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

In the former Editions, a Treatise of particular Estates, said to have been written by Sir John Dorderidge, was added; but it appears astonishing that

(a) See Watkins's Principles of Conveyancing, xxii. 2d. ed.
all the former Editors could have overlooked the circumstance, that it was only an incorrect transposition, from pages 67 to 78 of Noy’s Treatise of Tenures, which was evidently composed by the same person, who wrote the other part of that valuable work, and without which it would have been incomplete. No one would have the temerity to charge a man of Noy’s acknowledged superior legal attainments with being a plagiarist. The Editors also permitted the Tract to be called a Treatise of particular Estates, because that was the title of the first short section, though the remainder of it treats of “Possession, Reversion, Remainder, and Rights,” which the most careless student, in the infancy of his enquiries, would not term “Particular Estates.”

At the end of the Maxims, the Sixth Edition of the Dialogue (a) and Treatise of Tenures is now presented to the Profession, in which the work ascribed to Sir John Doderidge being included, it is not repeated as a separate Treatise.

To the former Editions of the Maxims were also added Observations on a Deed of Feoffment, by

(a) See Wynne’s Essay on Dialogue, Euanomus, 32, 3d ed.

T. H.,
PREFACE.

T. H., which, at the request of the Publishers, have been retained.

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

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

As the short desultory observations on the Life of the Author, prefixed to the former Editions of
the Tenures, were a very imperfect performance, they are omitted; and it is hoped the following Memoir will not be unacceptable to the Reader.

In the first five Editions of the Maxims, the Chapter on Leases was numbered XXXIV, and the next Chapter on Surrenders, by mistake, numbered XXXVI, and which, although incorrect, is retained in this Edition, because the work is frequently cited by the number of the Chapter: and in all the works the former paging is retained in the margin; the references to which, in the notes, postquam is generally to the old paging; ante to the paging of this Edition.

4, Gray's Inn Square,
14th April, 1821.
A SKETCH OF THE AUTHOR’S LIFE.

WILLIAM NOY was born about the year 1577, at St. Burien’s in Cornwall. Of his childhood we find nothing recorded, but at the age of sixteen he was entered of Exeter College, Oxford; where he continued a severe and diligent student about three years, and then left the University without taking any degree, and removed to Lincoln’s Inn, for the purpose of studying the Law. By his unwearied industry, and, according to his own expression, “moyling day and night” he attained eminence in his profession.

Blessed with a healthy and strong constitution, as he is described at the commencement of his professional career, and possessing an apprehension quick and clear, a judgment methodical and solid, a memory strong, a curiosity deep and searching, a temper patient and cautious, a well regulated and corresponding conduct, an ability to discover what he sought, or what was propounded to him, to separate truth from falsehood, to retain his discoveries, and to impart his knowledge, with facility to others. He thoroughly investigated cases, and entered minutely into the smallest circumstances attending
attending them, by which means he was enabled to reply with promptitude, to his opponent's unexpected objections: he understood his client's cause at the first opening, and saw the tendency of his adversary's reasons as soon as they were uttered. 

In argument, his memory was very ready, and his wit sometimes severe; his comparisons and ideas, were numerous, but orderly, though it appears he did not possess the graces of oratory (a). One of the distinctive marks of his wisdom, was his slowness of belief, and his distrust, led him beyond modern books of reports and abridgments, beyond late tracts and precedents, beyond partial explanations and commentaries, and induced him to examine by the test of reason, as gold is tried in a crucible, ancient customs and usages, untrodden histories, authentic records, indisputable maxims and principles.

He was possessed of a blunt honesty: but his pensiveness and taciturnity were great bars to his early advancement, as they announced a melancholy frame of mind, bordering on moroseness, displaying itself in harsh and abrupt expressions, and sometimes even in clownish behaviour. He was totally deficient in the polished graces of conversation, and those smaller courtesies, which adorn and give a charm to the intercourse of society, without destroying sincerity or independence of character.

The first evidence of his splendid abilities, quickness of perception, and extensive research, was given in a cause, in which three graziers at a fair, had left their money with their hostess, while they went to the market: one of them returned, received

(a) 1 Wood's Athenae Oxonienses, 594, 2d ed.
the money, and absconded; the other two, sued the woman for delivering what she received from the three, before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced, when Mr. Noy, not being employed in the cause, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed, and having received it, he moved in arrest of judgment, that he was retained by the defendant, and that the case was this; the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready to be paid, whenever the three men should demand it together; this motion altered the whole proceedings.

It may be presumed from this case, that our author was not unacquainted with the civil Law, a fruitful source of juridical knowledge, from which the English lawyer may derive both instruction and pleasure (a). Ulpian states the same point, in the Digest (b), but there is indeed a similar determination in Brooke’s Abridgment (c), probably derived from the same abundant fountain.

Mr. Noy never pleaded a cause in which his tongue was opposed to the dictates of his conscience. A Spanish soldier would as soon receive pay to fight against his country, as this advocate would have pleaded against truth; he not only heard his client, but nicely weighed the merits of his cause, and

(a) Sir William Jones, on the Law of Bailments, 12, 51.
(c) Bailment, pl. 4.
when he found it deficient in justice, he was far from endeavouring to gloss its defects, by diverting the attention from the point in issue, by a display of his extensive erudition. Cases of difficulty, which to others were insuperable, he brought to a speedy issue, directing his energies fairly to the point in litigation. His name by degrees became celebrated, his practice was extensive, and he was considered one of the first advocates in Westminster Hall. His industry kept pace with his fame, he maintained the credit he had obtained, convincing the world, that in the profession of the Law, talent combined with industry, rarely fails of ultimate success.

Mr. Noy was chosen representative for Helston, in the two parliaments, which begun at Westminster, 30th January, 1620, and 19th February, 1623 \((a)\), towards the end of king James's reign, in which he distinguished himself as a strenuous opposer of the royal prerogative, as then arbitrarily exerted, and a staunch supporter of the rights of the commonwealth. In 1623 he delivered the autumn lecture at Lincoln's Inn \((b)\); and was afterwards made a bencher of the Society \((c)\). In 1625 he was elected for St. Ives, to sit in the parliament held at Westminster the 6th February, in which, as well as in the succeeding parliament, he continued the same course of patriotic conduct he had previously pursued. His diligence was indefatigible in searching out every precedent favourable to parliamentary privilege, and in detecting all the oblique methods, used by former kings to raise money.

\((a)\) 1 Wood's Athenæ Oxonienses.
\((b)\) Vide Dugd. Origines Juridiciæ, 253, 3d. edit.
But the period now approached, which was to exhibit a melancholy change in his hitherto unblemished character and principles. Such a man was thought worth gaining; the lure of the Attorney-Generalship was held out to him, which proved a sufficient bribe, and he immediately wheeled about to the side of Prerogative, as then unconstitutionally exercised. From that time he was the most active and the most servilely addicted to the prerogative, of all the servants of the crown; and by bringing forward old penal statutes, and devising new exactions, he became, for the short time he enjoyed that power, the most pestilent vexation the age produced (a); and, in particular, he promoted every violent and arbitrary measure, and executed his particular office of public prosecutor with the most oppressive severity (b).

"Renegadoes never change by halves;" and Noy, like the generality of proselytes, from one extreme to the other, manifested an extraordinary zeal and activity, in favour of the cause he had embraced, being perhaps well convinced, that he who changes his party, is always regarded with an eye of suspicion, even by those to whom he has prostituted himself. Perhaps too, he was anxious to quiet or overcome the misgivings of his own mind, and, by the rigour of his proceedings, to manifest to the disappointed expectation, of his forsaken friends, the sincerity of his present professions.

It is impossible to record these transactions, without regretting, that a dereliction from principle, should have thrown a shade over the life of an

(a) Biographia Britannica.
(b) Hamond L'Estrange's Life of King Charles. Fuller's Worthies, Cornwall, 200.
otherwise upright man, who, had he remained firm to honour and virtue, would have ranked among the splendid ornaments of his profession.

To recompence the damage the crown sustained by the sale of the old lands, and by the grant of new pensions, the ancient laws of the Forest were revived by Mr. Noy, and exercised by the Earl of Holland with great rigour; by these means few men could assure themselves their estates and houses, might not be brought within the jurisdiction of some forest, in which case not only great fines were imposed, but great annual rents intended, and likely to be settled by way of contract: and as this burden fell mostly upon persons of quality and honour, who thought themselves above ordinary oppression, they were therefore disposed to remember it with more asperity (a).

The king, who considered Noy the most expert and clever man in his kingdom, consulted him as to the means of raising ship money, and his diligence soon discovered an ancient precedent for raising a tax for fitting out a fleet in case of danger. The king rejoiced at the discovery, looked on it as treasure trove, and immediately issued writs to the Port Towns within the Realm, declaring the safety of the kingdom in danger, and that therefore they should provide, against a certain day, twenty-seven ships of so many tuns with double equipage, ammunition, wages, and victuals (b).

And

(a) 1 Clarendon's History of the Rebellion, 121, 401, edit. 1819.

(b) See a quarto manuscript book, with many extracts from Mr. Noy's opinions, memoranda, &c. in the Harleian Collection in the British Museum. Codex, 980. "A note of all the townes that are to contribute to the raysiaing and maintaining
And as this expedient was considered as "a spring and magazine that should have no bottom," and for an everlasting supply of all occasions, a writ was framed in a form of law, and directed to the sheriff of every county of England, "to provide a ship of war for the king's service, and to send it amply provided and fitted by such a day, to such a place;" and with that writ were sent to each sheriff instructions, that "instead of a ship, he should levy upon his county such a sum of money, and return the same to the treasurer of the navy, for his majesty's use, with directions, in what manner he should proceed against such as refused:" and from hence that tax had the denomination of "ship money;" a word of a lasting sound in the memory of this kingdom; by which for some years really accrued the yearly sum of £200,000, to the king's coffers; and it was in truth the only project that was accounted to his own service. And, after the continued receipt of it for about four years together, it was at last (upon the refusal of a private gentleman to pay twenty or thirty shillings as his share) with great solemnity publicly argued before all the judges of England in the Exchequer Chamber, and by much the major part of them, the king's right to impose asserted, and the tax adjudged lawful; which judgment proved of more advantage and credit to the gentleman condemned (Mr. Hambden) than to the king's service.

ing of 20 ships in England and Wales, wt. double equipage, munition, wages, and victuals from the first of March unto the end of 26 weeks."

"Sum of ships 20, of men 4590."

But it appears the number of ships was afterwards enlarged to 27.

(a) Clarendon, 121. and see Hume, vol. vii. c. 50. p. 27. c. 52. s. 9. p. 103. 12mo edit.

" For
"For the better support of these extraordinary ways, and to protect the agents and instruments, who must be employed in them, and to discountenance and suppress all bold inquiries and opposers, the Council Table and Star Chamber enlarged their jurisdictions to a vast extent, 'holding' (as Thucy-dides said of the Athenians) 'for honourable that which pleased, and for just that which profited;' and being the same persons in several rooms, grew both courts of law to determine rights, and courts of revenue to bring money into the treasury; the Council Table by proclamations enjoining to the people what was not enjoyed by the law, and prohibiting that, which was not prohibited; and the Star Chamber censuring the breach, and disobedience to those proclamations by very great fines and imprisonment; so that any disrespect to any acts of state, or to the persons of statesmen, was in no time more penal, and those foundations of right, by which men valued their security to the apprehension and understanding of wise men, never more in danger to be destroyed.

"These errors (a) (for errors they were in view, and errors they are proved by the success) are not to be imputed to the court, but to the spirit and over-activity of the lawyers themselves; who should more carefully have preserved their profession, and its professors, from being profaned by those services, which have rendered both so obnoxious to reproach. 'There were two persons,' adds the noble historian 'of that profession, and of that time, by whose several and distinct constitutions (the one knowing nothing of nor caring for the court: the other knowing or caring for nothing else) those

(a) 1 Clarendon, 127.
mischiefs were introduced; Mr. Noy, the Attorney-General, and Sir John Finch, First Lord Chief Justice of the Common Pleas, and then Lord Keeper of the Great Seal of England.'

"The first, upon the great fame of his ability and learning, (and he was very able and learned), was, by great industry and importunity from court, persuaded to accept that place, for which all other men laboured, (being the best for profit that profession is capable of), and so he suffered himself to be made the King's Attorney-General. The court made no impression upon his manners; upon his mind it did; and though he wore about him an affected morosity, which made him unapt to flatter other men, yet—even that morosity and pride rendered him the most liable to be grossly flattered himself, that can be imagined. And by this means the great persons, who steered the public affairs, by admiring his parts, and extolling his judgment as well to his face as behind his back, wrought upon him by degrees, for the eminency of the service, to be an instrument in all their designs; thinking that he could not give a clearer testimony, that his knowledge in the law was greater than all other men's, than by making that law which all other men believed not to be so. So he concluded, framed, and pursued the odious and crying project of soap; and with his own hand drew and prepared the writ for ship-money; both which will be the lasting monuments of his fame. In a word, he was an unanswerable instance how necessary a good education and knowledge of men is to make a wise man, at least a man fit for business.

"Sir John Finch had much that the other wanted, but nothing that the other had. Having led a free life, in a restrained fortune, and having set up upon

b 2 the
the stock of a good wit; and natural parts, without the superstructure of much knowledge in the profession by which he was to grow, he was willing to use those weapons in which he had most skill, and so (being not unseen in the affections of the court, but not having reputation enough to guide or reform them) he took up ship-money where Mr. Noy left it; and being a judge, carried it up to that pinnacle, from whence he almost broke his own neck: having, in his journey thither, had too much influence on his brethren to induce them to concur in a judgment they had all cause to repent; to which his declaration, after he was Keeper of the Great Seal of England, must be added, upon a demurrer put in to a bill before him, which had no other equity in it than an order of the Lords of the Council; 'that whilst he was Keeper, no man should be so saucy as to dispute those orders, but that the wisdom of that Board should be always ground enough for him to make a decree in Chancery; which was so great an aggravation of the excess of that Table, that it received more prejudice from that act of unreasonable countenance and respect, than from all the contempt which could possibly have been offered to it.'

As an instance of Mr. Noy's discernment of early talents, it seems proper to remark, that he took notice of Sir Matthew Hale, when he was a student of Lincoln's Inn, directed him in his studies, and soon entertained so great a friendship for him, that in consequence of their intimacy, Hale was called young Noy (a).

Noy did not live to see the fulfilment of his ship-money scheme, for at length his constitution being

(a) Dr. Burnett's Life and Death of Sir Matthew Hale, London, octavo 1682, p. 19.
greatly impaired by his incessant labours, he retired to Tunbridge Wells in July 1634, in hopes of restoring his declining health, but the waters producing no salutary effect, he died there on Saturday the 9th of August following. His remains were privately buried on the Monday following, under the communion table of the chancel in the church at New Brentford, in Middlesex. Over his grave was afterwards placed a stone with an inscription on a brass plate, which was soon defaced.

The insertion of the following spirited letter requires no apology:

"To the Right Honourable the Lord Viscount Savage (a), at Long Melford.

"My Lord,

"The old steward of your courts, Master Attorney-General Noy, is lately dead, nor could Tunbridge waters do him any good: tho' he had good matter in his brain he had, it seems, ill materials in his body; for his heart was shrivell'd like a leather penny-purse when he was dissected, nor were his lungs sound.

"Being such a clerk in the law, all the world wonders he left such an odd will, which is short, and in Latin: the substance of it is, that he having bequeathed a few legacies, and left his second son 100 marks a year, and 500 pounds in money, enough to bring him up in his father's profession, he concludes, Reliqua meorum omnia primogenito meo Edol--

(a) Howell's familiar letters, 255, 11th edit.
ardo, dissipanda, nec melius unquam speravi Ego (a): I leave the rest of all my goods to my first born Edward, to be consumed or scattered, for I never hoped better. A strange, and scarce a Christian will, in my opinion, for it argues uncharitableness. Nor doth the world wonder less, that he should leave no legacy to some of your lordship's children, considering what deep obligations he had to your lordship; for I am confident he had never been Attorney-General else.

"The vintners drink carouses of joy that he is gone, for now they are in hope to dress meat again, and sell tobacco, beer, sugar, and faggots; which, by a sullen capricio of his, he would have restrained them from. He had his humours as other men, but certainly he was a solid rational man; and though no great orator, yet a profound lawyer, and no man better versed in the records of the Tower. I heard your lordship often say, with what infinite pains, and indefatigable study he came to his knowledge: and I never heard a more pertinent anagram than was made of his name, William Noy, I moyl in law. If an s. be added, it may be applied to my countryman Judge Jones, an excellent lawyer too, and a far more genteel man, William Jones, I moile in laws. No more now, but that I rest

"Your Lordship's most humble
"and obliged Servitor,

"Westm. 1st. Oct. 1635."

"J. H."

(a) The words are, "Reliqua meorum Eduardo filio meo quem executoresm Testamenti mei constitui, dissipanda nec melius speravi reliqui." The will is dated 3d June, 1634, and registered in Doctors' Commons, in Reg. Scagur, fol. 84; and there is a copy of it in the British Museum, on one side of half a sheet of foolscap, rather widely written. Ed.

Steele
Steele observes (a) that this "generous disdain and reflection upon how little he deserved from so excellent a father, reformed the young man, and made Edward, from an arrant rake, become a fine gentleman." No such effect however followed, as Edward did not live long to enjoy his father's bounty, being killed in a duel about two years afterwards in France by a Captain Byron, who escaped punishment by receiving a free pardon, as the celebrated William Prynn, an inveterate enemy to our author, informs us (b).

The next day after Mr. Noy's decease, the news was carried to Dr. Laud, Archbishop of Canterbury, then residing at Croydon, who immediately made this observation in his diary (c) "I have lost a near friend of him, and the church the greatest she had of his condition, since she needed any such." Indeed he was very vigilant in watching the adversaries of the church, and was industrious in prosecuting, the illegality of the design, of buying impropriations, by persons not well affected to the constitution, and he is said to have been fond of hearing Dr. Preston preach; "because he spake so solidly, as if he knew God's will."

The following anecdote seems worth relating, as expressive at once of humility and that sense of imperfection, which every man more or less cannot help feeling.

The goldsmiths of London, formerly had a custom, once a year, to weigh gold, in the Star Cham-

(a) Tatler, No. 9. Chalmers's Biographical Dictionary, XXIII. 267.
(b) See, at the end, in an appendix to a work, entitled "A dicion Tragedy, lately acted, or a Collection of sundry memorable examples, &c." printed beyond sea, ANNO 1636, quarto.
(c) In the breviat of his life, page 19.
ber, in the presence of the Privy Council, and the King's Attorney-General, which solemn weighing was called the *pix*, and in which they made use of such exact scales, that the master of the company affirmed, that they would turn the two hundredth part of a grain. "I should be loth" said Noy, who was present, "that all my actions should be weighed in those scales" (a).

The king regretted the loss of Noy, and the clergy regretted him still more, but the generality of the commons, and people rejoiced. The players, to whom he was not favourable, the next term after his decease, made him the subject of a merry comedy, entitled "A projector lately dead, &c."

Sir Anthony Weldon (b) gives the following quaint but humorous account of our author:—

"Formerly he was a great patriot, and the only searcher of precedents for the parliament: by which he grew so cunning, as he understood all the shifts which former kings had used to get money with. This man the king sent for, told him he would make him his attorney. Noy, like a true cynic as he was, did, for that time go away, not returning to the king so much as the civility of thanks; nor indeed was it worth his thanks, I am sure he was not worthy of ours. For after the court solicitings had bewitched him to become the king's attorney, he grew the most hateful man that ever lived, &c. he having been as great a deluge to this realm, as the flood was to the whole world: for he swept away all our privileges, and in truth has been the cause of

(a) Fuller's Worthies. Cornwall, 200.

(b) In his work, entitled "the Court of King Charles, continued unto the beginning of these unhappy times, &c." printed at the end of the court and character of King James. Lond. 1651. 2d edit. p. 174, 175.
all these miseries this kingdom hath since been ingulphed in: whether you consider our religion, he being a great Papist, if not an Atheist, and the protector of all Papists, and the raiser of them up unto that boldness they were now grown unto) or if you consider our estates and liberties, which were impoverished and enthralled by multitudes of Papists and illegal ways, which this monster was the sole author of."

In his office of Attorney-General he was succeeded by Sir Robert Banks; and the next year, Sir Robert Heath being removed from the Chief Justiceship of the King's Bench for bribery, Sir John Finch, who has been before mentioned, was created Chief Justice, on which occasion these verses were made:

Noy's Flood is gone,
The Banks appear;
Heath is shorn down,
And Finch sings there.

Mr. Noy has left behind him the following monuments of his legal knowledge and industry:—"A Treatise of the Principal Grounds and Maxims of the Laws of England," 1641, quarto. "Perfect Conveyancer; or, several Select and Choice Precedents," 1665, quarto, 2d edit. "Collected partly by William Noy, and partly by Sir Robert Hendon, Knt. some time one of the Barons of the Exchequer; Robert Mason, some time Recorder of London; and Henry Fleetwood, formerly Reader of Gray's-Inn;" "Reports of Cases in the Time of Queen Elizabeth, King James, and King Charles I." 1656, folio, "containing the most excellent exceptions for all manner of declarations, pleadings, and demurrers,
THE AUTHOR'S LIFE.

rers, exactly examined and laid down; (a) "Complete Lawyer; or, a Treatise concerning Tenures and Estates in Lands of Inheritance for Life, and other Hereditaments, and Chattels, real and personal," 1661, octavo, with his picture before it; "Arguments of Law and Speeches." As some of these were published during the Commonwealth, when his name was held in detestation, their professional merit must have been generally acknowledged (b).

He also left behind him several choice collections which he had made from the records in the Tower of London, reduced into two large paper books of his own hand-writing; one contained Collections concerning the King's maintaining his Naval Power according to the Practice of his Ancestors; and the other, concerning the Privilege and Jurisdiction of Ecclesiastical Courts. Dr. Thomas James, of Oxon, when he compiled his Manuduction or Introduction unto Divinity, printed 1625, acknowledged him-

(a) Mr. Hargrave, n. Co. Litt. 51 a. (10), says:—

"As Lord Hale makes so frequent a reference to Noy's Reports, it may not be amiss to apprise the student, that though the book is known by the name of that very learned lawyer, yet there is not the least reason to suppose that such a loose collection of notes was intended by him for the public eye." In an edition of Noy's Reports, penes editorum, there is the following observation upon them in manuscript:—A simple collection of scraps of cases, made by Serjeant Size, from Noy's loose papers, and imposed upon the world for the Reports of that vile prerogative fellow Noy. This account of Noy's Reports, which was probably written soon after the first publication in 1656, though expressed in terms inexcusably gross, contains an anecdote not altogether useless." Lord Hale, however, appears to have cited a manuscript copy of these reports, and not the printed work. See also Degge's Parson's Counsellor, 54, 6th ed.

(b) Biographia Britannica.
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self (a) indebted to the extracts out of the Tower, fairly and largely transcribed, as he says, by Mr. Noy, a great antiquary of law. Which extracts are presumed to be the same with those before mentioned (b).

It appears that he was engaged, jointly with Lord Bacon, Lord Hobart, Serjeant Finch, Mr. Henage Finch, Mr. Hackwell, and other eminent men, in reducing concurrent statutes, to one clear and uniform law, which was undertaken upon the suggestion of Lord Bacon, and by the direction of King James. According to Lord Bacon, a great deal of good pains were taken, and the work was advanced so far as to become of a great bulk (c) but it was not completed; if still in existence, it would doubtless prove of great service to those persons who probably ere long will be engaged in that necessary work of reformation (d).

(a) See the Table of MSS. by Dr. James, quoted at the end of the Manuduction.
(b) 1 Wood's Athenæ Oxonienses, 594, 2d edit.
(c) Bacon's Law Tracts, 14.
(d) See Hallam's View of the State of Europe during the middle ages, 470, 2d ed. 1 Whitelock's Note on the King's Writ for choosing Members of Parliament, 409. 1 Wynne's Eunomus, 107, 3d ed. Dial. 1. s. 18.
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A TREATISE

OF THE

PRINCIPAL GROUNDS AND MAXIMS,

WITH

AN ANALYSIS;

OF THE

LAWS OF ENGLAND.

By WILLIAM NOY, Esq.

Lex plus laudatur, quando ratione probatur.

THE NINTH EDITION.
THE

PREFACE

TO THE FIRST EDITION.

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

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

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

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

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

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

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

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

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

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

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

The Laws of England are threefold—
COMMON LAW, CUSTOMS, AND STATUTES.

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

OF THEOLOGY.

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

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

† The acts of parliament which restrain ecclesiastical persons from committing waste in their possessions, which were given them to maintain the service of God, shall bind the King, unless a special provision be made to the contrary by the same statute (b).

(a) The heighth of reason is, that which is done for religion. Co. Litt. 341. a. Wing. Max. 3.
(b) 5 Co. 14. b.
† If any general custom were directly against the law of God, or if a statute were made directly contrary to the law of God—as for instance, if it were enacted, that no one should give alms to any object in ever so necessitous a condition, such a custom on such an act would be void. Doct. and Stud. lib. 1. cap. 6. page 16. edit. 1815.

* P. 2. * 2, Dies dominicus non est juridicus (a).

Sale on a Sunday shall not be accounted a sale in a market, to alter the property of the goods.
† If a fine be levied with proclamations according to the statute of 4 H. 7. cap. 24. if any of the proclamations be made on a Sunday, all the proclamations will be erroneous, because the judges cannot sit on a Sunday, for this day is exempt from such business by the common law, by reason of the solemnity of it, in order that all mankind may apply themselves to their devotions, and the honour of God (b).
† If the teste of a writ of Scire facias be on a Sunday, it is error, because it is not a day in bank. Dyer 168.
† Persons using bull-baiting, or bear-baiting, or such like sports on a Sunday, shall forfeit three shillings and four pence. 1 Car. 1.
† If any butcher shall kill, or sell meat on a Sunday, they are liable to a penalty of six shillings and eight pence; carriers, drovers, &c. travelling on the

(a) Sunday is no day in law; because that day ought to be consecrated to divine service. Co. Litt. 135. a. 2 Saund. 291.
(b) Plowd. 265. Dyer, 181. b. And although the proclamations should be made on days which were dies juridici, yet if the contrary appear on record, the proclamations will be void; as no averment can be admitted against the record. 5 Cru. Dig. 92. Vide Treat. of Tenures, 86.

Lord's
OF THEOLOGY.

Lord's day, incur a forfeiture of twenty shillings.
3 Car. 1. c. 1.

† No person shall do any worldly labour of a Sunday, (except works of necessity or charity) on pain of forfeiting five shillings (a); and crying and exposing to sale any wares or goods on a Sunday, the goods to be forfeited to the poor, &c. on conviction before a justice of the peace, who may order the penalties and forfeitures to be levied by distress; but this is not to extend to dressing meat in families, inns, cooks-shops, or victualling-houses, nor to crying of milk (b) on a Sunday in a morning or evening.
29 Car. 2. c. 7.

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

† Law processes are not to be served on a Sunday (d), unless it be in cases of treason, felony, or on an escape, by virtue of 5 Ann. c. 9.

† Sunday is not a day in law for proceedings, contracts, &c.

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

† The service of a citation on a Sunday is good, and not restrained by 29 Car. 2. c. 7. and by two

(a) But the offender cannot be convicted more than once for any number of acts on the same day. Crepps v. Durden, 1 Hawk. P. C. 11. ch. 6. s. 2. n. Comp. 649.

(b) Or mackerel, before and after divine service, 10 & 11 W. 3. c. 24.; and fish carriages may pass, whether laden or returning empty, 2 Geo. 3. c. 15.

(c) Against the form of the statute.

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

B 2

Judges
OF GRAMMAR.

Judges the delivery of a declaration on a Sunday is well enough, it not being a process; but Holt, C. J. thought it ill, because the act intended to restrain all sort of legal proceedings. 1 Ld. Raym. 706.

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

OF GRAMMAR.

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

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

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

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

(a) See further, Com. Dig. Temps. (B. 3.) 20. Vin. Abr. 61. 4 Bla. Com. 63.

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

(c) 2 Hawk. P. C. 272. book 2. ch. 23. s. 111. 2 Hale, H. P. C. 176, 177.
OF LOGIC.

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

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

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

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

† Upon a divorce, the woman shall have the goods given in marriage, not being spent; for the goods

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

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

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

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

were
were given in advancement of the woman, and therefore it is reasonable that she should have them, the cause and consideration of the gift being defeated; for the cause ceasing, the effect also ceases. Dyer 13. (61). (a).

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

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

† If an annuity be granted to two for counsel, and one of them refuse, the office and grant being

(a) If the husband alien his wife's land, and they be afterwards divorced causa præcontractus, or any other divorce which dissolves the marriage à vinculo matrimonii, the wife, during the life of the husband, may enter by the stat. 32 H. 8. c. 28. 8 Co. 73 a. Co. Litt. 326 a.

(b) Plowd. 401. 5 Co. 49 b. 6 Co. 79 b. Dyer, 99 b. pl. 65. Wing. Max. reg. 57, pl. 61. 1 Hale, H. P. C. 426. 5 Bac. Abr. 292. Finch's Law, 9.

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

(d) 5 Edw. 4. 8. b.
entire, and not severable, the cause ceasing but in one, the whole annuity shall cease (a).

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

*5. Some things shall be construed, first, according to the original cause thereof.

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

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

Outlawry in trespass is no forfeiture of land, as outlawry of felony is; for although the non-appear-

(a) If the King grant any office, whatsoever it be, which requires confidence or diligence, to two men, and one of them is attainted, there, perhaps, the whole office is forfeited to the King. For of an entire thing the King shall have the whole or nothing, for he shall not make one another grantee to occupy in common with the other. Plowd. 380 a. 3 Bac. Abr. 743, fol. ed. 5 Bac. Abr. 212, 8vo. ed.

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

(c) Finch's Law, 10.
ance is the cause of the outlawry in both, yet the force of the outlawry shall be esteemed according to the heinousness of the offence, which is the principal cause of the process (a).

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

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

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

(a) Finch’s Law, 10. Co. Litt. 123 a. & b.
(b) Perk. s. 191.
(c) Litt. s. 710.

6. Secondly,
6. Secondly,—according to the beginning thereof.

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

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

† As if an annuity be granted pro consilio impenso & impendendo (b), and the grantee commit treason whereby he is imprisoned, so that the grantor cannot have access to him for his counsel, yet nevertheless the annuity is not determined by this non-feasance; yet it was the grantee's act and default to commit the treason, whereby the imprisonment grew: but the law looks not so far, but excuses him, because the not giving counsel was compulsory, and not voluntary, in regard of the imprisonment. 8 H. 8.

† So if a parson make a lease, and be deprived or resign, the successors shall avoid the lease, and yet the cause of deprivation, and more strongly of a resignation, moved from the party himself; but the law does not regard that, because the admission of the new incumbent is the act of the ordinary. 2 H. 4. 3. 26 H. 8. 2.

† So if I be seised of an advowson in gross, and an usurpation be had against me, and at the next avoidance I usurp again, I shall be remitted, and yet the presentation, which is the act remote, is my own act: but the admission of my clerk, whereby the

(b) For counsel given and to be given.
inheritance is reduced to me, is the act of the ordinary. 5 H. 7. 25.

† So if I covenant with J. S. a stranger, in consideration of natural love to my son, to stand seised to the use of the said J. S., to the intent that he shall enfeoff my son; by this no use arises to J. S., because the law does respect that there is no immediate consideration between me and J. S.

† So if I be bound to enter into a statute before the Mayor of the Staple at such a day, for the security of one hundred pounds, and the obligee before the day accept from me a lease of a house in satisfaction, this is no plea in debt upon my obligation, and yet the end of that statute was only security for money: but because the entering into this statute itself, which is the immediate act whereunto I am bound, is a corporal act which lies not in satisfaction, therefore the law takes no consideration that the remote intent was for money.

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

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

† So

(a) Vide Litt. s. 358. Perk. s. 801.

(b) The legal estate vested in a trustee in fee, or a mortgagee in fee of a forfeited mortgage, is in equity protected against
† So if a man purchase land in fee-simple, and
die without issue; in the first degree the law respects
dignity of sex and not proximity; and therefore
the remote heir on the part of the father shall have it
before the near heir on the part of the mother (a).

But

against his judgments, and other incumbrances, Finch v. Earl
of Winchelsea, 1 P. Wms. 278. 1 Madd. Ch. 456, 2d ed. and
against his bankruptcy, Bennet v. Davis, 2 P. Wms. 318. 3 P.
dower, Noel v. Jervon, 2 Freem. 43. 9 Vin. Abr. 226, pl. 51.
Bennet v. Pope, 2 Freem. 71; and free bench of his wife,
and from the tenancy by the curtesy of the husband of a
female trustee, or mortgagee in fee, Cashborn v. English, 7 Vin.
Abr. 156. 2 Eq. Ca. Abr. 728. 1 Atk. 603. S. C. 1 Cru. Dig.
523, 2d ed. Sug. Gilb. Uses, 18, n. Although the wife of a
trustee in fee, or of a mortgagee in fee of a forfeited mort-
gage, is at law entitled to dower, Sug. Gilb. Uses, 369, n.;
yet a fine on that account is never required by a purchaser;
because, if the wife of a trustee or a mortgagee were to be so
ill advised, as to prosecute her legal claim, equity would at
this day restrain her from proceeding, by injunction, and
would undoubtedly lay upon her all the costs. Sug. Vend.
303, 5th ed.

(a) Lord Bacon's Elements, Reg. 1, p. 3. Tracts, 37, ed. 1741.
So, according to Clere v. Brook, Plowd. Com. 450, when se-
veral are equally worthy in blood, as if all are of the male
line on the part of the father ascending, or of the female line
on the part of the father, the nearest shall be preferred in the
succession; but if one is more worthy in blood than another,
as if one is heir of the male line on the part of the father
ascending, and the other is heir of the female line on the part
of the father, there proximity is not regarded, but the more
worthy; viz, the heir of the male line, though more remote,
shall be preferred. And this doctrine is adopted by Sir Mat-
thew Hale, Hist. Com. Law, 268, &c. ed. 1779. Lord Chief
Baron Gilbert, Tenures, 19. William Osgoode, Esq. of Lin-
coln's-Inn, afterwards Chief Justice of Lower Canada, in a
Tract, entitled, "Remarks on the Laws of Descent; and on
the Reasons assigned by Mr. Justice Blackstone, for rejecting,
in his Table of Descent, a point of doctrine laid down in
Plowden,
But in any degree *paramont* the first, the law respects not; and therefore the near heir by the grandmother on the part of the father, shall have it before the remote heir of the grandfather on the part of the father.

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

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

Plowden, Lord Bacon, and Hale." Dr. Wooddeson, 2 Lectures, 262. and Mr. Cruise, 3 Dig. 380, 2d ed.

The contrary position has been maintained by Mr. Robinson, Law of Inheritances in Fee-simple, ch. 6. 55, &c. ed. 1755. Mr. Justice Blackstone, 2 Com. 238. Professor Christian has endeavoured to support, Blackstone, note 2, Com. 240, and Mr. Osgoode, in another anonymous Tract; entitled, "Remarks on the Inconsistency of the Table of Descents, projected by Mr. Professor Christian, in the Twelfth Edition of the Commentaries, with the Doctrine laid down by Sir William Blackstone, and by every Writer on the Law of Descents," has opposed the doctrine of the Annotator with much clearness and force of reasoning. Mr. Watkins, Law of Descents, 187, 3d ed. supports Justice Blackstone with much energy, though, it must be confessed, there is in this instance a want of clearness sometimes in his reasoning. A case exactly in point arose on the Midland Circuit in 1805, and was intended to have been argued in Westminster Hall, but was intended to have been compromised. Several eminent counsel were however consulted, among whom the late learned Mr. Serjeant Williams, the celebrated Editor of Saunders's Reports; and they were all of opinion that Sir W. Blackstone's doctrine was wrong. 3 Cru. Dig. 411.

(a) For fraud is not purged by circuity.

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

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

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

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

If a lease for years be made rendering a rent, and the lessee make a feoffment of part, and the lessor enter, the immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party; but it is only the pursuance and putting in execution of the title which the law gives; and therefore the rent or condition shall be apportioned. Dyer, 4 b. arg.

(a) And so on the contrary.

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

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

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

7. Thirdly,—according to the end thereof.

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

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

(a) Within the four seas.
(b) If it be proved he had notice of the disseisin, either before or when he was in the kingdom. Vide Litt. s. 440.
(c) But the law seems otherwise if he be sent beyond the sea in the King's service by his command. West's Symb. part 2, 68 a. Shep. Conn. 58. 77. Plowd. 366 a. vide further on this subject Doe, ex dem. Duroure v. Jones, 4 Term Rep. 300, and note, 301.
be compelled to answer till he comes in for that purpose by another process. 31 Edw. 3. Fitz. Abr. tit. Joinder in Action, pl. 10.

*8. Derivativa potestas non potest esse major  * P. 4. primativä (a).

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

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

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

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

† If

(a) The power derived cannot be greater than that from which it is derived.
(b) Wing. Max. p. 66.
(c) That which is not good in the beginning, no length of time can make good.
(d) But if the testament being made during the coverture, she approve and confirm the same after the death of her husband; in this case the will is good, by reason of her new consent, or new declaration of her will; for then it is as it were a new will. Swib. 88. And although the will be made before marriage, and the wife survive the husband, yet it seems that the will shall not revive upon the husband's death. Mrs. Lewis's case, 4 Burn's Eccles. Law, 51, 6th ed. vide 2 P. Wms. 624. For, as it is the nature of a will to be ambulatory during the testator's life, and marriage disables her from making any other will, the instrument ceases

C 2
† If a man seised of lands in fee make a lease for twenty-one years, rendering rent, to begin presently, and the same day he make a lease to another for the like term, the second lease is void; and if the first lessee surrender his term to the lessor, or commit any act of forfeiture, &c. of his lease, the second lessee shall not have his term; because the lessor at the making of the second lease, had nothing in him but the reversion. Plow. 432.

† A bishop makes a lease of lands for four lives, which is contrary to the statute (a), though one of

to be any longer ambulatory, and must be therefore void. Forse v. Hembing, 4 Co. 61 b. But where an estate is limited to uses, or a trust is created, and a power is given to a feme covert before marriage, to dispose of the property by way of appointment, notwithstanding coverture, such appointment either by deed or will may take effect. Doe v. Staple, 2 Freem. Rep. 695. But where by marriage articles a woman had power to dispose of her property by will after marriage, subsequent to the articles, but a few hours before the marriage she made a will, which was held to be revoked by the marriage. Hodsden v. Lloyd, 2 Bro. C. C. 534. Doe v. Staple, 2 T. R. 684. Et vide Sug. Pow. 264.

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

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

(a) See 4 Bac. Abr. 69. Gwil. edit. Leases (E), Rule 4
them dies in his life-time, so as now there be but three, and afterwards he dies, yet it shall not bind the successor; for those things which have a bad beginning cannot be brought to a good end. 10 Co. 62 a.

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

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

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

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

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

(b) Bro. Abr. Fine, pl. 18. Co. Reading 10. Tr. 253. 5 Crn. Dig. 76.

(c) Et ride 4 Co. 3a. 3 Bac. Abr. 715. Jointure (B) 1. Treat. Ten. 114.
10. *Unumquodque dissolvitur eo modo quo colligatur*.(a)

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

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

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

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

† Indentures being made for declaring the uses of a subsequent fine, recovery, &c. are only directory, and do not bind the estate or interest of the land; yet if the fine or recovery, &c. be pursued according to the indentures, there cannot be any bare

(a) Every thing is dissolved by the same mode in which it is bound together. *Nihil tam conveniens est naturali aquitati, unumquodque dissolvit eo ligamine quo ligatum est*. Wing. Max. p. 68. 2 Inst. 573. It would be inconvenient that matters in writing, made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. Countess of Rutland's case, 5 Co. 26 a.

In equity an agreement in writing may be discharged by parol, *Legal v. Miller*, 2 Ves. sen. 299. 9 Ves. 250. 3 Wood-Desou's Lect. 428. Phill. on Evid. 603. 4th edit. 1 Fonbl. Treat. Eq. 392. 5th edit.; but the proof must be clear, Buckhouse v. Crosby, 2 Eq. Ca. Abr. 33. 1 Madd. Ch. 407. 2d edit. Sug. Vend. 133. 5th edit. though it cannot be altered or contradicted by parol. Roberts, on Frauds, 89. averment,
averment, that after the making of the indentures, by mutual agreement of parties it was agreed that the assurance should be to other uses; but if other limitations of uses be made by writing or matter of so high a nature as the former, then the last agreement shall stand; for every contract and agreement must be dissolved by a matter of as high a nature as the other was. 5 Co. 26, and *Suprema potestas seipsam dissolvere potest* (a).

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

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

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

† An executor recovers and dies intestate, administration of the goods of the first testator is com-

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

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

mitted to J. S. J. S. shall not sue out execution upon this recovery. 26 H. 8. 7. (a).

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

12. Debile fundamentum, fallit opus (b).

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

† A spiritual corporation to which a church is appropriate being dissolved, the church is disappropriated. 3 E. 374.

† The lord confirms the estate of the disseisor to hold free, this after the recovery of the disseisee shall be ancient demesne again, for the estate upon which the confirmation enures, is defeated. 49 E. 3. 3.

13. Incidents cannot be severed.

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

† Lord and tenant by fealty and homage, the lord releases his fealty, this is void, for fealty is incident to the homage. 7 E. 4. 11. b.

14. Actio personalis moritur cum personâ (d).

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

If the lessor covenant to pay quit-rents during

(a) Finch, 13. Wing. Max. p. 83. pl. 28.
(b) A weak foundation destroys the superstructure.
(d) A personal action dies with the person.
the term, his executor shall not pay it, for it is a personal covenant (a).

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

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

† If a man commit a trespass in a forest, and die, by the forest law no action will lie for the trespass, agreeably to the rule of the common law, that personal actions die with the person.

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

† From

(a) See vide 2 Bac. Abr. 69. Covenant (E).
(b) He held.
(c) In right of his wife.
(d) It was a principle of the common law, that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done. And from a misconception, or misapplication of this
OF LOGIC.

this principle, it was formerly doubted, whether assumpsit would lie either for or against an executor; because the action, it was said, was in form trespass upon the case, and therefore supposed a wrong, and in substance to recover damages only in satisfaction of the wrong. Plow. 180, Norwood v. Read. Dy. 14, pl. 69. in margine. 9 Rep. 86 b. 89 a. Pinchon’s case. Cro. Jac. 294, S. C. 10 Rep. 77 a. The case of the Marshalsea. Yelv. 20, Slade v. Morley. 1 Lev. 200, 201, Palmer v. Lawson. 2 Ld. Raym. 974, Berwick v. Andrews. But where the cause of action was founded upon any misfeasance or misfeasance, was a tort, or arose ex delicto; such as trespass for taking goods, &c. trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other cases of the like kind, where the declaration imputes a tort done either to the person or property of another, and the plea must be not guilty, the rule was, actio personalis moritur cum personâ; and this rule still holds with respect to the person by whom the injury is committed; for if he dies, no action of this kind can be brought against his executor or administrator, though in some of these cases, such as taking away goods, &c. a remedy may be had against the executor in another form. Sir W. Jones, 174, Le Mason v. Dixon. Latch. 167, 168. S. C. Sir T. Raym. 57, Hole v. Bradford. Palm. 330, Carter v. Fossett. Cro. Car. 540, Perkinson v. Gilford. 1 Ld. Raym. 433, 434, Kinsey v. Hayward. Comp. 375, Hambly v. Trott. 2 Bac. Abr. 445. fol. edit. 3 Bac. Abr. 98. 6 Bac. Abr. 697, 8vo. edit. But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed; for there the action survived. Latch. 168. Cro. Car. 540. Comp. 375. It is true that no action of account lay either for or against an executor; not upon the principle before-mentioned, but because the account rested in the privity and knowledge of the testator only. Co. Litt. 89 b. 2 Inst. 404. But this action is since given to executors by the statute of West. 2. 13 Edw. 1. stat. 1. c. 23.; and against executors by statute 4 & 5 Anne, c. 16. s. 27. Nor did an action of debt lie against an executor upon a simple contract, when the testator could have waged his law; not because such action died with the person, but because the executor would lose the benefit of waging law. 9 Rep. 87 b. Pinchon’s case. Cro. Eliz. 600, Bowyer v. Garland. Comp. 375. For where the testator himself could not have waged his law, debt lay against his executor, as debt for rent upon a parol lease
lease made to the testator, or by a gaoler for diet provided for him while in prison. 9 Rep. 87 b. But _assumpsit_ always lay against an executor upon the simple contract of his testator, notwithstanding what is said to the contrary in Yelv. 20, _Slade v. Morley_. Plow. 180. 9 Rep. 87 b. So if the goods, &c. taken away, continued still _in specie_, in the hands of the wrong-doer, or of his executor, _replevin_ or _detinue_ would lie for or against the executor to recover back the specific goods, Sir W. Jones, 173, 174; or in case they were consumed, an action for _money had and received_ to recover the value. Cowp. 377. The rule of _actio personalis moritur cum personâ_, has received considerable alterations by the statute 4 Edw. 3. c. 7. _de bonis asportatis in vita testatoris_, which reciting, that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and so as such trespasses have remained unpunished, enacts, "that the executor in such cases shall have an action against the trespassers, and recover their damages in like manner, as they whose executors they be should have had if they were living." And this remedy is further extended to executors of excentors by stat. 25 Edw. 3. c. 5; and to administrators by stat. 31 Edw. 3. c. 11. The statute of 4 Edw. 3. being a remedial law, has always been expounded largely, and though it makes _trespasses_ only, has been extended to other cases within the meaning and intent of the statute. 1 Ventr. 187, _Emerson v. Emerson_. Sir W. Jones, 174. 2 Ld. Raym. 974, _Berwick v. Andrews_. Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the _personal estate_ of the testator in his life-time, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be. Latch. 168. So that he may now have trespass or trover, 5 Rep. 27 a. _Russell's case_. Sir W. Jones, 174; action for a false return, 4 Mod. 403, _Williams v. Cary_; for an escape, 2 Ld. Raym. 973, _Berwick v. Andrews_; debt on a judgment against an executor suggesting a _decastavit_, 1 Salk. 314; action for removing goods taken in execution before the testator (the landlord) was paid a year's rent, 1 Str. 212, _Palgrave v. Windham_; and other actions of the like kind, for injuries done to the _personal estate_ of the testator in his lifetime. See also 2 Bac. Abr. 445. fol. edit. 3 Bac. Abr. 97. Gwill. 8vo. edit. Cro. Eliz. 577, _Rutland v. Rutland_. 1 Ventr. 187, _Emerson v. Emerson_. But the statute of Edw. 3. does not extend to injuries done to the _person_, or to the _freehold_ of the testator;
† From a bare contract or promise, no action rises; it is called *nudum pactum* (a): As where a man makes a bargain and sale of lands, goods, &c. without any consideration or recompence to be paid for it; these are void in law, and the vendee cannot bring any action. Doct. and Stud. c. 24.

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

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

*P. 6.* *As matters in writing determine an agreement by words.*

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

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

† A man is bound to take his remedy upon his highest security. As for instance: Suppose a man testator; therefore an executor or administrator shall not have actions of assault and battery, false imprisonment, slander, deceit, diverting a watercourse, obstructing lights, cutting trees, and other actions of the like kind; for such causes of action still die with the person. Sir W. Jones, 174. Latch. 166. 1 Venr. 187. Wms. n. 1 Saund. 216 (1).


(b) Transacted in the country, without writing.
has an *assumpsit*, and a deed under hand and seal, in case he proceed upon the *assumpsit*, he will be nonsuited. 2 Stra. 1027. *Bulstrode v. Gilburn*.


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

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

† The 3 *H. 7*. c. 1. enacts, that if murderers, &c. are acquitted upon indictment, or the principal is attainted, &c. the wife or heir of the person slain shall have their appeal against the person so acquitted, or the principal so attainted; and it was resolved, that the words "attaint of murder" in that act shall not be intended only as a person who has judgment of life, but also shall be extended to one convict by confession or verdict; for a person attainted is a person convict and more, as every greater contains the less.

† Where there is a custom that a man shall not devise his lands for any higher estate than for life; yet if the devise be in fee, and the devisee claims but for life, the devise is good. When more is done than ought to be done, that seems to be done

(a) The greater contains the less. Jenk. Cent. 203. 4 *Co. 46*.

(b) During her widowhood, and vide *Whitlock's case*, 3 *Co. 70 b*.

It seems a settled rule, that where by the custom the *lord* may grant in *fee-simple*; he may grant *any less estate*, though there never was such a grant before. *Co. Litt. 52 b*. 1 Roll. Abr. 511 (L). 4 *Co. 23 a*. 1 Wms. Saund. 147 (1), 348 (8).

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which was to be done: So that if a man tender more money than he ought to pay, it is good enough; for every greater contains the less; and the other ought to accept so much of it as is due to him.

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

As the writings, the chest or box they are in (b).
† An adulterer takes the wife of another man, and new clothes her, the husband may take with his wife the clothes on her back. 11 H. 4. 31.
† The body of a man is more worthy than land, and therefore land shall follow the nature of the person: As a villain shall make free land to be villain's land; but villain's land shall not make a free man to be a villain. So land of the King, which he has in his natural capacity, shall be demesne according to the privileges and prerogatives of the King's person. 5 Eliz. 238.

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

(a) The more worthy draws with it the less worthy. 1 Inst. 43 b.
(b) Off. Executor, 64.
(c) The highest force is that of nature. Bract. c. 23. 2 Inst. 564, some say nature vis maxima.
(d) In a covenant to stand seised. Plowd. Com. 309 a. Sug. Introd. Gilb. Uses, liv. 245. 2 Bla. Com. 338. 2 Roll. Abr. 785. 2 Sand. Uses, 79, 80. 22 Vin. Abr. 124. 204. 7 Bac. Abr. 96. 100. Com. Dig. Coercant (G 3) But it is absolutely necessary that the consideration be natural love and affection to a child, or near relation, or marriage. 4 Cru. Dig. 136, 2d edit.

And
And one brother may maintain a suit for another (a).

† If there be mother and daughter, and the daughter is attainted of felony, such daughter cannot be heir to the mother; yet if after the attainder she kills her mother, this is matricide and petit treason; for she still remains her daughter, and that by the law of nature.

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

† If the father be slain, the son shall have appeal; for it shall be presumed he had the greatest love and affection for his father, and will be most earnest in revenging his death. And it was an ancient usage when a person was found guilty of murder on an appeal, that all those of the blood of him that was slain, should draw the criminal to the place of execution: Which was grounded upon the loss those of the blood had received, by the murder of one of them. Plow. Com. 304. 306. (b).

19. The law favours, first, some persons; viz.

Men out of the realm, or in prison, women * married, infants, idiots, mad-men, men * P. 7. without intelligence, strangers who are neither parties nor privies, and things done in right of another person.

(a) Vide 2 Inst. 564. Plowd. 304 a.
(b) 3 Inst. 131.

d 2 A descent
A descent shall not take away the entry of a man out of the realm (a), or in prison (b), or of a married woman (c), or of an infant (d).

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

An idiot shall not be compelled to plead by his guardian or next friend, but shall be in the court (e): and he who pleads the best plea for him shall be admitted.

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

If a lessee for years grant a rent-charge, and afterwards surrender the lease, the rent-charge shall be paid, during the term, to the grantee (f).

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

† Legal imprisonment without any covin shall be a good excuse for a parson’s non-residency, by reason of his impotency.

† The right of action of men out of the realm, &c. is saved till their impediments are removed, where others are bound by the Statutes of Limitation. 21 Jac. 1. c. 16. 4 & 5 Ann. c. 16.

20. Secondly,—a man’s person before his possession (g).

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

(a) Co. Litt. 260 a. b. 261 a. 262 b.
(b) Co. Litt. 259 a. 260 a.
(c) Co. Litt. 246 a.
(e) Vide Co. Litt. 135 b. 247 a.
(f) Co. Litt. 185 a. 233 b. 338 b.
(g) Finch’s Law, 29.

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

21. Thirdly,—and matter of possession more than matter of right, when the right is equal.

* As if a man purchase several lands at one *P. 8. time, held of several lords by knight service and die, the lord who first seises the ward shall have it, otherwise the elder lord.

(a) Co. Lit. 247 a. vide 2 Com. 291. 292. Fonbl. Treat. Eq. book 1. c. 2. s. 1, notes (d) and (g).
(b) See Mr. Hargrave’s learned notes, Co. Lit. 123 a. (3)(6).

Perk. sect. 314. We hear nothing of the tenure of villenage at present; and therefore as with regard to many other things which most commonly occur, no one scarcely considers whence this servitude has been entirely dropt in this country, without its being abolished by any statute. The statute of Charles the Second, c. 24, or rather of Cromwell, abolished those tenures only, which were attended with wardships, &c., declaring that the act should not be construed to alter or change any tenure by copy of court roll, or any services incident thereunto. Hargr. n. Co. Lit. 141 b. (4); besides this, we hear nothing of it after Queen Elizabeth; and little in her reign. This is the more extraordinary, as it seems to be generally agreed by historians, that more than half the lands of England were anciently held by this tenure, and the greater part of the inhabitants were consequently in a state of vassalage. Barrington’s Observations on the Ancient Statutes, 301, 5th edit. Vide Harris’s, n. Just. Inst. lib. 1. p. 12 Hargr. n. Co. Litt. 117 a. (1). By the old law, the exile or destruction of men was waste; as by the exile or destruction of villains or tenants at will, or making them poor, where they were rich when the tenant came in, whereby they depart from their tenures. Co. Litt. 53 b.
22. Matter of profit or interest shall be taken largely: and it may be assigned, but it cannot be countermanded: but matter of pleasure, trust or authority, shall be taken strictly, and may be countermanded.

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

A church-way is matter of ease.

† An office of skill and diligence shall not be granted over unless it be granted to him and his assigns, or in fee. 11 E. 4. 1.

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

† The king licences one to alien the third part of his land, and he aliens the whole, the alienation is entirely void. 4 E. 6. 68 b.

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

(a) So of a licence, 4 Term Rep. 73.
23. Nothing shall be void which by possibility may be good.

If land be given to a man, and to a woman married to another man, and the heirs of their two bodies, this is a present estate-tail, because of the possibility (a).

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

† And touching the uncertainty, if a man grant an advowson with warranty, and the tenant in a writ of right of advowson vouch, he shall have, if he lose, recompence in value of land, or other certain profit, and yet the advowson of itself is utterly of an uncertain value. So of a liberty, bona et catalla felonum (b). Hob. 43.

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

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

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

(a) Co. Litt. 25 b. 2 Bac. Abr. 548.
(b) The goods and chattels of felons.
(c) An action cannot arise from a naked agreement. Plow. Com. 305.
(d) Nor will the consideration of a person adopting the name of the covenantor be sufficient to raise a use. Hatton's case, Jenk. Cent. 2, case 60. Sug. Gilb. Uses, 456.

25. The
25. The law favours a thing which is, first, of necessity.

As to pay funeral expenses shall not be said to administer (a); to distress in the night, damage to a peasant; to kill another, to save his own life, murder.

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

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

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

† First, of preservation of life, if a man steal viands to satisfy his present hunger, this is no felony nor larceny. Staundf.

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

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

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

(a) Godd. 95. Off. Ex. 174. 3 Bac. Abr. 22.
(b) Bac. Max. Reg. 5 T. R. 55.
(c) In self defence.
quantity of the merchandize is cast overboard, whereby the merchant agrees with the customers by estimation, which falls short of the truth, yet the over-quantity is not forfeited; where note, that necessity dispenseth with the direct letter of a statute law. 14 H. 7. 29. per Read. 4 Ed. 6. pl. 4. Ed. 6. 20. condic.

† So if a man have a right to land, and do not make his entry for fear of force, the law allows him a continual claim, which shall be as beneficial to him as an entry; so shall a man save his default of appearance by cresetain de eau, (the overflowing of waters) and avoid his debt by duress. Litt. pl. 4. 19. 12 H. 4. 20. 14 H. 4. 30. B. 38. H. 6. 11. 23 H. 6. 8. 39 H. 6. 50.

† The second necessity is of obedience, and therefore where baron and fême commit a felony, the fême can neither be principal nor accessory, because the law intends her to have no will, on account of the subjection and obedience she owes to her husband. Staundf. 20. Fitz. Abr. tit. Coron. 160.

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

† So if a warrant or precept come from the King to sell wood upon the ground whereof I am tenant for life or for years, I am excused in waste.

† The third necessity is of the act of God, (c) or of

(a) It does not appear.
(b) In their commands.
(c) Although the act of God be an expression which long habit has rendered familiar to us, yet perhaps, on that very account,
of a stranger, as if I be particular tenant for years of a house, and it be overthrown by a great tempest or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging to it some cottages which have been infected, whereby I can procure none to inhabit them, or no workmen to repair them, and so they fall down; in all these cases I am excused in waste: But of this learning when and how the act of God and strangers excuse, there are other particular rules. B. 42 Ed. 3. 6. B. Wast. 31. 42 Ed. 3. 6. 19 Ed. 3. per Th. Fitz. Wast. 30. 32 Ed. 3. Fitzh. Wast. 105. 44 Ed. 3. 31.

† But then it is to be noted, that necessity privileges only quoad jura privata (a); for in all cases, if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuses not: For privilegium non valet contra rem publicam (b): And as another says, necessitas publica major est quam privata (c): For death is the last and farthest point of particular necessity, and the law imposes it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life. As if in the danger of tempest, those who are in the ship throw over other men's goods, they are not answerable; but if a man be commanded to account, it might be more proper, as well as more decent, to substitute in its place inevitable accident: religion and reason, which can never be at variance without certain injury to one of them, assure us, that "not a gust of wind blows, nor a flash of lightning gleams, without the knowledge and guidance of "a superintending mind;" but this doctrine loses its dignity and sublimity by a technical application of it, which may, in some instances, border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous. Jones on Bailments, 104.

(a) As to private rights.
(b) Privilege does not avail against the commonwealth.
(c) The public is greater than the private necessity.
bring ordnance or ammunition to relieve any of the King's towns which are distressed, then he cannot for any danger of tempest justify the throwing of them overboard; for in that case the speech of the Roman holds good, who, when the same necessity of weather was alleged to prevent him from embarking, said, \textit{Necesse est ut eam, non ut vivam} (a). So in the case put before of husband and wife, if they join in committing treason, the necessity of obedience does not excuse the offence as it does in felony, because it is against the commonwealth.

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

† This rule admits an exception, when the law intends some fault or wrong in the party who has brought himself into the necessity; which is \textit{necessitas culpabilis} (b). This I take to be the chief reason why seipsum defendendo (c) is not matter of justification; because the law intends it has a commencement upon an unlawful cause; because quarrels

\begin{itemize}
\item[(a)] It is necessary that I go, not that I live.
\item[(b)] A culpable necessity.
\item[(c)] Self defence.
\end{itemize}
are not presumed to grow without some wrongs either in words or deeds on either part; and the law which thinks it a thing hardly triable, in whose default the quarrel began, supposes the party who kills another in his own defence not to be without malice; and therefore as it does not touch him in the highest degree, so it obliges him to sue out his pardon of course, and punishes him by forfeiture of goods; for where there cannot be any malice or wrong presumed, as where a man assails me to rob me, and I kill him, or if a woman kill him who assails her to ravish her, it is justifiable without any pardon. 4 H. 7. 2.

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

26. And secondly,—for the good of the commonwealth,

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

† In cases which are for the public good of the people, a man may justify doing a wrong. As in time of war a man may erect bulwarks on another man's lands (e); and before the Statute of Magna Charta,

(a) Free will.
(b) Culpable infirmity.
(c) Culpable necessity.
(d) Dyer, 36.
(e) Dyer, 70.
the King might enter into another's woods, and cut the trees for reparations of castles, &c. Plowd. 322.

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

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

27. Communis error facit jus (a).

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

† This is established upon custom; for the law so favours the public good, that it will permit a common error to pass for right: As in cases of common recoveries, first had upon feigned and unlawful ground, which nevertheless having been used a long time, they having been taken and allowed by divers persons well learned, as law, are esteemed good. And that a common recovery bars an estate tail, is not to be disputed; because a great part

(a) Common error becomes right. 4 Inst. 240.
of the inheritances of the kingdom depends upon it. Plowd. 33. b.

23. And the law favours things which are in the custody of the law.

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

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

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

29. The husband and wife are one person.

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

An

(a) Litt. sect. 168, yet he may give to a trustee for her benefit, and the gift will be good. So he may convey land to her by way of use, as by enfeofing or covenanting with another to stand seised, or surrendering copyhold estate, to her use. Co. Litt. 112 a. Hargr. n. Co. Litt. 3 a. (1). 1 Rop. Husb. and Wife, 53. Wing. Max. 765.

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

(c) But if the husband, before the marriage, give a bond to his intended wife, with a condition to avoid it, if he leave her a certain sum of money at his death, the obligation would not be dissolved
An obligation with a condition to enfeoff a woman before such a day, and before the day the obligor takes her to wife, the obligation is forfeited, because he cannot enfeoff her; but he may make a lease for years with a remainder to his wife.

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

When a joint purchase during the marriage is made, and the husband sell, the wife shall have a cui in vita (b) for the whole against both; and on a feoffment made to one man * and * P. 11. his wife, and to a third person, the third person shall have one moiety.

† Because the husband and wife are but one person in law: So if an estate be made to the husband and wife, and to two others, the husband and wife shall have but the third part. Litt.

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

dissolved by their marriage; for the engagement never ripened into a duty, during the husband's life, and it could not have been released by him. Smith v. Stafford, Hob. 216. Clark v. Thompson, Cro. Jac. 571. Tylte v. Peirce, Cro. Car. 376. Gage v. Acton, 1 Ld. Raym. 515. Milboarn v. Ewart, 5 Term Rep. 381. 384. Thus it appears, that the express agreement of the parties created a right not inconsistent with the rules of marriage; so that, although the right be suspended, it is not extinguished by it. 2 Rop. Husb. and Wife, 77.

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

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

† An action of debt lies against the husband for goods delivered or sold to the wife, for the law presumes they must come to the use and possession of the husband; and the husband and wife are but one person. Pract. Reg. 102. But the wife may not make any contract or agreement without the consent of the husband; (except it be for necessary apparel, goods for her family, &c.) and if she bargain and sell any goods, if the buyer knows her to be a feme covert, the contract shall be void; unless it be for such things as she usually trades for, by the consent of her husband. 2 Inst. 713. And in case of banishment of the husband, a feme covert may act as lawfully as the husband might, if he were not dead in law. Stat. West. 3. c. 3.

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

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

† A man must answer for the trespasses of his wife; and if a feme covert slander any person, the husband and wife must be sued for it. But for scandalous words against a man and his wife, the husband may prosecute one action alone for his slander, and afterwards join in an action with his wife for her’s. Style’s Rep. 113.

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

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

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

† The

(a) Co. Litt. 351 a. But the freehold or inheritance of the wife is subject to other rules; for the husband, by the marriage, does not become absolute proprietor of the freehold or inheritance; although, as the governor of the family, he is so far master of it, as to receive the profits of it during her life; but he has no power to make an absolute sale of it without her consent. 1 Bac. Abr. 476. Baron and Feme (C) 1. Although a man who marries a woman seised in fee, gains a freehold in right of his wife, yet it must be pleaded, that the husband and wife, in right of the wife, were seised in fee, not of freehold merely: and if he state that he is seised in his demesne as of freehold in right of his wife, it will be bad on a special demurrer. Polybank v. Hackins, Doug. 329. So in Cullin v. Milner,
† The husband has power to dispose of things in action; and his release of an obligation made to the feme, or where goods were taken from her whilst she was sole, shall be good against the wife; but if he die without making such release, the wife shall have an action upon the obligation, and not the executors of the husband. 39 H. 6.

† And if an obligation made to a feme, become payable during coverture, and afterwards the wife die, the husband shall have an action of debt upon it; because it was a duty to the feme, and a thing in action before marriage; but it is otherwise where rent is in arrear. F. N. B. 121.

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

† If husband and wife bargain and sell the wife's lands by indenture, and the vendee grant them a

Milner, 2 Lutw. 1422. 1425, where it is stated, that the husband alone was seised in his demesne as of fee in right of his wife, it is well held not to be good pleading; for they are both seised in right of the wife; and so are all the precedents. Wms. n. 1 Saund. 253. The husband alone can make a tenant to the præcipe for the purpose of suffering a common recovery of his wife's estate, without her previously joining him in a fine. 2 Roll. Abr. 394, pl. 4. Pigot on Recoveries, 72. 1 Cases and Opinions, 456. 2 Ibid. 152. Cruise on Recoveries, 52, 2d ed. 5 Cru. Dig. 355, 2d ed. Butl. n. Co. Litt. 325 b. (2), at the end; but the husband and wife must be vouched.

(a) Co. Litt. 184 b. Her right being paramount, and her interest not having been displaced, she will be entitled to the term discharged from the payment of the rent, yet he might have granted away the term itself. 1 Bac. Abr. 476. Baron and Feme (C 2.) 1 Roper Husb. and Wife, 178. Harg. n. Co. Litt. 19; b. (9).
yearly rent out of it, her acceptance of this rent, after her husband’s death, does not bar her of the land, although the acceptance be an agreement to the bargain; the bargain being but a contract is the bargain of the husband only; for a wife is sub potestate viri (a); and therefore it is, that the judges, when a woman is to acknowledge a fine of lands, do examine her privately, whether she be willing to do it, or come by compulsion of the husband. Off. of Exec. 210.

† For this reason the writ, cui in vita (b), is given to the wife by law, for the recovery of her land after her husband’s death, being aliened by him. And in many cases, the law helps the wife, because she is under the power of her husband: As if baron and fême, in right of the wife, have title to enter into lands, and the tenant dies seised, the entry of the husband upon the heir, who is in by descent, is taken away; but if the husband die, the wife or her heirs may enter upon the issue; for the laches of the husband shall not turn to the prejudice of the wife or her heirs. Lit. Ten. 235. But it is otherwise if the wrong be done to the fême before marriage: And if it be for the performance of a condition annexed to the estate; as where a feoffment is made to the fême reserving rent, and for default of payment a re-entry, in that case the laches of the husband shall bar the wife for ever. Co. Lit. 24.

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

Personal things, and things absolutely real, as lands, rents, and so forth, or chattels real, and things in action, are only in her right; notwithstanding chattels real, and things in action, he may

(a) Under the power of her husband.

(b) In whose life.
dispose of at his pleasure \(a\), but not will nor charge them; and he shall have her real chattels, if he survive. Of things in action, the woman may dispose by her last will, and she may make her husband her executor, and he shall recover them to the use of the last will of his wife \(b\).

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

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

* P. 12. *The woman surviving, shall have all things in action; or her executors, if she die \(c\).

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

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

Note. A feoffment made to the wife, she shall have nothing if her husband do not thereto agree.

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

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

\(c\) Bultn. n. Co. Litt. 351 a. \(f\).

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

MORAL
MORAL RULES.

32. The law favours works of charity, right, and truth, and abhors fraud, covin, and uncertainties which obscure the truth; contrarieties, delays, unnecessary circumstances, and such like.

33. Dolus & fraus una in parte sanari debent (a).

No man can take benefit of his own wrong. If a man be bound to appear at a day, and before the day the obligor put him in prison, the bond is void.

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

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

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

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

(a) Deceit and fraud should be remedied on all occasions.
(b) To have.
the heir is to supply the rest, for he shall not take advantage of his own wrong. 4 Co. 63.

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

† The heir who is party to the death of his father, shall not have appeal for it (b). An infant's appeal shall not stay for his full age, for he shall not take advantage of his own wrong. 27 H. 8.

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

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

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

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

† And so it is of a feoffment upon condition, that

(b) Perkins, idem.
(c) The law does not compel any man to do what is impossible. 5 Co. 21.
the feoffee shall go as aforesaid, the feoffment is absolute, and the condition void; because it is a condition subsequent. But if there be a condition precedent impossible, no estate or interest is acquired thereby (a). Co. ib.

† If a lease be made for forty years upon condition that the lessee dwell upon the lands the whole term, and he die at the end of ten years, the executors shall enjoy the land, because the condition is become impossible. Dod. 37 Eliz. If a man be bound by recognizance or bond, with condition for his appearance the next term in such a court, and before the day the concussee or the concusor die, the obligation is saved.

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

**35. LAW CONSTRUCTIONS.**

The law expounds things with equity and moderation, to moderate the strictness. It is no trespass to beat an apprentice with a reasonable correction, or to go with a woman to a justice of peace, to have the peace of her husband against the will of her husband,

(a) In case of a feoffment in fee, with a condition subsequent, which is impossible, the estate of the feoffee is absolute; but if the condition precedent be impossible, no estate or interest will arise. Co. Litt. 206 b.
husband, which equity restrains the gene-
* P. 14. rality, if there be any mischief or * in-
convenience in it: as if a man make a feoff-
ment of his lands in and with common in all his
land in C. the common shall be intended within his
lands in C. and not in his other lands he shall have
elsewhere.

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

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

So an obligation to pay ten shillings at the feast of
our Lord God (b), it is no plea to say that he did pay

(a) Lord Nottingham's MS. n. Co. Litt. 267 b. (1). Finch's
Law, 63. Perhaps this doctrine may be considered a mere
quibble in the present day. If the recital stated the intention
to be only to grant a rent of ten shillings, that would coun-
teract the operation of this rule of law. Vide Shelley v.
Thorpe, 1 Ld. Raym. 235. Because it is a maxim of the
highest antiquity in the law, that all deeds shall be construed
favourably, and as near the apparent intention of the parties
as possible; for where the intention is clear, too minute a
stress ought not to be laid even on the strict and precise signi-
nification of words. 4 Cru. Dig. 292, 293. If such an unjust
advantage were attempted to be taken by the grantee of the
rent, it seems clear that equity would restrain him, and ob-
lige him to pay the costs. However, when tenants in common
grant a rent-charge, it is prudent to add a proviso and decla-
ration, that the grantee is only to receive the sum actually
intended, or otherwise to make a conveyance to uses, to the
cend and intent that the person to have the rent may receive
it, and subject thereto to the use of the grantors, as tenants
in common in fee.

(b) Christmas.
it; but he must shew at what time, or else it will be taken he paid it after the feast.

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

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

† If a man give lands to another et hereditibus (b), it shall be a fee-simple without the word suis (c), and though he do not give him a fee-simple expressly (d). If I give lands to A. B. and his heirs male, this will be a good fee-simple, and the word "males" is void (e). And if a man give lands to one et filio suo primo-genito (f), and he has no son at the time of the gift, but afterwards he has a son, that son shall have the land by way of remainder; for the law construes the limitation strong against the maker.

† If I make a lease for years upon condition, that in one month after the person to whom it is made

(a) Perk. s. 104. Post, 52 (a).
(b) And to heirs.
(c) His.
(d) 1 Plow. Com. 28 a. 29. Lord Coke says, it is safe to follow Littleton, and add suis. Co. Litt. 8 b.
(e) Co. Litt. 13 a.
(f) And to his first-born son.
shall have a fee, he shall have it after the month accordingly (a). If I sow all my land with corn, and then make a lease of it for years, the corn belongs to the lessee, if I except it not. 32 H. 6.

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

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

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

Ut res magis valeat quam pereat (c).

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

† The

(a) If livery of seisin, or what is equivalent to it be made.
(b) Vide note, infra, Condition, * 78.
(c) It is better for a thing to have effect than to be void.
(d) To have immediately after his death.
3 Bac. Abr. 399. The reason assigned by the court is, because by the grant of lands in the premises to the grantee, his executors,
LAW CONSTRUCTIONS.

† The King shall not be received after default of his tenant for life, because the demandant will not

executors, administrators, and assigns, the whole term of
years is transferred, and since by the premises the whole term
passed presently, but by the habendum not till after the death
of the grantor; ex consequentiă the habendum was repugnant to
the premises, and void; and this judgment was affirmed in
the House of Peers.

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

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

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

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

Assignments of terms for years from a future period, as
from Michaelmas day next, are not uncommon, and though
they are not technically correct, according to the old cases,
yet no objection is raised to the title on that account. But
when an assignment is to take effect immediately in interest
to avoid the above objection, it is prudent to make the ha-
 bendum "from the day next before the day of the date," or
"henceforth."

have
have the effect of the receipt, viz. to declare against him afresh, for no one shall declare against the King, for they must sue him by petition. 25 E. 3. 48.

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

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

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

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

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

† An use limited to commence when an eldest son (in ward to the King) is married by J. S. he is married by the King and J. S. yet no use arises, for he is married solely by the King. A patron who suffers an usurpation for six months, grants an annuity to J. S. till he is promoted to the benefice by him, and afterwards he and the usurper join in grant-


(b) For giving his advice.

(c) The author probably had in his mind, Reniger v. Fogossa, 1 Plowd. Com. 1.
ing the presentment, yet the annuity does not cease. Dyer, 191.

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

† Issues joined shall be tried by those who have most skill, viz. issues upon points of law, that is, demurrers shall be argued before, and adjudged by the judges learned in the law, &c. 4 Eliz. 230 b. (b).

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

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

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

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

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

(b) Vide Treat. of Ten. 26.

(c) But the entry must be congeable, and the lease must not be indenture or matter of record, because that would estop the disseisee, and he would not be remitted. Litt. s. 693. 694. 696. Perk. s. 159.
41. One thing shall enure for another.

If the lessor enfeoff the lessee for life (a), it shall be taken for a confirmation.

† A man grants the third presentment of an advancement and dies, the heir shall present twice, and the wife shall have the third for her dower; and then at the next avoidance after this, the grantee shall present, so that he shall have only the fourth.

15 H. 7. 7. (b).

† The King pardons the not building a bridge; this is only good for the fine for not building it: But notwithstanding the party shall build the bridge, for the King's subjects are interested in it.

37 H. 6. 4. (c).

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

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

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

(a) Without any words of limitation.
(b) Co. Litt. 579 a.
(c) Finch's Law, 63.
(d) Perk. s. 110. Finch's Law, 63. Wins. n. 1 Saund. 322 b. (6). And whenever the law gives any thing, it gives also a remedy for the same; quando lex aliquid alieui concedit, concedere videatur et id sine quo res ipsa esse non potest. Co. Litt. 56 a.

† In
† In cases of routs, assemblies, &c. if several persons meet to do an unlawful act, and separate without doing it, they are to be punished. Dalt. Just. 320. Justices of peace, constables, &c. are to suppress affrays, and commit offenders, &c. Lamb. 135.

† False allegiance is likewise punishable: And this is understood when any person binds himself to another, by obligation or promise, to execute acts of disloyalty.

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

† In forcible possession the sheriff may raise the posse comitatus to make restitution; and as constables are to see the peace be kept, they may command others to their assistance, &c.

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

† In case a lessor upon his lease excepts the trees, and afterwards has an intention to sell them, the law, as incident to the exception, gives to him and those who are willing to buy them, power to enter and shew and view the trees; because without entry, they cannot be viewed; and without view, they cannot be bought. 11 Co. 52 a.

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

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

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

43. \textit{A man cannot qualify his own act.}

As to release an obligation until such a time.

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

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

† A parson
† A parson makes a lease for forty years, the patron and ordinary confirms the said demise for twenty years, yet this confirmation extends to the whole term. 5 Co. 81 a. (a).

44. The construction of the law may be altered * by the special agreement of the * P. 16. parties.

If a house be blown down with the wind, the lessee is excused in waste; but if he have covenant-ed to repair it, there an action of covenant lies by the agreement of the parties (b).

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

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

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

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

(a) But many held the contrary, Dyer, 52 b. pl. 4. Vide Co. Litt. 297 a. 4 Bac. Abr. 110.
(b) Vide the first note to Covenants, infra, 85.

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

* P. 17. * 47. Qui per alium facit, per se ipsum facere videtur (a).

A promise made to the wife in consideration of a thing to be performed by her husband, if he agree, and perform the consideration, in an action of the case, he shall declare the assumption was made to him.

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

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

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

† If a man have a bailiff or servant, who is known to be his servant, and he send him to fairs and markets to buy or sell, his master shall be charged with the payment, if the thing which is merchandised comes to his use; and so it is if a man sends his boy to market, consideratis considerantis. And if a man make another his factor to buy things for

(a) He who acts by another is held to act by himself. 1 Inst. 258.
him, if he buy merchandise of any, the master shall be charged by his contract, though the goods come not to his possession. 4 E. 2.

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

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

Customs.

43. Consuetudo est altera lex (a).

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

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

General
The King's excellency is so high in the law, that no freehold may be given to him, nor derived from him but by matter of record.

Every custom is a sufficient authority to itself; and what is a custom, and what is not,

* P. 18. shall always be determined by the judges, because they are known to none but to the learned.

A custom shall be taken strictly.

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

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

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

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

† And what a copyholder of a manor ought to do, or ought not to do, the custom of the manor must direct.
direct. If there be no custom to the contrary, waste, either permissive or voluntary, of a copyholder, is a forfeiture of his copyhold. 1 Inst. 63.

† Refusing to do suit of court, to pay rent to the lord, being demanded on the land, not coming to be admitted tenant on a third proclamation, making a lease without a licence for longer time than a year, &c. are forfeitures of copyhold estates, by the general custom of manors.

† A lord of a manor may grant a copyhold out of his manor; and a surrender may be made to the lord or his steward, either in or out of the manor, without a particular custom. 1 Inst. 59 a. (a).

† If a copyholder for life surrender to another in fee, it is no forfeiture of his estate; for it passes to the lord by surrender, and not by livery. And copyhold estates shall not have the collateral qualities which estates of the common law have, without special custom; for the custom of the manor is to be observed. 1 Co. 22.

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

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

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

All

(a) Acts of parliament relate either to the kingdom at large, when they are called general acts, or only to particular classes of men, or to certain individuals, in which case they are called private acts. Laws which concern the king, or all lords of manors, or all officers in general, or all spiritual persons, or all traders, &c. are public laws. But such as relate to the nobility only, or to spiritual lords, or to particular trades, are private acts. Phill. on Evid. 309. 4th edit. Gilb. Evid. 45. 46. 4th edit. 39. 40. Sedgwick's edit. Phillips, on Evidence, the student may read with great advantage, even in the most early part of his studies.

The general rule is, that public acts of parliament are to be taken notice of judicially by courts of law, without being formally set forth; but particular or private acts are not regarded by the judges, unless formally shewn and pleaded. Bull. N. P. 222. Robins. Gavelk. 78. Gilb. Evid. 12. 4th edit. 10. Sedgwick's edit. Peake's Evid. 26. 2d edit. 29. 4th edit. Hargr. n. Co. Litt. 98 b. (1). In some cases, however, the necessity of pleading a private act has been dispensed with; as where there is a special clause enabling the defendant, in answer to any action for matters done under the act, to plead the general issue; or where the private act has been recognized by some public act of the legislature. Phill. Evid. 310. 4th edition.

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

The statute 23 H. 6. c. 9. respecting bail bonds, has been considered a private act in its original constitution, though according to the best authorities it was not, yet the statute 4 & 5 Anne having enabled the sheriff to assign the bond, made it a general law. Indeed, it seems extraordinary, that a statute which concerns the administration of the public justice of the whole kingdom, should ever have been construed to be a private statute. Benson v. Welby, 2 Saund. 154. Boyce v. Whitaker, Doug. 97, n. Saxby v. Kirkus, Bull. N. P. 224. Samuel v. Evans, 2 T. R. 575. Serjt. Wms. n. 2 Saund. 155.

It was a few years ago a practice to insert a special clause in private acts of parliament, declaring them to be public acts, in order that they might be judicially taken notice of without being specially pleaded, to save the expense of an attested copy. 5 Cru. Dig. 4. Such acts are to be considered on the same footing, and of the same authority in courts of justice, and proof of the contents will be as unnecessary as if they were public statutes.

However, it has been resolved that a private act shall not be made a public act in future; but a clause is now generally inserted in private acts, that they shall be printed by the king's printer, and that a copy so printed shall be admitted as evidence of the acts. Sug. Vend. 640. 5th edit. When a private act of parliament, not containing such a clause, is required in evidence, the regular proof is by an examined copy, compared with the original in the Parliament Office, Abingdon Street, Westminster. Even in the case of a private statute, if one of the parties to the suit has admitted the existence of the statute by doing an act under the statute, against which act the other party appeals, and the regularity of which proceeding is the question to be tried, there the appellant will not be obliged to produce an examined copy, but a common printed copy will be sufficient. On an appeal against a rate, made by the respondent under a private act, Mr. Justice Le Blanc observed, the respondent ought to begin by shewing that he had a right to make the rate under the act. Rex v. Shaw, 12 East. 479. Phill. Evid. 384.

(a) The collection 6 Bac. Abr. 384. Statute (1) 5. is an admirable
P. 19. * Four lessons to be observed, where contrary laws come in question.

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

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

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

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

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

P. 20. * CONCERNING POSSESSIONS.

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


(a) Treat. of Ten. 70.
CHAP. III.

OF POSSESSION IN FEE-SIMPLE.

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

And if a man die, they descend to his heir of the whole blood.

(a) But if land be given by deed to hold to the grantee in fee, without naming his heirs, and livery of seisin be made according to the purport of the deed, by this feoffment the grantee has only an estate for his life. Perk. s. 243.

(b) A man cannot have a greater estate of inheritance than a fee simple. Litt. s. 11. which extends as well to fee simple, conditional and qualified, as to pure and absolute. And he who has a fee simple, conditional or qualified, has as ample and great an estate as he who has an absolute fee. From this estate in fee simple, estates-tail and all other particular estates are derived; and because a man cannot have a more ample or greater estate; therefore two fee simples absolute cannot be of the same land. Co. Litt. 18 a. 2 Chan. Ca. 19. 2 Saund. 386.
FEE-TAIL is of whose body he shall come who shall inherit (a).

Tenant (a) Two things seem essential to an entail within the statute de donis. One requisite is, that the subject be land; the other requisite is, that the estate in the subject intailed be an inheritance. It is not necessary that the thing to be intailed should issue out of lands; for if it be annexed to lands, or in anywise concern or relate to lands, it may be intailed within the statute. Thus rents, estovers, commons, or other profits whatsoever, granted out of land, may be intailed. Co. Litt. 20 a. 2 Bac. Abr. 541. So the office of serjeant of the Common Pleas, and the office of keeper of a church, may be intailed, as also the office of steward, receiver or bailiff of a manor. Nevill’s case, 7 Co. 53 b. 1 Cru. Dig. 89. But neither estates pur auter vie in lands, though limited to the grantee and his heirs during the life of cestui que vie, nor terms for years, are intailable any more than personal chattels; because the latter not being either interests in land, or of inheritance, want both requisites; so the two former, though interests in land, yet not being also of inheritance, are deficient in one requisite. However, estates pur auter vie, terms for years, and personal chattels, may be so settled as to answer the purpose of an entail, and be rendered unalienable almost for as long a time as if they were intailable in the strict sense of the word. Thus estates pur auter vie may be devised or limited in strict settlement by way of remainder, like estates of inheritance, Fearne's Remainders, Butl. edit. 495. 3d edit. 585; but the having issue is not an essential preliminary to the power of alienation in the case of an estate pur auter vie, limited to one and the heirs of his body, as it is in the case of a conditional fee at common law, Harg. n. Co. Litt. 19 a. (2), (4), from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different: for in them no remainders can be limited; and where a term for years or other personal estate is limited either by deed
FEE-TAIL.

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deed or will to one in tail, it is an absolute and complete disposition of the whole term to him and his executors, or administrators; he may dispose of it as he pleases; if he do not dispose of it, it goes to his executors or administrators, and not to his issue, and it does not go to the remainder-man, or revert to the donor for default of issue, Fearne's Executory Devises, Butl. edit. 461. 463. 2 Rop. on Leg. 393. 2d edit.; but chattels real may at law be limited in tail by an ulterior limitation after an estate for life by executory devise: and in equity the like doctrine extends to chattels personal, Butler's edit. of Fearne's Remainders, note, p. 4. 402. 413. 421. Cru. Dig. tit. 8. ch. 2. s. 25. 2d edit. by executory devise, or by deed of trust, Hargr. n. Co. Litt. 18 b. (7). Butl. n. Co. Litt. 290 b. (1). X. Gilb. on Uses, 121. 124. and Sugden's notes. 7 Bac. Abr. 110. as effectually as estates of inheritance, if it be not attempted to render them unalienable beyond the duration of the boundary which now circumscribes executory devises, and limitations and trusts of the same nature; namely, the rule confining the contingency for the springing up of future and executory estates to the compass of a life or lives in being, and twenty-one years after, including a sufficient number (Hargr. n. Co. Litt. 123 b. (2.) of months for the birth of a child en ventre sa mere. 2 Hargr. Juridical Arguments, 50. 53. Butl. Fearne, 515. Sugden's Gilb. Uses, 260. 6 Cru. Dig. 466. 2d edit. 1 Eq. Cas. Abr. 191, pl. 1. n. 2 Eq. Cas. Abr. 337, pl. 9. 4 Bac. Abr. 304. A limitation of time not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the intail by fine or recovery for a longer space. But it seems the twenty-one years cannot be taken as an absolute term, but only as depending on the infancy of the person intended to be benefited. Thus, for instance, it seems that a limitation in a marriage settlement to A. in fee, with a proviso, giving the fee to B. at the expiration of twenty-one years after the death of C., a person living, would be void, as too remote; but that a limitation to A. in fee, with a proviso, that if B., a person living, leave issue, a child living in ventre sa mere at his death, who should live to attain twenty-one, such child shall have the fee, would be good. Sug. Gilb. Uses, 156. 261. 4 Cru. Dig. 415. 2d edit. Powell's Fearne's Execonsory Devises, 113. 2 Cas. & Opin. 440. Routledge v. Dorril, 2 Ves. jun. 567. Theluson v. Woodford, 4 Ves. jun. 260. 264. 337. 1 New Rep. 379. 386. 393. 1 Eden, 50. However, this is doubtful. Vide Sug. Pow. 424-5.
424-5, 2d ed. It sometimes happens that executory uses or trusts, limited to take effect at a period which exceeds the boundary of the rule against perpetuities, are created in estates or interests, the extent or duration of which does not exceed that boundary, as in leases for three lives, or twenty-one years. In all such ulterior limitations, the nature of the case appears to make it necessary that the clause introducing them must be understood to be accompanied with a tacit or implied condition, that the event on which it is to take effect, shall happen within the term or duration of the estate or interest, in which the use or trust is created; and on this supposition, such executory limitations may be good. Thus, if fee-simple lands are conveyed to A. and his heirs, and if A. shall have no son who shall attain the age of twenty-four years, to B. in fee; or if a monied fund be directed to be held in trust for A. his executors and administrators, and if A. shall have no son who attains the age of twenty-four years, in trust for B., in each case the limitation to B. will be void for its remoteness, as in each case the event, on which it is limited to take effect, must not necessarily take place, or become incapable of taking place, at the expiration of a life or lives in being, and twenty-one years. Now, if a leasehold for three lives be conveyed to A. and his heirs, and if he shall have no son who attains the age of twenty-four years, to B. and his heirs, or if a leasehold for twenty-one years be directed to be held in trust for A. his executors and administrators; and if he shall have no son who attains the age of twenty-four years, in trust for B. his executors, administrators, and assigns, in each case the limitation to B. may, at first view, appear to be liable to the same objection of remoteness; but it must be observed, that the lives, which in the first case, and the years, which in the second, form the term for which the property is held, are within the legal boundary. Butler's Fearne's Remainders, 500. However, this doctrine also seems doubtful, on account of the possibility that there may be a renewal; and as the renewed interest, although granted without any obligation to do so, would be subject to the trusts to which the original term was liable. Sug. Gilb. Uses, 277. In the case of terms for years and personal chattels, the vesting of an interest, which in reality would be an estate tail, bars the issue and all the subsequent limitations as effectually as a fine or recovery, in the case of estates intangible within the statute de donis, or a simple alienation in the case of conditional fees and estates pur autre vie, But. Fearne, 517. Powell's edit. 415. 3d edit. 406; and if the executory limitations of personalty are on contingencies too remote, the whole
whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personality, it is at length settled, that every species of property is in substance equally capable of being settled in the way of intail, Butl. n. Co. Litt. 290 b. xiv; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the intail is circumscribed almost as nearly within the same limits, as the difference of property will allow. But at the end of the above mentioned period against perpetuities, the property again becomes open to alienation, with this difference, that, at the end of the period, the real estate must either vest in some person for an absolute estate in fee simple, which includes a general power of alienation, or must vest in some person for an estate tail; in which latter case, by a fine or common recovery, he may acquire the absolute fee; but at the end of the same period, personal estate must vest absolutely. Butl. Fearne, 567.; and estates pur alter vie must vest in some persons absolutely, which gives a general power of disposition, or quasi in tail, in which case, such persons as have interests in the nature of estates tail may bar their issue and all remainders over by alienation of the estate pur alter vie, as those who are, strictly speaking, tenants in tail, may do by fine and recovery: such as a conveyance by the quasi tenant in tail by lease and release; or surrender to the immediate remainder-man or reversioner, although it be only to renew the lease, and although the surrender be made without the concurrence of the trustees of the legal estate; or even by articles of agreement either to sell or settle the estate. Low v. Burron, 3 P. Wms. 262. 2 Eq. Cas. Abr. 394, pl. 1. Baker v. Bayley, 2 Vern. 225. Norton v. Frecker, 1 Atk. 524. Wasteneys v. Chappel, 1 Bro. Par. Cas. 437. Forster v. Forster, 2 Atk. 259. Grey v. Mannock, 2 Eden, 339. cited 6 T. R. 292. Blake v. Blake, 3 P. Wms. 10. (1). 1 Cox, 266. Moody v. Walters, 16 Ves. 313. Blake v. Luxton, Coop. 178. Mogg v. Mogg, 1 Meriv. 690. But not by devise, according to the better opinion. Sulter v. Sulter, 2 Atk. 376. Campbell v. Sundys, 1 Sch. & Lef. 281, contra Doe, ex. dem. Blake v. Luxton, 6 T. R. 289. Though when a married woman has a freehold in an estate pur alter vie either absolutely or quasi in tail, a fine is necessary. Duke of Grafton v. Hannen, 3 P. Wms. 266. note. Perk. n. 615. Hargr. n. Co. Litt. 121 a. 2 Bl. Com. 355. 5 Crn. Dig. 200. Wms. n. 2 Saund. 175 f. (3). Gilb. Uses, 40. 244. Ritso's Introduction to the Science of the Law, 204. As to the intail of
Tenant in tail is said to be in two manners: tenant in tail general, and tenant in tail special (a).

General tail is, where lands or tenements are given to a man and the heirs of his body (b).

Special tail is, where lands or tenements are given to a man and his wife, and to the heirs of their two bodies (c), or to their heirs males, or to their heirs females (d).

Tenant in tail is not punishable for waste.

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

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

of estates pur auter vie, see 2 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 324. 2 Atk. 259. 376. 3 Atk. 464. and 2 Ves. 681. As to the intail of terms for years and personal chattels, see Manning's case, 8 Co. 94. Lampett's case, 10 Co. 46 b. Child and Bailey, W. Jo. 15. Duke of Norfolk's case, 3 Ch. Ca. 1. a case in Carth. 267. and one in 1 P. Wms. 1. See also Fearne's Essay on Cont. Rem. and Exec. Dev. 2d edit. p. 122, to the end; p. 384, 3d edit. 495. Butl. editions. Mr. Fearne's work is so very instructive on the subject of remainders and executory devises, that it cannot be too much recommended to the attention of the diligent student. Hargr. n. Co. Litt. 20 a. (5). 2 Gwill. Bac. Abr. 543.

(a) Litt. s. 13.
(b) Litt. s. 14, 15.
(c) Litt. s. 16.
(d) If lands be given to a man and to the heirs males or females of his body, he has an estate in general tail in him. Co. Litt. 25 b. So that it seems in such a case the proper expression would be tenant in general tail male, or female; and where it is limited to the heirs male or female of a particular man by a particular woman, or of a man and woman, tenant in special tail male, or female, Com. Dig. (B 4) pl. 3. (B 5) pl. 4, 5. are contradictory. Litt. s. 21. cited, does not support Comyn. 1 Cru. Dig. 35. does not notice this distinction. Vide 2 Bac. Abr. 547. Estate in Tail (C), which is a good collection on this subject.
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If a man would grant lands in tail, it behoves him to appoint what body they shall come of (a).

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


Inheritance is an estate which descends: It can not lineally ascend from the son who purchases in fee, and dies, to his father (d); but descends (e) to the

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

(b) Co. Litt. 9 b. 27 a. Cowp. 833. 9 East, 392. 7 Taunt. 85. 3 Bac. Abr. 256. 6 Cru. Dig. 288.

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

(d) “In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility,” 2 Bl. Com. 13, in his relationship of father. But though a father or mother cannot, as such, inherit immediately, yet if either of them happen to be also cousin to the son, and as such, his heir, the parent may immediately inherit in that remoter capacity. 2 Woodd. Vin. Lect. 257. 2 P. Wms. 614. 2 Bac. Abr. 296. Watk. Des. 88. Litt. s. 2. 3 Cru. Dig. 353. 2d edit. However, agreeably to the doctrine, which makes a sister of the whole blood heir to her brother, being last actually seised, in exclusion of their half-brother, Gilb. Ten. 16. Watk. Des. 60. a father has a chance of inheriting, indirectly, an estate in fee simple, originally acquired by the son, where it devolves to an uncle, who enters and dies seised, the father may then succeed, if he be the heir of the uncle. 2 Woodd. Lect. 257. Litt. s. 3. Gilb. Ten 13. Dalrymp. Feud. Prop. 183. ch. 5. s. 3. 4th edition.

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

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

* P. 23. claims title thereunto as heir ought to * make
himself heir to him who was last actually
seised (b).

(a) Litt. s. 399. 400. Perk. s. 49. Finch's Law, 117.
(b) The greater part of the law of descents is contained in
these two maxims, non jus, sed seisina, facit stipitem; and pos-
sessio fratris facit sororem esse haredem. It is not the right, but
the seisim, which makes a person the stock from which the
inheritance must descend; and the possession of a brother
makes his sister of the whole blood to be heir. Co. Litt. 14,
Copy. s. 41. 50. Tr. 116. 3 Crn. Dig. 366, 2d edit. Watk.
Gavelk. 100. 2 Bac. Abr. 296. 297. Descent (A) and (D).

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

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

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

And if the lands be once settled in the blood of the father, the heir of the mother shall never have them; because they are not of the blood of him who was last seised (b).

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

As if the father purchase land, and it descend to the son, who enters and dies without heirs of the father's part, then the land shall descend to the heirs of the mother, or father of the father, and not to the heirs of the mother of the son, although they are more near of blood to him who was last seised, yet they are not of the blood of the first purchaser.

* If the heirs be females in equal distance, *P. 24. as daughters, sisters, aunts, &c. (c) they shall inherit together, and are but one heir, and are called parencers.

(b) See Watk. Des. 149, 173.
(c) Or their heirs per stirpes jure representationis. Vide Watk. Des. 89, 150, n. Rob. Gavelk. 91.
PARCENERS.

GAVELKIND

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

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

CHAP. V.

PARCENERS.

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

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

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

(c) Of gavelkind, &c.

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

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

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

Parceners *(a)* At the common law, estates of freehold, either corporeal or incorporeal, could not be voluntarily partitioned by joint-tenants without a deed. Litt. s. 290. Co. Litt. 169 a. 187 a. post, 81. Tenants in common, however, might have made a partition by parol without deed, if as to corporeal estates they afterwards perfected the partition in severalty by livery of seisin, Co. Litt. 169 a.; and coparceners, whether of lands lying in livery or in grant, and although of lands situate in different counties, might have made a partition by parol without deed, Litt. s. 250. Co. Litt. 169 a.; and so joint-tenants for years might have made partition by parol without a deed. Dyer, 350 b. pl. 20. Co. Litt. 187 a. Roberts on Frauds, 283.

Since the statute of Frauds and Perjuries a writing is necessary to perfect a partition by agreement among tenants in common or coparceners, or joint-tenants for years, though as to joint-tenants in fee a deed is necessary now, because it was so at common law. Mr. Cruise, following Sir W. Blackstone, must be mistaken when he says, "the statute of Frauds has abolished this distinction, and made a deed equally necessary in all cases." 4 Cru. Dig. 96. s. 16, 2d edit. 2 Bl. Com. 324, and see Johnson v. Wilson, Willes, 248.

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

The courts of common law are now rarely resorted to for obtaining a partition of estates, because they have a difficulty of proceeding to the full extent of justice, and if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in those courts; or if any of the tenants in possession are seised of particular estates only, the persons entitled in remainder cannot be bound by the judgment in a writ of partition. Mitford's (now Lord Redesdale) Pleadings, H 2 110,
Parceners by divers descents. before partition being disseised, shall have one assise.

A parcener

110, 2d edit. Hargr. n. Co. Litt. 169 a. (2). 1 Fonbl. Treat. of Eq. 21. Partitions in courts of equity are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to certain persons to make the partition required, who proceed to divide the estate without a jury, and upon the return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties. But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition give possession, and order enjoyment accordingly, until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day to shew cause against the decree after attaining twenty-one, Tuckfield v. Buller, Amb. 198. 1 Dick. 240. S. C. 2 Cru. Dig. 541, 2d edit. 2 Madd. Ch. 469, 2d edit., although the infant, whether plaintiff or defendant, be only cestui que trust, and the legal estate capable of being conveyed by the trustees, Lord Brook v. Lord and Lady Hertford, 2 P. Wms. 519. Attorney-General v. Hamilton, 1 Madd. Rep. 214; but if no cause should be shewn, or cause shewn should not be allowed, the decree may then be extended to compel mutual conveyances. If a contingent remainder not capable of being barred or destroyed should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined; in either of which cases a supplemental bill would be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment. Redesd. Plead. 97, 3d edit. 2 Cru. Dig. 512, 2d edit.

A partition at law is perfected by the delivery of possession, in pursuance of the judgment of the court of law, which concludes all the parties to it without any conveyance whatever being made by them. But partition in equity proceeds upon conveyances to be executed by the parties, 1 Madd. Chan. 245, 2d edit.; in which case the same conveyances are necessary to confer a legal title, as if the parties had agreed to a private partition; and if the parties be not competent to execute the conveyances, the partition cannot be perfected. Whalley v. Dawson, 2 Sch. & Lef. 572. And where any of the parties
A parcener before partition may charge or demise her part.

The parties are fiances covert or tenants in tail, a fine or recovery will be equally necessary. But see as to the power of parceners tenants in tail, Co. Litt. 173 b. Husbands of parceners in fee, Co. Litt. 169 b. 170 b. 171 a. Infants parceners, Co. Litt. 171 a. Litt. s. 258. However, in all cases where the lands are entailed, or the parties are married women, it is advisable to have a fine or recovery, and in case of infancy to delay a partition by agreement until majority, or proceed in some other mode to effectuate it.

There are so many difficulties attending partition even by bill in equity, that if it be desirable to gain the legal estate immediately where there are infants interested, who would be entitled to shew cause against the partition at the distance of many years; or if the estate be so circumscribed that partition cannot be obtained either at law or in equity, as if the parties interested are lunatics; or the surviving trustee, or his heir of a settlement, with all the requisite powers of completing a partition, be a lunatic; or the trustees of an estate, in strict settlement, have no power by the settlement to make partition, and the parties interested be infants, or only tenants for life, with contingent remainders, to persons not ascertained, or not in being; or the trustees have a power to make a partition, but have no authority how to apply the money received for equality of partition, or how to raise the money to be paid for equality of partition; or if there be a power to make a partition, with a power to raise the money to be paid for equality of partition by sale or mortgage of part of the lands in settlement, and the money could be raised with greater ease and benefit to the parties immediately interested and the remainder-men, by a sale of timber, but the tenant for life in possession is restricted from cutting more than a certain quantity annually, or the tenant for life in such a case is subject to impeachment for waste, and in other instances as various as the necessities of families, and of which our intricate system of settlements prevents the accomplishment; and in many other cases in which courts of equity find they have no power to make a partition, unless clogged with such numerous impediments and inconveniences, that the parties would not be desirous of obtaining it, then the only effectual way of proceeding is by a bill in parliament, which has been
The entry or act of one coparcener or joint-tenant shall be the act of both, when it is for their good.

If a parcener after partition be entered (a), she may enter upon her sister's part, and hold it with her in parcenary, and have a new partition, if she sold none of her part before she was ousted (b).

been for many years a common mode of accomplishing a partition of estates. The private act operates as a conveyance, and transfers an immediate legal estate to the trustees appointed to make the partition, or immediately to the parties themselves, if the property which each is to take has been previously fixed without any conveyance from the parties beneficially interested. And infants and other persons under disabilities are by it irrevocably bound.

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

(b) Litt. s. 262. 1 Bac. Abr. 703. vide n. infra, page 64.

CHAP. VI.

JOINT-TENANTS.

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

Joint-

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

An exception is to be made of joint-merchants; for the wares,
merchandizes, debts, or duties, they have as joint-merchants or partners, do not survive, but go to the executors of him who dies; and this is *per legem mercatoriam*, which is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. Co. Litt. 182 a. 2 Beawes, 99. *Noy*, 55. Com. Dig. *Merchant* (D). 3 Bac. Abr. 675. *Joint-tenants*, &c. (C). See 1 Madd. Ch. 93. by mistake *contra*. In pleading, when the estate of partners in the partnership property is to be mentioned, it is usually described a tenancy in common. Watson on Partnership, 65, 2d edit.

Where two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, it is a joint-tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are not equal, and this appears in the deed itself, it makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered in equity but as a trustee for the others, in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they are to be considered as tenants in common, or the survivors as trustees for those who are dead. Per Master of the Rolls. *Lake* v. *Gibson*, 1 Eq. Ca. Abr. 291, pl. 3. *Jeffries* v. *Small*, 1 Vern. 217. *Lake* v. *Craddock*, 3 P. Wms. 153. See further, Watson on Partnership, 73, 2d edit. 2 Madd. Ch. 115, 2d edit. *2 Fonbl. Treat*. Eq. 103, 5th edit. *Sug. Vend.*, 522, 5th edit. So a lease renewed by one partner in his own name clandestinely is a trust for the partnership, and to be accounted for as partnership property. *Burroughs* v. *Elton*, 11 Ves. 29. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

It was formerly held, that lands purchased for the purpose of a partnership concern were, in all respects, a portion of the partnership fund, and were therefore distributable as personal property. Watson on Partnership, 81, 2d edit. However, in *Thornton* v. *Dixon*, 3 Bro. C. C. 199, Lord Thurlow determined, that though a copartnership agreement may alter the nature of real property, it must be express so to do; and
JOINT-TENANTS.

Joint-tenants may have several estates (a).

that upon the death of partners, the houses and lands they held and used in the trade, would descend according to the rules of the common law. See also Bell v. Phyn, 7 Ves. 453. Balmain v. Shore, 9 Ves. 500. The doctrine upon this subject has been altered by a very recent decision in the case of Townsend and others, executors of W. Mackintosh v. Decaynes and J. Mackintosh, reported Appendix, 1 Montagu on Partnership, 97. There is also a dictum of Lord Eldon, in Selkirk v. Davies, 2 Dow. P. C. 242, in which his Lordship is represented to have stated it as his opinion, that all property involved in a partnership concern ought to be considered as personal. The question will probably soon be brought forward again to receive a more solemn adjudication; in the mean time it is well understood to be the opinion of many gentlemen of the first professional eminence, that where real estate has been purchased with partnership property for the use of the partnership, it becomes personal property, not only as between the members of the partnership respectively, and as between the partnership and creditors, but also as between the representatives of a deceased partner. Eden's note, 3 Bro. C. C. 200.

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

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

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

(a) i. e. Two may have joint estates for their lives, and several inheritances, or the inheritance to one of them, Co. Litt. 132 a. b. 183 a. 184 a. 189 b.; but an estate of freehold cannot stand in jointure with a term for years; nor a reversion upon a freehold, with a freehold and inheritance in possession, Litt. s. 502; nor a seisin in the right of a political capacity, with a seisin in a natural capacity. Litt. 297. Co. Litt. 183 a. 4 Bac. Abr. 677.

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

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

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

(a) If there are two officers in one entire office, and one surrenders or forfeits, this shall redound wholly to the advantage of the other, because the office being entire he cannot grant away his moiety. Woodward v. Aston, Freem. 429. So where a man grants the office of keeper of a park, and a rent for the exercise of it out of a manor, to two for their lives, and for the life of the survivor, one of them is attainted of treason, the manor comes into the king's hands, the king shall not have the office, nor the rent; for, being an office of skill and confidence, the survivor shall hold it with the profits incident thereto. Sir H. Neville's case, Plow. 378. 5 Mod. 60. 5 Bac. Abr. 212. Office, &c. (M).

(b) Vide note (a), ante, 75.

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

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


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

They

516. The cases upon this subject are stated and commented on in a superior manner by Sir John Leach, in his able reply. Cholmondeley v. Clinton, 2 Meriv. [314]. See also Sug. Gilb. Uses, 143. 3 Bac. Abr. Gwill. edit. 679. 680.

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

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

If it should be established that conveyances to uses, which are now become the common assurances of the realm, were to
They may have a writ of partition by the statute of H. 8. c. 32.

If to be construed in the same manner as wills, even with respect only to the words of regulation, or modification of the estate; such a doctrine would, in some degree, tend to introduce all that latitude and uncertainty which now prevails in the construction of testamentary dispositions. Of this opinion was the late Mr. Booth, the author of the Treatise on Real Actions, and the most able conveyancer of the last century; who, in one of his opinions, says, "If deeds of uses must be governed by the same rules as prevail with respect to wills, then a limitation to a man's male descendants, or male children, may create an estate in tail; and an absolute inheritance may pass by a limitation to the use of the grantee for ever, which will produce infinite confusion." 2 Cas. & Opin. 279. Mr. Booth's opinion is confirmed by Lord Chief Justice Willes and his brethren, in the case of Tupner v. Marlott, Willes, 180, where he says, "As to what was insisted upon, that a conveyance to uses is to be construed as a will, and in a different manner from other conveyances, we are all clearly of a contrary opinion; for, since the statute of uses, an use is turned into a legal estate, to all intents and purposes, it must be conveyed exactly in the same manner, and by the same words: and if it were otherwise, as most conveyances are now made by way of use, endless confusion would ensue."

Lord Thurlow, Stratton v. Best, 2 Bro. C. C. 240, and Lord Kenyon, Doe, dem. Mussell v. Morgan, 3 T. R. 765. Alpasi v. Watkins, 8 T. R. 519, have fully assented to this doctrine. Therefore the better opinion seems now to be, that conveyances to uses are to be construed in the same manner as deeds deriving their effect from the common law. 4 Cru. Dig. 309. Vide Sug. Pow. 465, 2d edit. Sug. note, Gilb. Uses, 144. 1 Sand. Uses, 118, 3d edit.

The same construction is put upon a trust executed as upon legal estates. Wright v. Pearson, Amb. 358. 1 Eden, 119. 1 Fonbl. Treat. of Eq. 406, 5th edit. b. 1. ch. 6. s. 8. 1 Madd. Ch. 452. 552, 2d edit. 4 Cru. Dig. 510, 4th edit. Trusts executed are those where the trusts are directly and wholly declared by the deed or will to attach on the lands immediately. Trusts executory, are those which are only directory, or prescribe the intended limitations of some future conveyance or settlement, directed by the articles or will to be made for effectuating
effectuating them. In decreeing the execution of marriage articles, and in the construction of executory trust estates, the Court of Chancery regards the end and consideration of the settlement, and the intent of the trusts, beyond the legal operation of the words in which the articles or the trusts are expressed. Fearne's Rem. 90. Butler's edit. 3d edit. 62. 1 Madd. Ch. 552.

The analogy between the construction of legal estates and trusts executed, has been frequently affirmed: and Lord Talbot, speaking of Bale v. Coleman, 2 Vern. 670. 1 P. Wms. 142. 8 Vin. Abr. 265, pl. 7, says, "The execution was to be of the same estate as he had in the trust." An observation which seems equally applicable to all cases of trusts executed; that is, where the estates are finally limited by the deed or will itself, without any kind of reference to any further execution of them by a conveyance directed by that deed or will; for, in such cases, any occasional conveyance that may at any time be required of the legal estate from the trustees, may well be deemed a matter of form only; and not otherwise requisite, than for the mere purpose of investing the subsisting trusts, whatever they may be, with their cognate and commensurate legal clothings; whilst limitations, whose effect is referred by the deed or will itself, to a conveyance directed to be made for their establishment, may reasonably be considered as left to some degree of modification by that supplemental part of the deed or will viz. the conveyance to which their completion is referred. In the one case, the limitations may be deemed to receive their intended shape from the words of the deed or will itself; when, in the other case, they are in a state of embryo, till delivered by the directed conveyance, which is intended to model and give them their ultimate form. Fearne's Rem. 143. Butler's edit. 93. 3d edit. The limitations of trust estates, of whatever description, cannot be carried to a greater length, or go further towards a perpetuity than the limitations of legal estates; but limitations of trust estates are expounded more freely, with more regard to the evident intent, and with less adherence to the legal import of technical expressions than limitations of legal estate. Fearne's Rem. Butler's edit. 145. 3d edit. 94.

TENANT IN DOWER.

* P. 27. If one parcener, joint-tenant, or tenant in common take all, the others have no remedy but by *ejectione firme*, or such like, or waste.

GAVELKIND LANDS.

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

(a) Rob. Gavelk. 136. Somn. 179. 1 Cru. Dig. 164. 172. 2d edit. As to copyhold, see 2 Watk. 68.
(b) Rob. Gavelk. 158.

CHAP. VIII.

TENANT IN DOWER.

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

She

(c) If tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife has no estate in the tenements, and the husband has an estate only as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife die, in the life of the husband, and he afterwards take another wife and die, his second wife shall not be endowed in this case, because her issue could not by possibility inherit. Litt. s. 53. Although the wife be an hundred years
TENANT IN DOWER. 87

She shall have house-room, and meat and drink, in common for forty days (a). But she may not kill a bullock (b) within those forty days after the death of her husband, in which time her dower ought to be assigned her.

The assignment by him who had the freehold is good (c), but by him who is guardian in socage, or tenant by elogit, or statute, or lessee for years, is not (d).

* She is to demand her dower on the land. * P. 28.

She shall recover damages when her husband dies seised, from the death of her husband, if the heir be not ready at the first day to assign her dower (e).

She shall have all her chattels real again, except her husband sell them (f). He cannot charge them years old, or the husband at his death was but four or seven years old, yet the wife will be entitled to dower; because it is by nature possible that the wife may have issue; and though the husband be of such tender years, he has habitum, though he has not potentiam at the time. Co. Litt. 33 a. 40 b. Co. Litt. 31 b. Perk. s. 301, 302.

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

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

(c) Perk. s. 404.

(d) Perk. s. 404. Co. Litt. 35 a.

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

(f) 1 Bac. Abr. 476. Baron and Feme (C). 2.
or give them by his will. And likewise her bonds, though the money were due in the life of her husband (a); and all convenient apparel, but if she

(a) Choses in action, are debts owing, arrears of rent, legacies, residuary personal estate, money in the funds, upon mortgage, &c. 1 Bac. Abr. 480. Marriage is only a qualified gift to the husband of his wife's choses in action, viz. upon condition, that he reduce them into possession during its continuance; for if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it. Butler's n. Co. Litt. 331 a. (1). II. Scawen v. Blunt, 7 Ves. 294. A mere intention to reduce the wife's choses in action into possession, will be insufficient. The acts to effect that purpose must be such as to change the property in them, in other words, must be something to devest the wife's right, and to make that of the husband absolute; such as judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied for his use. Prec. Chan. 442. 418. Blunt v. Bestland, 5 Ves. 515. The transfer of stock into the wife's name, to which she became entitled during the marriage, will not be considered as a payment or transfer to her husband, so as to defeat her right by survivorship. Wildman v. Wildman, 9 Ves. 174. Where the father of A. a married woman, drew a check on his bankers in her favour for £10,000. On the same day she presented it, and instead of money she took from them a promissory note, payable on demand, which she delivered to B. her husband. During B.'s life all the money secured by the note remained with the bankers, except £1,000, which were received by B. and for which he gave his receipt, and he received the interest on the remaining sum of £9,000 up to his death. A. having survived her husband, claimed that sum as not having been received by him during his life. And it was determined in her favour by Sir Thomas Plumer, V. C. because the note was a chose in action of the wife, which, upon her husband's death, survived to her; and he observed, that if immediately after the check had been given, the husband had died, since it gave no legal right to sue the bankers if they had refused payment, the father alone could have recovered against them; that the note given to the wife in lieu of the check, gave
have more than is fit for her degree, it will be assets.

A woman shall be barred of her dower (a) so long as

gave a right to recover the sum, but that it was merely in action, and not like money or a chattel; and that the receipt by the husband of the £1,000, and of interest upon the remainder, was not a reduction into possession of such remainder, as such receipt did not alter the nature of the note, it still continuing a chose in action, a security for the remaining sum of £9,000. Nash v. Nash, 2 Madd. Rep. 135.

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

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

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

(a) When an estate is conveyed to uses to bar dower, the purchaser himself should be the releasee, on whose seisin the uses are to arise, because it has been held, that in the case of conveyances to uses, the possession of deeds appertains to the feoffee or covenantor, and not to cestui que use; and the reason given is, that it was so at common law; and the statute of Uses, though it transfers the legal estate of the lands to cestui que use, does not transfer the deeds. Sacheverell v. Baynall, 1 Roll. Abr. 31. (Z), pl. 3. Cro. Eliz. 356. Huntington v. Sir Anthony Mildmay, Cro. Jac. 217. Estaffe v. Vaughan, 15.
as she detains the body of the heir being in ward, or the writings of the son's land.

A woman

Vaughan, Dyer, 277 a. (58). Ekin's case, Cro. Eliz. 357. Stockman v. Hampton, Cro. Car. 441. Sir W. Jones, 377, S. C. Welbie's case, Noy, 145. Warwick v. Braddon, 3 Keb. 711. Reynell v. Long, Carth. 316. 13 Vin. Abr. 46, pl. 3. But this doctrine seems questionable, Hargr. n. Co. Litt. 6 a. (4), because the feoffe or releasee has only a seisin for an instant, and he can receive no benefit by keeping the deeds, nor sustain any damage by delivering them. Lord Buckhurst's case, 1 Co. 1 a. Besides, under the rule accessorium sequitur sumn principale, Co. Litt. 152 a. as the statute transfers the legal seisin of the lands from the feoffe or releasee to the cestui que use, it should also transfer the deeds relating to the title of such lands. 4 Cru. Dig. 148. 327. 2d edit. Lord Hardwicke, after referring to most of the cases, says, but though this is so clearly established, I know not but, when it is considered, it may be called a spungy reason, as Lord Vaughan says. Whitfield v. Fausset, 1 Ves. 394. The consequence of this doctrine is, that when any other person than the feoffe or releasee to use pleads a deed, operating under the statute of Uses, there is no necessity of setting it out with proiect in curia. Hal. MSS. n. Hargr. Co. Litt. 35 b. (6). Read v. Brookman, 3 T. R. 156. Bolton v. The Bishop of Carlisle, 2 H. Bl. 262. Wms. n. 1 Saund. 9. (a). Sug. n. Gilb. Uses, 186.

The usual limitation to bar dower is to such uses as the purchaser shall, by any deed or instrument in writing, appoint; and, in default of appointment, to him for life, without impeachment of waste, remainder to a trustee and his heirs, during the life of the purchaser, in trust for him, remainder to the purchaser in fee. This limitation has three objects; first, to enable the purchaser, by an exercise of his power, to convey the estate free from dower without his wife joining in a fine or recovery, and without the concurrence of the trustee; secondly, by interposing the limitation pur auter vie to the trustee, to prevent the union of the estate for life, and the remainder in fee, and the consequent seisin of the inheritance in possession by the purchaser, in which case it is doubtful whether the right of dower, which would immediately attach on the inheritance, could be defeated by a subsequent execution of the power, 1 Sand. Uses, 149, 3d edit. Sug. Pow. 387. 332. 2d edit. 1 Kop. Husb. & Wife, 521, 522; and, thirdly,
thirdly, that on the purchaser's decease it leaves the legal inheritance to descend to his heir, absolutely discharged from a title of dower in the purchaser's widow, or any outstanding estate in the trustee. Butler's Fearne's Rem. 347. 3d edit. 272.

The power was formerly extended to an appointment by will, but that power is useless, because the purchaser having the absolute ownership of the fee, he may, as fully and effectually, dispose of the fee simple by virtue of that ownership, as through the medium of a special power: besides, it is sometimes attended with this inconvenience, that it gives rise to nice questions, whether the disposition operates as a devise of the land, or as an appointment of the use, which makes it doubtful in whom the legal estate is vested. Butler's Fearne's Rem. 347. Thus, for example, a devise to A. in fee, to the use of B. either immediately, or when he attains twenty-one, if, operating under the ownership, would be executed into legal estate, under the statute of Uses, immediately in the first case on the devisor's death, and in the other when B. attains that age; but if operating as an execution of the power, the use would be executed in A., he would have the legal estate, because there cannot be a use on a use, and B. would only have a trust estate. Vide n. Uses, 59. For this reason the power of appointing by will has been, generally, wholly omitted.

Instead of limiting the estate to the trustee and his heirs, it is sometimes limited to him, his executors and administrators, to prevent its vesting in a minor; if the trustee die before the purchaser, as it has been supposed, an estate pur autre vie, although a freehold, may with equal propriety be limited to executors and administrators as to heirs. The reason assigned, is, because the successors of the trustee take as special occupants, and not by descent. Watk. Conv. 18. 26. 2d edit. See also Sug. Pow. 187. n. 2d edit. However, admitting that the usually interposed estate to a trustee for the life of the purchaser to bar the dower of his wife, may be effectually limited to executors, but which is extremely doubtful, because it is an estate pur autre vie lying in grant (see the note on Estates, pur autre vie, infra); yet in case of the intestacy of the trustee, the purchaser's estate for life, and his remainder in fee, would immediately unite, and of course the estates would not be executed only sub modo, Lewis Bowles's case, 11 Co. 80 n. so as to open on the grant of administration, to admit the intervening estate in the administrator, even if he were capable of taking the estate pur autre vie by limitation, as it would be the
the means of defeating a right of dower, which is said to be a favourite both of law and equity, because the husband taking all the personal property of his wife, the law, with its accustomed justice, gives her dower in return. Until grant of administration, there would be no person in whom the trustee's estate would be subsisting, and the purchaser would, immediately on the trustee's death, become seised of the freehold and inheritance, simul et semel, Perk. s. 353; and a right of dower would immediately attach on the estate; and if the purchaser afterwards die without executing his power of appointment, his widow would certainly be dowable, 2 Sand. Uses, 74, 3d edit. in which case the third object of the limitation would not be gained. In the case supposed, the question would arise, whether a subsequent execution of the power would defeat the title of dower; or, in other words, whether a person can be seised in fee, with a power existing separately in himself, of making an appointment, and thereby defeating the right of dower. The purchaser would be seised of the fee, by the rules of the common law, to such uses as he himself should appoint; and my Lord Coke says, in case of a feoffee or other conveyance, whereby the feoffee or grantee, &c. is in by the common law, such a proviso would be merely repugnant and void. Co. Litt. 237. Shep. Touch. 525. 1 Sand. Uses, 149, 3d edit. Sug. Pow. 122, 2d edit. This doctrine was followed in Goodhill v. Brigham, 1 Bos. & Pul. 192. 193. in which there was a devise to a feme covert in fee, with a power to her to appoint the fee; and it was held, that the power was inconsistent with such an estate. Vide Sug. Pow. 91, 2d edit. And Lord Alvanley expressed his opinion rather doubtfully, that the execution of a power, where the husband had the fee in default of appointment, would not defeat dower. Cox v. Chamberlain, 4 Ves. 657. So in Maundrell v. Maundrell, 7 Ves. 583. Sir William Grant clearly held, that a power followed by a limitation of the fee, must be absorbed in the fee; which includes every power, and that the husband could only convey, subject to his wife's right of dower. On this decision, and on another ground there was an appeal to Lord Eldon, who confirmed the decree on the other ground, but expressed his dissatisfaction with Sir William Grant's above mentioned reasoning; knowing, as he said, personally, that the doctrine was directly contrary to the whole system of conveying, the constant course of Mr. Booth, Mr. Pickering, Mr. Fearne, Mr. Holliday, and all the great conveyancers, Maundrell v. Maundrell, 10 Ves. 249; and that a conveyance to such uses as a man should appoint, and for default of appointment.
pointment to him in fee, was a mode used by conveyancers to prevent dower. 10 Ves. 263.

It is observable, that such a limitation would not prevent dower; for if the purchaser die without exequating his power, he would die seised in fee, and his wife would most clearly then become dowerable, Butl. n. Co. Litt. 216 a. (2); and it is equally clear that the limitation to prevent dower, suggested by the late Mr. Fearne, in his Essay on Remainders, Butl. edit. 347. 4th edit. 509. guarded against this circumstance. See the various methods formerly adopted to prevent dower with their inconveniences and insufficiencies. 1 Kop. Husb. & Wife, 518. Sug. Gilb. Uses, 321.

However, Mr. Fearne, in a manuscript opinion, says, the reservation of a power of appointment of an use is not rendered void by a subsequent limitation of the fee to the same person. It was a mistake to suppose that a limitation of the fee comprehended every power of appointment whatever. For a person seised in fee could not, by a mere instrument in writing, pass the fee to, or make it vest in another, but a proper form and mode of conveyance was requisite; whereas under a power of limiting the use, a person may, by such instrument only, vest the fee in another, without any of the usual ceremonies requisite to a conveyance of lands. MSS. of Mr. Butler, 4 Cru. Dig. 170, 2d edit. Butl. n. Co. Litt. 216 a. (2). Mr. Fearne does not state whether the power was to take effect on the seisin of the person having the power, or on the seisin of another person, though he must be supposed to mean the latter, which distinction is probably the ground of the apparent difference between, 1 Sand. Uses, 149. 2 Ib. 74, 3d edit.; but the point stated in the 2d vol. was not determined in Maundrell v. Maundrell, as it seems to be there supposed: although in that case the conveyance was not to the husband, but the uses were fed by the seisin of the trustees.

So in Sir Edward Cleré's case, 6 Co. 17 b. the uses were raised on the seisin of the feoffee. In that case three acres of land were held in capite, in which tenre the owner could only devise two thirds by his will, until the 12 Charles 2. converted knight's service into socage, Gilb. Uses, 211. Hargr. n. Co. Litt. 111 b. (1). 112 a. (1). the owner having made a feoffment in fee of two of the acres to the use of his wife for her life, for her jointure, he afterwards made a feoffment by deed of the third acre, to the use of such person and persons, and for such estate and estates, as he should limit and appoint by his last will in writing, and afterwards by his last will in writing, he devised the third acre to one in fee, and the court supported it as a limitation
TENANT IN DOWER.

...tation of the use, because otherwise the will could not take effect. Co. Litt. 111 b. Gilb. Uses, 35. 204. 210. 229. 4 Cru. Dig. 258, 2d edit. See also Ritso's Introduction to the Science of the Law, 239. The question of dower did not arise; but if the wife had died, and the husband had married again, would his seisin have entitled his second wife to dower in the whole three acres? If that question had been decided negatively in Sir Edward Clere's case, then it might have been partly an authority for the position it is brought forward to support. SUG. POW. 81, 2d edit.

It would certainly be a strange doctrine, that a man could be seised in fee simple, to such uses as he himself should appoint; as it assumes the proposition, that before the statute of Uses a man could be seised in fee, in trust for himself in fee, and that an equitable and legal interest in the same person, in the same right, and of equal extent, could subsist as separate estates, without the equitable merging in the legal estate; and it appears more strange that the separate existence of the power should be so anxiously endeavoured to be supported, on the ground, that otherwise the common assurances of the kingdom would be weakened, when the only object is to deprive a widow woman of her dower, a mere life estate, which the law gives her in one third of her husband's inheritance, and which by a cruel and insulting mockery, is termed a favourite of law and equity, even after refusing dower of a trust estate, and allowing curtesy in direct defiance of the old law. Perk. s. 349. 457. 1 Eden, 196. 2 Bl. COM. 337. 1 CRU. DIG. 483. SUG. GILB. USES, 48. The first case upon that point was COT v. COT, 1 Ch. Rep. 134, which has been followed by subsequent Chancellors, who have always expressed their regret at being bound by such a precedent, although none of them have ever had the courage, or the justice, to pronounce a contrary decision. How easy would it be to remedy what every person seems to lament, by following Lord Hardwicke's opinion, and letting in the wife to dower of a trust estate, CASBORNE v. SCARCE, 1 ATK. 606. The legislature could easily effect this, without producing any inconvenience, as of course the act would not have a retrospective effect. Besides it would simplify the present intricate method of conveyancing, and make it more level to the capacities of men accustomed to the principles of common sense. Vide 2 WATK. COPY. 79. 82. as to dower, and free-bench, of a trust. The only shadow of a reason attempted to be assigned for following the anomaly, that there should be curtesy and not dower of a trust, was similar to what is now brought forward to
to exclude dower, although the husband be seised of the legal estate of inheritance. Lord Talbot, in Chaplin v. Chaplin, 3 P. Wms. 254. 2 Eq. Ca. Abr. 335. n. says, that it had been the common practice of conveyancers to place the legal estate in trustees on purpose to prevent dower; wherefore it would be of the most dangerous consequence to titles, and throw things into confusion, contrary to former opinions, and the advice of so many eminent and learned men, to let in the claim of dower upon trust estates: for which diversity, as he could see no reason, so neither should he have made it; but since it had prevailed, he would not alter it.

However, it has never been necessary to decide this point since Maundrell v. Maundrell, 10 Ves. 266, in which Lord Eldon said (whatever may be my own inclination to think, that according to the true operation of these powers, when once executed, they drive out all intermediate estates, are prior and paramount to them, and the dowress cannot sustain her claim of dower upon the new estate, in the appointee of the power, as the cestui que use named in the conveyance limiting the power, and as if named in that deed), it would be too much for me to have said, if this power should appear to have been executed, that upon the ground of any opinion I entertain, I would not permit the party to take the opinion of a court of law upon that point. Buckworth v. Thirkell, 1 Hargr. Collectanea Juridica, 332. 3 Bos. & Pul. 652. n. 6 Cru. Dig. 471, 2d edit. 2 Bac. Abr. 222, 223, Gwill. edit. Butl. n. Co. Litt. 241 a. (4). is directly in point: in that case there was a devise in fee to a woman, with an executory devise over in fee, on her death without issue under the age of twenty-one years; she married, had a child, who died in her life-time, and then died under twenty-one without issue; and it was held, that a right to curtesy having attached on the first estate, was not determined by its determination when the estate shifted to another person under the learning of executory devises. The case under consideration is the exact counterpart of that case, the question being, whether a title of dower having attached, it be defeated by executing a power under the learning of shifting uses, and thereby determining the estate in right of which the dower arose? If there were no express decisions on this point in relation to shifting uses, yet the rule being settled in regard to executory devises, it must follow in relation to shifting uses, as the decisions on executory devises apply equally to future and shifting uses, and other springing and executory interests. Sng. Gilb. Uses, 157. Fearne's Ex. Dev. 321. 3d edit. 440, Butl. edit. See also Wilde v. Port, 4 Taunt.
4 Taunt. 337. 345. an authority supporting the right of dower.

On account of the doubt whether a right of dower having attached, is defeated by the subsequent execution of the power, and because a power of appointment is liable to be suspended and destroyed, and as the existence of the power is in a case of this nature the only circumstance which precludes the wife from her dower, Butl. n. Co. Litt. 216 a. (2), it is usual on the part of purchasers to require a fine at the vendor's expense from the husband and wife, to extinguish her right of dower; and conveyancers in this as in all other cases where a person has a power, and also an interest, ex abundanti cautela, generally make him not only exercise his power, but also convey his interest. Sug. Pow. 86. 191. 334. 2d edit.

To save the expense of a fine, and to prevent a title of dower attaching, the usual intervening limitation to a trustee and his heirs is created. Butl. n. Co. Litt. 379 b. (1). Fearn's Rem. 509, 4th edit. 317, Butl. edit. In which case an appointment at once defeats the estates limited in default of the execution of the power; nevertheless, in that case, it is the almost universal practice of the profession, not only to make the vendor exercise his power by a separate witnessing part, but also to make the vendor and his trustee convey their interests in default of appointment by lease and release, lest the power might have been suspended or destroyed by some secret act. Sug. Gilb. Uses, 325. Sometimes a difficulty arises in procuring the concurrence of the trustee; and where the purchaser is satisfied that the power was well created, and is in existence, he may safely dispense with the trustee's concurrence; but where this is not the case, the purchaser ought to insist on the trustee joining, because the entire fee simple could not be gained without a conveyance from him. Besides, it might turn out that the owner had destroyed his power, and forfeited his life estate by treason or felony; in which case the freehold in possession would be vested in the trustee, and an ejectment could not be maintained under a conveyance in which he did not join. Sug. Pow. 189. And it seems, that the purchaser is in all cases entitled to insist upon the concurrence of the trustee. 2 Cas. & Opin. 29. Though there are a few gentlemen who think the estate of the trustee to be of such minor importance, that they do not make him a party.

which
which her husband jointly held with another at the time of his death (a).

**Dower of Gavelkind Lands.**

The woman shall be endowed of one half so long as she is unmarried and chaste, and it may be held with the heir in common (b).

It is of lands and tenements, and not of a fair (c) or such like. Where the heir loses not his inheritance, there she loses not her dower.

*Jointure.*  

If a woman have a jointure before marriage, she may claim no dower. **27 II. 8.**

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

It she enter or accept of it, she shall not be endowed (e).

If she should be expelled of any part of her jointure, she shall be endowed of the residue of her husband's lands.

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

See further on the subject of Dower, 1 Roper on Husband and Wife, 332, &c. and Vin. and Bac. Abr. Com. and Cru. Dig. and a few observations at the end of the old editions of Gilbert on Uses.


(c) Perk. s. 435. Robinson's Gavelkind, 169. But it is otherwise of a bailiwick, or fair appendant to a manor, or land holden in socage within such precinct. Perk. s. 436. But see Robinson, 169.

(d) (i. e.) without any assignment by the heir.

(e) Co. Litt. 36 b. 3 Co. 26 a. 4 Co. 3 a. Plowd. Com. 396 a. 1 Eden, 138. 3 Bac. Abr. 718.
TENANT FOR TERM OF LIFE (a).

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

(a) See further 2 Bac. Abr. 558. Cru. Dig. Index, Estate for Life.

(b) There are different opinions on the question, whether the immediate freehold of an estate in lands pur auter vie, may be limited to executors or administrators, or whether they "may take as special occupants," as it is expressed by some persons. The expression, though improper, is adopted in the following works, where may be found most of the learning on occupancy; Roll. Abr. Occupant (O). Vin. Abr. Occupant (D). Bac. Abr. Estate for Life and Occupancy (B), 3, page 566. Com. Dig. Estates (F 1.) Carter, 61. 2 Bla. Com. 260. Wood's Institutes, 124, 10th ed. Lilly's Conveyancer, 227. 298, 3d edit. The same expression is used in 29 Car. 2. c. 3. s. 12. 14 Geo. 2. c. 20. s. 9, though of course an act of parliament cannot make an incorrect expression correct.

It has even been contended, that an estate lying in grant, namely, an estate of freehold expectant on an estate of freehold, such as the usual limitation to a trustee to prevent dower, may be limited to executors or administrators. See Sug. Pow. 187, 2d ed. Watk. Conv. 18. 25, 2d edit. It has not yet been contended, that the usual limitation to trustees to preserve contingent remainders, could be effectually made to personal representatives; but as one misconception generally introduces another, it has been supposed that an estate pur auter vie limited to executors and administrators, might be specifically devised, by a will unattested by three witnesses. The importance of the subject will be an apology for the following observations on

ESTATES POUR AUTRE VIE.

When a man leases land to J. S. for his life, after J. S. dies the life being spent for which the land was granted, it must necessarily
necessarily return to the lessor. But if the lease had been 
made to J. S. during the life of A. and J. S. had died, A. sur-
viving him; or if in the former case J. S. had granted over his 
estate to B. and B. had died in the life of J. S.; in these cases, 
he who first took possession of the land was, at the common law, 
lawfully the tenant pur auter vie, jure occupationis; for the re-
versioner could not claim in either case, because he had parted 
with the land during the life of A. in the one case, and of J. S. 
in the other; and J. S. could not have any right, as it would 
have been contrary to his own grant, if he claimed an interest 
which he had transferred to another; and the tenant pur auter 
vie being dead, his descendants could not claim it, because 
they were not comprehended in the words of the feudal dona-
tion; and therefore the person who could first enter on the 
land, might lawfully retain the possession so long as cestuy que 
vie lived, by right of occupancy.

As to the right acquired by occupation and gradual appro-
priation of property, see Dr. Taylor's learned and most 
entertaining Elements of the Civil Law, 460, &c. 2d edit. Puff-
fendorf, lib. 4. ch. 6. s. 2, &c. fol. edit. 1729, p. 386. Grotius, 
lib. 2. ch. 3. s. 1. 34. &c. 159, fol. edit. 1738. Domat, lib. 2, 
tit. 7. s. 2, 3, 1 vol. 475. Strahan's edit. 1722.

An estate pur auter vie, like all other things without an 
owner belonging to the first occupier or possessor; for when 
a man gets the possession of land which has no proprietor, the 
law immediately casts the freehold upon him, in order that 
there may be a sufficient tenant of the freehold to answer the 
precipes of the claimants, and that the lord may know how to 
avow for his services. 2 Bac. Abr. 561. 564. Estate for Life 

The reason of such anxiety about the freehold was, because 
by the ancient law, lands and tenements were never recovered 
in any personal action; but the writs of entry and assize were 
the usual means for the recovery of the possession, and these 
writs lay only against the freeholder. 9 Vin. Abr. 325. Eject-
ment (C), pl. 5. Runnington's (edition of Gilbert on), Eject-
ment, 3d edit. 1795.

If tenant pur auter vie, where the limitation was not to his 
heirs, made a lease for years, and died, living cestuy que vie, 
by this the lessee for years became occupant, and then the ac-
cession of the freehold merged his estate for years, because 
these estates could not consist together in one person. Cham-
but in that case, the lessee for years had made a lease at will, 
K 2 and
and then the tenant pur auter vie died, the lessee at will being in possession; and it was adjudged that the lessee at will was the occupant, and consequently the lease for years, which was in another person, was not drowned or merged, there being no union of the term for years, and the freehold in one person; 2 Roll. Abr. Occupant (P), 3, and that then the lessee for years might, by determination of his will, enter and enjoy his term, and the occupant could not prevent or hinder him, for he could only have and enjoy this estate of freehold in the same manner as the tenant pur auter vie had it, and he held it subject to the lease for years, because the occupant claims in quasi by the tenant pur auter vie, as his substitute, and liable to all his charges and incumbrances. Chamberlain v. Ewer, 2 Bals. 12. 4 Bac. Abr. 205, Leases (R). 2 Ib. 564, Estate for Life and Occupancy (B). 2. 2 Cru. Dig. 273. s. 30. 7 Ves. 442. Gilb. Uses, 11.

Lord Coke says, "It were good to prevent the uncertainty of the estate of the occupant, to add these words, 'to have and to hold to him and his heirs during the life of cestuy que vie,' and this shall prevent the occupant, and yet the lessee may assign it to whom he will; or if he have already an estate for another man's life, without these words, then it were good for him to assign his estate to divers men and their heirs during the life of cestuy que vie," Co. Litt. 41 h. to the use of himself and his heirs, which would execute the use in tenant pur auter vie and his heirs, by the statute of uses. Why Lord Coke should say, "divers men," does not appear, and it seems to be rather an ambiguous expression, though perhaps he meant to assign it to divers men, in trust for the tenant, as thereby he would avoid the inconvenience of having an infant trustee in the heir of a single assignee, as one of several assigns would be likely to outlive the cestuy que vie. Vide Shep. Touchs. 168. Litt. sect. 739, says, "Where lands are let to a man, to have and to hold to him and his heirs for the term of another's life, if the lessee die living cestuy a que vie, his heirs shall have the lands during the life of cestuy a que vie, &c." Lord Coke adds, "This case is, without question, that the heir of the lessee shall have the land to prevent an occupant." And so it is in case of an annuity, or of any other thing that lies in grant, whereof there can be no occupant. Co. Lit. 388 a. Vide Vernon v. Gatere, Dyer, 253 a.

If a man demise land to one and his heirs during the life of J. S. or tenant for life grant his estate to one and his heirs, in these cases the lessee or grantee has an estate of freehold descendible, vide 7 Ves. 437, 438, 445, but no estate of inheritance,
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heritance; for he shall be punished for waste, and he in-reversion or remainder shall enter for forfeitoue, and his heir shall not have his age, for he in a manner is but a special occupant, nor shall he be in respect thereof charged as heir in an action of debt. Seymours case, 10 Co. 98 a.

Nor are estates of inheritance only transmitted to all the sons according to the custom of gavelkind; but freeholds descindible are also of the same nature; as if a lease is made of gavelkind land to a man and his heirs pur ater vie, the heirs by the custom, after the death of the father, &c. shall be the special occupants. In like manner, as if lands of the nature of borough English be let to a man and his heirs, during the life of J.S. and the lessee die in the life-time of J.S. the youngest son shall enjoy the lands. Co. Litt. 111 b. Salk. 244. per Holt. And the same point was adjudged between Baxter and Dowdeswell, by Lord Hale, and the Court of King's Bench, 2 Lev. 138. 3 Keb. 475. 486. 498. And cited in 2 Vern. 226, though objected that it was only a special limitation to prevent an occupancy; for he takes as heir. Robinson's Gavelkind, 97, 20 edit.

Lord Chief Justice Vaughan's observations on this subject are deserving of particular attention; he says, "If a man demise land to another and his heirs habendum pur ater vie, or grant a rent to a man and his heirs pur ater vie, though the heir shall have this land or rent after the grantee's death, yet he has it not as a special occupant (as the common expression is) for if so the heir would be an occupant, which he is not, for a special occupant must be an occupant, but he takes it as heir, not of a fee, but of a descindible freehold, (see Martwood v. Turner, 3 P. Wms. 171.) and not by way of limitation, as a purchase to the heir, but by descent, though it is the opinion of some persons that the heir takes it by special limitation; as when an estate is made to one for life, the remainder to the right heirs of J.S. the heir takes it by special limitation, (see Fearne's Cont. Rem. 6, 4th edit. 9. Butler's edit.), if there be an heir when the particular estate ends. But I cannot see how, when land or rent is granted to a man and his heirs pur ater vie, the heir should take by special limitation after the grantee's death, when the whole estate was so in the first grantee, that he might assign it to whom he pleased, and so he who was intended to take by special limitation after the grantee's death, should take nothing at all.

To inherit as heir a descindible freehold, when the father or other ancestor had not disposed of it, agrees with the ancient law, as appears by Bracton, de legibus et consuetudinibus Angliae,
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Angl. 1. 2. c. 9. de acquirendo rerum dominico, page 26, 27. edit. 1640.

"Si autem fiat donatio sic, ad vitam donatoris donatorio et heredibus suis si donatorius prae mortuatur heredes ei succedent, tenendum ad vitam donatoris, et per assisam mortis antecessoris recuperabunt qui obiit ut de feodo."

Here it is evident, that land granted to a man and his heirs for the life of the grantor, the grantee dying in the life of the grantor, the heirs of the grantee, who died seised as of a fee, though not seised in fee, were to succeed him, and should recover by writ of mortd'ancestor in case of abatement, which infallibly proves the heir takes by descent." Vaugh. 201. By the act for preventing frauds and perjuries, 29 Car. 2. c. 3. s. 12. (3 Ruffhead, 386.) it is enacted, "that from henceforth any estate pur auter vie shall be devisable by will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions attested and subscribed in the presence of the devisor, by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

In Oldham v. Pickering, determined 8 W. 3. 1 Salk. 464. Carth. 376. 12 Mod. 108. 1 Ld. Raym. 96. S. C. and S. P. the whole court unanimously gave judgment, that an estate pur auter vie, limited to an intestate and his assigns, was not distributable; for, notwithstanding this alteration by the statute, it remains a freehold still, and the amendment of the law in this particular was only designed for the relief of creditors; that if it came to the heir by reason of a special occupancy, it should be in his hands assets by descent, that is, liable to the payment of those debts where the heir is chargeable, and of those only; but if there was no special occupant, then it should go to the executors or administrators, i. e. they shall be in the room of the occupant, and it shall be assets in their hands, i. e. they shall be bound to pay the debts of the deceased to the value thereof; so that it is not so much as assets to pay legacies (see 7 Ves. 446. 449. 450.), except such as are devised particularly thereout, the statute making it assets only for this particular intent, to pay creditors; and no debts appearing in this case, the administrator is, as it were, the
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the occupant, and shall not be compelled to make any distribution thereof, as he shall of goods and chattels, according to 22 & 23 Car. 2.

The report in Carth. 376. states of Lord Holt, that "he doubted whether this estate pur auter vie was subject to the payment of general legacies, in case it came to the hands of an executor or occupant by force of the stat. 29 Car. 2. c. 3.; and that it was made a quare, whether it shall go to the administra-\*tor de bonis non, &c."

By some unaccountable mistake, the report of Ripley v. Waterworth, 7 Ves. 446. 449. 450. states that in Carthew, Lord Holt even doubts whether it would not be assets for legacies upon the statute of Charles 2.; and this conclusion is drawn from Lord Holt's supposed doubts; and if so, it is very difficult to say it would not for the residue, which is in the nature of legacy.

But now by Mr. Fazakerley's act, 14 Geo. 2. c. 20. s. 9. after reciting the above section of 29 Car. 2. c. 3., it is enacted, "That such estates pur auter vie, in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate."

The following passage in 2 Rol. Abr. 151. Occupant (R), pl. 2. is the authority relied on as supporting the affirmative of the proposition, that an estate pur auter vie may be limited to executors, &c. "Si home leas al auter & ses executors terre pur vie J. S. & cestuy que vie morust, l'executor serra un special occupant (etsi soit un franktenement.) D. 16. El. 323. 10." If a man lease land to another and his executors for the life of J. S. and he for whose life it was held dies, the executor shall be a special occupant (though it be a freehold).

The following is an exact copy of the case in Dyer cited in Rolle: "Tenant for term of auter vie made a lease by indenture for a term of years, rendering a rent to him and to his executors and assigns; the lessor died within the term, the lessee continued in the occupation, and the cestuy que vie is yet living. Quere, whether the termor shall be adjudged occupant, or tenant by sufferance, paying the rent to the executors of his lessor? and if he will not do that, what remedy at law for the executors; and whether the freehold shall be adjudged in him who hath the reversion of the fee, &c.? But by Whiddon the case is better for the lessee for years than for love; for the lease in the beginning was made to the first tenant
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tenant haurendum to him, and his executors and assigns for the term of auter vie, &c.; and livery of seisin was made accordingly as it ought.” Dyer, 328 b. pl. 10. Vaillant’s edit. It would be difficult perhaps to ascertain the meaning of Whiddon’s observations. But the court pronounced no judgment. Lord Hale thus states the same case.—If A., lessee for another’s life, makes lessee for years who is possessed, and A. dies, it seems that lessee for years shall be occupant against his own will, though he doth not enter. Hal. MSS. Hargr. n. Co. Litt. 41 b. (1).

The same case is thus stated by the name of The Lord Windsor’s case, 3 Leon. 55. Sir Roger Lewkno being seised in fee of the manor of South Myms, made an indenture, Anno 11 H. 8., by which indenture he leased the said manor to twenty persons, to the use of Andrew Windsor, afterwards Lord Windsor, and Henry his son, and the survivor of them, as long as any of the said twenty persons should live; and further covenanted by the same indenture to stand seised of the said manor, to the use of the said Andrew and Henry, and the survivor of them, during the lives of any of the said feoffees named in the same indenture; which deed was made without livery of seisin; and he reserved upon it a yearly rent; and afterwards Henry the son died. And in 22 H. 8. a fine was levied of the lands by a stranger upon a release to Andrew Lord Windsor, in order to gain the fee simple by disseisin of the reversioner, although he still continued the payment of the rent reserved, during the lives of the feoffees; and afterwards, 34 of H. 8., Andrew Lord Windsor made a lease to one for years, and died; and made William and Edmond his sons, his executors; and afterwards William, his eldest son, being Lord Windsor, 2 & 3 Phil. & Mary, made a lease of the same land unto another, to begin after the first lease ended: which William died; and the Lord Windsor that then was accepted the rents; and agreed with one Vaughan who had married the heir of Sir Roger Lewknor, for the reversion in fee: and afterwards the lease made by Andrew Lord Windsor, 34 H. 8. ended in the 44th year of the reign of Queen Elizabeth; whereupon, the second lessee, that is to say, the lessee of William Lord Windsor, entered, and being ousted, he brought the ejectiome firme. At which time one of the twenty feoffees of Sir Roger Lewknor was alive; so that the estate for the life of centuy que vie was not determined. And the question upon the first part of the evidence was, if this latter lease made by William Lord Windsor were a good lease or not? And as to the fine, if Andrew Lord Windsor should have a fee simple by that fine? But
as the court was divided in opinion on both points, the jury were directed to find a special verdict. *Note,* Southcote was of opinion, that if no *fee simple* was in Lord *Windsor* at the time he made the lease, that the lease could not be good, nor the action maintainable. And he asked, if a *precipe quad red- dat,* were brought against whom it should be brought, against him in the reversion, or against him in possession? And if it should be brought against the tenant in possession, then he ought to have the freehold; because it cannot be brought but against one who has a freehold at the least. And then if Lord *Windsor* had nothing in the land, how could he make this lease to the plaintiff, when the *first lessee continued occupant* after the death of Lord *Andrew,* during the life of *cestui que vie*? There is not an expression in the whole case in any manner tending to support the proposition, that executors or administrators can take as special occupants by limitation.

The case cited by Rolle, or any other report of the same case, does not support his proposition; besides, when *cestui que vie morust* (he for whose *life it was held* died), the estate was determined, and the question of occupancy could not arise, because there was *no estate pur ater vie*; and if the executors of the lessee continued the possession, it was a disseisin of the reversioner. The proposition in Rolle is unmeaning and senseless: though the passage is copied in 3 *Atk.* 466, and relied on as an authority. *Vide* *Hargr.* n. *Co. Litt.* 41 b. (4).

A man being seised of a leasehold estate to him and his heirs, for three lives, upon his daughter's marriage conveyed it to trustees, in *trust* for the daughter, for her life, remainder to her husband for life, remainder for her children, and for want of such children, then in *trust* for the *settler,* his *executors,* and *administrators,* the daughter and her husband died without issue. *Duke of Devon v. Kinton,* 2 *Vern.* 719. 2 *P. Wms.* 381. On a bill by a creditor to charge this estate with the settler's debts, Lord Cowper, in delivering his judgment, said, "As to the statute against fraudulent devises, although the general words in it may extend to a devise of an estate *pur ater vie,* yet that is only for creditors by specialty; and the plaintiff here was only a creditor by simple contract. But in this case the residue of the term being to Mr. *K.* and to his executors and administrators, *he had made it personal estate,* and his Lordship took it that before the statute of frauds and perjuries, *in an estate pur ater vie came to an executor or administrator, it would be assets,* and decreed it accordingly." His Lordship must be understood to mean the trust of an estate *pur ater vie,* as the principal case was, because it is clear that before the statute of
of Frauds, a legal estate *pur auter virc* could not go to the
executors. However, Lord Hardwicke, after referring to the
statute against fraudulent devises, &c. and citing the part of
Lord Cowper's judgment printed above in italics, says, "If
before the statute of Frauds and Perjuries, granting an estate
*pur auter vie* to A., his executors or administrators, would
have made it assets, can devising it to them prevent its being
liable? Certainly not; for the reason, that taking as execu-
tors, they must take it as assets. Therefore I am of opinion,
that an estate *pur auter vie*, though it is devised, will be liable
to debts by specialty, to contribute in a method of distribu-
tion according to the gross value." Westfaling v. Westfaling,
3 Atk. 467. Vide 2 Fonbl. Tr. of Eq. 400, 5th edit. b. 4. pt. 2.
ch. 2. s. 1. The case of Devon v. Kinton was afterwards before
Lord King, by the name of Devon v. Atkins, on the same ground,
and he made a similar determination. 2 P. Wms. 381. The
marginal statement of this case is incorrect in 1 P. Wms. Cox.
edit. 1787, and the report improperly states, that Lord Cowper
determined, "that the reversion of this estate for lives re-
served to A. K. his executors and administrators, was, by the
statute of Frauds and Perjuries, made personal estate;" for
the ground of the determination was, that the settlor himself
had converted it into personal estate by the conveyance to trus-
tees in trust for him and his personal representatives. It is
also observable, that Lord King cannot be right when he says,
"the executors and administrators are made special occu-
pants," because the legal tenants of the freehold were the
trustees, and the possession was full by them, and therefore
there was no room for an occupant. It seems unaccountable
how it came to be stated in 7 Ves. 444, and 1 Rob. Wills, 53,
that this estate, "in Peere Williams appears originally granted
to trustees." The report in 7 Ves. 444-5, is very confused and
unintelligible, and the reasoning seems built on a misappre-
hension of Devon v. Kinton. In Elliot v. Jckyl, 2 Ves. sen. 683,
the estate was full by the possession of the trustee, and there-
fore the executor of the first lessee could not take it as a
special occupant, 684, so the question did not arise in that
case.

An estate *pur auter vie* was conveyed to A., his heirs and
assigns, he, by a memorandum in writing, declared that the
consideration was paid by B., and that A.'s name was used in
the conveyance in trust for B., his heirs, executors, adminis-
trators, and assigns. The administrator of B. brought an
action of *detinue* to recover the title deeds against the heir of
B.; judgment was given for the defendant. Atkinson v. Ba-
kerr,
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ker, 4 T. R. 329. The observations of Lord Kenyon seem to establish, that, in his opinion, if the limitation of a legal estate pur autre vie had been to heirs, executors, administrators, and assigns, that the heir would be entitled in exclusion of the personal representatives, "because it is a real estate." However, his expression that "here the heir at law is entitled to the estate as a special occupant, and has consequently a right to detain the possession of those documents which belong to the estate," cannot be correct, because the trustee, A., and his heirs, were the legal tenants of the freehold, whereby there was no want of an occupant; the estate of B., his heirs, executors, administrators, and assigns, was a trust not executed by the statute of 27 H. 8. c. 10; and consequently of equitable cognizance only. Vide Doe v. Pott, 2 Doug. 722.

The marginal statement of Atkinson v. Baker is not correct; nor is the point stated by Sir Henry Gwillim, 2 Bac. Abr. 566, determined by that case.

Lord Eldon has determined that an estate pur autre vie granted to a man, his executors, administrators, and assigns, can in no event go to the heir; that it does not beneficially belong to the executor; that, as between the next of kin, and the residuary legatees, the executor is a trustee for those to whom the testator gave his residuary personal estate, by a will sufficient to pass personal property. Ripley v. Waterworth, 7 Ves. 452. His Lordship observed, the case of stock affords some analogy; for, under all the acts, stock cannot be given by will, except with two witnesses: yet this court often considers it given without witnesses, for the purpose of a residuary bequest, p. 440. 452. Perhaps it may be questionable whether there is much analogy in the two cases, if the acts to which his Lordship referred are the 33 Geo. 3. c. 28. and 33 Geo. 3. c. 14. s. 16. for raising money by way of annuities, to be charged on the consolidated fund. The 33 Geo. 3. c. 28. s. 13. enacts, that all persons who shall be entitled to any of the annuities hereby granted, and all persons lawfully claiming under them, shall be possessed thereof as of a personal estate, which shall not be descedible to heirs, nor liable to any foreign attachment by the custom of London or otherwise; and there is a similar clause 33 Geo. 3. c. 14. s. 14. The 33 Geo. 3. c. 28. s. 15. enacts, that all persons possessed of any share or interest in the said stock of annuities, or any estate or interest therein, may devise the same by will in writing, attested by two or more credible witnesses; but that no payment shall be made upon any such devise, until so much of the said will as relates to such share, estate,
estate, or interest, in the said stocks of annuities, be entered in the said office, and that in default of such transfer or devise, such share or interest in the said stocks of annuities shall go to the executors, administrators, successors, and assigns.

There is a similar clause 55 Geo. 3. c. 14. s. 16.

It is observable, that estates pur aucter vie are not made personal estate, but remain freehold property with all the advantages by way of qualification annexed to freehold, and that these estates were not devisable at the common law; but on the contrary personal estate is bequeathable by the common law by a testament without any witness; and the stock acts do not say, although you have power to give your personal estate by a will without any witness, yet, of this particular part of your personal estate you shall not make a valid bequest without two witnesses. The acts, in this respect, appear to be quite inoperative; for if an act of parliament were made saying a man may devise his lands by a will with ten witnesses, would that restrain his power of making a valid devise with only three witnesses under the statute of Wills?

The marginal title, 7 Ves. 440, that an “executor may be a special occupant,” is not supported by his Lordship’s observations; nor is the assertion in a valuable treatise, that Lord Eldon “treated this point as clear” supported by the case: his Lordship relied on the following passage, 2 Bac. Abr. 8vo. edit. 566. Estate for Life and Occupancy (B) 5. which he said “has brought all the subject together.”

“If a lease be made of land to J. S., his executors and assigns, during the life of B., the executors of J. S. shall be the special occupants, if he dies in the life of B.; for though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants; and such designation will exclude the occupation of any other person, because the parties themselves, who originally had the possession, have filled it up by this appointment.” Dyer, 328. 2 Roll. Abr. 151.

Designatio vel descriptio personæ, therefore he must take by purchase, vide Fearne’s Cont. Rem. 143. 145. 3d edit. 319. 321. 4th edit. 210, 211, Butler’s editions. Indeed it has been said, “the heir shall be special occupant, and yet he is not in by descent, but he is particularly named, which is in the nature of a purchase.” Cart. 61. Vide also Low v. Burron, 3 P. Wms. 264. Chaplin v. Chaplin, 3 P. Wms. 368. 2 Eq. Cas. Abr. 394, 2d edit. As Dyer and Rolle, the authorities relied on, are shewn above to authorise no such proposition, and as the same case in Leonard rather opposes it, therefore this
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this extract from Bacon's Abridgment cannot be received as authority. The observations of Vaughan, ut supra, 101, as to the heir taking as occupant by purchase or descent, equally apply to executors and administrators.

The authority of Lord Coke should not be forgotten; "for as estates of inheritance or freehold descendible shall go to the heir, so chattels as well real as personal, shall go to the executors or administrators." Co. Litt. 338 a. "No man can institute a new kind of inheritance not allowed by the law." Co. Litt. 13 a. "Not even the King," Lorel's case, Bro. Abr. Patentes, pl. 104, and cited by the name of Lord Lovell's case, 1 Co. 43 b. Co. Litt. 27 a.

If the executor or administrator could take an estate in land pur ater vie, as representing the testator or intestate, independently of the statute of Frauds, then it would be in the power of the Ecclesiastical Court to determine the right to a freehold estate, and in the case of the administrator, at the least, would leave the freehold in abeyance, until the grant of administration, because an administrator cannot, as administrator, enter immediately on the death of the tenant pur ater vie, though an executor may. Moore, 664. 967. Mr. Fearne seems to have overlooked this circumstance. Cont. Rem. 308, Butl. edit. 235, 3d edit. Leaving the freehold in abeyance, is contrary to a rule of law, which admits of no other exception, Butler's note, Fearne's Contingent Remainders, 41. Butler's note, Co. Litt. 342 b. (1), than the abeyance of the freehold of the glebe, &c., when a clergyman dies, until another is inducted; Co. Litt. 342 b. and at common law when the tenant pur ater vie died, where the limitation was not to his heirs, or he left no heirs, the freehold was in abeyance until the occupant entered. Co. Litt. 342 b. The occupant however, did not take the estate as representing the tenant pur ater vie, but as a stranger, being the first person who entered on a vacant possession, consequently that case cannot be an authority that the freehold may be in abeyance to enable an administrator to take by limitation.

Lord Redesdale says, "Lord Hardwicke seems to have thought that a lease for lives to one, his executors and administrators, would make the executor or administrator a special occupant. The old authorities seem the other way, and if the case were before me, I should feel great difficulty in determining according to this apparent opinion of Lord Hardwicke. The title of an executor depends on his taking upon himself the administration of the will, and therefore does not commence instanter, but by his subsequent act; and as to an adminis-
ministrator, ex necessitate, his title cannot commence instanter; and therefore it should seem that the character of special occupant cannot properly belong to either.

"Two cases are stated in Roll. Abr. tit. Occupant, (G) 2 and 3. The first is an Anonymous case, taken from Dyer, 328 b. n. 10, but which is apparently reported in 3 Leon. 55, by the name of the Lord Windsor's case. Rolle, in his Abridgment, certainly represents that case as having determined, that if a lease be made of land to a man and his executors pur ater vie, the executor shall be special occupant, although it be a freehold. On the contrary, Comyn, in his Digest, Estates, F. 1, tit. Occupant, states the case in Dyer as having decided that the executor shall not have the land as special occupant; for an occupant had the freehold, which an executor cannot take; and he refers to the second case stated in Rolle's Abridgment, as an authority for this point. That case, which was long subsequent to Lord Windsor's case, is certainly in conformity to the opinion of Comyn, and, according to Salter and Butler, Moore, 664. Cro. Eliz. 901. Yelv. 9; and the law seems to have been understood by Peere Williams, S. P. W. 264, n. (D), as so settled, though Peere Williams does not appear satisfied with it. It is observable too, that the legislature, in framing the English statute of Frauds, 29 Car. 2. c. 3. s. 12, seems to have considered that there could be no special occupant to take on the death of a person holding pur ater vie, except his heir; and the statute, by its provisions, did not convert an estate pur ater vie, which is in its nature freehold, into a chattel, for want of a special occupant, though it gave the estate to an executor or administrator, nor did it authorize a devise of such an estate as a chattel. An executor or administrator taking an estate pur ater vie, by force of the statute, is still tenant of the freehold, and the person against whom a præcipe must be brought, even in the case of an administrator pendent lite. The authority of parliament could so vest a freehold; but could the mere convention of parties have the same effect? and could the convention of parties proceed farther than the legislature had done by the statute of Frauds, and convert a freehold into a chattel interest, to be acted upon as a chattel interest in specie? In Oldham v. Pickering, Carth. 376. 1 Salk. 464, and other books, it was held, that an administrator taking an estate pur ater vie, under the statute of Frauds, took only for payment of debts, and debts being paid, held as special occupant by force of the statute, and was not compellable to distribution. The English act, 14 Geo. 2. c. 20. s. 9, therefore made such an estate in the hands of an executor or administrator distributable.
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distributable as personal estate; though to be conveyed, I ap-
prehended, by a freehold conveyance, for the statute gives no
other conveyance. I observe Mr. Hargrave, in his notes on
Co. Litt. (141 b. n. 4.), seems not to have been satisfied with
Westfaling v. Westfaling, and the authority there relied on in
Dyer, 328 b. But Lord Hardwicke appears, in deciding the
case of Williams v. Jekyll, and Elliott v. Jekyll, to have con-
ceived that an executor, if not administrator, might take lands
granted for lives to one, his executors and administrators, as
special occupant, independant of the statute, and by virtue of
the words of the grant; which he seems to have considered as
making the estate a sort of chattel interest, different in its
nature from a lease pur ater vie, to a man and his heirs, ex-
pressly avoiding any declaration of what his opinion would
have been on the case before him, if the case had been of the
latter description." Campbell v. Sandys, 1 Sch. & Lef. Irish
 Lease of a house to a man, his heirs and assigns, for three
lives, who died intestate, the heir neither entered or claimed
the house, but the widow and administratrix, who was the sur-
viving life, continued in possession, and received the profits;
on a judgment in an action of debt against the administratrix,
upon a bond from the intestate, the sheriff on a fi. fa. sold the
estate pur ater vie, by bargain and sale inrolled, to the lessor
of the plaintiff, the question was, whether any title was derived
to the vendee of the sheriff? Serjt. Birch, for the plaintiff,
argued, that if the administrator here gained any estate, it
must be as general occupant, which could not be in this case,
because there was not vacua possessio, but it immediately vested
in the heir as special occupant, and there needs no entry; for
occupant is but a term of art in the law, the freehold is vested
131. 2 Cro. 554. 10 Co. 98. Buls. 135, 136. 3 Cro. 407; and
said it was most clear upon Littleton’s text, Sect. 739. and
Co. inde fol. 388. The act of frauds and perjuries does not
after the case, only it is made assets in the hands of the special
occupant; and if there be none such, it goes to the admin-
istrator. Sir John Combs and Serjt. Powys, Justices of Chester,
accordingly reversed a judgment pronounced to the contrary
in the Portmote Court at Chester. Johnson v. Streete, Comb.
201.
 There cannot be an occupant of any thing which lies in
grant, and which cannot be conveyed without deed, 2 Roll.
Abr. 150. Occ upant (C), pl. 1. Co. Litt. 41 b. such as rents,
advowsons, commons, reversions, remainders, &c. because
these
these things have no actual existence, except *in jure et intellectu*, and the only means the law gives to gain an estate by occupancy, is by entry. Bridgn. 94: but no entry can be made in a thing which has no real existence, consisting purely in the agreement of parties, and depending on the institutions of society for its being. Vau. 199, &c. 2 Bac. Abr. 562. 567. *Estate for Life and Occupancy* (B), 1. 3. 16 Vin. Abr. 70. *Occupant* (B). Therefore if a man grant a *rent* to another, his executors and assigns, for the life of J. S, and afterwards the grantee die, making an executor but no assignee; the executor shall not be a special occupant; because it is a *freehold* which cannot descend to the executor, and the rent is extinct. *Butler v. Shererton*, 2 Roll. Abr. (R), pl. 3. 151-2. *Salter v. Butler*, Noy. 46. Cro. Eliz. 901. Yelv. 9. *Salter v. Boteler*, Moore, 664. S. C. Rent granted to one, his executors and administrators, *pur aucter vie*, and the grantee dies, it shall not go to the administrator as special occupant, but determines by the death, unless there has been an assignment, *i.e.* as Lord Coke recommends *ut supra*, 100. Hale’s MS, Hargr. n. (4). Co. Litt. 41 b. and the authorities there cited.

So if a man grant a rent-chargé to another for the life of J. S., the remainder to the right heirs of J. S., and the grantee die, living J. S., the rent ceases for the benefit of the tenant of the land; but if J. S. die, living the *aucter vie*, his heir shall have the rent after the death of the *aucter vie*. *Salter v. Butler*, Noy. 47. If a rent be granted to J. S. and his executors, during the life of B. by the death of J. S. the rent is determined, because, says Chief Baron Gilbert, the supposed authority is and the greater part of Bacon’s Abridgment, “the executors cannot take as special occupants, since the nature of the thing lying in agreement is not capable of occupation, nor can they take by the grant, because then they must take as representatives, which they cannot be of a freehold, and the law will not permit people at their pleasure to vary the course of descents.” “So,” he says, “if rent be granted to A., his executors and assigns, during the life of B., and A. die intestate, the administrator cannot claim the rent; not as occupant, because no man can make himself a title to a rent by way of occupancy; not by the deed, because he is not assignee within the words of the grant by the letters of administration; therefore the rent is determined, since none can claim it as occupant.” 2 Bac. Abr. 566-7. *Estate for Life and Occupancy* (B) 3.

The above observations are equally applicable to a corporeal estate *pur aucter vie*, and it is singular that the supposed authority in Rolle’s Abr. should have misled so many great judges, and
and induced them to neglect the distinction between freehold and chattel property.

In 7 Ves. 448, Lord Eldon is made to say, after stating the above extract, p. 108, from Bac. Abr. that "the reasoning is analogous to rents; of which being an incorporeal hereditament, there could be no special occupant. Therefore, if it was granted to A. during the life of B., by the death of B., there is an end of the grant; but if to the heirs, &c. then, it is said, the executor should be quasi occupant; that is, he should take under the appointment and designation of the grantor, the person having a right to designate who should take it." This certainly must be a mistake of the reporter, because it is directly contrary to the cases in Bac. Abr.

But though there can be no occupancy of things which lie in grant, yet they may be occupied as appendant to things which pass by livery, and which may be occupied; as if a manor consisting part in demesnes and part in services, be leased to A. for the life of B., upon the death of A., whoever first enters and occupies the demesnes, has also the services: so the occupancy of a manor is the occupation also of the advowson appendant to the manor; for though neither the services nor the advowson are separately in their own nature capable of an occupancy, yet as they belong and are appendant to land, which is subject to occupation, the occupant of the demesnes has a right to the whole manor, because the occupancy making no severance or alteration in the manor, he who has a right to the whole manor by occupation, must necessarily be entitled to all its rights. Vaugh. 196. 2 Bac. Abr. 563. So the occupant of a house shall have the estovers, common, or way pertaining to the house; for since these things belong to the house, and the occupation of the house makes no severance of them, they must necessarily remain as they were before the occupant entered, at which time the possessor of the house enjoyed the estovers or way also. Vaugh. 196. 2 Bac. Abr. 563. Whosoever passes by livery of seisin, either in deed or in law, may pass without deed, and not only the rent and services, parcel of the manor, shall with the demesnes, as the more principal and worthy, pass by livery without deed; but all things regardant, appendant, or appurtenant to the manor, as incidents or adjuncts to the same, shall, together with the manor, pass without deed, without saying cum pertinentii. And if they pass by livery, which must be of the land, they must likewise pass by any lawful entry made into the land, and such is the entry of the occupant. Co. Litt. 121 b. Litt. s. 183. Vaugh. 196.

The
The statutes 29 Car. 2. c. 3. s. 12, and 14 Geo. 2. c. 20. s. 9, do not extend to rents, remainders, reversions, and other estates, lying in grant, because there could be no occupant of these estates at common law, and the statute of Frauds has only directed that estates capable of occupancy, viz. "in case there "be no special occupant thereof, it shall go to the executors or "administrators." The object of the statutes was to provide for the occupation of estates pur ater vie, which, upon the death of the owners, no person had a present right to occupy, and to apply them for the benefit of the creditors and representatives, of the former owners. Per Lawrence, Justice, in Zouch v. Forse, 7 East, 193. See also 2 Watk. Copy. 196. See vide dictum, 3 P. Wms. 264 (D). 6 Mod. 66 (1). Fearne's Rem. 306, Butler's edition, 233, 3d edit. 1 Rob. Wills, 51, n. 2 Sand. Uses, 248, 3d ed. See also dictum in Kendal v. Micklefield, Barn. Ch. Rep. 46. 15 Vin. Abr. 457, which case was a mortgage of a rent-charge of £160 a year for three lives, to J. S. his executors, administrators, and assigns, to hold to him, his heirs and assigns, upon trust, that J. S. his executors, administrators and assigns, should enjoy £100 a year out of it, till the mortgage money was satisfied, and it was determined that the legal estate of this rent belonged to the heir at law; but that he was a trustee for the executor of J. S.

There can be no occupant of a copyhold estate, on account of the prejudice it would do to the lord: and if a copyholder, tenant pur ater vie, die, the lord may enter, because no person can gain a copyhold by occupancy, but only by admission of the lord. Salter v. Butler, Noy. 47. 1 Roll. Abr. 511 (L), pl. 40. Smartle v. Penhallow, 1 Salk. 188. 6 Mod. 67. S. C. 2 Lt. Raym. 1000. Gilb. Ten. 326. 16 Vin. Abr. 69, pl. 8. Ibid. 71, pl. 6. 1 Watk. Copy. 302. 2 Ibid. 196. Zouch v. Forse, 7 East, 186. 1 Bae. Abr. 709. Copyhold (B). Sed vide Co. Copy. 56. Tr. 128. Though, if the limitation be to the tenant and his heirs during the life of estat que vie, the heir in such case would have the copyhold estate. Gilb. Ten. 327. Doe, dem. Lempriere v. Martin, 2 W. Blackst. 1148. But as the heir takes by descent, he must be admitted, and pay his fine.

The statutes 29 Car. 2. c. 13. s. 12, and 14 Geo. 2. c. 20. s. 9, do not extend to copyholds. Withers v. Withers, Amb. 152. 7 Bae. Abr. 417 (B). Zouch v. Forse, 7 East. 186. 1 Watk. Copy. 302, Vidal's edit. 2 Ibid. 196.

Upon the whole, perhaps, we may come to these conclusions, as to the limitation of an estate pur ater vie to executors or administrators,—that it will be perfectly inoperative, on account of their incapacity to take a freehold estate by limitation,
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that whether the estate pur auter vie be limited to executors, or administrators, or whether the limitation be simply to the tenant pur auter vie, without naming the heirs, executors, administrators, or assigns, or tenant pur auter vie shall have died without heirs, when the limitation is to them; in each case the estate will go to the executors or administrators, by virtue of the statute of Frauds and Prejuries, to the exclusion of a lessee for years, or at will, or an occupant, who shall enter after the death of tenant pur auter vie; that by 14 Geo. 2. c. 20. s. 9, though it be a freehold estate, yet, in the hands of the executor or administrator, it is assets for simple contract debts, 7 Ves. 441. 450; that consequently an executor or administrator, may dispose of the same, as in the case of chattels; that a mere assent of the executor will not vest the legal estate in a residuary legatee or the next of kin; but for that purpose there must be a freehold conveyance from the executor or administrator; that the title of the administrators will have relation to the death of the tenant pur auter vie, to enable them to recover the possession, and the menses rents and profits; that the beneficial interest in an estate pur auter vie may be given to residuary legatees by a will unattested by three witnesses, because the 14 Geo. 2. c. 20. s. 9. says, it "shall go, be applied, and distributed, in the same manner as the personal," which must mean residuary personal "estate of the testator or intestate," Ripley v. Waterworth, 7 Ves. 452; that for a specific or any other devise of it, for the benefit of other persons than those entitled to the residuary personal estate, to exclude those persons entitled to the residuary personal estate, the will must be attested by three witnesses, because the statute 29 Car. 2. c. 3. s. 12 requires it, contra Sand. note 3 Atk. 467; that any devise, except for the benefit of those entitled to the residuary personal estate, would not pass it, if the devise were made before the purchase of such an estate; that a previous will would be revoked by a renewal without a republication afterwards in the presence of three witnesses, Abney v. Miller, 2 Atk. 597. Marwood v. Turner, 3 P. Wms. 171: 1 P. Wms. 575. 1 Rot. Leg. 41. Pow. Dev. 583. 1 Rob. Wills, 309. Eden's note, 1 Bro. C. C. 265. Toll. Executors, 23; that it must be conveyed by a conveyance sufficient to pass a freehold estate, 1 Sch. & Lef. 290. 2 Sand. Uses, 249; that where a married woman is entitled to an estate pur auter vie, her heirs not being named in the limitation, or where she takes it either as a specific devisee, or residuary legatee, her heirs not being named in the devise, it seems her husband, although it be a freehold, would become entitled to the estate by administering
If a tenant for life sow the lands, and die before the corn be reaped, his executor shall have it (a), but not the grass or other fruit.

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

to her; and that if estates *pur auter vie* in copyholds, rents, remainders, reversions, and other estates *lying in grant*, were limited to executors and administrators on the death of the tenant *pur auter vie*, the grant would determine.

My Lord Eldon, 7 Ves. 445. asks "upon the executor's death who would take it? If he dies without an executor, would it go to the administrator *de bonis non*? Would it go to the representative of the executor? Would it be freehold estate in the man who first got possession? What is to become of it if the executor die without a representative? Is the administrator *de bonis non* to have it, the executor of the executor, &c.? All that," his Lordship adds, "is left undetermined by the language of these cases."


TENANT FOR TERM OF YEARS (a).

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

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

He is bound to repair the tenements.

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

If tenant for life or years grant a greater estate than he has himself, he forfeits his term.

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

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

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

(d) Vide note, post, 71.
TENANT at will is he who holds lands or tenements at the will of another.

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

* P. 31. * The will is determined by the death of the lessor, or of a woman lessee by her marriage (a); or when the lessee will take upon him to do that

(a) *Sed quaere de hoc.* The courts have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will; but have rather held them to be tenancies from year to year, as long as both parties please, especially where an annual rent is reserved. 1 Crn. Dig. 83. It has been settled, by several modern cases, that six months notice to quit must be given by a landlord to his tenant at will, or to his executors, before the end of which time an ejectment will not lie. Christian's note, 2 Bl. Com. 147 (3). Butler's note, Co. Litt. 270 b. (1). 4 Gwill. Bac. Abr. 180-1. 2 Selw. N. P. 688, 5th edit. 667, 4th edit. For where the duration of a lease is not prescribed by the terms of the contract, but is left subject to the will of the parties; the law, for the sake of convenience, and that neither of the parties may be surprised or distressed by the caprice of the other, will not permit the tenancy to be determined without a regular notice. What shall be a regular notice must depend upon the nature of the letting: hence, if the letting be originally for a month or week, a month's or week's notice will be sufficient. 1 T. R. 102. Espin. Ni. Pr. Ca. 94. 267. But where there is a clear tenancy from year to year, there must be half a year or 183 days notice, Bradley's Points, MS. 134. at the least, and determinable with the year. This notice being required for the sake of convenience, it must, consequently,
TENANT AT WILL. 119

that which none but the lessor may do lawfully, it determines the will and possession, and the lessor may have an action of trespass for it.

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

quently, extend to a tenancy in houses as well as in lands; it may be waived by the party giving it; or it may be wholly dispensed with by the consent of both parties. But no collateral considerations, such as a reservation of the rent quarterly shall be construed to be a dispensation with it. What shall be a waiver of a notice is a question of fact to be determined by the conduct of the party who has given it. Vide Shirley v. Newman, Espin. Ca. 266. Oakapple v. Copons, 4 T. R. 361. The receipt of rent accruing due after the expiration of the notice, eo nomine as rent, or the taking of a distress for such rent, have both been holden to be a waiver of it. Goodright v. Cordwent, 6 T. R. 219. Zouch v. Willingale, 1 H. Bl. 311.

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

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

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


(b) Vide note (a), ante, 21.

(c) There are certain incidents and qualities so annexed to and inherent in certain estates, as to be incapable of being restrained or prohibited by any proviso, condition, or limitation; and therefore where an estate is limited to take effect upon any such restrictive condition, annexed to a preceding estate, such limitation is held to be void and incapable of taking effect at all, as in the case of an estate tail; to which the power of suffering a common recovery, and of levying a fine (within statutes 4 H. 7. and 32 H. 8.) is so incident and adherent, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. 6 Rep. 41. 10 Rep. 38 b. Vide 2 Vern. 635. Fearne's Rem. 125, 3d edit. 584, 4th edit. 256, Butt. edit.

The power to suffer a common recovery is a privilege inseparably incident to an estate tail; it is a *potestas alienandi,* which is not restrained by the statute *de donis*; and has been
so considered ever since \( Taltarum \)'s case, 12 E. 4. 14 b. pl. 16. And this power "to suffer a common recovery," cannot be restrained by condition, Co. Litt. 223 b. 224 a. \( Sondar \)'s case, 9 Rep. 128; limitation, Cro. Jac. 696, \( Foy v. Hinde. Sondar \)'s case, 9 Rep. 128; custom, \( Taulor and Shaw. Cart. 6, and 22; recognizance or statute, \( Pool \)'s case, cited in Moore, 810; or covenant, \( Collins v. Plummer. 1 P. Wms. 104; nor an attempt, \( Corbet \)'s case, 1 Rep. 83. \( Mildmay \)'s case, 6 Rep. 40. \( Pierce v. Win. 1 Ventr. 321; or a conclusion, \( Mary Portington \)'s case, 10 Rep. 35. to suffer a recovery cannot be restrained. \( Vide Mr. Knowler \)'s Argument, 1 Burr. 84.

A common recovery by tenant in tail bars all collateral conditions subsequent, and limitations; as if a gift be to one in tail, determinable on his non-payment of £100, remainder to B. in tail, first tenant in tail, before the day of payment suffers a common recovery, and after fails in payment of the money, yet, because he was tenant in tail when he suffered the recovery, all is barred. So if tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitation. \( Vide 1 Mod. 111. and Pig. Com. Recov. 136. But a common recovery has this operation only, when suffered by tenant in tail. For a recovery by tenant in fee will not bar an executory estate, conditional limitation, or collateral condition. \( Pells v. Brown. Cro. Jac. 590. Fearne \)'s Rem. 425, 428. Butl. edit. 312, 314, 3d edit.\n
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M CHAP.
A REVERSION is the residue of an estate which is left, after some particular estate granted out, in the grantor: As if a man grant lands for life, without further granting, the reversion of the fee-simple is in the lessor.

CHAP. XIV.

WASTE.

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

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

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

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

Waste
* Waste is not given to the heir for waste * P. 33. in the life of his father (a).

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

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

(a) If an action of waste be brought by husband and wife in remainder in special tail, and pending the writ, the wife dies without issue, the writ shall abate; because every kind of action of waste must be ad exhaereditationem. Co. Litt. 285 a.

(b) See further, Com. Dig. Waste. This action is now very seldom brought, and has given way to a much more expeditious and easy remedy by an action on the case in the nature of waste. As to the pleadings in the latter action, see Wms. n. 2 Saund. 252. a. b.

CHAP. XV.

DISCONTINUANCE.

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

If a man seised in the right of his wife, or if a tenant in tail made a feoffment, and died, the wife could not enter, nor the issue in tail, nor he in reversion, but were put to their action.
Now the wife may enter by the statute 32 H. 8, and a recovery suffered by the tenant by curtesy, or by the tenant after the possibility of issue extinct, or for term of life, is now made no discontinuance.

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

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

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

CHAP. XVI.

DESCENTS.

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

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

Disseisin of rents in gross, the lord notwithstanding may distress (b).

(b) Vide Gilb, Rents, 106. Infra, 133 (e).
A dying seised of a term for life, or of a remainder or reversion (a), does not take away *an * P. 35. entry: He must die seised of the freehold and inheritance.

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

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

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

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

(CONTINUAL CLAIM.)

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

CHAP. XVIII.

REMITTER.

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

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

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

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

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

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

* Of Ward, Marriage and Relief. * P. 37.

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

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

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

(a) By the 12 Cha. 2. c. 24. tenure by knight’s service, whether of the king or of a common person, together with all its oppressive fruits and consequences, as also those of socage in capite, is wholly taken away; and every such tenure is converted into free and common socage. The same statute enacts, that all tenures which should afterwards be created by the king, should be in free and common socage only. Nothing can be more full in expression than this act; for, besides generally abolishing tenure by knight’s service, and the consequences peculiar to that tenure and socage in capite, it descends into particulars with a redundancy of words, which can only be accounted for, by the extreme anxiety to extirpate completely the evils the legislature had under contemplation; for which purpose it might be deemed most safe to attack them in every shape. Hargr. n. Co. Litt. 85 a. (1). 1 Cru. Dig. 38, 2d edit. If
TENURES.

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

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

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

A relief is no service, but is incident to a service, the guardian must not commit waste, vide CHATTELS REAL 49.

TENURE in SOCAGE.

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

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

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

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

If the guardian die, the heir cannot have an action of account against the executor of the guardian.

(a) Hargr. n. Co. Litt. 88 b. (2).
The executor of the guardian may not have the wardship, but some other of the next of kin. The husband cannot alien the interest of the wife in the guardianship, nor hold it; if she die it cannot be sold.

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

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

* Gavelkind. • P. 39.

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

(a) A speedy redress of all complaints relating to wards and guardians may be obtained by an application to the Court of Chancery, which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. 2 Bl. Com. 141.

(b) Robinson's Gavelk, 165.
A MAN has but two ages. The full age of male and female is twenty-one.

A WOMAN has Six Ages (a).

The lord her father may distrain for aid for her marriage when she is seven.
She is double at nine.
She is able to assent to matrimony at twelve.
She shall not be in ward if she be fourteen.
She shall go out of ward at sixteen.
She may sell or give her lands at twenty-one.

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

(a) Vide Treat. of Tenures, 41.
DIVERSITIES OF AGES.

* An infant may do any thing for his own * P. 40. advantage, as to be executor, or such like
(a): An infant shall sue by his next friend, and an-
swer by his guardian.

GAVELKIND.

The heir may give or sell at fifteen years of age.
1. The land must descend, not be given him by
will.
2. He must have full recompence.
3. It must be by feoffment, and livery of seisin
with his own hands, not by warrant of attorney (b),
or any other conveyance (c).

By

tees, in trust to present such person as the grantor, his heirs
or assigns, should by deed appoint; and on the principle that
an infant of any age may present, Lord Chancellor King con-
ferred an appointment by an infant heir, though it appeared
that the child was not a year old, and that the guardian guided
the child's pen in making his mark and putting his seal. Vide
Co. Litt. 89 a. and Hargr. n. (1). Co. Litt. 172 a. 3 Inst. 156.
Vin. Abr. Guardian, Q. X. pl. 2. Collation, A. pl. 10. Wat-
edit. 416. Burn's Ecclesiastical Law, Benefice, I. page 138,
6th edit. Fonbl. Treat. of Eq. b. 1. ch. 2. s. 5. (c). 83, 5th edit.
1 Wooddes. 458.

(a) By statute 38 Geo. 3. c. 87, it is enacted, that where an
infant is sole executor, administration with the will annexed
shall be granted to the guardian of such infant; or to such
other person as the spiritual court shall think fit; until such
infant shall have attained the full age of twenty-one years, at
which period, and not before, probate of the will shall be
granted to him. If there be two executors, one of whom has
attained the age of twenty-one years, and the other not, admi-
nistration shall not be granted during the minority of him who
is under age, because the former may execute the will. See
(b) Coombe's case, 9 Rep. 76 b.
(c) Therefore the custom does not enable him to make a
will
RENTS.

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

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

will of these lands at fifteen, or make a lease and release with an entry at common law, or a bargain and sale for a year under the statute of uses. Co. Copy. s. 33. Tr. 65. Rob. Gayelk. 195. 197.

(a) Godolphin's Orphan's Legacy, 23. 7 Bac. Abr. 300 Hargr. n. Co. Litt. 89 b. (6).

CHAP. XXI.

RENTS.

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

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

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

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

* P. 41. * The reservation of a rent without a deed is void, if the reversion be not in the reservor. If a rent be granted from the reversion, it is a rent-seck.

(b) Or, dry-rent. The difference between a rent-charge and a rent-seck is, if there be a clause of distress, it is a rent-charge, if there be none, it is a rent-seck. * Co. Litt. 143 b. Gilb. Rents, 38.
He who has no seisin of a rent-seck, is without remedy for the same.

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

No rent can be reserved upon any feoffment, gift, or lease, but only to the donor and his heirs, not to any stranger (a).

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

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

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

(b) Out of which it issues.
(c) And descent from them to him.
(d) Estate of inheritance, in point of duration, as the rent, such as when the estate in fee descends to a person entitled to a rent in fee out of the same lands.
(e) It may be laid down as a universal principle, that a distress may be taken for any kind of rent in arrear; if such rent have been duly answered or paid, for the space of three years, within the space of twenty years, before the 21st January, 1731; or if such rent were after that time created. 4 Geo. 2. c. 28. s. 5. Gilb. Distresses, Hunt's ed. 7. Bac. Abr. 8. Rent, (A.) 3. See further, Gilbert on Rents.
DISTRESS.

CHAP. XXII.

DISTRESS.

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

* P. 42. * A man may distrain for a rent-charge, rent-service, heriot-service, and all manner of service, as homage, escuage, fealty, suit of court, and relief, &c.

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

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

A man cannot distrain upon the possessions of the king, but the king may distrain in any lands of his grantee or patentee.

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

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

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

(a) 1 Roll. Abr. 594 (G), pl. 1. 4 Rep. 49. But he may now by 3 Ann. c. 14. s. 4. Wms. n. 2 Saund. 304 (8).

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

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

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

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

If cattle, they ought to be put in a common pound, or else in an open place where the owner may lawfully come and feed them, and notice given to him thereof, and then if they die, it is in default of the owner.

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

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

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

* No distress shall be driven forth of the *P. 44. hundred, but to a pound overt within three miles (a).

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

Fees for impounding one whole distress, four pence.

(a) 1 & 2 Ph. & M. c. 12. 2 Inst. 289. Noy, 62.
DISSEISIN OF RENTS.

The executor or administrator of him who had rent or fee-farm in fee, in fee tail, or for life, may have debt against the tenant who should pay it, or distrain: and this is by the stat. 32 H. 3. c. 28.

So may the husband after the death of his wife, or his executor or administrator. So may he who has rent for another man's life, distrain for the arrearages after his death, or have an action of debt. 32 H. 3. c. 37.

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


(b) 3 Bac. Abr. 20.

CHAP. XXIII.

DISSEISIN of RENTS.

THREE causes of disseisin of rent-service, resciuous, replevin, inclosure (c):

* P. 45. * Four of rent-charge, resciuous, replevin, denial, and inclosure (d): Two of rent-seck,

(d) Litt. s. 238.

denial
DISSEISIN OF RENTS. 137

denial and inclosure (a). Forestalling is a disseisin of all (b).

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

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

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

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

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

(a) Litt. s. 239.
(b) To which may be added counterpleading the title of the plaintiff for delay. Gilb. on Rents, 105. Com. Dig. Rent, (D. 2.)
(c) Litt. s. 240.
(d) Co. Litt. 161 a.
COMMON is the right which a man has to put his beasts to pasture, or to use and occupy the ground which is another man's.

There are divers commons, viz. common in gross (a), common appendant (b), common appurtenant, common

(a) If A. and all those whose estate he has in the manor of D. have had, from time immemorial, a fold course, that is, common of pasture for any number of sheep, not exceeding three hundred, in a certain field as appurtenant to the manor, he may grant over to another this fold course, and so make it in gross; because the common is for a certain number, and by the prescription, the sheep are not to be levant and couchant on the manor, but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor, as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. 1 Rol. Abr. 402, pl. 3. Day v. Spooner, S. C. Cro. Car. 432. Sir W. Jones, 375. 2 Saund. 327, n. 1 Saund. 346 b. 346 c. Bac. Abr. Common, A. 3. 1 vol. 620, 6th edit.

(b) Common appurtenant to land, is either common without number, as it is termed, or limited to a certain number of cattle. By common without number, is not meant common for any number of beasts which the commoner shall think fit to put into the common, but it is limited to his own commonable cattle levant and couchant upon his lands; (by which is to be understood as many cattle as the land of the commoner can keep and maintain in the winter. Patrick v. Lowre, 2 Brownl. 101. 1 Vent. 54. Leech v. Wildsley, 5 Term Rep. 48. Scholes v. Har- greaves;) and as it is uncertain how many in number these may be, there being in some years more than in others, it is therefore called common "without number;" as contradistinguished from common limited to a certain number; but still it is a common certain in its nature. Therefore a plea, prescribing for common appurtenant to land for commonable cattle, with-
common because of neighbourhood. See Terms of the Law.

The lords of wastes, woods, and pastures, may approve against their tenants and neighbours with common appurtenant, leaving sufficient common and pasture to their tenants.

As if one tenant surcharge the common, the other tenants may have against him a writ de admensuratione pasturæ (a), but not against him who has common for beasts without number; neither may the lord inclose from such tenants, if he do, the tenant may bring an assise against him, and recover treble damage; but the lord may have a quo jure (b), and make the tenant shew by what title he claims.

out saying levant and couchant, is bad, because levancy and couchancy is the measure of that kind of common which is claimed by the plea. 1 Saund. 343. 346 e. (3). Mellor v. Spatemán, 1 Saund. 352. Potter v. North, 2 Saund. 327. Hoskins v. Robins, 3 Wils. 274. 5 Term Rep. 48. Scholes v. Hargreaves. For it shall be intended common without number, according to the import of the words, without any limitation whatsoever; for there is nothing to limit it when it is not said for cattle levant and couchant. 1 Roll. Abr. 398, pl. 3. Hard. 117, 118. Chichley's case, and see 1 Saund. 346, n. (1). 8 Term Rep. 396. Benson v. Chester. From hence it follows, that where the common is limited to a certain number, it is not necessary to aver that they were levant and couchant; 1 Roll. Abr. 401, pl. 3. Cro. Jac. 27. 2 Mod. 185. 1 Ld. Raym. 726. Richards v. Squibb; because it is no prejudice to the owner of the soil, as the number is ascertained. Serjt. Williams's notes, 1 Saund. 28 (4). 346 c. 4th ed. 3 Bla. Com. 239.

(a) Of admeasurement of pasture.
(b) By what right.

CHAP.
WAYS.

*P. 47.  *CHAP. XXV.

WAYS.

THE king's highway is that which leads from village to village.

A common highway is that which leads from a village into the fields.

A private way is that which leads from one certain place to another. 3 Ed. 3.

In the king's highway the king has only passage for himself and his people; and the freehold and all the profits are in the lord of the soil, as they are presented at the leet.

Of a common highway the freehold and the profits are to him who has the land next thereto adjoining; and if it be stopped, and I be damned by it, I have no remedy but by presentment in the leet.

If a private way be straitened, or if a bridge there which another ought to repair, be decayed, an action on the case lies; but if the way be stopped, an assise of nuisance lies, and the lessee may have it after the lessor's years begin, or the lessee may have an action on the case. If the most part of a waterway be stopped, an assise will lie.
LIBERTIES.

* CHAP. XXVI. * P. 48.

LIBERTIES.

A LIBERTY is a royal privilege in the hands of a subject.

All liberties are derived from the crown, and therefore are extinguished if they come to the crown again by escheat, forfeiture, or the like; for the greater drowns the lesser.

One may have a park, a leet, waif, stray, wreck of sea, and tenura placitorum \(^{(a)}\), by prescription, and without allowance in eyre; but not cognisance of plea; nor catalla felonum, vel fugitivorum aut utlagatorum \(^{(b)}\).

A liberty may be forfeited by misusing it; as to keep a market otherwise than it is granted.

A liberty may be forfeited for not using it when it is for the good of the commonwealth; as not to exercise the office of the clerk of the market; but not to use a market, is no forfeiture.

Whatsoever is in the king by reason of his prerogative, cannot be granted or pardoned by general, but by special words.

\(^{(a)}\) Holding of pleas.
\(^{(b)}\) Chattels of felons, or fugitives, or outlaws.
CHATEL real are guardianships, leases for years, or at will, &c. (a).

Guardianship is the benefit of having the custody of the body or lands, or both, where the heir is within age: And the lord of whom the land is held by knight service (b) shall have the same to his own use; and as it is a chattel real, therefore his executor shall have it.

The guardian must not do waste, nor enfeoff, upon pain of losing the wardship: But he must maintain the building out of the issues of the lands, and so restore it to the heir.

If the committee of the king (c) commit waste, &c. the wardship shall be committed to another; if the grantee, he shall lose the wardship.

And one of the friends of the ward, being his next friend who will, may sue for him.

If a lease be made to a man and his heirs for twenty years, it is a chattel, and his executor shall have it: Otherwise if a man give by will a lease to a

(a) Chattels real are not called so, as being real estate, but because they are extractions out of the real. 3 Atk. 492. 4 Bac. Abr. 328. See further as to chattels real, 3 Bac. Abr. 60, Gwill. edit.
(b) Vide note (a), ante, 127.
(c) i. e. the person to whom the King committed the guardianship of his ward.
man and his heirs, here the word "heirs" are words of purchase *(a), and the heirs shall have it *(b).

* If a man grant proximam advocatio- * P. 50. * ncm *(c) to J. S. and his heirs, it is but a chattel, for it is but for unica vice *(d).

Writings pawned for money lent, are chattels *(e).

If a woman have execution of lands by statute merchant, and take a husband, he may grant it, for it is a chattel.

(a) In general, words of purchase are those by which, taken absolutely without reference to, or connection with, any other words, the estate first attaches, or is considered as commencing in the person described by them; whilst words of limitation operate by reference to, or connection with other words, and extend or modify the estate given by those other words. Fearne's Contingent Remainders, 108. 6. 4th edit. 79, Butler's editions.

(b) If a term be bequeathed to one for life, and afterwards to the heirs of his body, these words are generally words of limitation, and the whole vests in the first taker; but if there appears any other circumstance or clause in the will, to shew the intention that these words should be words of purchase, and not of limitation, then, it seems, the ancestor takes for life only, and his heir will take by purchase.

It is the same in the limitations of trusts of terms in marriage settlements.

It seems formerly to have been held in some cases, that an executory bequest of a term to a person not in esse was void; but that point is long since settled to the contrary, and it is now certain, that any executory devise or bequest, whether to a person in esse or not, is good, if confined to take effect within the limits prescribed against perpetuities. Vide note ante, 67.

If there be twenty limitations of a term, after a bequest to one for life, &c. every one of the twenty will be equally executory as the first of them; because all are equally limitations of a term after a disposition thereof for life, which cannot hold otherwise than by way of executory bequest. Fearne's Remainders, 490. 492. 495. 504. Butler's editions, 379. 380. 385. 392-5, 3d edit.

(c) Next presentation to a living.

(d) One turn or presentation.

(e) 3 Bac. Abr. 65.
Of CHATTELS PERSONAL.

Chattels personal are gold, silver, plate, jewels, utensils, beasts, and other chattels and moveable goods whatsoever, obligations, and corn upon the ground.

All goods, as well moveable as unmoveable, corn upon the ground, obligations, right of actions, money out of bags, and corn out of sacks, sunt catala.(a).

Money does not pass, by the grant off all his goods and chattels; nor hawks, nor hounds, nor other things ferae naturae (b), for the property is not in any person, not even after they are made tame, any longer than they are in his possession; as my hounds following me, or following my man; or my hawk, flying after a fowl, or my deer, straying out of my park: But if they stray of their own accord, it is lawful for any man to take them; and the heir shall have them.

*P. 51. * All chattels shall go to the executors; as vats and furnaces fixed in a brewhouse, or dye-house, by the lessee; but if they be fixed by tenant in fee, the heir shall have them(c).

(a) Are chattels.
(b) Of a wild nature. See Toller's Ex. 147.
(c) Vide 3 Bac. Abr. 60. Com. Dig. Biens (A. 1.)
OF CONVEYANCES.

Now something has been said concerning possessions; it follows that it be shewn, how they may be conveyed from one man to another.

CHAP. XXVIII.

OF CONVEYANCES.

In every conveyance there must be a grantor and a grantee, and something granted (a).

The conveyance of some person is void, of others voidable (b).

Conveyance of a woman covert is void, without the consent of her husband (c), and it ought to be made in her and his name, except it be done as executor to another (d).

The conveyance of an infant which does not take effect by the delivery of his own hands, is void (e); and an action of trespass will lie against the grantee for taking the things given (f).

Otherwise it is but voidable, except it be as executor, or for necessary meat and drink, &c. for his advantage (g).

* Voidable of non sanae memoriae (h), or * P. 52. made by duress (i).

Voidable by the parties themselves and their heirs, and by those who shall have their estates, except non sanae himself (k).

(a) Perk. s. 1. (f) Perk. s. 13, 14.
(b) Perk. s. 2. (g) Perk. s. 14.
(c) Perk. s. 6. (h) Of unsound mind. Perk.
(d) Perk. s. 7. s. 21.
(e) Perk. s. 12. Et supra, (i) Perk. s. 16, 17, 18.
150 (b). (k) Perk. s. 21.

Grants
OF CONVEYANCES.

Grants by fine are voidable by a writ of error, by an infant during his nonage (a), and by the husband for a fine levied by his wife alone during their marriage (b).

The conveyance of some persons cannot be good for ever without the consent of others; as the dean without the chapter; the mayor without the commonalty; and of other bodies politic who have a common seal; or of a parson without the patron and ordinary (c).

If there be no addition in the conveyance it shall be intended the elder (d).

A conveyance made to a woman covert shall be good and of effect, until her husband do disagree.

An infant may be grantee, so may a woman outlawed, a villain (e), a bastard, and a felon.

A bastard can have no heir but the issue of his body lawfully begotten.

* P. 53. * An infant at the age of discretion by his actual entry, and a woman against the will of her husband may be a disseisor or a trespasser.

In all conveyances there must be one named, who may take by force of the grant, at the beginning of the grant.

A grant made to the right heirs of one who is

(a) Perk. s. 19.
(b) Perk. s. 20.
(c) Perk. s. 31.

(d) If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father grant an annuity without any addition, yet the grant is good; for he cannot deny his own deed. Perk. s. 37. 3 Bac. Abr. 378. Grants (C).

(e) See note (b), ante, 29.
dead is good, or custodibus Eccle. (a), is good for goods. All chattels, real or personal, may be granted or given without a deed (b).

Rent-service, rent-seck, rent-charge, common of pasture, or of turbary, reversion, remainder, advowson, or other things, which lie not in manual occupation, cannot be conveyed for years, for life, in tail, or in fee, without writing.

The mayor or commonalty, or the like, cannot make a lease for years without a deed.

(a) To the keepers of the church.
(b) But since the statute of frauds a writing is necessary as to chattels real. Vide Roberts on Frauds, 164. and post, ch. 43.

CHAP. XXIX.

OF DEEDS.

THREE things needful and pertaining to every deed are, writing, sealing, and delivering.

* In the writing must be shewn the per- * P. 54.
sons names, their dwelling place, and degree (c).

Things granted upon what consideration, the estate, whether absolute or conditional, with the other circumstances, and the time when it was done.

No grant can be made but to him who was party to the deed, except it be by way of remainder.

(c) See 2 Vin. Abr. 81, 88. Additions (C).
The words must be sufficient in law to bind the parties; as if a man grant *omnes terras certa sua* (a), a lease for years passes not, but freehold only, at least *nec per omnia bona sua* (b).

*Exceptio semper ultimo ponenda est* (c).

The *habendum* must include the premises.

A condition cannot be reserved but by the grantor; and it is proper to follow the *habendum* presently.

The *habendum* or condition must not be repugnant to the premises, if it be, it is void, and the deed will take effect by the premises (d).

A warranty is good although it extend not unto all the lands, nor to all the feoffees, or be made by one of the feoffors.

If a deed be erased or interlined in the date, or in any material place, it is very suspicious (e).

• P. 55. •

**Of Sealing** (f).

A writing cannot be said to be a deed if it be not sealed, although it be written and delivered, it is but an escrow.

And if it were sufficiently sealed, yet if the print of the seal be utterly defaced, the deed is insufficient, it is not my deed.

(a) All his certain lands.
(b) Not for all his goods. See Co. Litt. 118 b.
(c) The exception is always placed at the end.
(d) *Vide* note, ante, 50 (e).
It cannot be pleaded, but it may be given in evidence (a).

Of Delivery.

A deed takes effect by the delivery, and if the first delivery take any effect, the second is void.

A jury shall be charged to enquire of the delivery, but not of the date; yet every deed shall be intended to be made when it bears date (b).

Diversity in delivering of a Writing as a Deed or Escrow.

This delivery ought to be made by the party himself, or by his sufficient attorney, and so it shall bind him whosoever wrote or sealed the same.

* If one be bound to make assurance, * P. 56 he need not deliver the deed unless there be one to read it to him before (c).

And if any writing be read in any other form to a man unlearned (d), it shall not be his deed although he seal and deliver it (e).

There are two sorts of Deeds.

A deed poll, which is the deed of the grantor; a deed indented, which is the mutual deed of either

(a) See Perk. s. 135, &c. Gilb. Evid. 95. Sedgw. edit. 107, 4th edit.

(b) Com. Dig. Evidence (A 3). Hargr. n. Co. Litt. 36 a, (5) and (6). Phill. on Evid. 506. 585. 4th edit. As to the execution of deeds under powers, see Sug. Pow. 231, 2d edit. Phill. on Evid. 507.

(c) Thoroughgood's case, 2 Co. 9 b.

(d) Or to a blind man, Sutcliffe's case, 12 Co. 90. See also 4 Cru. Dig. 31, 2d edit.

(e) Manser's case, 2 Co. 3 a.
party. But in law, one is the deed of the grantor, and the other the counter part. And if any variance be in them, it shall be taken as it is in the deed of the grantor; and if the grantor seal only, it is good.

CHAP. XXX.

BARGAINS and SALES.

No manors, lands, tenements, or other hereditaments can pass, alter, or change from one man to another, whereby an estate of inheritance or freehold (a) is made, or takes effect in any person or persons, or any use thereof is made, by reason only of any bargain and sale thereof, except *P. 57. the same be made by writing indented, sealed, and enrolled in one of the courts of record at Westminster, or within the same county or counties where the tenements so bargained do lie, before the custos rotulorum and two justices of peace, and the clerk of the peace, or two of them, whereof the clerk of the peace to be one, and that within six (b) months after the date of such writing indented. 27 H. 8. c. 16.

(a) Bargains and sales for years are not restrained by this statute; and though they are not by deed indented nor enrolled, yet the statute of uses executes the possession to the use. 2 Inst. 671. Heyward's case, 2 Co. 36. Fozz's case, 3 Co. 94. Gilb. Uses, 85. 285. 2 Sand. Uses, 42, 3d edit. 4 Crn. Dig. 122, 2d edit. 1 Bac. Abr. 463.

(b) Lunar months. 2 Inst. 674. Gilb. Uses, 99. The time for enrolment is exclusive of the day of the date; and any instant of the last day of six lunar months shall be said to be, within the six months. Thomas v. Popham, Dyer, 218 b.

The
The inrollement shall be intended the first day of the term, and shall have relation to the delivery of the deed against all strangers.

CHAP. XXXI.

FEOFFMENTS.

By a feoffment an estate is made, by the delivery of possession and seisin, by the party, or his sufficient attorney (a).

A man cannot make livery of seisin before he has the possession.

A joint-tenant cannot enfeof his companion (b).

A coparcener may make a feoffment of his part, or release.

A man cannot enfeof his wife.

* A disseisor cannot enfeof the disseisee; * P. 58. for his entry is lawful upon the disseisor.

Such persons as have possession in lands for years or for life, &c. cannot take by livery and seisin of the same lands (c).

If a feoffment be made, and the lessee for years give leave to the lessor to make livery and seisin of the premises, saving to himself his lease, &c.

(a) Since the 29 Car. 2. c. 3, it must be put in writing, and signed by the parties making the same. See further, 3 Bac. Abr. 114. 2 Sand. Uses, 1. Butl. n. Co. Litt. 271 b. (1). I.
(b) See the reason, 3 Bac. Abr. 694.
(c) Because having the possession already, they cannot have a further possession: the proper way of conveying a greater estate to them, is by release in enlargement; or to confirm their possession, a confirmation.
and he does, the term is not surrendered; for the lessee had an interest which could not be surrendered without his consent to surrender, and here his intent to surrender does not appear; wherefore he may enter, and have his term, and the rent is renewed: But it is otherwise with a lessee for life, and the rent is extinct.

The lessor cannot make livery and seisin, against the will of the lessee being on the land; but he may grant the reversion, and if the lessee do attorn, (a), the freehold will pass without livery of seisin.

**LIVERY of SEISIN.**

Livery of seisin is a ceremony used in conveyance of lands, that the common people might know the passing or alteration of the estate. It *P. 59.* is requisite in all feoffments, *gifts in tail, and leases for life, made by deed or without deed (b).*

No freehold will pass without livery of seisin, except by way of surrender, partition, or exchange, or by matter of record, or by testament.

Livery of seisin must be made in the life-time of him who made the estate.

*Dona clandestina sunt semper suspiciosa (c).*

By livery of seisin in one county, the lands in another county will not pass.

(a) See post, 163.

(b) Or something tantamount to it, such as a bargain and sale for a year under the statute of uses, or a lease for years and entry by the lessee at common law, and a release in enlargement.

(c) Clandestine gifts are always suspicious.
FEOFFMENTS. 153

Livery within view is good, if the seoffor do enter in the life-time of the seoffor.

Livery cannot be made of an estate to be given in futuro (a), for no estate of freehold can be given in futuro, but shall take effect presently by livery and seisin.

Of Uses (b).

The statute of 27 H. 8. c. 10. has advanced uses, and established a surety for him who has the use against

(a) In future.

A devise may be made to uses under the statute of uses. Thus a devise to A. and his heirs, to the use of B. and his heirs, would give the legal fee to B. But if the testator's intention cannot take effect under the statute of uses, the law will leave its effect to the statute of wills. Thus if a devise be made to the use of A. for life, with remainders over, if it were considered as a limitation under the statute of uses, it would be void for want of a seisin to serve the uses. Butl. n. Co. Litt. 271 b. (1), III. 5. So if a devise be to A. and his heirs, to the use of B. and his heirs, and A. die in the testator's life-time, perhaps the courts would, in favour of the intention, construe the devise as a disposition not affected by the statute of uses, but as giving the fee to B. at once. But even admitting that the devise would be void at law, yet equity would compel the testator's heir to fulfil the intention, by conveying the estate to the same uses. Sug. Pow. 133, 2d edit. But whether a devise to uses operates solely by the statute of wills, 1 Collectanæa Juridica, 427; or by that statute jointly with the statute of uses, is, except in a very few cases, a matter rather of speculation than of use, 2 Fonbl. Treat. of Eq. 24, 5th edit. as it is now settled that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the
against the feoffees: For before the statute, the feoffees were owners of the land, but now that is destroyed, and the cestui que use is the owner of the land: Before the statute the possession * P. 60. ruled the use, but since * the use governs the possession. Indentures subsequent are sufficient to direct the uses of a fine or recovery precedent, when no other certain and full declaration was made before (c).

ATTORNEY.

An attorney ought to do every thing in the name, and as the act of him who gave him the authority; as leases in name of the lessor, but he must say,

the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best, with the intention of the testator. Butl. n. ubi supra. See further, Powell on Devises, 272. 1 Sand. Uses, 203, 3d edit. 195, 2d edit. Gilb. Uses, 162. 281. Sugd. edit. 356. 486. 1 Cru. Dig. 436, 2d edit. The subject is interesting and leads to important results.

(a) To uses.
(b) He who has the use.
(c) Gilb. Uses, 54. 259.
(d) Combes's case, 9 Co. 76 b. But it is immaterial whether the attorney place his own name first or last. Therefore an execution thus "for J. B. (the principal), M. W. (the attorney), L. S." is valid. Wilks v. Bags, 2 East, 142. The proper way is "J. B. by M. W." 1 Wms. Conv. 175.

Where an attorney enters into an agreement on behalf of his principal, the agreement should be made and signed in the name of the principal by him as attorney; for if an attorney covenant in his own name for himself, his heirs, &c. he will himself be personally bound, though he be described in the instrument as covenating for, and on the part of his principal. Appleton v. Binks, 5 East, 148. Kendray v. Hodgson, 5 Esp. Ca. 228. See Duke of Norfolk v. Worthy, 1 Campb. N. P. 337. Bowen v. Morris, 2 Taunt. 375. Sugd. Vend. 42, 5th edit.
by virtue of his letter of attorney I do deliver you possession and seisin of, &c. for, &c.

An attorney must first take possession before he can make livery of seisin.

If an attorney do make livery of seisin otherwise than he has warrant, then it is a disseisin to the feoffor.

An attorney must be made by writing sealed, and not by word (a).

(a) Though the contract itself must, by the statute of frauds be in writing, an authority to buy or treat for lands as agent for another may be good, and effectual without any writing. Waller v. Hendon and Cox, 5 Vin. Vin. Abr. 524, pl. 45. Wedderburne v. Carr, cited 3 Wooddes. Lect. 427. Coles v. Trecothick, 9 Ves. 250. It is, however, in all cases highly desirable that the agent should have a written authority.

CHAP. XXXII.

EXCHANGE.

In an exchange both the estates must be equal; There must be two grants, and in every grant mention must be made of this word "Exchange."

* It may be done without livery of seisin, * P. 61. if it be in one shire, or else it must be done by indenture, and by this word "Exchange," or else nothing passes without livery.

Exchange imports in the law a condition of re-entry, and a warranty, voucher, and recompence, of the other land which was given in exchange (b).

(b) Bustard's case, 4 Co. 121 a. 4.
EXCHANGE.

An assignee cannot re-enter, nor vouch, but rebate; an exchanger may re-enter upon an assignee. And the same condition defeated in part, is defeated in the whole. And the same law is in partition.

(a) Finch's Law, 116. In case of eviction from the part received in exchange by a person claiming under a superior title. Litt. s. 262.

(b) Of the part given in exchange, in case of eviction from the part received in exchange, before alienation in fee of any part of the land received in exchange. Litt. s. 262.

(c) Dumper's case, 4 Co. 120 a.

(d) Co. Litt. 173 b. 1 Bac. Abr. 703. Coparceners (F).

There is a floating opinion, unsanctioned by practice, but founded on the doctrine of the text, that when lands received in exchange, &c. are sold, the vendor ought to produce an abstract of the title, and the deeds relating to the lands given, as well as those received in exchange, &c.; because the purchaser might, under an express or implied warranty, be evicted from the lands purchased, on account of a defect in the title to the lands given in exchange, &c. (a). Unless there were covenants in the deed of exchange, &c. to produce the title deeds, it would not be prudent for the person who has the lands given in exchange, nor can he be compelled to suffer his deeds to be inspected in order to discover a defect in the title, as it would subject him to the inconvenience probably of a bill of discovery in equity, a consequent action of ejectment, and ultimately the loss of the possession, even after expending a large sum of money in improvements.

An Abstract of Title in modern conveyancing being of great importance, a few observations are added on the subject:

When an abstract of a title relates to lands held under different titles, or in different shares, or under different tenures, such as freehold, leasehold, or copyhold, the abstract of the title to each farm, &c. held under a different title or share, or

(a) Vide Bustard's case, 4 Co. 121. Co. Litt. 173 b. 4 Cru. Dig. 431, 2d edit.

species
species of property, should be arranged separately; so a separately arranged abstract should be made of each attendant term, where there has been many assignments of it.

The title of the abstract should be for all the premises, and then the separate classifications may be in this manner: "As to the freehold part of the said farm, &c.;" "or as to one fourth part of the said farm, &c. which descended to the said as one of the coheirs of the said &c."

The abstract should commence at least sixty years back, and the first deed abstracted, should not be in execution of a power, or refer to a preceding deed or will, or shew an entail, although it has been barred, because in these cases the counsel for the purchaser would require the production of the deed containing the power, the preceding deed or will referred to, or the deed creating the entail, and the assurances by which it has been barred.

If the purchaser of a leasehold interest be not precluded by the contract, he should generally require the production of the title of the person who granted the lease: and if it be an underlease, the title of the original and all underlessors: in the latter case each lease should be carefully inspected to ascertain that there are no are covenants, the breach of which would cause the assignee to be evicted by a superior landlord, without any default on his part. A lessee is a purchaser pro tanto, and whenever he intends laying out money on the premises, should always require the production of the title of the person who assumes to grant a lease, whether he be owner of the inheritance, tenant for life, or in tail, under a power of leasing, or where the lessor himself has only a term for years or life, the title to the freehold, as well as the leasehold interest, should be investigated. All the leases of the Pullicney estate were set aside on account of a power of leasing not having been duly pursued. So the Duchess of Bolton, who was tenant for life, but pretended to have a power of leasing for three lives, granted leases of lands in Devonshire, and received fines to the amount of £29,000, but as she had no such power, the leases were set aside. Unless the lessee examines the title deeds, with the abstract, he cannot be assured that the lessor has not previously mortgaged the property, in which case the lessee, and those claiming under him, would be liable to be evicted by the mortgagee, unless they redeem the mortgage; because all leases or other interests in the land, made or conveyed by the mortgagee subsequent to the mortgage, though before forfeiture, are void as against the mortgagee, and if he permitted the lessee to

remain,
remain, he would be a mere tenant at will, and liable to be turned out of possession, in which case his only remedy would be an action against his lessor under the covenants in the lease. *Keech v. Hall*, Doug. 21. 1 Pow. Mort. 226. 5 Bac. Abr. 15. But if the mortgagee fraudulently, or by that gross negligence which amounts to evidence of a fraudulent intention, permits the mortgagor to retain the title deeds, it seems, the mortgagee would be restrained in equity from evicting the lessee. *Head v. Egerton*, 3 P. Wms. 281. *Ryall v. Rovles*, 1 Ves. sen. 360. 1 Atk. 168. *Goodtitle v. Morgan*, 1 Term. Rep. 762. *Peter v. Russell*, 2 Ves. 726. 1 Eq. Cas. Abr. 321. *Gilb. Eq. Rep. 122. Tourle v. Rand*, 2 Bro. C. C. 650, and Eden's note. *Plumb v. Fluit*, 2 Anstr. 432. *Evans v. Bicknell*, 6 Ves. 190. *Barnett v. Weston*, 12 Ves. 133. And see 1 Pow. Mortg. 62, 4th edit. 1 Fonbl. Treat. Eq. 165, 5th edit. 1 Mad. Ch. 324, 2d edit. *Sug. Ven*. 281, 5th edit. In *Keech v. Hall*, 1 Doug. 23, Lord Mansfield treats it as clear, that a lessee has a right to examine the title deeds of his lessor. He says, "whoever wants to be secure, when he takes a lease, should enquire after and examine the title deeds. In practice, indeed, especially in the case of great estates, that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title." And see *Waring v. Mackreth*, Forr. Exch. Rep. 129. *White v. Foljambe*, 11 Ves. 343. *Deverell v. Lord Bolton*, 18 Ves. 505. Coventry's note, Pow. Mortg. 176. Sed vide *Gwillim v. Stone*, 3 Taunt. 433. On a bill by the intended lessor for the specific performance of an agreement, to take a lease for twenty-one years, at rack rent, Sir William Grant decided, that the plaintiff could not enforce a specific performance without producing the title to the inheritance. *Fidies v. Hooker*, 2 Meriv. 423. A purchaser, or an intended lessee of a bishop's lease, cannot call for the lessor's title. *Fane v. Spencer*, 2 Meriv. 430, n. It remains undecided, whether a purchaser of a leasehold interest, or an intended lessee, can, as plaintiff, compel the production of the title to the inheritance. Therefore in every contract for a lease, or for the purchase of a leasehold interest, there should be an express stipulation respecting the production of the title, either affirmatively or negatively. Lessors cannot sometimes be advised to shew their title, as Lord Eldon observed, 8 Ves. 141. The *Newcastle Corporation* case is a good lesson upon this subject of
of production. They produced their charters to satisfy curiosity: some persons got hold of them; and the consequence was, the corporation lost £7,000 a-year.

The abstract of a deed should shew the date; the parties their residence; the character in which they act, such as heir, executor, &c.; and if the property descended from a remote or collateral ancestor, a pedigree should accompany the abstract; the substance of every recital; the consideration, by whom, and to whom paid; the persons who grant, &c.; the persons by whose consent they grant, &c.; all the operative words; the parcels; the exception; the habitandum; the uses; the trusts; the reddendum; the condition or proviso, if special, fully; the covenants, by whom and to whom, whether restrained or general, for what purpose, every qualification and exception, special covenants fully; by whom executed; and the mode of attestation; the receipt for the consideration money; of feoffments, and leases for lives deriving their effect from the principals of the common law, livery of seisin; of bargains and sales for life, or in fce, enrolment; of lands in register counties, registry.

The abstract of a recovery should shew the term in which it was suffered; the demandant; the tenant; the vouchees; the manner of vouching; the description of the parcels; the return of the execution of the writ of seisin (a).

The abstract of a fine should shew the term in which it was levied; the cognizors; the cognizees; what kind of fine; the description of the parcels; the indorsement of the proclamations.

The abstract of a will should shew the date; the name and description of the testator; the devisee or legatee; the words of gift, and every expression in the will in any manner abridging, giving over, charging or relating to the property in hee verba; the execution and attestation; the death of the testator; and generally of freehold property, who was the testator's heir at his death; of leasehold—the appointment of executors; the court where, and by whom proved; in a register county, the registry. In general it is adviseable to send to counsel, with the abstract, a copy of the will, with the material parts marked in the margin in pencil.

When trusts or powers are created either by deed, will, or private act of parliament, every circumstance required to a valid execution of the powers, and also the trusts, should be

(a) Vide note (a), Noy's Treat. Ten. 31.

abstracted,
abstracted, unless there are the usual clauses of indemnity to purchasers and mortgagors on payment of their money to the trustees, or in the manner required by the act, in which case the trusts need not be stated.

An abstract of an administration should state the date; by what court granted; of what, whether general, de bonis non, or special; of whom; to whom; if any of the administrators were dead when they assigned, the fact should be shewn by their burial certificates, or probates or administrations. Vide note, p. 106, infra.

The abstract of a private act of parliament, usually called an estate act, if made before 33 Geo. 3. c. 13. (a), should state the session in which it was made; if after that time, the day when the act received the royal assent; the title of the act; the recitals; the enacting clause; the mode of paying the purchase monies; the indemnity clause to purchasers, &c.; in the case of an exchange, &c. the eviction clause; the powers; the saving clause should be always particularly stated.

The abstract of an award under an inclosure act need only state, that [the commissioners] acting under and by virtue of an act passed the Geo. 3. intituled [title of the act] by their award, bearing date, &c. allotted unto, &c. in respect of, &c. all that, &c.: at the end it should state where the award has been enrolled. There should be a title shewn to the lands in respect of which the allotment is made, previously to abstracting the award.

Whenever the title to an estate has not been investigated for some time, such as in the case of a descent from father to son from a remote period, and the proprietor intends either to sell, mortgage, or lease his estate to a person requiring the production of the title, or it is intended to bar an entail of long continuance, or enter into articles to make a settlement previous to marriage, it is a prudent precaution to lay an abstract of the title before the proprietor's own counsel, previously to a contract for sale, or an agreement to produce the title to a lessee, or delivery of the abstract to the solicitor of the mortgagor, or the friends of the lady. By which means, if there should be any defect in the title, it will only be known to the solicitors and counsel of the proprietor; and if the defect can be remedied, a contract for a sale, &c. may be delayed until the proprietor is enabled to make a marketable title; whereby he will save the damages which might have been recovered against him for a breach of contract, by not making out a good title.

(a) 6 Bac. Abr. 370.
There is extreme danger in exposing the defects of a title. Lord Clinton is likely to lose an estate worth about £20,000 a-year, and which he claims under a settlement made by his father in 1792, on account of the treachery of a person who, informed of the defect of the title; the representatives of a mortgagee, to the amount of upwards of £41,000, to lose the mortgage money; and the children claiming under the settlement made by Lord Clinton's father, to lose their portions.(a).

The vendor, &c. ought to produce his title-deeds at the office of the solicitor for the purchaser, &c. or pay the expenses of a journey to the place where the deeds are. Vide Sug. Vend. 351, 5th edition. The title-deeds should be carefully examined with the abstract by the solicitor for the purchaser, &c. before he sends the abstract to counsel: every word of every deed ought to be read with attention; and as the probates of wills cannot be relied on, when the title depends on a devise, because there have been instances of probates of wills being incorrectly engrossed; therefore, in many cases, the agent of the purchaser's solicitor should examine the original will itself, and not even rely on the register books.

In examining a title under an act of parliament, so far as the title depends on the act, it is only necessary, 1. to search the rolls of parliament at the Parliament Office, Abingdon Street, Westminster, to see that such an act is there entered on the record, and that it had the royal assent; 2. to see whether the words of the act are comprehensive enough to pass the estate; 3. to be careful to observe all the provisoes and directions contained in the act, so as to see whether there is any thing made requisite by the act, for the takers, under the uses of it, to do or perform, in order to entitle themselves to take and enjoy the estates intended thereby, and to proceed conformably thereto; and, 4. that the saving clause has nothing in it to preserve the rights of those persons who ought to be bound by the body of the act, or the rights or estates of any others who appear to have any interest in the premises. 2 Cas. & Opin. 407, stated by Mr. Powell, 1 Wood, as his own.

(a) Cholmondely v. Clinton, 2 Meriv. 173.
GRANTS must be certain. A grant to J. S. or J. N. is void for the uncertainty, although it be delivered to J. S. for the delivery of the deed will not make a void grant good, or to take effect.

The lord cannot grant the wardship of his living tenant, because of the uncertainty who shall be his heir, unless he name some person.

* P. 62. * When any thing is granted which is not certain, as one of my horses, then the choice is in the grantee.

When several things are granted, then it is in the choice of him that is to do the first act.

A man cannot charge or grant that which he never had.

A man may charge a reversion.

A parson may grant his tithes, or the wool of his sheep, for years.

A thing in action, a cause of suit, right of entry, or a title for a condition broken, or such like, may not be given or granted to a stranger, but only to the tenant of the ground, or to him who has the reversion or remainder.

A thing which cannot begin without a deed cannot be granted without a deed; as a rent-charge, fair, &c. Every thing which is not given by delivery of hands, must be passed by deed. The right of a thing real or personal, cannot be given in, nor released by word. A rent, or condition, or a re-entry, cannot be reserved to one who is not party to the deed.

All
All things which are incident to others, pass by the grant of those things which they are incident to:

* A man by his grant cannot prejudice * P. 63. him who has an elder title.

If no estate be expressed in the grant, and livery and seisin be made, then the grantee has only an estate for life: But if there be such words in the grant, as will manifest the will of the grantor, so if his will be not against the law, the estate shall be taken according to his intent and will.

All grants shall have a reasonable construction, and all grants are made to some purpose, and therefore reason would they should be construed to some purpose.

A grant shall be taken most strongly against him who made it, and most beneficially for him to whom it is made.

To grants of reversion, or of rent, &c. there must be attornment, otherwise nothing passes, if it be not by matter of record.

ATTORNMENT (a).

Attornment is the agreement of the tenant to the grant by writing or by word; as if he say, I do agree to the grant made to you, or I am well contented with it, or I do attorn unto you, or I do become your tenant, or I do deliver unto the grantee a

GRANTS.

penny by way of seisin of a rent, or pay, *P. 64. or do * but one service only in the name of the whole; it is good for all.

It must be done in the life-time of the grantor.

Without attornment a seignory, a rent-charge, a remainder, or a reversion, will not pass but by matter of record.

Without attornment services pass not by the sale of the manor, nor from the manor but by bargain and sale inrolled.

Attornment must be made by the tenant of the freehold, when a rent-charge is granted.

By the attornment of the termor to the grantee of a reversion, with livery, the reversion and the rent also pass, though no mention be made thereof. Before attornment a man cannot distrain, nor have any action of waste.

By fine the lord may have the wardship of the body and lands, before the attornment of his tenant.

The end of attornment is to perfect grants, and therefore cannot be made upon condition or for a time.

A tenant who is to perfect a grant by attornment, cannot consent for a time, nor upon a condition, nor for part of a thing granted; but it shall enure for the whole absolutely.

* P. 65. * If the tenant have not true notice of all the grant, then such attornment is void.

Attornment is unnecessary upon a devise (a).

(a) Of a rent service or a rent charge, or of a reversion expectant on a lease for life or years, and the devisee might have distrained, or had a writ of waste, though the tenant never attorned. Litt. s. 583, 586.

CHAP.
LEASES.

CHAP. XXXIV.

LEASES.

A LEASE for years must be for time certain, and ought to express the term, and when it should begin, and when it should end, certainly; and therefore a lease for a year, and so from year to year during the life of J. S. is but for two years, and it may be made by word or writing. If I lease to J. N. to hold until one hundred pounds be paid, and make no livery of seisin, he has an estate only at will.

A lease from year to year, so long as both parties please, after the commencement of any year it is a lease for that year, &c. till warning be given to depart. 14 H. 8. 16.

A lease beginning from henceforth shall be accounted from the day of the delivery; for the making shall be taken inclusive from the day of the making, or of the date exclusive (a).

If lands descend to the heir, before his entry, he may make a lease thereof.

* A man lets a house cum pertin' (b), no * P. 66, lands pass: But if a man let a house cum omnibus terris eidem pertin' (c), there the lands enjoyed therewith pass.

If a man let lands wherein are coal-mines, quarries, and the like, if they have been used the tenant may use them, and if they be not open, if the te-

(b) With the appurtenances.
(c) With all the lands belonging to the same.
nent open them and employ them not on the land, it is waste: Likewise Marl. The land is the place where the rent is to be paid and demanded, if no other place between the parties be limited.

Trespass is not given for not paying the rent to the lessor on the land although it be payable there. And if a man let lands without impeachment of waste (a), and a stranger cut down the trees, and the lessee brings an action of trespass, he shall not recover for the value of the trees, but for the crop, and breaking of his close; and the heir of the lessor shall have such trees, and not the executor of the lessee, unless they be cut by the lessee, and enjoyed by the grantee without waste.

Lessee for years or for life, tenant in dower or by the curtesy, or tenant in tail after possibility, &c. have only a special interest or property in the trees, being upon the ground, growing as a thing annexed unto the land, so long as they are annexed thereunto.

But if the lessee (b) or any other sever them from the land, the property and interest of the lessee in them is determined, and the lessor may take them as things which are parcel of his inheritance, the interest of the lessee being determined.

To accept the rent of a void lease will not make the lease good; but of a voidable lease it will (c).

If the husband and wife do purchase lands to them and the heirs of the husband, and he make a lease, and die, his wife may enter, and avoid the

(a) Without any liability to punishment for committing waste.
(b) See Herlakenden's case, 4 Co. 63 a.
(c) Vide Wms. n. 2 Saund. 180 a. 4 Bac. Abr. 13. 117, Leases (C) and (H). 7 Bac. Abr. 64, Void and Voidable. 1 Rop. Hush. and Wife, 90.
lease for her life; but if she die, leaving the husband, who afterwards dies before the term ends, the lease is good to the lessee against the heir.

Where it is covenanted and granted to J. S. that he shall have five acres of land in D. for years, this is a good lease, for *concessit* (a) is of such force as *dimisit* (b).

If a man make a lease for ten years, and afterwards makes another lease for twenty-one years, the latter shall be a good lease for eleven years, when the first is expired.

If the lessee at his own cost put glass into the window, he cannot take the same away again, but if he do he shall be punished *P. 68.* for waste (c): And so of wainscot and beds fastened to the ceiling, if not fixed with screws.

Tenant in tail may make a lease for such lands or inheritance, as have been commonly letten to farm, if the old lease be expired, surrendered, or ended, within one year after the making of the new: but not without impeachment of waste, nor above twenty-one years, or three lives, from the day of the making, nor without reserving the old rent, or more, 32 *H. 8.* 28. Indenture of lease, by tenant in tail, for twenty-one years, made according to the form of the statute, rendering the ancient or more rent, if the tenant in tail die, it is a good lease against his issue; but if a tenant in tail die without issue, the donor (d) may avoid this lease by entry (e).

(a) Granted.
(b) Demised.
(c) Co. Litt. 53 a. 4 Co. 63 b. 1 Atk. 477. 3 Bac. Abr. 63. The doctrine of annexation has, on principles of public policy, been gradually relaxing. Ambl. 113. 2 Str. 1141. Toll. Ex. 198. Off. Ex. 62.
(d) Reversioner, or remainder-man.
(e) *Pain*’s case, 8 Co. 34 a.
32 H. 8. 28. And if he in the remainder do accept the rent, it shall not tie him, for as the tail is determined, the lease is determined and void. Ed. 6. 19.

The husband may make such a lease of his wife's lands by indenture, in the name of the husband and wife, but she must seal the lease, and the rent must be reserved to the husband and his wife, and to the heirs of the wife, according to her estate of inheritance.

* P. 69. * A lease made by the husband alone, of the lands of his wife, is void after his death, but the lessee shall have his corn (a).

By the husband and wife voidable, if it be not made as aforesaid.

If a man let lands for years, or for life, reserving a rent, and enter into any part thereof, and take the profit thereof, the whole rent is extinguished, and shall be suspended during his holding thereof.

The acceptance of a re-demise to begin presently is a suspension of the rent before any entry: Otherwise of a re-demise to begin in futuro (b).

**Reservations and Exceptions.**

There are divers words by which a man may reserve a rent, and the like, which he had not before, or to keep that which he had, as *tenendum, reservendum, solvendum, faciendum* (c), it must be out of a messuage, and where a distress may be taken, and not out of a rent, and must be comprehended within the purport of the same word.

(a) Which he has sown.

(b) In future.

(c) To hold, to reserve, to pay, to make. See Co. Litt. 47 a.

Exceptions
Exceptions of part (a) ought always to be of such things as the grantor had in possession at the time of the grant.

*The heir shall not have that which is * P. 70. reserved, if it be not reserved to him by special words (b).

If a man make a feoffment of lands, and reserve any part of the profits thereof, as the grass or the wood, that reservation is void; because it is repugnant to the feoffment (c).

A man by a feoffment, release, confirmation, or fine, may grant all his right in the land, saving unto him his rent-charge, &c. Things which are gained only by taking and using, as pasture for four bullocks, or two loads of wood, cannot be reserved but by way of indenture, and then they shall take effect by way of grant from the grantee to the grantor, during his life, and no longer, without special words.

Exceptions of things, as wood, mines, quarry, marl, or the like, if they be used (d) it is implied by the law, that they shall be used (e); and the things without which they cannot be had, is implied to be excepted, although no, &c. (f).

But otherwise, if they be not used, then the way and such like must be excepted.

An assignee may be made of lands given in fee, or for life, or for years, or of a rent-charge, although no mention be made of "assigns" in the grant.

(a) Of the thing granted.
(b) As if a particular field be reserved to the grantor, without naming his heirs.
(c) Shep. Touchs. 79.
(d) At the time of the grant.
(e) In future.
(f) Exception be expressly made.
But otherwise it is of a promise, covenant, or grant or warranty.

If a lessee assign over his term the lessor (a) may charge the lessee or assignee (b) at his pleasure.

But if the lessor accept of the rent of the assignee, knowing of the assignment, he has determined his acceptance, and shall not have an action of debt against the lessee, for rent due after the assignment (c).

If after the assignment of the lessee the lessor grant away his reversion, the grantee cannot have an action of debt against the lessee (d).

(a) An assignee of a reversion may have an action of debt for rent against the lessee, and the action being founded, not upon any privity of contract, but upon privity of estate only, is local. Wms. n. 1 Saund. 241 b. 238 (1). Com. Dig. Action (N. 4. 6.).

(b) The lessor may bring an action of debt against the assignee, upon the privity of estate there is between them by virtue of the assignment for the rent actually incurred during his enjoyment. 2 Bac. Abr. 73, Covenant (E). 4. 1 Fonbl. Treat. Equity, 359 (y).

(c) By reason of his own acceptance, which has extinguished the privity of contract, Walker's case, 3 Co. 24 a, b. Cro. Jac. 334, though he may still have an action of covenant for the payment of the rent, because a personal covenant cannot be transferred by the acceptance of the rent. 1 Roll. Abr. 522 (N), pl. 1. 6 Vin. Abr. 412. Bull. N. P. 159. But if the covenant be merely implied by law, as yielding and paying, it seems his acceptance of the assignee for his tenant leaves him without remedy against the lessee. 1 Fonbl. 362, 5th ed. Wms. n. 1 Saund. 241 a. And the assignee of the reversion may have an action of covenant by 32 Hen. 8. c. 34. Brett v. Cumberland, Cro. Jac. 521. 522. Thursby v. Plant, 1 Saund. 240. See further, Butl. n. Co. Litt. 269 b. (3). Gilb. Ten. 67. 68. Sug. Ven. 31. 254, 5th ed. Staines v. Morris, 1 Ves. & Bea. 11. 2 Bac. Abr. 72, 73. 2 Saund. 302 a. (5).

(d) Because there was no privity of estate between them, as the lessee assigned his term before the grant of the reversion. 1 Saund. 241.
RESERVATIONS AND EXCEPTIONS.

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If a lessee assign over his interest and die, his executor shall not be charged for rent due after his death (a).

(a) Lord Coke, in Walker's case, 3 Rep. 24 a. says, it was adjudged, in Overton v. Sydhall, that if the executor of a lessee for years assigns over his interest, an action of debt doth not lie against him for rent due after the assignment, and that if the lessee for years assigns over his interest, and dies, the executor shall not be charged for rent due after his death; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was determined. In answer to which it may be observed, 1. That Popham, the Chief Justice, in his report of the same case (Poph. 120.), says, that he was of another opinion: and in Moor, 352, Walker v. Harris; Hatch. 262, Iremonger v. Newsam; and in 1 Show. 341, Pitcher v. Tovey, it is said that no judgment was given. 2. The case may be admitted to be law, if the lessor, after the assignment, either by the lessee or the executor, accepted of the assignee as his tenant: for then the lessor cannot bring debt against the executor, because the privity of contract was determined by the assignment, and acceptance of the assignee. But, 3dly, if it were decided in that case, either that the assignment itself, without any acceptance of the assignee, destroyed the privity of contract; or that the death of the lessee for years, after an assignment of the term by him, without any acceptance of the assignee, determined the privity of contract; so that the lessor in either of these cases cannot maintain an action of debt after such assignment, such decision appears not to be well considered; and indeed the case of Overton and Sydhall has been frequently denied. 1 Sid. 266, Hellier v. Cusbard. 1 Lev. 127, S. C. 3 Mod. 325, Coghill v. Freeloce. 2 Vent. 209, S. C. 4 Mod. 76, Pitcher v. Tovey. For it is now settled by these cases, that the privity of contract of the testator is not determined by his death, but the executor shall be charged with all his contracts so long as he has assets; and therefore he shall not discharge himself by making an assignment without the consent of the lessor, but shall still be liable in an action of debt, as well as covenant, for the rent incurred afterwards; and so, where the testator himself has assigned the term in his life-time, his executor is chargeable in the same manner. 3 Mod. 326, Wilkins v. Fry, 1 Meriv. 265. Wms. u. 1 Saund. 241.
If the executor of a lessee assign over his interest, an action of debt does not lie against him for rent due after the assignment (a).

If the lessor enter for a condition broken, or the lessee surrender, or the term end, the lessor may have an action of debt for the arrearages.

A lease for years rendering rent, with a condition, that if the lessee assign his term, the lessor may re-enter; the lessee assigns, the lessor * P. 72. receives the rent from the hands of * the assignee, not knowing of the assignment, it shall not exclude the lessor of his entry.

A thing in action (b) may be assigned over for a good cause, as just debt: As where a man is indebted to me twenty pounds, and another owes him twenty pounds, he may assign over his obligation to me in satisfaction of my debt, and I may justify the suing for the same in the name of my debtor at my own proper costs and charges.

Also where one has brought an action of debt against J. N. who promises me, that if I will aid him against J. N. I shall be paid out of the sum in demand, I may aid him.

An assignee of lands, though he be not named in the condition, yet he may pay the money to save his land (c).

But he shall receive none, if he be not named:

The tender shall be to the executor of the feoffees(d).

(a) See last note.
(b) Chose en action.
(c) Thus, a feoffee upon condition to pay a sum at Michaelmas, and in default the feoffor to re-enter, the feoffee aliens before Michaelmas, the second feoffee may pay. Litt. s. 386. 5 Co. 96 b.
(d) See Litt. s. 337. Co. Litt. 210 a. The personal representatives are always entitled to money secured on mortgage. See Butl. n. Co. Litt. 298 b.
SURRENDERS.

An assignee shall always be intended, to be him who has the whole estate of the assignor, which is assignable. A condition is not assignable (a); nor the office of an executor or administrator. The law will not allow an assignee in law, if there be an assignee in deed (b): So long as any part of the estate remained to the assignor, the tender ought to be made to him or his heirs, and it serves; yet a * colourable payment to the heir * P. 73, shall not devest the estate out of the assignee, as a true payment will (c). Vide Covenant.


(b) Assignees are either in fact, sometimes called in deed, or in law. Com. Dig. Assignment (B). Co. Litt. 8 b. The law will never seek out an assignee in law, when there is an assignee in fact. 5 Co. 97 a. 3 Buls. 169. A devisee is an assignee in law. 2 Show. 59. 3 Vin. Abr. 156.


CHAP. XXXVI.

SURRENDERS.

A SURRENDER is an instrument testifying with apt words, that the particular tenant of lands or tenements, for life or years, does sufficiently consent, that he who has the next immediate remainder or reversion thereof, shall also have the particular estate of the same in possession, and
that he yields or gives the same to him for ever. A surrender ought forthwith to give a present possession of the (a) thing surrendered unto him who has such an estate, wherein it may be drowned (b).

A joint-tenant cannot surrender to his companion.

An estate in things, though it cannot be granted without a deed, may be determined by the surrender of the deed to the tenant of the land (c).

Lessee for years cannot surrender before his term begins, he may grant, but he cannot surrender even a part of his lease (d).

* P. 74. * Surrenders are made in two ways, in

DEED, or in LAW.

A surrender in law is when the lessee for years takes a new lease for more years.

A surrender in deed must have sufficient words to prove the assent and will of the surrenderee to surrender, and that the other do also thereunto agree (e).

The

(a) Or executed interest in the thing surrendered, sometimes called a vested interest. Watk. Des. 42, 3d edit. Fearn's Rem. 1. Sug. Gilb. Uses, 231. As if tenant for life in remainder surrender to the remainder-man in fee, he cannot have a present possession, but only a present right to future enjoyment. Perk. s. 605. 616.


(d) Because it is only a right to enter at a future time. Co. Litt. 338 a. But he may release to the lessor.

(e) Where an estate is limited to A. for life, remainder to B. for life, remainder to C. the eldest son of A. in fee; and A. in the life-time of B. in consideration of an annuity of £14, to be
RELEASES. 175

The husband may surrender his wife's dower for his life, and her lease (a) for ever.

By deed indented a man may surrender upon condition.

be paid by the said C. to him out of the premises, and for other considerations, did, by deed, give, grant, surrender, and confirm unto the said C. and his heirs, the said premises; it was held, that, though the deed could not operate as a surrender, according to the intent of the parties, upon account of B.'s intermediate estate for life, yet there being a consideration of blood between father and son, the conveyance should operate as a covenant to stand seised. Per Lord Kenyon, Stafford Summer Assizes, 1797, Doe, on demise of Woolley v. Pickard; and it must be pleaded as a covenant to stand seised, and not as a surrender. 4 Mod. 150, Barker v. Lade. Wms. n. 1 Saund. 236 c. A similar circumstance occasionally occurs in practice; and the validity of many titles depends on this construction. 2 Saund. Uses, 79, 3d ed. Butler's n. Co. Litt. 337 b. (2).

(a) For years.

CHAP. XXXVII.

RELEASES.

A RELEASE is the giving or discharging of a right or action, which a man has or claims against another, or out of or in his lands.

A release or confirmation made by him, who at the time of the making thereof had no right, is void, though a right come to him afterwards, unless it be with warranty, and then it shall bar him of all right which shall come to him after the warranty made.

Release
RELEASES.

P. 75. * Release or confirmation made to him who at the time of the release or confirmation made, had nothing in the lands, is void, it behoves him to have a freehold or a possession and privity (a).

A release made to a lessee for years, before his entry, is void (b).

A man cannot release upon a condition, nor for a time, nor for part; but either the condition is void, and the time is void, and the release shall enure to the party to whom it is made for ever, for the whole, by way of extinguishment. But a man may deliver a release to another as an escrow, to deliver to J. S., as his act and deed, if J. S. do perform such a thing, or a release upon a condition by deed indented, may be good.

A joint-tenant of a rent-charge may release, yet all the rent is not extinct (c); or if he purchase the lands, his companion shall have the rent still (d).

If the grantee release parcel of a rent-charge to the grantor, yet all the rent is not extinct.

A release to enlarge an estate ought to have these words "and his heirs" or words to shew what estate he shall have.

P. 76. * A release made to him who has a reversion or a remainder shall serve and help him who has the freehold: So shall a release made to a tenant for life, or a tenant in tail, enure to him in the reversion or remainder, if they plead it:

(a) Of estate.

(b) i. e. At common law; but after a bargain and sale for years, under the Statute of Uses, it is otherwise.

(c) But only his particular share who released; which release would be a severance of the joint-tenancy.

(d) Viz. his particular share during their joint lives, and the whole rent if he survive his companion, who purchased the lands.
and so to trespassers and feoffees, but not to disseisors (a).

A release of all manner of actions does not take away an entry, nor prevent the taking of one's goods again, nor is it any plea against an executor.

A release of all demands extinguishes all actions real and personal, appeals, executions, rent-charge, common of pasture, rent-service, and all right and seizure, and all right in lands and property in chattels; but not a possibility (b) or future duty, as a rent payable after my death, and the like.

(a) Litt. s. 522. See post, 179.
(b) But it might be released by proper words; for he who is to have an interest by any possibility, may release the same to the present possessor, as well as if he had a future right, because it is according to the policy of the law, for the quiet and peace of the possessors. Lampet's case, 10 Co. 48 a, b. Gilb. Uses, 143. Ritso, 48. So it seems clear, that contingent or executory interests or possibilities in lands of inheritance, may be passed at law by fine by way of estoppel. Fearne's Rem. 365. 551. Butler's ed. 287. 444, 3d ed. Sug. Gilb. Uses, 124. 5 Cru. Dig. 251, 2d ed. Where, however, a man is tenant for life, with a contingent remainder to himself, and the reversion is in another, he ought not to levy such a fine. See Vick v. Edwards, 3 P. Wms. 372. Butl. n. Co. Litt. 191 a. (1). So possibilities of personal estates are devisable, as well as assignable, in equity. Fearne's Rem. 549. 560, Butl, ed. 439. 447, 3d ed.
CONFIRMATION.

CHAP. XXXVIII.

CONFIRMATION.

CONFIRMATION is when one ratifies the possession, as by deed, to make his possession perfect, or to discharge his estate, which may be defeated by another's entry.

* P. 77. * As if a tenant for life will grant a rent charge in fee, then he in the reversion may confirm the same grant.

Where a man by his entry may defeat an estate, there by his deed of confirmation he may make the estate good.

A confirmation cannot enlarge an estate which is determined by express condition or limitation (a). To confirm an estate for an hour, if it be to tenant for life, it is good for life: if to tenant in fee, for ever (b).

A lease for years may be confirmed for a time, or upon condition, or for a piece of the land: But if a freehold be confirmed, it shall enure to the whole absolutely.

A confirmation to enlarge an estate, must have words to shew what estate he shall have.

The estate for tenant for life can only be confirmed to his heirs, by habendum (c) the land to him and

(a) For though a confirmation may make a voidable or defeasible estate good, it cannot operate on an estate which is void in law. Co. Litt. 295 b. So a confirmation of a void lease does not make it good. Dycr, 239 b. Com. Dig. Confirmation (D. 1.)

(b) Litt. s. 519. Co. Litt. 297 a.

(c) To have.

his
CONDITION.

his heirs; and therefore it is good to have such habendum in all confirmations (a).

In a confirmation new service cannot be reserved, but an old service may be abridged (b).

A confirmation made to one disseisor, shall be voidable to the other; so shall not a release (c).

(a) Litt. s. 523. 532. 533. Co. Litt. 299 a. Com. Dig. Confirmation (B. 3.)
(b) As if the tenant held by scalfy and 20s. rent, the lord may confirm his estate, to hold only by 12d. rent. Litt. s. 538.
(c) See Litt. s. 522, and the comment, ante, 177.

• CHAP. XXXIX. • P. 78.

CONDITION.

THERE are two sorts of conditions, one expressed by words, another implied by the law; the one called a condition in deed, the other a condition in law.

If an estate be made, and the condition is against the law, the estate is good, and the condition is void.

If the estate begin by the condition, then both are void.

Bonds with conditions, expressly against the law, are void (d).

Conditions

(d) All the instances of conditions against law, in a proper sense, are reducible under one of these heads:—
1st. Either to do something which is malum in se, or malum prohibitum. Co. Litt. 206.
Condition.

Conditions repugnant, the estate good, the conditions void.

Conditions

2dly. To omit the doing of something which is a duty. Palm. 172. Hob. 12, Norton v. Simms.


Such conditions as these the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes; and therefore, as in the text, and in Co. Litt. 206. a feoffment shall be absolute for an unlawful condition subsequent, and a bond void. But where there may be a way discovered to perform the condition, without a breach of the law, it shall be good, Hob. 12. Cro. Car. 22. Perk. s. 228. Mitchell v. Reynolds, 1 P. Wms. 189; in which case the subject is treated in a masterly manner.

Where the condition of a bond is entire, and the whole be against law, it is void; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest. Rex v. Yale, 2 Brown. P. C. 381. 5 Vin. Abr. 99, pl. 9. Chesman v. Nainby, 2 Ld. Raym. 1459. 2 Stra. 744, S. C. Norton v. Simms, Hob. 14. Mo. 856, 857, pl. 1175. Twyne's case, 3 Co. 83 a. Mosdel v. Middleton, 1 Vent. 237. 1 Saund. 66 a. But if a sheriff take a bond for a point against 23 H. 6., concerning bail bonds, and also for a just debt, the whole bond is void; for the letter of the statute is so. Norton v. Simms, Hob. 14. 3 Vin. Abr. 451.

Those bonds which chiefly deserve consideration, on the ground of unlawfulness, are such as relate to—

1. Bond's restraining trade.

Though a bond, covenant, or promise, even on good consideration, not to use a trade anywhere in England, is void; as being too general a restraint of trade; yet if such bond, covenant, or promise, be not to use a trade at a particular place, it is good. Pragnell v. Gosse, Allen, 67. For the same reason it seems, that a bond, covenant, or promise, not to use a trade with particular customers by name, if founded on a good consideration, is also valid. Hanlocke v. Blackstone, 2 Saund. 156. All the cases on this subject, prior to Mitchell v. Reynolds, 1 P. Wms. 181, are noticed in that case. There, in debt on bond, the defendant prayed oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of
CONDITION.

Conditions impossible, are void, the estate good: It shall not enlarge any estate.

By

of a messuage and bakehouse in L., in the parish of St. A., for the term of five years, if the defendant should not exercise the trade of a baker within that parish during the said term; or in case he did, should, within three days after proof thereof made, pay to the plaintiff £50, then the obligation to be void: and pleaded that he was a baker by trade; that he had served an apprenticeship to it, by reason whereof the bond was void in law, wherefore he traded as he well might: and, on demurrer, the court was of opinion, that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the bond was good; and that the true distinction was not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appeared to make it a proper and a useful contract, and such as could not be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place—that the former is void, being of no benefit to either party, and only oppressive; but the other is good. The principle of this case was afterwards recognized and adopted in Chesman v. Nainby, 2 Stra. 739. 2 Ld. Raym. 1456. 3 Bro. P. C. 349. S. C. So, where the condition of a bond was, that, in consideration A. would take B. as an assistant in his business as a surgeon, for so long a time as it should please A., B. agreed not to practice on his own account for fourteen years within ten miles of the place where A. lived, the bond was held good. Davis v. Mason, 5 T. R. 118. See Sloman v. Walter, 1 Bro. C. C. 418. And where by indenture between A. and B. and C., dissolving their partnership as rope-makers, A. and B. covenanted to allow C., during his life, two shillings on every hundred weight of cordage which they should make, on the recommendation of C., for any of his friends and connections, and whose debts should turn out to be good: and that A. and B. should stand the risk of such debts incurred; but should not be compelled to furnish goods to any of C.'s connections whom they should be disinclined to trust. And C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted, or to be contracted in his or their name
By pleading, a man cannot defeat an estate of freehold, by force of a condition in deed, unless he shew

name, pursuant to the indenture, should be the exclusive property of A. and B.; and that C. should, during his life, exclusively employ A. and B., and no other person, to make all the cordage ordered of him, by or for his friends and connections; on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever. It was held, that the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, A. and B. not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together according to the apparent reasonable intent of the parties; and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred: and C. was still at liberty to work for any of his friends, who were refused to be trusted by A. and B.; by which construction the restraint on C. was only co-extensive, as in reason it could only be intended to be, with the benefit to A. and B.; and therefore the restraint on C. could be no prejudice to public trade. Gale v. Reed, 8 East, 80. 2 Saund. 156, n. See Crutwell v. Lyce, 17 Ves. 335. 1 Fonbl. Treat. Eq. 263, 5th ed. 1 Bac. Abr. 645, Gwill. edit. Conditions (K).

II. Bonds of resignation.

In Fytche v. Bishop of London, it was determined by the court of Common Pleas, that general bonds of resignation were legal; which judgment, upon a writ of error, was affirmed in the King's Bench: but upon a writ of error that judgment was reversed by the House of Lords. See Cunningham's Law of Surmeyy. 1 Bro. C. C. 96. 3 Burn's Ecc. Law, 356, 6th ed. Redesdale's Plead. 157, 3d edit. This decision, which was brought about by the great eloquence and ability of Lord Chancellor Thurlow, and the honest zeal of the bishops, was contrary to the opinion of all the judges, except Eyre, B. See Dr. Watson's (Bishop of Landaff) Life of Himself, vol. i. 180. The principle of this decision is not generally favoured, or likely to be extended. Thus a bond given by an incumbent to the patron on presentation to reside on the living, or to resign if he did not return to it after notice, has been adjudged good.
shew the condition of record, or in writing sealed; yet the jury may help a man, where the judges will take their verdict at large: of chattels he may.

The


III. Marriage brocage bonds.

Though these bonds are good at law, yet in equity they are justly condemned as introductive of infinite mischief, Law v. Law, 3 P. Wms. 594; but equity does not interpose on account of any particular injury done to the party, who is particeps criminis, and not entitled to relief, but on public considerations, that marriage, as it greatly concerns the public good, may be on a proper foundation, Law v. Law, Cas. Temp. Talb. 192. 2 Eq. Ca. Abr. 187, pl. 2. Debenham v. Ox, 1 Ves. 277; and therefore such a bond is in no case to be countenanced. Thus where the plaintiff gave a bond to the defendant, conditioned in effect, that if the plaintiff married J. S., then the plaintiff to pay a certain sum of money; the defendant procured the marriage, and put the bond in suit; but it was decreed to be delivered up, the young gentlewoman having £2,000 portion, and the man being sixty years of age, and having seven children. Drury v. Hooke, 1 Vern. 412. 2 Ch. Ca. 176. See Ch. Rep. 87. Totihill, p. 27, edit. 1820. So a bond for payment of £500, for procuring a marriage between persons of equal rank, fortune, &c. was, on appeal from the court of Chancery, declared by the House of Lords to be void; because such bonds to match-makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not be countenanced in equity; for marriage ought to be procured by the mediation of friends and relations; and such bonds would be of evil example to executors, guardians, trustees,
The word "proviso" makes a condition; but when it depends upon another sentence, or has reference to, tics, servants, and others, who have the care of children. *Hall v. Potter*, Show. P. C. 76. *Smith v. Aykwell*, 3 Atk. 566. So a bond to give money, if such a marriage could be obtained, is ill; and, by the same reason, a bond to forgive a sum of money, in the same event, must be ill also. *Hamilton v. Mohun*, 1 P. Wms. 120. So wherever a mother or father, or guardian, insist upon a private gain, or security, for obtaining or consenting to a marriage, and obtains it of the intended husband, it will be set aside in equity. Thus *J. S.*, by will, gave his niece £1,200, she married, but, antecedently to the marriage, her father took a bond from the then intended husband to pay him £200, in case the daughter should die without issue male in the life-time of her husband: the daughter died without issue male, living her husband; the father sued the husband at law upon the bond, and the husband on a bill was relieved against this bond; for, it appearing that no money was paid, nor any consideration for entering into it, the court took it to be in the nature of a marriage brocage bond, and therefore ordered it to be delivered up. *Anon. 2 Eq. Ca. Abr. 187*, pl. 1. *Lamlee v. Hanman*, 2 Vern. 466. 499. *Hamilton v. Mohun*, 1 P. Wms. 118. *Salk. 158*. 2 Vern. 652. *Gilb. Chan. 297*. 1 Eq. Ca. Abr. 90, pl. 6. 10 Mod. 447. *Keat v. Allen*, 2 Vern. 588. *Anon. Prec. Chan. 267*. *Tooke v. Atkins*, 1 Vern. 451. *Gale v. Lindo*, 1 Vern. 475. *Kemp v. Coleman*, 1 Salk. 156. *Cole v. Gibson*, 1 Ves. 503. *Belt's Supp. 211*. *Hylton v. Hylton*, 2 Ves. 547. The power of a parent or guardian ought not to be used for such purposes, as it would be making a way to enable them to sell infants under their care. And these contracts with the father, mother, or guardian, though of the same nature with brocage bonds, are of more mischievous consequence, because it would happen more frequently; and it is now a settled rule, that if the father, on the marriage of his son, take a bond of the son, to pay him a sum of money, or make him any recompence, it is void, being procured by coercion, while he is under the control of his father. *Treat. of Eq. b. 1. ch. iv. s. 10*. *Fonbl. 5th edit. 260*. And as these contracts are avoided on reasons of public inconvenience, they will not admit of subsequent confirmation by the party, *Shirley v. Martin*, 1 Fonbl. 264, n. (1). 3 P. Wms. 74. *Cole v. Gibson*, 1 Ves. 506. *Morse v. Royal*, 12 Ves. 364. 373. *Crowe v. Ballard*,
ENCE TO another part of the deed, *it *P. 79. makes no condition, but a qualification or limitation of the sentence, or of that part of the deed,

v. Ballard, 1 Ves. jun. 220; and consequently the party entitled to relief in a court of equity cannot release his right to a remedy, and thereby indirectly effect a confirmation; as it would be contrary to the maxims—that which is originally bad cannot be made good; and that which cannot be done directly cannot be done indirectly. Sed vide 1 Ves. 507. And the court will decree a gratuity actually paid to be refunded: Thus where a servant maid prevailed with her master's niece, who was about fifteen years old, and lived in the same house with him, and was entitled to a good fortune, to marry his journeyman, without the consent or knowledge of her uncle; and for the good offices she was to do the journeyman in that affair, he had given her a bond of £100, conditioned to pay her fifty guineas at six months end; and after he had gained the niece's goodwill, by the help of this maid, and the young lady had been prevailed on to go with him in a hackney coach to be married, he gave the maid fifty guineas more, the marriage was had: and afterwards the maid servant married, and the bond not being paid, was put in suit, and judgment obtained on it; and a bill was brought against the defendants, the maid servant and her husband, to be relieved against this bond, and to have the fifty guineas repaid; because the bond wasentered into, and the money given for no good consideration, but only on account of this marriage broage. And the Master of the Rolls decreed the bond to be given up, and satisfaction to be acknowledged on the judgment, and the fifty guineas received to be repaid; and if it were not done on service of the order, the defendants were to pay costs; and this, notwithstanding the husband of the servant maid, insisted by his answer, that he looked upon the bond and fifty guineas as his wife's fortune, and had married her in prospect of it; and this decree was affirmed by Lord Keeper Wright. Goldsmith v. Bruning, 1 Eq. Ca. Abr. 89, pl. 4. Smith v. Bruning, 2 Vern. 392. S. C.

IV. In restraint of marriage.

It was a rule in the civil law, that marriage ought to be free, 3 Ves. 96, and the same policy has obtained in equity; and therefore, in case of a bond in common form for payment of money, but proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond:
deed, as "provided that the person of the grantee " shall not be charged." He

bond: the court will decree this bond to be delivered up to be cancelled, as being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any compulsion. Key v. Brudshaw, 2 Vern. 102. 1 Eq. Ca. Abr. 88. So, if A., being a widow, gives a bond to B. for £20, if she should marry again, and B. gives a bond to the widow, to pay her executors the like sum if she did not marry again, and the widow soon after marries, her bond will be decreed to be delivered up. Baker v. White, 2 Vern. 215. Woodhouse v. Shepley, 2 Atk. 535. See Lowe v. Peers, 4 Burr. 2225. Bateman v. Wells, Tothill, p. 25, ed. 1820. So, where a bequest of an allowance to a feme covert was made on condition that she lived apart from her husband, the condition was held contra bonos mores, and void. Brown v. Peck, 1 Eden. 140. Vide Atherley's note, Shep. Touch. 132 (x).

V. To a kept mistress.

Both courts of law and equity make a distinction, when it appears that these bonds are given as a reward for past cohabitation, and when it appears that they are given as an inducement to future concubinage: and therefore,

1st. Premium pudicitiae. A bond purporting to be in consideration of cohabitation had between the obligor and obligee, was held to be good; per Clive, Bathurst, and Gould, Justices, (absent Chief Justice Wilmot) without hearing the other side. Clive, Justice; I am in a court of common of law, and not in an ecclesiastical court; if a man has lived with a girl, and afterwards gives her a bond, it is good; suppose this bond had been given by the defendant to the plaintiff for being his mistress, it would have been good in point of law, although in a court of equity, it would be postponed to creditors. Sir Joseph Jekyll, Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond; and where it is premium pudoris, a court of equity will not relieve against such a bond. This condition is incapable of an explanation to make the bond an illegal act. Bathurst, Justice; where a man is bound in honour and conscience, God forbid that a court of law should say the contrary; and wherever it appears that the man is the seducer, the bond is good. Bracton says, when a man cohabits with an unmarried woman, it is legitima concubina, and Exodus, cap. xxii. v. 16. "If a man entice a maid that is not betrothed, and lie with
CONDITION.

He who has interest in a condition, may fulfil the same for safeguard of himself.

Between

with her, he shall surely endow her to be his wife.” See also Deuteronomy, cap. xxii. v. 23. 29. “If a man find a damsel who is a virgin not betrothed, and lay hold of her, and lie with her, and they be found; then the man who laid with her, shall give unto the damsel’s father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days.” Honour and conscience ought to bind every man in point of law. In an action in the King’s Bench, upon a promise of marriage, the evidence upon the trial was, that the defendant had bragged and boasted that he had debauched the plaintiff, by promising her marriage; this cause being tried before me on the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and 500l. damages, which I thought right; the court of King’s Bench approving of my opinion, refused to set aside the verdict, and thought 500l. damages were little enough.—Gould, justice; the court may take this for a lawful and conscientious consideration; we must presume, that the defendant has done what in honour and conscience he ought to have done, and that he thought himself a wrong doer, and gave the plaintiff this bond to make her amends. Turner v. Vaughan, 2 Wils. 339.

Formerly it has been held in a court of equity, that if it were charged in a bill, and proved in evidence, that the defendant was a common strumpet, and commonly dealt and practised after that manner, and was used to draw in young gentlemen, the court would relieve against a bond given to such a woman. Whaley v. Norton, 1 Vern. 484. Though it seem, even in case the woman had been a prostitute, the court would not formerly relieve the party himself, who was culpable, though it was otherwise, when his executor sought relief. Matthew v. Hanbury, 2 Vern. 187. Bainham v. Manning, 2 Vern. 242. Bodly v.——, 2 Ch. Ca. 15. 19 Vin. Abr. 301. (E). However, the liberality of modern judges has softened this severity, on the ground, that a provision enables a woman in such an unfortunate situation, to lead a course of life, more conducive to her happiness. A voluntary bond given by a person to a common woman, after he had kept her two years, was not relieved against, upon a bill by the executor of the obligor. Hill v. Spencer, Amb. 641. Lord Camden, in delivering his judgment, said, I am clear
Between the parties, it is not requisite the condition be performed in every thing, if the other party do agree; but to a stranger it must.

If clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities given to common prostitutes, went upon the circumstances of the securities being given previous to the cohabitation; a consideration, which being turpis in its nature, the court has reliev'd against them. In this case, the bond was not given for a consideration, but was voluntary. H. had resort to her for near two years before he gave her the bond. Past service could not be a consideration at law, and nothing was stipulated for the future. There is no principle in equity which says, a man may not give a voluntary bond to a common prostitute: it would be going but a little further to say, he could not give her money without her being liable to be called upon for it. There is no circumstance of fraud in this case; and I do not think, that in the case of a voluntary bond, the obligee being a common prostitute, is, of itself, a sufficient ground for relief. And according to that case, the woman having been criminally connected with another man after she was taken into keeping, does not invalidate the bond. So, a voluntary bond during cohabitation, to a woman, previously of a very loose life; and soon afterwards another bond, expressly securing a continuance of the connection by an annuity in case of separation; on a bill by the executor to have the bonds delivered up, was, by the court of Exchequer, dismissed with costs: the former being considered unimpeached; and the latter void at law, as pro turpi causâ. Gray v. Mathias, 5 Ves. 286. So a bill brought to be relieved against a bond given to a housekeeper for secret service, was dismissed. Bainham v. Manning, 2 Vern. 242.

If the consideration be præmium pudicitiae pellicis, equity will not assist the obligee, if she knew the obligor were a married man. Thus, a bill for payment of a sum of money, and an annuity secured by a deed poll by defendant to plaintiff, who, being a young woman, came to live in the family of defendant, then a married man, as a companion to his sister, and who, by continuing to live with him, occasioned a separation from his wife, was dismissed, but without costs, on account of her previous good character. Priest v. Parrot, 2 Ves. 160.

But it seems that equity will not in any case relieve the obligor on his own application: as where he had seduced his wife's sister,
CONDITION.

If the obligee be party to any act, by which the condition cannot be performed, then the obligor shall

sister, and had several children by her, and had given her a bond for payment of money, as a provision for her and the children, the bond being put in suit against him, he brought a bill, suggesting that the bonds were not given for money lent, or any valuable consideration, Lord Somers decreed the payment of what was due on the bond for principal and interest, with costs, by a short day, or else the bill to be dismissed with costs: and his Lordship said it was a pity he could do no more. *Spicer v. Hayward*, Prec. Chan. 114. 1 Fonbl. Treat. of Equity, 229.

These bonds being merely voluntary, even though *præmium pudicitiae*, the payment of them, out of the personal estate, will be postponed by a court of equity, until all the other creditors; whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if there be any. *Jones v. Powell*, 1 Eq. Ca. Abr. 84. pl. 2. *Cray v. Rooke*, Ca. Temp. Talbot, 153. *Harris v. Marchioness of Annandale*, 2 P. Wms. 432. 3 Bro. Par. Ca. 445. 1 Eq. Ca. Abr. 87. pl. 6. S. C. Thus, where *A* having a wife who lived separate from him, afterwards courted and married another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife, that the former was alive, *A* in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee for the second wife, to leave her 1000l. at his death, and died, not leaving assets to pay his simple contract debts; Sir Joseph Jekyll held, that if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife; after such time as she knew the first wife was living, and to induce her to continue with *A*, this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. *Lady Cox's case*, 3 P. Wms. 339. 2 Eq. Ca. Abr. 182, pl. 6. 258, pl. 13. So, where there was a bond by *S. G.*, upon articles, in consideration of 10l., which imported a direct assignment by *Mr. H.* of his wife, who was herself a party, to the use of *S. C.*, with covenants for quiet enjoyment, and further assurance; upon a bill to have this bond postponed, and to be relieved against an assignment and bill of sale of goods made by *S. G.* in trust, and for the benefit of *Mrs. H.*; as to creditors,
shall be discharged; so he shall be by the act of God.

Where


But the bond or deed must be executed, for in matters executory, even on the consideration *premium pudicitiae*, the court of Chancery will not compel the party or his executors, to fulfil an agreement to provide for a forsaken kept mistress. *Whaley v. Norton*, 1 Vern. 483. Thus, a general demurrer was allowed to a bill against the widow and executrix of the testator, to enforce an agreement by him when single, first by a letter to the plaintiff, and afterwards by a parol agreement with her, to settle an annuity on the plaintiff, who was separated from her husband, and a deed of separation was executed by them, in which the husband gave up all claim to any property the plaintiff might acquire. After this separation, the plaintiff was induced to live with the testator, and lived with him for several years; when he, being about to marry, communicated his intention to a lady, a friend of the plaintiff, requesting her to break the matter to the plaintiff, and expressing an intention to settle upon her 100l. a-year. The testator wrote afterwards to the plaintiff, enclosing her 25l., which he said, "I look upon as a quarter of the annuity I intend securing to you for your life, which shall be regularly paid at the four usual quarters. I shall send you 50l. in the course of a few days, and will send you the same sum at Christmas, to purchase what you may have occasion for to make you comfortable." In consequence of the proposal of the annuity, it was finally agreed between the plaintiff and the testator, that the connection should cease, and that the plaintiff should not in any respect, impede or endeavour to prevent the intended marriage with the defendant; and that the plaintiff should in future live a retired, chaste, and virtuous life, and should so conduct her-
Where every and the 'C, And certainly Rep. it absolved obligation agreement. for of self, woman, law, connection; only of self, was that was not founded on any good, meritorious, or valuable consideration; it was therefore voluntary, and I take it to be a clear rule in this court, that a bill does not lie to enforce a voluntary agreement. It has been contended, that there was a moral obligation to provide for this woman. Did that moral obligation arise in respect of the past adulterous intercourse? Certainly not. Though separated from her husband, she was not absolved from her marital obligation to live chastely; and her connection with the testator, was a high offence by the divine law, as well as against society. Whether, if any annuity had been settled, the court would take it from her; or whether the court would refuse her any assistance, as in Priest v. Parrot, it is not necessary to consider. Matthews v. L——e, 1 Madd. Rep. 558. 563.

But if there be any fraud practised on the unfortunate woman, a court of equity would afford her relief: thus, where a man having debauched a young woman, and intending afterwards to put a trick on her, made a settlement upon her of 300l. a-year for life, out of an estate which was not his; the court decreed him to make it good out of an estate which he had of his own, and this decree was afterwards affirmed on appeal to the House of Lords. Carew v. Safford, 1 Eq. Cas. Abr. 31, pl. 4. And where Sir W. B., having seduced Mrs. O., then a young lady of about fourteen years of age, of a good family, and entitled to 12,000l. fortune, settled on her 300l. per annum, for years; but the estate was incumbered, and, Mrs. O. dying, her administrator brought a bill in order to disincumber the land which was charged with this annuity, and was relieved accordingly. Ord v. Blacket, cited in Marchioness of Annandale v. Harris, 1 Eq. Ca. Abr. 87, pl. 6. 2 P. Wms. 433. 19 Vin. Abr. 303, pl. 2.

Under the maxim, that equity relieves against accidents, Grounds and Rudiments of Law and Equity, 37, it seems, if the grantee in a voluntary deed, or the obligee in a voluntary bond,
Where no time is set, if the condition be for the good of a stranger, or of the obligee, then it is to be

bond, lose the deed or bond by accident, they may have remedy against the grantor or obligor in equity. Underwood v. Staney, 1 Ch. Ca. 78. 13 Vin. Abr. 104, pl. 4. 20 Vin. Abr. 101, pl. 2. Lat. 24. 2 Ch. Ca. 30. Though 1 Eq. Ca. Abr. 92, pl. 4, adds, “Quare, for these matters are discretionary;” and there certainly are some old cases contra. Miller v. Reanes, 1 Rol. Abr. 375. Chancerie (Q). pl. 1. Vincent v. Beverlye, Noy, 82. Pop. 205. 206. See Toulmin v. Price, 5 Ves. 235. Though in a more modern case, where J. S., a little before his death, granted an annuity of 30l. per annum to his housekeeper, and entered into a voluntary bond for payment of the annuity, and the bond being lost, his representatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her, service alone being a consideration, and no turpis contractus shall be presumed, unless proved. Lightborne v. Wedesh, 1 Eq. Ca. Abr. 24, pl. 7. Ibid. 93. pl. 5.

2d. Praemium Concubinati (a). Though a court of law will not enquire into the consideration of a bond, yet if it appear to be illegal on the face of it, the court cannot sanction the claim: thus a bond reciting, that the parties had agreed to live together, therefore the obligor had agreed to find the woman meat, drink, washing, lodging, &c.; and to leave her an annuity of 60l. a-year, if he quitted her, or she outlived him: and if they had any child, he was to take care of and provide for it. But if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or leave her any annuity. Per Lord Mansfield.—It is the price of prostitution, praemium prostitutionis: if she becomes virtuous, she is to lose the annuity. It appears clearly, upon the condition, that the bond is illegal and void. Walker v. Perkins, 3 Burr. 1568.

But after a verdict at law upon a bond praemium concubinati, against the obligor, a demurrer was allowed to a bill to have it delivered up, charging the consideration to have been an agreement by the defendant to cohabit with the plaintiff as his wife; and that she had lived in a state of adultery and in-

(a) See Taylor's Elements of Civil Law, 273.

continence
be performed within convenient time; if for the good of the obligor at any time during their lives.

The

continence with various persons, and praying a discovery.  
Franco v. Bolton, 3 Ves. 368.

VI. Bonds for gaming debts.

By the 9th Ann. c. 14. all bonds and other securities, given for money won at play, or money lent at the time to play with, are utterly void. See further, 4 Bla. Com. 172. 1 Fonbl. Tr. of Equity, 233. But a man has been allowed to recover money which he had lent to the defendant to game with, and at the same time won it of him; for the word contract was not mentioned in the statute 9 Ann. c. 14. Barjean v. Wallmsley, 2 Str. 1249. So, where plaintiff lent defendant money to bet at a horse race, he was allowed to recover. Aleinbrook v. Hall, 2 Wils. 309. See also Wettenhall v. Wood, 1 Esp. N. P. C. 18. Robinson v. Bland, 1 Bla. 234. 256. 2 Burr. 1077. Faulkney v. Reynolds, 4 Burr. 2069. Aubert v. Maze, 2 Bos. & Pul. 371.

VII. Of relief at law, and in equity, on an illegal transaction, where the claimant is particeps criminis.

1st. At law:—Where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, or if one recovers money mal$$ fide, by suit in an inferior court, he may bring indebitatis assumpsit for the money. Moses v. Macfarlan, 2 Burr. 1005. 1 Bl. Rep. 219. S. C. But where one knowingly pays money upon an illegal consideration, or where the act is in itself immoral, or a violation of the general laws of public policy, he is particeps criminis, and he shall not have this action, for he parted with his money freely, and volenti non fit injuria. Tomkins v. Bernet, 1 Salk. 22. Skin. 411. S. C. For where both parties are equally offenders against such laws, potior est conditio defendantis, Smith v. Bromley, Doug. 698; not because the defendant is more favoured, but because the plaintiff must draw his justice from pure fountains. Therefore though if A. agree to give B. money for doing an illegal act, as if a wager be made on a boxing match, B. cannot (though he do the act) recover the money by an action; yet if the money be paid, A. cannot recover it back again. Webb v. Bishop, Bull. N. P. 132, 7th edit. See Lucaussade v. White, 7 T. R. 535. Hovson v. Hancock, 8 T. R. 575. Vandyck v. Hewitt, 1 East. 96.

2d. In equity:—Equity extends relief to particeps criminis, on grounds of public policy, Hatch v. Hatch, 9 Ves. 292. 299. Shirley v. Martin, cited 11 Ves. 536, 537. 9 Ves. 299; there-
If the plaintiff himself was a party in the illegal transaction, because the public interest requiring that relief should be given, it is given to the public through the plaintiff, though he be himself *particeps criminis.* Lord *St. John v. Lady St. John,* 11 Ves. 535, 536. Thns A. by his interest with the Commissioners of Excise, got an office in that branch of the revenue for B, who, in consideration thereof, gave a bond to A, to pay him £10 per annum, as long as B enjoyed the place; equity relieved against the bond. *Law v. Law,* 3 P. Wms. 391. Cas. Temp. Talb. 140. 2 Eq. Cas. Abr. 187, pl. 10. So money advanced by the plaintiff to the defendant to procure him a commission in the marines, was decreed to be refunded with interest, the plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged: first, upon grounds of public policy; and, secondly, as the plaintiff had been imposed upon, the defendant knowing that he was incapable of holding the commission. *Morris v. M'Cullock,* Amb. 432. 2 Eden, 190. A private agreement obtained by a father from his son, in derogation of an allowed sale, of the command of a post office packet, by the father to the son, duly registered in the name of the son, upon a promise by the officers of the post office, that if he would convey the vessel to the son, they would appoint the son commander of the packet, in the room of his father, on a bill filed by the widow and executrix of the son against the executors of the father, an account was decreed. Per Sir William Grant—That the agreement, which is impeached by this bill, was illegal, as being a fraud upon the post office, cannot be doubted after the cases of *Hartwell v. Hartwell,* 4 Ves. 811; *Thompson v. Thompson,* 7 Ves. 470; and more particularly *Parsons v. Thompson,* 1 Hen. Bla. 522; *Garforth v. Feuron,* Ibid. 327. I think it illegal also upon the ground of its being a fraud on the provisions of the ship registry acts. *Stat. 26 Geo. 3. c. 60.* Stat. 34 Geo. 3. c. 68. The father therefore could never have enforced it; but my doubt was, whether the father having received the profits, this court would decree them to be accounted for, and refunded; or whether the general rule, that *in pari delicto melior est conditio possidentis,* should prevail; as both are guilty of a violation of the law. Upon an examination of the cases, however, I think the plain-
If a man be bound to pay money, or farm rent, he must seek the parties: But if he be bound to perform all payments, if he tender his rent on the land, it suffices.

tiffs are entitled to the relief sought by the bill. Courts both of law and equity have held, that two parties may concur in an illegal act, without being deemed to be in all respects in pari delicto. I consider this agreement, as substantially, the mere act of the father. He put up to sale a situation, which the young man would naturally be desirous of obtaining, and could obtain only upon the terms prescribed by his father. In the case of *Morris v. M'Cullock*, Amb. 432. the parties were more independent of each other; yet the money paid was decreed to be returned. In *Goldsmith v. Bruning*, 1 Eq. Ca. Abr. 89, pl. 4. a marriage brocage case, the party obtaining money by the sale of her influence, must have been considered as more criminal than the purchaser; for she was decreed, first, at the Rolls, and afterwards upon appeal, to refund the sum which she had received. There is no case calling in question that decision. Lord Thurlow, indeed, in *Neville v. Wilkinson*, 1 Bro. C. C. 543. (see 547-8, and Eden's notes) seems to have thought, that in all cases where money was paid for an illegal purpose, it might be recovered back, observing, that "if courts of justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state in which they were before." It is, however, unnecessary, in the present case, to lay down so broad a rule. These parties are not, I think, in pari delicto, by entering into this illegal agreement. It was not confirmed; if indeed it admitted confirmation, by signing the account. The account must therefore be taken as if the son had been, from the beginning, the actual owner of the packet, and entitled to all its earnings. As the plaintiff chooses to open the account, the defendants are not bound by any deductions which they agreed to make, if they can establish a right to the sums deducted. *Osborne v. Williams*, 18 Ves. 379.


*CONDITION.*
P. 80. * If the feoffee or feoffor die before the day of payment, the tender shall be to the executor, although the heir of the feoffee enter, if the heir be not named (a). See Assignee in Assignment.

The money must be tendered so long before sunset, that the receiver may see to tell it.

To pay part of a sum at the day, cannot be satisfaction for the whole sum; as a horse or a robe is. But before the day, or at another place at the day of the request, and acceptance of the obligee, is full satisfaction.

An acquittance is a good bar though nothing be paid.

In all cases of conditions, for payment of a certain sum in gross, touching lands or tenements, if lawful tender be once refused, he who made the tender is discharged for ever.

And the manner of the tender, and payment shall be directed by him who made it, and not by him who did accept it, as that he paid the sum in full satisfaction, and that he accepted thereof in full satisfaction.

Where a man is bound to pay money, to make a feoffment, or renounce an office, or the like, * P. 81. and no time is limited when he shall * do it, then upon request, he is bound to perform it, in so short a time as he can.

But where the time is limited, if he refused before the day, it is of no consequence, if he be ready to perform it at the day.

Where a covenant or condition is, to marry or enfeoff a stranger by such a day, the refusal of the stranger is no plea, as that of the obligee is. The

(a) Quære, to receive the money. Vide ante, 172, (d).
obligee is to be ready on the land at his own peril: a stranger must be requested; if he refuse, the obligation is forfeited; wherefore it is good to have these words, "If the stranger do thereunto assent."

ENTRY.

The determination of an estate, is not effected, before entry.

When any person will enter for a condition broken, he must be seised in the same course and manner, as he was when he parted with his possession. It behoves such persons as will re-enter upon their tenants, to make a previous demand of the rent.

If the lessor demand before he die, his heir may enter.

If the lessor distrain he may not re-enter.

* The lessor may accept of the rent, * P. 82, and yet re-enter: But if he receive the next rent, he may not, for that establishes the lease (a).

Entry into one acre, in the name of more, is good; if the land do not extend into two counties.

By the entry of the husband, the freehold shall be in the wife: And so of the like.

In gavelkind land, the eldest son only, shall enter for the breach of a condition (b).

DEMAND.

The land is the place where the rent is to be paid and demanded, if there be no other place appointed.

(a) Vide ante, 119, n.
(b) Dyer, 343 b. Though it seems, that when the eldest son has entered into the whole, for breach of the condition, and defeated the estate of the grantee, the younger sons may enter into their part, and hold together with their brother. Robinson’s Gavelk. 119, 2d ed. 2 Cru. Dig. 44, s. 52; 2d ed. s 3. And
And there the lessor himself, or his sufficient attorney, a little before sun-set, in the presence of two or three sufficient witnesses shall say, "Here I demand of J. B. ten pounds due to me at the feast of, &c. for a messuage, &c. which he holds of me in lease by indenture, &c." and there remain the last day the rent is due to be paid, until it be so dark, that he could not see to tell the money.

* P. 83. * CHAP. XL.

**WARRANTIES.**

There are three sorts of warranties; lineal, collateral, and by disseisin.

Warranty lineal, is where a man by his deed binds him and his heirs to warranty, and dies, and the warranty descends to his issue.

Warranty collateral, is in another line, so that he to whom it descends cannot convey the title which he has in the tenements, by him who made warranty (a).

Warranty by disseisin, is where he who has no right to enter, enters, and makes a warranty; this is by disseisin, and bars not.

(a) Lord Chancellor Cowper said, that "a collateral warranty was certainly one of the harshest and most cruel points of the common law; because there was not so much as an intended recompence; yet he could not find that Chancery had ever given relief in it." Earl of Bath v. Sherwin, 10 Mod. 3. 4. Vide ante, 199 (c).

Lineal
WARRANTIES.

Lineal warranty, bars him who claims a fee-simple, and also fee-tail, with assets in fee: If he sell, his son may have a formedon.

Collateral warranty, is a bar to both (a), except in some cases, which are remedied by statute, as warranty by tenant by the curtesy, except the heir has an equivalent by descent from the same tenant (b).

Tenant in dower, for life, remedied, but * P. 84. do bar him in reversion (c).

A warranty descends always to the heir at the common law, viz. the eldest son (d), and follows the estate, and if the estate may be defeated, the warranty may also (e).

It bars not the second son in gavelkind, although all the sons shall be vouched, and not the eldest son alone: yet he only shall be barred (f).

To

(a) Him who claims an estate in fee simple, or in fee tail.
(b) Who aliened with warranty.
(c) 11 Hen. 7. c. 20, enacts, that in case a wife, after the death of her husband, shall alone, or with any after-taken husband, alien with warranty, any lands which she holds in dower, or of which she is seised in tail, of the gift of her former husband, or of any of his ancestors, such warranty shall be void. 4 Ann. c. 16. s. 21. enacts that all warranties made after the first day of Trinity Term 1706, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void, and of no effect: and that all collateral warranties made after the same day, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir. As this act does not extend to alienations by tenants in tail in possession, their warranties have the same effect as they had before. See 2 Bl. Com. 303. 4 Cru. Dig. 444. 7 Bac. Abr. 235.
(d) Litt. s. 718. Co. Litt. 376 a. 386 b.
(f) As heirs in gavelkind, cannot take advantage of a warranty, so, on the other hand, they shall not be barred by it; for
To plead a warranty against him that made it, or his heirs, is called a Rebutter.

Where fee or freehold is warranted, the party shall have no advantage, if he be not tenant.

Where a lease for years is warranted, it shall be taken by way of covenant, and good if he be ousted.

The feoffor by the words of *dedi & concessi* (a) shall be bound to warranty during his own life (b).

for warranty on land in Borough English, or gavelkind, binds only the heir at common law: Dyer, 343 b. Litt. s. 735, 736. but a personal lien, binds the special heirs, as heirs in gavelkind, &c. Co. Litt. 316 b. Cro. Jac. 218. Robinson's Gavelk. 124. 126, 2d ed.

(a) I gave and granted.

(b) A warranty may be made upon any kind of conveyance, Co. Litt. 385 a. 7 Bac. Abr. 227. Warranty (B); and may be annexed to freeholds or inheritances, Co. Litt. 378 b. 389 a. Gilb. Ten. 176; either lying in livery or in grant, and either corporeal or incorporeal, Co. Litt. 366 a; but it cannot be annexed to chattels real or personal, and if a man warrants chattels real or personal, the party shall have an action of covenant, or an action on the case, or an action of deceit. Co. Litt. 101 b. 389 a. In modern conveyances by deed, a warranty is never inserted, because covenants are more beneficial to both parties; for if the covenantor, covenant for himself and his heirs, it is then a covenant real, and descends upon the heirs, 2 Saund. 136. who are bound to perform it, provided they have assets by descent, but not otherwise; and the executors and administrators are bound by every covenant, and also in a bond without being named, Dyer, 14, pl. 69. unless it be such an act as is to be performed personally by the covenantor, and there has been no breach before his death, Co. Litt. 209 a. Cro. Eliz. 553; so that a covenant in which the heir is named, is a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor, who usually covenants only, for the acts of himself and his ancestors, whereas a general warranty extends to all mankind. 2 Bl. Com. 304.
COVENANTS.

* CHAP. XLI.  * P. 85.

COVENANTS.

COVENANTS are of two sorts; expressed by words in the deed, or implied (a) by the law.

(a) Thus the words "grant" or "demise" in a lease for years, create a covenant in law for quiet enjoyment of the lands demised, during the term; and if the lessee be evicted by the lessor, or by any person claiming a lawful title to the land, he may bring an action thereupon. 4 Co. 90 b. 5 Co. 17 a. 4. Butl. n. Co. Litt. 384 a. (1). So in a lease for years, the words "yielding and paying" create a covenant for payment of the rent. 4 Roll. Abr. 519. Cor. pl. 10. 6 Vin. Abr. 379, pl. 10. Bull. N. P. 157, Bridgman's edit. 2 Bac. Abr. 65. Cov. (B). Com. Dig. Cov. (A 4.) The distinction between implied covenants by operation of law, and express covenants, is, that express covenants are taken more strictly. 3 Burr. 1639. 4 Cru. Dig. 449. 2 Bac. Abr. 65. Hence an express covenant to pay the rent, is binding on the tenant, both at law and in equity, in every event, and in every state and condition of the premises; Monk v. Cooper, 2 Stra. 763; because the party by his own contract creates the duty or charge upon himself, and he might have provided against it by his own contract. Paradine v. Jane, Sti. 47, 48. Allen, 26, 27. And so if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Dyer, 33 a. 18 Vin. Abr. 515, pl. 10. And it now appears to be settled, both in law and equity, that if a tenant covenant to repair, damage by fire excepted, he cannot be relieved from the payment of rent, if the premises are destroyed by fire. Belfour v. Weston, 1 T. R. 310. Hase v. Groves, 3 Aust. 687. Holtzapffel v. Baker, 18 Ves. 115. Et vide 2 Eden, 219. Ante, 57.

The doctrine of implied covenants is confined to land property. Hence, if goods be demised by indenture, for years, and the lessee be evicted, covenant does not lie upon the word "demise;" for the law does not create a covenant, for a personal thing. Com. Dig. Covenant (A. 4.) 1 Selwyn's Ni. Pr. 430, 2d edit.

A covenant
A covenant in deed is an agreement made by a deed in writing, and sealed between two persons, to perform some things; for no writ of covenant is maintainable without such a specialty, but in London, &c.

When a covenant extends to a thing in being, parcel of the demise, or the thing to be done by force of the covenant, is *quodammodo* annexed, or appertaining, to the thing demised, and goes with the land, it shall bind the assignee although he be not named: As to repair the houses, it shall bind all that shall come to the same, by the act of the law, or by the act of the party.

But if the covenant concern the land, or thing demised in some sort, the assignee shall not be charged, although he be named; as to make a wall at another person's house, or to pay a sum of money to the lessor, or to a stranger; but the lessee, his executors and administrators shall be charged.

* P. 86. * If the covenant extend to a thing which had no being, but is to be made new upon the demised land, it shall bind the assignee, if he be named, because he will have the benefit of it.

If a man make an under-lease for years, and the lessee covenant and grant to pay &c. to the lessor, his heirs and assigns, yearly during, &c. ten pounds, his executor shall have it (a).

(a) 1 Vent. 161. Because the lease, from which the under-lease was derived, devolved to the executor, the rent, as accessory, shall follow the principal. So if a lease be made by the owner of the inheritance, reserving the rent at Michaelmas, or ten days after, if the rent be not paid at Michaelmas, and before the ten days are expired, the lessor dies, his heir, and not his executor shall have the rent. 10 Co. 127 b. So if the lessor die on the day on which the rent is to be paid, after sun-set and before midnight, the heir, and not the executor, shall have the rent. 3 Bac. Abr. 63. 6 Bac. Abr. 23. Co. Litt. 202 a. (1). 1 Saund. 287. Salk. 578.
COVENANTS.

On a covenant in law, upon a demise, or grant, the assignee in deed, or in law may have a writ of covenant.

An obligation to perform all covenants and grants, is forfeited on the breach of a covenant in law.

A covenant in law is not broken, but by an elder title (a).

A covenant in law may be qualified (b), by the mutual consent of the parties (c).

CHAP.

(a) Vide Noke's case, 4 Co. 80 b. 3. The eviction must be by one who has a prior title, though it is otherwise, it has been said, where there is an express covenant, 2 Leon. 104. Cro. Eliz. 214. 2 Browul. 161. though it seems now to be settled, that an express covenant, in the most general terms, shall be restrained, to lawful interruptions. 3 T. R. 584. Lofft. 460. Vaugh. 118. 2 Bac. Abr. 65. Vide Wms. n. 1 Saund. 322. (2).

(b) Thus an express covenant, will qualify the generality, of an implied covenant, and restrain it, so that it shall not extend farther, than the express covenant. Noke's case, 4 Co. 80 b. Cro. Eliz. 674. 1 Mod. 113. Gainsford v. Griffith, 1 Saund. 60. and n. (2). 1 Ves. 101.

(c) The usual covenants upon the sale of an estate in fee simple are, that the vendor is seised, and has power to convey in fee; for quiet enjoyment; that the estate is free from incumbrances; and for farther assurance. The vendor, if he was himself a purchaser for valuable consideration, delivering or covenanting to deliver, his title-deeds, covenants against his own acts only; if his title be by descent, by devise, or otherwise, as a purchaser, not for valuable consideration, he covenants against the acts of the last purchaser; or, at least, of the person immediately preceding him. See Loyd v. Griffith, 3 Atk. 264. Wakeman v. The Duchess of Rutland, 3 Ves. 233. 504. 8 Bro. Parl. Cas. 145. 15 Ves. 263, n.

The usual covenants upon the sale of a leasehold estate are, that notwithstanding any act done by the vendor, or the person under whom he beneficially claims, the lease is valid, not forfeited, surrendered, or determined, or become void or voidable; that the vendor has, or the assigning parties have, good right to assign; that the rent has been paid, and the covenants performed, up to a certain time; for quiet enjoyment during
during the term; free from incumbrances; and for further assurance. The assignee is bound to covenant with the assignor, that he will pay the rent, and perform the covenants in future; and indemnify the assignor, from the payment and performance thereof, although it be not mentioned in the conditions of sale, Pember v. Mathers, 1 Bro. C. C. 52; or although the assignment be, by an executor or trustee, not beneficially interested in the purchase money, who only covenants that he has not incumbered, Staines v. Morris, 1 Ves. & B. 8; but as the assignees of a bankrupt, after they have parted with the possession of leasehold property, are not liable to be sued at all, they stand in no need of an indemnity, and therefore cannot require it, from the vendee of their estate.

When an estate is sold by trustees or executors, it is the usual practice for the parties beneficially interested in the purchase money, to covenant for the title, "notwithstanding their own acts, and those of the person under whom they claim, but so nevertheless as to be answerable in damages only rateably, to the amount of the purchase money received by each respectively."

A covenant being part of a deed is subject to the general rules of exposition of all parts of deeds: As, 1. To be always taken most strongly against the covenantor, and most in advantage of the covenantee. 2. To be taken according to the intent of the parties. 3. To be construed ut res magis valeat quam pereat. 4. When no time is limited for its performance, it should be done within a reasonable time. Shep. Touch. 166.

CHAP. XLII.

HOW CHATTELS PERSONAL MAY BE BARGAINED, SOLD, EXCHANGED, LENT, AND RESTORED.

A CONTRACT is properly where a man for his money, shall have by the assent of another, certain goods, or some other profit at the time of the contract, or after.
* In all bargains, sales, contracts, promises, and agreements, there must be *quid pro quo* (a) presently, except a day be given expressly for

(a) An equivalent for value received. *Vide postquam*, Treat. Ten. 44. But the contract, &c. must be legal; for transactions which have for their object the encouragement of manifest crimes, such as murder, theft, perjury, and personal outrage, can never receive the sanction of a court of judicature; and any engagement for a reward to abstain from such crimes, is equally discountenanced, as it might effectually lead either to criminality or extortion. Shep. Tonchs. 132.

There is a tradition that a suit was instituted by a highwayman against his companion, to account for his share of the plunder, and a copy of the proceedings has been published as found amongst the papers of a deceased attorney. It was a bill in the exchequer, which avoided stating in direct terms the criminality of the engagement, and is founded upon a supposed dealing as copartners, in rings, watches, &c. but the mode of dealing may be manifestly inferred. The tradition receives some degree of authenticity, by the order of the court being such as would in all probability ensue from such an attempt. The order was, that the bill should be dismissed, with costs, for impertinence, and the solicitor fined £50. The printed account is accompanied by a memorandum, which states the particular times and places where the plaintiff and defendant were afterwards executed. Eur. Mag. 1787. vol. ii. p. 360. *John Everett against Joseph Williams*. The bill stated, that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c. that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expences on the roads, and at inns, taverns, or ale houses, or at markets or fairs. "And your orator and the said *Joseph Williams* proceeded jointly in the said business with good success on *Hounslow Heath*, where they dealt with a gentleman for a gold watch, and afterwards the said *Joseph Williams* told your orator, that *Finchley*, in the county of *Middlesex*, was a good and convenient place to deal in, and that commodities were very plenty at *Finchley* aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that
for the payment, or else it is nothing but com- unction (a).

If a man agree for the price of wares, he cannot carry them away before he has paid for them, if he have not a day expressly given him to pay for them.

about a month afterwards the said Joseph Williams informed your orator, that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse, they dealt for the said horse, &c. that your orator and the said Joseph Williams continued their joint dealings together until Michaelmas, and dealt together in several places, viz. at Bagshot, in Surrey, Salisbury, in Wiltshire, Hampstead, in Middlesex, and elsewhere, to the amount of £2000 and upwards." The rest of the bill is in the ordinary form for a partnership account. 3d October, 1725, on the motion of Serjeant Girdler, the bill referred for scandal and impertinence. 29th November, report of the bill as scandalous and impertinent confirmed; and order to attach White and Wreathcock, the solicitors. 6th December, the solicitors brought into court and fined £50 each; and ordered that Jonathan Collins, Esq. the counsel who signed the bill, should pay the costs. The plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735. Wreathcock, the solicitor, was convicted of robbing Dr. Lancaster in 1735, but reprieved and transported. Lord Kenyon, in the case of Ridley v. Moore, Appendix to Clifford's Report of Southwark Election, has referred to this case. But, upon examining the office, the account is not supported. Taking the case as a supposition one, it sufficiently illustrates the general principle.

Every transaction, the object of which is the violation of a public or private duty, is also void; such are bribes for appointing to offices of trust, private engagements that an office shall be held in trust for a person by whose interest it was procured, agreements to stifle a prosecution for any crime of a public nature. See Parsons v. Thompson, 2 H. B. 322. Garforth v. Ferran, ib. 327. Blackford v. Preston, 8 T. R. 89. Collins v. Blantern, 2 Wils. 347. 1 Fonbl. Treat. of Equity, 255, 5th ed. 2 Evans's Pothier on Contracts, 2. Et ride ante, 179 (d).

(a) 2 Sheppard's Counsellor, 249, ed. 1654.
But the merchant shall retain the wares until he be paid for them; and if the other take them, the merchant may have an action of trespass, or an action of debt, for the money, at his choice (a).

If the bargain be, that you shall give me ten pounds for my horse, and you give me one-penny in earnest, which I accept, this is a perfect bargain (b), you shall have the horse by an action on the case, and I shall have the money by an action of debt (c).

If

(a) Manby v. Scott, 1 Mod. 137. Dyer, 30 a, pl. 203.
(b) Notwithstanding the earnest, the money must be paid upon the fetching away the goods, where no other time for payment is appointed. The earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money, is void. After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore if the vendee do not come and pay, and take the goods, the vendor ought to go and request him; and then if he do not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person. Per Lord Holt, Langfort v. Tiler, 1 Salk. 113. Vide Peeram v. Palmer, Gilb. Evidence, 170. Sedgw. edit. 191. 4th edit.
(c) If a man by word of mouth sell to me his horse, or any other thing, and I give him, or promise him nothing for it; this is void, and will not alter the property of the thing sold. But if one sell me a horse, or any other thing, for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or all, or part of the money is paid in hand; or I give earnest money (although it be but a penny) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a good bargain and sale of the thing, to alter the property thereof; and in the first case, I may have an action for the thing, and the seller for his money; in the second case, I may sue for and recover the thing bought; in the third, I may sue for the thing bought, and the seller for the residue of the money; in the
If I say the price of a cow is four pounds, and you say you will give me four pounds, and do not pay me presently, you cannot have her afterwards, except I will; for it is no contract. But if you begin directly to tell your money, if I sell her to another, you shall have your action on the case, against me.

* P. 88. * If I buy a hundred loads of wood, to be taken in such a wood, at the appoint-ment of the vendor; if he upon request will not assign them unto me, I may take them, or I may sell them: But if a stranger cut down, any part of the trees, I cannot take them; but I may supply my vendee with the residue, or have my action on the case.

If the bargain be, that I shall give you ten pounds for such a wood, if I like it upon the view thereof, this is a bargain at my pleasure, upon my view (a): And if the day be agreed upon, though I disagree before the day, if I agree at the day, the bargain is perfect, although afterwards I disagree. But I may not cut the wood, before I have paid for it; if I do, an action of trespass, will lie against me; and if you sell it to another, an action of tres-pass on the case, will lie against you.

If I sell my horse for money, I may keep him until I am paid (b), but I cannot have an action of debt, until he be delivered; yet the property of the horse, is by the bargain, in the bargainee or buyer: But if he presently tender me my money, and I

fourth case, where earnest is given, we may have reciprocal remedies, one against another; and in the last case, the seller may sue for his money. Sheppard's Touchstone, 224. Sheppard's Counsellor, 252.

(a) Shep. Counsellor, 257.
(b) Hob. 41.
refuse it, he may take the horse, or have an action of *detinue*. And if the horse die, in my stable, between the bargain, and the delivery, I may have an action of debt, for my *money, *P. 89, because by the bargain, the property was in the buyer.

If a deed be made of goods and chattels, and delivered to the use of the donee, the property of the goods and chattels, are in the donee presently; but before any entry or agreement, the donee may refuse them, if he will.

If I take the horse of another man, and sell him, and the owner take him again, I may have an action of debt, for the money; for the bargain was perfect by the delivery of the horse; & caveat emptor *(a)*. Every contract imports in itself an assumption: For when one agrees to pay money, or deliver a thing upon consideration, he does, as it were, assume and promise to pay and deliver the same; and therefore, when one sells any goods to another, and agrees to deliver them at a day to come; and the other in consideration thereof, agrees to pay so much money, on the delivery, or after, in this case, he may have an action of debt, or an action on the case, upon the assumption.

The duty to resign an action personal, may not be apportioned: As if I sell my horse, and another man's for ten pounds, who takes his horse again, I shall have all the money *(b)*.

*If a man retain a servant for ten *P. 90. pounds per annum, and he depart within

*(a)* And let the purchaser beware.
the year, he can have no wages: If it were to be paid at two feasts, and the man after the first feast die, he shall have wages but for the first feast: Therefore men provide for it in their agreements.

By a sale made in a fair or market, the property is altered, (except it be against the King) (a), so that the buyer know not of the former property, and do pay toll, and enter it; and those things as thereupon ought to be done, it must be on the market, and at the place where such things are usually sold; as plate at the Goldsmith's stall, and not in his inner shop.

In an exchange of a horse for a horse, or such like, the bargain is good, without giving of a day, or delivery.

If a thing be promised by way of recompence, for a thing which is performed, it is rather an accord, than a contract; and upon an accord, there lies no action of account; but if he to whom the promise be made, had been put to expense by reason of the act which he has performed; then he shall have account, for the thing promised, though he that made the promise, has no profit thereby: As if a man

(a) 2 Bla. Com. 450. If goods be stolen, and sold in market overt, the property is changed, and the former owner cannot retake them, nor bring an action for them: but he must prosecute the offender; and if on his prosecution the thief be convicted, he will in that case be entitled to his goods again, under 21 Hen. 8. c. 11. 2 Wooddeson's Lectures, 412. 431. 3 Idem. 213. 2 Hawk. Pleas of the Crown, 250, ed. 1787. b. 2. c. 23. s. 55. 1 Hale, H. P. C. 512. ed. 1778. In the particular case of horse stealing, it is enacted, by 31 Eliz. c. 12, that where horses are stolen and sold in open market, and the several requisites of the statute observed in relation to the sale, if the owner claim them again within six months, and pay the buyer as much as they cost him, he shall have them again, without prosecution. 2 Inst. 714. See Perk. s. 93.
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say to another man, "You have cured such a poor man," or "You have made such a highway," &c.

The intent of the party, shall be taken according to the law: As if a man retain a servant, and do not say one year, or how long he shall serve him, it shall be taken for one year, according to the statute.

In all contracts, he that speaks obscurely or ambiguously (a), is said to speak at his own peril; and such expressions are to be taken strongly against himself.

(a) There are two sorts of ambignities of words, the one ambiguitas patens, and the other latens. Patens is that, which appears to be ambiguous upon the deed or instrument; latens is that which seems certain and without ambiguity, for any thing that appears upon the deed or instrument; but there is some collateral matter out of the deed, which occasions the ambiguity. Bac. Maxims Reg. 28. Tr. 99. See further, T. Raymond, 411. Roberts on Frauds, 15. Roberts on Wills, 13. Sugden's Vendors, 115. 134, 5th ed. Phillips on Evidence, 566, 4th ed. 7 Bac. Abr. 342. Pow. Dev. 502. 513.

CHAP. XLIII.

OF LENDING AND RESTORING.

If money, corn, wine, or any other such thing which cannot be re-delivered, or occupied, be borrowed, and it perish, it is at the peril of the borrower.

But if a horse, or a cart, or such other things, as may be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss.
if they perish not through the default of him who borrows them, or he who made a promise at the
time of delivery, to re-deliver them safe again. If
they be used in any other manner than according
to the lending, in whatever manner they
* P. 92. may perish, if it * be not by default of
the owner; he who borrowed them shall be
charged with them, in law and conscience (a).

If a man have goods to keep till a certain day,
he shall be charged, or not charged after, as default
is, or is not, in him.

But if he receive any thing, for keeping them safe,
or make a promise, to re-deliver them, he shall
be charged with all chances which may happen,
because of his promise.

If one man find goods of another, and they be
hurt or lost by the negligence of him who found
them, he shall be liable to make them good to the
owner.

If a common carrier go by ways which are dan-
gerous on account of robbers, and will drive by
night, or other unfit times, and be robbed (b); or if

(a) If a man borrow a horse, for the purpose of coming to
London, and go towards Bath, or having borrowed him for a
week, keep him for a month, he becomes responsible, for any
accident which may befall the horse, in his journey to Bath, or
after the expiration of the week. 2 Ld. Raym. 915. Doct.
and Stud. 222, ed. 1815. dial. 2. ch. 36. Jones on Bailments,
68. See Terms of the Law, Bailment, 35 b. 2 Sheppard's
Counsellor, 266. Hargr. n. Co. Litt. 89. 2 Fonbl. 180 (i).

(b) Doct. & Stud. 222, dial. 2, ch. 36. And in the reign of
Elizabeth it was resolved, that if a common carrier be robbed
of the goods delivered to him, he shall answer for the value
of them. Co. Litt. 89 a. Mo. 462. 1 Roll. Abr. 2. Wood-
liffe and Curtiss. The modern rule concerning a common
carrier is, that "nothing will excuse him, except the act of
God,"
he over-charge his horses; or drive so that his load fall into the water; or be otherwise hurt by his default; he shall be answerable for his negligence (a).

And if a carrier would refuse to carry, unless a promise were made to him, that he shall not be charged with any such miscarriage, that promise were void.

Every innholder is bound by the law to keep in safety bona & catalla (b), of his guest, so long as they are within the inn, though the guest did not deliver them unto him, nor acquaint him with them (c).

* He shall not be charged, if the servant * P. 93. or companion of the guest, embezzle them; or if the guest leave them in the outward court.

The ostler shall not answer for the horse which is put to pasture (d), at the request of the guest; but if he do it without the guest’s orders, he shall (e).

God, or of the king’s enemies.” Bull. Ni. Pr. 70, 71. If robbery excused a carrier, confederacies would be formed between carriers and desperate villains with little or no chance of detection, to the infinite injury of commerce and extreme inconvenience of society. Ld. Raym. 917. 12 Mod. 487.

Jones, 104.

(a) In an action against a carrier, it was holden to be no excuse, “that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water had gushed,” Dale v. Hall, 1 Wils. part 1, 281; but the true reason of this decision is not mentioned by the reporter: it was in fact, at least ordinary negligence, to let a rat do such mischief in the vessel. Jones, 105.

(b) The goods and chattels.

(c) Vide Jones, 91. 94, 95. D. 4. 9. 5. and 12 Mod. 487.

2 Cro. 189. Mo. 78. Dyer, 158 b. 1 And. 29. 1 Bl. Com. 430. D. 4. 9. 1. & 3.

(d) Even if he turn ont the horse, by order of the owner, and receive pay for his grass and care, he is chargeable for ordinary negligence, as a bailee for hire, though not as innkeeper; for if a man, to whom horses are bailed for agistment,
OF LENDING AND RESTORING.

If any man offer to take away my goods, I may lay my hands upon him, and rather beat him than suffer him to take or carry them away.

leave open the gates of his field, in consequence of which neglect they stray and are stolen, the owner may have an action against him. Mo. 543. 1 Roll. Ahr. 4. Jones, 92.

(c) Cayle's case, 8 Co. 32. See also Countess of Salop's case, 5 Co. 15b. So also if a shepherd to whom sheep are intrusted, by negligence suffers them to be drowned, or otherwise to perish, an action upon the case lies. Wing. Max. 670, pl. 3.

The following SYNTHESIS of Sir William Jones's celebrated LAW OF BAILMENTS may not be unacceptable to the reader, in this place:

1. Definitions:—1. Bailment is a delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods re-delivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed. 2. Deposit is a bailment of goods to be kept for the bailor without a recompense. 3. Mandate is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them. 4. Lending for use is a bailment of a thing for a certain time to be used by the borrower without paying for it. 5. Pledging is a bailment of goods by a debtor to his creditor to be kept till the debt be discharged. 6. Letting to hire is, 1. a bailment of a thing to be used by the hirer for a compensation in money; or, 2. a letting out of work and labour to be done, or care and attention to be bestowed, by the bailee on the goods bailed, and that for a pecuniary recompense; or, 3. of care and pains in carrying the things delivered from one place to another for a stipulated or implied reward. 7. Innominate bailments are those where the compensation for the use of a thing, or for labour and attention, is not pecuniary, but either, 1. the reciprocal use or the gift of some other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the use or gift of another thing in consideration of care and labour, and conversely. 8. Ordinary neglect is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concern. 9. Gross neglect is the want of that care, which every man of common sense, how inattentive soever, takes of his own property. 10. Slight neglect is the omission of that diligence, which every circumspect and thoughtful persons use in securing
OF LENDING AND RESTORING.

securing their own goods and chattels. 11. A NAKED CONTRACT is a contract made without consideration or recompense.

II. The rules, which may be considered as axioms flowing from natural reason, good morals, and sound policy, are these:

1. A bailee, who derives no benefit from his undertaking, is responsible only for gross neglect. 2. A bailee, who alone receives benefit from the bailment, is responsible for slight neglect. 3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect. 4. A SPECIAL AGREEMENT of any baillee to answer for more or less, is in general valid. 5. All bailees are answerable for actual fraud, even though the contrary be stipulated. 6. No bailee shall be charged for a loss by inevitable ACCIDENT or irresistible force, except by special agreement. 7. ROBBERY by force is considered as irresistible; but a loss by private STEALTH is presumptive evidence of ordinary neglect. 8. GROSS neglect is a violation of good faith. 9. No ACTION lies to compel performance of a naked contract. 10. A reparation may be obtained by suit for every DAMAGE occasioned by an INJURY. 11. The negligence of a servant, acting by his master's EXPRESS OR IMPLIED ORDER, is the negligence of the master.

III. From these rules the following propositions are evidently reducible:

1. A DEPOSITARY is responsible only for gross neglect; or, in other words, for a violation of good faith. 2. A DEPOSITARY, whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed. 3. A MANDATORY to carry is responsible only for gross neglect, or a breach of good faith. 4. A MANDATORY to perform a work is bound to use a degree of diligence adequate to the performance of it. 5. A man cannot be compelled by ACTION to perform his promise of engaging in a DEPOSIT or a MANDATE. 6. A reparation may be obtained by suit for DAMAGE occasioned by the non-performance of a promise to become a DEPOSITARY or a MANDATORY. 7. A BORROWER for USE is responsible for slight negligence. 8. A Pawnee is answerable for ORDINARY neglect. 9. The hirer of a thing is answerable for ordinary neglect. 10. A WORKMAN for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking. 11. A LETTER to hire of his care and ATTENTION is responsible for ordinary negligence. 12. A CARRIER for hire, by land or by water, is answerable for ordinary neglect.

IV. To
IV. To these rules and propositions there are some exceptions:
1. A man, who spontaneously and officiously engages to keep, or to carry, the goods of another, though without reward, must answer for slight neglect. 2. If a man, through strong persuasion and with reluctance, undertake the execution of a mandate, no more can be required of him than a fair exertion of his ability. 3. All bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed on a lawful demand. 4. A borrower and a hirer are answerable in all events, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement. 5. A depositary and a pawnee are answerable in all events, if they use the things deposited or pawned. 6. An innkeeper is chargeable for the goods of his guest within his inn, if the guest be robbed by the servants or inmates of the keeper. 7. A common carrier, by land or by water, must indemnify the owner of the goods carried, if he be robbed of them.

V. It is no exception, but a corollary, from the rules, that every bailee is responsible for a loss by accident or force, however inevitable or irresistible, if it be occasioned by that degree of negligence, for which the nature of his contract makes him generally answerable; and to conclude this important title in jurisprudence, all the preceding rules and propositions may be diversified to infinity by the circumstances of every particular case; on which circumstances it is on the continent the province of a judge appointed by the sovereign, and in England, to our constant honour and happiness, of a jury freely chosen by the parties, finally to decide: thus, when a painted cartoon, pasted on canvas, had been deposited, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question "whether the depositary had been guilty of gross neglect," was properly left to the jury, and, on a verdict for the plaintiff with pretty large damages, the court refused to grant a new trial (a); but it was the judge, who determined, that the defendant was by law responsible for gross negligence only; and, if it had been proved, that the bailee had kept his own pictures of the same sort in the same place and manner, and that they too had been spoiled, a new trial would, I conceive, have been granted; and so, if no more than slight neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide against law, that a bailee without reward was responsible for it. Jones on Bailments, 117.

(a) 2 Stra. 1099, Mytton and Cock.

CHAP.
OTHER MENS' CONTRACTS.

CHAP. XLIV.

HOW FAR OTHER MENS' CONTRACTS AND MISDEMEANORS BIND US.

A MAN shall be bound by many trespasses of his wife, but not to sustain corporal punishment for it.

For murder, felony, battery, trespass, borrowing or receiving money in his master's name, by a servant, the master shall be not charged, unless it be done by his command, or came to his use by his assent.

If I command one to do a trespass, I shall be a trespasser, or even if I do but consent. There is no accessory in trespass (a).

* We shall be charged if any of our family lay or cast any thing into the highway, to the nuisance of his Majesty's liege people.

Every man is bound to make recompence for such hurt as his beasts shall do in the corn or grass of his neighbour, though he knew not that they were there; and for his dogs, bears, &c. if they hurt the goods or chattels of any other, because he is to govern them.

A man shall not be charged by the contract of his wife, or his servant, if the thing come to his use, having no notice of it: but if he authorise them to buy generally, he shall be charged though they come not to his use, or he had no notice thereof (b).

If a wife or servant accustomed to buy or sell, if he sell his master's horse or exchange his ox for

(a) 20 Vin. Abr. 461, (R. 2). Ibid. 461, pl. 4 and 5.
(b) 4 Bac. Abr. 585, Master and Servant (K).

wheat
wheat which comes to his master's use, his master cannot have an action of trespass for it; but he shall be charged for the corn, and the other need not to shew that he had warrant to buy for him.

If a man servant who keeps his shop, or who is accustomed to sell for him, shall give away his goods, he shall have trespass against the donee.

But if I deliver my goods to another to *P. 95. keep to my use, and he give them away, * I shall not; for the donee had no notice whose goods they were, as in the case of the servant.

If a man make another his general receiver, who receives money, and makes an acquittance, and pays not his master, yet that payment discharges the debtor.

If a servant keep his master's fire negligently, an action lies against the master: Otherwise, if he carry it negligently in the street.

If I command my servant to distress, and he ride on the horse taken for the distress, he shall be punished, not I.

If a man command his servant to sell a thing which is defective, generally to whom he can sell it, deceit lies not against him: Otherwise if he bid him sell it to such a man, it does.

A contract or a promise made to the wife is good, when the husband agrees, so it is to a servant; and it shall be said to be made to the husband and master himself (a).

If a man take a wife who is in debt, he shall be charged with her debts during her life; if she die, he shall be discharged (b).

(a) See further, 4 Bac. Abr. 582. Master and Servant (I), (K).
(b) 1 Roll. Abr. 351. (G), pl. 2. 4 Vin. Abr. 142. But he will be liable as her administrator to the extent of her assets. *Heard v. Stamford, Cas. Temp. Talb. 173. 1 P. Wms. 465. 468.
HAVING hitherto treated of such contracts as take effect in the life-time of the parties, with their differences, it is now necessary to treat of instruments which take effect after their deaths, that those things which men have preserved with care, and procured with pains in their life, might be left to their posterity in peace and quietness after their death: Of which sort are last wills and testaments.

There are Two Sorts of Wills; Written and Nuncupative.

A nuncupative testament is when the testator by word only, without writing, declares his will before a sufficient number of (b) witnesses concerning his chattels only; for lands pass not but by writing.

(a) Testamentum, or last will, is thus described by Modestinus:—Voluntatis nostrae justa sententia de eo quod quis post mortem suam fieri velit. D. 28. 1. 1. One great and principal use of a good definition is this, that it may be considered as a whole doctrine in epitome: and thus, I am persuaded, all the necessary knowledge upon the subject of testamenti fuctio would turn up, by carefully surveying the terms contained in the definition before us. Taylor's Civil Law, 531, 2d edit.

(b) By the 29 Car. 2. c. 3. s. 19. the estate bequeathed must not exceed the value of thirty pounds; there must be three witnesses; it must be made in the last sickness of the testator, in a house where he shall have been resident for ten days, except he be taken ill on a journey; and it should be committed to writing within six days after the making. See further, 7 Bac. Abr. 337. 1 Abr. Eq. Cas. 403. 2 Bl. Com. 500.
It may for the better continuance after the making be put in writing, and proved; but it is still a testament nuncupative.

A written testament is that, which at the very time of the making thereof is put in writing, by which kind of testament in writing only, lands and tenements pass, and not by word of mouth only.

Two things are required to the perfection of a will by which lands pass, viz. first, writing, which is the beginning (a); secondly, the death of the devisor, which is the finishing.

In a will of goods there must be an executor named; it is otherwise of lands.

A man may make one executor or more simply, or conditionally for a time, or for parcel of his chattels.

If no executor be named, then it still retains the name of the last will, and shall be annexed to the letters of administration on account of the legacies.

Gavelkind lands may be devised by custom.

Lands holden in socage tenure are all devisable in writing, but knights service two parts in three (b).

(a) By the statute of frauds and perjuries, 29 Car. 2. c. 3. s. 5. a will of fee simple lands, or pur auter vie, must be signed by the testator, or by some person for him in his presence, and by his direction, and be attested and subscribed in his presence by three witnesses; by 25 Geo. 2. c. 6. a beneficial devise, legacy, estate, interest, gift, or appointment, to a witness to a will is void; by 55 Geo. 3. c. 192, dispositions by will of copyhold estates are made effectual without previous surrenders to the uses thereof, but no particular ceremonies are requisite to the validity of such a disposition. See further, Hargr. n. Co. Litt. 111 b. (3). Phillips on Evidence, 527, 4th edit. 7 Bac. Abr. 308. 6 Cru. Dig. 59, 2d edit. Roberts on Frauds, 289.

(b) These distinctions are now abolished.
Fear, fraud, and flattery, are three unfit things to be at the making of a will.

A woman may make a will of the goods of her husband by his consent and licence: By word is sufficient, and of the goods she has as executor without his consent; but she cannot give them unto him.

* A boy after his age of fourteen, and * P. 98. a maid after her age of twelve, may make a will of their goods and chattels by the civil law (a).

The will of the testator shall be always observed, if it be not impossible, or greatly contrary to the law.

A devisor is intended inops consilii (b), and the law shall be his counsel; and according to his intent appearing in his will, shall supply the defect of his words.

A prerogative will is five pounds in another dio-
cese (c).

A man cannot traverse the probate of a testa-
ment, or letters of administration directly, but he
may say against the testament, that the testator
never made the party his executor (d).

(a) Hargr. n. Co. Litt. 189 b. (6).
(b) Wanting counsel.
(c) See Office of Executor, 45.
(d) But see Toll. Ex. 76.
CHAP. XLVI.

DEVISES.

A DEVISE ought to be good and effectual at the time of the death of the devisor. The devisee (a) cannot enter into a term for years, or take a chattel personal but by the delivery of the executor. But he may sue for it in Court Christian (b).

(a) When chattels, either real or personal, are given by will, it is a bequest; devise is exclusively applied to gifts by will of estates of freehold or inheritance. So the person to whom chattels are given by will is, in strict propriety, called a legatee, and not a devisee.

(b) i.e. The Ecclesiastical Court. Cases have occurred in which courts of common law have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon proof of an express assumpsit, or undertaking by the executor to pay them. But it seems to be the opinion of modern judges, that this jurisdiction extends to cases of specific legacies only; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. Atkins v. Hill, Cowp. 284. Doe, dem. Lord Say and Sele v. Grey, 3 East. Rep. 120. So it seems to be the better opinion, that when the legacy is not specific, but merely a gift out of general assets, and particularly when a married woman is the legatee, that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit of doing. Deeks v. Strutt, 5 T. R. 690. 2 Rop. Leg. 595. Thus legacies bequeathed to married women, ought, in general, to be paid to their husbands; but in cases where the husband has made no provision for his wife, the executors may withhold payment of the legacy until he consent to make a suitable provision, as the Court of Chancery, upon a bill filed by the husband for the legacy, would refuse to make such an order, unless
DEVISES.

* Into freehold or inheritance he may * P. 99.

Devises are purchasers (a): So if a lease for years be willed to a man and his heirs, the heir shall have it; for heir is a name of purchase here (b).

A reversion of lands or tenements will pass by the name of lands and tenements in a devise.

If a man devise all his lands and tenements, a lease for years does not pass where he has lands in fee, and also a lease of land there, otherwise it will (c).

If unless the husband consented to a reasonable settlement on the wife, out of the legacy; Brown v. Elton, 3 P. Wms. 202. 2 Eq. Cas. Abr. 241, pl. 29, or unless the legacy be under £200, or £10, in annual payment. March v. Head, 3 Atk. 721. Beames's Orders in Chancery, 464. 1 Madd. Ch. 482, 2d edit.; and it seems, that though the wife elope from her husband, and cohabit with another man, if she be unprovided for, the court will not allow her husband to take her property, without making a provision for her. Ball v. Montgomery, 4 Bro. C. C. 339. 345. See also Carr v. Eastabrooke, 4 Ves. 146. But if the wife consent in court, or if abroad, before proper commissioners, for the husband to receive her legacy, the court will decree it accordingly, without requiring any settlement. Willats v. Cay, 2 Atk. 67. Parsons v. Dunne, 2 Ves. 60. Ellis v. Atkinson, 3 Bro. C. C. 565. But when the feme-legatee is the subject of a foreign state, by the law of which the husband would be entitled to receive the whole of his wife's property, without making any provision for her, the Court of Chancery will dispense with the wife's consent in such cases, and decree the legacy to her husband. Campbell v. French, 3 Ves. 323. 1 Rop. Leg. 372. 1 Fonbl. Treat. of Equity, 98, n.

(a) Ante, 143, note (a).
(b) Sed vide ante, 143, note (b).
If a man devise all his goods, a rent-charge which he had for years will pass, and all other his personal chattels.

And if a man give all his moveables to one, he shall have all his horses, cattle, pans, and personal chattels; and if he give all his immovable to another, he shall have all his corn growing, and fruit on his trees, and the chattels real (a).

A man may devise lands or goods to an infant in the mother's womb (b), or goods to the churchwardens of D. (c).

There

Riccardson, 1 H, Blacks. 26, n. 2 P. Wms. 459, n. Lane v. Earl Stanhope, 6 Term Rep. 345. Thompson v. Lady Lawley, 2 Bos. and Pull. 303. 5 Ves. 476. Cru. Dig. 232, 2d edit. 1 Rob. on Wills, 440. 2 Rop. Leg. 560. Whenever it can be collected from the words of the will, that the testator's intention was that both freehold and leasehold should pass, the will has that effect.

(a) Godolphin's Orphan's Legacy, 392, s. 6, 7. See Perk. s. 525.

(b) Scatterwood v. Edge, 1 Salk. 229. It was formerly disputed, whether a devise to an infant in ventre sa mere was good or not; some held that it was not, whilst others contended it was; but all agreed that a devise to an infant when he should be born was good. A devise to such infant necessarily implies a future disposition, to take effect at its birth, as much as if the words "when he shall be born" were added; for we cannot imagine an intention, that the child should take the estate before it is born. But at this day it is clearly agreed that a devise to an infant in ventre sa mere is good, though he be born after the testator's death, and he shall take by way of executory devise. So a limitation to the child of which the wife was supposed ensient was a good contingent remainder (the wife taking a preceding estate for life) to a supposed child in ventre sa mere; and if there had been no devise to the wife for life, the devise to the child for life, being in futuro (by which must be meant being in its own nature future), would have been a good executory devise. 1 Freem. 244. 293. Fearne's Rem. 533-4-5, Butler's edit. 426, 3d edit. By the 10 & 11 W. 3. c. 16. it is enacted, that where any estate is settled
DEVICES.

There is great diversity where the property is devised, and when the occupation is devised: a man may settled in remainder to children, with remainder over, any posthumous child may take in the same manner as if born in the father's life-time. See Fearne's Rem. Butler's edit. 309, 3d edit. Hargr. n. Co. Litt. 11 b. (3). Butler's n. Co. Litt. 298. (3). 2 Cru. Dig. 330. 3 Ibid. 351, 2d edit. Sug. Gilb. Uses, 146. Watk. Des. 131, &c. An infant in ventre sa mere may take a share of real estate under a devise “to the use and behoof of all and every such child or children of my said brother as shall be living at the time of his decease.” Doe v. Clarke, 2 Hen. Bl. 400. Clarke v. Blake, 2 Bro. C. C. 321. 2 Ves. jun. 673. And it is now settled, that an infant en ventre sa mere shall be considered, generally speaking, as born for all purposes for its own benefit. Lancashire v. Lancashire, 5 T. R. 49. Watk. Des. 142. A child en ventre sa mere may be vouch-ed in a recovery, though for the purpose of answering over in value. Co. Litt. 390 a. It may be the subject of murder, 3 Inst. 50, 51. It may take under the statute of distributions, as living at the intestate's death. Edwards v. Freeman, 2 P. Wms. 446. Wallis v. Hodson, 2 Atk. 114. It may be entitled to the benefit of a charge for raising portions for children living at the death of the testator. Hale v. Hale, Pre. Ch. 50. It may obtain an injunction to stay the commission of waste to its disadvantage. Musgrave v. Parry, 2 Vern. 710. It will prevent a remainder from taking effect which depended upon the death of its father, without leaving issue. Burdet v. Hopegood, 1 P. Wms. 487. A limitation to it for life, with remainder to its first and other sons successively in tail, will, as it seems, be a good limitation, which could not be unless a posthumous child is considered in law a child in esse, Long v. Blackall, 3 Ves. 486. 7 T. R. 700. S. C. and Per Buller, J. Thelluson v. Woodford, 4 Ves. 322. Upon the whole, “posthumous children are entitled to all the privileges and advantages of other persons.” 1 Rot. Leg. 89. 2 Fonbl. Treat. of Eq. 349. Lord Kenyon's opinion, to which he seems to have adhered so firmly in Pier- son v. Garnett, 2 Bro. C. C. 47. Cooper v. Forbes, Ibid. 63. Freeman tle v. Freeman tle, 1 Cox, 248. is now over-ruled.

As to illegitimate children, it seems settled, that if an ille-gitimate child en ventre sa mere, be so described as to ascertain the object intended to be pointed out, it may take under that description, as in the case of a bequest to the natural child with which a woman is now ensient, without reference to any person as
may devise, that a man shall have the occupation of his plate, or other chattels during his life, or for years, and if he die

as the father; nor would such a bequest be invalidated, by the testator giving as a reason for the legacy, that he believed he was the father of such child. Wilkinson v. Adam, 1 Ves. & B. 423. Gordon v. Gordon, 1 Meriv. 141. But a bequest to "such child as A. may happen to be ensient with, by me," has been held void. Earle v. Wilson, 17 Ves. 528. Eden's note, 2 Bro. C. C. 321. So a limitation to a bastard not in esse is held to be void; for the law does not favour such generation, or expect that such should be. Fearne's Rem. 249, Butler's edit. 176, 3d edit. See further, Hargr. n. Co. Litt. 3 b. (1). 3 Bac. Abr. 378. Grants (C). 2 Rol. Abr. 43, 44. 4 Vin. Abr. 233. Bastard (P). 14 Vin. Abr. 37. 1 Fonbl. Treat. of Eq. 349.


But a gift, conveyance, appointment, or settlement of lands, tenements, or hereditaments, or any personal estate whatsoever, to be laid out and disposed of in the purchase of lands, &c. made by deed indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor (including the days of the execution and death), and enrolled in the High Court of Chancery, within six calendar months next after the execution thereof, is good; and so stocks in the public funds may be appropriated to a charitable purpose, if transferred six calendar months at least before the death of the donor or grantor. But the charitable purpose must be made to take effect in possession, for the charitable use intended, immediately from
DEVISES. 227
die within the term, that it shall remain to M. A. and it is good; for the first has but the occupation, and the other after him shall have the property.

But if a chattel be given to one for life, the remainder to another, the remainder is void.

For a grant or devise of a chattel for an hour is good for ever, and the devisee may dispose of it; but if he do not, the other shall have it (a).

A man may devise his lands he holds in lease, but not his lease under this condition; provided that if the lessee die within the term, then the lessor shall have it.

If a man will his goods to his wife, and that after from the making thereof, and must be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him. But the donor may reserve to himself a power to alter the rules for governing the charity, or may be a joint trustee of the charity, or reserve a power to himself of appointing the trustees during his own life. See further, 1 Bac. Abr. 593. 2 Rop. Leg. 72, 2d edit.

(a) In equity, limitations over of chattels personal, after a bequest to one for life, are good as executory bequests.

The ancient distinction between the bequest of the use of a personal thing, and the thing itself to any one for life, &c. has been completely settled, in the constructive operation of such a limited gift, to entitle the restricted legatee only to the use of the thing for the period expressed.

In case of a bequest of goods to one for life, with remainder over, the legatee for life was formerly compellable in equity to give security for the goods being forthcoming at his decease: but the later practice is for an inventory to be signed by the legatee for life, &c. to be deposited with the Master for the benefit of all the parties: which Lord Thurlow observed was more equal justice; as there ought to be danger in order to require security. Foley v. Burnell, 1 Bro. C. C. 279. Slanning v. Style, 3 P. Wms. 336. Hyde v. Parratt, 1 P. Wms. 6, and notes. Fearne's Rem. 404. 406. 407. Butler's edit. 30. 34. 35. Powell's edit. 302. 306, 3d edit.

her
her decaese his son and heir shall have the house wherein they are; she shall have the house for term of her life, yet it is not devised unto her by express words. But it appears that his intent was so by the words (a).

(a) Bro. Abr. Derise, pl. 52. Vaughan 263. A good commentary on all the cases. Horton v. Horton, Cro. Jac. 75. For by the express words of the will the heir was not to take it till after the death of the wife; therefore if she did not take it, no one else could. So if a man having a wife and two daughters, heirs at law, devise lands to one of the daughters after the wife's death; this is a devise to the wife for life by implication, though the daughter is but one of the co-heirs. Hutton v. Simpson, 2 Vern. 723. But if a man devise to any other person than the heir, after the death of his wife, it gives the wife no estate for life by implication, but in the mean time, until her death, the estate descends to his heir; Smartle v. Scholar, 2 Lev. 207. T. Jones, 98. Fawlkener v. Fawlkener, 1 Vern. 21. Gardner v. Sheldon, Vaughan, 259. because the devise only points out when the estate of the stranger shall commence; and it is a rule, that whenever there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the testator's heir at law. Vide Chambers v. Brailsford, 18 Ves. 368. This observation should be particularly attended to, when a person entitled to an estate-tail under an executory devise, which has left the freehold and inheritance to descend to the heir at law, intends suffering a common recovery to bar his estate-tail. In such a case, the concurrence of the heir at law, in making the tenant to the precipice, is absolutely necessary. Such is the case where a testator devises to A. in tail, after six months from the testator's decease; during those six months, the estate descends to and continues in the heir at law: and therefore if A., during those six months, should suffer a recovery of the estate, it would be essential to its validity, that the heir at law should concur in making the tenant to the precipice. Butler's Fearne's Rem. 537. 3d edit. 432. So where a testator, in case his eldest son should die and leave no issue of his body, then after his decease gave the lands to his youngest son and his heirs, it was held, that the eldest son took an estate tail by implication. Walter v. Drew, Com. Rep. 372. Fearne's Rem. 387.
DEVISES.

If a man will his lands to his wife till his son come to the age of twenty-one years, and the woman take another husband and die, the husband shall have the interest (a).

* By a devise, a man may have the fee-

P. 101.

simple without the express word "heirs:"

As if lands be willed to a man for ever, or to have and to hold to him and to his assigns, &c.

By will, lands may be entailed without the word "body:" As if lands be given to a man and his heirs male, it makes an estate tail.

If a man will that his executors shall sell his lands, the inheritance descends to the heir (b); yet the executors may enter and enfeoff the vendee (c).

But if lands be given to the executor to sell, and they receive the profits thereof to their own use, and do not sell the same in reasonable time, the heir may enter (d).

One executor may sell if the others will not (e).

If lands be recovered against tenant for life, or for years, by an action of waste or superior title, he cannot gather his corn (f).

387. 477, Butler's edit. 300. 362, 3d edit. See further on devises by implication, Gilb. Devises, 75, 3d edit. 4 Gwill. Bac. Abr. 288. 6 Crn. Dig. 206.


(b) Co. Litt. 236 a.

(c) Vide Litt. s. 169. Hargr. n. Co. Litt. 113 a. (2). 1 Roll. Abr. 329, 330. 3 Vin. Abr. 419, 420. 4 Bac. Abr. 281, De

(d) Litt. s. 383.

(e) By 21 Hen. 8. cap. 4. See Co. Litt. 113 a. 181 b.

(f) Perk. s. 515. Co. Litt. 55 b.
EXECUTORS.

If the cognisee have sown the lands, and the cognisor bring a scire, the cognisee shall have the corn sown (a).

If a man devise omnia bona & catalla (b), hawks nor hounds do not pass, nor the deer in the park, nor the fish in the ponds.

(b) All his goods and chattels.

* P. 102. * CHAP. XLVII.

EXECUTORS.

An executor is he who is named and appointed by the testator to be his successor in his stead to enter, and to have his goods and chattels, to bring actions against his debtors, and pay his legacies so far as his goods and chattels will extend.

Where two executors are made, and one proves the will, and the other refuses, notwithstanding he who refuses may administer at his pleasure, and the other must name him in every action for every thing due to the testator, and his release shall be a good bar. If he survive he may administer, and not the executor of him who died: But otherwise if all had refused (c).

EXECUTORS.

If one prove the will in the name of both, he who does not administer shall not be charged.

If the executor do any one act which is proper to an executor, as to receive the testator's debts, or to give acquittance for the same, &c. he cannot refuse.

But other acts of charity or humanity he may do, as to dispose of the testator's goods about the funeral (a), to feed his cattle lest they * perish, or to keep his goods lest * P. 103. they be stolen: These things may every one do without danger.

When executors bring an action, it shall be in all their names, as well of them who refuse, as of the others.

But an action must be brought against him only who administers; and he who first comes shall first answer.

An executor of an executor, is executor to the first testator (b), and shall have an action of debt, account,

v. Lord Petre, 1 Salk. 311. After one has proved, the other cannot renounce till after his death; but if he then renounce, the testator is dead intestate. Com. Dig. Administrator (B. 1.)

11 Vin. Abr. 68, pl. 21. 31.

(a) Ante, 32, note (a).

(b) 2 Bla. Com. 506. Toll. Ex. 243. 3 Bac. Abr. 19. Executors (B), 2. 1, pl. 2. Com. Dig. Administration (G). But this is to be understood, when the first executor proves the will; Palm. 156. for if the executor die after administering, and before probate, his executor cannot prove the will of the first testator; because he is not named executor to him in the will; and no one can prove the will, but who is named executor in the will; Wankford v. Wankford, 1 Salk. 309; and administration of the goods of the first testator cum testamento annexo, must be granted to the executor of the executor, if the residue of the goods of the first testator were bequeathed by his last will to the first executor; or, otherwise to the residuary legatee, if any, or to the next of kin of the first testator. Roll.

X 2
EXECUTORS.

account, &c. or of trespass, as of the goods of the first testator carried away, and execution of statutes and recognizances, &c. Stat. 25 Ed. 5.

The title and interest of an executor is by the testament, and not by the probate; and without shewing the probate they may release the debts: But the justices will not allow them to sue actions (a).

The executor shall have the wardship of the body and lands of the ward in knights service, but not in socage, and leases for years, and rent-charges for years, statutes, recognizances, bonds, lands in execution, corn upon the ground, gold, silver, plate, jewels, money, debts, cattle, and all other goods and chattels of the testator, if they be not devised, and may devise them:

But if the executor give by will omnia bona &c chattela sua (b), the goods of the testator pass not, neither shall they be forfeited by the executor.

An executor is chargeable for all duties of the

P. 104. goods and chattels of the testator, if they be not devised, and may devise them:

An executor may assent to a legacy, assign a term, or release an action as well as a debt, before probate, Middleton's case, 5 Co. 28 a. Hudson v. Hudson, 1 Atk. 461.; and in short, is a complete executor, before probate, for all purposes, excepting that he cannot declare in an action before probate; for without producing his letters testamentary, he cannot assert his right in court; but he may commence an action at law, Bacon's Law Tracts, 160. 1 Salk. 303. 4 Burn's Eccl. Law, 246. 6th ed. or file a bill in equity before probate, Humphreys v. Humphreys, 3 P. Wms. 351. and when produced, it shall have relation to the time of suing out the writ, or filing the bill; and on a bill in equity, it is sufficient, if the probate be obtained at any time before the hearing. 3 Bac. Abr. 53. Toll. Ex. 46. Com. Dig: Administration, (B. 9).

(b) All his goods and chattels.

testator
testator which are certain, so far as he shall have assets: But not for trespass, nor for receipt of rents, nor for occupation of lands, as bailiff, or guardian in socage, &c. for this is not any duty certain (a). If the executor waste the goods of the testator, he shall pay for them out of his own.

An executor shall be charged only with such goods as come to his hands; but if a stranger take them out of his possession, they are assets in his hands (b).

If an executor take another man's goods amongst the goods of the testator, he shall be excused for the taking in an action of trespass.

Duties by matter of record shall be satisfied before duties by specialty; and duties by specialty before charges on contract; and legacies after other duties (c).

An executor may pay a debt or credit of the same kind, or degree pending the writ, before notice of the action, but not after notice or issue joined (d).

An executor may pay debts with his own money, and retain so much of the testator's goods, but not lands appointed to be sold.

Any of these words, debere, solvere, recipere (e), borrowed, or any word which will prove a man a debtor, or to have the money, if it be by writing, will charge the executor or administrator, but not the heir, if he be not named.

(a) Vide note, ante, 22.
(b) Vide Shep. Touch. 490.
(d) Vide Toll. Ex. 289.
(e) To owe, to pay, to receive.
AN administrator is he to whom the ordinary of the place, where the intestate dwelt, commits the intestate's goods, chattels, credits, and rights.

For wheresoever a man dies intestate, either because he was so negligent that he made no testament, or made such an executor as refused to prove it, or otherwise is of no force; the ordinary may commit the administration of his goods to the widow or next of kin making request, or to both, which he pleases, and he may revoke it again at his pleasure.

The ordinary may assign also a tutor to the intestate's children, to his sons until fourteen, *P. 106. to his daughters until twelve years (a): *but so that it may be not a prejudice to him who

(a) This is according to the rules of the civil law; Just. Inst. 1. 22. Taylor's Elements, 259, 2d ed. Wood's Civil Law, 63; 2d ed. for by the common law, guardianship in socage determines when either a male or female infant attains fourteen years; Co. Litt. 78 b. except when there is a guardian by nature, or when the father of a minor has specially appointed a guardian either by deed, or will, to continue for a longer time by virtue of the 12 Car. 2. cap. 24. The right of the Ecclesiastical Court to appoint a guardian, was admitted, 2 Lev. 162. T. Jones, 90; but has in more modern times been treated as a presumption, and has been confined merely to the appointment of guardian ad litem, on the ground that it would break in upon the jurisdiction of the Court of Chancery relating to the guardianship of infants. Buck v. Draper, 3 Atk. 631. Rex v. Delaval, 3 Burr. 1456. 3 Bac. Abr. Gwill. ed. 411. Swinburne states this power to have existed, by general custom observed, within the province of
who is the guardian (a). And after those years he or she may respectively choose their own curators, and the guardian may confirm them, if there be no good order taken by their father’s will; (b) and if such a tutor die, the infant cannot have an action of account against his executor.

The power and charge of an administrator is equal in every point to the power and charge of an executor (c).

A man of York; Part 3. sect. 9. 11. 1 Pow. cd. 282. 283, which custom must have existed long before there was any Court of Chancery in this kingdom. 4 Burn’s Eccle. Law. 116, n. 6th ed. See further Hargr. n. Co. Litt. 88 b. (16), Third. Com. Dig. Gardian. 2 Fonbl. Treat. of Equity, 237. Powell’s n. 1 Swinb. 263.

(a) i. e. at common law.

(b) A minor after fourteen, being of course freed from custody, is at liberty, if willing, to put himself a second time under guardianship, until he is of full age, Hargr. n. Co. Litt. 88 b. (16), first.—But, if a minor, being an adult, does not consent to receive a new guardian, then no court would appoint a guardian, unless ad litem. But, if a testator nominate a guardian, until his child arrives at full age, then the son, although above fourteen, is compelled to receive the guardian, who is thus expressly appointed for a certain time; but if no certain time be mentioned, there is then no guardianship, if the minor be an adult, Harris’s n. Just. Inst. 1. 22. 2. Thus, if a man devise the custody of his child to J. S. and mentions no time, either during his minority, or for any other time, this is a good devise of the custody within the 12 Car. 2. cap. 24. if the child be under fourteen at the death of the father, because by the devise the modus habendi custodiam is changed only as to the person, and left the same it was as to the time. But if above fourteen at the father’s death, then the devise of the custody is merely void for the uncertainty. For the act did not intend every minor should be in custody until one and twenty, Non ut tamdum sed ne diutiuis, therefore he shall be in this custody but so long as the father appoints; and if he appoint no time, there is no custody. Bedell v. Constable, Vaughan. 134.

(c) Though some are of opinion that one of several administrators may without the others sell goods, release debts, plead
A man may have an action on the case against the executor or administrator, upon the assumption of the testator, upon good consideration; or debt for labourers wages, by the statute (a).

And if a man make an infant his executor, the ordinary may commit the execution of the will to the tutor of the child, to the child's behoof, until he be of the age of seventeen years, and if it be granted for longer time, it is void (b).

An administrator *durante minoritate* (c) can do nothing to the prejudice of the infant, he cannot sell any of the goods of the deceased, unless it be upon necessity; as for the payment of debts, or that they would perish; nor let a lease for a longer time than whilst he is executor (d).

* P. 107. * An infant upon the true payment of a debt due to the testator, may make an acquittance, and it shall be good (b): for a child may better his estate, but not make it worse (e).

to actions, and the like, in the same manner as executors may, Goldsb. 141. 3 Bac. Abr. 30. 5 Bac. Abr. 700. Toll. Ex. 408; yet this is doubted by others because they all have but one entire authority, wherein they ought to join in what they do, Crompt. 45. Godolphin's Orphan's Legacy, 134, 4th ed. Shep. Touch. 485. *Hudson v. Hudson*, 1 ATK. 460. 11 Vin. Abr. 73. 2 Fonbh. Treat. of Equity, 391, n. 5th ed. Bacon's Law Tracts, 162, ed. 1737. Works, 4th vol. 83. Supp. Off. Executor, Wilson's ed. 124. 4 Burn's Eccle. Law, 316, 6th ed. Wood's Inst. 325, 10th ed. It seems to be the better opinion, that, a title to a leasehold estate, cannot be safely accepted from one or more of several administrators, when the others have not united in some manner in the sale or conveyance or subsequently assented.

(a) *Quere* 5 Eliz. cap. 4.
(b) Vide 131, note (a), ante.
(c) During minority.
(d) Vide 3 Bac. Ab. 13. Executors, (B).
(e) Cowel's Inst. 43. lib. 1. tit. 21.

See Lord Kames's view of the transmission of moveables from
from the dead to the living, and of the different changes this species of succession has undergone in Britain, *Essays on British Antiquities*, 174, 3d ed.


See the three first chapters of the Auth. Collat. ix. *Tit. 1. Novell. cxxviii.*, in Greek, Latin, and English, with notes at the end of Dr. Harris's cd. of Justinian. The three first chapters of this novel constitution deserve the attentive consideration of the English Juridical Student, not only because they contain the latest policy of the civil law in regard to the disposition of the estates of intestates; but because they are the foundation of our statute law in this respect. *Holt's Cases*, 259. 1 *P. Wms. 27*, note in margin. *Prec. in Chanc. 593. T. Raym. 496*. And they are still almost of continual use, by being the general guide of the courts in *England*, which hold cognizance of distributions, in all those cases, concerning which our own laws have either been silent, or not sufficiently express. Dr. Harris's elegant translation of Justinian's Institutions, contains also many valuable notes on the English law.

If a man die seised of any lands, and do not dispose of them by his will, they descend to his heir as aforesaid (a).

And

(a) Ante, 65. 71. A bastard, by the general consent of almost all civilized nations, is considered, as it were, the first of his family. For which reason he cannot by law be heir to his father; for he has none, at least the law knows of none. D. 1. 5. 23. And upon the same principles, having no legal relations, no body can claim a legal succession to him, except the heirs of his body, who spring from him, and without whom he has no relations at all. Taylor's Civil Law, 273. When a bastard dies without wife or child, the crown, as ultimus heres, is entitled, subject to his debts, to his personal effects, including leases or terms for years: and the king or other immediate lord of the fee, subject to his incumbrances, and his wife's right of dower, is also entitled to a real estate of inheritance, of which a bastard dies seised, without having devised it, and without leaving issue. But as the rigorous exertion of this
And he shall have not only the glass and wainscot (a), but any other of such like things affixed to the freehold or ground; as tables, dormants (b), furnaces, vats in the brewhouse or dyehouse (c); and the prerogative would, in many obvious cases, carry the appearance of great hardship; it is usual therefore to make over the royal claim to the bastard's quasi kindred, reserving one tenth, or other small proportion of the value, both of real and personal property. 1 Wooddes. Lect. 397. The quasi kindred procure letters-patent, or other authority from the king; and then the ordinary of course grants administration to such appointees of the crown. 2 Bl. Com. 505. Manning v. Napp, 1 Salk. 87. Com. Dig. Administrator (A), pl. 8. 11 Vin. Abr. 88, pl. 25. Jones v. Goodchild, 3 P. Wms. 34. Megit v. Johnson, 2 Doug. 548. Toll. Ex. 108.

(a) Herlakenen's case, 4 Co. 63 b. 64 a. Swinb. pt. 6. s. 7. 2 Pow. ed. 758.

(b) i.e. Bedsteads or couches, fastened to the ceiling with ropes, or nailed. Sed vide contra, 3 Atk. 478, as to landlord and tenant.

(c) Ante, 144. 1 Powell's Swinb. 256. 3 Bac. Abr. 63. Executors, (H) 3. Off. Ex. co. 62. Godol. Orp. Leg. 127. The law seems now to be held not so strictly as formerly, and if these things can be taken away without prejudice to the fabric of the house, or soil of the freehold, it seems, that the executor shall have them; as tables, although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise: 4 Burn's Eccles. Law, 301, 6th ed. 257, 4th ed. 3 Gwill. Bac. Abr. 64. Toll. Ex. t98; and hangings, tapestry, and iron backs to chimneys, belong to the executor, Harvey v. Harvey, 2 Str. 1141, and Ld. Ch. Baron Comyns, at the Assizes at Worcester, upon an action of trover, brought by the executor against the heir, was of opinion, that a cyder mill which is let very deep into the ground, and is certainly fixed to the freehold, was personal estate, and he directed the jury to find for the executor. Ex relatione Mr. Wilbraham, 3 Atk. 14. 16. So Lord Hardwicke decided that a fire engine, set up for the benefit of a colliery, by a tenant for life, was, as between his executor and the remainder-man, to be considered as part of his personal estate, and should go to the executor, for the increase of assets in favour.
the box or chest wherein the evidences are (a); the hawks and the hounds (b); the doves in the dove-

favour of creditors. And his Lordship observed, that, so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold; but, since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done. Coppers and all sorts of brewing vessels, cannot possibly be used without being so much fixed as fire engines, and in brewhouses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them. It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man: but even in these cases, it does admit the consideration of public conveniency for determining the question. I think, he added, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir. Lawton v. Lawton, 3 Atk. 13. So if tenant in tail, erect a fire engine to work a colliery, it will be considered as part of his personal estate, and not go with the estate to the remainder-man, but this does not hold between the heir and executer, Lord Dudley v. Lord Warde, Ambl. 113. See also Bul. N. P. 34.

(a) Off. Ex. 64. Godol. Orp. Leg. 127. 4 Burn's Eccl. Law. 304, 6th ed. But those deeds and writings which relate to terms for years, goods, chattels, or debts, belong to the executor, 3 Bac. Abr. 65. Ante, 143. Toll. Ex. 192. So where a bill was filed in Chancery for an antique horn, with this old inscription, Pecote this Horne to hold Huy thy Land, and which had immemorially gone with the plaintiff's estate, and was delivered to his ancestors to hold their land by, and praying that it might be restored; the Lord Keeper was of opinion, that if the land were held by the tenure of a horn or cornage, Co. Litt. 107 a. the heir would be well entitled to this monument of antiquity at Law, Pusey v. Pusey, 1 Vern. 273.

(b) Sed vide Off, Ex. 57. 3 Bac. Abr. 57.

house ;
house; the fish in the pond; and the deer in the park (a), and such like.

He shall be charged by specialty for the debts of his ancestor, so long as he has assets, if the executor or administrator have not sufficient (b).

No law or statute charges the heir for the wrong or trespass of his father (c), but by express words.

*WIDOW.*

The widow shall have all her apparel, her bed, her copher, her chains, borders, and jewels (d), by the honourable custom of the realm, except her husband unkindly give any of them away (e): or be

(a) And rabbits in a warren; if the ancestor had the inheritance, Godol. Orp. Leg. 126, or but for life, in the pond, warren, park, or dove-house: but if the deceased were but a tenor, they go to the executor, as necessary chattels, following their principal, Off. Ex. 53. Hargr. n. Co. Litt. 8 a. (10).

(b) But the body of the heir is protected, and the plaintiff shall only have a special elegit of lands descended in fee-sim-ple, Luson's case, 1 Dyer, 81 a. pl. 62. or pur autre vie, by the statute of frauds. And if the heir pay his ancestor's debts to the value of the land descended, he shall hold the land discharged: because otherwise he might be chargeable ad infinitum, Buckley v. Nightingale, 1 Stra. 665; and the heir must be expressly named, in a writing under hand and seal, otherwise he is not chargeable. Gifford v. Manley, Cas. Temp. Talb. 108. 3 Bac. Abr. 458, Heir, &c. (F).

(c) Ante, note (d), p. 21.


(e) Whatever jewels a wife wears for the ornament of her person, the husband may alien in his life-time, 3 Atk. 394; but he cannot bequeath them, by his will, any more than an ancestor can heir looms from the heir. Tipping v. Tipping, 1 P. Wms. 730. So if a husband pledge his wife's paraphernalia, and die, leaving a sufficient estate to redeem the pledge, and pay all his debts, she will be entitled to
so in debt, that it cannot be paid without her bed (a), &c.; yet even in that case she shall have her necessary apparel.

have it redeemed out of the husband's personal estate: although a specific legatee would be entitled in equity to have it disincumbered, or to receive an equivalent out of the personal estate of the testator. Graham v. Londonderry, 3 Atk. 395. 3 Bac. Abr. 66. And as a specific or any other legatee shall, in equity, stand in the place of a bond creditor or mortgagee, and take as much out of the real assets, as such creditor by bond or mortgage shall have taken out of the personal estate from his specific or other legacy: Cox's n. 1 P. Wms. 680. much more shall the wife be privileged with respect to her bona paraphernalia, which are preferred to legacies, and the court will marshal the assets for that purpose. 1 P. Wms. 730.

(a) In which case they must be put in the inventory with the other goods of the deceased, towards the payment of his debts, 2 Pow. Swinb. 761. Supp. Off. Ex. 62.

CHAP. I.

ARBITRAMENT.

What Things are arbitrable, and what not.

Things and actions personal uncertain are arbitrable; as trespass, taking away a ward, &c. (b).

But things certain are not arbitrable, unless the submission be by specialty, or they be joined with others uncertain; as debt with trespass (c).

Some


(c) A certain and fixed debt is not discharged by an award; for
Some matters concerning the commonwealth are not arbitrable; as criminal offences, felonies, and the like, concerning crimes.

In the submission, three things are to be regarded:

First, That it be made in writing with the covenants of the parties; or bonds subsequent, sufficient to bind them, their heirs, executors, administrators, * and assigns (a), to perform *P. 109. the award which shall be thereupon made; that both the arbitrators may know their power; and the parties revoke not their power; for all is void which is not contained in the submission, or necessarily depending thereupon; and the arbitrator's labour is lost, if they want means to compel the same to be executed.

Secondly, That there be power given to them sufficient to do all things necessary for terminating the controversies; as to appoint times and places for their meetings, to examine and decide the matters for the end and design of an arbitration is to reduce uncertain debts and duties to a certainty; and to award a man a certain debt is to give him no more, nor do any greater thing for him than was done before, for now he can have but an action, and that he might have before; and to give him less than he had before is to do him a manifest injustice, which the arbitrator cannot do. 1 Roll. Abr. 264. (R), pl. 2. 3 Vin. Abr. 101. 1 Bac. Abr. 203. But if £20 be due to a man, and he and another submit all personal things, &c. to arbitration, there, if the arbitrator award £10, it is a good award, because there were other uncertain things submitted, and the arbitrator had consideration of all, and set one against the other in making the award, so as perhaps the debt of £20 was diminished in consideration of some trespasses done by him to the other party. Allen, 52. Godfrey v. Godfrey, 2 Mod. 303. 1 Bac. Abr. 203. 1 Roll. Abr. 264. (R), pl. 3. 3 Vin. 102, pl. 3. Kyd on Awards, 53, 54, 2d edit.

(a) Com. Dig. Arbitrament (D 1). 1 Bac. Abr. 204. (D).
submitted, and to bring the parties with their proofs, evidences, and witnesses, thither together before them, and to punish the parties defective by means of their award, and to expound and correct such doubtful sentences and questions, as may arise upon their award, afterwards inconvenient to either parties, contrary to equity, and the arbitrator's real meaning; which inconveniencies were not before seen by them, at the making of the award. *Temporis filia veritas* (a).

Thirdly, Convenient time and place are to be limited, for the yielding up, their award to the parties, or to their assigns.

† Stat. 9 & 10 Will. 3. c. 12. s. 1. after the 11th May, 1698, all merchants and others, desiring an end to any controversy (for which there is no remedy but by personal action, or suit in equity) by arbitration, may agree that their submission of the suit to the award or umpirage of any persons, shall be made a rule of any of his majesty's courts of record, which the parties shall choose, and may insert such their agreement in their submission, or the condition of the bond or promise; and on producing an affidavit of such agreement, and upon reading and filing of such affidavit in the court so chosen, the same may be entered of record in such court, and the rule of court thereupon made, that the parties shall submit to, and finally be concluded by such arbitration or umpirage; and in case of disobedience thereunto, the party neglecting or refusing shall be subject to all the penalties of contemning a rule of court, and process shall issue accordingly; which shall not be stopped or delayed by any order, § c. of any other court either of law

(a) Truth is the daughter of time.
or equity; unless it appear on oath that the arbitrators and umpires misbehaved themselves, and such award was corruptly or unduly procured; and by sect. 2, any arbitration or umpirage procured by corruption, or undue means, shall be void and set aside by any court of law or equity, so as such corruption or undue practice be complained of in the court where the rule is made, for such arbitration made and published to the parties.

† Vinyor brought debt against Wild upon a bond of twenty pounds of arbitration, in which case three points were resolved; first, that though Wild was bound in an obligation to stand to, abide, observe, &c. the rule, &c. arbitrament, &c. yet he might countermand it; for a man may not by his own deed raise such an authority, power or warrant not countermandable; as if I make a letter of attorney to make livery, or sue an action in my name, or assign auditors to take an account, or make a factor, or submit myself to an arbitrament, though they are by express words irrevocable, yet they may be revoked. So if I make my last will and testament irrevocable, yet I may revoke it; for my act, or my words cannot alter the law, and make that irrevocable which is in its own nature revocable; whether it be by bond or otherwise that the submission is made, the authority of the arbitrator may be revoked or countermanded: But then in the one case he forfeits his bond, though in the other he loseth nothing; for ex nudo, &c. 2. It is not material to the plaintiff to aver, that the arbitrator had notice of the countermand, for it is implied in the words revocavit et abrogavit omnem authoritatem, &c. (a) for sans notice it is no revoca-

(a) That he revoked and abrogated all authority, &c.
cation or abrogation of the authority; and therefore if there was not notice, the defendant might join issue *quod non revocative*, &c. and if there was not notice it shall be found for the defendant, &c.

3. It was resolved, that by this countermand or revocation of the power of the arbitrator, the obligee shall take advantage of the obligation; for two causes, first, because the obligor hath broken the words of the condition, which are, *that he should stand to and abide*, &c. the rule, order, &c. and when he countermands the authority of the arbitrator *he doth not stand to and abide*, &c. which words were put in the condition with intent that no countermand should be, but that it should be finished by the arbitrator, and that his power should endure till he had made an award. And when the award is made, then are these words to compel the parties to perform the same, viz. observe, perform, fulfil, and keep the rule, order, &c. *Secondly*, the other reason is, that the obligor, by his own act, hath made the condition of his bond, which was made to save him from the penalty thereof, impossible to be performed by him. *Vinyor's Case*, 8 Co. 30. 81. 82.

* P. 110.  * Six things to be regarded in an arbitration.

1. That it be made, according to the very submission touching the things submitted, and every other circumstance.

2. That it be a final end of all controversies submitted.

3. That it appoint either party, to give, or do, unto the other, something beneficial, in appearance at least.

4. That the performance be honest and possible.

5. That
5. That there be means by the law by which either party may attain what is thereby awarded to him.

6. That every party have a part of the award, delivered to him.

For if it fail in any of these points, the whole arbitrament is void, and of no effect.

Examples thereof.

1. An award that the parties shall obey the arbitrament of A. M. is void, for power cannot be assigned.

An award that any of the parties shall be bound or do any other act by the advice of the arbitrator, is not good, except it be in the submission so; but that the parties shall be bound, or make assurance by the advice of counsel, is good.

2. An award, that the parties shall be nonsuited, is not good; because it is no final end, for the party may begin again: That the party do withdraw his suit, is good.

If the submission be of many things, and the award only of some of them, yet is the award good for that part; as if the submission be of all actions real and personal, and the award be of personal only, or if it be only de possessione (a).

3. If two submit themselves to the arbitrament of all trespasses, and it is awarded that the one shall make amends to the other, and nothing is awarded for the other’s benefit; this award is void.

So, if it were that one of them should go quit against the other, if the submission were not by bond; for an award must be final, obligatory, and satisfactory, to both parties.

(a) Of the possession.
An award, that either party shall release to the other all actions, and that because one has trespassed more than the other, he shall pay money to the first, is good.

In debt or trespass for goods taken, that the defendant shall retain part, and the plaintiff to have the rest, is not good.

* P. 112. * 4. An award that one of the parties shall do an act to a stranger, the award is void, if the parties be not bound.

Or if it be that he shall cause a stranger to enfeoff, or be bound to the other party, because he has no means to compel the stranger.

5. An award is void if it be neither executed, or there are no means by law for the execution thereof: As if it should be awarded, that one should pay the other ten pounds, this is good; for he may recover the same by an action of debt. But if it were awarded, the one should deliver to the other an acre of land, or do such like act executory, it were void, if it be not delivered straightway, or provision made by bond or otherwise, to compel the payment thereof according to the award, if the submission be not by specialty.

6. Indentures of arbitrament, must be made of so many parts as there are parties, that every person may have a part.

Arbitramentum æquum tribuit cuique suum (a).

An award is commonly made by laymen, and shall be taken according to their intent, and not in so precise a form as grants or pleadings, but

* P. 113. as verdicts; yet the substance *of the matter ought to appear either by express words.

(a) Arbitrament awards to each person his right.
words, or by words equivalent, or by those which amount thereto.

But it is advisable that awards be drawn by some person who is skilful, to avoid controversies, which otherwise might arise about the same.

AGREEMENT.

An agreement to terminate a difference, is made between the parties themselves: There must be a satisfaction made to either party immediately, or a remedy given for the recompence agreed on, or else it is but an endeavour to agree.

Tender of money without payment, or agreement to pay money at a day to come, is not any satisfaction before the day be come, and the money be paid. It cannot be pleaded in bar, in an action of trespass; for as one party has no means to compel the other to pay the money, so he may refuse it at the day, if he will. It is otherwise in an arbitrament: But money paid at a day, before the action is brought, is a good plea.

** IN the former Editions, there followed in this place a small Tract on particular Estates, Possession, Reversion, Remainder, and Rights, which, in this Edition, is printed in the Work whence it was taken, Page 67, of THE TREATISE OF TENURES. See Preface. **
AN ANALYSIS OF THE LAWS OF ENGLAND.

Justice is the constant and perpetual desire of giving to every man that, which is due to him (a). It is

Natural
Law
According to Law, wherein are considered

Law Divine
Law of Reason

Law Human

Foreign

English

Common where is treated

Civil

Foreign

Ecclesiastical

Temporal

1. Of Law, where is considered

The Law itself, which is written

General, and belongs to (A).

Statute.

2. Of the manner of delivering that Law

Injuries forbidden by that Law

Private against goods

Public against

The person and goods

The King and Commonwealth.

(a) Just. Inst. lib. 1. tit. 1.
(A) The person, where is considered

- The Quality, as
  - King
  - Subject, who is
    - Natural, who is
    - Villain
- Name
  - Of Baptism
  - Creation

The thing, which is

- Universal, which is
  - Of natural right
- Out of divers causes

Particular, in which Dominion may be gained

Where are considered

The King according to his prerogative

Legal and Ordinary
Regal and Absolute

According to peculiar Custom of Place
Prescription of Persons

1. Things or Goods themselves, which are

- Real
- Secondary
  - Of the Land
  - Upon it
- Personal
- Corporate
- Incorporate
2. To have ownership, which is

   By Estate and Property
   By his own Right
   Right of Action and of Entry

   Possibility
   Remote
   Near

   Joint
   Partniers
   Joint-tenants
   Tenants in Common
   Right of another, as Interest and Propriety, Use, Authority

   Single

   By Possession
   Freehold
   Freehold alone
   By Law
   By Gift or Conveyance
   For Life, or Life of another

   Chattels
   Real
   Term of years
   At will

   Personal
   Animate
   Inanimate

   Hereditary
   In Fee
   Conditional
   Qualified

   In Tail
   General
   Special

   As Dower
   Curtesy of England

   For Life, or Life of another

   Absolute

   Reversion
   Remainder
3. The manner of acquiring ownership

- By Law: Descent or Forfeiture
  - By Record: Fine, Executory
  - By Recovery: Single, Double

- By Purchase: Absolute with consideration
  - By Deed: Grant
  - By Word (a): Grant with Attornment
  - By Devis: Bargain and Sale enrolled

- By Operation of Law: Extinction, Suspension
  - By Discontinuance: Entry

- By act of the Party: Commission, Omission
  - By Warranty: Estoppel
  - By Forfeiture

(a) Since the Statute of Frauds all grants, &c. must be in writing.
CERTAIN OBSERVATIONS CONCERNING A DEED OF FEOFFMENT.

BY T. H. GENT.

*Cujus posse est velle.*

THE PREMISES.

You may find in the premises, first, the direct nomination as well of the feoffor as of the feoffee, together with their places of residence, habitation, or dwelling, and their qualities, estates, additions, or conditions. Secondly, The certain expressing and setting down of the lands conveyed.

*In Com' Norff.*] Comitatus dicitur à comitando, of accompanying together; for generally, at assises and sessions, those of that county where such assises and sessions are kept, use *P. 134* to be impanelled upon juries, &c. for trial of issue taken upon the fact betwixt party and party, and not those in another county: And it is a common presumption, that all persons within their counties take notice of such things as are there publicly done; hereupon it happens, that where
lands, &c. lie in divers counties, if they be conveyed by feoffment, &c. livery of seisin must be made in every county, where any parcel of the lands, &c. do lie. Otherwise it is of two parcels of land in one and the same county. The name County is, in understanding, all one with Shire, which is so called from dividing, and either of them contain a certain portion of the realm, which is parted into counties or shires for the better government thereof, and the more easy administration of justice. Hence it comes to pass, that there is no parcel of this kingdom, which lies not within the circuit or precinct of some county or shire. There are reckoned in England forty-one counties or shires, and in Wales twelve. The county of Norfolk lying northward, is so called in opposition to Suffolk, which lies towards the south, each one in respect of the other gains its name.

The addition given to the feoffor, you may perceive to be Yeoman; the etymology whereof Mr. Verstegan fetcheth from Gemen, a word anciently used amongst the Teutonicks, which (as my author says) signifies Vulgar or Common; and so the letter G, by corruption being turned into the letter Y, we say and read Yemen or Yeomen. Others (how probably I dare not affirm) derive it by contraction from these two words, viz. Young Men. The famous Mr. Camden, in his Britannia, after he has reckoned up sundry degrees both of Nobility and Gentry, ranks Yeomen in order next Gentlemen, naming them Ingenious;” in which sense I apprehend Yeomen to be mentioned in a certain statute made 16 R. 2, and in divers other statutes. And although the derivations of words be conveniently required in the law, and in every liberal science, (for Ignoratis terminis ignoratur
ignoratur & ars) yet, to use the expression of a learned divine, though spoken in another case, Melius est dubitare de occultis quàm litigare de incertis; so I must leave you to your own conceit concerning the original of the word Yeoman, having only set you down one or two opinions about it: However I must not forget what Sir Thomas Smith says in his Repub. Anglorum; who very truly and properly calls him a Yeoman, whom the laws of England call Legalem hominem, * that * P. 136. is to say, a Freeman born: And Mr. Lambert, in his Eirenarcha, will excellently inform you who are, and who are not, probi & legales homines.

There is no special, but only a general consideration expressed in the feoffment, neither of which (as I conceive) is in such case absolutely material, (though I may say formal) in regard of the notoriety of deeds of feoffment, &c. for livery and seisin (as shall be said afterwards) is essentially required to make them perfect, which cannot be without the knowledge of others, besides the parties themselves: And a feoffment does thereby always import a free and willing consent; otherwise, peradventure, it might have happened in a bargain and sale, before 27 H. 8. c. 16. for the better illustration whereof take this example: You and another man agree together, that you shall give him a certain sum of money for a parcel of land, and that he shall make you an assurance of it; you pay him the money, but he makes you no assurance; in this case, although the estate of the land be still in him; nevertheless the equity in conscientia boni viri is with you, which equity is called the Use; for which until the 27 H. 8. c. 10. there was no remedy, (as says Sir Francis Bacon) * and that very * P. 137. truly, except in the court of Chancery; but
the same statute conjoins and annexes the land and the use together, so you by this means for the consideration have the land itself, without any further conveyance, which is called a "Bargain and Sale." But those grave senators and worthy statesmen, who made the said act of the 27 H. 8. c. 10. for the transferring of uses into possession, wisely foreseeing that it would be very inconvenient and prejudicial, nay, mischievous, that men's possessions should, upon such a sudden, by the payment of a little money, be transported from them, and perhaps in a tavern or ale-house, and upon strained advantages, did discreetly provide in the same parliament the said act of 27 H. 8. c. 16. that lands, &c. upon the payment of money as aforesaid, should not pass [for an estate of freehold or inheritance] without a deed indented and inrolled, as by the purport of the same act may appear. Now, seeing that the said act of 27 H. 8. c. 16. lands might pass by bargain and sale upon consideration, without deed indented and inrolled, and might pass without consideration in such manner: Therefore I have heard lawyers say, that consideration is still required in a bargain and sale, though it be

* P. 138. by deed intended and inrolled, * according to the statute. Sure I am, that regularly in a deed of feoffment it is not so as formerly is declared, and for the reason before expressed.

DEDISSE.
DEDISSE (a).

THE word *dedi* (by force of an act of parliament made 4 Ed. 1. c. 4. commonly called the statute *De Bigamis*) implies a warranty to the feoffee and his heirs during the life of the feoffor; whereupon Fitzherbert, in his *Natura Brevium*, fol. 134. b. puts a case to this effect, viz. If a man give lands to one in fee by deed, by the words *Dedi Concessi*, *&c.* hereby he shall be bound to warrant the lands of the feoffee by virtue of those words; and if the feoffee be impleaded, he shall have his writ of Warrant, Chart. against the feoffor by reason of the words *Dedi Concessi*, *&c.* but not against his heirs; for the heir shall not be bound to warranty, except the father bind himself and his heirs to warranty, *&c.* by express words in the deed. I know some allege, that because as well the statute, as Fitzherbert, mentions not only *dedi* but *concessi* also; therefore the one without the other implies no warranty: To whom it may be answered, * That the statute itself does *P. 139. plainly prove against them; for the conclusion thereof hath these words, *Ipse tamen feoffator in vita sua ratione proprii doni sui tenetur warrantizare*; and also the testimony of Sir Edward Coke may be produced herein, who affirms, that the statute of *Bigamis, anno 14 Eliz.* in the court of Common Pleas, was expounded, as above is mentioned; namely, that *dedi* did imply the warranty. And Mr. Perkins, c. 2. (b) says, That *dedi*, in a deed of feoffment, comprehends in it a warranty against the feoffor, and so does not the word *Concessi*.

(a) To have given. (b) Sect. 124.
CONCEDESE (a).

I CONCEIVE the word Concessi in feoffments and grants, (the implied warranty excepted, which Dedi creates) to be of the same effect with Dedi, and also with Confirmavi, especially in some cases: To which purpose, hear what Littleton says in his chapter of Discontinuance: Also (says he) in some cases, this verb dedi, or this verb concessi, has the same effect in substance, and shall enure to the same intent as the verb confirmavi: As if I be disseised of a carve of land, and I make such a deed, Sciant præsentés, &c. quòd dedi to the disseisor, &c. or quòd concessi to the

* P. 140. * said disseisor the said carve, &c. and I deliver only the deed to him, without any livery of seisin of the land, this is a good confirmation, and as strong in law as if there had been in the deed this verb confirmavi, &c.

(a) To have granted.

LIBERASSE (b).

THE word Liberavi I take to be of the same nature with Tradidi (c), which I have often seen in feoffments, whereof it is remarkable, that Hepbron the Hittite, when he assured the field of Machpelah to Abraham, Gen. xxxii. 11. used the word tradó, agrum tradó tibi (d), that is, to Abraham, as S. Jerome's translation reads it.

(b) To have delivered.  
(d) I deliver the field to thee.

(c) I have delivered.
FEOFFASSE (a).

THIS word comes from feudum or feodum, which signifies Fee; and is always, or for the most part, used in feoffments, as participating of the same nature.

(a) To have enfeoffed.

CONFIRMASSAE (b).

CONCERNING the word Confirmo, somewhat may be gathered from what hath been spoken * about the verb concedisse, yet I * P. 141. cannot forget how S. Jerome renders the expressing of the said assurance of the said field of Machphelah to Abraham for a possession, in these words, confirmatus est ager (c), &c. Gen. xxiii. 17. And now I come to the second thing considerable in the premises; namely, the Feoffee, whose addition is Generoso.

(b) To have confirmed. (c) The field is confirmed, &c.

GENEROSO.

GENEROSUS, in English we read gentleman; which some derive from the two French words Gentil Home, denoting such a one as is made known by his birth, stock, and race. Sir Thomas Smith calls all those gentlemen who are above the degree of
of yeomen: whence it may be concluded, that every nobleman may be rightly termed a gentleman, *sed non vice versá*. Mr. Cowel conceives the reason of the appellation to grow, because they observe *gentilitatem suam* (a), the propagation of their blood, by giving or bearing of arms, whereby they are distinguished from others, and shew from what family they are descended.

(a) His gentility.

* P. 142. * Hæredibus et assignatis suis (b).

SOME will have an heir so called *quia hæret in hæreditate* (c), or *quia hæret in se hæreditas* (d): but to let such conceits of witty invention pass, it is certain that an heir is so called from the Latin word *Hæres*.

Mr. Littleton, in his chapter of Fee-Simple, says, that these words "*his heirs*" only make the estate of inheritance in all feoffments and grants, &c. sure then it is necessary for him who purchases lands, &c. in fee-simple, to have the feoffment run to himself *et hæredibus suis*; for if it run only to himself *et assignatis suis*, although livery and seisin be made accordingly, and agreeably to the deed; yet thereby only an estate for life shall pass, because there wants words of inheritance: and yet without livery and seisin, in the case aforesaid, only an estate at will shall pass. And the reason why the law is so strict in this thing, (as in many others) for to prescribe and appoint such certain words to create and make an estate of inher-

(b) To his heirs and assigns.

(c) Because he is fixed in the inheritance.

(d) Because the inheritance is fixed in him.
ritance is, (as Mr. Plowden says in his Commentaries) for the eschewing and avoiding of incertitude, the very fountain and spring from whence flows all manner of confusion and disorder, which the law utterly condemns and abhors. What herein has been said is to be apprehended and understood of persons in and according to their natural capacities. Yet perhaps an estate of inheritance may sometimes pass in a deed of feoffment by words, which may have reference and will relate to a certainty, for *certum est quod certum reddi testa* (a): as for example; you enfeoff me and my heirs of a certain piece of land, to hold to me and my heirs, &c. and I re-enfeoff you in as large, ample, and beneficial manner as you enfeoffed me: in this case (they say) you have a fee-simple for the reason above expressed. So I come next to see, what observations a deed of feoffment further affords.

(a) That is certain which can be made certain.

**Totam ill. pec. terrae cont.** *(b)*

Very necessary and convenient it is in deeds of feoffment, &c. to have the lands, &c. thereby intended to be conveyed, certainly and expressly to be set down, as well how much by estimation in quantity they contain, as the quality of the same, whether meadow, pasture, &c. being the species of land, (which is the *genus*) and the place where, and manner how, they exist and lie,* the *P. 144.* better to shun and avoid doubt and ambiguity, which oftentimes stir up occasions of unkind

(b) All that piece of land containing.
suits and contentions betwixt party and party. I know that grammarians, reading the word *peciam,* will be ready to smile; and allege, that it cannot defend itself in *bello grammaticalni,* which I easily confess: but what then? What can they infer from hence? Will they therefore utterly condemn the use thereof? Methinks they should not; but might give lawyers leave to speak in their own dialect. But what if some take exceptions at this word, having occasion to meet with it here, what would they do should they read the volumes of the law, where, instead of *bellum,* they shall find *guerra;* instead of *sylca,* they shall find *boscus,* and *sub-boscus,* with a thousand the like. Surely (as says Erasmus) they might commend or else condemn what they could not understand, or haply understanding, might admire from whence such uncouth words should proceed: for their better information (if I thought they would thank me for my labour) I could tell them, that because the Saxons, Danes, and Normans, have all had some hand, or at least a finger, in our law: therefore through the mixture of their several languages, it comes *P. 145.* to pass, that such difficult terms and harsh Latin words (if I may so call them) are frequently obvious in the books and writings of the law. And indeed I see no reason why any man should object or cavil against the usage of such words, though they be not classical, seeing, that as well in the art of logic, as in philosophy, there are found many words, which they call *vocabula artis*(a), which can no better stand, according to the strict rules of grammar, than the ancient words of law which cannot be changed without much inconvenience.

(a) Terms of art.
ACRA.

ACRA, in English, an acre, seems to come from the Latin word *ager*. An acre is taken to be a quantity of land containing forty perches in length, and four in breadth. Mr. Crompton, in his Jurisdiction of Courts, says, that a perch is in some places more, and in some places less, according to the different usages in different countries; and so then it must needs be of an acre. But ordinarily, or for the most part, a perch is accounted and esteemed to contain ten feet and a half in length. I take it to be the same with that measure which we call a rod or pole. A perch in law Latin is *P. 146. called pertica or perticata*. See the ordinance made for measuring of land, anno 34 Ed. 3. in Pulton's Abr. title Weights and Measures.

QUARENTENA.

QUARENTENA, in English, a furlong or furrow long. *Firlingus or firlingum* is the same. It has been sometimes accepted and taken for the eighth part of a mile, anno 35 El. 6. and I have read that *Firlingus or Firlingus terrae continet 32 acras*. The Latins call it *Stadium*.

ABBUTTO.

ABBUTTO is a verb used by lawyers to shew how the heads of lands do lie, and upon what other lands or places, denoting for the more certainty what
what lands, &c. are adjacent about the lands, &c. abbutalled. And now, that I may speak once for all, in regard that lawyers do use to abbreviate their words in writing, the reason is not (as some ignorantly have supposed) because they cannot express their terminations and endings, as they ought to be, but because of the multiplicity of business * P. 147. which they are to go* through, oftentimes requiring very sudden dispatch. Yet I could wish that the custom of short writing *alicui scriptori non esse dispendium (a); but I fear me too many hereby take occasion to be wilfully ignorant, which otherwise pervadventure they would not do.

(a) That it might not be troublesome to any other writer.

MILITIS (b).

MILES, amongst the Latins, signifies a soldier; and in this place, and the like, Miles is to be Englished a knight, which (as Mr. Camden notes) is derived from the Saxon Gnite or Cnight. The heralds will inform you of divers and sundry orders of knights, if you please to consult with them or their writings thereabouts. A knight at this day is, and anciently has been, reputed and taken for one, who for his valour and prowess, or other service for the good of the commonwealth performed, has by the king's majesty, or his sufficient deputy on that behalf, been, as it were, lifted up on high, advanced above or separated from the common sort of gentle- men. The Romans called knights Celeres, and some-

(b) Vide 2 Vin. Abr. 81—63. Additions (C).
times *Equites*, from the performance of their service upon horseback; and amongst them there was an order of gentility styled *Ordo Equestris*, but distinguished* from those they called *P. 148. Celeres*, as several Roman histories do plainly testify. The Spaniards call them *Cavallero’s*, the Frenchmen *Chevaliers*, and the Germans *Rieters*; all which appellations evidently enough appear to proceed from the horse, which may be some testimony of the manner of the execution of their warlike exercises. And surely it is a very commendable policy in states to dignify well-deserving persons with honourable titles, that others may thereby be stirred up to enterprise and undertake heroic acts, and encouraged to the imitation of worthy and renowned virtues.

**ARMIGER.**

*ARMIGER*, in English, signifies Esquire, from the French, *Escuier*; and perhaps an esquire may be called *Armiger quasi arma gerens*, from his bearing of arms. Ancient writers and chronologers make mention of some who are called *Armigeri*, whose office was to carry the shield of some nobleman. Mr. Camden calls them *Scutifieri*, which seems to import as much, and *hominis ad arma dixti*. They are esteemed and accounted of amongst us next in order to knights.
CLERICUS, in English, we read clerk. It has with us two sundry kinds of acceptations: in the first sense it notes such a one who by his practice and course of life exercises his pen in any of the king’s majesty’s courts, or elsewhere, making it his calling or profession. Hereupon you shall find in the current of law mention made of divers clerks: as for example; the clerk of the crown, the clerk of assize, the clerk of the warrants, the clerk of the market, the clerk of the peace, with many others. In the second sense, it denotes such a one as belongs to and is employed about the ministry of the church, that being his function; in which signification it is to be taken in this place, and in the like: for I, for my part, did never find clerk in the first sense appropriated to any as an addition simply. We have the use of the word Clericus from Clerus or Clericatus, signifying the clergy; that is to say, the whole number of those who, properly so called, or rather strictly, are de Clero Domini, i.e. hereditate sive sorte Domini; for Clerus cometh from ἀλήφ, a Greek word signifying the same with sors in Latin, namely, a lot or portion.

THE office of the habendum is to name again the feoffee, and to limit the certainty of the estate; and it may, and does some times, qualify the general implication of the estate, which by construction and intendment of law passes in the premises: for an example.
example whereof, see Buckler's case, in the second book of Sir Edward Coke's Reports, and Throckmorton's case, in Plowden's Commentaries. It is to be noted, that the premises may be enlarged by the *habendum*, but not abridged, as it plainly appears as well in the said case of Throckmorton, as in Worteslie's case, reported also by Mr. Plowden. And I have read (as my collections tell me) that it is required of the *habendum* to include the premises. Moreover, the *habendum* (as W.N. Esq. has it, in the Treatise of the Grounds and Maxims of the Law) must not be repugnant to the premises, for if it be it is void, and the deed will take effect by the premises, which is very worthy of observation.

*THE TENENDUM.* *P. 151.*

THE tenendum, before the statute of Quia emptores terrarum, made 18 Ed. 1. was usually *de feoffatoribus et haeredibus suis, et non de capitalibus dominis feodorum, &c.* viz. of the feoffors and their heirs, and not of the chief lords of the fee, &c. whereby there happened divers inconveniences unto lords; as the losing of their escheats or forfeitures, and other rights belonging to them by reason of their seignories, which as the same statute expresses it, *durum et difficile videbatur,* &c. Whereupon it was granted, provided, and enacted, *Quod de caterto liceat unicuique libero homini, terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita tamen quod feoffatus teneat terram illam seu tenementum illud de capitali domino feodi illius, per eadem servitiae et consuetudines per quae feoffator suas illa prius de eo tenuit.* Que estate fuit fuit (as says one) *pur l'avantage del seignior.*
seignior. Which statute was made for the advantage of lords, and indeed I easily believe it. Now it is evident from that which has been declared out of the said statute, that at this day the *tenendum*, where the fee-simple passes, must be of the *P. 152. chief* lords of the fee, &c. for no man, since the said statute, could ever convey lands in fee to hold of himself, out of which rule the king only (I think) may be excepted: And it is not in silence to be passed over, that where lands, &c. are conveyed in fee, though there be no *tenendum* at all mentioned, yet the seofflee shall hold the same in such manner as the seofflor held before, *quia fortis est legis operatio*, the statute so determines.

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**THE CLAUSE OF WARRANTY,**

*Et ego et haeredes mei, &c. warrantizabimus, &c. defendemus (a).*

**WARRANTIZO** is a verb used in the law, and only appropriated to make a warranty. Mr. Littleton, in his chapter of Warranty, says, *Que cest parol, &c. that this word warrantizo makes the warranty, and is the cause of warranty, and no other word in our law; and the argument to prove his assertion is produced from the form and words used in a fine; as if he should say, Because the word *defendo* is not contained in fines to create a warranty, but the word *warrantizo* only; *ergo, &c. which argument deduced and drawn à majore ad minus is very.*

(a) And I and my heirs, &c. will warrant, &c. defend, &c. forcible.
forcible, for the greater being enabled, needs must the * lesser be also enabled; * P. 153. 

Omne majus in se continet quod minus est, et quod in majori non valet, nec valet in minori (a). But certainly Mr. Littleton is to be understood only of an express warranty in deed, and of a warranty annexed to lands, for there may be and..are other words which will extend and enure sufficiently to warrant chattels (b), &c. and which will imply a warranty in law; as dedi, &c. and * excambium (as I have heard say) implies a warranty in law, which from Glanvil's Vel in excambium, or escambium datione, l. 3. c. 1. may receive some confirmation. And Mr. Littleton, in his chapter of Parceners, teaches, that partition implies a warranty in law, &c. And lest some may here say, that defendemus stands for a cypher, I will tell them what Bract. declares of it, speaking about a warranty in deed from the feoffor and his heirs, whose words are these, Per hoc autem quod dicit (scilicet feoffator) defendemus, obligat se et hæredes suos ad defendendum si quis velit servitutem ponere rei datae contra formam donationis, &c. Lawyers in their books make mention of three kinds of warranties, viz. warranty lineal, warranty collateral, and warranty which commences by disseisin. The first is, when one by deed binds both himself and his heirs to warranty, and after * * P. 154. death this warranty descends to and upon his heir. The second is in a transverse or over-thwart line, so that the party on whom the warranty 

(a) Query of this deduction, from the greater to the lesser. It might be drawn in most cases, à minori ad majus; but not vice versa. In Co. Litt. 260 a. à minori ad majus, is twice printed by mistake for à majori ad minus, which is just the reverse of the above error.

(b) Sed vide ante, note 200 (b).
descends cannot convey the title which he has in the
land, from him who was the maker of the warranty.
The third and last is, where a man unlawfully enters
upon the freehold of another, thereof disseising him,
and conveys it with a warranty; but this last cannot
bar at all. Of these you may read plentiful and ex-
cellent matters and examples in Mr. Littleton's chap-
ter of Warranty, and Sir Edward Coke learnedly
commenting upon him, to whom for further illustra-
tion hereof I refer you; as also to Mr. Cowel's inter-
pretation of words in the title of Warranty, who
there states divers things very worthy observation
concerning it. Before I come to the fifth part of
the deed of feoffment, give me leave to observe,
that a warranty always descends to the heir at the com-
mon law, and follows the estate (as the shadow of the
substance) and whencesoever the estate may, the war-
ranty may also be defeated, and every warranty (as
says Sir Edward Coke) which descends, does de-
send to him that is heir to him which made the war-
ranty by the common law.

* P. 155. * And moreover it is to be noted, as may
be gathered from what hath been formerly
said, that an heir shall not be bound to an ex-
press warranty, but when the ancestor was bound
by the same warranty; for if the ancestor was ne-
ever bound, the heir shall never be charged. And I
remember I have read a case in Br. Abr. 35 H. 8.
pl. 266. to this purpose; Si home dit en son gar-
 ranty, Et ego tenementa prædicta cum pertinentiis
 præfato A. B. le donee warrantizabo, & ne dit, ego &
heredes mei il mesme garrantera, mes son heir nest
tenus de garranter, pur eco que heirs ne sont expresse
en le garrante. B. Garr. 50. So will I forbear to
speak any further herein, being a very intricate and
abstruse kind of learning, requiring the pen of a
cunning
cunning and experienced lawyer. And now I address myself to the fifth orderly or formal part of the deed of feoffment, the clause of *In cujus, &c.*

*In cujus rei testimonium (a), &c.*

This clause is added as a preparatory direction to the sealing of the deed: For sealing is essentially required to the perfection thereof, because it plainly shews the feoffor's consent to, and approbation of what *therein is contained. *P. 156. Hereupon it will not be much devious or out of the way to make some mention of those fashions, which in the manner of sealing and subscribing of deeds, have been anciently used by our ancestors. Some report, that the Saxons in their time (before the Conquest) used to subscribe their names to their deeds, adding the sign of the cross, and setting down in the end the names of certain witnesses, without any kind of sealing at all. But when the Normans came in, as men loving their own country guises, they per petit & petit, changed that custom, as also many others which they found here. And Ingulphus, who was made Abbot of Croyland in Anno Domini 1075, seems to confirm this opinion in these words, *Normanni cheirographorum confectionem cum crucibus aureis, & aliis signaculis sacris in Anglia firmari solitam, in cera impressa mutant.* Yet I have read of a sealed charter in England before the Conquest, namely, that of St. Ed. made to the Abby of Westminster: Yet surely this does not altogether impugn that which has been formerly said; for I have seen in Mr. Fabian's Chronicle, and elsewhere, that St. Ed. was educated in Nor-

(a) In witness v. hercof, &c. mandy,
mandy, and it is not unlikely but he might in some things incline to their fashions. The Frenchmen have a *proverb, Rome n'a
este bastie tout en un jour, and we in England use the same, namely, Rome was not built in one day; so it cannot be conceived that the Normans in an instant did alter the Saxon custom wholly in this particular, but that it did change by degrees, and perhaps at the first the King had some nigh unto and about him did use the impression of a seal, which I am somewhat persuaded to believe from a certain story which I have heard concerning Richard de Lucy, Chief Justice of England, who, in the time of H. 2. is said to have chidden an ordinary man, because he had sealed a deed with a private seal, quant ceo pertain al Roy & Nobilite solement. In the days of Ed. 3. sealing and seals were very usual amongst all men; for proof whereof I need not produce any other testimony but the deeds themselves, whereof almost every man has some. But I must remember that Sir Edward Coke, in the first part of his Institutions (fol. 7 a.), seems to overthrow the former opinions about the first using of seals in England: The sealing of charters and deeds (says he) is much more ancient than some have imagined; for the charter of King Edwin, brother of King Edgar, bearing date Anno Domini 956, made of the land called Jecklea, in the isle of Ely, was not only sealed *with his own seal (which appears by these words), Ego Edwindus grátia Dei totius Britannicæ telluris Rex meum donum proprio sigillo confirmavi; but also the Bishop of Winchester put to his seal, Ego Elysiimus Winton. Ecclesie divinus speculator proprium sigil- lum impressi. And the charter of King Offa, whereby he gave the Peter-pence, does yet remain under seal.
OF THE DATE, DAT'.

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The either of which two charters are much more ancient than that of St. Ed. before mentioned: Yet haply there may be some reason probably affirmed, why as well King Edwin and the Bishop of Winchester, as Offa, who was King of Mercia about the year 788, did annex their seals to their charters, which no king of England, or nobleman, did before or after them (except St. Ed.), until the coming in of the Conqueror, that ever I could learn, hear, or read of in any author. Nevertheless I must of necessity leave the search of such reason to others better studied in the commentations and alterations of persons, times, and customs, than I myself: However, I never heard any one deny, but that the frequent use of sealing deeds did commence in the time of Ed. 3. and was not ordinarily used amongst private men until then, as has been formerly touched.

* OF THE DATE, DAT'. * P. 159.

In this clause the stile of the King at large, the year of his reign, and the year of our Lord God, according to the computation and account of the Church of England, together with the day of the month, are expressed. In former times, deeds were often made without date, and that of purpose, that they might be alleged within the time of prescription, as Sir Edward Coke, in his said book of Institutes (fol. 6.), very worthily observes: And moreover, that the date of deeds was commonly added in the reign of Ed. 2. and Ed. 3. and so ever since, to whom I refer you, who in the place last quoted, has very excellent matter and observations thereabouts.
LIVERY OF SEISIN.

LIVERY of seisin is a ceremony in law used in the conveyance of an estate of freehold at the least, in lands and other things corporeal: But in a lease for years, at will, &c. livery of seisin * P. 160. is not required, it * being only a chattel and no freehold. By livery of seisin, the feoffor declares his willingness to part with, that whereof he makes the livery, and the feoffees acceptance thereof is thereby made known and manifested. The author of the new terms of the law says, That it was invented as an open and notorious thing, by means whereof the common people might have knowledge of the passing or alteration of estates from man to man, that thereby they might be the better able to try in whom the right and possession of lands and tenements were, if they should be impanelled on juries, or otherwise have to do concerning the same. The usual and common manner in these days of delivering of seisin I know to be so frequent, that of purpose I will omit it: But I pray you note with me before I make an end, that livery of seisin is of two sorts, viz. livery of seisin in deed, and livery of seisin in law, which is sometimes termed, livery of seisin within the view. Livery of seisin within the view cannot be good or effectual except the feoffee enters into the lands, &c. whereof the livery of seisin was made unto him in the life-time of the feoffor. And it is not to be passed
passed over in silence, that a livery in law may sometimes be perfected * by an * P. 161.
entry in law; as if a man make a deed of feoffment, and deliver seisin within the view, and
the feoffee dare not enter for fear of death, but claim the same, this shall vest the freehold and in-
heritance in him, to which effect you may see the opinions of certain justices, 38 Ass. pl. 23. upon a
verdict of assise in the county of Dorc. And I con-
ceive, that this vesting of a new estate in the said case in the feoffee, making his claim where he dares
not enter, stands upon the same reason; for contra-
riorum eadem est ratio, that the revesting of an an-
cient estate and right in the disseisee does by such
claim, whereof you may read plentifully in Mr. Lit-
tleton’s chapter of Continual Claim. It is worth the obser-
vation, that no man can constitute another to receive livery for him within the view, nor yet to
deliver (as I have heard my Master say); for none
can take by force or virtue of a livery in law, but
he that takes the freehold himself, et est contra.
Otherwise it is to take and give livery of seisin in
deed, for there as well the feoffee in the one case
may ordain and make his attorney or attorneys in
his name and stead to take livery, as the feoffor in the
other case to give livery; Concurrentibus
iis qua in jure requiruntur. And now * let * P. 162.
delivery of the deed be added to the seal-
ing thereof, and the estate executing of the lands
thereby conveyed, and then I presume none will
refuse to allow, that every thing has been named,
which is essentially required to the perfection of a
bare deed of feoffment; and although I have men-
tioned the delivery of the deed in the last place, yet
it is not the least thing, or of the least consequence
or moment; for after a deed is sealed, if it be not
BB2 delivered
delivered est a nul purpose, it is to no purpose, and the delivery must be by the party himself, or his sufficient warrant. So it may be gathered from what has been said, that sealing of deeds without delivery is nothing, and that delivery without sealing will make no deed; but that both sealing and delivery must concur and meet together to make perfect deeds.

I hope such as are present at the sealing and delivering of deeds of feoffment, and the estate executing thereupon, will not forget to subscribe their names or marks, as witnesses thereof, whereby they may the better be enabled to remember what therein has been done, if peradventure there shall be occasion to make use of them. And it is not amiss * P. 163. here before I end to observe, that * although upon deeds of feoffment, &c. it was not usual before the latter end of II. 8. or thereabouts, to indorse or make mention upon such deeds of the sealing and delivering of the deeds, or estate executing of the lands, &c. intended thereby to be conveyed, for I myself have many deeds of feoffment which do testify as much; yet it is to be credibly supposed, and not without some manifest probability, that such persons whose names are inserted after a certain clause in such deeds, beginning with his testibus, were eye-witnesses of all. Thus desiring you to take notice, that I have called the said six parts of the feoffment Formal; because they are not absolutely of the essence of deeds, &c. manebo in hoc gyro, I will here conclude, requesting all those to whom any sight hereof shall or may happen to come, friendly to admonish me of my failings herein, whereby they shall ever engage me thankfully.

A DIA-
A

DIALOGUE AND TREATISE

ON

THE LAW;

AND ON

TENURES, ESTATES, HEREDITAMENTS;

AND

CHATTELS, REAL AND PERSONAL;

AND

IN WHAT MANNER THEY MAY BE RECOVERED AND CONVEYED.

BY WILLIAM NOY, Esq.

THE SIXTH EDITION.
THE DIALOGUE.

How were the multitudes of people at the first divided?
Into families, commonwealths, and kingdoms (a).
To what end?
To live godly, peaceably, and quietly together.
How is that performed?
By keeping the law of God, which we call religion; and by executing justice and punishing vice; from which virtue and good manners spring.

* P. 2. * What does best uphold and maintain these things?
The law (b).

(a) See Ferguson's Essay on the History of Civil Society; Millar on the Origin of the Distinction of Ranks in the different Members of Society; Stuart's View of Society in Europe, in its progress from Rudeness to Refinement; Strahan's Domat. vii. ed. 1722, ch. 2; Esprit des Loix de Montesquieu, liv. 1. ch. 2; Taylor's Elements of Civil Law, 260.

(b) Law in general is human reason, inasmuch as it governs every people on earth; and the civil and political laws of each nation should only be particular cases to which this human reason is applied. They ought to be so adapted to the people for whom they are made, that it would be difficult for the laws of one nation to suit another. They ought to bear a relation to the nature and to the principle of the government which is established or intended to be established; whether they form it, as political laws, or whether they preserve it, as civil laws. They ought to bear a relation to the nature of the country, to the frozen, burning, or temperate climate; to the quality
How manifold is that?
Two-fold, viz. The law of nature, and the law written.
What is the law written?
It is either divine or civil.
What does the civil law work?
A defence and encouragement to the good, and a bridling and punishment of the evil.
What else does it work?
A security to the life of man, and quiet enjoyment of Meum and Tuum.
How came in Meum and Tuum?
By the law of jus gentium, whereby right and property to lands, tenements, goods, and chattels, are belonging to men (a).

How quality of the soil, to its situation, to its extent, to the kind of life pursued by the natives, be they husbandmen, hunters, or shepherds; they ought to bear a relation to that degree of liberty the constitution can admit; to the religion of the inhabitants, and their inclinations, to their riches, to their number, to their commerce, to their morals, to their manners. In short, they have relations to each other, they have also relation to their origin, to the objects of legislation, and to the order of things on which they are established; and it is under all these points of view that they should be considered. Montesquieu's Spirit of Laws, b. 1. ch. 3.

(a) It is certain that there was a great simplicity in the early ages of mankind; that the terms of meum et tuum were not understood; that no man could call any thing his own, and therefore had no right to inclose it, or separate it from the use and enjoyment of others. To conceive this aright, let us but imagine it probable, that all the great improvements of life were struck off nearly at once. The acknowledgments which the ancients paid to Ceres and Bacchus (or however to those persons whom Ceres and Bacchus represented) to those—

"Who gave them corn for mast, for water wine:"

Dryden's Virg. I. Georg. 10.

were well intended, if those inventions had stopped even there. But refinement shewed the way to refinement. For whilst
THE DIALOGUE.

How does every subject in England claim and hold his lands and goods?
By estates in law.

whilst mankind were contented with the simplicity of their original diet, it was indifferent to them which oak shed the acorn, and which rock distilled the beverage. The world was all before them; and there was as little of choice, as there was of elegance in the entertainment. But see how considerably the case was altered, upon the invention of agriculture! There was not a man who planted a vineyard but like the householder in the parable, He hedged it round about, Matth. xxi. 33. And in like manner, when the husbandman had spent his strength in manuring and tilling the ground, and in the sweat of his face had prepared his bread, Gen. iii. 19. it became needful to inclose, and to distinguish it, that others might not reap where he had sown. When labour therefore had given the relish to their enjoyments, it was natural for them to secure what had cost them so much fatigue in the preparation.

Hominibus, says Justin of the Scythians, II. 2. inter se nulli fines: Neque enim agrum exercent. But as the boundaries and landmarks rather described than fenced, rather pointed out where avarice ought not to intrude, than secured the pass where violence would sometimes presume to enter, some collateral security was thought necessary: and that collateral security was a general agreement. There was a mutual engagement to stand by each other in these appropriations: and what we call law, was the condition of the obligation. Next, the utility of these engagements soon extended them beyond the considerations of property: and it came to pass, that not only every man's right was fenced in with proper inclosures, but the boundaries of the human passions also were as well regulated as their estates: the voice of the law pronounced now in a general language, Hitherto may'st thou come, but no further: and thus by a regular process the culture of the field ended in the culture and refinement of manners. Taylor's Elements of Civil Law, 448. 451. 452, 2d ed. Vattel's Law of Nations, 93, ed. 1797, b. 1. ch. 18. Pufendorf's Law of Nature and Nations, 361, ed. 1729, b. 4. ch. 4. Grotius on War and Peace, 142, ed. 1738, b. 2. ch. 2. Cowel's Inst. 57. b. 2. tit. 1. s. 11.
THE DIALOGUE.

How many estates in law are there in lands and tenements?
Three, viz. Estates of inheritance, freehold, and chattels real.

How are estates of inheritance divided?
Into fee-simple and fee-tail.

How are fees-simple divided?
*Into fees-simple absolute, and fees-simple *P. 3. conditional.

What is an absolute fee-simple?
When lands are given to me, and to my heirs for ever.

What is a fee-simple conditional?
When lands are given to me, and to my heirs for ever, upon condition I do such or such a thing, &c. (a).

(a) Before the statute de donis conditionalibus, 13 Edw. 1. c. 1. 2 Inst. 331. a gift of lands to a man and the heirs of his body, or to a man and his wife, and the heirs of their bodies, or given in free marriage, was a 'fee-simple conditional. Litt. s. 13. That statute has deprived the feudatory of his ancient power of alienating the lands, or charging them with rent, common, and the like, Co. Litt. 19 a. upon having issue, or performing the condition. The pretence of this statute, as appears from the preamble, was to comply with the will of the donor, who in all such grants intended, that the feud should be transmitted to the descendants of the feudatory in the same state he received it; and upon failure of the descendants, that it should revert to the donor himself, Willion v. Berkley, 1 Plow. Com. 235: but the real design of making the statute, was to raise the pride of great families, 1 Burr. 115; and to introduce a perpetuity to other purposes, which was contrary to the original policy of the English law; for, towards the end of the barons' wars, the crown took a new method to break the interest of the baronage; and when any feud subsisting in large districts and territories escheated, or was forfeited to the crown, the king divided it, and gave it out in lesser feuds, thereby to destroy the power of the peerage: this, the barons saw, would tend to the ruin of their body, and therefore passed this
THE DIALOGUE.

How are estates-tail divided?
Into estates-tail general and special, and into tenant in tail after possibility of issue extinct.

What is an intail general?
When lands or tenements are given to I. S. and to the heirs of his body lawfully begotten, or to be begotten.

What is an intail special?
When lands or tenements are given to a man, and to his wife, and to the heirs of their two bodies, between them lawfully begotten (a).

Who is tenant in tail after possibility of issue extinct?
When lands are given to a man and his wife, and to the heirs of their two bodies between them lawfully begotten, if the man or wife die without issue between them, the survivor is tenant in tail after possibility, §c. (b).

* P. 4. * Is such a tenant punishable for committing waste or not?
No, he is not punishable for waste (c), yet he may forfeit his estate by granting a greater estate to another than he has himself.

May

this act to make all such new fees unalienable, and by that means not forfeitable as a fee-simple, and fee-simple conditional were, Co. Litt. 19 a. for treason or felony of the feudatory, although the condition should be performed by having issue; and from the time of this statute, the donor's possibility, or right of reverter, was turned into a reversion; and the donee, who before had a fee-simple conditional, has now but an estate tail. 2 Bac. Abr. 540. Estate Tail. 1 Cru. Dig. 80, 2d ed. vide next note.

(a) Vide ante, 70, note (d).
(b) Litt. s. 32. 2 Bl. Com. 124. 2 Bac. Abr. 554.
(c) P. N. B. 59. P. 2 Inst. 502. Doct. & Stud. 102, 18th edit. Dial. 2. ch. 1. And so being unpunishable for waste by law, he has equally with tenant for life, without impeachment of
May other tenants in tail forfeit their estates?
No, unless they commit treason (a).

How is freehold divided?
Into four parts, viz. tenant by courtesy, tenant in

of waste by settlement, an interest and property in the timber. *Williams v. Williams*, 15 Ves. 419. 427. But the Court of Chancery, by analogy to the rule adopted in the case of tenant for life, without impeachment of waste, will restrain tenants in tail after possibility of issue extinct, from pulling down houses, cutting down trees planted for shelter or ornament; or any other kind of malicious waste, *Abraham v. Bubb*, 2 Freem. 53. 2 Show. 68. *Anon. 2 Freem. 278*: because the court will never see a man disinherited. 6 Bac. Abr. 287.

1 Cru. Dig. 156, 2d ed.

(a) Their exemption from forfeiture under the statute *de donis* was not agreeable to the rapacious principles of Henry the Eighth, and he had the address to procure the statute 26 Hen. 8. c. 15. by which, and by 5 & 6 Edw. 6. c. 11. if any tenant in tail in possession, or who has a right of entry, be attainted of high treason, the estate tail is barred, and the land is forfeited to the king. Co. Litt. 372 b. But where a tenant in tail, with the remainder to a subject, discontinues his estate tail before his attainer, his issue having only a right of action, is not affected by it, *Marquis of Winchester's case*, 3 Co. 3 a. *Dowty's case*, 3 Co. 10 b. 1 Hal. H. P. C. 242; though where the immediate reversion is in the crown, Co. Litt. 335 a. the tenant in tail cannot create a discontinuance of the estate tail; because no estate of inheritance or freehold can pass or be removed from the crown without matter of record, *Walsingham's case*, 2 Plow. Com. 552-3: and no one can discontinue an estate tail, unless he discontinue the reversion of him who has the reversion or remainder; Litt. s. 625, and therefore a right of entry remains in the issue, and which is forfeited by the attainer. 2 Hawk. P. C. 642, 6th edit. Bk. 2. ch. 49. Estates in remainder are not forfeited by the attainer of the person having the first estate tail; and in that case the crown only acquires a base fee, determinable on the failure of the heirs in tail of the person attainted. 2 Plow. Com. 557.

As to felonies, the statute *de donis* still remains in force, so that by attainer of felony, estates tail are only forfeited during the life of the tenant in tail, and the inheritance is preserved to the issue. Co. Litt. 592 b. 1 Cru. Dig. 96. 108, 2d edit.

dower,
dower, tenant for his own life, and tenant for another man's life.

How are chattels divided?
Into real and personal (a).

What is a chattel real?
A term for years, the wardship of lands, and tenant at will.

What are chattels personal?
All manner of goods, corn, cattle, household-stuff, and utensils whatsoever.

How does a fee-simple in lands or tenements pass from one to another?

It may pass by a fine, or by deed, in raising a use upon valuable consideration (b), or by deed with livery

(a) Co. Litt. 118 b. ante, 142.
(b) A use cannot be raised by any covenant or proviso, or by bargain and sale upon a general consideration: and therefore, if a man by deed indented and inrolled according to the statute, ante, 150, for divers good considerations, bargain and sell his lands to another, and his heirs, nil operatur inde; for no use shall be raised upon such general consideration, for it does not appear to the court that the bargainor has quid pro quo; and the court ought to judge whether the consideration be sufficient or not; and that cannot be done when it is alleged in such general terms. But the bargainee in such case may aver that money, or other valuable consideration, was paid or given, and if the truth be such, the bargain and sale would be good. So if a man by deed covenant with J. S. for divers good considerations, that he and his heirs will stand seised to the use of J. S. and his heirs, no use without a special averment, will be raised by it; but if J. S. be of his blood, and in truth the covenant was made for the advancement of his blood, he may aver that the covenant was in consideration thereof; for in both these cases the person who is to take the use is certain; and an averment may be taken which stands with the deed, although it be not expressly comprised in the deed. Villers v. Beaumont, Dyer, 146 a. Mildmay's case, 1 Co. 175 b. And where the reservation in a bargain and sale of a pepper corn as rent, to be paid at the end of six months, upon demand, and the release and grant of the reversion thereupon was only
livery of seisin (a), or by a will in writing, signed since the statute of wills, or by a deed without livery,

"for divers good considerations," the whole court adjudged that the reservation of a pepper corn was a good consideration to raise a use to support a common recovery; Barker v. Keat, 2 Mod. 253. See 2 Salk. 677. Sug. Gilb. Uses, 95; but it has been supposed, by mistake, that a pecuniary consideration is necessary to raise a use on a bargain and sale. 2 Sand. Uses, 45, 3d edit. 53, 2d edit. 2 Bla. Com. 339. Gilb. Uses, 47. 4 Cru. Dig. 123. 127, 128. 145, 2d edit. To plead a bargain and sale "for the considerations therein mentioned," generally, without shewing it to be for money or valuable consideration, seems to be ill on demurrer; but it is cured by a verdict, or by taking issue on a collateral fact. Sargent v. Reed, 2 Str. 1229.

(a) The usual conveyance at common law was by feoffment, to which livery and seisin were necessary, the possession being given thereby to the feoffee; but if there were a tenant in possession, and so livery could not be made, then the reversion was granted, and the particular tenant always attorned to the grantee: and upon the same reason it was, that, afterwards a lease and release were held a good conveyance to pass an estate; but at that time it was made no question, but that the lessee was to be in actual possession by means of an actual entry on the lands, before the release was made. Afterwards, when uses became frequent, and settlements to uses very common, to prevent the many inconveniencies thereby introduced, the statute 27 Hen. 8. c. 10. was made, by which the use was united to the possession; and after this statute, it became an opinion, that if a lease for years were made upon a valuable consideration, by the word "demise, lease, or grant," a release might operate upon it, without an actual entry of the lessee, because the statute executed the lease, and raised a use presently to the lessee. This was first practised and continued by Sir Francis Moore, Serjeant-at-law, at the request of Lord Norris, in order that some of his relations might not know what settlement he had made of his estate. Phillips on Capias and Process of Outlawry, 115. Barrington on the Ancient Statutes, 133, 5th ed. 2 Bla. Com. 339. But as some persons were of opinion, that where conveyances may ensue two ways, either by the common law, or by the statute of uses, the common law should be preferred, unless it appeared that
very, inrolled within six months after the date there-
of, by the statute in the 34th year of H. 8. and by a grant

the party intended it should pass by the statute; it became
the usual course, to put the words, "bargain and sell," only
into the lease for a year, and to make it in consideration of five
shillings, or some other small sum, to bring it clearly within
the statute, and to declare in the release that the bargain and
sale was made, to the intent and purpose, that by the statute
of uses, the lessee might be capable of a release; but not-
withstanding this, as Lord Chief Justice North observes,
2 Mod. 252, our learned author was of opinion, that this con-
veyance by lease and release could never be maintained, with-
out the actual entry of the lessee, before the execution of the
release. Et vide ante, 117. 176. His mind, accustomed to the
rational and substantial principles previously established, could
not easily accommodate itself, to the magical influence of the
statute of uses, in secretly transferring lands, by a mere writ-
ing, in opposition to the notoriety of livery and seisin, or entry,
or attornment at the common law; and perhaps the follow-
ing case, put by our great master, Littleton, sect. 459, might
have biassed his judgment: if a man let land to another for a
term of years, if the lessor release to the lessee all his right,
&c. before the lessee enter into the land by force of the lease,
such release is void, because the lessee had no possession in
the land at the time of the release, but only a right to have
the land by force of the lease: but if the lessee enter into the
land, and have the possession of it by force of the lease, then
such release made to him by the feoffor, or by his heir, is suf-
cient to him, by reason of the privity, which by force of the
lease is between them. Lord Coke adds, for before entry the
lessee had but interesse termini, an interest of a term, and no
possession, and therefore a lease which enures by way of en-
larging an estate, cannot work without a possession, for be-
fore possession there is no reversion. Co. Litt. 270. a. The
whole of this reasoning is true at common law, but according
to the construction put on the statute of uses, vide ante,
150 (a), a bargainee for years, by its instantaneous operation,
has an actual vested estate, even although it be by a mere
writing neither indented or enrolled, vide ante, 150 (a), be-
cause the statute of enrolments does not extend to leases for
years, although the intention of the legislature was, that men's
lands should not suddenly and privately pass, upon payment of
a little
grant of a reversion in fee with attorn-ment (a). * But of things incorporeal, there * P. 5. can be no actual livery (b), but they pass by grant in writing only (c), or by lineal descent.

May tenant in fee-simple convey his lands and tenements from his wife and heir?

Yes; he may, to whom and by what estate he will, except it be in mortmain, contra statutum the seventh of Edward the First (d); and excepting such right and dower as his wife has in the same lands.

May he charge these lands?

Yes; either by a yearly rent with a clause of distress, which is called a rent-charge, or by an annuity, or by statute; and also if he die, these lands shall be assets to pay his debts (e).

Is there no forfeiture of these lands?

None, except he commit felony or treason.

May they any way escheat?

Yes; if the tenant die without heir general or spe-

a little money in an alehouse, or the like. Shep. Touch. 223. And the bargainee for years is as capable of a release before or without entry, as a lessee is, at common law after actual entry; and this is now too firmly established to be shaken; although even now, he cannot bring an action of trespass without an actual entry. Barker v. Keat, 2 Mod. 251. Latwich v. Mitton, Cro. Jac. 604. Shep. Touch. 223. If the use of the release be declared to the releasee in fee, he takes the fee by the rules of common law; but if the use be declared to a third person, the statute again operates, and annexes or transfers the possession of the releasee, to the use of the person, to whom the use is declared. Butl. n. Co. Litt. 271 b. (1). III. 3.

(a) Ante, 163 (a).
(b) Ante, 111, 112.
(d) Vide ante, 226 (c).
(e) See Watk. Des. 55. 140, 3d ed.
cial, then the lord of whom they are holden, shall have the same by escheat (a).

What is the law since the statute [Quia emptores terrarum] in such cases?

If at this day, there be lord and tenant in fee-simple, by chivalry and twenty-pence rent; if the tenant enfeoff a stranger of the land, the stranger shall hold of the lord by the same services and rents as the tenant held, and the feoffor or seller shall be excluded, and not retain any interest whatever in the land.

What if the tenant make a feoffment of the land to another, without expressing to whose use?

Then it shall be to the use of the feoffor and his heirs (b); except a valuable consideration be given for the land, in which case it shall be to the use of the feoffees.

What if the tenant since that statute enfeoff a stranger of part of the land?

Then the stranger shall hold of the lord per particular morum, viz. the rent shall be apportioned; as if there be twenty acres of land, and twenty shillings rent, the purchaser shall hold by three shillings rent, for three acres: but if there be an entire service that cannot be apportioned, as a horse, a hawk, &c. the lord shall have the whole (c).

(a) Vide ante, 238 (a).
(b) See Co. Litt. 12 b. and Hargr. n. (2). Lilly's Conveyancer, 242. 3d ed. And he is in of his ancient use, and not by purchase, therefore the descent is not altered. Samme's case, 13 Co. 56. 3 Cru. Dig. 363, 2d ed. Thus, if he were previously seised ex parte materna, the future descent would not be ex parte paterna. See Watk. Des. 181. Sug. Gilb. Uses, 23. 118.
(c) i.e. Such entire service shall be multiplied, and the feoffor as well as the feoffee shall render the entire service. Brucerton's case, 1 Co. 1 a. Talbot's case, 8 Co. 105 b. Co. Litt. 149 b. Gilb. Rents, 170.
The Dialogue.

What if the purchase be of the moiety of the whole land?
There shall be no apportionment of the rent, &c. (a)

What if the lord since that statute purchase parcel of the tenancy?
By that purchase all the entire annual services are extinct, except it be for the * P. 7. profit of the commonwealth (b), when it remains, otherwise it is extinct. For that purpose read Bruerton's case, in the sixth part of Lord Coke, 1.

What if the lord purchase parcel of the land where the rents and services are apportionable?
Then the rents and services shall be apportioned.
Put a case thereof.

If there be lord and tenant of six acres of land, by sixpence rent, and suit of court, if the lord purchase two acres, the rent shall be apportioned (c); but otherwise if the rent and services be entire, as suit of court, homage, &c. then they shall be extinct.

What if these entire services come to the lord of

(a) Because such a feoffee is not within the purview of the statute, the words of which are particula illa, the same parcel, which is understood of a part in severality, and not in common; and a moiety or a third part, &c. pro indiviso, is not particula. 2 Inst. 503. 1 Co. 1 a.

(b) As knight's service, and castle guard, for the defence of the realm; or the administration of justice; or if such entire service were a work of charity or piety. 6 Co. 1, 2. Co. Litt. 149 a. Gilb. Rents, 166.

(c) According to the value, and not according to the quantity. 2 Inst. 503. And this apportionment is the business of a jury, who, upon the evidence offered, are to judge of the value of the land, purchased by the lord or lessor, or aliened by the tenant, according to the statute Quia emptores terrarum, from which evidence it is easy for them to compute, how much is due from the tenant for the residue of the land in his hands. 6 Bac. Abr. 50. Rent, (M) 3.
part of the land, by the mere act of God, or of the law?

Then the entire services shall remain to the lord.

Put a case of that?

If there be lord and tenant of four acres of land, by the service of a hawk, homage, suit of court, and heriot; in this case, if one of these acres descend to the lord, the whole services remain: but * P. 8. if the lord had purchased the said acre, or released to the tenant the services of the said acre, all the services always are extinct.

Also, in this case, if the tenant enfeoff any stranger of one of those acres, the feoffee shall hold subject to the whole services (a). But otherwise if the services may be apportioned, as of common or proper rent, &c. And thereupon are great diversities between rent-service and rent-charge.

What apportionment is there of rent-charge?

Rent-charge is now at this day, as rent-service was before the statute: that if the party who has the rent, purchase any part of the land charged, the whole rent is extinct (b).

May

(a) Ante 294 (c).

(b) Litt. s. 222. But if a man who has a rent service, purchase part of the land out of which the rent issues, the rent service, is not extinguished, but shall be apportioned according to the value of the land; so that such purchase is a discharge to the tenant, for so much of the rent as the value of the land purchased amounts to. 6 Bac. Abr. 47. Rent (M). The reason of the difference is this; in the case of rent service, the tenant is under the obligation of the oath of fealty, to bear faith to his lord, and to perform the services for the land which he holds of him; and this obligation has its force, while the tenure of the lord continues; and the tenure could not be discharged by purchase of part of the tenancy, for that construction would not only be attended with this absurdity, that the remaining part in the tenant's hands would be held of nobody; but in consequence would produce this public inconvenience, that the remainder
THE DIALOGUE.

May a tenure be reserved upon a gift in tail since the said statute?

Yes; as a tenure might have been created and reserved upon lands and tenements in fee-simple, before the statute, so it may be of lands given in tail, since the statute.

What

remainder of the tenancy would be free of all feudal duties, which in the heighth of the feudal tenures must have been a detriment to the public, quia bono publico et pro defensione regni. Co. Litt. 149 b. wherefore, since for this reason, the tenure between the lord and tenant, continued for so much of the land as remained unpurchased, the tenant, by his oath of fealty, was obliged to perform the services of it. But it would be unreasonable and severe, to oblige him to the performance of the whole services reserved, upon the old donation, because the lord had by his own act resumed part of the land, which was the consideration, upon which the obligation to make the annual return of the services was founded; and the medium between these two extremes was, that since the enjoyment of the land was the consideration for the services, the return ought always to be made according to the proportion of the land which the tenant continued in possession and enjoyment of: and therefore, if a man hold his land of another, by homage, fealty, and escuage, and certain rent, if the lord purchase part of the land, &c. in this case the rent shall be apportioned: but yet in this case the homage and fealty abide entire to the lord; for the lord shall have the homage and fealty of his tenant, for the rest of the lands and tenements holden of him, as he had before, because such services are not yearly services, and cannot be apportioned; but the escuage may and shall be apportioned according to the quantity or quality, and value of the land, &c. Litt. s. 223, Co. Litt. 149 b. vide ante, 127 (a). Litt. s. 98, 99. Hargr. n. Co. Litt. 73 a. (2). But in the case of a rent charge, when the grantee purchases parcel of the land, the whole rent is extinguished, because there is no feudal dependence between the grantor and the grantee by the deed of grant which created the rent charge, as there was by the feudal donation which created the rent service; and therefore as these grants, were of no benefit to the public, and afforded no additional strength or protection to the kingdom, Co. Litt. 149 a. the law carries them into execution, only so far as the rent could take effect.
What if the donor reserve no service upon the gift in tail?

Then the donee shall hold (a) by such services as the donor holds over.

effect, according to the original intention of it: and therefore, if the grantee had wilfully, by his own act, prevented the operation of the grant, according to the original intention of it, the whole grant was to determine. And when a rent charge is granted out of land, the rent issues out of every part of the land, and consequently every part of the land is subject to a distress for the whole rent; and therefore, when the grantee purchases part of the land, it is become impossible, by his own act, that the grant should operate in that manner: because it is absurd, that the grantee should distraint his own lands, or bring an assayse against himself. And therefore such grants, after such purchase, have been adjudged void: and the rather, because, in their original creation, they were against the reason and policy of the law; since they were so far from contributing to the strength of the kingdom, that they really weakened it, because the tenant, whose land was subject to such charge, was the less able to provide himself for the field, or to perform the duties of the feudal or military tenure; and the grantee was under no obligation to attend the grantor in the wars, or venture his life for the public, on account of the benefit he received from the grant, as the person who took under the feudal donation was obliged to do; and therefore, such grants are said in the law books to be against common right; Co. Lit. 147 b. that is, they were against the policy of the feudal structure, Gilb. Rents, 133. But in this case, if the grantor by deed, reciting the purchase, had granted, that the grantee should distraint for the same rent in the residue of the land, the whole rent charge had been preserved; because such power of distress had amounted to a new grant. Gilb. Rents, 131. and so when a person sell a part of land, out of which a rent issues, and it is intended, that the part sold should be free from the rent, the lord should exonerate the land conveyed from the rent, and the vendor should give him a power of distress and entry, for the whole rent, on the part not sold; or if the lord will not consent to that, the vendor should grant to the vendee, a power of distress and entry on the land not conveyed, for the rent the grantee may be obliged by the lord, to pay.

(a) Of the donor, 6 Bac. Abr. 439. Tenures (D).
How is this to be understood?

* Where the reversion in fee-simple remains in the donor.

What if the reversion be granted over?

Then the grantee thereof, shall hold his reversion of the chief lord.

Is the king bound by the statute of Quia emptores terrarum?

No; the king is not subject to that statute (a).

Upon what things may a tenure be reserved?

Properly upon a feoffment, or gift in tail, of lands or tenements, and of corporeal things, into which may be an entry or manual occupation.

Of what things may no tenure be reserved?

Upon incorporeal things; as courts, rents, ways, fisheries, and the like.

Of what things in nature must the tenure be?

Of things which are either profitable to the feoffor or donor, or to the commonwealth.

May the service upon the tenure be reserved to be done by a stranger?

They cannot properly be so reserved.

Can the tenant hold his land by two tenures?

No; one parcel of land cannot be holden by several tenures.

* What tenure and service may be reserved upon an estate of freehold?

Commonly upon an estate of freehold nothing is reserved but rent, and to that rent, fealty is incident, by proper right.

What is freehold?

An estate for one's own life, or for another man's life.

(a) 11 Co. 68 b. 5 Bac. Abr. 560. Prerogative (E) 4. i. e. The king may give lands in fee-simple to hold of himself, in frankalmoigne, Litt. s. 140. Hargr. n. Co. Litt. 100 b. (1). 12 Cha. 2. c. 24. s. 7. or in free or common socage, ante, 127 (a).
How does it pass?

Either by writing or by parol (a): and on the same generally, there must be a livery of seisin (b).

How many kind of estates for life are there?

There are four: tenant for his own life, for another man's life (c), tenant in dower, and by curtesy.

Have these the like power as the other tenants have?

No; tenant for life, or tenant for years, cannot grant a greater estate to another, of the lands, then he has himself; nor can he commit waste, or charge or incumber the lands longer than he has an estate therein.

What do you call waste?

Waste is properly any thing that is done or committed in the land to the disinheriting of the lessor, or of him in the reversion (d).

(a) Ante, 151 (a). 3 Bac. Abr. 157.

(b) On leases for lives from ecclesiastical and other persons, deriving their effect from the principles of the common law, livery of seisin, or something tantamount to it, is necessary; such as a lease for a year at common law, and a release in enlargement for the lives, after an actual entry by the lessee; or a bargain and sale for a year under the statute of Uses, and a release in enlargement for the lives. But a lease for lives under a power, deriving its effect from the statute of Uses, may be created in the mode prescribed by the power, without any of the above-mentioned ceremonies. The reason is, the lease, or, more correctly speaking, the appointment, takes effect by way of limitation of the use out of the original seisin of the feoffees or releases, to uses; and it operates by way of shifting use pro tanto. 12 Mod. 201. 1 Vent. 291. 2 Lev. 149. 13 Vin. Abr. 170, pl. 15. 4 Bac. Abr. 157-8. 4 Cru. Dig. 202. s. 6, 2d edit. SImg. Pow. 95. 200, 2d edit. 1 Sand. Uses, 155. 158, 3d ed. Butl. n. Co. Litt. 271 b. III. 4. Powell's Fearne's Executory Devises, n. 382.

(c) Vide note, ante, 96, on Estates pour autre vic.

(d) ? Bac. Abr. 251, Waste (C).
THE DIALOGUE.

*Who shall punish waste or forfeitures? * P. 11.

He who is next in reversion or remainder, in the land of an estate of inheritance (a).

By

(a) Either in fee-simple or in fee-tail; but sometimes another shall join with him for conformity; as if a reversion be granted to two, and to the heirs of one of them; those two shall join in an action of waste; and in like manner the surviving coparcener, and the widower of the deceased coparcener, who is tenant by the curtesy, shall join in an action of waste; and if there be two joint-tenants for life, with the remainder to the heirs of one of them, and they make a lease for life, they shall join in an action of waste: so if there be a fine to the use of A. for life, remainder to B. in fee, with power for A. to make leases for three lives; A. makes a lease accordingly, and the lessee commits waste; A. and B. shall join in an action of waste. Hal. MSS. n. Co. Litt. 53 b. (7), and although a tenant for life cannot have an action of waste, yet a parson, vicar, archdeacon, prebend, and the like, may have this action, and in the writ it shall be said, ad exharedationem ecclesiae, &c. ipsius B. or praebenda ipsius A. Co. Litt. 341 a.

But if an estate tail determine pending the action of waste, and the plaintiff become tenant in tail after possibility of issue extinct, the action of waste is gone: Co. Litt. 53 b. 285 a. Ritso’s Introduction, 155; and if the tenant commit waste, and he in reversion die, the heir shall not have an action of waste done in the life of the ancestor, because he cannot say that the waste was done to his disinhercion; nor a bishop master of an hospital, parson, or the like, for waste committed in the time of the predecessor; F. N. B. 59, O. Co. Litt. 53 b.; but if a bishop make a lease for life or years, and the bishop, die, and the lessee commit waste during the time the see is void, the successor shall have an action of waste. Co. Litt. 356 a. 7 Bac. Abr. 263, Waste (G). Executors or administrators of a term for years, though they hold in auter droit, shall be punished for waste done in their time, but not in the time of the testator or intestate, 2 Inst. 302. 2 Rol. Abr. 828, pl. 7, because it is actio personatis qua moritur cum persona. Bro. Abr. pl. 133. If a lease be made to A. for life, remainder to B. for years, remainder to C. in fee; an action of waste lies for C. against A. during B.’s mesne remainder, because, as the recovery would not destroy the term for
By what law?

Tenant in dower, and tenant by the curtesy (a), before the statute of Gloucester, and the rest by statutes (b).

for years, it would be no impediment. But if a lease be made to A. for life, remainder to B. for life, the remainder to C. in fee, no action of waste lies against A. until after the death or surrender of B. in the mean remainder. Paget's case, 5 Co. 76 a.; because B.'s estate for life would be thereby destroyed, as C. would recover the place wasted, as well as treble damages. 6 Bac. Abr. 233, Waste (M). But though an action of waste does not lie in this case on account of the intermediate remainder for life, yet a court of equity will interpose by injunction to prevent waste. Hargr. n. Co. Litt. 54 a. (5). Perrot v. Perrot, 3 Atk. 94. Robinson v. Litton, Id. 210. Farrant v. Lovell, Id. 723. 6 Bac. Abr. 286-4. 286. 294. So the Court of Chancery will interfere in behalf of the persons entitled to contingent or executory interests, to prevent unreasonable waste being committed by the tenants in possession; Dayrell v. Champness, 1 Eq. Ca. Abr. 400, pl. 4; and has even gone so far as to decree a restitution of the value to a contingent remainder man, for waste committed before the contingency happened, by the tenant in possession, in collusion with the person entitled to the inheritance in remainder. As where A. being tenant for ninety-nine years, determinable on his life, without impeachment of waste, except voluntary, remainder to trustees to support contingent uses, remainder to the first and other sons of A. successively in tail, remainder to B. in fee; A. having no son then born, agreed with B. to fell timber, and divide the profits; a son was afterwards born, and Lord Hardwicke decreed that the son should recover against the representatives of B. Garth v. Cotton, 1 Ves. 524. 546. Dick. 183. S. C. 2 Cru. Dig. 396, 2d edit. Stansfield v. Habergham, 10 Ves. 278. Fearne's Executory Deseives, 562. Butl. edit. 450, 3d edit.

(a) So Lord Coke, 2 Inst. 299, 300. treats it as clear that tenants by the curtesy, as well as tenants in dower, were punishable for waste at common law; and see Doct. & Stud. 102. 113, 18th ed. to the same effect: however, in 2 Inst. 145, he says, the writ of waste against tenant by the curtesy is by statute, see 2 Inst. 301. 7 Bac. Abr. 264. Waste (H).

(b) Marlbridge, 52 Hen. 3. c. 24. 2 Inst. 143. Gloucester, 6 Edw. 1. c. 5. 2 Inst. 299. 11 Hen. 6. c. 5. Booth's case, 5 Co. 77 a. Vide ante, 123, note (b).
The Dialogue.

What call you a reversion or remainder?
The estate which depends, and is to come in possession after these particular estates are ended.

How does a reversion pass, since there can be no livery of seisin, without licence of the tenant of the land?

It passes properly by deed in writing, and attornment of the particular tenant (a), or by fine, &c.

How does a remainder begin?
Always it begins with the particular estate, and depends upon it; otherwise it is commonly not good, unless it be by devise or will (b), and it must begin when the particular estate ends, or else it is void.

Put me a case upon that point?
If a lease be made to I. S. of certain lands for life, the remainder thereof to the right heirs of I. N. this is a contingent remainder: *for * P. 12. if I. S. die in the life of I. N. the reversion thereof is void (c); otherwise if I. N. die in the life of I. S. and has an heir, then the remainder is good.

What difference is there between a reversion and remainder?
Great difference; the reversion is the remnant of the estate that the donor or lessor reserves in himself, and passes not with the particular estate: but the remainder always passes with the particular estate at the first creation thereof; but being created, it may pass as a reversion without the particular estate. Also he who comes to lands by remainder, comes in as a purchaser, and shall not be in ward; but the other in reversion may be in ward.

(a) Vide ante, 163, note (a).
(b) i. e. Executory devise; or unless it be by shifting or secondary use, to take effect within the rule against perpetuities. Vide ante, 67.
(c) Co. Litt. 378 a, Fearne's Rem. 9, Butler's edit.

What
What other estates are there unmentioned?
There is tenant by the statutes merchant, of the staple, tenant by elegit, tenant for years, tenant at will (a), and tenant by sufferance.

Does an action of waste lie against these tenants? No (b); but only against tenant for years, and he is subject to the like law as tenants for life.

May an estate in remainder depend upon an estate for years?
* P. 13. *Yes, very well; and then if the remainder be for one life or more, there must be livery of seisin made to the tenant for years at his first entry (c).

If tenant for years die, who shall have his term? If he do not grant it in his life, nor devise it by his will, his executors or administrators shall have it.

How may it pass? Either by writing, or by parol (d), and it shall be assets to pay the owner's debts, if he die possessed of it.

What do you call assets?
There are assets in hand, which are goods and chattels of the deceased; and there are assets per discent, which are lands in fee-simple: and both these shall be liable to pay debts, so far as they will go.

(a) Vide ante, 113, note (a).
(b) Co. Litt. 54 a. 2 Inst. 302. because tenant by statute-merchant, statute-staple, or elegit, do not hold for life or years, but only for an uncertain period, until their debts are satisfied; and therefore they are out of the statute. Dean and Chapter of Worcester's case, 6 Co. 37 b. Sed vide F. N. B. 58. H. contra.
(c) Litt. s. 60. The livery is not necessary in this case for the lessee himself, because he has only a term for years, but it is for the benefit of the persons in remainder. Co. Litt. 49 a.
(d) It cannot pass by parol since the statute of frauds.
What do you mean by devise or will?
When lands, goods and chattels, are devised, or given by the last will and testament of any person.
May lands be so given without license?
Yes, they may, since the statute of wills, 32 H. 8.
How was the law before that statute?
No man, before that statute, could give lands or tenements by his will in writing, *to * P. 14.
make an estate of freehold or any greater estate, unless the same were in use, viz. conveyed to, and in the hands of feoffees to uses.
How is the law since that statute?
Since that statute a man may devise all his lands in socage, and two parts of his lands holden in knight's-service.
Why may he not devise the other third part?
Because it ought to descend, that the lord be not defrauded of the fruits of his tenure, viz. ward, marriage, &c. (a).
How are wills made?
Either in writing, or without writing, and the latter is a nuncupative will; but no estate in lands for life, or a greater estate, will pass by a will nuncupative, because it is without writing.
What other general learning is there concerning wills?
The last will is always of force, Quia voluntas est ambulatoria, et non consummatur usque ad mortem Testatoris(b); and then the intention of the devisor

(a) The 12 Cha. 2. vide ante, 127, note (a), having converted knight's service into socage, in which there is no wardship, ante, 128, post, 322, a man may now devise all his estates in fee-simple, or pour autre vie, except what he holds in joint-tenancy. Vide ante, 220, note (a).
(b) Because the will is ambulatory, and not consummated until the death of the testator.
shall be complied with as far as the words will extend.

What do you mean by the word Use?
I distinguish it thus, that before the statute of 27 H. 8. one man might have the lands, and another the use (a) of the same lands.

What did invent those uses?
Two things, viz. fear and fraud; fear in *P. 15.* the time of war and troubles; and fraud to defeat the lords of the fee, and creditors.

How many kind of uses are there?
Two, viz. in esse, and to come in contingency.

How in esse?
Either in possession, or reversion, or remainder.

How in contingency?
Uses which may come, and afterwards be in possession, reversion, or remainder, if they be not cut off or barred.

What things are incident to those uses?
Confidence in the persons enfeoffed, and privity in estate.

Did they good or harm at common law?
They did more harm than good; whereupon several statutes, as 10 R. 2. the 4 H. 4. 10 H. 7. the 11 H. 7. and 10 R. 3. were enacted to suppress the mischiefs which uses brought in.

Were the mischiefs remedied by those statutes?
No, they were not, until the statute of 27 H. 8. by which statute uses were transferred into possession (b); so that now upon creating a use, it is presently turned into possession, and the feoffees are but conduit-pipes to lead the uses.

(a) Beneficial enjoyment.
(b) More correctly speaking, the possession is transferred to the use.

How
* How was it before that statute?  

Before that statute, he who had the possession, viz. the feoffee, might sell the land from *cestui que use*, and he had only his remedy in Chancery.

Are there any uses now in law?

Yes; but they are transferred *ipso facto* into possession, and hereupon the feoffee is excluded.  

(a) In all conveyances deriving their effect from the statute of Uses, the seisin upon which the use arises, must be co-extensive with the use: for if lands be given to A. and B. during their lives, to the use of C.; if A. and B. die, C.'s estate is determined, for the seisin to serve the use, which A. and B. had, was only for their lives, and the execution of it in C. cannot make the estate larger: Gilb. Uses, 66. 229. So if in a conveyance to A. omitting, "and his heirs," to the use of B. his heirs and assigns, the use is only executed for the life of A. When uses are to be declared on the seisin of a releasee or feoffee, the conveyance should be to him and his heirs, and not to him, his heirs and assigns, because, as he is only a conduit-pipe through whom the uses are to arise, his momentary seisin is not capable of being assigned, and therefore the word "assigns" is useless. So if A. tenant for life, bargain and sell, or covenant to stand seised to the use of B. in fee, B. only acquires an estate *pour auter vie*.

In all conveyances operating under the statute of Uses, it is only the first use which is executed into a possession, or that draws the seisin of the feoffee or releasee to it, by virtue of the instantaneous operation of the statute; because there cannot be any use declared on that possession, which is created by the statute, or in other words, there cannot be a use upon a use, Lord Bacon's reading on the statute of Uses, 43. Tracts, 335, 2d edit. *Tyrrell's case*, Dyer, 155 a. Gilb. Uses, 161, arising from that seisin which is transferred by the statute: and if there be any ulterior use declared, it will be only an equitable estate.

The reason why there cannot be a use on a use is, that when the statute has executed the use in the first degree, it has exhausted its power, and cannot operate any further, for the words of the statute are, "where any person or persons shall be *seised* to the use, confidence, or trust of any other person or persons, &c." and therefore on a release, or any other conveyance,
veyance, operating by transmutation of the possession to A., to the use of B. to the use of C.; or on a conveyance not operating by transmutation of the possession, as on a covenant by A. to stand seised to the use of B. to the use of C.; or a bargain and sale by A. to the use of B. to the use of C.; A. in each case, and not B. is seised by the rules of the common law; B. has no seisin whatever independently of the statute, and by giving B. that seisin, the statute is functus officio. However, the doctrine that a use cannot be on a use, has been made, as Mr. Rowe very justly observes, Bac. Uses, 131, the subject of much intertemperate, though impotent censure, by Mr. Watkins, Princ. Conv. Introduc. xi. xii. 2d ed.

The rule may be thus exemplified, for the purpose of shewing what uses are, and what uses are not executed by the statute: First, if upon those conveyances, operating by transmutation of possession, viz. a fine, recovery, feoffment, lease at common law, or bargain and sale for a year, and a release in enlargement, the use be declared on the seisin of A. the conuze, demandant or recoverer, feoffee, or releasee, to the use of A.; or unto and to the use of A.; he is in by the common law, and not by the statute: Samne's case, 13 Co. 56. Long v. Buckridge, 1 Str. 111. Guwan and Ward v. Roe, 1 Salk. 90. Gilb. Rep. 16, 17. 2 Cas. & Opin. 281. the reason of which is, that whenever an estate may take effect either by the rules of the common law, or by the statute of Uses, the common law is preferred: and notwithstanding A. is in by the common law, and the use limited to him is so far of no effect, yet that intervening use prevents the statute attaching on any ulterior use; and so far it has effect, that if in either of the above cases, a use in the second degree had been limited to B. he would have taken only an equitable estate. Girland v. Sharp, Cro. Eliz. 332. Attorney-General v. Scott, Cas. Temp. Talb. 139. So also, if on the seisin of A. the use be declared to B. to the use of C.; the use to B. is executed into legal estate, and the use to C. gives him only an equitable estate. So if on the seisin of A., the use be declared to the use of A., or unto and to the use of A.; or to the use of B. to the uses, intents, &c. hereinafter mentioned, these uses in the second degree will be mere trusts; and if these ulterior uses contain a power to appoint the lands, the appointee under such a power will only have an equitable estate. So where A. made a settlement by deed and fine, to the use of himself and his heirs until his then intended marriage, and afterwards to the use of his wife for life, and after her death
to the use of the cognizees in the fine, and their heirs during
the life of A. upon trust to permit him to receive and take the
rents and profits, remainder to the first and other sons of the
marriage, &c.; remainder to the use of the heirs of the body
of A.; it was adjudged by the whole court that A. took only a
trust estate for life, because the use to him could not execute
upon the use which was limited to the trustees for his life;
and consequently the legal estate for his life was executed in
them by the statute of uses, and that the limitation to the heirs
of the body of A. was a contingent remainder, and such as the
heir would take by purchase, and not by descent. Tippin v.
Cosin, Carth. 272. Comb. 312, 313. 1 Ld. Raym. 38. 4 Mod. 380.
So where the uses of a fine were declared to the use of the
husband for life, remainder to the use of trustees and their
heirs for the life of the husband, in trust to support contingent
remainders, remainder to the use of the wife for life, re-
mainder to the use of the trustees and their heirs (omitting for
the life of the wife) in trust to support the contingent uses;
and estates thereinafter limited from being defeated or de-
stroyed, and for that purpose to make entries and bring actions
as occasion should require, but nevertheless to permit the
wife and her assigns to receive the rents, &c.; and after the
several deceases of husband and wife, to the use of the first
and other sons of the marriage in tail; &c. remainder to such
uses as the wife should appoint, remainder to the use of the
right heirs of the wife in fee: the use to the trustees subse-
yuuent to the estate for life of the wife being in fee, all the
ulterior uses were mere trusts. Venables v. Morris, 7 Term
Rep. 342.

As estates created under powers deriving their effect from
the statute of uses, are uses arising from the seisin of the
feoffees, releasees, &c. in the conveyances giving the powers,
and are to be construed in the same manner as if the estates
created under the powers, were limited by or contained in the
conveyances giving the power; therefore such an appointment
to A. to the use of B. executes the use in A. giving him the
legal possession, under the statute, and B. has only an equit-
able estate. But under an authority deriving its effect from
the principles of the common law, where the donee of the
power has no seisin of the estates, as in the case of a bargain
and sale, under a bare power to executors to sell, where the
estate is not devised to them, and the inheritance descends to
the heir; ante, 229. Co. Litt. 113 a. or under a bargain and
sale
sale by the Remembrancer of the Court of Exchequer, of land extended for a crown debt, by virtue of 25 Geo. 3, c. 35; or a bargain and sale under the land-tax acts, in each of which cases the bargainee has a common law seisin, and a use may be declared on it, which will be executed into a legal possession by the statute of Uses. Sug. Pow. 196, 2d edit. Sug. Gilb. Uses, 351.

Some conveyances operate partly by the rules of the common law, and partly by the statute of Uses: as for example, the usual limitation to prevent dower, ante, 89, 90. on the seisin of A. the purchaser, to the use of such person, &c. as A. shall appoint; and in default of appointment to A. for life, remainder to B. the trustee, and his heirs, during A.'s life, in trust for A., remainder to A. in fee: A.'s estate for life, and the fee limited to him in default of appointment take effect by the rules of the common law, independently of the statute; but the limitation to B. is executed by the statute, and the ulterior trust for the life of A. is neither affected by the common law, nor by the statute, but is a chancery trust; and so also when A. exercises his power of appointment, the appointee is in by the statute under the learning of shifting uses. The reasons why A. cannot be seised to the use of himself, are, because a man could not be a trustee for himself before the statute of Uses; and the words of the statute are "where any person or persons shall be seised to the use, confidence, or trust of any other person or persons, &c.:" and Lord Bacon says, the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore, he adds, the statute ought to be expounded, that where the party seised to the use, and the cestui que use is one person, he never takes by the statute, except there be a direct impossibility or impertinency for the use, to take effect by the common law: as if A. enfeoff B. in fee to the use of B. in tail, and then to the use of C. in fee; or if A. covenant to stand seised to the use of himself in tail, and to the use of his wife in fee; in both these cases the estate tail is executed by the statute; first, in favor of the issue in tail, Samue's case, 13 Co. 56; and, secondly, because an estate tail cannot be re-occupied out of a fee-simple, being a new estate, unknown to the common law, created by the statute de donis, and not like a particular common law estate for life or years, which are but portions of the absolute fee, and are disposable by the owner in like manner, without any restriction. But if A. enfeoff B. in fee, to the use of C. for life, and then to the use of
B. in fee, B. is in of the fee-simple, merely in course of possession, and as of a reversion, and not of a remainder, Co. Litt. 22 b.: but Lord Bacon says, the law would be contrary, if A. enfeoff B. in fee to the use of C. for life, then to the use of B. for life, with remainder to the use of D. in fee; as the law will not admit fraction of estates, B. is in with the rest by the statute. Bacon on Uses, 64. However, the last proposition is questionable, and it is contrary to his Lordship's reasoning in the preceding page.

So where A. by lease and release conveyed lands to C. and D. and their heirs, to hold to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the only proper and absolute use and behoof of them, their heirs and assigns for ever: counsel made a point, that although the scisin was in common, yet the use being to them as joint-tenants, whatever interest passed by the release survived to B., and no part descended under the release to the defendants, the heirs of C.: but at a future day, time having been given him to consider this point, he admitted that C. and D. took as tenants in common, although, if it had been a use executed by the statute, the consequence would be, that they were joint-tenants, yet he admitted, that where the person seised to the use and estuque use, is the same, the statute does not operate. And for this he cited Lord Bacon, ut supra. Wherefore judgment passed for the defendants. Doe, ex dem. Hutchinson v. Prestwidge, 4 Maule & Selw. 178. This was certainly admitting the principle to a great extent, and it seems that there was ample room for argument.

2dly. On conveyances not operating by transmutation of possession, viz. a covenant to stand seised, or a bargain and sale under the statute, the uses are fed by the seisin of the covenantor or bargainor, and the covenantee or bargainee has only a use, which is immediately executed into a legal estate by the statute; and therefore any ulterior use will not be executed: as for example, if A. covenant to stand seised to the use of B., to the use of C., or bargain and sell to B. to the use of C., the use to B. only is executed by the statute, and the use to C. is a trust estate. Tyrrel's case, Dyer, 155 a. Shep. Touch. 225. 508. 7 Bac. Abr. 121. Uses (H), 1. Ash v. Gallen, Ch. Ca. 114. 22 Vin. Abr. 207, pl. 14.

3dly. The same doctrine extends to devises: therefore a devise to A. to the use of A., in trust for B., or unto and to the use of A., in trust for B., gives A. the legal estate, and B. an equitable estate only. Robinson v. Comyns, Cas. Temp. Talib. 164. vide ante, 153, note (b).

4thly.
4thly. Independently of the rule that a use cannot be on a use, wherever something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another’s separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or where their approbation is necessary to the receipt of the rents and profits by a tenant for life, or the like, the legal estate is vested in them, and the person beneficially interested has only a trust estate: and this distinction has prevailed ever since the 36 Hen. 8, when the judges delivered an opinion, that where a man made a feoffment in fee, to the use of the feoffor for life, and after his decease that A. should take the profits, the use was executed in A.; but on the contrary, if he said that after his death the feoffees should receive the profits, and pay them to A., the use would not be executed in A., because he could only have the profits by the hands of the feoffees. Bro. Abr. Feffements al Uses, pl. 52. Wms. n. 2 Saund. 11 c. and see Kenrick v. Beauclerk, 3 Bos. & Pul. 178. As where lands were devised to trustees and their heirs in trust for a married woman and her heirs, and that the trustees should from time to time pay and dispose of the rents and profits to A., or to such person or persons as she by any writing under her hand, as well during coverture, as being sole, should order or appoint, without the interfering of her husband, whom the testator willed should have no benefit or disposal thereof; and as to the inheritance of the premises in trust for such person or persons, and for such estate and estates as A. by any writing purporting to be her will, or other writing under her hand, should appoint; and for want of such appointment, in trust for her and her heirs, the question was, whether this was a use executed by the statute, or a bare trust for A.: and the court held it to be a trust only, and not a use executed by the statute. Nevil v. Saunders, 1 Vern. 115. So where lands were devised to trustees and their heirs, in trust, after payment out of the rents and profits of several legacies, annuities, and the trustees costs and charges, to pay all the residue of the rents and profits to A., a married woman, during her life, for her separate use, or as she should direct, and after her death the trustees to stand seised to the use of the heirs of her body severally and successively as they should happen to be in priority of birth and seniority of age, and to the heirs of their respective bodies in tail general, subject to the payment of the several annuities and legacies, with remainders over to the plaintiff. A. and her husband levied a fine, and suffered a recovery of the premises, and died without issue, under
under whom the defendant claimed the estate. Lord King was of opinion, that by the words of the will the use was executed in the trustees and their heirs during the life of A., and that she had only a trust in the surplus of the rents and profits, after payment of the annuities during her life, but that by the subsequent words, "that the trustees should stand seised to the use of the heirs of the body of A., &c." the use was executed in the persons entitled to take by virtue thereof, chargeable with the payment of the annuities, and therefore there being only a trust estate in the ancestor, and a use executed in the heirs of her body, those different interests could not unite so as to create an estate-tail by operation of law in the ancestor, under the rule in Shelley's case, 1 Co. 98, that where the estate limited to the ancestor, is merely an equitable or trust estate, and that to his heirs, &c. carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor; as (in general) would have been the case, if they had been both of one quality, that is, both legal, or both equitable. Butl. Fearne, 52. 3d ed. 34. Lady Jones v. Lord Say and Seal, 8 Vin. Abr. 262, pl. 19. And the rather in this case his Lordship added, because it was limited to the heirs of her body severally and successively, as they should be in seniority of age and priority of birth, and the heirs of their respective bodies issuing: and he said there was a difference between this case and Broughton v. Langley, 2 Salk. 679; for there it was to permit A. to receive the rents and profits for life; but here it is a trust in the trustees, to pay over the rents and profits to such and such persons; and therefore the estate must remain in them to answer these trusts; otherwise she must be the trustee, contrary to the express words of the will: and he decreed accordingly for the plaintiff. And this decree was affirmed in the House of Lords. 1 Eq. Ca. Abr. 383, pl. 4. 3 Bro. Parl. Cas. 113. It seems difficult to understand how the use could in this case be executed in the heirs of her body, because no person can have an heir until his death, and she died without issue. The counsel for the respondents made a more rational construction, when they said, it appeared to have been the intention of the devisor, that after the death of A. a legal estate tail should vest in the heirs of her body, as purchasers, and not by descent. 3 Bro. Par. Cas. 118. In which case, the uses in remainder, would have been executed sub modo only, until the death of A. and then have been liable to be anticipated in enjoyment, by the contingent use in tail, arising to A.'s heirs, in the event of her leaving heirs of her body. But
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even that construction cannot be supported, as it seems clear, that the use could not execute either in the issue, if there had been any, or in those in remainder, because the trust, for payment of the legacies and annuities, required that the trustees, should have the legal estate, to enable them to execute that trust; Butl. Fearne, 54.; and therefore it seems, that under the rule in Shelley’s case, as the estate for life to A. and the limitation to the heirs of her body, were both equitable estates, they united, and she became equitable tenant in tail. Butl. Fearne’s Rem. 56. 4th ed. 74. And consequently the estate tail and the remainders over, being both equitable estates executed, they were barred, by the equitable recovery which she suffered. Fearne’s Posthumous Works, 333. And see White v. Carter, Ambl. 670. 2 Eden, 566. S. C. Fearne’s Rem. 55. 183, Butl. ed. And where a devise was made to trustees and their heirs upon trust, to permit and suffer a married woman to receive and take the rents and profits during her life, for her own sole and separate use, notwithstanding her coverture, and without being in anywise subject to the debts, management, power, or control of her then or after-taken husband, and her receipt alone to be a sufficient discharge, with remainder to her first and other sons in tail; it was held, that the legal estate was vested in the trustees; because it being the intention of the testator to secure to the feme covert a separate allowance, free from the control of her husband, it was essentially necessary to effectuate that intention, that the trustees should take the estate with the use executed in themselves, otherwise the husband would be entitled to receive the profits, and so defeat the very object the devisor had in view. Harton v. Harton, 7 Term Rep. 652. Sir James Mansfield, 2 Tannt. 111, says, he always understood the decision in Jones v. Say and Selé, to have gone on the same ground, that it was the case of a feme covert, and was so held in order to protect her. So where lands were devised to trustees and their heirs in trust, that they should, out of the rents and profits, or by sale or mortgage of the whole, or so much of the estate as should be necessary, raise a sum sufficient to pay the testator’s debts and legacies, and afterwards in trust and to the use of A. for life, with several remainders over; the question was, whether the legal estate vested in the trustees; Lord Hardwicke was of opinion that the devise to the trustees and their heirs carried the whole fee in point of law to them, and therefore the estate for life, as well as the estates in remainder, were merely trust estates in equity; that part of the trust was to sell the whole,
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whole, or a sufficient part of the estate, for the payment of debts and legacies; which would carry a fee by construction, had the word heirs been omitted in the devise, as in Shaw v. Weigh, 1 Eq. Cas. Abr. 184. [Fearne's Rem. 284, 3d ed. 356-7, Butl. ed.]; for the trustees must have a fee in the whole estate, to enable them to sell, because, it being uncertain what they may sell, no purchaser could otherwise be safe; that the only doubt he had was on the case of Lord Say and Sele v. Lady Jones; but on examination that case differed in a material point; and taking together all the clauses of that will it amounted only to a devise to trustees, and their heirs, during another's life, upon which a legal remainder might be properly limited: but in the present case, the whole fee being in the trustees, a remainder of the legal estate could not be limited to A. Bagshaw v. Spencer, 1 Vcs. 143. 2 Atk. 246. 570. 1 Collectanea Juridica, 382. So where lands were devised to trustees and their heirs, upon trust yearly, by equal quarterly payments, by and out of the rents and profits of the premises, after deducting rates, taxes, repairs, and expenses, to pay such clear sum as should then remain to A. and his assigns, for his life; and from and after his decease, to the use and behoof of the heirs male of the body of A. as they should be in priority of birth; with remainder over in default of such issue. Lord Thurlow held, that the trustees being to pay the taxes, repairs, &c. must have an interest in the premises; that, therefore, the legal estate for the life of A. was in them, and he had only an equitable estate for life, and, the subsequent estate being executed, he had an equitable estate for life, and a legal remainder in tail, [it is difficult to understand how A. could have a remainder in tail when his heirs took by purchase. Quere, omit the words in italics, and read those afterwards in crotchets] which could not unite, [with the legal remainder in tail to his heirs male;] and of course, there could not be a good tenant to the precipe, and the recovery suffered by A. was void. It being necessary, in order to make a good tenant to the precipe, that there should be a legal estate for life, with a legal reversion in tail, or an equitable estate for life, with an equitable reversion in tail. Shapland v. Smith, 1 Bro. C. C. 75. Fearne's Posthumous Works, 421. 2 Cox, 145. See also Robinson v. Grey, 9 East. 1. Chapman v. Blissett, Cas. Temp. Talb. 150. So where the testator devised, unto his friends and trustees, W. L. and J. L. his several houses therein described, and also all his monies in the public funds or otherwise, which he should die possessed of, to hold to them his said trustees, to and for
the intents and purposes therein after mentioned, viz.: upon trust to permit and suffer, his the testator's wife, to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use, of all and singular the interests of the said monies in the funds, or otherwise, and rents and profits arising from the said houses, for and during the term of her natural life, if she should continue his widow, and unmarried; and that her receipts for all rents, interests, profits, with the approbation of any one of his said trustees, should be good and valid, she his said wife providing for, and educating properly all the (five) children (therein named) which the testator then had; and also paying Mrs. M. D. thereout of his said estates one annuity of £20, half yearly, to whom the testator bequeathed the same during her natural life, and likewise paying to Miss M. J. besides board and lodging, one other like annuity of £20, half yearly, to whom the testator also bequeathed the same. The question was, whether, on the true construction of the above devise, the use was executed in the widow, under the statute of uses, giving her the legal estate, so as to enable her to make a distress for rent. At the Assizes, Heath, J. thought that no doubt a simple devise to trustees to suffer any one to enjoy rents and profits was a use executed in the cestui que trust, unless there is any thing to be done by the trustee: but in this case there were receipts to be approved and annuities to be paid. He therefore thought that as there was something to be done by the devisees, the use was not executed in the widow, and under his direction the jury found a verdict accordingly. On a motion for a new trial, Chambre, J. said, In this case the legal estate is in the trustees: to determine that, we must look to the intent of the will; and it seems pretty clear that intent was not to give the widow the legal estate. It is true, there is very little left for the trustees to do during her widowhood, but if it was intended that she should have the legal estate, there would have been no need of any trustees at all. The testator making the approbation of the trustees necessary to her receipts, I think, shews it was not intended to give the widow a legal estate. Gibbs, J. The rule has been misconceived. Though an estate be devised to A. and his heirs, to the use of B. and his heirs, the courts will not hold it to be a use executed, unless it appears by the whole will, to be the testator's intent that it should be executed. The courts will rather say, the use is not executed, because the approbation of a trustee is made necessary, than that the approbation of a trustee is not necessary, because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the
the trustees: "I leave my wife to receive the rents, provided there is always the control of one of the trustees upon her receipts." The testator, therefore, certainly meant that some control should be exercised, and what could that control be, except they were to exercise it in the character of trustees? I agree, therefore, that the legal estate is in the trustees. Gregory v. Henderson, 4 Taunt. 772.

The same principle of construction is equally applicable to deeds: thus, where A. tenant for life, remainder to B. his son in tail; reversion to A. in fee, conveyed lands to trustees and levied a fine of estates in L. and N. to the use of the trustees and their heirs, in trust, with the consent in writing of A., A.'s wife, and B. or the survivor of them, and of an incumbrancer, to sell the estates in fee, and apply the money arising by sale of the N. estates, in discharging debts, redeeming annuities, &c. and stand possessed of the money arising by sale of the L. estate, upon trust to invest the same with the approbation of A., A.'s wife, and B. in the purchase of other lands in fee, to be settled to uses for their benefit: with a proviso, that the rents, issues, and profits of the L. estate should, until sale of the inheritance, be received by such person and for such uses as the same rents, &c. would have been, if these presents had not been made and no fines levied: it was held, that the use of the L. estate was immediately executed in the trustees, even before any consent given for the sale of it by A., &c.: that the proviso, that the rents, &c. should be received by such person, &c. was nothing more than the common provision in such cases, for the perception of the rents and profits, by the persons beneficially entitled at the time of the conveyance, until the sale should be made, and by no means carried the legal estate to such persons. Keene v. Deardon, 8 East, 248. 263.

In general, it has been shewn the distinction is, that where the limitation to trustees and their heirs is in trust to receive the rents and profits and pay them over to A. for life, &c. this use to A. is not executed by the statute, but the legal estate is vested in the trustees to enable them to perform the will; but where the limitation is to trustees and their heirs in trust, to permit and suffer A. to receive the rents and profits for his life, &c. the use is executed in A. unless it be necessary that the use should be executed in the trustees to enable them to perform the trust. As where lands were devised to trustees and their heirs, and the testator declared that the trustees and their heirs should stand seised of the lands, to the uses, intents, and purposes therein-after mentioned, that is to say, to the intent and purpose, to permit and suffer A. to receive and take the rents and profits,
for and during the term of his life, and after his decease, should stand seised of the lands, to the use of the heirs of the body of A., remainder over; with a proviso, that A. with the consent of the trustees, might make a jointure, for his wife; it was held, that this was a use executed in A., and not a trust estate, because it would have been a plain trust at common law, and what at common law was a trust, of a freehold, or an inheritance, is executed by the statute, which mentions the word trust, as well as use. And it was held, that a power to make a jointure, does not necessarily exclude an estate tail; because as tenant in tail cannot make a jointure without discontinuing or barring the entail, such power has its use. And the case of Burchett v. Durdant, 2 Vent. 312. adjudged to the contrary upon the above point, was denied to be law. Broughton v. Langley, 2 Ld. Raym. 873. 2 Salk. 679. 1 Lutw. 814. 823. 1 Eq. Ca. Abr. 383. pl. 3. Fearne's Rem. 116, 3d. ed. 159, Butl. ed. And the same distinction was taken by Lord Kenyon, in the case of Doe on the demise of Wolley v. Pickard, Stafford Summer Assizes, 1797; and by Mr. Justice Lawrence, in Jones v. Prosser, Worcester Spring Assizes, 1798. Wms. n. 2 Saund. 12. So where lands were devised to two trustees, and the survivor of them, to hold to them and the survivor, and his heirs and assigns, upon trust to permit and suffer the testator's wife to have, receive, and take the rents, issues, and profits thereof, during her natural life, for her own absolute use and benefit, and from and after her decease, in case A. should be then living, in trust to pay unto, or permit and suffer A. to have, receive, and take the rents, issues, and profits thereof, for her natural life, with remainder, over: the question was, whether the legal estate was in the survivor of the devisees in trust, or in A.; Mansfield, C. J. I thought it had been settled by the case of Shapland v. Smith, that the distinction was abolished, unless in cases where something especial was to be done by the trustee, as to pay rates, or repairs; but I find it is otherwise. It is miraculous how the distinction ever became established; for good sense requires that in both cases it should equally be a trust, and that the estate should be executed in the trustees; for how can a man be said to permit and suffer, who has no estate, and no power to hinder the cestui que trust from receiving. The court took time to consider, and on another day, the Chief Justice delivered the following judgment:—This case might be argued and considered for ever, without advancing it at all in law, reason, or precedent. But as it happens, in this will, the last words are, "permit and suffer," which give the cestui que trust a legal estate; and the general rule is, that if there be a repugnancy,
nancy, the first words in a deed, and the last words in a will shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested. *Doe, ex dem. Leicester v. Bigg, 2 Taunt. 109.* So under a devise to trustees, their heirs, &c. of freehold and leasehold estate, upon trust to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain twenty-one, and then to the use of his son in fee; and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained twenty-one; and in the mean time to apply the profits in discharging the interest of a bond of £3000; and on his son attaining twenty-one, upon trust by sale, lease, or mortgage of the last-mentioned premises, to raise the £3000, and discharge the bond; and subject thereto, to the use of his son in fee on his attaining twenty-one: and a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust, by sale, lease, or mortgage of the same, to raise £3000, and pay it to his daughter E.; and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper to raise money to pay his debts, legacies, and funeral expences; and then upon trust to pay the interest and produce of his real and personal estate, to his then wife, for the maintenance of herself and two children till the latter should attain twenty-one, if she continued his widow; but if not, then for the benefit of the two children till twenty-one; and then to transfer to those children such residue; with further trusts if either or both of them died under twenty-one; with a proviso, that it should be lawful for the trustees, and the survivor, at any time or times till all the said lands, &c. devised to them, upon trust as aforesaid, should actually become vested in any other person or persons by virtue of the will, or until the same or any part thereof should be absolutely sold as aforesaid, to lease the same or any part thereof, for any term not exceeding fourteen years, in possession and not in reversion, at the best rent, &c.; it was held that the devise in the first clause to the trustees, upon trust to permit and suffer the testator's wife to receive and take the rents and profits of the lands there described until his son attained twenty-one, vested the legal estate of those lands in her, and was not affected by the subsequent leasing power giving to the trustees, which, it was held, was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale, &c. *Right, lessee of Phillipps v. Smith, 12 East, 455.* So a devise of lands to a trustee and his heirs,
to the use of A. and B. during their lives, and the life of the longest liver of them, without impeachment of waste: and from and after the determination of that estate, to the use of the trustee and his heirs, during the lives of A. and B. and the life of the longest liver of them, upon trust to preserve the contingent uses and estates, &c. but nevertheless to permit the said A. and B. and the survivor of them, during their lives, and the life of the longest liver of them, to receive and take the rents and profits of the said lands and premises for their own use: and from and after the several deceases of A. and B., then in trust for the heirs male of the body and bodies of A. and B.: and in default of such issue, then to and for the use and behoof of C. and his heirs. A. died without issue; B. afterwards suffered a recovery of the premises; devised them to his daughter in tail general; and died without issue: the question was, whether the devise to the trustee and his heirs in trust for the heirs male of the bodies of A. and B. were executed, so as to make that a legal estate, as well as the estate for life, and therefore, whether B.'s recovery had barred C. the lessor of the plaintiff? Lord Ellenborough, C. J. The testator uses the words trust and use indifferently: both of them are within the operation of the statute; for a trust may be executed as well as use. And nothing else is relied on but the change of these words in order to denote the testator's intention. In truth, in every case where a testator creates an estate tail by words of this description, unless he is perfectly cognizant of the technical rule of law, he does not intend to enlarge the life estate of the first taker to an estate tail: but the rule of law notwithstanding attaches to give the first taker an estate tail. Postea to the defendant. *Doe, ex dem. Terry v. Collier, 11 East. 377.* So, under a devise of lands, arrears of rent, and a bond and judgment to trustees, and the survivor, and the executors and administrators of such survivor, in trust, out of the rents and profits of the said estates and arrears, &c. to pay certain annuities for lives, and a sum in gross; and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to C. in tail, remainder to his own right heirs; and he also gave a general power of leasing to the trustees for the best rent, with an allowance of £10 a year to each for their trouble: it was held, that the purposes of the trust being all answered by the death of the annuitants, and the raising of the money for legacies, the remainder-man in tail (the life estate being spent) took the legal estate in the premises. For where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall
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shall pass to them by implication; but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. And in this case it was held sufficient to answer the purposes of the trust, to give the trustees by implication an estate for the lives of the annuitants, with a term of years in remainder, sufficient for the purpose of raising the gross sum charged out of the rents and profits. And this construction was held to be further confirmed in this particular case, by the bequest to the trustees of the arrears, and the bond and judgment, as well as of the rents and profits; for otherwise the interest in the bond, &c. would go to different representatives than the estate, if the trustees took a fee: and the leasing power was only to be executed as the occasions of the trust required: and there was also a personal remuneration to the trustees of £10 a year for their trouble, which was not extended to their heirs. Doe, ex dem. White v. Simpson, 5 East, 162.

5thly. Estates for years cannot be conveyed to uses so as to be executed into legal estate by the statute, because the words of the statute are, where any person shall be seised, and a lessee for years is not seised, but is only possessed; for the word seisin, in the language of the law, is exclusively applied to estates of freehold and inheritance, Litt. s. 324. Co. Litt. 200 b, because there needs no livery of seisin to be made to the lessee, Litt. s. 59: therefore if A., possessed of a lease for years, assign it to B. to the use of C., the legal estate is in B., and C. takes only a trust or equitable estate: but A., seised in fee, may convey his estate to B. to the use of C. for years; or A. seised in fee, may bargain and sell, or covenant to stand seised to the use of C. for years; and such use would be executed by the statute into a legal estate for years in C.

6thly. The statute of uses does not extend to copyholds, because the transmutation of possession by the sole operation of the statute, without the consent or allowance of the lord, or the agreement of the tenant, would tend to the prejudice both of the lord and of the tenant: Co. Cop. s. 54. Tr. 124. Wms. n. 2 Saund. 12, and this is plain from common experience; for when a copyholder surrenders to the use of another, the possession is not executed to the use; as the estate remains in the surrenderor, and surrenderee has nothing until admittance but an equitable estate: Gilb. Ten. 182. 1 Sand. Uses, 203, 3d edit. 195, 2d edit. 1 Cru. Dig. 418, 2d edit. Cru. Uses, 55. Sug. Gilb. Uses, 72, and therefore a surrender of copyhold lands to uses is not to be considered on the foot of a use or trust, for as copyholds are not within the statute of Uses, such surrender
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surrender is only a direction to the lord whom to admit; and when admitted the surrender is in by the grant of the lord, not of the surrenderor; so that it is of a particular nature, and not as a use or trust on the statute. *Per* Lord Hardwicke. 2 Ves. 257. 1 Watk. Cop. [100]. [185]. 2 Ibid. [193]. and therefore the construction of the surrender of copyholds must be the same, as if the estates had been limited by feoffment, or any other deed, deriving its effect purely from the principles of the common law, without the intervention of the statute of Uses, and must be alike governed by the same rules of the common law. *Per* Holt, C. J. 1 P. Wins. 76. And therefore it should of consequence follow, that springing uses, or uses to arise in future, cannot be created by surrender. Gilb. Ten. 260-261. Watk. n. 5 Bac. Abr. 779. Mr. Watkins says, that a fee cannot be limited on a fee by a common law conveyance, is not necessary to be proved: it is acknowledged. And surely if a surrender of copyhold lands is to be construed as a common law conveyance, it must follow, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender: for if a fee can be limited on a fee by a surrender, then the surrender cannot be construed as a conveyance at common law. And on the same principle, if an estate for life, or of inheritance, cannot be created to commence in futuro by a common law conveyance, and a surrender of copyholds ought to be construed as such conveyance at common law ought to be construed, then an estate for life, or of inheritance cannot be created to commence in futuro by a surrender of copyholds. If we acknowledge the premises, we must not deny the conclusion. 1 Watk. Cop. [208]. Sug. n. Gilb. Uses, 353. The learned Mr. Sanders, however, is not satisfied with this reasoning, in the shape of syllogism; he says *syllogismus assensum constringit, non res*: and endeavours to show, that the use limited on an immediate surrender, has no resemblance to a feoffment at the common law before the introduction of uses; but that it closely corresponds with the use, in its fiduciary state, on a feoffment: Sanders on Surrenders of Copyholds, page 7, and after observing that there can be no doubt that by means of *uses* limited on *feoffments*, or other common law conveyances, a freehold may be created to commence in futuro, without a previous particular estate to support it, and that a fee may be limited upon a fee, or that pre-existing uses, commensurate to the fee-simple, may be defeated by contingent, springing, and executory uses; and that the question to be considered is, whether, in these instances, uses on a surrender correspond with uses on feoffments, or other common law conveyances;
Why are they used?
Properly to convey the benefit of estates to wives: for the husband cannot enfeoff, or grant, immediately to his wife, because they are but one person in law (a).

How must such an estate be made?
The husband must enfeoff two or three, to the use of his wife for life, or otherwise.

conveyances; he proceeds to shew, that the resemblance between them is not destroyed or opposed by any direct decision; and that consequently there will be no material difficulty in establishing the analogy between them by authority, as well as principle, page 20; and he comes to the conclusion, that the authorities in favour of the limitation of a future use, on an immediate surrender of a copyhold appears satisfactory, 36; and that springing, contingent, and executory uses, may be limited upon a surrender, defeating, by their operation, uses previously existing by limitation and admittance, page 45; from whence he assumes that powers of revocation and appointment are applicable to settlements of copyhold estates, because a use, arising under the exercise of a power, is a springing use, page 57. Considerable reliance is placed on forms in Lex Customaria, Jacob's Court Keeper, the English Copyholder, and Horseman's Conveyancing; but the errors of these books can be of no authority, when the principle they would establish is contrary to reason, and besides there are other forms in all these books, which would equally countenance the contrary doctrine. The learned Gentleman also says, page 47, Kitchen, 170, edit. 1657, one of the oldest writers on copyholds, says, "use may be of copyhold, as well as of freeholds." But the words which immediately succeed in Kitchen are omitted, viz. "but the statute of 27 Hen. 8, for uniting the possession to the use, doth not extend to such tenures: nor (he to whose use) cannot forfeit the land by cutting trees, if it were not by the consent and commandment of the copyholder." Kitchen on Courts, 172. edit. 1663. Mr. Fearne appears to have been of the same opinion as Mr. Sanders; Contingent Remainders, 201, 3d edit. 417, 4th edit. 276, Butl. edit. See 5 Cru. Dig. 590, s. 93, 2d edit.

(a) Ante, 38, note (a).
Why must he enfeoff two at the least?
Otherwise one feoffee has such an estate thereby, that his wife can have her dower (a).
May not the subject hold lands of the king?
Yes; all the lands of England are holden either mediately, or immediately, from the king, as lord paramount (b).

How may they be holden of the king?

What differences are there in these tenures?
Many great differences: All lands holden in capite in chivalry draw ward, marriage, and relief, viz. a knight's fee is five pound, and so rateably; and it causes all other lands holden of mean lords to be in ward; also the tenant cannot grant these lands for life, or for any other higher estate, without license of the king; nor his wife cannot marry without license (c); and if they do, they shall answer

(a) Sed quære de hoc. Sir Joseph Jekyll says, in the case of a use, the widow of a trustee has been determined to have no claim of dower from such momentary seisin, 1 Atk. 443: because the same act which gives the husband the estate, conveys it also out of him in the same instant of time, 2 Bl. Com. 132: and of such a seisin for an instant a woman shall not be endowed. Co. Litt. 31 b. So if the commee of a fine grant and render the land to the consor, the wife of the commee shall not be endowed; for it is not possible that the husband could have endowed his wife of such an estate, Cro. Jac. 615: nor shall the land be subject to his recognizances or statutes. Cromwell's case, 2 Co. 77 a. , Vau. 41. Vide ante, 11, n. (b).
(b) See 1 Wynne's Eunomms, 153, 3d edit. et ante, 127.
the king mean profits. And if a tenant enter, and sell without license, he must pay for his license one year's profit thereof. But to have license before he enter, and sell, is but the third part of one year's profit. Also the heir having been in ward, when he comes to full age, must sue livery, which will cost him one year's profit. And if he be at full age, at the death of his ancestor, then he must have a primer seisin, which is of like charge (a).

What if it be holden in socage in capite?

That draws not ward, &c. nor any other lands; and the relief is one year's rent; but the tenant must sue his livery or primer seisin of those lands only (b).


That draws only ward, marriage, and relief, only for that land, in case of a common person, but that the king must have his prerogative without priority or posteriority (c).

What

(a) Vide ante, 127, note (a).
(b) In the note last referred to, it appears that tenure in socage in capite, is changed into tenure in socage; which is liable to no other services than fealty, and the payment of the thing reserved to the lord. 6 Bac. Abr. 501. Tenure (Q).
(c) Before the 12 Car. 2. c. 24. when there was an heir either male or female, who had many capital lords, they could not all have the custody of the heir, nor did the marriage of the ward admit of partition, and therefore one must have been preferred before the others; and that lord was preferred who first enfeoffed the ancestor in knight's-service, and to whom the ancestor in consequence first did homage, and to whom the heir therefore owed allegiance for his first fee; the other lords were only entitled to have their reliefs and rightful services, and the custody of the lands which were holden of their fee: but if any heir held of the king in capite by knight's service, whether he had any other lords or not, the king was preferred before the others, to the custody of the heir, without regarding priority or posteriority of enfeoffing, because the king
What do you mean by priority?

That if a common person holds several lands of two lords by knight’s-service, the eldest tenure, viz. he that made the first feoffment shall have the wardship of the heir: which is not so in the king’s case.

How may a person otherwise hold of the king?

He may hold by grand-serjeanty, and by petty-serjeanty.

How do they differ?

Grand-serjeanty is knight’s-service, and more, for the relief thereof is, the value of the land by year; and petty-serjeanty is socage in nature.

Put a case thereof?

He that holds of the king, to find a man to serve in the wars for forty days at his own cost, holds by grand-serjeanty. But he that is to find a horse, or such a thing, to serve as aforesaid, that is petty-serjeanty, because it is not to be done by a man’s body.

Also the tenant may hold of the king, * P. 19. * or of a common person, by escuage, homage-ancestral, or by homage, fealty, and suit of court.

What is the meaning thereof? State a case.

Escuage uncertain, is knight’s service, and escuage certain, is socage(a). Homage-ancestral is always between the feoffor and feoffee and their heirs; the other homage is sometimes joined to knight’s service, and sometimes to socage. And fealty is always incident to all manner of tenures and estates.

king has no equal, much less a superior in his realm. Cowel’s Inst. 22. 39.—1. 10. 7.—1. 16. 9. Glanv. 1. 7. c. 10. Beaines’s Translation of Glanv. 173, which, with the learned notes, is a valuable present to the profession.

(a) Litt. s. 98.
Of what nature are these services?
Some of them are valuable, and some not.
Upon what cause were they reserved?
To keep an acknowledgment between the lord and tenant, in lieu and recompence of the land.
What remedy is there if the tenant do not perform his services?
The lord may of common right, restrain for them; and if the tenant die without an heir, general or special (a), or be attainted, the lord shall have the land by escheat, as having no tenant to do his service. And thus much briefly, of estates, tenures, and services.

* Why has the lord, the ward of the body of lands of the heir, not being twenty-one years of age?
Because if the land be given to the tenant, to do service of chivalry, and when the tenant dies, his heir being within age, as such a tenant cannot do the service, the lord shall have the body, and land until the heir comes of age (b).

When shall such an heir be said to be in ward?
When the father dies seised of lands, holden in knight's service, and his heir being a son, and within the age of one and twenty years; and if it be a daughter, within the age of fourteen years, the lord shall have the ward until sixteen years by the statute-law (c).

(a) *Ante, 238 (a).
(b) To educate the heir in feats of war and chivalry, Stuart's View of Society in Europe, 87, 2d ed.; St. Palaye's Memoirs of Ancient Chivalry; and receive the profits of the feud to his own use, without rendering any account to the heir, in order to provide a substitute to do the feudal duties. Watk. n. Gilb. Ten. 308. 472.
(c) Vide ante, 127 (a).
What if the father die seised only of a reversion of the lands, there being a previous estate for life or years?

The heir shall be in ward for his body.

Is it so, if the father die seised of a remainder?

No, the heir there shall not be in ward (a), if the tenant for life be living.

What other differences are there?

If lands holden in knight's service, come to the *P. 21. heir by descent, he shall be in ward; *but if it come by purchase, he shall not be in ward.

Put a case thereof.

If the father and son purchase lands, holden as aforesaid, to them, and to the heirs of the son, and the father die, the son within age, shall be said to be in by purchase, and not by descent, and shall not be in ward (b). But by the statute in the 30th of Henry 8. if it be holden of the king, he shall be in ward.

When shall the heir be said to be out of ward?

If it be a male, when he accomplishes the age of twenty-one years; if it be a female, she must be full fourteen years at the death of her ancestor, otherwise the lord will have her in ward until she be sixteen, by the statute (c). And also, if the heir being in ward, and within age, be made a knight, then he shall be out of ward: but otherwise if he be made a knight, in the life of his father.

What is the lord to have of his tenant when he comes to full age?

He is to have the value of his marriage, if he do

(a) A reversion draws with it the rents and services, a remainder does not.
(b) Gilb. Ten. 95. Fearne's Rem. 36, Butl. cd. 27, 3d ed.
(c) Litt. s. 103.
not take a wife during his nonage; and the double value of his marriage, if he take a wife during his nonage, * if the lord tender * P. 22. him a wife without disparagement. But note, that the first tender, is not material (a).

How shall that value be tried?
By a jury, sworn to try and value the same.

Shall the heir in socage within age be in ward?
Yes, until he come unto the age of fourteen years, and then the guardian is to account to him, for the profits of the lands; and after the age of fourteen years, he is to take the profits of his lands by his prochein amie. But the guardian in chivalry, is not to do so, but to have the ward of body and land to his own use, until the age before mentioned.

Who ought to have the wardship of the heir in socage?

If his lands descend to him by the father's side, his next uncle or friend on the mother's side, to whom the land cannot descend: Et sic è converso.

What is the relief of lands in socage?
The value of one year's rent (b).

What if a man be disseised of his lands and tenements, or dispossessed of his goods * and chattels, what remedy has he in law? * P. 23.

His remedy is either to enter into the lands and tenements, if his entry be congeable, as if there be no discontinuance, nor descent cast; or else to bring his action, and so to recover the same by course of law; upon every which action, there is a proper and special writ ordained.

(a) Litt. s. 103. Cowel's Inst. 21. 1. 10. 4.
(b) Vide Hargr. n. Co. Litt. 85 a. at the end.
THE DIALOGUE.

How many kind of actions are there?
There are actions real, and actions personal, and actions mixed.

What do you call actions real?
Some are possessory, and some are ancestral: the first being where the plaintiff has been seised, and is disseised; and the other where the plaintiff was never seised, but some of his ancestors were, whose next heir he is.

What shall the plaintiff recover in real actions?
In real actions the plaintiff shall recover the things in demand.

For whom and against whom do these actions lie by law?
Always by, or against the tenant of the freehold.

Shall the plaintiff in these real actions, always recover costs and damages?
In some of these actions he shall, in some not.

* P. 24. * How shall he know what action does properly lie for every demandant?
That requires great learning, and a long discourse.
Let me somewhat understand it in general.

First you must note that there are some writs, only for tenant in fee-simple, as a writ of right, of Ayel, Besaiel, Cozenage, Nuper obiit, and such like, as Natura Brevium will shew (a). Also there are some writs, only for tenant in tail, and the donor, as a Formedon in remainder, discender, and in reverter. The first for tenant or heir in tail, the second for him in the remainder, when there is no heir, and the intailed land ought to come unto him, by his remainder. And for the donor, when both the other fail, and for want of heir or remainder, the land ought to revert.

(a) See also Booth's Real Actions, 200, &c.
revert, or come back, to the donor. And some other 
wrts lie for tenant for life, and against tenant for 
term of life, as the writ of Novel disseisin, and all the 
wrts of entry in degree (a), as the cause lies, viz. 
The writ of entry sur Disseisin, the writ of entry in 
the Per, Cui, and Post; and in all these, damages 
are to be recovered, and not commonly in the 
former (b).

* How are these and the former to be tried? * P. 25.
The writ of right being the highest writ 
in nature, lies where all the rest fail, and is to be 
tried by battle, and grand assize; and the issue is 
by joining the mise (c) upon the mere right; and the 
rest are to be tried by verdict of twelve men, to 
whom the parties, may have their due challenge.

Where is the nature of actions personal?
It is for the most part to recover costs and da-

mages, for the thing in demand, and they are to be 
tried by verdict as before-mentioned.

Recite some of these wrts for actions personal.
There are many, as a writ of trespass, of debt, ac-
count, deceit, detinue, covenant, &c. Vide Natura 
Brevium.

How else do the real and personal actions differ?
In real actions, the tenant of the land must be 
summoned, and the view taken. But in personal 
actions, the person of the defendant must be sum-
moned.

What are actions mixt?
They are part in reality, and part in personalty.

(a) An alienation or descent, makes the first degree. Finch's 
(b) Booth's Real Actions, 7. 237.
(c) i.e. The issue of a writ of right.

F F 3

Recite

There is the action of waste, in which the place wasted shall be recovered, and treble damages.

How, and by whom, are these trials to be executed in law?

They are executed two ways; either by judges, or by jurors lay-men, which ought to be twelve and freeholders.

When by the judges?

When the counsel of both sides demur in law, that is, rest upon a mere point in law, it shall be tried by the judges.

When by a jury?

When the counsel join upon an issue in faict, which must be tried juxta probatum et allegatum, viz. By evidence and witnesses.

Where shall the trial in faict be?

In that county where the jurors may best take notice of the matter; Nam ibi semper debet fieri triatio, ubi Juratores meliorem possunt habere notitiam.

How is that meant?

As when one is robbed in one county, and the goods are found in another county; or

* P. 27. wounded in one county, and dies in another county: sometimes the counties shall join together if they can.

You have reasonably satisfied me in this matter, perceiving thereby that the law is the life and sinews of every commonwealth: but what does your law consist of?

It consists of a positive law, of customs, and of statutes (a).

What

(a) Pref. 4. Co. v. But, according to others, the law of England, has six principal foundations, viz. the law of reason, the divine law, the general customs of the kingdom, certain principles
THE DIALOGUE.

What do you call the positive law?
That which was the first law, before customs or statutes altered it.

Shew me some example of your positive law.
There is a positive law in England, that a descent tolls \((a)\) an entry; that between joint tenants, the survivor shall have the whole, if no act be done to the contrary \((b)\); that the eldest son alone shall inherit, and all the daughters by equal portions. *Et sic de cæteris.*

What do you call custom?
Custom may be in free-land, or in copyhold-land.

How in one, and how in the other?
By the custom in certain boroughs, which is called Borough-English, the youngest son shall inherit, And in gavelkind all the sons \((c)\): *et sic de cæteris.* And in copyhold-land, the words *sibi* *et suis* create an estate of inheritance; and *P. 28.* the wife of a copyholder who dies seised of copyhold-lands, shall have her free-bench during widowhood.

How are the customs maintained?
The life of a custom is use and continuance, so that it be not altogether against reason \((d)\).

What do you call your statutes?
Acts and laws, which are established by act of parliament, by the King, with the assent of the Lords Spiritual and Temporal, and the Commons of the Realm.


\((a)\) Takes away.
\((b)\) i.e. Effecting a severance of the joint-tenancy.
\((c)\) And in default of sons, all the daughters. Litt. s. 210. 65. Robinson's Gavelkind, 90.
\((d)\) Vide ante, 59, \(a\). Plow. Com. 400. Cow. Inst. 6.—1. 2. 7.
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To what end are they made?
They are made generally either to abridge the power of the common law, or else to enlarge the same.

Was the common law defective before these statutes?
No, not altogether defective; but the law has been by great wisdom altered, or at least increased, or abridged, according to the offences of the subjects, growing and increasing, from time to time.

Shew me some examples thereof.
At the common law, the counterfeiting of the great seal of this realm was felony, and now by statute, it is treason. So the cutting of a

* P. 29. purse was but trespass, * and afterwards the losing of his thumb, and now it is felony: and so of divers other things.

Have these statute laws amended or impaired the common law?
Where they have not altered the positive law, but have only increased or decreased the punishment thereof, they have done great good; but where they have altered the common law in substance, they have done great harm.

Shew me an example where a statute has altered the common law.

Amongst others, I will speak only of the statute of Westminster the Second, of entail.

Did that statute good or harm?

In my opinion, much more harm than good, to the commonwealth, and subjects.

Shew me some of the conveniences and inconveniences.

The first cause of that statute was to continue lands in the issue in tail, or in him in remainder, secundum voluntatem Donatoris, which now may be cut off, by fine
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fine and recovery (a). Secondly, if the father die far in debt, these lands will not be liable to pay his * debts: and thus sometimes the * P. 30. creditor is undone, and many times de-frauded. Thirdly, no man can take any good estate from

(a) A fine with proclamations is a bar to the issue in tail; and a recovery alone is a bar both to the issue in tail, and those in remainder or reversion. Bacon's Law Tracts, 149. When a tenant in tail has the reversion or remainder in fee by descent; a common recovery is preferable to a fine on account of their different operations.

A fine levied by a tenant in tail who has the immediate re- version in fee in himself, merges the estate tail, and brings the reversion in fee into immediate possession, by which means it will become liable to the incumbrances of all those who were seised of the reversion: so that if a tenant in tail with the immediate reversion in fee in himself, make a lease, acknowledge a judgment, or incumber his estate in any other manner, and his heir levy a fine; or if tenant in tail has created any such charge, and afterwards levy a fine; it will operate as a confirmation of these incumbrances, and make them an immediate charge on the estate. Cru. on Fines, 274, 2d ed. 5 Cru. Dig. 252. 2d ed. So where a person is tenant for life, remainder to his first and other sons in tail, with the reversion in fee in himself, and becomes indebted by bond, or incumbers the estate in any other manner, and after the death of such a tenant for life, his son levies a fine, or there is a failure of issue in tail, it will let in the reversion in fee, and make it liable to the incumbrances of tenant for life, notwithstanding the reversion has descended to, and been devised by the tenant in tail. Kynaston v. Clarke, 2 Cru. Dig. 447, 2d ed. 2 Atl. 204. So it seems if a tenant in tail be incumbered with judgments, &c. and make a mortgage for five hundred years, and to corroborate the mortgage term, levy a fine sur concessit for five hundred years with proclamations to the mortgagee, the fine will let in all prior incumbrances, before the mortgage, according to their priority. Vide Pigot on Recoveries, 121. However, in all these cases, the incumbrances of the ancestor may be prevented from becoming an immediate charge, by conveying by grant previously to the fine, the reversion in fee, to a trustee, in trust for the tenant in tail, or the purchaser.

On the contrary, a common recovery gives a new fee, de-
from the tenant in tail, contrary to the statute of 2 H. 8. but he must be at the charges, of a fine and recovery; whereby the estates of poor men are defeated. Fourthly, if the father commit felony, the son shall have the land; which is an encouragement to evil. Which, as it stands, in my opinion, has brought more harm than good; as purchasers are defeated, lessees evicted, estates and grants upon good considerations avoided, creditors defrauded, offenders emboldened, and divers other inconveniences (a).

rived entirely from the estate tail, and freed from the incumbrances of any preceding reversioner or remainder-man: post, 81, but it lets in all the preceding incumbrances, and renders valid all acts of ownership which the tenant in tail who suffers it, has exercised over the estate tail; so that if a tenant in tail make a lease not warranted by the statute, 32 Hen. 8. or acknowledge a judgment or recognizance, or otherwise incumber his estate, and the same tenant in tail, afterwards suffer a recovery, it will operate as a confirmation of these charges, which were before defeasible by the issue; for as the recoveror acquires an estate in fee-simple derived out of the estate tail, therefore all those acts which bound the tenant in tail will also bind the recoveror, who cannot aver that the person against whom he recovered had but an estate tail, at the time he incumbered; and all those incumbrances will thereby become valid, and take place before any charge which is made on the lands, by or after the recovery. Cru. on Recoveries, 284, 2d ed. 5 Cru. Dig. 492, 2d ed. Pigot on Recoveries, 120. Cholmley's case, 2 Co. 52 b.

A recovery, therefore, only lets in the incumbrances of the person suffering it, while a fine lets in the incumbrances of the ancestors seised of the reversion, as well as those of the cognizor: Watk. Conv. 129, 2d ed. and consequently a common recovery in such a case, is, in general, to be preferred to a fine, excepting where the immediate tenant of the freehold will not join in the recovery; or the only object be to gain a title by non-claim.

I understand this, and suppose the law is the same in other cases. But how may estates in tail be cut off contra voluntatem Donatoris? and I will trouble you no more.

Always the donee in tail in possession, under a gift in tail by his ancestors, [and he has the remainder in fee in himself] by a fine duly executed, may cut off that intail, and conclude parties and privies, viz. those who are parties to the same fine, and their heirs. If it be with remainder over to persons named in the deed, then there needs a fine with recovery to make it sure; yet * the fine is * P. 31. good as long as the first donee has issue living; and does bind him in the remainder, if he make not his claim within five years after his title accrued: but by a recovery with a fine, it is barred immediately after the perfecting (a).

How

(a) i.e. When the tenant to the praecipe for suffering a common recovery is made by fine, which is what the author has in view, in the next paragraph, but which is not commonly done in the present day, on account of the expence: the more usual way now is to make the tenant by bargain and sale, enrolled either before the recovery, or within six lunar months from the date of the bargain and sale; Gilb. Uses, 99. 295. or by lease and release; or by feoffment.

Although common recoveries are deemed to some extents fictitious, yet there must be actores fabulae, for which reason there must be a tenant to the praecipe; that is, in the case of a legal recovery the writ of entry must be brought against a person who is actually seised of the freehold by right or wrong, or else the recovery is void; because in every real action there must be a good tenant to the freehold, otherwise he cannot render the land as the writ commands: Pigot on Recoveries, 28. Booth's Real Actions, 3. and the same mode of proceeding must be pursued, and all those forms strictly adhered to, which are necessary to be observed in an adversary suit. 5 Cru. Dig. 324, 2d ed. So in the case of an equitable recovery, the tenant to the praecipe must be made by the person having the
How must this fine and recovery be sued out?

First, there must be a recognition of the seller, called the cognizor, by *DEDIMUS POTESTATEM*, or in the Common Pleas before the judges, to the buyer, called the cognizee, of the nature and quantity of the land, and then finished accordingly to make him tenant of the land. Then take a *PRECEIPE QUOD REDDAT*, or a writ of entry in the post must be brought by two strangers, against the said tenant, and he must vouch the cognizor, *viz.* the tenant in tail, and he must appear by attorney, or in person, and vouch the common vouchee, and so the tenant to hold in quiet possession, and the cognizor or tenant in tail to recover over so much land: and this recovery over (so pursued) is a fiction of the law, and called the double recovery.

What is the single recovery?

Such a *PRECEIPE* or writ of entry in the post, must be brought against the tenant in *P. 32.* tail, and he must vouch the common vouchee, who must appear as aforesaid, and confess the warranty.

Why is this not so good as the other?

Because in the last case it is necessary that the tenant in tail must be seised of the estate tail, at the time of the recovery: for if he be seised of any other estate at the time of the recovery; as if he first discontinue the entail, and so be seised of a fee-simple at the time of the recovery, then the recovery is void. Also, a collateral warranty from the ancestor of the

the immediate equitable freehold; for if there be a previous *CESTUI QUE TRUST* for life, the *CESTUI QUE TRUST* in tail cannot bar the estate tail by a common recovery without the concurrence of the equitable tenant of the freehold, by analogy to the rule in the case of a legal recovery. 2 Ch. Cas. 64. 18 Vin. Abr. 207, n. pl. 2. 3 Bac. Abr. 242. 5 Cru. Dig. 478.
tenant in tail; which ancestor dying without issue, and the warranty descending upon the issue in tail, is a bar also of the entail, if he make not his claim in the life of his ancestor (a).

If the remainder be in the King, shall the King be barred?

This was somewhat doubtful before the statute of 34 & 35 Hen. 8. But since that statute, it is no discontinuance of the tail, nor bar to the tenant in tail, nor to the King in remainder; yet the law makes a difference at this day, if the King give lands in tail, with the remainder or *re- • P. 33. version in the King, a fine or recovery will not bar that entail: but if a common person give lands in tail with a reversion or remainder in the King, that entail may be cut off by a fine and recovery (a). And so the difference is, when the gift is

(a) Vide ante, 199. (c).

(b) The estate-tail may be barred by a common recovery alone: Co. Litt. 372 b. and wherever a recovery is a bar, a fine with proclamations will be a bar to the entail, although the reversion be in the crown: Co. Litt. 373 a. because no estate-tail is preserved by the 34 & 35 Hen. 8. unless the estate be created by the king's letters-patent, or the estate-tail be made by the king's provision, as when the king, in consideration of money, or of assurance of other lands, or for other consideration, procures a subject to make a gift in tail to one of his servants or subjects, in recompence of their service, or other consideration, with the remainder to the king; but not where the estate-tail is of the gift or creation of a common person without the king's provision. So if a person make a gift in tail, and afterwards the crown descends to him, this gift is out of the statute, because it was made by a subject. Wiseman's case, 2 Co. 15 b. 5 Bac. Abr. 555. Prerogative (E), 3. Yet where a reversion or remainder is in the king, a recovery by tenant in tail cannot bar or devest such reversion or remainder: and therefore a recovery by a tenant in tail in possession, which was not by gift of the king, remainder in tail to a stranger, and the reversion or remainder
is from the King, and when from a common person. And thus much generally of entailed lands.

Pray state some more differences between the prerogative and grant of the King, and of a common person; and, first, touching his person.

First, the king's majesty has two bodies, viz. a natural and a politic body.

Why has he a politic body?

For three causes, viz. Causa Majestatis, necessitatis, et utilitatis. In the first, he cannot give, nor take, nor grant, but by matter of record. Secondly, to the king, bars the estate-tail and all remainders, except the estate of the king. 2 Roll. Abr. 394, pl. 2. see Dyer, 32 a. (1). So a recovery by tenant in tail of the gift of a subject, remainder to the king in tail, remainder to a stranger in fee, binds the estate-tail, and the remainder in fee, but the estate of the king is not touched by it. 2 Roll. Abr. 394, pl. 3. Com. Dig. Estates (B. 31). 13 Vin. Abr. 195. However, according to our author, such a recovery would only bar estates prior to those in the crown, but not any estates subsequent to those in the crown. Post, 32. The doctrine that a remainder or reversion in the crown, created by a subject, cannot be barred, has however been denied by some lawyers of great eminence. The late Mr. Macnamara, in a very able opinion on a question of this kind, contended that the statute 34 & 35 Hen. 8. was merely declaratory of the common law; and that where an estate-tail was not protected from the effects of a common recovery, a remainder or reversion in the crown, expectant on it, was not protected. That the contrary opinion would be introductive of something like a perpetuity; for by a limitation of the ultimate reversion to the crown, the tenants in tail could only acquire a base fee in the estate. And the late Mr. Serjeant Hill was of the same opinion. See also 2 Co. 15 b. 16 a. Pigot's Recoveries, 85.

As the crown can only grant leases, &c. under the statute 39 & 40 Geo. 3. c. 83. the usual mode of acquiring a good title to an estate-tail, whereof the reversion is in the crown, is, by obtaining an act of parliament, enacting that the reversion shall be divested out of the crown, and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by a common recovery. 5 Cru. Dig. 462-529. 2d ed. 

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to avoid *inter-regnum* and nonage, &c. that body cannot die (a). Thirdly, to take lands by descent; and in that case the half-blood cannot hurt. *Vide Calvin's case*, 7 Co. 12 a.

What is the meaning of all this? That the king or queen of England in *their* politic bodies cannot be disabled, as *P. 34.* by death, nonage, marriage, or any such occurrence as a common person may be.

What of his natural body?

He may have lands by descent, and purchase as a common person may, by way of remainder, or matter of record.

What is his prerogative in grants made to him, and in grants made by him?

It is a ground in law, *quod nemo potest plus juris ad alium transferre quam in ipso est.* And further, nothing can pass from the king, nor for the most part to the king, but by matter of record, *viz.* by letters-patent under the great seal; and that the king cannot pass any thing by livery of seisin, nor by matter *in finit.* nor cannot disseise, nor be disseised. Also it is a maxim in law, *quod nullum tenu- pus occurrit regi* (b), that there shall be no laches nor

(a) See 1 Wynne's Eunomus, 153, 3d ed. Dial. 2. s. 6.

(b) But by the 21 Jac. 1. c. 2. it was enacted, that a quiet and uninterrupted enjoyment for sixty years, before the passing of that act, of any estate originally derived from the crown, should bar the crown from any right or suit to recover such estate, under pretence of any flaw in the grant, or other defect of title. And by the 9 Geo. 3. c. 16. it was enacted, that the king's majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in any wise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises); or for, or in any wise concerning the revenues, issues, or prof-
nor estoppels in the king for any right or title contrary to his express grant.

Then it seems that grants made from the king are taken strictly?

Yes, the king must not be deceived in his grant, and the thing must be named, and express set down; for things not named will not pass by this word *P. 35. Appurtenances; and the grant shall not be taken strictly against the king, nor largest for the grantee, as in a common person's case.

What things in a common person's case will pass by this word *Appurtenances?

An advowson appendant; common appendant; or appurtenant, and by reason of vicinage; ways; and the like.

fits thereof; or make any title, claim, challenge, or demand of, in, or to the same, by reason of any right or title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof; unless his majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or some other person or persons, bodies politic or corporate, under whom his majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by force and virtue of any such right or title to the same, the rents, revenues, issues, and profits thereof, or the rents, issues, or profits of any honour, manor, or other hereditaments, whereof the premises in question shall be part or parcel within the said space of sixty years; or that the same have or shall been duly in charge to his majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or have or shall have stood *insuper of record, within the said space of sixty years. Vide Co. Litt. 41 b. Hargr. n. Co. Litt. 119 a. (1). Runnington's Gilb. Ejectm. 50. ed. 1795. 3 Cru. Dig. 506. & Cru. Dig. 268, 2d ed.

What
What things may pass by the grant of another thing, as incident thereunto?

Many things may pass by the grant of another thing, without specially naming the same. As a rent, by the grant of the reversion; by grant of a manor, the hundred-court or leet, and the services; by a grant of a fair, the court of Pypowder; and many things else in the same nature.

What are things corporeal and incorporeal?

Things corporeal are those of which there may be an actual possession, and entry thereunto; as of a manor, a house, lands, tenements, and the like.

What are things incorporeal?

Things incorporeal are rents, courts, services, common, and the like; and these may be appendant, appurtenant, or belonging to corporeal things, as lands and the like.

What do you call common?

It is the depasturing of one man's cattle in the lands of another man, in which the commoner has no estate; but it is according to the nature of the common claimed.

How many sorts of commons are there?

Four: common appendant, appurtenant, in gross, and by reason of vicinage.

How do they differ?

Many ways: common appendant, and by reason of vicinage can only be by prescription, time out of mind; but the other two may begin at this day. Also, common appendant belongs properly to arable land, or to meadow or pasture, which was anciently arable land; and it must be used with such cattle as are levant and couchant upon the same lands, viz. the same both in summer and winter; and with such cattle as may hide and gain the lands, viz. graze and manure.
manure the lands; and not with hogs, goats, or geese. But if the commoner purchase any part of that land, or the tenant sell any part thereof, the common shall be apportioned: but if the commoner buy all the lands for an estate equal in duration with the estate in the common, the common is drowned; and common appendant cannot be severed or granted from the land; otherwise of appurtenant. But if the commoner appurtenant purchase any part of that land, the whole common is extinct, because it is against common right; and common appurtenant may belong to any, and for all manner of cattle *sans nombre*:\(^\text{a}\): so as the usage and claim of either of these commons shews and declares what manner of common that is. Common in gross may be by grant or prescription, to have common in another man's lands with twelve oxen, or twelve kine, or less, to a certain number; and that may be granted over to another. Common by reason of vicinage is, when two seignories or lordships, and the tenants thereof, have used, time out of mind, to common together in their common or fields, in the fallow or common time, by reason of their adjoining and want of inclosure: and this common is of the same nature as common appendant, and the one seignory or lordship may inclose from the other, and drive or keep the one's cattle out of the other's seignory or lordship; but the one may not stall-drive their cattle into the other's seignory or lordship; and the one cannot have an action of trespass against the other, if the one's cattle wander, or voluntarily go and depasture the other's seignory or lordship.

\(^{\text{a}}\) *ante*, 133, note (b).


Quære, if the tenants of one seignory or lordship may inclose part of their lands from the other, and leave part thereof for common. *Vide Tyrinham's case, in 4 Co. 37.* Also, none of these commoners can have an action of trespass against a stranger who shall do trespass there, nor is to take his common otherwise than with the mouths of his cattle.  

Quære, if the commoner may trench the ground to let out the water which hurts the land. *Stat. 12 H. 1.*

Pray make me better understand what *tenant in dower* is.

Dower is an estate for the third part during the wife's life, in all such lands and tenements as her husband was at any time seised of an estate of inheritance during the coverture.

*Is the wife to have a third during her* *P. 39.* life of all such lands and tenements?

No, he must be sole seised thereof, and not in joint-tenancy. Secondly, he must have the freehold and the inheritance of the land, *simul et semel,* during the coverture (*a*). And thirdly, he must be seised of such an estate during the coverture, that the child which he may beget of the said wife, may by possibility inherit the said lands (*b*).

Of what age ought such a wife to be at the death of her husband?

Of the age of nine years.

May the husband by his act any way bar the wife of her dower?

Yes, in committing treason, but not felony (*c*), by the statute in the first of *E. 6.* by laches, entry, suit, and pleading.

May

(a) *Ante, 92.*

(b) *Ante, 86,* note (*c*).

(c) If the husband be attainted of high or petty treason, his widow will be barred of her dower so long as the attaintee stands.
May tenants in dower forfeit their estate?
Yes, divers ways, as other tenants for life may, and also by elopement from her husband in his life, without reconciliation.

* P. 40. * May the wife of him who holds lands *of the king in capite* (a) be endowed by the heir or any other common person?
No, she ought to come into the Chancery, and there make an oath, that she will not marry without the king's license: whereupon a writ shall be directed to the escheator to endow her (b).

May the wife have dower and also jointure of her husband's lands?
No, unless it be in special cases.

When may the wife be put to her election?
If a jointure be made during the coverture, then at the decease of her husband she may choose the one or the other; but if it be made before the coverture, then she must be tied to her jointure only (c).

Was stands in force, Co. Litt. 392 b: but by the 1 Edw. 6. c. 12. and 5 Edw. 6. c. 11. she will not lose any title of dower previously accrued, by the attainder of her husband for any manner of murder or other felony whatever. Rob. Cav. 250. Ante, 97. So she will not be barred of her jointure, although her husband commit treason or felony. Co. Litt. 37 a. But if a woman be attainted of treason or felony, she will thereby lose her dower; but if pardoned, she may then demand it, though her husband should have aliened in the mean time. Co. Litt. 33 a. 13 Co. 23. 1 Crn. Dig. 202. 238. 2d ed.

(a) Vide ante, 127, note (a).
(b) Cow. Inst. 23. 1. 10, 11.
(c) So if a female infant, under the age of twenty-one years, be married to a gentleman of great estate, and she have a jointure made to her agreeably to the 27 Hen. 8. c. 10. of only one-tenth of the value of his lands, whereas the right of dower extends to one third; notwithstanding this, as the law has intrusted parents and guardians with the judgment of the provision
Was it so at the common law?

No, but is now so by the statute of 27 H. 7. vide Vernon’s case, in the fourth part of the Lord Coke’s Reports.

Is tenant in dower punishable for waste?

Tenant in dower, and by the curtesy, were punishable for waste by the common law, and the other particular tenants by the statute of Marlbridge (a).

vision to be appointed, she shall not set aside this transaction by reason of the great inequality between the dower and the jointure. 3 Wooddes. Lect. 453. Drury v. Drury, Hargr. n. Co. Litt. 36 b. (7). Earl of Buckinghamshire v. Drury, 1 Eden, 60. 3 Bro. Parl. Cas. 492. 4 Bro. C. C. 505, n. Williams v. Chitty, 3 Ves. 545. But if a provision previous to the marriage of a female infant in bar of dower, thirds, and all claim upon the real and personal estate of the husband be precarious and uncertain, as, that the personal estate shall go according to the custom of London, it does not bar her. Smith v. Smith, 5 Ves. 189. So where on the marriage of a female infant, an estate was settled on the husband’s mother for life, remainder to the husband for life, remainder to the wife for life, in bar of dower: this settlement does not bind the wife, because the mother might, as in this case she did, survive the husband; and the wife may therefore elect to take the provision under the settlement, or her dower and free-bench, Caruthers v. Caruthers, 4 Bro. C. C. 500. 1 Fonbl. Treat. of Eq. 74. 1 Rop. Husb. & Wife, 471: because the estate must take effect in possession or profit immediately after the death of the husband, Co. Litt. 36 b. as the statute 27 Hen. 8. c. 10. designed nothing as a satisfaction for dower, but that which came in the same place, and is of the same use to the wife; and although the mother had died during the life of the husband, yet this provision would not have been good; for every interest not equivalent to dower, being not within the statute, is a void limitation to deprive the wife of her dower. Vernon’s case, 4 Co. 2 b. 3 Bac. Abr. 713. Jointure (B), 1.

(a) Ante, 300, (a).
How many ages of women are there to be observed in law?

* P. 41. * Eight: First, seven years in aid pur fille marrier; nine years to be endowed of her husband, if her husband be seven years of age or upwards at his death: ten years upon ravishment: twelve to consent to marriage (a): full fourteen to be free from ward; to be in ward until the age of sixteen: seventeen to be an executor (b): twenty and one to do all acts (c).

What do you call tenant by the curtesy?

It is when the husband after the death of his wife, is to have an estate for life in the lands of his wife, and whereof she died seised of an estate of inheritance.

What estate ought the wife to have in the lands whereof the husband may be tenant by the curtesy?

She ought to have such an estate as the husband is to have by whom she claims dower as before mentioned. And besides, the wife must thereof have a possession in fait, and not only in law (d), ex-

(a) By the 26 Geo. 2. c. 32. all marriages solemnized by license, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of the father, if living, of such of the parties so under age first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and if there should be no such guardian, then of the mother, if living and unmarried; or if there should be no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery—are void.

(b) Vide ante, 131. (a).

(c) Vide Taylor's Civil Law, 254, 2d ed. Our author, ante, 150, by omitting ten years upon ravishment, and seventeen to be an executor, makes the number of women's ages to be six. Vide Co. Litt. 78 b.

(d) Vide note postquam, 69.
cept it be of an advowson, or of a rent: but it is otherwise in dower.

What else is requisite to make him tenant by the curtesy?

He must have a child by his wife born alive * during the coverture.

May he forfeit his estate?

Yes, as tenant in dower may.

May his wife hurt his estate, or possibility of estate?

Yes, if the wife commit felony before he is entitled to be tenant by the curtesy, viz. having no issue, he shall not be tenant by the curtesy: but it is otherwise after issue.

What other particular estates are there?

There is tenant by elegit, statute-merchant, and statute-staple (a).

What is tenant by elegit?

It is the creditor or debtee that has the moiety of all the lands of the debtor delivered to him by way of extent, with all the goods of the debtor, until the debt be levied, by the statute of Westminster the Second (b).

What is tenant by statute or recognizance?

It is a creditor who has all the lands and tenements of the debtor delivered to him by extent, until the debts be paid by the yearly value thereof.

*What if the land extended grow better, * P. 43.

and of more yearly profit?

Then the debtor may have an audita quaerela, and thereupon shorten the extent and time of payment.

(a) See the learned Mr. Serjeant Williams's notes, 2 Saund. Rep. 68 to 70 f. 2 Cru. Dig. 50, 2d ed. 3 Bac. Abr. 687. Execution (B).

(b) Com. Dig. Execution (C. 14).
What if the cognizee purchase part of the land?
If the cognizee purchase any part of the land, after the execution and extent, the whole is discharged; but if it be before the execution, and after the statute acknowledged, it is a discharge for the other feoffees of the said land. And also if the cognizor purchase the land of the cognizee, an extent may be sued thereof.

What if many strangers be severally enfeoffed of the land, and an extent be sued against one only?
He shall have an *audita quærela*, to have contribution of the rest. But if the cognizor reserve any part upon such a feoffment, and an extent be sued only against him, he shall have a contribution. *Quære* if his heir shall have contribution.

What difference is there between these statutes and an obligation?
These statutes bind the land from the *P. 44.* time of the acknowledgement, and make it liable, in whose hands soever it be to pay the debts. But the obligation only binds the lands or goods from the time of the judgment.

Does a writ of waste lie against such a tenant?
No action of waste lies against such a tenant, but an action of account (*a*).

Besides these grounds of law, and matters before rehearsed, what is the general learning of making and dissolving of contracts?
First, it is a general learning, that there must be in every contract, *quid pro quo* (*b*), viz. some valuable consideration between the parties, to be paid or performed, either presently, or at a day to come; or else some earnest to be given presently, otherwise the contract is void: for *ex nudo*

(a) *Ante*, 122. (b) *Vide* *ant*.; 205.
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pacto non oritur actio. And some doubt whether a consideration past, makes a contract good. Another learning is, that in an action of trespass, quod actio personalis moritur cum persona, and the heir or executor shall not be charged therewith (a).

You have reasonably satisfied me in general concerning grants to men, and from men: Now shew me a little how such contracts and * grants may be discharged and avoided by * P. 45. law by the parties consent; and I will make an end.

First, it is a general ground, quod nihil est tam conveniens naturali æquitati, quam unumquodque dissolvit co ligamine quo ligatur (b).

What do you mean by that?

As there are matters of record, and fait, and some matters in fait by writing, and sometimes by parol, the matter of record generally must be defeated by the like matter, and the matter in writing by matter in writing, and not by parol, except in a few cases.

Put me a case thereof.

If I enter into a bond to pay six pounds at a day, I may plead payment thereof by parol and witnesses: but otherwise of a bond without condition.

Also every lease or estate of freehold or for years, may be drowned by taking a higher estate in the same land at any time after. Also these lesser estates may be surrendered to greater estates, and the lesser so drowned.

Put me a case thereof.

A lease is made to one for life, the remainder * to another for life, the remainder * P. 46. to the third in tail: if he who has the first estate for life surrender to him in tail, or in

(a) Sed vide ante, 22. (b) Ante, 18.

fee,
fee, the surrender is void, because of the mean estate for life (a).

How by releases?

There it behoves that he who releases has an estate in esse, at the time of the release made; and that he to whom the release is made, has a freehold in the land in law or in fait.

Let me understand something of the nature of tithes, and what you call them?

It is commonly the tenth part of the yearly profits, which the lay-man pays to the spiritual man out of his lands, tenements, and hereditaments.

How many kind of tithes are there?

Three, viz. temporal, predial, and mixt.

When began these tithes?

Abraham gave the first tithes to Melchisedec.

Did Abraham then give the tenth of his increase?

Many doubt whether it was more or less.

May the spiritual man take all those tithes without delivery?

* P. 47. *No, although they be severed the ninth from the tenth, but must be set out by the lay-man: for Melchisedec did not take his tithes, but Abraham gave his tithes.

What remedy had the spiritual man, if the lay-man would not give his tithes?

He had no remedy before the statute in 2 E. 6, but to sue for the same in the Spiritual Court: for by that statute treble damages are given to the spiritual man, upon wrongful detaining or taking away his tithes.

Who may prescribe to have tithes, or not to pay tithes?

No lay-man, except the King or the patron,

(a) Vide ante, 174, (e).
ought to have tithes in their own right, or prescribe not to pay tithes. Vide the case of the Bishop of Winchester, 2 Co. 43.

Are tithes always to be paid proprio genere?
No lay-man can prescribe in non decimando, but in modo decimandi.

Of what things are tithes properly to be paid?
Out of such things as increase, and bring a yearly profit; as of corn, grass, wood, cattle, silva caedna, wool, calves, and such like.

What tithes are to be paid on cutting * P. 48. down great trees?
None at all, because it is a destruction of the stock; and so it seems of all wood above twenty years growth (a).

Where are these tithes to be recovered?
If the right of tithe be in question, in the Spiritual Court: but if the lay-man prescribe in modo decimandi, then upon the libel, he is to sue a prohibition, alleging his manner of tithing, and it shall be tried at the common law by a jury: for the Spiritual Court will allow no such plea, but in proprio genere.

To what spiritual man is the lay-man to pay his tithes?
Most commonly to the parson or vicar of the parish.

Was it always so?
No, before the council of Lateran, the lay-man might have paid his tithes to any spiritual man who soever that would take cure of his soul.

Are they all paid at this day to the parson or vicar of the parish?
No, some were given out to houses of religion,

(a) Toller on Tithes, 101. Doc. & Stud. Dial. 11. c. 55. page 293, 18th ed. 6 Bac. Abr. 719. Tithes (C) 4.
as to abbies, priories, nunneries, chaunteries, and such like.

* P. 49. * How happens it that laymen have, and enjoy tithes, contrary to the law?

That began upon appropriations.

What mean you by that, Sir?

It is a maxim in law, that the fee-simple as well of tithes, as of all other lands and tenements, is in some person; and the fee-simple of tithes, is in the ordinary, patron, and incumbent; which three together may grant or charge the tithes at their pleasure.

What mean you by that?

I mean, that the clergy, heretofore abounding in livings, were content with the patron, for gain or favour, to grant a great part of the tithes to any layman?

What did they usually grant?

Most commonly the rectory or parsonage, either in fee-simple, or for a long term, and for a small rent.

How was the cure then served and discharged?

By that means a poor vicarage was hatched out of a great parsonage; which vicar in these days discharges the cure, and the lay-man holds the residue of the parsonage.

* P. 50. * May such leases be made at this day?

No; divers statutes have abridged their power in such case; and especially the statute in 13 Eliz. So that they can make no good lease but for three lives, or one and twenty years, according to the statute (a).

Now, lastly, a word or two concerning the quantity of lands, and tenements (b), and their special

(a) 4 Bac. Abr. 41. Leases, (E).
(b) Vide Hargr. n. Co. Litt. 5 a. (11). 69 a. (2).
names and terms in law, and of all manner of reliefs, &c. due for the same; and then I shall fully make an end.

First, you must note, that two fardels of land, make a nook of land; and two nooks, make half a yard-land; and two half-yards, make a yard-land; and four yard-lands, make a hide of land; and four, (and some say eight) hides, make a knight's fee (a); the relief whereof is £5, and so rateably. And every knight's living or revenue heretofore was, or ought to have been £20 per annum. And the yearly revenue of every baron was, or ought to have been, four hundred marks. And the yearly revenue of every count or earl £400. Wherefore the relief of a baron was, and is, 100 marks, of an earl or count £100, and of every duke £800. *So * P. 51.

you may note, that the knight's revenue at the first being £20 per annum, the baron at the first was to have thirteen knight's fees, and a quarter of a fee; and the earl or count twenty knight's fees; and the duke forty knight's fee; by which proportion the reliefs aforesaid were rated as before mentioned; which is the reason that noblemen ought not to be arrested or attached by their bodies, because the law presumes, that they have sufficient lands and tenements, to discharge any suit. And they have these dignities given them by the king, for two purposes, viz. ad consulend. Regi tempore pacis et ad defendend. Regem tempore belli; in token whereof they are adorned with a cap of honour on their heads, and with a sword by their sides. Also there is another relief due, after the death of the tenant, who holds by grand serjeanty, and likewise after the death of the tenant, who holds in

(c) Vide Hargr. n. Co. Litt. 69 b. (1).

sodage,
socage, whereof I have made mention before. And
the relief for lands in socage, is due to the Lord
immediately after the decease of the tenant, of what
age soever the heir is. But of the rest,

* P. 52. when the * heir has not been in ward, and
is of full age, at the death of his ancestor,
such a relief is due presently after the death of his
ancestor, being tenant of any such lands, or of any
such estate, as before is mentioned. Vale.

Quicquid agas, prudenter agas, et respice finem.
Lex plus laudatur, quando ratione probatur.
THE most part of all such things, which the king's majesty, or any of his subjects, does or may enjoy, are, according to the terms used in the laws of England, either hereditaments or chattels.

We call such things hereditaments, which are hereditary, and in a natural body, may descend from ancestor to heir, and from heir to heir for ever; or which in a body politic may successively, or otherwise, have a perpetual continuance, as honours, messuages, dignities, privileges, liberties and the like. And to some purpose it makes no difference what estate or interest the party has, who enjoys any such thing: for although he has therein, the basest or meanest estate that may be, yet the name of an hereditament in a thing enjoyed in a natural sense remains, because it is in its kind hereditary, and an estate of inheritance has therein always its being in some person, except by some accident in some special case, it happen to be for a time suspended, or for ever extinguished, as shall afterwards appear. And therefore if he who has but a term of years in lands, grant his interest in all the hereditaments which he occupies or enjoys, his interest in the lands
lands is thereby granted; but yet nevertheless, he who has therein but a term for certain years, has but a chattel, and in regard thereof, in common sense, it loses the name of an hereditament; in the most usual and proper sense it retains the name of an hereditament, only in such person who has therein an estate of freehold or inheritance. And therefore if a man seised of certain lands in fee, and possessed also of other lands for term of years, demise all his hereditaments to another, for certain years, the lands, wherein the lessor had but a term, do not pass thereby, no more than they should pass in the same case, if the lessor had demised all his tenements: and yet in a natural sense, lands retain the name of a tenement and hereditament, as well in a termor, as it does in him who has therein a freehold or inheritance.

Also every hereditament is either local, transitory, or mixed.

1. Local, as messuages, which are vulgarly called houses or lands, be they arable, meadow, or pasture, &c.

2. Transitory, as dignities, privileges, liberties, rents, services, and such like.

3. Mixed, as honours, or manors, which consist of messuages, lands, services, privileges, &c.

Rectories or parsonages are local and transitory, when they consist of such things as land, tithes, and the like. But a rectory, when it consists only of tithes, (as some do) is a transitory hereditament; and the observation of this difference, is very material in matter of conveyance, as shall be hereafter declared. But it seems that such things, whereof no estate of inheritance is, or ever was in being, are not to be termed hereditaments. Also, if a man seised of lands in
fee-simple, grant out of the same a yearly rent, or common of pasture for life, or for years, this rent or common (as it seems to me) is not properly any hereditament: because no estate of inheritance is, or ever was thereof in being. But if a man seised in fee of lands, do by sufficient conveyance in the law, demise the same to another for term of his life, and limit the remainder thereof, to the right heirs of a man who is living at the time of such demise, no estate of inheritance is thereof in being, in any person whatsoever; for by the law, the estate of inheritance passes out of the lessor presently; and yet it cannot be in such heir to whom it is so limited, until the death of his ancestor: for until his death he can have no heir; but the person who is likely to be his next heir, is in the mean time only termed, his heir apparent. Also, if I. S. seised of a rent in fee, do by a sufficient conveyance grant the same to another for life or for years, and afterwards the same I. S. do release or grant the rent to him who is tenant in fee-simple of the land, out of which it is issuing, and to * his heirs, in * P. 57. which case the inheritance of the rent is extinct in the land; yet in a common and proper sense, during the estate for life in the same, and in a natural sense, during the estate for years, it retains the name of an hereditament: for in both these cases, an estate of inheritance in the thing demised or granted, had once its being, although by matter Ex post facto in the case of the remainder, it remains in suspension and abeyance for a time, and in the other case extinguished for ever. And in that which follows, when I speak generally of things hereditary, or hereditaments, I mean thereby hereditaments according to the common sense.

ChatteLS are such things as are not hereditary, but
but testamentary, as moveable goods, leases for years, wardship of lands and body, and the like: and they are called testamentary, as well because by the course of the common law, things only of that nature, and not hereditaments, (as shall be hereafter declared) might be disposed by will and testament; as also because after the death of such testator, the law does transfer the same to the executor of his last will and testament, for the payment of his debts and legacies; for until a statute made 32 H. 8. hereditaments were not disposable by will, if the testator had therein any greater estate than for years (a); except the use as before-mentioned, and hereditaments that were devisable by will, by a special custom, and not by the common law. And the cause why an estate of inheritance of a use was testamentary by the common law, arose from the estimation which the law then had thereof, as being less than a chattel; for a chattel was protected by law against wrongs, but so was not a use, apt remedy by law, being for the one ordained, and not for the other. But it is to be noted, that although other hereditaments were not testamentary by the course of the common law; yet by special custom in some cities and boroughs, the lands and tenements therein situate were always testamentary, in regard of their own nature, as chattels were; but sub modo by a special custom (b).

Of chattels, some are real, and some are personal: chattels real are properly such as savour * P. 59. of the reality, viz. consist of such things, as are in their nature hereditary, wardships of lands, or of other hereditaments, leases, or interests for years, or at will, derived out of any thing

(a) Ante, 303. (b) Post, 104.
thing whereof an estate of freehold or inheritance has or had a being (a). Chattels personal are goods moveable, as goods, plate, money, oxen, kine, &c. And hereby it appears that some chattels personal are without life, and some living: but it is to be observed, that living creatures feræ naturæ, as deer, conies, hares, and such like, are not goods or chattels, except they are made tame. Also charters or deeds of any estate of inheritance or freehold, although they are moveable, are not chattels. Also chattels real, are either local, transitory, or mixt, in such cases as is before observed of hereditaments; for although they are termed chattels, in regard to the feebleness of their estates, yet the things enjoyed by force of such interests, are for the most part by nature hereditaments; and of these differences in chattels real, some profitable use may be made, as hereafter will also appear. And it is to be noted, that some interests for years, are derived neither from any inheritance or freehold, but only from a man's *person: as if a man by deed * P. 60. create an annuity for years, without limiting it to issue out of any land or tenement, the same is derived only from the person who granted it, who in his life-time, and his executors or administrators who represent his person after his death, shall be only charged therewith; and, therefore, as well such interest in an annuity, as also a wardship of the body of an infant, which consists of a person, may in a strained sense be termed personal. But although the words Guard. de Terre, in the division of possessions, in the beginning of Mr. Littleton's tenures, seems to imply, that wardship of body, is not to be reckoned in the number of chattels real; yet it ap-

(a) Ante, 142. (a).
pears by other express books, that wardship of body, is no less real, than the wardship of lands: and, therefore, such implication as before-mentioned is no proof, that it is to be reckoned in the number of chattels personal, otherwise than in a strained sense; for things transitory, or moveable, consisting of any estate, (as wardships consisting of a term during the minority of the ward, or a term in an annuity, vil-lein (a), &c.) are not properly called chattels

* P. 61. personal, but real. And * because some things which may be enjoyed in the form before-mentioned, are neither hereditaments nor chattels, it is therefore proper to consider, in what generally those things are comprised: and as to that, it is to be observed, that not only those things which are neither hereditaments nor chattels, but also all hereditaments whatsoever in every such person who has therein any greater estate than for years, are classed under the general name of freehold, as in the next chapter more fully appears.

(a) Ante, 29, (b).

**FREEHOLD (b).**

W HAT is a freehold, and what is a chattel, is very clearly set forth in the beginning of Littleton's *Tenures*, by the said figure of division of possessions: whereby it appears, that all manner of estates of inheritance, or for life, be they estates according to the common law, or according to the custom, are comprised in the name of freehold; that is to say, each of them, is aptly termed a freehold

(b) Franktenement is of the same meaning as freehold.
which in judgment of law, is greater than any estate for years, though it be made for many thousand years, not in regard of any *probable* presumption, that an estate for life, may be more durable than such estate for years; but because a freehold, which is proper as well to any estate of inheritance, as to an estate for life, in account of law, has always been had in greater estimation than any estate for years; and for this cause only a term for years is subject to a forfeiture, by an outlawry in a personal action; for an offence wherein the offender is *felo de se*; and the like: but no estate of freehold, (unless it be by some special custom) is subject to any forfeiture of that kind. The difference between a freehold and chattels being explained, it seems fit to proceed to the consideration of Estates.

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**ESTATES.**

An estate is that which in Latin we call *Status*; and it may aptly be thus defined, *viz.* An estate is a permanent abode or continuance for a time or for ever, in a thing of such nature, as either is, may, or might be hereditary; as manors, mills, lands, tenements, rents, services, commons, dignities, liberties, franchises, privileges, offices, and the like. But no estate can be proper to chattels personal: and on that account, a gift thereof for a moment of time is of like force, as if it *were* *P. 63.* given for ever. But it may be objected, that so it may be said of a term for years in lands, or
other hereditaments, (that is to say) if such a term be given or granted for an hour, it is of like force, as if it were given or granted for ever; yet such term therein is properly called an estate. To which objection I answer, That although the law be so in a grant of a term, which is as much as to say, his whole interest in the thing, wherein he is so interested, viz. his land, and not his term therein for one hour; the grantee shall enjoy it no longer than for the time so limited, but otherwise it is of such gift or grant of chattels personal: but herein a difference is to be observed between such a gift or grant of goods moveable, and a demise thereof; for although a grantee for years of things properly demisable does enure as a demise or lease thereof, yet such grant has not the like operation in a thing demisable; only in an improper or borrowed sense. And therefore although a grant of goods moveable for a time, alters the property for ever; yet a demise thereof for a time shall only enure as a disposition of the profits thereby arising, during that time.
*P. 64. As for example; if a flock of sheep or kine, be let for certain years, the lessee has not thereby the general property thereof, but only a special interest or property therein, by force of which he may take the profit thereof during the term; but such interest therein, is not properly an estate. And although it be vulgarly called a lease of such kine or sheep, yet it is not so to be termed, otherwise than in a borrowed sense: for if a man so interested is likewise possessed of other leases of lands, and grant all his leases to another, his interest in these chattels personal, or the profits thereof, will not pass thereby. Of estates, some are general, and some particular, as hereafter appears.
GENERAL ESTATES.

A GENERAL estate is that which we term an estate in fee-simple, which is the greatest and largest estate that can be; and it is divided by Littleton in the first chapter of his first book, according to the etymology of the words "fee-simple," which in Latin are called feodum simplex, quia feodum idem est quod hereditas, et simplex idem est quod legitimum vel purum, et * sic feodum * P. 65. simplex idem est quod hereditas legitima vel hereditas pura; and it received the name of a general estate, not only because it was the most common and usual of all other estates: but also because of the ampleness thereof, it is exempted from the number of all particular estates.

But yet it is further to be observed, that there are three kinds of fee-simple: The first a fee-simple without any other addition. The second a fee-simple determinable. The third a base fee-simple.

The first of these is more general and common than any of the rest, and it can never perish so long as the substance, wherefrom the estate arises, has any being. And therefore, although he, who is seised of such estate, happen to die without heir, yet the same estate is not extinguished but by act in law, in some other degree it is transferred to the lord of whom the lands were holden, by way of escheat; because the land wherein the tenant has such estate, does still continue: but if a man seised in fee of a rent-charge, or rent-seck, die without heir, this fee-simple, although it be of the first sort, perishes, because the rent, * wherein * P. 66. he has an estate, being transitory, is by such dying without heir, quite swallowed up,
and drowned in the land out of which it issued. And although a fee-simple of this kind is sometimes absolute, and sometimes conditional, yet the condition thereto annexed, does not alter the same in nature or kind, but only in the accidental quality.

Secondly, a fee-simple determinable, is such as may be determined by a special limitation, before the effluxion of the time, comprised in the general and proper limitation.

Thirdly, a base fee-simple is, when two fee-simples in one thing are in being at one time, the one being in nature more worthy than the other. In which case, that which is the least worthy, is called a base fee-simple, because it is base in respect of the other.

There is a general rule in the law, that none can have a perfect (a) estate, but the donee; who is the party to whom it is given, or the heirs of his body. And it is further to be observed, that every estate of inheritance is either fee-simple, or fee-tail; of the one there has been sufficiently spoken; * P. 67. for the other, some further * account shall be given in the chapter following.

(a) Vif.

In the former Editions of the Maxims, page 117, the following Chapters on Particular Estates, Possession, Reversion, Remainder, and Rights, were printed as a separate Tract, and ascribed to Sir John Doderidge. See Preface.—As these Chapters are often cited according to the paging of Noy's Maxims, that paging is preserved in the inner margin in crotchetes.
PARTICULAR ESTATES.

A PARTICULAR estate is such as is derived from a general estate by separation of one from the other; as if a man seised in fee-simple of lands or tenements, do therein create by gift or grant an estate tail, or by demise, a lease for life, or any estate for years, these are in the donee or lessee, particular estates in possession, derived and separated from the fee-simple in the donor or lessor, in reversion. Also if lands be demised to A. for life, the remainder to B. and the heirs of his body, [*118] *the remainder to C. and his heirs, the estate for life limited to A., and the estate tail limited to B., are particular estates derived ut supra, and separated in interest from the fee-simple in remainder given to C., although the same remainder depends upon those particular estates. And of particular estates, some are created by agreement between the parties, as the particular estates before specified; and some by the act of law, as the estate of tenant in tail, after possibility of issue extinct, estates by the courtesy of England, dower and wardship. For although an estate in dower be not complete, until *it be assigned, which oftentimes is done by * P. 68. assent and agreement between parties; yet because the party who so assigns the same, is compellable so to do by course of law, that estate is also said to be only created by law (a). Also an estate at will is a kind of particular estate, but yet not such as makes any division of the estate of the lessor; for notwithstanding such estate, the lessor is seised of

POSSESSION.

the lands in his demesne, as of fee in possession, and not in reversion: Also an estate at will is not such a particular estate, whereupon a remainder may depend. But of all the estates before-mentioned, *many fruitful rules and observations [*119] are both generally and particularly so clearly set forth by Mr. Littleton in the 1, 2, 4, 5, 6, 7, and 8 chapters of his first book, which is extant as well in English, as in French; whereunto I refer you.

POSSESSION.

IT is further to be observed, that all estates which have their being, are in possession, reversion, remainder, or in right: but of all these, possession is the principal, because it is the full fruition of all the *estate. There are two degrees of possession: The first and chiefest, is possession in fact; the other is possession in law. Possession in fact (a) or deed is, such as is before spoken of and it is most proper to an estate which is, present and immediate; but such possession of immediate estate, if it be no greater than a term (b), operates and enures to make the like possession of a freehold,

(a) Possession in fact, or actual possession.

(b) And therefore the possession of a lessee for years, is a sufficient seizin for the heir to make possessio fratris, &c. Co. Litt. 15 a. And so the possession of lessee for years is deemed the possession of husband and wife, so as to give curtesy, without entry or even receipt of rent. De Grey v. Richardson, 3 Atk. 469. Hargr. n. Co. Litt. 29 a. But if the reversion be expectant on an estate of freehold, the law in both instances is different. Vide Bunt. n. Co. Litt. 239 b. (2).
or reversion. When a man is said to have a term, it is meant a term for years; when a man is said to have the fee of lands, it is also meant a fee-simple. Possession in law, is that possession which [\*120] the law itself casts upon a *man before any entry or receipt of the profits. As if there be father and son, and the father die seised of lands in fee, and the same descend to his son as his next heir: in this case, before an entry, the son has a possession in law. So it is also of a reversion expectant, or a remainder dependant upon a particular estate for life, in which case, if tenant for life die, he in reversion or remainder before his entry, has only a possession in law. All manner of possessions, which are not possessions en fait, are only possessions in law, and it is to *be observed, \*P. 70. that if a man have a greater estate in lands than for years, the proper phrase of speech is, that he is thereof seised (a), but if for years only, then he is thereof possessed (b): but yet nevertheless, the substantive possession is proper, as well to the one as the other.

(a) 2 Bl. Com. 104.
(b) 2 Bl. Com. 144. Co. Litt. 46 b. Ante, 64.

REVERSION.

A REVERSION is properly an estate which the law reserves to the donor, grantor, lessor, or [*121] the like, when he *disposes of a less estate in law, than that whereof he was seised at the time of such disposition. As if a man seised of lands in
in fee, give the same to another, and the heirs of his body; or if he demise the same for life or years, in each case the law reserves the reversion thereof in fee to the donor, or lessor, and his heirs, because he parted not with his whole estate, but only with a particular estate, which is less than his estate in fee: and such reversion is said to be expectant upon the particular estate. Also, if he who is but a tenant for life of land, by deed or parol, give the same to I. S. in tail, or for term of his life, which is a greater estate than he can lawfully convey; in this case the law reserves a reversion in fee in such donor, though he were formerly but tenant for life: and the reason thereof is, because by such unlawful disposition, which by deed or word cannot be without livery of seisin, he does by wrong pluck out the rightful estate in fee, from him who was thereof formerly seised in reversion or remainder, and by force thereof, by a priority of time gained in an instant, he was seised of a fee-simple at the time of the execution thereof. But if a man seised of [122] lands in fee-simple, give the same unto A. and his heirs until B. die, without an heir of his body; in this case the law reserves no reversion in the donor, because the estate so disposed to A. is a fee-simple; which though it be a fee-simple determinable, is in nature as great as the estate which the donor had at the time of such gift, and consequently he departed thereby with all his estate. And thereby an apparent difference is between a gift made to A. and the heirs of his own body, and a gift made to him and his heirs, until B. die without heir of his body; for in the one case the donee has

(a) Litt. s. 611. Co. Litt. 330 b.
has but an estate tail, in the. * other a. *P. 72. fee-simple determinable; and the donor has a possibility of reverter; for if B. die without an heir of his body, then whether A. be living or dead, the land shall revert to the donor. But such possibility of reverter differs much from the nature and property of a reversion; for he who has only such a possibility, has no estate, nor has he power to give his possibility; but in the other case, the donor has an estate in fee (a), and therefore he has power to dispose thereof at his pleasure (b).

(a) Expectant on the determination of the estate tail.
(b) See Butl. n. Fearne's Remainders, 4. 381.

[*123] *REMAINDER.

A REMAINDER is a remnant of an estate disposed of to another at the time of the creation of such particular estate whereupon it depends (c). As if I. S. seised of lands in fee, demise the same to B. for life, the remainder to C. and the heirs of his body, the remainder to D. and his heirs; in this case B. has a particular estate for life, and the remnant of the estate of the lessor is then also disposed to C. and D. ut suprā, whereby B. has an estate for life, C. a remainder in tail, and D. a remainder in fee, depending in order upon the particular estate in possession: and in every remainder five things are requisite.

1. That it depend on some particular estate.

(c) Co. Litt. 143 a. Ante, 120.
2. That it pass out of the donor, grantor, or lessor, at the time of the creation of the particular estate, whereupon it must depend.

3. That it vest during the particular estate, or at the instant of the determination thereof.

4. That when the particular estate is created, there be a remnant of an estate left in the donor, to be given by way of remainder.

*5. That the person or body to whom the [*124] remainder is limited, be either capable at the time of the limitation thereof, or else (Potentia pro-pinququa) to be thereof capable during the particular estate.

If lands be given to I. S. and his heirs, the remainder for default of such heir to I. D. and his heirs, that remainder is void, because it does not depend upon any particular estate (a). But if lands be given to I. D. and his heirs during the life of I. N., the remainder to I. B. this remainder is * good, for it is not limited to depend upon a fee-simple, but upon a particular estate, which is only called an estate for the life of I. B. descendable (b).

If lands be given to B. for twelve years, if C. should so long live, the remainder after the death of C. to D. in fee, the remainder is void: for in that case it cannot pass out of the donor at the time of the creation of the particular estate for years. But

(a) There cannot, by the rules of the common law, be a fee-simple limited after a fee-simple, because by the first limitation the whole estate is disposed of: but under the doctrines of springing or shifting uses, and executory devises, an estate in fee-simple may be defeated, and another estate in fee-simple take effect in its place, if the contingency on which the estate is to shift be limited to happen within the boundaries of the rule against perpetuities.

(b) Vide ante, 101.
REMAINDER.

if a lease be made to B. for life, the remainder to the heirs of C., who is then living, this remainder is good upon a contingency, viz. if C. die in the life of B.: for this remainder may pass out of the lessor immediately, although in abeyance, without any inconvenience, because only the inheritance separated from the freehold, is in abeyance (a).

If lands be given for life with a remainder [*125] to *the right heirs of I. S., and the tenant for life die in the life of I. S., this remainder is void; because it did not vest or settle either during the particular estate, or at the time of the determination thereof; for until I. S. die, no person is thereof capable by the name of his heirs. But if lands be given to I. S. for term of his life, the remainder to his right heir in the singular number, and the heirs of his * body; and afterwards I. S. has * P. 75, issue a son, and dies, this is a good remainder, and the son has thereby an estate tail: for although it were impossible that such remainder should vest during the particular estate, because during his life none could be his heir (b); yet it

(a) Plowd. Com. 25, (o). 29, (b); for although the immediate freehold cannot be in abeyance, ante, 109, yet the inheritance may, Co. Litt. 341 a. Litt. s. 646, although it is discouraged as much as possible. Butl. n. Co. Litt. 342 b, (1). 1 Cru. Dig. 70, 2d ed. But where a remainder of inheritance is limited in contingency, by way of use, or by devise, the inheritance in the mean time, if not otherwise disposed of, remains in the grantor and in his heirs, or in the heirs of the testator, until the contingency happens, and takes it out of them. Fearne's Rem. 275, 3d ed. 351, Butl. ed. and see Co. Litt. 371 b. So according to Mr. Fearne, the inheritance continues in the grantor, when a contingent remainder of inheritance is created in conveyances at common law; but on this subject there is a diversity of opinion. Fearne's Rem. 285, 3d ed. 359, Butl. ed. 2 Cru. Dig. 435, 2d ed.

(b) Nemo est hæres vicentis.
might vest at the instant of his death, which was at the time of the determination of the particular estate.

Concerning the fourth thing, if a man seised of lands in fee, grant out of the same a rent or common of pasture, or the like thing, which before the grant had no being, to I. S. for term of his life, the remainder to I. D. in fee, this remainder is void; because of this thing granted, there was no remainder in the grantor to dispose. And yet some here-tofore have been of opinion, that although the same cannot take effect as a remainder, yet it shall take effect as another grant *of a new rent or [*126] common, ut res magis valeat quam pereat (a).

There is a rule of law, that all things enjoyed in a superior degree, shall not pass under the name of a thing in an inferior degree: and therefore if lands be given to two persons, and to the heirs * P. 76. of one of them, or to husband and *wife and the heirs of the husband, and he who has the estate of inheritance grant the reversion of the same land to another in fee, such grant is void, because the grantor thereof was seised in a superior degree, viz. in possession, and not in reversion, as appears 12 Edw. 4. 12 & 13 Edw. 3. Brook, tit. Grants, pl. 100.

And concerning the fifth and last thing, if a lease be made of land for term of life, the remainder to the mayor and commonalty of D. whereas there is no such corporation then in being, this re-

(a) It has been since held by Lord Holt, that there may be a remainder of a rent created de novo. Weeks v. Peach, Salk. 577. Lutw. 1218. and see Salter v. Butler, Yelv. 9. Fearne's Rem. 232, 3d ed. 305, Butl. cd. And a rent-charge de novo may be granted so as to commence in futuro. 3 Cru. Dig. 308, 2d ed.
remainder is merely void: although the king's majesty by his letters-patent do create such corporation during the particular estate, for at the time of such grant the remainder was void, because then there was no such body corporate thereof capable, or in potestia propinqua to be created, or made capable thereof, [*127] during *the particular estate; but the possibility thereof was then foreign, and not probably intended. The like law is, if a remainder be limited to John the son of T. H. who had then no son, and afterwards during the particular estate a son is born, who is named John, yet this remainder is void; for at the time of such grant, it was not probably to *be intended that T. H. should have * P. 77. any son of that name. Also before the dissolution of abbies, if a lease of lands were made to I. S. for life, the remainder to one that then was a monk, such remainder was void, for the cause before alleged, although he were deraigned during the particular estate: but if such remainder had been limited to the first begotten son of I. S. it had been good, and should accordingly have vested in such son afterwards born during the particular estate.

RIGHTS.

A RIGHT in land is either cloathed, or naked. A right cloathed is when it is [*128] * wrapped in a possession, reversion, or remainder. A naked right, which is also most commonly called a right, is when the same is separated from the possession or remainder, by disseisin, discontinuance, or other divesting and separating the possession
possession from it. As for example, if a lease of land be made for life to I. S. the remainder to I. D. in fee; in this case I. S. has a right cloathed with a possession, and I. D. cloathed with a remainder:

but if a stranger who has no right or title, * P. 78. * do in the same case enter into the land by wrong, and put I. S. out of possession, such entry by wrong is called a disseisin; and therefore the possession is moved from the right; for by reason thereof the disseisor is seised of the land, and I. S. has only a naked right to the possession, and I. D. has also the like naked right to the remainder, which by such disseisin, is likewise devested and plucked out of him, and cannot be revested in him during the right of such particular estate, unless the possession of the particular tenant be therewith revested, which must be by I. S.’s entry, or recovery by action; and by such entry of the particular tenant, or by his recovery with execution, the remainder shall be revested as well as the particular estate. Also there is a right in goods and chattels, as well as in lands, tenements, and hereditaments, which *is also [*129] cloathed with a possession, so long as the rightful proprietor has the same; but if another take them from him by wrong, he has now only a naked right to the same, which cannot be by him granted, for the cause before alleged; but yet he may release his right therein to him that is thereof possessed, for the same reason as is before alleged of a

* P. 79. release of right in *land: and if such right happen to be forfeited to the king, his majesty may grant the same by his prerogative.
COMMON RECOVERIES.

A COMMON Recovery is such as is suffered and recovered by the assent of both parties to the same, of any manors, lands, tenements, advowsons, rents, services, or other hereditaments, for such estate, and to such use or uses as are between them agreed upon; and it is most commonly suffered by the writ of *entry sur disseisin en le post*; the nature of which writ is sufficiently set forth by Justice Fitzherbert, in his book of *Natura Brevium*; although sometimes it has been, and may be also suffered in other actions. And such common recovery is usual by single, double or treble voucher, as the cause requires. And for the better understanding hereof, it is requisite to observe the terms of law used therein. The immediate party who recovers, is called the recoveror; and the party against whom the recovery is had, is called the recoveree: but in the proceedings therein, he who is to recover is called the demandant, *and the *P. 80. party against whom the immediate recovery is to be had, is called tenant: for it is to be noted, that he must be tenant of the freehold, or else the recovery cannot be a good and sufficient assurance in the law. A voucher is the calling into the court of some other person to warrant the land; and he who first vouches, viz. he who calls another to warranty is the tenant, and the party vouched is termed the vouchee or tenant by the warranty. And in a recovery with a single voucher, are included two recoveries, viz. one at the suit of the demandant against the tenant, and another at the suit of the tenant against the vouchee. And if it be with a double voucher, there are included in it three recoveries,
Common Recoveries.

Recoveries, one by the demandant against the tenant, one by the tenant against the vouchee, and the third by the first vouchee against the second vouchee. And in a recovery with a treble voucher, are included four recoveries, whereof three are such as are last mentioned, and a fourth is a recovery by the second vouchee against the third; and in these recoveries the demandant has judgment to recover the land against the tenant, and the tenant * P. 81. has likewise judgment to recover in value against the vouchee; and if it be with a double voucher, the first vouchee has also the like judgment to recover in value against the second; and if it be with a treble voucher, the second vouchee has the like judgment against the third. And the record also makes mention of the execution of the judgment against the tenant by entry, or writ of Habere facias seisinam accordingly. And when such recovery is so executed, the uses agreed upon do forthwith arise out of the lands, tenements, &c. so recovered, according to the mutual agreement of the parties (a). The scope of a common recovery with a single voucher, is to bar the tenant and his heirs of such estate tail only, which then is in him, to bar others of such estate as they have in any reversion expectant or remainder dependant upon the same, and of all leases and incumbrances derived out of

(a) A judgment in a common recovery has no manner of operation, nor does it alter the nature of the estate, until it appears to have been regularly executed by the return of the writ of seisin; and as almost all common recoveries are now suffered to users, the recoverors do not acquire any seisin, and consequently no use can arise until the recovery is executed; that is, until the writ of seisin is returned, for it is now never in fact executed. W. Jones, 10. 2 Stra. 1185. 1 Wils. Rep. 55. 5 T. R. 179. 5 Cru. Dig. 410, 2d ed. Cru. Recov. 154, 2d ed. See further on Recoveries, Atherley's notes, Shep. Touch. 37.
such reversions or remainders (a). The scope of a common recovery with a double voucher, is to bar the first vouchee and his heirs of every such estate as at any time was in the same vouchee, or any of his ancestors whose heir he is, of such estate; and all other persons of *such right to a * P. 82. reversion or remainder, as were thereupon at any time expectant or dependant, and of all leases, charges, and incumbrances derived out of any such reversion or remainder; and that will be also a perpetual bar of such estate whereof the tenant was then seised in reversion or remainder; expectant or dependant upon the same, &c. The scope of a common recovery with a treble voucher, is to make a perpetual bar of the estate of the tenant, and of every such estate of inheritance as at any time had been in the first or second vouchee, or any of them, or either of their ancestors, whose heirs he or they are, of such estate, and as well of every reversion thereon dependant, as also of all leases, estates, charges, and incumbrances, derived out of any such reversion or remainder.

The law does so protect the King’s possessions, that they cannot be devested or taken from him by any feigned recovery or disseisin; and such protection thereof does also support and preserve the remote reversion and remainder after the King’s, that they cannot be devested by a feigned recovery suffered by tenant in * tail in pos- * P. 83. session, or by his feoffment, or by any disseisin of the freehold; but yet such recovery will be sufficient of the particular estate tail of the recoveree or vouchee, and of such reversion thereupon dependant as are in esse, between his estate and the

(a) Vide ante, 121.
remainder in the King, unless the estate tail of the recoveree or vouchee were created by letters-patent of his Majesty, or of some of his progenitors, or by his, or some of their provision (a).

(a) Ante, 337.

FINES.

As a common recovery is an assurance of the greatest force to bar such reversions and remainders as are mentioned in the preceding Chapter; so to another purpose, that is to say, to conclude strangers of their right, if they do not make their claim according to the form of the statutes in that behalf made, a fine is before all other assurances to be preferred; and it receives the name of a fine, Quia finis finem litibus imponit (b). In every fine there are two several parties, the comisor, and the conussee: the party levying the fine is called the comisor; and he to whom it is levied is called the conussee. A fine is partly said to be levied, when it is acknowledged in the court, or when it being acknowledged elsewhere, is certified into the court, and received to be there ingrossed and recorded. There are two sorts of fines; the one at common law, the other levied and proclaimed according to the statute.

Two several statutes are chiefly to be considered in fines levied and proclaimed according to the form of the statutes; the one of them is the statute of 1 R. 3. c. 7; the other is the statute of 4 H. 7. c. 24. being in some things afterwards explained by a statute made in Anno 32 H. 8. c. 36. The number of

(b) Ante, 333.
these proclamations are four, and to be made at four several terms; and a fine levied and proclaimed in the King's Majesty's Court, before his justices of the Common Pleas, of any lands or hereditaments, is ordained to be a final end, and to conclude as well privies as strangers to the same, except such strangers as are women-covert, persons then being within age, viz. the age of twenty-one years, in prison, or out of this realm, or not of sound mind, at the time of such fine levied. But this exception is *conditional, viz. that they or *P. 85. their heirs, inheritable to the same lands, &c. do take their action or lawful entry according to their right and title, within five years next after they be of full age of twenty-one years, out of prison, uncovert, within this realm, and of sound mind; and the same actions sue, or their lawful entries make and pursue according to the law.

Concerning fines with proclamations, five things are to be observed. First, the time of levying and proclaiming the fine. Secondly, the place where, and before whom it is to be levied. Thirdly, of what things it is to be levied. Fourthly, what ceremonies are therein to be observed. Fifthly, the several times are to be observed and considered. 1. That the fine be levied after the feast of Easter, which was in the year of our Lord God 1496. For all fines levied before that time are out of the compass of this statute, 4 H. 7. as by the letter of the same statute appears. 2. That the proclamation must be made in time of the term; and therefore if any of those proclamations do happen to be made either before the beginning, or after the end of any term, or on a Sunday, or other festival day *exempted from the term; as on the *P. 86. feast-day of the Purification of St. Mary
the Virgin, Ascension Day, All Saints, All Souls, or on the feast-day of Saint John the Baptist, if it happen on any other day than on the Friday next after Trinity Sunday, and be recorded accordingly, then if it be not helped by the statute 23 Eliz. c. 3. all the proclamations are reversable by a writ of error, or by plea, as it appears in Finch's case, Plow. Com. 366. 267. and then the fine will be of no other nature or force than a fine without proclamations. And although in truth the proclamations were all made within the terms, according to the form of the statute, yet if the record or records do purport the contrary, they are reversable by error, or avoidable by plea, if it be not helped by the said statute; for a record is of that credit in law, that no averment may be admitted to the contrary (a).

It is to be considered who are privies, and who are strangers to a fine; according to the statute, there are three privities only: 1. Privity in blood only; 2. Privity in estate only; 3. Privity in blood and estate.

There are three kinds of privities in blood
* P. 87. only. 1. One * is when a man is heir to his late ancestor, and yet has nothing by descent from him. As for example: if a father seised of lands in fee, do thereof enfeoff a stranger and his heirs; or if he by his last will and testament in writing dispose of the same, being holden in socage, to another in fee, and have issue, and die; in that case such issue is privy in blood, having nothing by descent. 2. One other kind of privity in blood is, when something is descended to him as heir to his ancestor, and yet he claims the same by some other right, and not as heir to such ancestor.

(a) Vide ante, 2.
As for example; if there be a father and son, and the son purchase lands of a stranger in fee, and is thereof disseised by his father, who dies thereof seised, and the same descend to his son as heir; in this case the son is privy also in blood, but not in estate: for although the possession of the same land came to him by descent, as heir to his father, yet he was therein remitted forthwith to his former estate. 3. And a third kind of privity in blood only is where a man in some respect is privy in blood and estate, and in another respect is privy in blood only. As for example; if there be two brothers, and the eldest purchase lands in fee, and is thereof disseised by his younger brother, who is afterwards disseised by a stranger, and that stranger dies thereof seised, the younger brother being within age, and afterwards the elder brother die without issue, the younger son has two manner of rights to the land; the one is a right of entry against such heir as is in by descent during his minority: but that right is only in respect of his former possession, which he obtained by disseisin, and not as heir to his brother; and in this respect he is privy in blood to his eldest brother, but not privy in estate. The other right which is now in the younger brother, is only a right in action, and not a right of entry; and this is in him as heir to his brother, whose entry was taken away by the said descent: in respect of his right, he is privy in blood and estate to his brother.

Privity in estate only is where a man claims an estate in land, as assignee to another; as if A. enfeoff B., in this case B. and his heirs are privy in estate to A.

Privity
Privity in blood and in estates are of two sorts, whereof the one may properly be called a privity of blood and estate; the other is so called improperly, and in a borrowed sense. That which is properly called a privity in blood and estate, is when both privities do accrue by descent, by or from one ancestor. The other is, when one of them accrues by one manner of title, and the other by a title of another kind. As for example; if there be a father and a son, and the father purchase lands, and die thereof seised, and the same descend to his son, he is to his father in a proper sense privy in blood and estate; because both those privities do to him accrue, by one descent, from one ancestor.

It is to be noted, that such privies as the statute means are after the ingrossing of the fine and proclamations made according to the form of the statute, absolutely barred, without hope of recovery or reinstatement, by any claim; but such as are strangers are barred only conditionally, if they or their heirs do not claim according to the form of the statute, within the times therein prescribed.

It is a rule in law, that no error by the fault of the judge can be assigned to reverse a judgment, unless it be so apparent, that it may be tried by view of the record, or by inspection of the person (a): for if it should, many grave judgments would be overthrown by corrupt trials of false surmises, to the subversion of justice, and maintainance of vice. But if the judge give judgment for the one party upon the matter appear-

(a) As when a fine is levied by an infant, it may be reversed by inspection of his person by the court during his infancy.
ing of record, whereas he ought to give judgment for the other party, this is reversable by error; because such a fault of the judge, through ignorance of the law, is apparent by the view of the record. Also a fine levied by a feme-covert is not erroneous (a), and therefore it is not reversable by error, but avoidable by her. Also a fine levied by a feme-covert at the common law, is avoidable by the entry of the husband; yet since a fine levied at this day, and proclamation according to the form of the said statute of 4 H. 7. or 31 Eliz. cannot be avoided by the entry of the husband of the coonor, as to the estate of inheritance, but only to the freehold during the coverture, and so long afterwards as he shall be tenant by the curtesy, if he had issue by his said wife before the fine levied. And in that case, although the husband enter within five years, or before proclamations had and *made, the feme and her heirs * P. 91. are barred as privies to the fine, the words of the statute of 4 H. 7. being the fine to be a final end, and conclude as well privies as strangers: and yet all strangers shall not be barred by such fine; the King is no such stranger as is comprised in the said act; for if the law-makers had meant to conclude the King thereby of his right, then it is not to be doubted (his greatness being such as it could not be forgotten) but they would have made some provision for his claim; which thing they have not done, because they never intended to conclude him; but others, being bodies corporate of things that go by way of succession, are comprised in this word strangers in the body of the act: and yet they are

(a) Unless it appears upon the face of the record that she was a married woman.
LIVERY.

not contained in the letter of exception, or of any of the savings which save rights to men and their heirs, speaking nothing of corporations or successions, or of any thing in succession.

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LIVERY.

THERE are two kinds of liveries; the one called a livery in fact or in deed, which is a ceremony used in the execution of a feoffment in fee, or a lease for life, by delivery of the ring of the door of the house, or a clod of the land contained in *P. 92. the feoffment, * in the name of the house and other hereditaments therein comprised. The other is called a livery in law, or a livery within the view, with the like ceremony in other form used in the execution of such feoffment or lease for life; but that is not always made upon the land, but only in the view thereof, that is to say, in a place where the parties do see and behold the land; and the feoffor so beholding the same, says to the feoffee, "I make a livery to you of this land; according to the purport of the deed" (if it be a feoffment by deed) if it be without deed (a), then the words are to this effect, viz. "I do deliver to you seisin of this land;" or, "I do make livery and seisin of this land to you and your heirs;" or if it be for term of life, "To you for term of your life (b)." This being done, the feoffee or lessee must enter; and before such entry, the livery within the view is not complete; for if the

(a) Vide ante, 154, (a). (b) Vide ante, 298, (b).
feoffor happen to die before an entry made by the feoffee, such livery within the view is void, and cannot be made good by any entry afterwards.

CONVEYANCES AND ASSURANCES BY DEED-POLL, OR BY PAROL.

A CONVEYANCE or assurance by deed-poll, is when it is made by a single deed which is not indented: and although many conveyances may be by indenture, which would not be good by law, if they were made by deed-poll, or by parol; yet è converso all conveyances and assurances that may be sufficient by deed-poll, or by parol, may also without all question be good by indenture. Also, what thing soever may be conveyed by parol (a), may be also conveyed by deed-poll; but è converso, many things may be conveyed by deed-poll, which may not be conveyed by parol. Therefore it seems fit now to consider what things in respect of their nature and kind may be conveyed by deed-poll, and not by parol; and as touching hereditaments transitory, or things transitory, which pass properly, or arise by grant, not by livery, as reversions, and remainders expectant, or dependant upon a particular estate in any hereditaments whatsoever, which may by apt conveyance, pass, or be created by deed-poll, but not by parol; * and here- * P. 94. upon arises the general rule, that those things which lie in grant, and not in livery, can-

(a) Since the statute of frauds there can be no conveyance of lands, &c. by parol, excepting leases not exceeding three years.

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not pass by parol, but by deed. But such things as lie in livery, may pass without deed; foecommens of messuages, lands, houses, manors, or rectories, and the like, are good without deed; and so are leases for years thereof made; because the freehold thereof will pass by livery; otherwise it is of grants of seignories in gross, rents, services, commons, advowsons, wastes, liberties, franchises, and the like, being transitory, or of such remainders or reversions as are before-mentioned. It is to be noticed, that lands, tenements, or hereditaments, or any estate therein, or any estate in a thing issuing thereout, cannot be conveyed to the king, without matter of record, as by fine or recovery, or by deed inrolled; and therefore a grant, or any other conveyance of such thing by deed, is not sufficient, unless the same deed be inrolled (a). And if a lease of land be made for life to I. S. the remainder to I. S. in fee-tail, the remainder to the king in fee, this remainder to his majesty cannot be good, unless the same be by deed inrolled: but a deed-poll thereof *inrolled, will be no less sufficient to this purpose than an indenture inrolled.

And to the inrolment thereof, the king is tied to no time certain, so that an inrolment thereof at any time during his majesty's life will be good in law; but if it be not inrolled in his life-time, then nothing can thereby be in the king: and if the king grant the same to another before inrolment, the grant is void, and cannot be made good by the inrolment thereof afterwards.

There are two sorts of conveyances by deed (b). The

(a) ante, 60. 339.
(b) nothing more seems necessary in the art of conveyancing, than to know what degree of property the party is clearly possessed
The one enures by transmutation of possession, transferring a naked right. Conveyances by deed, that enure by way of transmutation of possession, are of divers sorts (a); whereof some enure by way of removing a possession, and creating an estate, some by creating both an estate and possession; some by extinguishment; some by suspension thereof; and some by removing the possession, and drowning the estate. Conveyances by transmutation of possession that enure by removing both the estate and possession, are such whereby an estate and possession formerly settled in the one party, are removed to the other party. Conveyances that enure by removing a possession, and creating an estate, are such whereby a possession formerly settled in one party, is removed to another, by the creation of a new estate, other than such as was in the party, from whom it was divided. A conveyance that enures by creation of an estate and possession, is when the thing conveyed had no being before the making of such conveyance. A conveyance by transferring a possession, is said to enure by way of extinguishment, when the thing and the estate conveyed are thereby extinguished. A conveyance enures by removing the possession, and drowning the estate, when a surrender is made of a particular estate for life, or for years, to him who has the reversion or remainder thereof; in which case the possession of the land is removed, but the estate is drowned; for he to whom the surrender is made, is

*(a) Ante, 306.*

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not seised of the particular estate, but of such estate wherein the same is drowned; and such surrender of an estate which might have been created without deed, or matter of record, may be surrendered by parol.

Note, that a surrender to any person * P. 97. * of a particular estate which could not be created without deed, or matter of record, cannot be good by parol (a).

(a) Where, at common law, a deed was necessary to perfect the surrender, the same solemnity is still required; and where it might have been by parol, a writing is made necessary by the statute of frauds. Rob. on Frauds, 248. *Ante*, 174. Williams's n. 1 Saund. 235 b. (9). 4 Gwil. Bac. Abr. 209. *Leases*, (S). (T).

### CONVEYANCES BY WILL.

A CONVEYANCE by will is commonly called a devise: the party who gives or bequeathes a thing by will, is commonly called the devisor, and he to whom it is bequeathed the devisee (b). Of devises in general, there are three sorts: 1. a devise by the common law, 2. a devise by custom, 3. by force of the statutes of 32 & 34 H. 8. By the common law no manner of hereditaments wherein the testator had any greater estate than for years (except an estate in a use, of lands or tenements) was devisable by will; but he that had such use in fee, or for another man's life, might before the statute 27 H. 8. *de usibus in possessionem transferendis*, have devised the same by will, as he might do of a

(b) *Ante*, 322 (a).
CONVEYANCES BY WILL.

term for years. For the better discerning what devise is good by the common law, and what not, six things ought to be observed: 1. That the devisor be a person able to devise: 2. That the devisee be capable of the thing devised: *3. That the things are devisable by law: 4. That the purport thereof being no other in effect, than such as might stand good in law, in a conveyance by act executed, in the life of the devisor: 5. That the devise be not impossible: 6. That it be certain.

Concerning the first of these; forasmuch as every will takes effect by the death of the testator, therefore without the death of such testator, there can be no will, and without a will there can be no devise; and consequently all kind of corporations are unable to devise any thing by will, because they never die. A mayor and commonalty, provost and fellows of a college, wardens and commonalty of a company cannot devise any thing by will; nor can a bishop, dean, parson, or vicar devise any thing devisable, which they have in their politic capacity, viz. which he has in right of his bishopric, deanry, parsonage or vicarage; but every of them may devise such things devisable, as they have in their natural capacity; for in respect thereof every of them must die. But there are some natural persons who have no power or ability in law to devise any thing by will; as persons not of sound mind, and idiots: but an infant of fourteen years of age may make a will, and thereby make an executor of his goods (a). The husband may devise goods or chattels to the wife, although they are one person in law: a woman-covert has no power to give any goods by will; for

(a) Ante, 132 (a).
without the consent of her husband she cannot by law make a will, either of any of her husband's goods, or of such chattels in possession, or in right of action, as are in her husband in his right, or in herself in her own right: 12 H. 7. Fol. 24 (a).

A man outlawed in a personal action, or a person attainted of felony or treason, cannot devise any chattels personal or real; for if they were devisable or grantable, the property thereof is in the king, as before-mentioned, by such outlawry or attainder.

Concerning the second thing to be observed; not only persons of full age, women sole, and persons of discretion and sound mind, but also infants, feme-coverts, idiots, and mad men are capable of a devise, because it tends to their benefit, and not to their prejudice; but yet such capacity of a woman-covert, is subject to a condition in law, viz. if her husband do not disagree to the same; for if at any time during the coverture he disagree thereto, the devise is void in law, unless before such disagreement he did formally agree to the same; but if he do once agree to it, his disagreement afterwards is of no effect. Also persons outlawed in a personal action, or convict, or attainted of felony or treason, are capable of a devise: but in such case, if the devise be of a chattel, the king shall have the thing devised; as a chattel forfeited by the outlawry, conviction, or attainder: and if the devise be of an estate in freehold, or inheritance in lands or tenements, then in some cases the king, and in some cases the lord of whom the same is holden, as the case may require, shall be entitled thereto: also a devise made to a child in his mother's womb is good in law (b).

(a) Ante, 15 (d).  
(b) Ante, 221 (l).
Of the third observation, for the better discovering what thing is devisable by the common law, and what not, a difference is to be observed, between an estate to the use of another created by law, and an estate made or conveyed to the use of another by agreement of parties; for where it is created by law to the use of another, * there * P. 101. it is not devisable by will; but if it be made or conveyed by agreement, it is otherwise; as for example: if a man seised in fee of lands holden in socage, have issue a son, and die, the son being under fourteen years of age; in this case the law appoints the care and custody of such issue, and of the same lands which came to him by descent from his father unto his mother (if she be living) as guardian in socage, until he be of the age of discretion, viz. fourteen years: but this wardship in socage, so to her accruing by law, is to the only use and profit of the infant, and therefore it cannot be devisable by will, neither shall it go to the executor or administrator of the mother after her death, but to the next ancestor of the infant of the mother's side, as it appears in Plowden, fol. 239 and 294. in the case between Osborn and Joye (a).

Concerning the fourth, if cestui que use in fee of land before the said statute of 27 H. 8. had devised the same to I. S. and his heirs, and for default of such heirs to remain to I. D. or if he had devised the same to I. S. and his heirs, until I. N. happened to die without issue of his body, * the * P. 102. remainder to I. D. and his heirs, this devise of such remainder had been void; because by the rules of law, a remainder could not be limited to depend upon an estate in fee-simple; so that such a

(a) Ante, 5(b). remainder
remainder could not have been created by conveyance executed in a man's life.

Concerning the fifth observation; if a man be possessed of a term determinable by his death, do devise the same by will to another, the devise is void, because it is impossible that it should take any effect. Also a devise to I. the son of T. S. of D. whereas the son of T. S. has only issue W. is void, because there is no such person in rerum Natura. So it is also, if a term be devised to the executor of I. D. whereas I. D. died intestate.

Concerning the sixth observation; if any person having issue many children, do by will give or bequeath a cup of silver, a horse, or any other thing devisable, to one of his sons, this devise is void because it is uncertain which of his sons should have it; so it is also, if the like devise be made disjunctively to I. S. or I. D. but a devise to one

* P. 103. of his sons, at the * choice of his executors, is good, because the uncertainty may be reduced to a certainty, by the election of the executors. So also if a man be possessed of a term in lands for sixty years, and by his will devise to I. D. such and so many years of the said term as shall be nominated or appointed by his executors; this devise is good, causa qua supra: and yet a grant or gift thereof in that form made by conveyance, executed in his life, would not be good, the reason thereof is, because he can have no executors in his life-time, by reason whereof it is impossible to reduce such gift or grant to a certainty before his death; and a conveyance executed in a man's life must be reduced to a certainty before his death, or else it can be of no effect in law. But that reason ceases in a devise (which takes no effect until his death) and, therefore, the law differs therein accordingly.
ingly. Also it is to be observed, that a devise of chattels may be good, either by will nuncupative, or by writing (a).

Concerning a use, it is to be observed, that a man seised of lands or tenements in fee, to the use of himself and his heirs, could not by the common law devise the use thereof by will, * P. 104. unless the same lands or tenements were devisable by custom (b). But if I. S. seised of certain lands in fee, had infeoffed certain persons thereof, to the use of himself and his heirs, the use so severed from the possession, was devisable by the common law, although the lands out of which it arose were not devisable (c).

(a) Ante, 219 (b).
(b) Vide ante, 94. 308.
(c) Since the statute of Frauds, in a devise of a trust or equitable estate, in freehold lands, the formalities of execution and attestation, required by the statute, are as necessary to be observed, as in wills disposing of the legal estate. Wagstaff v. Wagstaff, 2 P. Wms. 258. Roberts on Frauds, 325. 1 Roberts on Wills, 45. As to the solemnities required, see also Phillips on Evidence, 527. Peake on Evidence, 360, 2d ed. 412, 4th ed. 7 Bac. Abr. 305, Wills (D). Powell on Devises, 47. Gilbert on Devises, 84, 3d ed. 1 Fonbl. Treat. of Eq. 192. 200, 5th ed.

CONVEYANCES BY WILL OF LANDS DEVISABLE BY CUSTOM.

It is to be noted, that although by the rule of the common law, no hereditaments (other than a use) was devisable by will; yet by particular customs in divers cities and boroughs, lands and tenements therein situate have always been devisable by testament;
CONVEYANCES BY WILL, &c.

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tament; so that the custom does therein alter the course of the common law. But in every such devise six things are especially to be observed (a).

1. That the thing devised be comprised within the custom.

2. That the devise be pursuant to the custom.

* P. 105. * 3. That the power of the devisor be not restrained by statute.

4. That the custom be lawful and reasonable.

5. That the intent of the devisor be certain, lawful, and not impossible.

6. That the will be not countermanded.

Concerning the first of these, the observation is double:

1. That the thing devised be as well in nature and kind, as also in continuance, such as is warranted by the custom.

2. That it be contained within the bounds and limits thereof.

As to the first part, if by custom all the tenements within a certain city or borough, be devisable by will; a rent-charge, and rent-seek which had continuance time out of mind, are in nature, kind, and continuance, such as are comprised within the cus-

(a) The statute of frauds requires the same solemnities of writing, signing, and attestation to a devise by custom, as to one under the statutes. The two powers of devising being thus assimilated, and made for the most part commensurate, it can seldom happen, that it should be necessary to call the power by custom in aid; though it is possible, as where the custom enables an infant of fourteen, or a feme covert, neither of whom is capable of devising under the statutes. As to the infant, see 37 Hen. 6. 5. Perk. s. 504. 2 And. 12. 5 Co. 84. post, 110. as to gavel-kind, ante, 131, (c): as to the feme covert, 3 Com. Dig. 14. Devises, (H. 3), where it is said, that by the custom of London she may devise to her husband, but without citing any authority. Hargr. n. Co. Litt. 111 b. (4). Roberts on Frauds, 326.
CONVEYANCES BY WILL, &c.

As to the second part of the observation: if a man seised of rent in fee, which time out of memory has had a continuance, and the same rent is issuing as well out of lands within the limits of such custom, as before-mentioned, as * P. 106, also out of lands not contained within the precincts; this rent is not devisable by the said custom, because the same or any part thereof is not contained wholly within the precincts thereof, which must be taken strictly (a).

The second observation has three branches, one concerning the person devising, another touching the persons to whom the devise is made; and the third branch the devise itself.

1. As to the first branch, a devise made by a foreigner, to any person, of lands or tenements situate within the city of London, according to the custom of London, is good, as appears M. 8 & 9 Eliz. Dyer, fol. 255 a. But yet some persons comprised within the general custom, are by the rule of the common law exempt from the same; as a devise made by a person lunatic, an idiot, an infant, and a man seised only in the right of his wife, is void, this custom notwithstanding.

As to the second branch; citizens and freemen of London, may by the custom of the said city, without the king's license, lawfully devise lands in London, whereof they are seised in fee, to guilds * or corporations, as appears by * P. 107.

(a) So it seems, that where by the custom, all lands and tenements within a certain precinct, &c. are devisable by all manner of persons, who are of the age of fifteen years, or upwards, a devise of a trust or equitable estate of freehold, by an infant is not good. Perk. s. 504.
CONVEYANCES BY WILL, &c.

5 Hen. 7. fol. 10. 19 (a). But if he be only a freeman and no citizen, or only a citizen and no freeman, he cannot without the king's special licence lawfully devise in mortmain.

As to the third branch; if the custom be, that lands and tenements within a certain city be devisable in fee, they may be devised in fee-tail, for such estate; before West. 2. was a fee-simple (b); also it seems probable, that by force of a custom which makes lands and tenements devisable, a man may devise those things that are therein growing, as trees, grass, and such like. But if a devise of a rent, or common out of lands devisable, is not pursuant to the custom, because they had no being at the time of the devise; and though they had any being, yet were they created within the time of memory, they are not devisable for the cause before-mentioned. If a house be only erected upon devisable lands by custom, a devise thereof is pursuant to the custom, although in that place there was never any house before, because the house retains the nature of the land whereupon it was *P. 108. built, as a principal part whereof it *consists, the change of the name notwithstanding.

Concerning the third observation, it is to be noted, that although the custom has been to devise lands to any person or body politic, yet the same may not by force of such custom be devised at this day in mortmain, upon pain of forfeiture, according to divers statutes, unless by the license of the king, with the consent of the lords mediate and immediate, be first therein had and obtained; for such custom

(a) Dyer, 255 n. (3). Vide ante, 256 (c).
(b) Ante, 285 (a).
is in that behalf qualified and restrained, upon the
pain before-mentioned, by the statute of mortmain,
viz. Magna Charta. A custom that began only since
the statute, cannot be good; for every custom that
may evidently appear to have its beginning since the
time of R. 1. is void in law, as appears by 33 H. 6.
27. 9 H. 6. and Littleton 38. yet nevertheless the
customs to devise in mortmain, are not abrogated
by any of the said statutes: for the devise, or other
form of alienation in mortmain, is not by any of the
said statutes made void; but it is only in advantage
of the lords, who might sustain loss thereby, prohi-
bited upon pain of such forfeiture to them
accruing, as thereby appears; * so that by * P. 109.
license and consent as aforesaid, a devise
in mortmain, by force of a custom, may stand good in
law, without danger of the penalty of forfeiture (a).

Concerning the fourth observation; if the custom
be not lawful and reasonable, it is void, so that a
devise by virtue thereof, cannot be of any force in
law. And, therefore, if an alien purchase and de-
vise lands lying within a certain borough by force of
a custom, that lands and tenements within the same
borough are devisable to aliens in fee to their own
use, and by them devisable by testament, this devise
is void: for such custom against the king's prero-
gative is unlawful; although his majesty cannot be
thereunto entitled without office or other matter of
record, yet in the mean time between such purchase
and office found, &c. I take the alien to be receiver
of the profits, and that the estate purchased is forth-
with in him in consideration of the same custom, until
the king's title appear by office or other matter of re-
cord. Also it is to be observed, that a custom to de-

(a) Vide ante, c26, (c).
vise a right, separated from the possession, cannot be lawful, because it savours of maintenance.

* P. 110. * As touching unreasonable customs: if the custom within any city or borough be, that tenements therein situate are devisable by infants, idiots, or mad men, it is unreasonable, and therefore void. But a custom, that the same be devisable by children of fourteen years is good (a).

Concerning the fifth observation; if the intent of the devisor be uncertain, unlawful, or impossible, the devise will be of no force in law. The intent of the devisor may be uncertain, either in the person to whom he devises, or in the thing devised, or in the estate that should pass thereby. And first concerning the person, it appears 49 E. 3. 3. one Jorden devised certain tenements in London to one for life, so that after his decease the same should remain unto two of the better sort of the fraternity of London: this remainder was agreed to be void for want of certainty, what persons of the fraternity should have the same. Secondly, as concerning the certainty in the thing devised; as for example, if a man seised of lands or tenements devisable, do by will bequeath a portion thereof to I. S. 

* P. 111. this devise is void, because it * does not appear what or how great a portion thereof the devisee should have by force of the said will. Thirdly, although the intent of the devisor does certainly appear, and the persons to whom the devise is made, and the estate in the lands and tenements devised; yet if the estate therein limited be so uncertain, that neither by matter expressed, or implied in the will, nor by a common intendment, it cannot be reduced to a certainty, the devise will be void in law. And, therefore, if a man seised of lands de-

(a) Ante, 394.
visable as well by will nuncupative, as by writing, do by will in writing amongst other things bequeath the same to I. S. for such estate as is specified in a schedule thereunto annexed, and then the devisor die without annexing any schedule to the said will, or other declaration of the certainty of the estate; this devise is void in law.

Now it is to be considered, that although the intent of the devisor be certain in all things, that nevertheless if it be unlawful, the same will be of no force. And, therefore, it is also needful to discern, where and in what case the intent of the devisor is unlawful, and where not: and the intent of the devisor is unlawful, when it is *so *P. 112. repugnant to the rules of the law, as that by any counsel learned in the law, it could take no effect by conveyance executed in his life-time; as for example, a devise of a naked right, or possibility of a remainder to depend upon an estate in fee-simple thereby bequeathed, is said to be unlawful; for as no such remainder could be given, id est, conveyed by any act executed in a man's life, so also no bare right could be conveyed by the like act executed in his life to any person, other than such as were seised, or to be seised of the freehold of the same lands at the instant of the execution of the conveyance, and that only by way of extinguishment. And hereupon it follows, that a man having right to lands deviseable, being by defeasable title in the possession of I. S. cannot devise the same by will to I. D. So also the lord, of whom the lands deviseable are immediately holden by knights service, cannot devise his possibility of escheats or wardship, that may thereof accrue to him, when his tenant shall happen to die without heirs; or the possibility of wards, when the heirs shall be within age.

Con-
Concerning an intent impossible, we * P. 113. * term that an impossible intent which by no probable and common possibility can be accomplished: and of such impossible intents, there are three sorts: 1. Impossible both at the time of the making of the will, and also at the death of the devisor: 2. Impossible only at the time of the devise, and not at the time of the decease of the testator. 3. Impossible at the time of the making of the devise.

And as to the first sort, of lands devisable by will, bequeathed to the heirs of S. who was attainted of felony or treason, unreversed at the time of the devise, or death of the devisor; or if in the time of the Romish religion, such devise were made to one who was a monk, being not deraigned at the time of the devise, or death of the testator; or if the same be devised to the heirs of I. D. who was then dead without heir; or to a corporation that had no being at the time of the will, or death of the testator: or if a man by his will devise a certain house in a borough, wherein at the time of his devise and death he had nothing: or if lands be devised to the executors of I. S. who died intestate; in every of these cases the intent of the devisor was impossible, both at the time of * P. 114. * the devise and death of the devisor; and for such impossibility, the devises are absolutely void.

Concerning the second sort, if lands were devised to a monk, who at the time of the death of the testator was deraigned, or to the heirs of one who is attainted of, &c. which is afterwards reversed before his death; or to a corporation that has a being at the time of his death, but not created at the time of the devise: in these cases the intent of the devisor was
CONVEYANCES BY WILL, &c. 401

was only impossible at the time of the devise, but not at the time of the decease of the testator. And yet I take the law, that those devises be also void: *Nam quod ab initio non valet, id tractu temporis non convalescit* (a).

The sixth observation is, that the devise be not countermanded; for it is a clear case, that it is countermandable at the pleasure of the devisor, and thereby the devise will be of no force in law. And it is to be noted, that there are two kinds of countermands, the one is a countermand in deed, the other a countermand in law. A countermand in deed is when a testator does expressly revoke his will formerly made, or any *part * P. 115. thereof; and this countermand by word is of no less force than if it were by writing (b); for although the will contain amongst other things devises of lands, be it in writing, as an effectual part thereof, in case where the custom or law does so require it: yet, nevertheless, an express countermand by word of the will, or of any devise of lands therein comprised, will be sufficient in law to controul the same, as it appeareth by *Kett's case*, 14 *Eliz.* Also, if after making the will, the testator cause a devise therein made to one man to be quite struck out; this is also a countermand in deed of that devise, and the will stands good for all the residue. A countermand which in law, is that which neither by word or deed is expressed, but only in those other acts implied. As for example, the making of another will implies a revocation of the former, and therefore it is a countermand in law thereof. So likewise if lands be devised by will,

*(a) Ante, 15.*
*(b) It is otherwise since the statute of Frauds, 29 Car. 2. c. 3. s. 6. and 22.*
and afterwards the devisor enfeoff'd a stranger in fee thereof, this feoffment implies a revocation of the devise of the land, and therefore it is in that part a countermand in law, although * P. 116. * he afterwards repurchase the same, 44 Edw. 3. 33. And although lands devisable by custom may be executed by a writ of ex gravi querela(a), yet if there be no special custom to the contrary, the devisee may (if he please) execute the same by entry, as it appears by 35 Ass. p. 12. 40 Ass. p. 2. 27 Ass. p. 60. And in every such case the possession in law of the thing devised, immediately after the decease of the testator, is no less cast upon the devisee, than it should have been cast upon the heir, if no devise had been thereof made, as appears Brooke, tit. Devise, 490.(b) 

(a) F. N. B. 198 L. Co. Litt. 111 a.
(b) A will of freehold interests in lands or hereditaments need not be proved in the Ecclesiastical Court, although it is usually done, because most wills of land contain also a disposition of personal estate; 6 Crn. Dig. 11, 2d ed. for if a man devise lands by force of the statute of wills, or by custom, the probate of the will in the spiritual court cannot be given in evidence; because all the proceedings, so far as relate to freehold lands or hereditaments, are coram non judice, as the Ecclesiastical Courts have no power to authenticate any such devise; and therefore a copy produced under their seals is no certain evidence of its being a true copy. Bull. N. P. 245. Dike v. Polhil, Ld. Raym. 744.

So where a person in ejectment would prove the relation of a father and son by his father's will, he must have the original will, and not the probate only, for where the original is in being, the copy is no evidence; yet the ledger-book is evidence in such case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relationship, the rolls of the spiritual court are sufficient proof of such testament. Bull. N. P. 246. Phillips on Evidence, 393, 4th ed. A will exemplified under
the great seal is not evidence before a jury in ejectment. Anon. Comb. 46. 12 Vin. Abr. 116, pl. 14.

It is therefore frequently necessary to produce the original will, and for that purpose it was formerly the practice to apply to a Court of Equity for an order to take it out of the Ecclesiastical Court, where it had been proved, on giving security to return it. Frederick v. Aynscombe, 1 Atk. 627. Williams v. Floyer, Amb. 343. Morse v. Roach, 2 Stra. 946. 1 Dick. 65. S. C. Pierce v. Watkin, 2 Dick. 485. Luke v. Causfield, 3 Bro. C. C. 263. Forder v. Wade, 4 Bro. C. C. 476. In Hodgson v. ——, 6 Ves. 135, Lord Eldon granted the order very reluctantly; and in Ford v. ——, 6 Ves. 802, his Lordship said there was so much authority for the application, that he could not refuse it; and that he had found a case among Lord Hardwicke's notes: but his Lordship expressed his surprise, that such a jurisdiction should have been exercised. The Court of Exchequer in Wells v. Corbyn, 3 Anstr. 648, refused to exercise it; and in Fauquier v. Tynte, 7 Ves. 292, the court refused to permit depositions in the French language to be delivered out for the purpose of being translated; and Lord Eldon said, I cannot order a record out of the possession of the officer of the court. Though in the case of a will I have followed what my predecessors have done, I never could answer the question what I could do to the officer, if he refused to obey the order.

The present practice is to apply personally to the Ecclesiastical Court, where the will was proved, requesting that one of the clerks of the office might be permitted to attend the trial or hearing of the cause, with the original will, and offering to pay his expenses and loss of time in going to, attending, and returning from the trial or hearing: this application is granted as a matter of course on an affidavit being made by the attorney, agent, or party in the cause requiring the same, stating, that the will was proved in the Ecclesiastical Court, to which the application is made; the nature of the action or suit; the reason why the will is wanted at the trial or hearing; and that it is absolutely requisite the will should be produced. Before the original is permitted to be taken from the office, it is necessary that the probate or an office copy should be left until the clerk returns with the will; and if the party applying has neither of them, he must be at the expense of an office copy, which will be given up to him on the return of the original. The whole of this expense is often much less than the charges incurred formerly by an application to a Court of Equity; in which case, indeed, if other persons were beneficially interested
interested under the will, the court would not make the order without their consent.

Where a will of lands, forty years old, appears, after a search at Doctors' Commons, to be lost, as the probate under the seal of the Ecclesiastical Court, is not admissible evidence of the contents, an examined copy of the will should be produced. Per Lord Ellenborough, at Nisi Prius. Doe, dem. Ask v. Calvert, 2 Campb. 389. And where it was proved that a will of lands had been lost, parol evidence of its contents was received from a person who had heard it read in the presence of the testator's family, on the day of his funeral. Per Mr. Baron Wood, at Nisi Prius. Anon. 2 Campb. 390.

The probate of a will is the only legitimate evidence of personal property, including chattels real or terms for years, being vested in an executor, or of the executor's appointment; the original will is not admissible for that purpose. Coe v. Westernham, 2 Selw. N. P. 730. Thus a probate unrepealed is conclusive evidence, in civil cases, of the validity of such will; and therefore payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null and void, because a probate as long as it remains unrepealed, cannot be impeached in the temporal courts. Allen v. Dundas, 3 T. R. 125. See further, Phillips on Evid. 336, 4th ed.

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**CONVEYANCES BY WILL BEFORE THE STATUTES 32 & 34 HEN. 8. (a)**

Although lands and tenements, wherein a man had any greater estate than for years, were not devisable by the common law; yet until the making of the statute 27 H. 8. c. 10. de usibus in possessionem transserendis, men commonly put their lands in use; viz. they enfeoffed others in fee, to

(a) 32 Hen. 8. c. 1. explained by 34 & 35 Hen. 8. c. 5.
the use of themselves and their heirs, to the end that they might devise the same use; and by force thereof, after the decease * of the * P. 117. testator, the feoffees did, at the request of such devisee, make and execute to him an estate in the land according to the use devised: and if the feoffees refused so to do, the devisee might thereunto compel them by suit in the Chancery. And so by such subtle invention, the devisee obtained the effect of a devise of the same lands or tenements, which were not then devisable by law (a).

(a) Ante, 303. 358. 388.
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THE END.

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ERRATA.

Page 7, line 7, from the bottom, dele "one."
15, line 5, read "primitiva."
26, line 8, from the bottom, read "bis."
37, line 24, read "acquittance."
39, last line, add "193."
48, line 4, after "lands in," add "C."
line 5, dele "in C."
52, line 15, after "As," add "if."
53, line 3, from the bottom, after "be," add "by."
87, line 31, read "case."
line 33, after "B," add "162."
100, line 6, from the bottom, read "Gatacre."
120, line 17, from the bottom, dele "21," add "66."
122, line 2, from the bottom, read "Sel. Cas. Ch."
130, line 7, dele "double," read "dowable."
133, line 10, after "ancestors," add "(c)—after "not,"
dele "(c)."
144, line 8, read "catalla."
line 9, read "of."
171, line 15, read "Latch."
328, line 6, from the bottom, read "descender" before "remainder."
329, line 16, read "What."