words in a deed create a joint tenancy. However, in a modern case these words in a deed have been holden to

2 Bl. 193.
3. Bac. 196
1 Eq. Ca. [illegible]
1 P Wms. 14
Sal. 391.
[illegible]
Cro. El. 54.

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To create a Tenancy in Common —
2 Woodeson, 135. 1 Ibid, 34. Co. Lit. 66 b

2 Woodd. 135. Litt. § 320. Tenancy in Com. may subsist in estates of freehold, chattels real and chattels personal — The wife of a tenant in Com. of an inheritance is entitled to
2 Woodd. 135. Litt. § 44. 45 Dower — and it seems the husband to curtesy where the wife is tenant in Com. — As tenants in Com. have distinct
2 Woodd. 135. 36. interests one may directly convey his share to the other, — which a joint tenant cannot do tho he may release —

As to the incidents of a Tenancy in common. — Tenants in Com. are not
2 H. Bl. [illegible] 2 Woodd. 137. compellable at Com. law to make partition: tho by Stat. 31 and 32 Henry 8 they are — There is no survivorship
2 Bl. 194. between them for they take by distinct
2 Bl. 194. Litt. § 311. 2 Woodd. 135. 3 B. & P. 214. Co. Litt. 194 a. 3 Sal. [illegible] Cruise 340. moieties — They cannot join in actions relating to the realty; for their titles and interests are several. Ld Raym. 22. 2 H. Bl. 387

Yet if an indivisible thing as a horse

holden

holders in [illegible] [illegible] [illegible] all right to join. 7 Bac 286. [illegible] [illegible]

But in trespass and all personal actions grounded on their interest in land, they ought to join: For tho' their estates are several yet the damages to be recovered in personal actions are not so. Besides it would be impolitic to permit several actions for one trespass &c. Indeed these actions survive to the survivor.

7 Bac 286
Litt. [illegible] 315
2 [illegible] 384 8.

[illegible] 198
[illegible]
[illegible] 2 [illegible]

If they make a lease rendering rent the reservation shall follow the nature of the reversion which is several. Therefore they cannot join in avowry for rent arrear. If they are disseised they cannot join in an action to recover their land: for their titles and interests are distinct.

[illegible]
[illegible] 384
[illegible]
[illegible] 203

[illegible]
~~[illegible]~~
[illegible] 342

For the same reason, they cannot make a joint demise to support an ejectment: the lessee in such case cannot recover.

7 Bac [illegible]
1 Show 342.
[illegible] 200.
[illegible]
[illegible] 384
[illegible]
[illegible] 668

Deeds of tenants in common as well as joint tenants [illegible] [illegible] [illegible] may be

[illegible]

power or possessn in action

If ten. in com. receive the more he is liable in an account for receiving more than his share of the profits of the estate; except where the latter was made bailiff to the former as in case of joint-tenants —   2 Inst. [illegible] 1 Mod. 99. 2 Lev. 180.

Contra since the Sta. of Ann.

So by Stat. Westm. 2. one may have an action of waste agt. the other.   1 Inst. 198. 9.

If one tenant in com. disseises (ousts) the other: the latter may have ejectment to regain possession — the same rule holds as to joint tenants —   Co. Lit. 199. Cow. 218. [illegible] 194. [illegible] 118.

But there must be an actual ouster, i.e. the possession of one is the possession of both. The sole possession, and receipt of the whole profits are not in themselves sufficient. — Com. R. 113. Str. 531. [illegible] 60. 1180.   Hob. 120. 1 Bur. 119. Sal. 392. 7 Mod. 39. 1 Ld. Ray. 404. [illegible] 830. 716. [illegible] 107. [illegible] 568.

As to what amounts to sufficient evidence of actual ouster: — There need not be an actual forcible ouster proved: Sole possession by one as tenant in com.

an

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can never amount to evidence of actual ouster. But, a sole and adverse possession by one, is sufficient. Eg. Possession by one who denies the other's title

Co Litt. 243. b.
Cowp. 217.
14 Wen. 512.

Here, the Jury may presume actual ouster. So, great length of sole and quiet possession (as 36 years) by one no account being demanded by the other is sufficient evidence to a Jury. The possession is adverse.

Cowp. 2[illegible]
5 Burr. 1895.
[illegible]
[illegible] 558.

Confession by the Deft in ejectment of lease, entry and ouster is sufficient. i.e. it is sufficient to prevent a non suit and may go to the Jury.

[illegible]
5 Bur. 1895.
[illegible]

After such recovery in ejectment the tenant dispossessed may have trespass for mesne profits — for this is incident to the recovery and is virtually only an action of account.

[illegible] 118.

The Stat. of Limitations does not run agt one tenant in com. out of possession where his companion is in possession 4

cept

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except in case of actual ouster - but note
If there is no ouster the possession is
adverse and therefore the possession of
the tenant [illegible]. But for the tenant
[illegible] out of possession may elect to consider
[illegible] himself ousted or not. See 1 Burr. 11. 117.

These remedies between tenants in
Litt. s. 322 com. extend only to tenants in com. of
things real - or the money of the realty -
as tenants. If a chattel personal is owned
2 Bac. 219. in com. and one takes the sole possession
the others only remedy is by retaking it
when he can. So of joint tenants -

Tenancy in com. may be destroyed

1. By partition. 2. By uniting all the
2 Bl. 194 titles and interests in one tenant by pur-
chase or otherwise - This then an estate or
estate in severalty.

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[illegible]

Alienation by Deed

There are two modes of acquiring [illegible]
estate in [illegible] here [illegible] 2 Bl. [illegible]
[illegible]: 1. By Descent and
by [illegible] Purchase [illegible]
[illegible]
[illegible] estate except by Descent, though
[illegible]
[illegible] Wherever [illegible]
[illegible]
of these two modes — There are various
ways in which one may acquire a
title by purchase. 1. By Escheat.
2. By [illegible] 3. By Prescription. 2 Bl. [illegible]
4. By Forfeiture. 5. And lastly by the 258. 262. 263.
Alienation. The four first will not be noti-
ced. [illegible] Introductory Remarks
upon the subject of alienation which
alone will be treated of.
[illegible] for the most usual method of ac-
quiring

Alienation by Deed: Introductory remarks

acquiring title to real estate is that of ali-enation, or by purchase in the limited sense of the word. The word 'alienation' comprehends every mode of creating title by which estates are voluntarily resigned by one & accepted by another.

4: 424

During the early period of the common law in England a tenant of lands could not alienate them without the consent of his lord: nor could he by any means subject his lands for his debts or devise them. without the consent of his lord: And though he had the consent of his lord yet he still could not alienate them without the consent of his heir apparent or presumptive. And on the other hand the lord himself could not alienate ~~them~~ his seignory without the consent of his vassal or tenant which was done by attornment. So that the feudal obligation in both cases was reciprocal. The general principle of the whole doctrine of attornment

[illegible] 2 Bl. [illegible]

[illegible]

though

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Alienation by Deed.

Introductory Remarks.

though it was otherwise, afterwards. It seems settled that during the time of William the Conqueror, and that of his sons, land was absolutely unalienable, upon any terms whatever. And for some time after the right of alienation was introduced, the highest estate that the lord of the seignory himself could grant was one for the life of the grantee. From this original, the rule that if an estate is given to a man without specifying what estate the grantee takes, he takes an estate for his own life only. These feudal restrictions have now been gradually abolished. And principally in this manner. It seems that in the reign of Henry I. a person was allowed to convey in fee a part of his land, he had purchased, though not so much as to disinherit his children. But even then he was not permitted to alien in fee any part of his ancestral estate. At a later period he was allowed to dispose of all his

purchased

Cruise vol. 4. p. 4.

2 Bl. C. 287

2 Bl. C. 288.

2 Bl. C. 289.

Real Property [illegible]

Alienation
By
Deed
[illegible]
[illegible]

[illegible] estate of the [illegible] [illegible] [illegible] [illegible] without the [illegible] [illegible] allowed to dispose of the [illegible] of his estate unaccompanied by consent with the consent of his heir. But the 18 Edward 1 called the Stat. of "Quia Emptores" enabled all persons except the king's tenants in capite to alien all their fee [illegible] his estate. But by the Stat. 1 Ed. 3 these tenants in capite were themselves allowed to alien on paying a fine to the king. But by the Stat. 12 Charles 2d. the fines the fines required of the king's tenants in capite were all abolished and all of freehold tenures: all of which by the Stat. were converted into free and common socage.

2 Bl. 289

12 Car. 2 c. 24

The power of charging lands with the debts of the owner was introduced by Stat. Westm. 2. 13 Edward 1. which subjected the half of a man's lands to an execution called an Elegit, & under this the lands were to be holden till the debt was satisfied out of the rents,

Stat. [illegible]
[illegible]
2 Bl. 289

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rents or profits. Except [illegible] [illegible] a [illegible]. [illegible] by the Stat. [illegible] Discontinuance [illegible] a tenant was enabled [illegible] [illegible] by

Reversioner [illegible] was entitled a [illegible] [illegible]. By the Stat. [illegible] he might relieve them by [illegible] Stat. [illegible]. [illegible] by the [illegible] they might be relieved by [illegible] other real injuries. The exception of [illegible] was abolished by the Stat. [illegible] nor shall [illegible] by Stat. [illegible] Sec. II. the alienation of any tenant of [illegible] the forfeiture of any lease, unless made with the consent of the landlord, or by virtue of a term of notice.

Alienation
Dis-
continuance
[illegible]

2 Bl. [illegible]
3 Bl. [illegible]

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The legal evidences of the alienation of Real Property are called in the law "Common assurances": because they are the means by which a man's estate is assured to him. There are 4. kinds 1st By Deed: 2nd By matter of Record. 3rd Assurances governed by special custom. And 4th Devise.

2 Bl. Com. [illegible]

2 Bl. 295

Alienation by matter of Record is unknown to our law. hence the fines and common recoveries unnecessary. [illegible] Secondly there are no special customs in the United States. Alienation by Devise by Deed and by Execution are treated of in these Lectures. The first has already been treated of and the two last are now to be noticed.

The first species of Com. assurance is Deed. It is defined to be a writing sealed and delivered. Writing and Sealing constitute the Deed. but delivery not [illegible]

[illegible] 2 Bl. [illegible]

Lecture

As the making of a Deed is the [illegible]

[illegible]

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Wherever a man [illegible] that a covenant [illegible] himself [illegible] in the recital of his property, he is said by reason of the solemnity to be estopped by his own seal and. A deed in the law is sometimes called a "legal solemnity". The meaning of the rule of estoppel is this, that he [illegible] permitted to aver or prove anything in contradiction of his deed: which he might otherwise have done. The legal notion of an estoppel is a thing that prevents a man from averring or proving what otherwise he might ~~have done~~ aver or prove.

2. Bl. 295.
Plowd. 434
2. Bl. 308.

And hence if A. make a lease of land to B. in which he has no interest at the time and afterwards purchases the land himself he is estopped to deny that he had any interest at the time of making the deed: because one of the implied covenants in the lease is that the lessor is entitled to make it. But it seems, that if a recital of interest instead of being taken

Sal. 290
3. T.R. 436 441.
1. Ld. Raym. 729.
3 T.R. 371.
2 [illegible]

3 [illegible] 505.
303.

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[illegible] [illegible] release [illegible] [illegible] [illegible] through [illegible] [illegible] [illegible] the grantor [illegible] [illegible] of the deed [illegible] [illegible] [illegible] to deny: [illegible] [illegible] [illegible] [illegible] of the [illegible] [illegible] be held [illegible] [illegible] a [illegible] [illegible] [illegible] [illegible] such: which can not be cured by pleading

2 Deed of release quit claim is no estoppel to the grantor: because the party who makes the deed [illegible] not even assert that he has title — this deed is frequently called in law a release and [illegible] [illegible] it is merely a conveyance of what interest the parties [illegible] at the time — On the above principle it is that if one having made a [illegible] is [illegible] in [illegible] by the [illegible] if is not competent for the [illegible] to aver that he had no interest at the time when he made the mortgage — And the rule is the same between the [illegible] and his [illegible]: in case the [illegible] [illegible] a [illegible]

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The contrary doctrine is [illegible] of the whole [illegible] concerned. Property [illegible] within the doctrine of estoppel. [illegible] it has been determined in Conn. that any ordinary lessee cannot deny the title of the lessor when sued in Ejectment. 1 Root [illegible]

This is also deemed to be the English rule. It is an established rule in England that the lessee when sued in Debt or Covenant for rent cannot deny the lessor's title if the lease was made by [illegible] or Indenture. Deeds of the same were [illegible] Deed poll: hence in this deed being the act of only one party and not of both the other [illegible] following [illegible] but the Deed in Indentures [illegible] binds both to the [illegible] [illegible]

[illegible]

The distinction between a Deed poll and an Indenture is that a Deed is executed by the one of the parties only, it is called a Deed poll or Single Deed. But if executed by all the parties it is called an [illegible]

[illegible]

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Indentures. 1. An Indenture being inter [illegible] there should be as many copies of

2 Bl. 296 as are parties, and each party executes but one of the parts only, and then the one executed by the grantor is called the "original" and the rest are counterparts; though of late it is customary for all parties to execute every part, which renders them all "originals".

[illegible] counterparts
evidence at
[illegible] vide
[illegible]
[illegible] 487

And in counterparts, where the [illegible] holder [illegible] different [illegible] of the original with a counterpart has been [illegible] [illegible] the [illegible] of the Deeds.

2. It is not necessary that there be parties

[illegible] 330
2 Bl. 296

[illegible] [illegible] for the [illegible] and a thing or subject matter to be contracted for [illegible] in every [illegible] there [illegible] be [illegible] and a [illegible] [illegible] of the [illegible] to [illegible]

first

[illegible] [illegible]

[illegible] of the [illegible] [illegible] [illegible] many [illegible]
[illegible] [illegible] for life [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] of the whole interest
[illegible] [illegible] [illegible] [illegible] [illegible] grant[illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] interest [illegible]
[illegible] [illegible] [illegible] On the other hand, all
those who are intended to take any re-
mainder interest in either way other
[illegible] [illegible] [illegible] remainder [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] can
take any interest at law but a remain-
der under the deed. It is a general
rule that all persons under no legal
[illegible] [illegible] [illegible] done. But
the rule is not [illegible] for a person
[illegible] [illegible] though having the
right of [illegible] cannot [illegible] to an-
other who is also out of [illegible] for [illegible]
of [illegible] under the circumstances
would [illegible] [illegible] [illegible]. This is
a rule of the [illegible] [illegible] [illegible] benefit [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible].

[illegible] [illegible]

2 Bl. [illegible]

[illegible]

[illegible]

[illegible]

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[illegible] [illegible] [illegible] generally that a
conveyance to the owner and [illegible]
of the [illegible] [illegible] in the
[illegible] Gen.l Covenants [illegible] the estate before [illegible]
[illegible]; because there is something of
[illegible] [illegible] [illegible] case. It seems
2 Dall. 282 to be settled however, that the owner of
1 Swift's Sys. land out of possession is not possessed of
his right to convey to the actual possessor
[illegible] of another, to whose land possession is
adverse. Hence releases and permissions
may be granted though in the possession
of the particular tenant. The posses-
sion of the tenant in this case is deemed to be
the possession of him in remainder (?) —
hence the same principle it has been
1 Swift's Sys. determined in Connect. that if one is put in
possession of another's land claiming under
the owner the latter may convey to a third
person. This is also law in England.
Kirby 228 It has also been determined in Connect.
1789 and [illegible] [illegible] [illegible] [illegible]

[illegible]

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the Court deny that the Stat. [illegible] [illegible] by persons [illegible] [illegible] to [illegible] [illegible] by the State. And it likewise has been deter-mined that such [illegible] [illegible] [illegible] [illegible] of the land [illegible] [illegible] within the State. The [illegible] [illegible] [illegible] by Guardians who sell the lands of their wards, [illegible] [illegible] of a Court of Chancery. [illegible]

It has also been determined, that a sale by a Collector of taxes, for the purpose of [illegible] [illegible], is not within the [illegible] of the law; [illegible] [illegible] [illegible] the Sale was therefore [illegible] [illegible] [illegible]. It has been determined, that a mortgage [illegible] [illegible] by the Mortgagee or by [illegible] [illegible] may sell his equity of redemption [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

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Bl's Commentaries: "Ch. thinks, that if A sells to B and continues in possession and claiming adverse to B, B cannot sell to any other one.

Bul. Suff. [illegible] [illegible] near note)

Conveyances by Infants are generally voidable only, and not void. For more on this subject see "Parent and Child"

"Parent and Child" 1 Vol.

Idiots and Lunatics are not totally disabled to convey their lands by deeds, but only voidable: By the Eng. law neither an Idiot or Lunatic can avoid his own deed by alleging his own incapacity, or as to [illegible] others [illegible] [illegible] himself) which rule Ch. Kent [illegible] seems to be highly unreasonable: under the only [illegible] that [illegible] for if so, that he [illegible] in [illegible] of [illegible] what he did. But although an idiot cannot avoid his own deeds yet the [illegible] may [illegible] during his life): as the objection in the above case [illegible] But: The Conveyance of a Lunatic may

2 Bl. 291.
Co. Lit. 295
4 Co. S. 205.
[illegible] 152.
Kent 40.
1 Fonb. 46
1 [illegible]
[illegible]
[illegible]
[illegible] 1104.

2 Bl. 2[illegible]
1 [illegible] 3[illegible]
1 Fonb. 43
2 Vern. 41
678.
1 [illegible] 249

not

ess or not. Here however they take the property to the use of the families. But when the king [illegible] a [illegible] from [illegible] he takes the profits to himself. Then after the death of an [illegible] [illegible] his heir [illegible] [illegible]. [illegible] [illegible] [illegible] whether the heir or [illegible] depends upon the nature of the instrument. But though a [illegible] [illegible] [illegible] the [illegible] as [illegible] [illegible] the land of a [illegible], yet this [illegible] be [illegible] by a [illegible] in [illegible] [illegible] [illegible] only by his Representatives Personal.

[illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] [illegible] have [illegible] on the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

by

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[illegible] of warranties.

A thing strictly [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] be considered as a [illegible] proper.

[illegible]

Another distinction is that if a [illegible] [illegible] accept by the party himself or his personal representatives: but [illegible] not any person who has any interest may take advantage [illegible] or Recovery [illegible] by the representatives [illegible] by the party himself. ([illegible]) If a person [illegible] covering the [illegible]

[illegible]

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by heir. But if he die without recover-
ing his understanding or having recov-
ered it without applying to the pur-
chase, his heir may avoid it.

For conveyances by married women [illegible]
see the proper title "Husband & Wife". [illegible]

If a deed is obtained from a man
by duress, he may, when at liberty, either [illegible]
affirm or avoid it, the other party being
bound if the one under duress wish it
and it makes no difference whether he
was grantor or grantee. By the law [illegible]
all persons may be purchasers [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] is a limitation
of [illegible] but a sale [illegible].
[illegible] the same with the purchase of [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] purchase by [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

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An alien friend, however, may [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] for the conven-
[illegible] 2 [illegible] ience of commerce. [illegible] [illegible] are
[illegible] [illegible] entitled [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] from the leg-
islature. There is one exception [illegible]
[illegible] of [illegible] British subjects who had
lands here previous to the Revolution; [illegible]
Moreover the French subjects the rights to
which they are entitled under the Treaty of
Amity with France XVI. And [illegible] [illegible]
[illegible] since the adoption of the Federal
Constitution, persons naturalized are not
comprehended in the [illegible].

[illegible] In certain [illegible] [illegible] alienations
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] are absolutely prohibited, and [illegible]
[illegible] restrained. [illegible] [illegible] generally
mean alienation to some "Ecclesias-
tical corporations". [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]

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1 Requisite which [illegible] the Consideration.

Every deed must be founded upon [illegible] lawful and sufficient consideration. 2 Bl. 296.

It seems however that previous to the statute of uses no consideration need be recited in a deed; because the deed itself implies one. But under the law of uses the beneficial interest is said to remain in the grantor and the legal title to the grantee, i.e. in case of a deed without consideration. The beneficial interest could only be recovered in a Court of Equity and that Court would enforce no contract unless founded on sufficient consideration. Since the Stat. of uses has executed the use, i.e. transferred the legal estate to him who has the beneficial interest, a deed without consideration is said to enure to the grantor as at Com. Law before that time it only did in equity.

2 Bl. 330
2 Bl. 272
2 Cr. 450

4 Bac. Abr. 8.
Gilb. Uses
[illegible]
2. Bl 296

2. Consideration of a Grant may

be

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either good or valuable and either of them is sufficient to support a use. But a Conveyance merely voluntary is void. 2 Bl. 337. 338. 1 Cruise 8.

2 Bl. 338 Christian's Note. It is questioned by Christian in his notes whether the rule, that a deed without any consideration enures to the use of the grantor applies to any other species of Conveyance than that of Bargain and Sale. Also

[illegible] a deed declaring no use enures to the use of the grantor. The doctrine of uses and trusts has been abolished in Vermont and he presumes in no other State: therefore it is doubtful whether a deed without consideration in the United States enures to the ~~use~~ benefit of the grantor.

A good consideration is that of kindred

2 Bl. 297. or natural affection, between near relations: as that of Parent and Child, Brother and Sister, Nephew and Niece or Heir at law. Relations more distant than these will not authorize a good conside-

[illegible]

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A valuable consideration is one in which there is any pecuniary value and so marriage has always been held to be a valuable consideration. Either of these considerations will support a deed as between the parties but one where only a good consideration) is only voluntary and, as to subsequent bona fide purchasers, fraudulent and void. The consideration expressed in the deed cannot be denied by the grantor or by his representatives, for the purpose of defeating the title: because they are estopped. But the grantor, may impeach the deed for illegality in the consideration as usury: for this does not contradict the matter of fact: but confesses and avoids it. And strangers to the deed as creditors to the grantor and bona fide purchasers may deny the existence of the consideration expressed. A deed expressed to be "for divers good considerations" is regarded as expressing none at all. For

2. Bl. 297.
3. Mass. 50.

1. Pow. 349.
2. Bl. 296.
Plowd. 130.
4. Coke 40.

2. Bl. [illegible]
2. Lev. 109.

1. V. 149.
Ibid. 15.
2. Ps. 15.
Cr. 16. 3.

proof

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from such an expression, the first con-
[illegible] from the face of the deed judge of
the consideration: and the parties are
not to put their own construction upon
the consideration. But, in this case the
parties may aver and prove the actual con-
sideration: and this will render the deed
operative: as if it be given in pursuance of
a settlem[ent]: for though parol evidence
is incompetent to contradict the deed
yet this is [illegible] with it." So, also where
there was a consideration specified in
the deed it was holden competent for the
grantee to show that there was an ad-
ditional one. Hence it would seem, that
the actual consideration may be proved
by parol, though the deed mentions no
kind of consideration whatever. Mr
[illegible] says there is no [illegible] rule to this
effect though it seems to follow from the above
If no [illegible] in the deed itself of
any consideration that the convey-

ance

[illegible] 38

[illegible]

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is to one within the aforegoing instances of relation (as to his grandchild, wife, child, &c.) there is a sufficient consideration implied from the near relation of the parties: and there is no need of averring a consideration in this case. But in such case if a consideration is specified no other can be established from the force of the maxim "Expressio facit cessare tacitum" or "expressio unius exclusio alterius". Though the consideration in a deed cannot be contradicted yet the acknowledgement in the deed of the receipt of the consideration is only presumptive and not conclusive evidence that the grantor + was thus has been decided in Penn. by the Sup. Court in the case of Weaver and Steller

3d. The third requisite of a deed is that it be written or printed, and the common law requires that it be done on Parchment or paper. But it may be on any other

(as)

7. Co. 39. b
Plowd. 314 a
1. Rol. R. 68.

7. Co. 39 b
1 Inst. 183 b
5. Co. 97 a

1 Rawle 479.
2 Rawle 91

Lecture.
1 Inst. 229 a.
2. Bl. 297.
4. Cruise [illegible]

word or language. Formerly lands might be conveyed without deed or writing. But now by Stat. 29. Charles 2d no interest in lands for longer term than three years can be created without writing. And if for longer time and not in writing they operate as leases at will, and yet Courts of Justice have construed them leases from year to year. The deed must be written before the sealing and delivery: for if one seal and deliver a blank paper and directs it to be filled up, it will not be his deed, though afterwards filled up, as he directed, because a deed always takes effect from delivery and as delivered. But in the case of Bonds, signing a blank paper with directions, to fill it up will be good when filled up.

2. Bl. 297. 306. 311-313. 1 Cru. 50. Rob. on Stat. of Frauds

Shep. Touch. Atkin. 54. Perk. §. 118. [illegible] 26

See title "Bills of Exchange".

4th. The fourth Requisite of a deed, is that the subject matter be legally set forth. It is not indispensable however that the different parts of a deed should be in the

1 Inst. 6. 225. 2 Bl. 297. 8 [illegible]

order

order usually set forth: though it is the better way. The different formal or orderly parts of a Deed are eight.

1. The first is what is called the "Premises". These contain, the names of the parties, with their additions, the necessary recitals (if any), the consideration, the description of the subject or thing granted, and the exceptions to the grant if there are any. The Premises indeed include all that precedes the "Habendum." The omission however of the grantee's name in the premises does not vitiate the deed if his name is in the Habendum, where it always is if the deed is formally drawn. And in such case a wrong name in the premises may be rejected as surplusage: the being actually delivered to him, named in the Habendum. Deed, where the name of the grantor was omitted in the operative words of the grant, but the consideration was expressed to have

2. Bl. 298.
4. Cruise 33

3. [illegible]
1. Inst. [illegible]
[illegible]
4. Cruise [illegible]

[illegible]
[illegible]
4. Cruise [illegible]

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have been formed to bring the suit, was taken
[illegible] the good agt. heirs. So also where
a grant was made to [illegible] Earl of Devon
[illegible], the grant was good though his name
was [illegible] [illegible]
[illegible] [illegible] [illegible]
a deed [illegible] against the [illegible]
[illegible] [illegible] to be construed
that every [illegible], may be [illegible]:
for the construction of a deed [illegible]
ought [illegible] [illegible] [illegible] of a deed
[illegible] [illegible] forever: the
[illegible] [illegible] to show he is
[illegible] [illegible]. The mistake [illegible]
figures in the recital in reference to [illegible]
the [illegible] [illegible] allowed to be
[illegible]. A grant to one of the [illegible]
the wife of [illegible] is sufficient to entitle her
[illegible] [illegible] though then there
was [illegible] [illegible]: So though she
be [illegible] [illegible] should however
[illegible] [illegible] [illegible]

[illegible]

belong to the [illegible] persons. But in [illegible] a grant to one [illegible] [illegible] only is void ×
for uncertainty. So to John —— and
a [illegible] either case to a person [illegible]
[illegible] [illegible]. But a [illegible]
[illegible] the [illegible] is a sufficient
[illegible] of a grantee: thus if a deed
be to an illegitimate person who has no
name [illegible] But a grantee may
be sufficiently described without either of
his names: thus a grant to the eldest
son of John Stiles is a good one to
[illegible] Stiles, who is the eldest son of J.S.
So also the word "done" is a sufficient de-
scription. As a grant to the "done" of J.S.

There are several material particulars
to be observed in the premises of a grant
as to what shall amount to [illegible]
[illegible] to the deed: which will not [illegible]
[illegible] [illegible]

[illegible]

Instances

[illegible]

See Litt. Comment.

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2 and 3. The Habendum and Tenendum.
These are the next parts of a deed and are so denominated from the Latin words habendum and tenendum "To have and to hold."

After the Premises come the Habendum. Its office properly is to designate the quantity of interest conveyed: that is the appropriate office. but the quantity of interest is sometimes shown in the Premises. It is not, xxx to be considered however that this is the only purpose it answers: for as has been seen it answers sometimes to correct the Premises further. When the quantity of interest is expressed in the Premises, it may be explained or enlarged restrained or qualified by the Habendum.

And the rule is said to be the same if a grant be in the Premises to A. and his heirs & [illegible] the Habendum to the heirs of his body. This however is contradicted and it is said that in this latter case the grantee takes a fee tail only. This latter doctrine is

[illegible] 41

1 Inst. [illegible]
2 Rol. Ab. [illegible]
Cr. [illegible]
2 Bl. 298.

2 [illegible] 58.
[illegible]

[illegible]
[illegible]
[illegible]
[illegible] 154.

is supported by the weight of authorities and is probably correct. It is a General Rule that any generality of expression in the descriptive part or in the premises, may be restrained by the Habendum. Though the Habendum may restrain or qualify the premises, yet if totally repugnant or contrary to them it is void: as in the construction of statutes, a saving repugnant to the body of the act is void.

Cruise 7.

2 Co. 23.
8 Co. 56.
4 Cruise 12.
2. Bl. 298.
See title "the municipal law" 1 Vol.

It is a general rule that in a deed, the first clause always take effect: in which it differs from a will where the last of two inconsistent clauses always prevails.

4. Cruise. 45. 131.

The Tenendum was formerly used to express the tenure by which the land was holden. But since the Stat. of Charles has reduced them all to free and common socage it is used only as a matter of form.

2. Bl. 299.
4. Cruise. 9. 44.

6. The Reddendum part of a deed is the Reservation. The office of this is to reserve

2 Bl. 299.
4 Cruise 9.
8 Co. 71.
Co. Lit. 47.

some

[illegible] the terms of these are ways in which the grant is made, they need no explanation. It may be observed however, that the word rendering, used as a term of conveyance, amounts to a covenant on the part of the lessee to render rent or services.

5. The fifth word of grant is the condition: of this, nothing will be said.

6. The next word of grant is the Warranty. This is not generally well understood; and though sometimes used as synonymous with Covenant, is not so. The Warranty is that grant by which the grantor for himself and his heirs, warrants the estate to the grantee. And if in this case, the grantee is evicted the grantor is bound to give him other lands of equal value of those of which he has been evicted. And then he may be compelled to do either by a voucher of the grantee or by writ of Warrantia Chartae [illegible] on the Warranty. The former process [illegible] the grantee [illegible] to the [illegible]

[illegible]

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& appear here before the title, when the grantor is sued. Warranties are of two kinds: Lineal and Collateral. They may also be Express or Implied. These are similar to express or implied covenants. In modern practice Warranties are nearly disused being superseded by covenants, which is the most nearly important part of a deed.

2 Bl. 300
4 Cruise [illegible]

4th Covenants: These are agreements in which either of the parties stipulates something in favour of the other. So there may be a covenant as well by the grantee as the grantor. The usual covenants by the grantor in [illegible] are two: 1st that he is well seised and has good right to convey. 2nd that he will warrant and defend [illegible] the grantee's title. The principal difference in effect between a Warranty and a "covenant" is that the former binds the grantor and [illegible] may [illegible] a [illegible]

Lecture
4 [illegible]
2 Bl. 304
[illegible]

[illegible]
[illegible]
[illegible]

had

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but it does not bind the personal representatives of a covenantor as contradistinguished from a covenantee, unless the covenantor be expressly named in covenant, and hence the personal representatives, heirs, and him, the heir, unless therein named.

If land conveyed is described by metes and bounds, and answers that description the grantor is not liable on his covenant, though the [illegible] fall short of the quantity. Unless there is a special covenant as to the quantity. Then he is liable

1 Hill. 380
1 Hill. 375 pro rata particularly to deficiency.

The rule is the same if the deed refers for

1 Hill. 380 the description to another deed or document, and the land answers the description there given. In some instances, the description is by metes, or length of lines, and by the monuments, measurement: in these cases though the length of line is incorrectly given, the [illegible] and the grantee can hold no further than the

encumbrance". But, if the description is by quantity alone, without metes or bounds the grantee is liable on his covenant if the land fall short of the description given. [illegible] description is Estoppel. The rule in this case however is altered if the qualifying words "more or less" are used. And it is almost universally practised to use as a safeguard these words if the quantity is mentioned: this being the quantity mentioned was that by estimation only. These words are introduced [illegible] when the description is by metes & bounds [illegible]

[illegible]

The eighth and last necessary part of a Deed is the Conclusion.

This mentions the execution and the date: In a deed poll the date is usually expressed in the conclusion: in an Indenture it is in the Premises though referring to the Conclusion. The date however is not absolutely a part of the deed itself: that is merely [illegible] of the execution

2 Bl. 304

of the deed. Anciently date was not necessary to a deed in England: and it is even good now without a date: though it is advisable to have it. Hence when the date is expressed it is merely prima facie evidence of the time of execution: and for this reason the date may be always contradicted by proof. So if it contain a wrong date or an impossible date (as the 30th of February) or no date at all the true date may be shown by proof.

1 Inst. 6 b
[illegible] 28.
[illegible] 45.
[illegible] 6.

If there are two deeds between the same parties and manifestly containing the same agreement and date: that which appears best to support the intention of the parties shall be presumed to have been executed first.

[illegible]

5th The fifth requisite to a deed is the Reading of it; this is necessary if either of the parties desire it. And if desired and it is refused though the party execute the deed under these circumstances he

[illegible]

may

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[illegible] of [illegible] parties [illegible] the
[illegible] deed is executed [illegible] not in proof
[illegible] called [illegible] And the foregoing
[illegible] agt. [illegible] of a person being
estopped by his own deed. If the party
be able to read he ought indeed to read it — 2 Co. 3.
himself: and if he do not request it to be — 11 Co. 28 / 2 Bl. 304
read, nor read it himself he shall be — 2 Roy't
bound by it. And if he is unable to read — [illegible] 186
it ought to be read to him. If when re- — *to make the [illegible] content [illegible]
quest it is read falsely it will not be his
deed he said: and in general as to the — 5 Co. 9b / [illegible] / 2 Bl. 304
whole. Deeds of falsity used by collusion
in order to make it binding.

6. The sixth Requisite at Com. law is
Sealing: and by stat. 29. Charles II. — 2 Bl. 305 / 2 Wils [illegible]
Signing is in most cases also necessary.
Sealing only was in use at Com. law because — Com. St. [illegible] / "Frauds § 1.
when the rule was established, very few
men knew how to write. In relation to
Signing it is necessary as well by a recent
statute as by the stat. of frauds. The [illegible]

[illegible]

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may be authorized to execute a deed, but it must be done in the name of his principal. Vid. Frontin v. Small by Willes [illegible] K.B. Combe's case by Attorney. Stra. 705. Plow. 142. 9 Co. 76. 6 Mod. 177. 2 Ray. 1418.

White v. Cuyler 6 T.R. 176. Stra. 705. 9 Co. 77. 1 Wil. 105. If it is not executed in the name of the principal, but in the name of the attorney himself, it will bind the latter, tho' not the former. For though in Front. v. Sm. W. C. was the attorney of S. and though S. was intended to be bound by the deed, yet if it was executed in the name of W. C. only, it is a matter of law, and must be judged of from the face of the deed.

1 Bos. & P. 39. 7 T.R. 207. Com. Dig. tit. "Att." 6 T.R. 176. But it seems, that an attorney or agent cannot bind his principal, and that one partner cannot bind his co-partner by deed, unless he received his authority by deed. For as a man cannot bind himself by a deed without sealing, so he cannot confer upon another an authority to do it for him, without giving that authority

by

is in [illegible] recites that the deed be taken to be
the person, but he is very, no one present in the
Book; — The rule is not to contemplate an
attestation of the deed by an attorney in
the absence of the principal. For it has
been lately determined that if one in the
presence of another executes a deed for
himself and the latter the deed will bind
him, i.e. if done by direction. This rule
must be so settled [illegible] a little to recollect
[illegible] more, not so well settled from
being a [illegible] could not be any hospita-
ble, to make a deed. — Indentures are na-
tured in practice commonly one of them
party, and each has himself, where it will
be his free deed. Ex. If a deed begins and
recites at A. B. and C. and the latter
delivers for himself only it will be his deed.
7th The next Requisite to a Deed, is the
Delivery. Every deed to be operative
must be delivered. Then every deed takes
effect from the delivery, not the date

1 P.W. 18.

[illegible]
1 Co. 88.

Lecture

2 Bl. 307
[illegible]
[illegible]
[illegible]
[illegible]

Deed

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Where the [illegible] [illegible] [illegible] [illegible]
[illegible] the grantee [illegible], but in [illegible]
[illegible] delivery after [illegible], it will bind
him. And though a third person [illegible]

2 Bl. 307.
Perk. § 20.
Co. Litt. 28.

the deed, yet if the grantor delivered, he is
bound by it. But if a deed is delivered

5 Co. 84

before it is sealed, the delivery is void, as it cannot
take effect as a deed, because it must
take effect from the time of delivery and
at that time it was no deed.

[illegible] 28.
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible] 28.

The act of delivery may, without any
words used by the grantor, be effectual
on the one hand; and on the other there
may be an effectual delivery with words
only. As if the grantor says "There is your
deed" it lying before him, "Take this as my
instrument as my deed."

[illegible]
[illegible]
[illegible]
[illegible]

If however while the deed is in the presence
of the parties the grantee takes it without
the consent of the grantor, there is no legal
delivery, unless it is shown that the grantor
intended the grantee should so receive it [illegible]

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In deeds. A deed may be delivered either to the grantee in person or to any other person having authority to receive it for him or to any stranger for the benefit and in behalf of the grantee: in this last case the third person is to deliver it over to the grantee. However a deed cannot be delivered so as to have any effect [illegible] [illegible]. For if the first delivery has any effect and is not strictly void a subsequent delivery will be void. But if strictly void a second delivery of the same deed may be effectual. Thus if a deed [illegible] was delivered by a feme covert, then the delivery is strictly void: therefore if after the death of the husband she delivers the same deed again this is a good delivery and will be effectual. [illegible] the same principle if a deed which was made [illegible] becomes [illegible] [illegible] [illegible]: as to [illegible] deed. [illegible] [illegible] [illegible] delivery is good

2 [illegible]
Perk. § 1[illegible]
Dyer 16[illegible]

2 F. S. 60.
Perk. § 154,
2 [illegible] 1806.
Coke 201.
+ [illegible] 20.
24. 24

and

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was effectual. So the other way: if an infant delivers a deed, this is only voidable; therefore if on his coming of age he deliver the same deed again, such second delivery is absolutely void. And the rule is the same with respect to deeds obtained by duress. The rule, in these cases, does not mean that the deed is inoperative when delivered a second time, but only that it is not a good delivery so as to make the deed take effect as a new deed in relation from the second delivery: but it will operate as a confirmation of the first delivery, by [illegible] affirming what before was voidable.

[illegible]

§ 2. Delivery may be either absolute or conditional. When the deed is delivered to the grantee himself, or to some other person, but to be delivered over to the grantee without any condition, the delivery is absolute.

[illegible]

But if it be delivered over to a third person to be delivered over to the grantee upon some condition, or when the performance of

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a contingency, then the delivery is con-
ditional: and in this case, the writing
thus delivered over is called in the law
an "Escrow." And it seems settled that
a writing cannot be delivered to the gran-
tee himself as an "Escrow": but if it is de-
livered to him the delivery is absolute of
course. The reason is that the grantor can-
not aver by parol evidence any thing ag[ains]t
the solemn act of delivery: that being
proved: which is a matter of fact, cannot
be contradicted. So it was determined
in [illegible] 2 [illegible] or in [illegible]
[illegible] or [illegible], to be delivered over
to the proceeding party is an "Escrow":
as it is to be delivered over only in the event
of the [illegible] being [illegible] of the obligee
[illegible]. There is a distinction on this
subject [illegible] [illegible] Mr. Gould
[illegible] a grantor, when delivering a deed,
[illegible] "[illegible] you this writing" [illegible] an "Es-
crow" [illegible] [illegible] "I deliver you this

as

2 [illegible] 309.
5 Co. 84.
Shep. T. 58.
[illegible]
[illegible] 138
2 Bl. 307
[illegible] 835.
[illegible] 684.

1 [illegible] 37

2 [illegible]
Shep. T. 58
[illegible]
[illegible]
Com. Dig.
[illegible] A. 3

as an escrow, to be delivered to J. S. is to be considered as absolute and will enure to the grantee. But when a deed is properly delivered as an escrow it is of no force till the condition is performed: and though it should be delivered over before the condition is performed yet it will not bind the grantee: the condition on which it was to be delivered may be proved by parol.

2 T. S. 54.
[illegible] 29/30

But, on the condition being performed when the writing is delivered over it becomes a deed, ceases to be an escrow and takes effect absolutely. Hence it seems from the Shep. Touchstone that if on performance of the condition the depositary should refuse to deliver it over the title would still vest in the grantee by relation to the first delivery: because, from the first delivery, the title is inchoate and becomes complete from the time of the condition being performed the relation still remains from what time

2 Bl. 35.
Sh. T. 2. 60.
5 Co. 84 b
2 Bl. 34.

was

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as the granting title commences. In ordi-
nary case, the Courts take the rule to
be, that the deed takes effect from the se- 3 Co. 35.b 36.
cond delivery. By ordinary case, is meant 5 Co. 84.
those where there exists no disability in
the grantor at the time of the first deliv-
ery, or any intervening until the grant at the
first delivery. But in cases of necessity ut
res magis valeat quam pereat the
deed shall take effect and the title vest by
relation to the first delivery. Thus if a feme
sole delivers a writing and then marries 3 Co. 35.
and on performance of the condition, the Sheb. T.S. 42.
deed is delivered over to the grantee during Cr. El. 4 & 4.
the coverture the deed will take effect by 5 Co. 35 b.
relation to the first delivery: ex necessitate Bla. 423.
rei, and ut res magis valeat quam pe-
reat. These distinctions are highly important
in practice says (Mr. Gould) And if
one delivers a writing as an escrow and [illegible]
then dies it will take effect from the first
delivery when delivered over from the

necessity

same property. Thus in such cases as these the performance of the condition alone without a delivery over will vest the title because at such time there is a visibility in the grantor; and as the relation is to the first delivery, such delivery, which was in its nature inchoate, is consummated, it is said, by the performance of the condition. Hence also if one deliver a

5 Co. 84
1 Prest. 160
2 Prest. 280

writing as an escrow to be delivered over at the grantor's death, when delivered over it takes effect from the time of the first delivery. So also if one of sound mind

Cro. El. 494
6 T. R. [illegible]

make a deed of feoffment & a letter of attorney to make livery and then becomes non-compos the livery will enure and relate back to the time when the deed was delivered because then the grantor was of sound mind. This doctrine of relation

4th Perk. § 163.
Vide Also
[illegible]
[illegible]
[illegible]

applies only to those cases, where such second act is a confirmatory one, & not an original one. Thus if the maker

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a power of Attorney to B. to make a feoffment for A. and then A. dies before feoffment made, B. never can execute his power of Attorney, because the execution of his authority must be an original act: and also a naked authority is revoked by the death of the party who gave it. In these cases there is no inchoate conveyance which the act of the attorney is to consummate, but each act must itself originate the conveyance, as well as consummate it.

If the application of the doctrine of relation would defeat the deed, where it is delivered over as an escrow, it shall vest from the second and not from the first delivery, or rather it shall not have relation. If a person seised make a lease to one out of possession, and deliver the deed to another to deliver to the lessee upon the land, the lease shall take effect from the second delivery on the land: ut res

magis

Kelw. [illegible]
[illegible]

Br. [illegible]
2 Co. [illegible]
1 Inst. [illegible]
Ch. [illegible]
1 Bac. 15

imaginary relation given thereat and the agent, when in the land is in strictness in suspension. This rule cannot be extended however as to violate the principles of law so as to cover any legal incapacity or disability at the time of the first delivery. Thus, if an infant make a deed, to a stranger to be delivered over, and after the infant comes of age, the delivery is made, such second delivery will not bind the infant though of full age at the time because his contraction shall not bar him of his legal privileges: Or, suppose a feme covert make a deed, and give it to a third person, to be delivered over, who waits till her coverture is determined and then deliver it: now that deed shall not have effect by relation to the first delivery.

3. Co. 35 b. Br. 6, 165. Cr. 1, 614.

A deed, when it does take effect by relation, never affects collateral acts by that relation. Thus if a bond be delivered as an escrow, under circumstances which would

[illegible]

give

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gave it effect by relation; yet a release of all demands by the obligee between the time of the first and second delivery will not discharge the obligor. The rule, in other words, is this, that the deed upon the second delivery operates retroactively by relation only (i.e.) for the purpose of vesting the right or title created by it. This relation or this retroactive operation of the second delivery, is an illustration also of the [illegible] – In fictione juris consistit aequitas. This rule however (Mr. Gould says) is not laid down totidem verbis in any of the English Books. – If deed delivered to A. to be delivered over to B. is good of course till B. refuses; for he is presumed to assent till the contrary appears. If a deed is delivered to a stranger to be delivered over to the grantee, who upon tender of the deed refuses to accept it, he can never afterwards claim it. For on his refusal the first delivery to the stranger loses its whole force

since

Com. Dig. [illegible] (Confirmation)
[illegible] 4
2 Co. 26b. 36a.
1 Inst. [illegible]

2 Rol. 26.

5 Co. [illegible]
3 Co. 35b.
Doe. Plac.
260. 255.
[illegible] 50.
Cro. El. [illegible]

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And if after his refusal the Deed is deliver-
ed without the consent of the grantor the
latter may plead "non est factum"
being part of the Delivery.

7. The last requisite to a Deed, at Com-
2 Bl. 307 mon Law, is the attestation of the delivery of the
execution by the presence of witnesses
and it is called attestation: because the
Co. Litt. 3 [illegible] 307 witnesses are to attest all the facts & not
an [illegible] part of them
though it is not necessary in practice
all [illegible] & on the back of
something evidence of the authenticity
and is no part of the essence of a deed.
Anciently the attesting witnesses did not
sign and subscribe the deed themselves:
but since the practice is [illegible]
the keeping of writing & a Deed without any
attestation is good at Common Law: and so it is
now in England by [illegible] all grants or
[illegible] 503. conveyances of Estates or lands [illegible]
[illegible] by the Statute of Frauds.

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In Conn. there are certain requisites prescribed by stat. to a Deed, unknown to the Com. law. 9th In the ninth place then it is essential in Conn. that all grants or mortgages of houses or lands should be acknowledged before a justice of the Peace. There is a provision in the Stat. to compel the grantor to acknowledge if he refuses to after execution.

Sw. Dig. 163.
1 [illegible]

10th There is a tenth requisite to a deed in Conn. to make it operative agt. strangers, viz. this: That no deed or mortgage of houses or lands shall be good except agt. the grantor or his heirs unless it be recorded in the town in which the land lies. As to the grantor and his heirs the deed will be effectual agt. them, if the other requisites are complied with: for the stat. was intended for the benefit of third persons. Hence the title as agt. third persons is in general complete and effectual from the date of the record which always is the

Sw. Dig. 163.

[illegible] 90

same

[illegible] with the deeds of the estate, at the
[illegible] to the office of the Clerk. It follows
that the deed is received and noted by the
Clerk such priority arises, both in relation
to others; or between several and
distinct purchasers of the same subject.
The terms of the stat. however have received
certain modifications by construction.
So that the Court holds, and holds as not.
a prior grantee of the land under the obli-
gation to procure his deed to be recorded
if he has lodged it at the office within
a reasonable time. But in the Registry
Acts in England the deed first
recorded is of course best at law; however
Equity may give relief under circum-
stances which require it. But if the prior
grantee in the above case is delayed to
procure his deed to be recorded in unrea-
sonable time a subsequent purchaser
with a prior record or an attaching cre-
ditor shall hold to his exclusion. The rule
has

5 Mass. 288
2 [illegible] 200
2 [illegible] 230
[illegible] 248
8 [illegible] 252

2 [illegible]
1 [illegible] 388
Sugd. 238.

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has definitively settled what shall be a reasonable time: but this must be determined by the particular circumstances of each case. If the first grantee having lodged his deed in season, prevent, at himself from being recorded it at length in season, the subsequent recording of it at length will not have relation to the time of its first delivery as agt. intermediate purchasers for a valuable consideration. But this rule does not hold where the first deed is prevented from being recorded in season by the subsequent purchaser or the grantor or by the town clerk himself. It has been determined in Connt that the subsequent deed first recorded shall take the relation of the prior deed where the prior grantee has been guilty of gross neglect, though the subsequent purchaser had notice of the prior deed. These points concern the priorities of [illegible] [illegible] [illegible] the [illegible]

1 [illegible] 38.

1 [illegible] 8.

[illegible]

[illegible]

1 [illegible]

fee

[illegible] [illegible]

grantee is guilty of neglect and the said [illegible] [illegible] in quality of [illegible] [illegible] entitled to the subsequent purchaser before purchase will render the contract fraudulent as against the [illegible] be [illegible] [illegible] [illegible]: [illegible] [illegible] [illegible] established the limit even though not [illegible] till after the [illegible].

1 [illegible] 23.
[illegible] 95.
[illegible] 75.

[illegible] 58
[illegible]
[illegible]
[illegible]

It has also been determined in Court that a Town Clerk after having received a deed for record [illegible] [illegible] at his residence [illegible] without recording it at full length: and though he does it by and with the consent of both the parties he will still be liable to any third person who can show that he has been injured by it. And Mr Gould thinks that if the Town Clerk having received the deed and made his endorsement upon it should conceal it from those who wish to see it, and the [illegible] having [illegible] [illegible] con[illegible] and [illegible] [illegible] [illegible] [illegible] pur[illegible] and afterwards the title is defeated

2 [illegible] 38.

the

the Town Clerk would be liable to costs &c in damages to the injured party.

How Deeds may be Destroyed or Avoided.

On this subject little will be given. a[illegible]

If the instrument wants any of the essential requisites of a deed it is not good as such though it may amount to evidence of an agreement between the parties. 2 Bl. 308.

A deed may also be destroyed or avoided by matter ex post facto: as by erasure, interlineation &c. Thus if one gives a bond for twenty shillings and this is changed into pounds, it is void even for the shillings, because as the instrument now stands it is not the act of the party. 2 Bl. 308. 11 Co. 27

But a erasure, interlineation or any other alteration of the deed will not invalidate it if made before delivery and a memorandum of it made at the time which, however, is not [illegible] in [illegible] 5 T. 507 & Cruise [illegible] 2 Bl. 308.

the

title and the deed is void without it. But in Mass. there is no such rule or known; and an alteration may be proved in any other manner.

On this subject of alterations there are some distinctions to be observed. An alte-

11 Co. 27 a
[illegible]
2 H. Bl. 308.

ration made by the grantee after the deed is delivered will destroy it whether the alteration is in a part material or immaterial. But an alteration made by a stranger in the deed does not destroy it unless it is made in a material part.

What is material and what not must

11 Co. 27
Cr. El. 626.
2 B. [illegible]
2 [illegible]

be judged of from the structure of every deed. If the deed is substantially altered, it avoids it whether done by a stranger or any other person: because then it is not the party's deed. And in these cases

[illegible]

therefore the Deft. may plead non est factum. But a stranger who destroys

Cr. El. 626

the deed by altering it is liable to the grantee in an action on the case.

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A deed may also be destroyed by breaking off the seal: or by delivering it up to be cancelled. 2. Bl. 308 309. 5. Co. 23.

And a deed may become void by a subsequent refusal of those whose concurrence is necessary to give it validity. As in a purchase by a feme covert where the assent of her husband is necessary. And lastly a deed may be avoided by the judgment, sentence or Decree of a Court of competent jurisdiction. — 5. Co. 68. 2. Bl. 310. — 2. Inst. 143 & 183. 2. Bl. 309.

At this day Courts of Equity are resorted to for the purpose of avoiding deeds, it not being contended for in a Court of Law. But this was formerly done in the Court of Star Chamber.

On the different kinds of deeds see 2. Blackstone's Commentaries.

Of the Construction of Deeds.

1. Mo. P. 56a
2. T. R. 84.
2. Bac. 10a
3. Atk. 136.

Deeds are to be construed as near the apparent intention of the parties as the rules of law will permit. Bad grammar will not vitiate a Deed any more than bad style. And the construction should always be upon the whole instrument and not upon any one part of it, i.e. in construing any particular part of a deed reference should be had to the other parts. for "inspectur à corpis" and one part should be so construed as to give effect to all.

1. Lu. M. 114,
2. T. R. 84.
Litt. § 183.
Plowd. 161.

Another rule is that the words of a deed are to be taken most strongly ag.t the grantor or party whose words they are and most favourably to the grantee. And if there is an ambiguity in the words, one in favour and the other ag.t the grantor, the latter is to be adopted. for they are his words and he should have explained himself. If there are two repugnant clauses

2. T. R. 573

elauses

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clauses in the same instrument the first must stand: in which case differ from wills. Co. L. 88. 1 Vern. 30. 1 Ins. 299.

Words of general relation when standing alone are to be construed generally i.e. literally. But if words of general relation are preceded by a particular recital they are to be restrained by such recital. This rule will seldom be found to be of importance in practice: and there are some contradictory decisions on it. Whenever the words of a deed will bear two constructions one of which is agreeable to law and justice and right and the other inconsistent with both, the former is to be preferred. And in all cases, words which are repugnant to the general tenor of the deed and the evident intention of the parties are to be rejected.

When any thing is granted it includes all the means that are necessary for the attainment of its full effect.

[illegible] Ellis }
[illegible]
Cro. [illegible]
1 Saun. 300
3. Lev. 263.

1 Inst. 42 a.
183 a.
4 [illegible] 47.

1 Inst. [illegible]
3. Bro. P.C. 357.

1 Inst. 56.
[illegible] 36.

Where

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grants to a piece of land in the center of [illegible] he impliedly grants a right of way to it. Or if he [illegible] trees growing on his land the grantee has a right of ingress, egress and regress for the purpose of taking away the trees. Or if one grant [illegible] in his [illegible], the grantee has a right to go to the same &c. Or if he grant a [illegible] in his land he impliedly also grants the right of digging it: for if it were otherwise the grantee could take no benefit of the grant. Indeed it is a general rule that the grant of the [illegible] grants with it the incidents necessary or essential to its [illegible] and [illegible] pertinences. Upon the same principle if he grant a mill he impliedly grants the water which runs the mill [illegible] [illegible] [illegible] [illegible] [illegible] he [illegible] a bridge [illegible] the [illegible] [illegible] the [illegible]

This is a well established rule,

5 Co. 88 [illegible]

[illegible]

5 [illegible]

and

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That a deed framed in a form in which by law it cannot operate may operate to the effect as a deed of another form or species: for the purpose of effectuating the intention of the parties ut res magis valeat quam pereat. Of this rule there are many examples. As for instance a deed conveying one joint tenant's part to his co-joint tenant though made as a feoffment or grant it shall operate and be treated as a "release." Hence a [illegible] in one pale to a near relation shall operate as a covenant to stand seised, [illegible] provisions ex-[illegible] to be [illegible] bargained, [illegible] is [illegible] a covenant which is [illegible] for a good consideration and [illegible] a valuable [illegible] a bar-gain and sale requires a valuable con-sideration. So suppose a deed offer'd [illegible] by the particular tenant to the remainder [illegible]. And though this can

[illegible]

cannot take effect as a feoffment yet ut res magis valeat quam pereat it shall operate as a "Surrender". So if a creditor covenant "never to sue" his debtor: this shall enure as a release and may be so pleaded: And if a deed is made by several in which one of them only has the whole interest the deed shall operate as the deed of that one only.

[illegible] Wherever the terms of a deed are so uncertain that the intention of the parties cannot be discovered then the deed is void for uncertainty.

There are some distinctions to be taken as to when a deed being void in part is void as to the whole and where it is void as to that part only which is unlawful.

[illegible] If a deed contain several covenants or stipulations some of which are lawful and the others unlawful the latter are void and the former good. The same rule is not [illegible] [illegible] [illegible] Stat. part of the

deed

[illegible]

[illegible] made by plaintiff [illegible] the whole deed is void. The true reason of this is that [illegible] condition of [illegible] and therefore avoids the whole instrument. Secus as to the [illegible] of a deed contained in two distinct clauses or parts, one of which has been [illegible] to the grantor and the other part by the execution will be good as to the former tho' not as to the latter. But the Court conceives these rules cannot apply to a case where the instruments are connected and dependent one upon the other — that if a deed containing several distinct [illegible] covenants is destroyed as to any one of them it is avoided in toto, because the instrument as now produced is not the act and deed of the grantor and he may plead non est factum.

If two persons are jointly bound [illegible] and the seal of one of them is torn [illegible]

[illegible] 212.
[illegible]
[illegible] 200.

[illegible] 70.

[illegible] 70.

[illegible]

[illegible]

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If the whole seal is avoided [illegible] of jointly and severally bound: for in the latter case it is void only as to that one the seal of which is broken off.

If two distinct obligations are written upon the same paper, and one of them is sealed entirely and the other [illegible], the latter is good and the other void.

60. [illegible] b
[illegible] 23. b
[illegible] 3.

And if a seal is [illegible] not torn off an entire deed, it is necessarily void in toto.

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Title by Execution.

(Lecture)

In Eng. law in former times the levying of an execution has become a common mode of acquiring title to land and our law on this subject differs from that of England. By the Com. law the only executions there on personal actions of the creditor originally liable were 1st The Fieri Facias. 2d The Levari Facias: and 3d The Capias ad satisfaciendum — But in neither of these could land be taken —

2. Co. 13.
Com. Dig. title "Execution" .. 12
3. Bl. 414.

1. As to the Fieri Facias: when this execution [illegible] only the goods and chattels of the deft. could be taken. And the property when taken was not delivered to the creditor but sold by the sheriff and the money applied to the debt of the creditor. However a chattel real as a term for years as well as the [illegible] chattels [illegible]

3. Bl. [illegible]
2. B. [illegible]
"Execution" C. 3
[illegible]
8. Co. 171.

Com. Dig. [illegible]
"Execution" [illegible]
[illegible]
[illegible]
[illegible]

[illegible]
"Execution" [illegible]
3. Bl. 4[illegible]

[illegible] [illegible]

When one [illegible] [illegible] [illegible] executors
[illegible] to the [illegible] [illegible] [illegible] [illegible]
sheriff may take the goods of the Defendant
[illegible] [illegible] [illegible] in possession [illegible]
[illegible] [illegible] [illegible] be taken upon
the execution [illegible] [illegible] [illegible] [illegible]
be [illegible] [illegible] [illegible] the Deft in the
execution [illegible] [illegible] [illegible] the
whole personal estate may be taken in exec
[illegible] [illegible] [illegible] separately. But when
neither of them [illegible] the lands of the Deft
be taken both of them [illegible] [illegible]
[illegible] indirectly [illegible] at [illegible]
as executor [illegible] [illegible] [illegible]
lands of the Deft [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] executors
[illegible] [illegible] [illegible] [illegible] either of
his executors. The [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] —
[illegible] [illegible] Execution the Body of the
Deft. could be taken. But this [illegible]
law was allowed only in cases where the
injury for which the judgment was reco-
vered, was committed [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] the [illegible]
[illegible] [illegible] [illegible] evil [illegible]
[illegible] [illegible] property [illegible] extreme jealousy
with which [illegible] [illegible] viewed per-
sonal Security: and Fourthly because it
would tend to [illegible] the end of the [illegible]
[illegible]: Hence at [illegible] [illegible] a judgment
was obtained in any other [illegible] [illegible]
[illegible] [illegible]", the Deft's [illegible]
[illegible] [illegible] of the two [illegible] [illegible]
[illegible]. But by the Stat. [illegible]
[illegible] [illegible] the [illegible] [illegible]
and the 25 [illegible] [illegible] [illegible]
attended [illegible] between subject [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

might

[illegible] Bl. [illegible]

[illegible]

[illegible] Bl. [illegible]

Real Contracts

might have recovered agt. the heir at law. Str. 1 Lev. 2. Gr. fol. 50. Salk. [illegible] Cro. [illegible] Com. Dig. title Covenant B. C 2.

3 Lev. [illegible] 1 Bl. [illegible] [illegible] Gr. fol. 50. But a former covenant was once held in the case above mentioned – the rule as between privies and subject was the consequence of the feudal restraint upon alienations. But since frequent adjudications

[illegible] Com. Dig. Covt. C 2. [illegible] upon an obligation of his ancestor the heir might at law have recovered agt. only the lands which the heir had by descent from his ancestor and this right was grounded in the necessity of the case. For the law subjected the heir upon an obligation of his ancestors and the heir's person was not liable: and the goods of the ancestor could not be liable for they

Plowd. 439. did not belong to the heir as assets but to the personal representatives: therefore if the lands had not been liable in this case the law would have given a right without a remedy. But even here the goods of the land

could

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or lands could be taken: but it was generally allowed to be taken by the creditor till the rents and profits should satisfy the execution. Though now by certain English Statutes, the land is liable in divers kinds of Execution.

1. By Stat. Westm. 2. 13. Edward I.

Plff. having obtained a judgt. may have an execution called an "Elegit." whereby the goods and chattels of the debtor must be taken and one half of his lands: the possession of which is delivered by the Sheriff to the Plff. who is entitled to hold them till his debt and damages are fully paid – under this execution however the goods and chattels are not sold as under a Fieri Facias: but they are taken appraised and delivered to the Plff. in satisfaction of his debt – and by the Stat. De Mercatoribus 13 Edward I and by Stat. 27 Edward 3. when the forfeiture of the recognizances under the Stat. merchant [illegible]

2. Bl. 161
3. Bl. [illegible]
2. Inst. 395

Tidd. Prac. 1014
2. Bl. 161
[illegible]

2. Bl. 160
2. Bl. [illegible]
[illegible]

and Staple all the lands as well as the goods and person of the Deft. might be taken in execution. But in these the use of land cannot be taken in execution: nor by any Stat. in England except under the Bankrupt Laws –

Act in [illegible] In Conn. there is but one kind of execution in personal actions and that is ag. the lands, goods and body of the Deft. But it is by no means indifferent as to the order of taking goods, person or land, for the Stat. is imperative and must be followed. In England they have different writs.

Stat. p. 28. Where goods are taken in execution they must be posted on a sign post in the town (vulgarly called whipping post) of the town or Society in which they are taken and are to be sold within 20 days.

But no levy of execution is allowable before a demand has been made to the Deft. to pay the amount of the execution [illegible] then the officer can levy upon the [illegible]

Real [illegible]

[illegible] the Pl[ainti]ff [illegible] to the [illegible] the Def[endant]'s personal property can be [illegible] to satisfy the judgment. Personal [illegible] [illegible] all be taken in preference to land. It has been settled here as in England [illegible] neither [illegible] could be [illegible] [illegible]; [illegible] to take [illegible] [illegible] which [illegible] [illegible] to be taken [illegible] [illegible] free [illegible] taken [illegible] [illegible] of a [illegible] on the effect of [illegible]. [illegible] settled [illegible] here [illegible] in England that [illegible] be taken [illegible] of the Def[endan]t [illegible] sufficient [illegible] to satisfy the [illegible] either [illegible] the land [illegible] be taken [illegible] the Pl[ainti]ff [illegible] the Pl[ainti]ff [illegible] [illegible] the Def[endan]t [illegible] [illegible] the [illegible] [illegible] the Def[endan]t

Sal. 7. h. 22.
[illegible] 282.
322.

[illegible]
[illegible] 370.
[illegible]
[illegible]
[illegible]
[illegible] 282.
[illegible] 222.

[illegible] 185.
[illegible] 281.

[illegible]
[illegible] 282.

[illegible]

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Conditions [illegible] [illegible] [illegible] [illegible] ascerta-
[illegible] [illegible] [illegible] [illegible] the [illegible]
[illegible] [illegible] after [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] the officer [illegible] [illegible] the person
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] very
different [illegible] the [illegible] [illegible] [illegible]
the [illegible] [illegible] released [illegible] [illegible] [illegible]
if he is released by the consent of the Plff
he can never put his [illegible] in any way
whatever; either on his execution or by
Death or Judgment. In [illegible] we have no
similar rules [illegible] [illegible] any of [illegible]
[illegible] the [illegible] in [illegible] as in Eng-
land when taken on execution. In England
in case of doubt whether the property in
question is the debtor's the Sheriff has power to
call a jury to find the fact of ownership
and their finding is [illegible] [illegible] But if
there be reasonable ground of doubt whether
the property is the debtor's or not the Sheriff
will [illegible] to take it. This is reasonable

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on the officer for if he takes property not the Defts he is not liable. 2. Saund. 283.

But if [illegible] after [illegible] [illegible] wrongly the officer suffers the Debtor who owned it to [illegible] it he is liable to the Sheriff. 2. Saund. 283.
and the seller is not responsible for the ownership of whatever he [illegible] to [illegible] –

If the first levy is not sufficient [illegible] with some in [illegible] subsequent levies may be made till the Execution is satisfied. But if there were enough which might have been taken and the officer neglects to take enough [illegible] no new [illegible] can [illegible] the officer is liable to the [illegible]. [illegible] if there [illegible] sufficiency after the officer has had an opportunity to take the levy he neglected to [illegible] [illegible] is [illegible] deduct it from any [illegible]. But if there is not sufficient 2 Saund. 282.
personal property to be found [illegible] the levy [illegible] [illegible]
[illegible] out of the [illegible] the [illegible] [illegible] may be taken [illegible] the [illegible]

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is extended to every [illegible] that [illegible] lands, &
the [illegible] cannot be taken in England. In
[illegible] all sorts of property is liable
to Execution except such as is expressly exempted.
It has been extended to all cases of
1 Cruise 36. lands and tenements. An equity of
1 Bl. Ab. 355. Redemption, has been holden to be a vesting Estate tho'
2 [illegible] it be a mere equitable right, and not in
most respects within the reach or cogni-
zance of Courts of Law. In England an
7 [illegible] equitable right is liable to Execution tho'
[illegible] this gives a Court of Law [illegible] which
has no jurisdiction over an equitable inte-
rest — [illegible] of [illegible].

As to the [illegible] of acquiring title by
Stat. [illegible] Execution by our law the Statute provides that
1 Swift 84. the officer [illegible] make a Return of
1 Swift 332. the debt [illegible] the selling [illegible]
[illegible] 282. can be taken within the bailiwick of the
St. [illegible] officer — If the debt be not then paid, [illegible]
[illegible] [illegible] [illegible] the Execution [illegible]
[illegible] 392. be levied on the Real estate.

P. T.

Real Property.

Ere real estate be taken on execution, [illegible] [illegible], personal or other, or personal property is tendered, no title is acquired in the land and the officer [illegible] over [illegible] [illegible], regularity of the proceedings must appear on the officer's return, no valid title is acquired, except in cases of [illegible] before the 1st of [illegible] 18[illegible]. The proceedings to that time are specially provided for by stat. For at that time though officers proceeded irregularly, the returns did not generally show the particulars, as they might. The Stat. was therefore passed confirming and rendering valid former extents, [illegible] the requiring greater strictness in subsequent cases. The estate levied upon is to be appraised by three indifferent freeholders of the same town, except where the town is [illegible], & the [illegible] in that case [illegible] from the next adjoining town. [illegible] the three freeholders are to be chosen by the Offi-

Sta. P. 103.

Sta. P. 284.
1 Bk. 74.

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Deft. one by the Plff. and a like no. by tenant

jointly, if they can agree, if they cannot

[illegible] the next justice [illegible] named [illegible] or if they

neglect to appoint [illegible] the Justice [illegible]

[illegible] all three. These men are to be

[illegible] [illegible] of the vicinity.

[illegible] holder [illegible] independent freeholder of

his freehold: though he would not be a

competent juryman. [illegible] relation

of consanguinity or affinity [illegible] as

[illegible] [illegible] or [illegible] disqualifies.

The [illegible] freeholder [illegible] not [illegible]

for an appraiser: but the appraisement

is [illegible] [illegible] not [illegible] [illegible]

[illegible] practice [illegible] [illegible]: [illegible] cannot

alter the line. [illegible] [illegible] [illegible] [illegible]

[illegible] that if a [illegible] [illegible] [illegible]

[illegible] and marry [illegible] without the

assent [illegible] [illegible] appointed an appraiser.

But [illegible] [illegible] [illegible] [illegible] very

[illegible] [illegible] set aside [illegible] [illegible]

[illegible] [illegible] except that [illegible] were

appointed

appointed by a Justice &c without giving his reason for appointing them &c has been held void. 2 Root 434. A return that the land was appraised by A. B. and C. appointed by a Justice &c but it did not appear that the parties refused or neglected to appoint &c has also been holden good. But Mr. Gould thinks both these incorrect. As to the "next Justice" it has been decided that these words mean any Justice of the town in which the land lies. 1 Root 141. 1 Swift 335. The last requisite, is that the officer must return the execution together with the endorsement upon it to be recorded in the town where the land lies and by the Clerk of the Court whence the writ of execution issued. All these, make the title complete in the Cr.: But it must be recorded in both places, or the title is not complete. 1 Root 481. 534. 1 Swift 333 335. Stat. f. 182. 3 As before observed the law [illegible] [illegible] in every town com-plied with [illegible] point and the mode of

Real Property

& acquired an inheritant title un-

[illegible] distribution – It was once held

that a copy of the record of the Court and a

mere certificate of the Town Clerk was

sufficient evidence of the title. But some

again, [illegible] differs from this deci-

sion – But it has been determined and

[illegible] correctly that a deed

of the [illegible] by the collector sufficient to

answer the execution [illegible] at any time

Smith v. Clark [illegible] — remaining to the [illegible] records [illegible]

tinued defeats the title and the land [illegible]

their possession the acquiring [illegible]

siste payment, as it ought to be: this is

consistent with the [illegible] of the law.

2 Root 15. 1 Swift 334. — The mode of acquiring [illegible] therefore

this in [illegible] the same [illegible]

[illegible] but whatever the interest of the

Deft may be [illegible]

[illegible] a part [illegible] the same

[illegible] the [illegible] term

1 Swift 33[illegible] — of years [illegible] must be taken. It has been

question[illegible]

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sometimes practised to lay the execution
on the growing crops when the Deft. is a
tenant at will and sell them as personal
property: but this seems not to be the regu- Swift 335-6.
lar practice under our Stat. law.
The most correct mode would be to take
all the interest the tenant has in the land
and appraise it. As to the mode in Eng-
land see Com. Dig. title Exon. C.4. Sal. 358.
By our Stat. if the Deft. suffers default by
means of absence from the State both Stat. [illegible]
when the writ of notice was taken out and 1 Root, [illegible] Swift 285. 335-6
Judgmt. recovered before execution issued
the Plff. in whose favour it is must give
bonds to abide the proceedings in case the
Deft. appears and makes tender of the debt
before execution is fully satisfied. This tender
must be accepted, or after being made
title cannot be obtained on the execution.
But no person except the Deft. or his repre- Swift [illegible]
sentative can take advantage of the error:
[illegible] investigating [illegible] or through the
proceedings

proceedings which render the tender unneces-
sary yet as they are [illegible] entirely [illegible]
right and judicial decisions [illegible] except the Deft. has no reason to com-
plain — Without such tender given the Deft.
may reverse the judgment. All executions
in Conn. must be made returnable in
60. days or the next term of Court, provi-
ded that cannot come in less than 60. days
from the date of the execution. If one is
made returnable according [illegible] if the
very next term be in less than 60. days the
return need not be made till the follow-
ing term next but one. But an execution
from a single magistrate must always
be returned in 60. days: for a single
magistrate does not hold his Court at regu-
lar stated times, and of course, no regard
to such need be had. From this it follows
that if an execution is not after the return
day it is irregular and voidable [illegible] required
[illegible] in England an execution be

fully

[illegible] 2 [illegible]

1. [illegible]
2. [illegible] 281.
[illegible] 282.

[illegible] 282.

[illegible]
[illegible] 81.

(Exec: Liberty)

fully satisfied no return need be made: otherwise if only partly satisfied Sal. 3.8. Bac. Ab. title "Execution" D. - Here a return must be made in either case Our Com. practice has settled it that if an execution be partly levied before it has expired, the remainder may be levied although it be out of date.

But here and in England the execution only vests the title to property and does not cut the possession of the Deft. because if it did, the Deft in the execution might be put out by a void levy and he is allowed to retain his [illegible] to contest the validity of the execution. If he [illegible] remains in possession the Deft. may bring an action of Ejectment and will recover by virtue of his execution title. Alias Executions in Court are issued of course to the Clerk and he then issues them in execution alias

But if an Execution is incompletely satisfied [illegible] void levy, the Plff. can

2. Bin. 85
3. T.R. 295. 8
2. Bac. Ab.
title Exec.
[illegible]

2. Bin. 6.

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can never take out an alias of the Elegit [illegible] order. [illegible] apply [illegible] the [illegible] [illegible] an [illegible] either [illegible] [illegible] a neither [illegible] [illegible] to be entitled to the [illegible] conse-quently [illegible] where the property was [illegible] to be [illegible] the [illegible] it afterwards turns out [illegible] [illegible]: ie after the [illegible]

[illegible] of satisfaction has totally failed: as when the party is [illegible] in [illegible] or [illegible] a new execution will be [illegible] in case [illegible]. It was for-merly a matter of doubt [illegible] settled by a [illegible] Stat. [illegible] [illegible] there is no time limited for taking out an Execution: But [illegible] and [illegible] be taken out in a Judgment within a twelvemonth and a day from the [illegible] renders [illegible] out of date: i.e. [illegible] will not be allowed [illegible] a [illegible] on the [illegible]

[illegible]

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[illegible] issues. At Com. law the Scire facias was allowed in real actions, but not in personal: in these last it is granted in virtue of Westm. Statute 2.

Com. Dig. [illegible]
[illegible] 2.
[illegible]

Both here and in England an Execution can be claimed or sued out by the parties only who are privy to the Judgment and their legal representatives. In a real action if the Plff. die after Judgment and before Execution, his heir may sue out a Scire facias. But if the action be personal his Exec.r or Adm.r may obtain execution by a Scire facias, which however is not matter of course for it may be a question whether [illegible] heir Exec.r or Adm.r [illegible] entitled to a Scire facias. If a man obtain an Execution but die before the [illegible] the officer [illegible] as though the Plff were alive: for the right [illegible] obtained [illegible]

Com. Dig. [illegible]
[illegible] Bladen [illegible]
[illegible]

Com. Dig.
[illegible]
[illegible]

Com. [illegible]
Com. Dig.
[illegible] II
Cleaver [illegible]

[illegible]

execution in favour of the [illegible] [illegible] before that time [illegible] [illegible] proceed [illegible] [illegible] of the [illegible] 2 Bac. Abr. 88. 2 Ca. Conf. for [illegible] [illegible] is ascertained &c.

And if there be an Exec.r [illegible] [illegible] 1 Ro. 888. [illegible] estate of the Exec.or who obtains Judgment and the Exec.or attains full age before execution, he may sue Execution by sci fa.

On the other hand if [illegible] [illegible] Execution may issue. If Judgment is obtained against two and one die before Execution taken out the Plff. may take it out agt the survivor by means of a scire facias: but not otherwise for before execution ought not to issue [illegible] one alive [illegible] [illegible] case. He must also shew the death of the other parties. If one die before execution is taken out, leaving lands in fee simple to his heir: execution may be taken out by scire facias agt the heir, but in no other way. And then either his person

[illegible] [illegible] Rep. 52. 22. Aug. 26.

2 Bac. [illegible] [illegible] [illegible] 220. Cro. [illegible] 86.

or

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or personal property will be liable. The reason is that a scire facias ought to lie, as it is not certain that any execution ought to issue against the heir: his rights are [illegible] [illegible]. If the heir is under age the parol must demur which stays all proceedings till he attains full age. The Plff may also have execution agst the executor or administrator where the Deft dies after judgment and before execution taken out.

2 Bac. Abr.
3. 4.
1 Mod. 90.

[illegible]

It would seem that this rule cannot obtain in Connt for it would defeat the average [illegible]. If an execution be levied [illegible] before the Defts death it is not necessary to sue out a scire facias.

Conn. Dig.
Ex. [illegible] 2.
Cro. El. 181.
2 Ventr. 218

If husband and wife are subjected in a judgment and he dies before execution taken out it may be taken against the wife alone: so in any case where two persons are subjected in judgment and one dies before execution taken out

Bac. Abt.
[illegible] Ex [illegible]
[illegible]
Cro. El. 518.
520.

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18th Feby. 1812.

Fraudulent Conveyances

Lecture

This says Mr. Gould is a very important title in the law, particularly in the practice. — In the English Stat. 13 Eliz. and a similar one in Connt. all conveyances, bonds, suits, judgments, executions and contracts made to defraud the creditors of the grantor or party to be bound by the act, are fraudulent and void. This is usually called the Stat. agt. Fraudulent Conveyances, though it not only affects Conveyances but bonds &c.

Stat. Ct. 35, 5

These Conveyances &c. are all utterly void as agt. the creditors of the grantor or party intended to be bound & their representatives, executors and assigns. There is a proviso in the English Stat. that the act shall not extend to any conveyances &c. to a bonâ fide purchaser having no notice of any fraudulent intent. This proviso

2 Bac. Ab.
tit. "Fraud."
Com. Dig. tit. C.

is not in the Conn.t Stat. but the Courts would [illegible] not conceive, there is always a [illegible] [illegible] [illegible] [illegible] [illegible] within the [illegible] public [illegible] [illegible] [illegible] [illegible].

[illegible] There is also another English Stat. 27 Eliz. by which all conveyances made to defraud
[illegible] note
bona fide purchasers are rendered void. This Stat. contains a similar proviso with the other, that it shall not be construed to [illegible] [illegible] [illegible] those which are in the nature of the Com. Law. In former times these were holden to be in affirmance of the
Cowp. 432. Com. Law only as resp.t prior purchasers or
3 T.R. [illegible] creditors, but not as resp.t subsequent ones.
2 Stra. [illegible] [illegible]
5 Coke. 80. But it is now holden that every object produ-
[illegible] 2 [illegible] ced by these two Statutes might have been ob-
tained by the principles of the Com. Law.

Pre. Ch. [illegible] As between the parties to a fraudulent
104. 489. conveyance the act is binding. If A
conveys to B to defraud the creditors of the
latter: such creditors may treat the conveyance

as

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is fraudulent: for it is good between the parties by an express clause in the Stat. they are only void agt. the creditors.

And a fraudulent conveyance within the 27. Eliz. is void as agt. a subsequent purchaser for a valuable consideration, even though the subsequent purchaser have notice of the former fraudulent conveyance: for though he have notice &c, only of that which the law has declared void. The propriety of this rule, has in some late cases been doubted*

5 Co. 60.
Cowp. 711.
2 Br. Ch. 148.
9 East 59.

* [illegible] 335.
1 Taunt. 271.
[illegible]
[illegible]

The same rule obtains in a Court of Equity. It is also well settled that a fraudulent conveyance made to defeat creditors is void as well agt. subsequent as agt. prior creditors: for the statute makes no discrimination at all.

2 Br. Ch. 148.

Stile, 446.
1 Br. Ch. 90.
1 Atk. 94.
2 Atk. 600.
[illegible] 64.

The most usual cases of fraudulent conveyances, are those that are secret and voluntary or such as are made without consideration. But these are not

the

[illegible]
2 Atk. 481.
520.
[illegible]
[illegible] and a lien [illegible] being one [illegible] subject.

the only cases: for a conveyance that is made for an adequate and even a good consideration if made on the one hand and received on the other with intent to defraud, will be considered as fraudulent and void. In some cases arising under these statutes the fraud is actual and in others constructive. The latter will be mentioned hereafter.

[illegible] 35

It is not necessary in all cases that there should have been an intention to defraud creditors, in order to render the conveyance fraudulent. Where the fraud is actual it is not necessary in the purpose of invalidating the conveyance, that the creditor or purchaser should actually have been deceived by it: it is sufficient that the conveyance was made with actual intent to defraud. The intent to defraud may be inferred from circumstances and it is not necessary that the object or [illegible] to defraud should be proved by direct

[illegible]
[illegible]
[illegible]
[illegible] 88.

evidence

evidence for if a deed made is voluntary & is regarded to be a conveyance for a valuable consideration afterwards made of the same thing: these two facts are of themselves sufficient evidence of fraud.

And if a fraudulent conveyance is defeated by a subsequent conveyance for a good consideration as it is called by the fraudulent conveyance that though this is not quite conveyance, because it is void by the non performance of a condition therein contained it does not restore the former fraudulent conveyance: for the Stat. has once destroyed such conveyance.

[illegible]
[illegible]

It was formerly established that if a conveyance was made to defraud a particular creditor of the grantor no other creditor could take advantage of it. But it is now well settled that if a conveyance is made to defraud any one of the grantor's creditors it is void as to all. Hereafter will be mentioned the circumstances of fraud: but

Co. 93.
[illegible]
Palm. [illegible]
[illegible] 43 [illegible]
Dyer. 192.

as

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At present the rule will be noticed for the purpose of drawing a distinction between the Stat. 13 and 27 Eliz. The circumstance of the grantor being indebted at the time of the conveyance is a badge of fraud under the 13 Eliz. as against his creditors. But it does not furnish any presumption of fraud, as to purchasers to whom he sells under the 27 Eliz.

2 H. Bl. [illegible]
Cowp. 711.

According to many weighty opinions, the want of a valuable consideration in a conveyance of land, i.e. a voluntary conveyance, is not per se fraudulent but only furnishes evidence of fraud.

[illegible] 268
Cowp. 434
[illegible] 465
[illegible]
[illegible] 75.
[illegible]
Sugd. V. [illegible] 508
[illegible] 66. [illegible]

But on the contrary there are many opinions (and these have lately been sanctioned by the Court of Kings Bench*) which hold a voluntary conveyance to be per se fraudulent against subsequent purchasers by the 27 Eliz. This is the law, seems now to be settled the rule, that a voluntary conveyance is per se fraudulent and void

9 East 59.
*Doe and Rusmuning
[illegible]
2 Ves. 10.
[illegible] 261.
[illegible] 1019.
[illegible] 194.
204

as agt. subsequent bonâ fide purchasers, and not vice versa is allowed to be shewn. This, Thus, if A. should make a voluntary conveyance to his son, without any kind of intent to defraud, but afterwards for a valuable consideration makes a conveyance to a stranger; there the first conveyance is held to be fraudulent and void.

But this last rule, Mr Fonblanque conceives, does not hold under the Stat. 13 Eliz: i.e. a voluntary conveyance is not considered as per se fraudulent as to subsequent creditors. If the grantor to be sure were embarrassed at the time, such conveyance would be almost decisive evidence of fraud; but if he were not so, such conveyance might be good. In the construction of these two statutes, greater favour has always been shewn to purchasers under the Stat. 27 Eliz. than to creditors under the 13. Eliz. And this, Mr Fonbl. thinks, is very properly; for a purchaser always advances

1 Atk. 412.
2 Vern. 327.
3 Atk. 10.
1 Fonb. 268.
Rob. 190.

1 Ves. Jr. 334.
3 Bac. 143.
1 P. W. 491.
Sal. 449.
2 Vern. 564

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advanced his money in contemplation of the thing sold or conveyed to him and does not advance it upon the personal responsibility of the grantor as the creditor does. And he is considered to have more equity on his side than a creditor who it would seem had taken no pains to secure himself. There is also some little difference in the phraseology of the statute in favour of the purchaser.

Rob. 76. 18. 22 a 24. 2 Atk. 81. 8 Ves. 692 a 529. 4 Cruise 388. 393. 398. And it has been frequently settled that family settlements, voluntary conveyances, for the preferment of ones children &c are good as agt creditors if the grantor were not involved in debt at the time of the conveyance & even as to purchasers -

Settlem. **Marriage** is always in law a valuable consideration. A conveyance made then

Rob. 103. 105. 260. Sugden 432. 2 Bl. 296. 4 Cruise 24. 388. 393. in consideration of marriage is never considered as fraudulent: and cannot be set aside on the ground of its being voluntary either by creditors or subsequent purchasers. This principle has a [illegible] in consideration of marriage is entitled to the benefit of the Stat. 27 Eliz. agst a prior voluntary conveyance. Thus if A. voluntarily conveys to B. and afterwards in consideration of marriage conveys to C. may have the benefit of the Stat. agt the voluntary grantee B.

Rob. 10. 123.
7 Vesey. 398.
4 Cruise 383.

There is however a diversity to be observed between a marriage consideration and any other valuable consideration. If a conveyance be made to A. B. and C. for a pecuniary consideration received of A. only then B. and C. are protected as well by this consideration as A. himself. But if in consideration of marriage a conveyance is made to one of the parties to the marriage and the issue with remainder to collateral relatives; this consideration will protect the parties to the marriage and their heirs but not the limitation to collateral relatives whose advancement is not one of the objects of the marriage. The authorities however

Rob. 99. 0. 123
Ld. 784.
Burr. 604
7. Co. 26 b.
2 Mod. 32.
[illegible]
[illegible]
[illegible]
[illegible]

an

in these subjects are divided. But Mr Justice [illegible] believing the better opinion to be in favour of the rule as he has given up the ground of his [illegible] to be true. That [illegible] constitute in the first case the same measure to the consideration but at any rate it is presumed that they might have done so. Even in the case of the Collateral Relations. It [illegible] however [illegible] said in the case of Roe and Rutledge that such a limitation to collateral relations is good agst. creditors. This however is an isolated opinion [illegible] and Mr Justice [illegible] thinks it [illegible] [illegible] by the other authorities.

Opinion of Ld Mansfield Doug. 711 Roe and Rutledge.

But though marriage is a valuable consideration there is an essential difference between a conveyance in contemplation of Marriage made before and one made after Marriage is celebrated. A settlement made after Marriage not in pursuance of any agreement before Marriage

[illegible] 5 [illegible] 109. 15. [illegible] 23 [illegible]

[illegible] 287 [illegible] 6.

is

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[illegible] made any new and valuable consideration is considered as voluntary, and therefore fraudulent and void ag^t purchasers under the Stat. 27 Elizabeth. Such settlement however where the party making the conveyance is not indebted at the time of making it have been usually supported ag^t the subs. creditors of the grantor. The reason of the difference between conveyances made before the marriage takes effect, and such as are made after, is, that in the one case the conveyance is the procuring cause of the marriage, and therefore valuable; [illegible] the conveyance is made after, marriage [illegible] not [illegible] from this. [illegible] appear that such a conveyance is [illegible] void and [illegible] ag^t creditors [illegible] attended with actual [illegible] fraud. [illegible] a settlement made after marriage [illegible] been [illegible] consideration [illegible]

Cowp. [illegible]
[illegible]
Sid. [illegible]
P. Wms. 18. n.
[illegible]

[illegible]
[illegible]
[illegible] 8.
[illegible] 2 – 8.
[illegible] Ch. 14
[illegible]

as voluntary, still if it be made in pursuance of an agreement made previous to
1 Eq. Ca. 35. marriage it will be good both agt the cre
2. Ventr. 193. ditors and bona fide purchasers of the gran
1. Str. 237. tor or settlor. The consideration in this case
2. Vern. 702. which supported the agreement also supports
3 [illegible] the conveyance which is made in execution of it. But if the settlement made in
Amb. 88. pursuance of an original agreement
2 Vern. 288. vary from such prior agreement it is vo-
2 Atk. 440. luntary pro tanto as it varies: for that
[illegible] 245.4 part which varies cannot be made in pursuance of an original agreement and therefore cannot attach to itself the consideration of marriage. This rule holds not only as to the subject of the agreement and conveyance but also as to the quantity of interest i.e. the conveyance is only good for the same tenements and for the same estate as the one agreed for.

Since the rule that a settlement made after marriage is good if made in

pursuance

pursuance of an agreement made before marr. though the previous agreement were by parol: because this is a good consideration for the subsequent conveyance though it could not have been enforced. There are many distinctions arising under this division of the subject.

3 Atk. 457. 2 Ves. 30. Rob. 222. 228.

Where the agreement made before marriage has not been executed a Court of Equity will not enforce it agt. subsequent purchasers and mortgagees without notice of the agreement: though that Court will enforce it agt. mere volunteers and agt. the creditors of the husband. The reason of this is that in the enforcing of agreements specifically Chancery exercises its discretion. And here the rule prevails, that where the equity is equal the legal title shall prevail. And in this case the equity is equal because the mortgagee and purchaser acted without notice of the agreement and thereby have the

2 Ves. 304. 1 P.W. 622. Salk. 60. Rob. 227-8. 230. 124. -2.

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the legal title (yet, had the Husband executed such previous agreement the wife might have held, even agt. the purchasers or mortgagees. — Also a settlement after marriage and even without any prior agreement, or without any other consideration than that of providing for one's family, is good as agt. the subsequent creditors of the Husband both at law and in equity. Here again appears the preference given to ~~creditors~~ purchasers over creditors. — Whenever an application is made to a court of equity to correct a settlement made after marriage in pursuance of an agreement before that, court will never afford it, relief so far as to defeat a purchaser for a valuable consideration, even though he had notice. because says Roberts a purchaser is not presumed to be acquainted with rules of equity as he is with those of law: and therefore he not supposed to know that equity can correct.

Rob. F. C. 245.
187. 191. 224. n.
2 Ves. 10
3 Atk. 520.

Lomb. 288.
1 P. W. 30.
Rob. 225.

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correct such mistake, the late [illegible] Gould says does not appear to him to be very reasonable: and he cannot conceive that the purchaser's ignorance of the rule ought to excuse him: for though he may not know the rules of equity he knows of the agreement wherein there exists at least a meritorious consideration.

But where the articles, made after marriage in pursuance of an agreement made before, require no correction, the persons claiming under them, may have them enforced ag^t. purchasers with notice, because here the terms of articles which are not defective. — If a man for a valuable consideration make an executory agreement for a purchase but with notice of a prior voluntary settlement a Court of Equity will not enforce such executory agreement ag^t. the prior voluntary settlement. For in this case the purchaser has not the legal title and he has no equity.

Rob. 230-4.

Rob. 235.
1 Ch. C. 287.

5 Bo. 60.
2 Br. Ch. 46
& case 59.

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A recital in an agreement for a settlement made after marriage that it was
[illegible] in pursuance of an agreement made before
Pr. Ch. 101 marriage is, with slight & concomitant
[illegible] facts sufficient evidence of a prior agreement. And a settlement made after
marriage upon a new and valuable consideration occurring at the time, is not considered as voluntary. So if a Husband
2 Atk. 511. during coverture, make a settlement
Ver. 1. 92. in consideration of the wife's estate being
113. 123. 1 P. W. 16.
2 Ves. 40. 46. settled for his benefit: this is not considered
as voluntary, but is good. So also if a set-
2 Ves. 8. tlement is made during coverture in consi-
[illegible] deration of a settlement or portion given to the
Husband by the friends of the wife, it is
deemed valid both agt. the subsequent cre-
ditors and purchasers of the Husband.
1 Ves 209. Nor is it any ground of objection in the last
* to the validity of the settl. case,* that the stipulated portion has not
been paid to the Husband: for the agreement
itself to pay the portion is a valuable con-

sideration

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consideration. Thus if a Husband being obliged to resort to Equity to obtain his wife's portion is required by the Court to make a settlement upon her as a condition of a decree in his favour, such settlement so made will be good ag.st both creditors and purchasers though made after marriage: for the settlement is a Condition on which he recovers his portion.

2 Atk. 420
1 P. Wms 459
3 P. W.ms 305
Rob. 278 9
288.

So if the trustee of the wife's property require a reasonable settlement to be made on her by the Husband as the condition of conveying over her property to the Husband such settlement will be good and valid if made. For here as the Husband cannot recover more than equity would have compelled him to the title is the same. But if the Husband [illegible] can make a settlement to be made when the trustee resigns the property to them readily and without consideration that settlement is voluntary and void against subsequent purchasers.

Pr. Ch. 22
Com. B. 21
1 Atk. 190

[illegible]
3 P. Wms 606
[illegible]
1 Ves 535
2 Atk 357

But

Post Nuptial Settlements

But the question as to whether the settlt is made as a voluntary depends on the circumstances of the Husband being solvent or not at the time of the settlement. But in the case of the

2 Ves. 16
Atk. 190
[illegible]
[illegible]

husband being [illegible] before the settlement the [illegible] of the Husband's creditors occurs a bonafide settlement it would be considered as voluntary as to the creditors. These are all rules for Courts of Equity. What a reasonable settlement is depends upon the circumstances of the case.

[illegible]
2 Atk. 420. 28
Cr. Ba. 8.
3 P. Wms [illegible]

Again: if in Equity in whose hands there is a legacy belonging to the wife require a reasonable settlement to be made upon her by the Husband as a condition of his obtaining the legacy, the settlement so made will not be considered as voluntary, but good and valid; for the case is the same as that of the creditors; and as the Husband is not here entitled to a Court of Equity to [illegible] because he cannot and the Creditors, by the [illegible] [illegible]

the

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same, than that Court would have required. It seems however, that if a feme covert have only an equitable title to a chattel real, the Husband may dispose of it even in equity without the condition of making a settlement. It follows then from this rule that a settlement made in consideration of receiving such a chattel will be considered as voluntary. [illegible] in several cases [illegible] the distinction between the [illegible] [illegible] it been decided that [illegible] [illegible] [illegible] and [illegible] that it has been always [illegible] as without [illegible] [illegible]

1. Vern. 7. 8.
1. P. W. 245
2. Vern. 710.
4. B. C. 29.

There are some cases in which a disposition or [illegible] by a woman to a third person, or even to her own use in the [illegible] of her Marriage, are considered fraudulent and void as to the Husband under certain circumstances. Such is the following [illegible] case.

Sole Property

1. If a woman before any treaty of marriage is in fact reserving an exclusive dominion over her own property with a view to any future (her marriage) the husband whom she afterwards marries, having received no settlement, and when her conveyance [illegible] cannot be set aside upon application even though he had no notice of such settlement. Such a disposition to be fraudulent requires an actual fraudulent intent.

2 Br. Ch. 345
2 Cox 28.
2 Vern. 270.
Hill. 536.
1 Ves. 5 [illegible]
2 [illegible] 4 [illegible]

2. But if a single woman pending a treaty of marriage or even in contemplation of marriage with a particular person whom she afterwards marries, make a disposition of her property, reserving an exclusive dominion over it to herself, it will be set aside in favour of the husband.

2 Br. Ch. 345.
2 Ch. C. 41.
2 Vern. 17.
2 Bac. 292.
1 Sch. 259.

And even in the first case, if the husband make a competent settlement upon the wife, he may be relieved agt. the conveyance, that she has made in her own favour upon the ground of fraud [illegible]

2 P. W. 33.
Rop. 152
239

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inferable from the want of notice, for he is supposed to make the settlement when in consideration of the property which he was to obtain by her.

3. But if a woman in contemplation and even pending a treaty of marriage make a settlement for the purpose of her children by a prior marriage such settlement will be good agt. the husband tho' he had no notice of the settlement is made. And the reason of the difference between this, and the case before mentioned is the obligation which parents are under to support their children. Such settlement has been considered as good and valid not only as agt. the intended husband but as agt. [illegible] [illegible] subsequent bona fide purchasers. But Ld. Eldon in the late case of Lee and [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] purchasers [illegible] [illegible] the [illegible] [illegible] [illegible] though the husband [illegible] [illegible] [illegible]

[illegible]
1 P. Wms. 260.
2 Vern. 292.
Bunb. 10

1 Atk. 258.
[illegible]

[illegible]

Ves. 35.

a

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a settlement on the wife without notice of the settlement made by the wife on the children. But on the other hand if the Husband has made a settlemt. upon the wife which settlement was made or induced by her intentionally concealing the fact of the settlement made on the children and her holding out false appearances to him this amounts to actual fraud and therefore the settlement upon the children will be set aside in his favour in Chancery.

2 [illegible] 533.
2 Bro. Ch. 301.
Rob. 354-6
357-360.

And finally if a woman on the eve of marriage make a voluntary conveyance to a stranger it is void as agt. the Husband. But in this last Case emg it must be taken for granted that the Husband has no notice of the conveyance at the time of the marriage.

1 Fonb. 2. 282
2 Ve. 684

And on the other hand a wife has been in general cases relieved in equity agt. clandestine agreements by the Hus band

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husband with [illegible] prior to the marriage on the eve of coverture. But the law Cts. not so easily set aside conveyances made by the husband in favour of the wife as vice versa. The case in which the Court will relieve ag.st the husband in favour of the wife, must be where there has been an actual fraud committed on her, and her expectations have been excited and in which if these acts of which she complains are not set aside she must be disappointed.

3. P.W. 55. 74. 7.
Pr. Ch. 131.
Rob. 350. note.

Lecture

Who can take advantage of the Stat.s 13 and 27 Elizabeth. Lecture

And first of the 27 Elizabeth

Under this enquiry the general rule is that no other than a purchaser bona fide and for a valuable consideration, can avoid a prior voluntary conveyance under the Stat. 27 Eliz. [illegible] subsequent voluntary purchaser

3. Co. 81.
Comb. 735. 712.
Salk. 64.
3. Mod. 356.
Cr. El. 445
Bur. 396
Rob. 369. 372.
382. 425.

therefore

(Real Property)

[illegible] conveyance. [illegible] valuable consideration; and [illegible] with [illegible] conveyance [illegible] conveyance [illegible] of [illegible]

But a purchaser [illegible] consideration of natural relation only cannot set aside a prior voluntary conveyance in favour of a mere stranger. [illegible] to a [illegible] consideration.

[illegible] conveyance in favour of her [illegible] made after [illegible] there is a valuable consideration. [illegible] in which it has been [illegible] conveyance, has been [illegible]

pre-

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[illegible] the priority with [illegible] prior [illegible] a bona or voluntary conveyance: the [illegible] does not think the rule a good one; nor does he see any reason in this case why the trusted plaintiff should not be allowed to avoid the conveyance, as the payment of debts is a valuable consideration.

But with regard to conveyances upon valuable consideration, where one makes a purchase upon a valuable consideration it is said that the mere inadequacy of price is no objection to its setting aside a prior voluntary conveyance.

[illegible] Rob.s 57

But inadequacy of price accompanied with circumstances indicating collusion between the parties to overturn a prior voluntary conveyance may be sufficient objection to the purchaser taking the benefit of the stat. 27 Eliz.; for in this case he is not a purchaser bona fide; and if this were not the case the binding force of the prior voluntary conveyance upon the

[illegible] Rob.s 57

whom the grantor might be eluded. And though mere inadequacy of price is no objection while gross inadequacy amounting to only a colourable consideration is a sufficient objection to the purchaser, taking the benefit of the Stat. And where there is no collusion in the case, yet if the subsequent purchaser for an inadequate consideration appears to have over-reached or to have cheated the grantor, he cannot set aside a prior voluntary conveyance for no man by practising fraud can entitle himself to the benefit of that Stat. which was made for the protection of honest men. A mortgagee though not mentioned in the Stat. has in the construction been deemed to be within the of it, and is entitled to the benefit of it. But this material distinction is to be observed between a purchaser and a mortgagee. A mortgagee being in equity a purchaser only for security and to the extent of his debt the voluntary

[illegible]
[illegible]
[illegible]

[illegible] 420.
[illegible] 124.
2 Vern. 240.
[illegible]
[illegible] 282.

[illegible]
[illegible]

voluntary conveyance is void as ag^t him only per Stat.: it follows then that the voluntary purchaser will hold the equity of redemption ag^t the Mortgagee notwithstanding and upon paying the debt is entitled to the land. But in the case of a purchaser (in the broader meaning of the word) it would not be sufficient to refund him his purchase money but he is entitled to the land itself. It seems doubtful however whether a Court of Equity will ever grant a foreclosure decree in favour of a subsequent voluntary purchaser though it will often do it in favour of the original mortgagor— [illegible] could [illegible] not find this rule any where adjudged, though Roberts thinks it will not be granted &c.—

[illegible]
Rob. [illegible]

It seems also that a surety to whom a conveyance is made to indemnify him is a purchaser within the Stat.— The opinions however are not all agreed on this point and Roberts considering the rule as

[illegible] 305.
[illegible] 70.
Dyer 295 a
[illegible] 783.
Roberts. 84.
Rob. 374

being

very questionable: But Mr Gould said he cannot conceive that the case can be brought out if the conveyance is made by way of Mortgage, and imports to be what it really is, an indemnity, which is certainly an exception, and he thinks undoubtedly valuable. If indeed the Conveyance is absolute on the face of it he thinks it would not be entitled to the benefit of the Sta. Eliz. but it would be set aside in favour of such Conveyances as are entitled to the benefit of it because the conveyance is an absolute transfer of property when the eventual payment of any consideration whatever is altogether contingent. Besides such conveyance in its nature implies a secret trust for the benefit of the grantor, and if there be no secret trust it is an undue advantage taken of the grantor, and therefore void under the 27 Eliz. And there have been frequent decisions to this effect by the Sup. Court and Court of Errors in Conn.

Beach and
Battle and
Neavelle and
Rannie
Sup. Court

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To constitute a purchaser within the Stat. 27 Eliz. the purchase must be of the same real thing which was the subject of the ~~[illegible]~~ prior voluntary conveyance. And if the purchase is not of the identical thing the purchaser can take no benefit of the Stat. Thus where A. having a lease for 99 years upon condition, granted a lease for 90 years absolute, and then sold it to B. for a valuable consideration, it was holden that he was not a purchaser within the Stat. The conveyance also contained the words of his interest in the land which conveyed the granting interest as between themselves tho' it did not set aside a prior voluntary conveyance. But if a valuable consideration be paid, it is immaterial what species of interest is purchased. in this case, it is not material whether the purchaser had an actual positive interest, or the mere by relinquishment of an interest. A lessee for years, for a valuable consideration is a

Lecture
Vol. 3
Rob. 345.

Rob. 373.

a

a purchaser within the stat. and must take the benefit of it: and it is not material tho' the consideration only is a reservation of rent upon the lease. It has been said that to render a conveyance fraudulent within the stat. he who makes it must be the same person who afterwards conveys to a bona fide purchaser. This rule obtains only in those cases where the person making the second conveyance is a stranger to the estate at the time of making the conveyance. As where there was grandfather, father and son, the grandfather made a voluntary conveyance to the grandson and died: the father makes a mortgage for a valuable consideration and dies. It was holden that the mortgagee could not set aside the voluntary conveyance because the father had no interest in the estate at the time of making such conveyance. On the other hand if the person making the second conveyance has the estate

2 Vern. 224
Co. Ju. 61.
2 Bl. 1019.

1 Vern. 105.
Rob. [illegible]
7. 38

estate in him at the time when he made it though he was not a party to the prior voluntary conveyance still the subsequent purchaser for valuable consideration may take advantage of the voluntary conveyance. And if A. makes a fraudulent conveyance to B. and then makes a voluntary conveyance to C. and A. sells to D. for a valuable consideration: now D. cannot avoid the fraudulent conveyance for at the time, that the fraudulent conveyance was made to B. C. was not a party and had no interest at the time in the estate, because B. had the first conveyance and has equal merit with C.

6 Co. 72.
Rob. 379. 385.

Moore 833.
Rob. 383-4.

And it seems to be settled in equity that a trustee under a voluntary ~~conveyance~~ settlement cannot become a bona fide purchaser so as to avoid the settlement. For he must, to be entitled to the benefit of the Stat. 27 Eliz. be a purchaser bona fide and for a valuable consideration

3 Ves. [illegible]
3 P. W. 262.
Rob. 386

And

And if a trustee by the direction of the cestui que trust makes a voluntary conveyance he cannot afterward without the direction of the cestui que trust, make a sale to a bona fide purchaser without notice so as to defeat the voluntary conveyance — because the second conveyance is made in equity by a stranger to the first. But a person who makes a purchase in his own name with the money of another for the use of another is a purchaser within the Stat. and may set aside a prior voluntary conveyance: for he acts in pursuance of his trust and takes advantage of the Stat. for the benefit of the cestui que trust - And a person purchasing any rent profit or commodity within the land may be a purchaser within the Stat as well as if he had purchased the land itself and will set aside the prior voluntary conveyance quoad the rent profit &c. And in general all incumbrances bonâ

Ver. 15. Hob. 39.

3. Co. 82. Vin. Abr. title Volun. Conveyance D. 2.

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bona fide and for valuable consideration to purchasers within the Stat. of Elizabeth, is a mortgagee of a Stat. merchant or Stat. staple, is a purchaser within the Stat. These Statutes ag. fraudulent conveyances, relate as well to the transfer of real as personal property, yet in the application of them to these different kinds of property there is sometimes a material difference. When there is a voluntary conveyance of money or any other personal chattel, the thing is consumed or lost, or spirited away by the fraudulent grantee so that it cannot be found, before the creditor can take it in his execution, his remedy as to the property is gone forever. For his only remedy under the Stat. is to levy his execution upon the specific property. Now in the case of land or chattel real this result can never happen, because the specific thing cannot be consumed or lost. There is however both in England and [illegible] has been

5 [illegible]
[illegible]
Cro. [illegible] 450

9 [illegible] 123
1 Day. 38.

penalty for the creditor and purchaser [illegible] be given for the penalty inflicted by the stat. [illegible] either [illegible] of the fraudulent [illegible] [illegible] to the case of personal property the amount of the penalty is the whole value of the property, whereas it is but [illegible] [illegible] the forfeiture ordinarily is only one year's rent of the land, which [illegible] in this latter case prevents by way of punishment of the offender.

Rob. on Fraud. Conv. 13. & note.

[illegible] it seems to be the opinion of Roberts, that a voluntary gift of money is not within the Stat. Eliz. But Mr. Roberts says he cannot perceive on what ground this rule stands: for he sees no reason at all if the creditor can levy his execution upon the specific money, why he should not.

Rob. on Fr. Conv. 93. 429.

Where a bond has been given by a man to a woman in consideration of an injury done to her by her seduction: this bond is considered as good as between the parties, though void as to the creditors of the obligor. That is, [illegible]

Lechmere 2 Mod. [illegible] 2 Blk. [illegible] [illegible] 186. 188.

[illegible]

supposing the destruction to have taken place previous to the time of giving the bond.

And upon the same principle in which a bond to raise agt. creditors in a suit of equity, a conveyance upon the same consideration would be deemed bad as agst creditors and purchasers for value at law.

It is said that a conveyance to trustees for the payment of the grantor's debts where no one of the creditors is party to the deed is void as agst subsisting creditors and bona fide purchasers. This is on the principle of its being voluntary and the trustee a stranger to the consideration — This seems to have been deduced from decisions there being none expressly in point. Ld Eldon in [illegible] which doubts the rule: because though the trustee be a stranger to the consideration yet if made to the use of the creditors it is presumed to be done with their consent till the contrary appears. It is clear however that if a creditor be a party to such conveyance, it is

good

[illegible]

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good: and that agt. a creditor not a [illegible] in the trust, because there is and there is valuable consideration: and it is merely preferring one creditor to another which may be done both in England and in this country. So if a conveyance be made to a creditor in trust for the payment of his own debt and those of [illegible] others, is good.

[illegible] 50.
[illegible] 332.
2 Ves. 226
[illegible]
[illegible]
[illegible] 1811.

But the [illegible] says he cannot recover from the conveyance in the latter case is good except as to the individual creditor [illegible] party of the conveyance [illegible] in the former [illegible] of the former rule is correct.

It has also been determined in Penn. that a conveyance to trustees for the payment of debts made in a neighbouring State, by the laws of which State such conveyance is good agt. dissenting creditors will be good here though not so if made here as the debtor's [illegible]. Hence it seems that such a conveyance for the payment of debts, as is valid according to the foregoing rules, is valid

[illegible]
Bin. 138.
[illegible]
New York [illegible]
[illegible] 12.

[illegible] 630.
[illegible] 389.
[illegible] 120.
[illegible]
[illegible] 240.
[illegible]

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unless though the debts intended to be paid by the conveyance are barred by the stat. of limitations - for the stat. of limitations only bars the remedy but does not extinguish the debt; and that was the case an acknowledgment of the debt would not renew the claim. And as the slightest acknowledgment will take it out of the stat., it follows that this conveyance removes the bar of barred debts and of those the remedies on which are thus barred.

But though it is said that a conveyance to trustees for the payment of debts where no creditor is party is voluntary, yet if after such conveyance the creditors bring a bill to compel the trustees to perform it this, it is said, will make the conveyance valid ab initio. Donation to charitable uses are void if the donor was indebted at the time. But if he was not indebted at the time it seems the conveyance cannot be set aside by reason of any future creditors, unless they were

[illegible]

[illegible] 8

void as against [illegible] though [illegible] for [illegible] valuable consideration. The [illegible] may be con[illegible] any how far this rule is encouraged by the Stat. 43 Eliz. encouraging donations to charitable uses. Now as to subsequent bona [illegible] fide purchasers, the rule is that though there be a purchaser for a valuable consideration still if he has notice of the conveyance he cannot set it aside.

There is a particular species of gift called a "Donatio causa mortis," partaking partly of the nature of a gift "inter vivos" and partly of a legacy. It resembles the former in this respect that it is made in the life of the donor, and the latter it resembles because it is to take effect only in the event of the donor's dying. This would on principle be void agt. the donor's creditors. [illegible]

It has been determined in equity that a conveyance to trustees for the payment of debts was not void agt. the Pltff. in an action arising of debts, though the conveyance was made [illegible]

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made pendente lite" and with the pro-
fessed intention of defeating the Pltff. of his
damages. But on the ground that at the
time of the conveyance there was no debt.
It seems however that a mere voluntary Ch. L. 135-6.
conveyance in the case might under
these circumstances, be set aside by the
Pltff. though the demand sound in dama-
ges only. It has also been determined
that a voluntary settlement made bet- Pr. [illegible]
ween the date and the breach of a covenant Prob. [illegible]
sounding in damages only cannot be set aside
by the covenantee after the Covenant is broken
and he has recovered damages: because at
the time of the conveyance there is no pre-
sent debt or duty to be defeated And hence
here only "actual fraud" will entitle the
covenantee to have the conveyance set a-
side — The rule however would be different
if the covenant was to pay money in fu-
ture: or if there was a bond or a promisso-
ry note: because here the claim is
"debitum

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"Debitum in presenti" though "Solvendum in futuro." If one person procures an estate to be conveyed originally not to himself but to another (as to his children) this conveyance to the children is not void as to the creditors of the father or purchasers of the same estate under him. The rule is different if the conveyance appears to have been made in trust for the father. The reason of the first rule is that the property cannot belong to the father and never did. And it has been holden that such conveyance procured by a father for a daughter was good though the father enjoyed the profits during the minority of the child: he being for that time considered as guardian. But the Chancellor in that case said that after the full age of the child such enjoyment would be deemed fraudulent in the father.

In general, if one has a mere power over property in another's right and makes a conveyance of it, that conveyance cannot

be

Pr. Ch. 257
Finch. [illegible]
Prec. [illegible]
[illegible]
[illegible] 4[illegible]

1 P. [illegible]
618
1 [illegible] 415
Vol. 468

1 [illegible]
[illegible]

Co. [illegible]
[illegible]

be deemed fraudulent as agt. the grantor's creditors, though he was indebted at the time of making it: because the property sold was not a fund to which they could have resorted had it not been sold: and therefore they have not been defrauded—

But if the person having a power over property in another's right should convey 2 Vern. 287 the property voluntarily in trust for him Rob. 470–1 self, or to be disposed of as he should direct, this is considered as fraudulent and void as agt. his creditors— and by such conveyance he virtually gives himself the beneficial interest— In the language of the law, the property is altered and becomes virtually his— Upon the same principle, whenever any person having a general pow 2 Ves. 11. er of appointment over property makes Ca. Ch. 52 a voluntary appointment of it— such 2 Vern. 232. 319. 465. appointment in equity is deemed fraudu 1. Atk. 405 lent and void as agt. the creditors of the 3. Atk. 266 person because such person might E.C. H. 6. 472. to 477

make

make it his own at he wills. and that is considered as beneficial interest for the use of his creditors. Ex. A. S. gives property to J. K. to be subject to whatever appointment he shall fully make of it &c. however is void the in equity only because it is nothing more than an appointment.

Where the power of appointment is special however, the rule does not hold. As (Ch. l. 4–56) where A. gives power to B. to vest the legal title in C. D. and E. now B. has no beneficial interest in it —

[illegible] A voluntary bond while it rests merely in contract is void in equity under the Stat. 13 Eliz: it is undoubtedly as much void at law as in equity. But it is generally set aside in a Court of Equity because while it remains in contract it is not in a situation to be disputed at law: nor will it there till execution is levied on property at which time bona fide creditors may take the same property, and then question at law the

Eq. Ca. 7. 1 Atk. 293. Ves. 4–8.

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the goodness of the execution. After the obligor's death unless the question may arise in any case be tried at law even while the bond remains in contract: thus, where to an action on simple contract the Exec.r pleads "Bonds outstanding" to which the Pl.ff may reply the voluntary consideration. The bond's remaining in possession of the obligor is a very strong badge of fraud. Thus where a father gave a bond to his daughter and retained the possession of it till his death it was held void as agst his creditors. But a voluntary bond is in general good agst mere volunteers: as the legatees of the obligor: therefore such a bond is not to be disputed by the obligor himself. Nor is it to be disputed by his Exec.r or Adm.r, unless there is a deficiency of assets to satisfy other bona fide creditors.

Rob. 576.
580.

1 Ch. 440.
2 Eq. Ca. Ab. 156.
1 Atk. 625.
1 P. Wms. 377.

1 Atk. 135
Rob. 485 to 613.

And even where a voluntary bond has been delivered up to be cancelled, a Court of Equity has under certain circum

1 Vern. 152
1 Eq. Ca. Ab. 84
Rob. 486

stances

circumstances decreed a performance of it as ag^t mere volunteers. Thus where a Husband after marriage gave a voluntary bond conditioned to settle a jointure and it was given up on the jointure being settled, it was decreed to be performed in Chancery when the jointure failed of effect. And if a bond or any other obligation is voluntary a judgment confessed upon it will be so. — But as to the rule of evidence when a judgment is claimed to be by confession there is this distinction —

[illegible] 14
2 Term Rep.

If the judgment rendered by confession is claimed to be fraudulent the onus probandi lies on the Pltf. in the judgment and he is to show that it was rendered for a just debt. But if it were rendered by trial the onus probandi lies on the party claiming it to be fraudulent —

Holt 327.

But though a voluntary conveyance or contract of any kind, is fraudulent, yet the mere preference of one creditor to ano

5 T.R. 235.
3. Day. 340.
2. Johns. 226.

ther

Real Property)

another will not render any conveyance or contract whatever, fraudulent, as agt other creditors. There is a different rule in England introduced by the policy of the Bankrupt laws. A conveyance void in its creation may become good in favour of a bona fide purchaser, by matter expost facto as well as [illegible] an ex post facto consideration. As if A. conveys by fraud to B. & B. conveys to C. a bona fide purchaser — & C. then conveys to D. who is also a bona fide purchaser, then D. will hold to the exclusion of A, by reason of the ex post facto consideration — & the case the conveyance by the fraudulent grantee is said to come within the proviso made in the Stat. of Eliz. in favour of all bona fide purchasers. But the Rule would exist without this provision it would have been equally good by the Com. Law)

Rob. 642.
1 Burr. 467. 477
Cowp. 620
3 D. & E. 608
1 Br. Ch. 167.

1 P. W. [illegible]
Prec. Ch. 44.
[illegible] 200.
[illegible]
Cases [illegible]
[illegible] 136
[illegible] 22.

The rule seems to be the same in England as to the creditors of the grantor, under the St. Eliz. which contains a similar proviso

[illegible]

In

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In the State of New York there is no such provision and on that account it has been holden in Court that such bona fide conveyance by the fraudulent grantee is void as to creditors. But Mr. Gould conceives this decision is not correct though made in the Court of Errors and instead in the Supreme Court it was unanimously holden the other way. The clause in the English statute, he conceives, was put in out of abundant caution, and with reference to the conveyance of the original grantor only: Moreover that the decision in the Court of Errors is destructive in its operation, and unsupported by any analogous principles of the law. For where one purchases property of another trusting to regular and authentic muniments of his title, his title must be protected on any thing - no principle of law which Mr. Gould thinks will avoid it. The great objection always urged is the danger of collusion. But Mr. Gould conceives

[illegible] 249

conceives

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conveyance, for there is danger of collusion to be expected from the purchaser & even the fraudulent grantee than is to be expected from him, even the original grantor himself: who is doubtless might make a good conveyance.

Under the Stat. 27 Eliz, a valuable consideration whenever it occurs, entirely obliterates the fraud &, that it can never again affect the transaction, thus a purchaser upon a valuable consideration under the fraudulent grantee, will hold against a bona fide purchaser under the original grantor — In some cases of Marriage-Settlement a constructive consideration ex post facto has been holden to support a conveyance originally voluntary, as of a subsequent bona fide purchaser — Thus where a voluntary conveyance was made to A. who continued him in possession under his conveyance & then entered into a treaty of marriage

Vol. [illegible]

1 Ves. 133
Pr. Ch. 245
[illegible]
Comb. 405
Vol. 503 to 516

marriage with one, who trusts to the appearances of property under these circumstances, because these appeared to be regular and authentic evidence of title It was holden good in equity. On the other hand

1 F. 255. a conveyance originally good can never

[illegible] become fraudulent by any matter

2 [illegible] 265. ex post facto, and there is no reason (Mr. Fonb. says) why it ever should, because no person can be deceived by it.

But this very important rule has been established in the Court of Errors in Conn.

Kirb. [illegible] which is supported by all the analogous

Root 322. principles, of the English law: a fraudu-

Day 321. lent grant can never become legitima-

Conn. ted in favour of the fraudulent grantee himself, by lapse of time or length of possession. From this, it follows that he is not entitled to the benefit of the Stat. of limitations. There is however not a case to this effect in England.

The Stat. 13. and 27. Eliz. like all other

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The Statutes ag^t. Fraud are to be construed liberally, for the purpose of suppressing the fraud and enlarging the remedy. But this requires modification — So far as they respect the fraudulent transaction itself and go to set it aside, they are to be construed liberally, so as to enlarge the remedy — But so far as respect the penal part, they are like all other penal laws to be construed strictly — So that a case not within the letter of the act can never be brought within the spirit of it

1 Bl. 88.
Rob. 552.
3 Co. 82.
Plowd. 54. 78.
1 Sch. 131.

And as the Statutes are to be construed liberally for the purpose of suppressing the fraud it has been decided that if a tenant for life commits an act of forfeiture, the reversioner being bound to the act, the creditors of the tenant for life may defeat that forfeiture, though it is not within the Stat. being in fraud of cred.

1 Vent. 254.

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8. Lecture

To ascertain what are fraudulent conveyances, there are certain enumerated badges of fraud, some of which do not always attend such conveyances.

The following are among the number.

1. A grant, being general, including all the grantor's property, is a badge of fraud. By a badge of fraud, however is meant only prima facie evidence of fraud.

2. A second badge of fraud is, the grantor remaining in possession after the time of the conveyance. But this is not a very strong one.

3. The deeds being made in secret, is usually a badge of fraud though slight.

4. The deeds being made by the party indebted during the pendency of an action agt. him is another badge of fraud.

5. Circumstances denoting an apparent trust between the parties is a very strong badge of fraud. By this is meant a

secret

mere colourable conveyance.

6. The insertion of unusual clauses in a deed of conveyance was held in Twyne's case, to amount to a badge of fraud: and it certainly did in that case.

3 Co. 80.
Moore. 638
Fonb. 5. 1. c.
585.

7. Another badge of fraud arises from the circumstance of making the conveyance in the absence of the grantee.

8th The grantor's retaining the possession of the deed, is another very strong badge &c.

9. The grantor's being deeply involved in debt is another badge of fraud.

10. And finally, the insertion of a clause of revocation, in favour of the grantor, is one of the strongest badges of fraud that can occur.

These ten are selected as the principal signs or badges of fraud, in a conveyance. But there may occur many others.

All these other badges of fraud however are in general important only as they conduce to prove the 5th Quality of fraud

viz.

ing circumstances denoting an apparent trust between the parties — But, this is not universally true; for a conveyance may be fraudulent when intended to defeat creditors though there be a valuable consideration, and the conveyance is meant to operate. Of these badges of fraud, the grantor's remaining in possession after an absolute conveyance, is one of the plainest and strongest: because such possession is inconsistent with the nature of the deed, and it conduces to prove a trust. [illegible] possession in such case is a badge of fraud; possession retained and accompanied with acts of ownership is a still stronger badge.

3. T.R. 620.
2 Ch. 286.
1. Ves. 245.
456.
1. Mass. 44.
Robt. 194.
200. 548. 591.

1 Coke 81 & onward

The precise ground of the last rule is, that the possession being inconsistent with the conveyance, is evincive of a trust between the parties. Though possession by the grantor after an absolute sale is in all cases a badge of fraud, yet it is not so strong in case of conveyances of land as where the

Robt. 44, 45
519. 548
558.

the conveyance of chattels personal for in the former case there are title deeds to which we can have reference. But possession of chattels is all that is required in case of the sale of them.

But possession retained by the grantor of the title deeds is a very strong badge of fraud: because by retaining the evidence of the title which is stronger than of the land. – The grantor remaining in possession of land however after an absolute conveyance is only a badge of fraud and may therefore be explained. There being a substantial difference between such circumstances as constitute fraud per se and those which are only presumptive evidence of fraud. In the former case it is incumbent on the party to rebut such evidence. Thus if one having conveyed lands to a trustee for the payment of debts is left in possession as a bailiff of the trustee the fraud in this case may be rebutted.

Rob. 554. 555.

Rob. 554.

It was holden however in the case of Edwards and Harben that the possession of chattels by the grantor after an absolute conveyance makes the conveyance fraudulent at law [illegible] per se fraudulent. This rule (as held) is very questionable both upon principle and authority and indeed it being the rule was never advanced until the case of Edwards and Harben. If the said title give the Vendor a false credit it is answered that this has nothing to do with the Statute 13. and 27. Eliz. though it may have with the Stat. 21. James, (as to Bankrupts) because it is there expressly provided. But under the Stat. 27. Eliz. this cannot be the case because if it had been intended the framers of the Stat. would have mentioned it particularly. Under the Stat. of Eliz. then, the only question so far as concerns this point is, whether the sale was in fact fraudulent.

Hitherto, the possession after absolute conveyance

2 T.R. 587.
[illegible] 225.

[illegible]
[illegible]
[illegible] 438.
[illegible]
[illegible]

[illegible]

[illegible] 12 30.
[illegible] 5 65.

conveyances has been spoken of: and the word 'absolute' is emphatical. For if the deed is not absolute, the possession of the grantor may not be inconsistent with the conveyance and so it furnishes no evidence of fraud. It will not be evidence of a fraud if the grantor is in possession under a conditional conveyance – thus if A make a conveyance to B. upon a condition precedent his possession is in itself no badge of fraud. And it matters not whether the subject of the conveyance is land, or personal chattels. The rule is the same as to mortgages – A mortgagor's remaining in possession is not a badge of fraud – for he does not consider himself, nor does the law contemplate him, as having the legal title – A Mortgage of goods, under the Stat. 21. James 1. is fraudulent and void if the Mortgagor remain in possession – But this relates only to Bankrupts' cases, and is to prevent confusion in deci-

ding

2. Bul. 225
2. Str. 54.
2 Ves. 555-6
Pr. Ch. 284.

Cr. Jac. 65
2 T. R. 587-8. 65

1 Atk. 16.
2. Ves. 348.
Esp. N.P. 336.
5. [illegible] 226.

pending the authorities. It is however, clear that if goods are sold by an actual conveyance but the immediate act of delivery of them to the vendee is impossible, the want of such immediate delivery is no badge of fraud as in case of ship, &c. sold at sea. This is certain whatever may be the correctness of the rule in Edwards v. Harben. And in such case the sale is good not only under the Stat. 13 Eliz. but also under the Stat. of Frauds.

1. Atk. 171.
2. Atk. 162.
[illegible]. Atk. 477.
1. Ves. 354.
3 Bl. 366.
1. Bur. 468.
1. Br. Ch. 25.

And, where though the sale of goods is absolute, immediate manual delivery of them would be attended with great inconvenience to the parties, the want of it has been holden to be no badge of fraud but a mere symbolical delivery has been adjudged sufficient.

2 Atk. [illegible]
2. H. Bl. 220.
2. Atk. 41.

Among the enumerated badges of fraud the grantor's being indebted at the time of the conveyance is one: And it being to be agreed that a grant being made voluntary

1. Leon. [illegible]
2 Ves. [illegible]
1. Bl. [illegible]
1. Vern. 459.
Prob. [illegible]

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During the pendency of a suit agt. the grantor is void under the Stat. 13 Eliz. though it was said not to be at Com. law. Qu. whether the suit is at law or equity? If one makes a purchase for a valuable consideration with notice that the grantor is indebted by bond or other contract, this notice does not affect the purchaser, even in equity: and this rule does not infringe on the Stat. aforesaid.

Lecture

Rob. 579. 42.

Under the English Stat. 13. Eliz. if one conveys land with intent to commit an act of felony and then commits an offence which amounts to a forfeiture, this conveyance will be fraudulent as agt. the king and the land will be forfeited notwithstanding. And where one makes voluntary conveyance and soon after commits a crime of forfeiture, there is a presumed fraudulent intent. The Connect. stat. does not contain the word "forfeiture" but only the words "debt or duty". It is interpreted however but a different

1 Sid. [illegible]
Cro. [illegible]
Fraud. [illegible]
3 Co. 80.
Cham. [illegible]

different constructions might be given.

In what manner a fraudulent conveyance is to be avoided by those who are within the benefit of the Stat. 13

Cy. 3. 233.
Dyer 295.
Roll. Abr. 1. 398.

It is to be observed generally that the party entitled to the benefit of these Stat.s has a right to treat the conveyance as though void i.e. as if it never had been. Thus where to a writ of execution agt. a fraudulent grantor he pleaded "non tenure" it being found that he had conveyed it away to defeat the judgment was given agt. him upon the ground of the property's being considered still as in his tenure.

Cr. Eliz. [illegible]
[illegible]
Dyer 295 b

Plo. 42.
Cy. [illegible] 233.
[illegible] 60.
Dyer 149 a.
Roll. Abr. 1. 613.

And from this it appears that a fraudulent conveyance is considered as no conveyance at all and is treated so in pleading. In the common case of a Bill of Sale to defraud creditors: a creditor having obtained judgment and taken out execution, may seize and sell the property as being that of the grantor, though in the

Co. [illegible] 814.

the

the possession of the grantee. And if one having made a fraudulent sale of goods or chattels, dies insolvent, the property is considered after his death as assets in the hands of his Exec^r for the payment of his debts. In Conn^t the property of a deceased person is never taken in execution for the payment of his debts: but it is sold by the Judge of Probate's direction, and the avails applied for the payment of debts.

Cr. El. 810.
2. Rol. R. 173.
Ast. 542-3
596.

In England if one dies after a fraudulent conveyance of his real property, his simple contract creditors, cannot take it in execution though his specialty creditors may, for the latter bind both real and personal whilst the former bind only the personal estate. Unless if creditor by simple contract has obtained judgment previous to the grantor's death. And in this case such simple contract creditor is not injured by the fraudulent conveyance because he has no claim on the land, being

1. Bl. 243
248.
3. Bl. 470
Powel. 90
4 Co. 321.
5 T.R. 66

of

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it was made. In an action agt. the heir upon the obligation of his ancestor, proof, that
5 Co. 60. / 7 Bac. 412 / Cr. El. 233. the conveyance was fraudulent, supports the averment of assets by descent: for the estate thus conveyed is considered as real assets.

And the rule, that a fraudulent convey-
Cr. Jac. 271. / 3 Leon. 54. / 2 T.R. 587. / Yelv. 174 / Lane 223. ance, is strictly void, is so far extended that a fraudulent grantee has under the 13. Eliz. if he takes possession of them after the death of the grantor, in some cases been treated as Exec.r de son tort. And for the purposes of determining when he is Exec.r de son tort and when not, the following distinctions are to be observed. If the frau-
Cr. Jac. 271. / 3 Leon. 54. / Rob. 593-4 / B.N.P. 258. dulent purchaser, after the death of the vendor, takes the goods even by permission of the vendor's Exec.or he may be still charged as an Exec.r de son tort to the creditors. This Mr. Gould says is greatly extending the principle, because regularly there can be no Exec.or de son tort when there is a rightful Exec.or. And he cannot conceive on

what

on what principle it is so extended, unless it is from the antipathy (as Roberts calls it) which the law has agt. fraud.

So also if after the death of the fraudulent grantor, the fraudulent grantee takes possession of the goods, before probate of the will, where there is one, or in case of intestacy before administration granted, he may be charged as Exec.r de son tort. On the other hand it was decided in the time of Elizabeth, that if the fraudulent grantee take the goods without permission of the Exec.r or Adm.r even after probate or administration granted, he is liable to the Exec.r or Adm.r as a trespasser. 'Tis difficult however to reconcile this with the general rule, that a fraudulent sale or conveyance binds the vendor or grantor and his representatives. And indeed this in Mr. Gould's mind renders the rule in Croke Eliz. 810 somewhat problematical. (If he says it is law

2 Rob. 584.

Cr. El. 810.
Rob. 584.

Cr. J. 240.
Rob. 185-6
Rob. 643.

it

it must be on the ground that the Exor or Admr from the necessity of the case may claim agt the [illegible] for the benefit of the creditors - If this were the true notion then the rule in Woods v Clif. cannot be true

[illegible]
[illegible]
Plowd. [illegible]
Rob. [illegible]

If an heir make a fraudulent conveyance of an estate descended to him from his ancestor to defeat the creditors of the latter this conveyance is void under the Stat. 13 Eliz. though the debt was not originally the debt of the heir - And the rule is the same with fraudulent sales by Executors and Admrs to defeat the creditors of the testator or intestate - And in such cases it is necessary for a Court of Equity to interpose that Court will pursue the debts specifically into the hands of the fraudulent grantee in favour of the creditors - But neither in law or equity can the same be collected in favour of the creditors if the purchaser were bona fide and for valuable consideration - But in this

[illegible] 3.

[illegible] 66.

1 [illegible] 183.
2 [illegible]

this case, their only remedy is against the Executors or Administrators themselves.

How far fraudulent Conveyances are binding upon the parties. Lecture

And here the general rule is that a fraudulent conveyance is binding upon the grantor, his representatives and all who claim as volunteers through him. Co. Lu. 290. 3. Mod. 80. [illegible] 174. [illegible] 182

And as to this point the rule is the same in equity as at law. [illegible] 56. This observation however only applies in general to voluntary conveyances executed; for a voluntary uncompleted contract, will not in general be enforced in equity: and this upon the ground that the interposition of that Court to enforce agreements specifically, is always discretionary: and they will never enforce any agreement unless founded on valuable consideration. [illegible] 9. Ves. 248. [illegible] [illegible]

But where on the death of A. admi- [illegible] nistration was granted to B. a mere stranger

stranger who pending the suit for the repeal of the letters of administration sold the property that sale was held good as [illegible] for at the time the vendor had legal authority to make the sale.

[illegible] 168 [illegible] 547. [illegible] 555. So also where the grantor himself attempts by any collateral act to defeat a voluntary conveyance, it was holden that it should bind the property & equity will interfere to prevent him.

Prec. 1 Vern. 100 132 454 1 Atk 586. It follows also that no one can defeat his own voluntary conveyance by his last will; hence the legatee must claim as volunteer. And the rule is the same though the estate be devised for the payment of debts. And where a man having made a voluntary settlement

[illegible] upon his wife during coverture and afterward cancelled the deed it was holden that the conveyance bound the property the cancelling notwithstanding.

Though

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Though a fraudulent conveyance binds the grantor and all claiming under him yet by a subsequent deed he may pass an equitable interest remaining in him even though the conveyance be voluntary as an Equity of Redemption in a Mortgage. Rob. 3. 654.

Though equity will not generally enforce voluntary conveyances yet a voluntary bond for a specific sum will be good in equity if it does not interfere with the claims of bona fide purchasers. 3 Ch. 229. 1 Ves. 324. An agreement in consideration of consanguinity or natural affection will be specifically decreed in equity only in favour of a wife or children but not in favour of those of a more distant degree: as Grand children 2 Ves. 182. Ibid. 654.

Reeve
and
Goulds
Lectures

W. Bond

IV