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Accession No.
MANUSCRIPT
COMM. LAW LECTURES
GIVEN
BY RAPHAEL REEVE
LITTELFIELD LAW SCHOOL

ARLICIA FLASHERN
Lexe Mercatoria.

As delivered by Mr. Reeve

This as its true name designated is the law regulating commercial concerns, which is adopted in its general provisions by all commercial nations, qualified and modified by modified and modified by their various customs of ordnances.

It has been termed the custom of merchants; but that custom is not here called the legal propriety, for the mercantile law is general; it is not to be found as particular customs are, but has within itself particular laws customs, which must be proved in the same manner as those at law.

It is not exclusively the custom of merchants but regulates all mercantile matters; if it stands in the same relation, with regard to commercial concerns, as the law does to all other transactions.

The subjects of the Lex Mercatoria.

Bills of Exchange are regulated by this law. Foreign bills are always regulated by it in all countries; if Mortgages and Bills are by the special ordinance of most commercial countries regulated by it, as are promissory notes of certain description.
Law Merchant.


The Variance between the Common Law of Merchants Law.

1. At law, bills in action were not assignable, so as to vest the property in the assignee. If such assignment was a species of offense, barred maintenance. But courts of equity in Eng. soon began to infringe on a rule which it was found difficult to preserve in a commercial country. It compelled the debtor to pay the money to the assignee. Since that this has been collaterally recognized by courts of law, they still retain the form of bringing the action in the name of the original obligee. A promise by the debtor to pay the assignee, is held good at law. To this they have in certain cases made an assigned note a set off, to a claim due by the obligee against the assignee. So that all remaining of the old common law rule of the formality of bringing the action, in the name of the original obligee.

But by the law merchant, such negotiable notes as are within its cognizance, are vested immediately in the assignee, both as to the legal of equitable interest, and without any privity of contract. The L. M. raises an agreement between the drawer, drawer, the payee of the person holding the note.

II. Again, at law, that species of contracts known
Law Merchant.

Summaries, are so privileged, that no inquiries can be gone into, to prove the want of consideration.

By the law Merchant, all negotiable instruments of the having been negotiated, are equally privileged, as formerly, but before they are Negotiated they stand on exactly the same ground as other instruments at law.

III. Again, some Mercantile contracts are valid, when there is no legal consideration, but merely that of honor; for instance, A draws a bill on B in favor of C. B refuses to accept it, to an old acquaintance standing by, honors it voluntarily, without any consideration actual or anticipated, now by the law Merchant, B may maintain his action against A for the amount of the bill. This was not, notwithstanding there is no priority of contract between them.

IV. Again, by the law of England, fraud in the consideration of a contract does not render it void. The party injured may have his remedy, in damages, but a fraud in the execution always nullifies contracts.

The Mercantile law destroys a contract, altogether for a fraud, however minute in the consideration. It requires an uprightness of honesty, such as the keenest moral sense of the most delicate integrity would dictate, to the least trick, equivocation, deceit, or concealment of facts, destroys the contract forever. This how ever cannot extend to private speculative opinions or surmises.

In accordance by the rule of Law, Law,
Law Merchant

When the flawless is complete, even in the consideration it renders the contract void.

V. Again: At common law, if execution is obtained on a judgment against more than one, if one party be liberated from confinement, settlement, or otherwise discharged, this is a discharge of all, without a satisfaction of payment. This is the law proceed upon the ground of a

laissez-faire satisfaction.

But by the Mercantile law, a discharge of one does not at all discharge the remaining debtors.

VI. Again: By a general rule of the common law, contracts by which property is agreed to be transferred, if a consideration paid for it, are considered as executed by the property itself.

But by the L. Merc. if property be bought by one, if payment made by note or Book charges, yet if the person of whom the goods were bought, discover that the purchaser was a bankrupt; or even in failing circumstances, he may stop the goods in transitu to make them back into his own possession.

VII. Upon the same rule, one undertake as landlord month by

the M. S. as Calendar Month.

VIII. Again: An instrument at by law, to commence its operation from the date, would include the day on which it is

made, but if from the day of the date, exclude it. The law

Mercantile excludes it in both cases.

IX. The law Mercantile does not at all recognize the just annulment of a tenancy.
Law Merchant.

Of Bills of Exchange.

A bill of Exchange has been defined to be an open letter from one person to another, requesting him to pay a sum of money to a third person at his order.

There are three parties concerned in a bill of exchange:

1. The drawee, who makes the bill.
2. The payee, being the person in whose favor it is drawn.
3. The drawer, or person to whom it is directed, by whom it is to be paid.

A bill of Exchange in the hands of the payee ensures the payment of money, for the mode of sign or indorse it over, which immediately vests the property in the indorsee.

The indorsee of a bill may indorse it, his indorsee may also indorse it, if so on indorsement.

Every indorsee is quasi a drawer, subject to the same liabilities as the drawer.

If a drawer refuses to accept a bill or having accepted to pay it, the indorsee must sue the drawer or any one of the indorsers or all at his election.

The last person to whom the bill was negotiated is termed the holder.

These bills, after having been once endorsed, need not at the payee may be indefinitely transferred, but if the bill after such indorsement, be ever so often transferred, no one
Law Merchant.

can be paid by the law Merchant except those who are parties to the bill or the face of it.

Those bills payable to 3rd party, or 2nd or 3rd may be always be endorsed without indorsement, if when transferred by delivery they are at fully the property of the transferee as if they had been endorsed.

The law Merchant is authorized proceeds upon the ground presumption that the drawer has effects in his hands of the drawer's to the amount of the sum mentioned in the bill.

A bill of exchange is never received as payment, until the amount is actually paid. Where a man purchases a bill, it is not as if he purchases an house, for if the bill is lost in the hands of the payee the drawer becomes his debtor to the amount of it.

Promissory Notes payable to order are by

Observation: 

The statute 44 & 45 Geo. III. placed on the footing of bills of exchange. The distinction between bills of exchange & Notes of hand, is sometimes difficult of punctual.

The word "Drum" of a Note, "Drawer" of a bill of exchange, are sometimes ignorantly used as synonymous but they mean very different things. For the drawer of a note is rated on the same footing as an acceptor of a bill of exchange. The word recently used "Maker" of a note recently used, avoids this confusion.

Checks or draughts on hands are regulated by the

Act. These are payable to Beers of always or demand, but of those of promising. Notes, Plus ultra.
Bills of Exchange are drawn various ways—sometimes payable at sight, sometimes at a certain time, at the option of the drawer, or in some cases to run after date.

The term 'time' is used in various ways, so that it seems to require that it be construed. The term is applied to the time at which a bill is to be paid, and the time is regulated by the various customs of different places. In England, bills are made payable at six months or within one month. Sometimes bills are made payable at double recourse.

It is a general usage of merchants to allow some days after the expiration of the time at which the bill is to be paid, or offered for payment. These are termed 'days of grace.' In almost all countries, three days are allowed.

When a bill is payable at sight, no day of grace is allowed. This is more requisite than in any other case.

Inland bills of exchange are not at all governed by the law Merchant, until by an Act of the 18th of June, 1777, the provisions of which have been copied by most of the States in the Union. The rate of discount on the same footing as foreign bills of exchange.

Between persons of the same State, it seems exempted by the Merchantile law, as the bills between different States undoubtedly are.

It has been much disputed in England whether promissory notes payable to bearer or order were negotiable at law. That the Maker of such a note, promises to
Law Merchant.

Any person able to make any valid contract may draw bills of Exch. in their own names, but
Infants may bind themselves for necessities, but
not by Bond or Bill of Exch.

But, if an infant give a Bill which is negotiable, the person negotiating it is as much bound, as if it had been given by an adult.

A note payable to the order of J. A. 1772 made
in the name of C. A. 1772 coming payable to S. A. 1772, is payable to B. A. 1772 as clearly negotiable.

When there are two or more partners, the act of one binds the rest in all commercial concerns.

It was formerly a question whether one partner could bind the other or others, by drawing or accepting a Bill of Exch. The transactions in receipts bills of Exch. are said have been determined to be commercial, therefore when one of the partners draw or accept a bill of Exch, in the name
Law Merchant.

of the firm, it will be always binding on all.

But in cases of making title, or in any transactions not commercial, one partner cannot bind another or other partners, unless he does it in the name of the firm, unless by special leave given him by the other partners.

Suppose however, it was a man's own individual commercial concern, his dehacto interest, if he being a partner should either draw or accept a bill, would bind the company? It was at first determined that it would not, but now, even if it be a separate individual concern, other persons not knowing it to be so, it will bind the company for they holding themselves out to be a firm, for very many lawyers, it would be hard that strangers should be deceived by finding the responsibility to be attached to one person only, when they supposed it to belong to the firm.

Suppose a bill of exchange was drawn by a person sui juris by several persons as a factor. Who only is responsible? Suppose the bill will be liable on account of the factor only, for a company having joint interest, authority as a man as their factor. If he draws a bill of exchange, they will certainly be bound.

It is not necessary that a merchant sign a bill himself to render himself liable. A signing by his clerk, who has been in the habit of doing business of this kind for his employer is sufficient.

The next case to be considered where is not whether merchants draw a bill on it in favor of themselves, payable
Law Merchant.

to their own order. & audit to the bill. P. A. one of the

showers endorsing the bill to B. another of the drawers,

is this bill well endorsed so that C can be sued when
it, A. if not being partners. P. & should both endorse to
render it good that is the endorsement for P. & as Manual

let in Merchants to prove the custom. other it was govern-

ed by the general law, if therefore not required to be proved,

the jury found it not properly indicated. D. Bass can

not reconcile this proceeding of P. Manual with the rule

that the L. A. can never be proved by Merchants let

in as Manual, it appears that this did not depend upon

special custom. Do not a particular custom chal-

lenge. proof so always admissible to prove the custom. if

the case will be governed by it.

The fact was that P. Manual this a great genius

of very learned man, was not a technical man. P. often

transgressed the boundaries of technical jurisprudence to give

place to substantial justice. but hands hire in this

case did not know the general custom.

Bill of Exchange has been obliterated are privileged as

specialties. They have also the peculiar nature of meeting

the property immediately in this instance.

The properties or qualities of Bills of Exchange (Bills of

Exchange) are

Every letter of request from one man to another, delivering

him to do a particular thing. and a Bill of Exchange, though it

might be a valid contract for,

acted 1771. 1. The first quality of a Bill of Exchange is, that it is always
Saw Merchant.

for money, I mean for any collateral thing.

1. It must carry a personal credit without not depending
on any particular fund or Bank, for when a man lends
3½% or 4% and the letter to pay is drawn out of any particular fund
3½% or Bank, this is the good contact between the parties is not
2½% or 2½% a bill of Cash, for it does not make the Drawee answerable
generally.

A bill of Cash may appear to be payable out of
a particular fund, yet the Drawee is liable generally,
as a bill dated March 4 in the words "please to pay $50 out of my
half pay in one month, which will be due next Sept.; now by
the half pay here nothing can be intended but to inform the
Drawee how he will get paid, and it is but a request to pay the
prayer $50.

It is remarkable there is not a single instance in which
notes of hand, whether payable out of a particular fund or
otherwise are not considered as negotiable. The reason of the
distinction between Notes of hand, it seems cannot safely
prevail.

1½% or 1½%
3½% or 3½%
2½% or 2½%
1½% or 1½%
Law Merchant.

But there are many cases of notes in this inscription which are allowed to be good as a promise to pay some money on the death of A.

"It is not necessary that the certainty should be a physical certainty, a moral certainty will be sufficient to render the bill or note negotiable." These are the words of J. Reeve.

In all the cases before mentioned, the contracts would be good as between the parties, but not being negotiable would not partake of the qualities of nature of bills or notes or promissory notes.

What has been said as to the necessity of the words "value received" in bills or notes. It is certain that they are generally used, but not that they are absolutely necessary. There have been many obiter opinions that they are not necessary in bills or notes which are negotiable instruments. This is true as soon as they are transferred, but they lose every quality of negotiability, if therefore a consideration will always be presumed, it never occurred to be gone into.

There has been one case in which the words have been deemed not to be necessary.

Ittity says that they are not necessary to be inserted, but that it is best to insert them, for otherwise damages cannot be recovered if the bill is not accepted, or if accepted if not paid.

To the word "due" necessary to determine the time.
Law Merchant.

The word "order" a constituent part of a bill of Exchange, its negotiability would be defeated, if the mere letter of request between the parties.

Before a bill of Exchange is negotiable, the want of consideration may be enquired into, as between the parties, but after assignment this inquiry is forever precluded.

For as has been remarked, an assignment gives to a bill of Exchange all the privileges of a specialty.

It is entirely immaterial whether the Endorsor knew that there was no consideration between the parties or not, in either case the bill is good in his hands.

OF ILLEGAL CONSIDERATION.

In law, law the illegality in the future of a consideration is a matter open to inquiry. In these mercantile transactions the law is somewhat different, for in some cases the illegality does, in others it does not affect the Bill in the hands of the holder.

Ordinarily that which is not law an illegal consideration.

Common law does not affect the bill in the hands of the holder, if he be an innocent bona fide holder.

But where the holder knows the consideration to be illegal, between the parties at the time of receiving of the bill, he is considered a minor if not an innocent holder, if the security is not good in his hands.

If however he transfers it to an innocent or bona fide purchaser, the reason of the rule ceases to operate.
Law Merchant.

"But where the specialties have by Statute been declared to be "read to all intents and purposes," as in some in-
stances they have, the Court have, as the case of two evils,
chosen to comply with the regulations of the Statute,
and render the same void in the hands of nominal holders
as in cases ofgraining ofsubsidiary contracts.

But the indorser may due his indorse as on a new
note, as he may renew at law, law, provided the note
was not illegal when it was given at the time it may be so
when it is sued.

Of the State of the parties at the time of the ac-
ceptor, and the doctrine of acceptance.

Under this head, the doctrine of promissory notes
cannot properly be considered, for the Maker of a Note
is also the acceptor.

The acceptance is an engagement to pay the bill to the
holder.

A man who previously engages to accept a bill on
Presentment, its being presented, does by such engagement actually
accept it.

The most usual mode of acceptance is according to the
tenor of the bill, but this is not universal.
Municipal Law

must be (when established) compulsory. And so
must general customs in order to be binding
the customs must be consistent with each other.
and hence two contradictory customs will destroy each
other. If a party intends to reject any custom
pleaded by the other, he ought to deny its exis-
tence. If he admits its existence and then
relies upon another inconsistent with it, this rule
abrogates both and it would be attended with a
manifest absurdity

Constructions of customs

Those customs which are in derogation of the
Common Law are to be construed strictly, and
ever extended to other cases of a similar
tone. Thus by the custom of gravelkind
rent, an infant may convey all his
estate.
Municipal Law.

If he buys land in Kent, it descends according to the common law of the realm, not according to the particular custom of Kent.

III Of Particular Laws which are by customs observed only in certain parts of jurisdictions. These are generally in Great Britain the civil and canon Laws of Rom.

They differ from particular customs which have local usages, as those have merely a local jurisdiction. These derive all their in Great Britain from their adoption, and not from any intrinsic efficacy in their own.

This adoption may have been by usage, or by act of Parliament. In case they cease to be unwritten they are equally binding with any other Law.
Law Merchant.

On the ground of the Statutes of Frauds, if acceptance have been objected to, but inapplicable by the presumption of law it is always that the drawer has effects of the drawer in his hands.

This acceptance need not necessarily be made to the holder, at this, it is valid, if he whensoever it is made, it is obligatory on the acceptor, binding him to every previous indorsee or subsequent holder.

So a letter from the drawer to the drawer that he
receives
will accept the bill, is a good acceptance; but there
may be equitable circumstances which as between
Courts it may be equitable circumstances which may as between
Drawing, the drawer of drawers may exonerate the latter.

A bill may be accepted in part in which the case it is good for the
at a different time from that mentioned in the bill.

As has been observed, in many ways variant
from the tenor, but in all these cases it is at the option of the holder to receive such acceptance or resort to his remedy against the drawer or previous indorsees if any.

Conditional acceptance, when the condi-

What constitutes an Acceptance.

Ariest any thing which can indicate on acceptance will bind the Drawee, as writing “seen” or “presented” with any the bill. So also when it was said “leave it with me
Law: Merchant.

If I will accept it, it was held a good acceptance, is also a direction by the drawer to a third person to pay the bill; hence, it was held a good acceptance.

An acceptance is an engagement not only to pay the holder, but any subsequent indorser.

The drawer is rendered liable by a subsequent protest may revoke the drawer. If at the time of drawing the bill he had in his hands sufficient of the drawer's effects to discharge the bill.

An acceptance neither the situation of the holder by giving him an additional security.

Of the negotiation of Bills of Exchange.

A made payable "to bearer," a bill may be transferred by delivery; but if "to order" it must be indorsed. These indorsements are ordinarily blank indorsements, such a bill may pass by delivery, but if the blank be filled up, it must be again indorsed. But blank before it can pass by delivery.

Of Indorsements.

Whenever a bill or note passes by delivery, if the payee receiving it, is a stranger to the bill, on the face of it, he can not in case of non-acceptance maintain his action agst. the parties to the bill, by the law merchant; but he may resort to his own law remedy against the person transferring it to him.
The indorsee may at any time make himself a party to the bill when the indorsement is blank by filling it up with his own name. This may be done by the indorsee in two ways. 1st. By filling it up as being vested in himself. 2d. By filling it as a power of attorney to himself, to receive the money of the indorsee.

In short, any thing respecting the bill may be written over a blank indorsement.

There is implied in the contract arising from a bill of exchange, an engagement not only to pay the payee of this indorsee, but every subsequent indorsee.

The indorsee holds the bill with the same privileges against the drawer as the payee did, together with an additional security viz. the payee, if in all cases with the same privileges against the drawer as the payee would have if there were a valuable consideration.

It is laid down as an universal rule, that whenever the indorsee has received a valuable consideration from the indorsee, he cannot so indorse it as to restrain or prevent the drawer from negotiating it.

But when the indorsee is any agent for the indorsee, a restrictive indorsement may be made, so as to be payable to a certain designated person of him alone.

The words "in order" are not necessary to be used in the endorsement to render bills or notes negotiable to any party.
of the payer, if by the words "on order" in the bill, the payer has a right to negotiate. 

When the transfer is by delivery, the bona fide holder has a right to recover it of the drawer, the interior directly it was obtained by fraud, or theft. Law at Comm. 47. The case of every other except that of money, of a thief selling property to a bona fide purchaser, it does not take my right to it for prior in time or, fiction est in jure. 

The difference between money and collateral articles is made on a principle of policy, not to improve the circulation of the medium of the Country. The law here. The same ground extends this exemption to bills of Exchange, also to a common draught, an one's private Banker. 

When two or more partners are joint payees, an indorsement by any is binding on all, but when a bill is made payable to two or more persons who are not partners, good faith, it is said to be determined, that to convey the property all must indorse. 

Some persons are under certain circumstances enjoined by law to endorse. As when a femme sole who is a payer married, her husband may endorse without her. 

So the assignees of a bankrupt may endorse. 

So also may executors of a last will and testament. 

So a trustee may endorse for the cestui que trust. 

A bill cannot be so divided by partial in-
dorsements as to render the drawer liable in more
than one action.
Neither can it be so divided as to subject the accept
Beau 266.
ance, or in more than one suit, unless when accepted it
was previously indorsed over in parcels. But if it were
indorsed over in parcels, he is liable in as many actions
as there were separate indorsements.
If the drawer pays a part of the bill, if it is indorsed
over for the remainder, the drawer is liable in one
suit only.
Let us now resort to the engagement of the drawer.
The drawer engages: 1st, to the payee that the drawer is
capable of binding himself. 2. That he is to be found at
the place where he is described to be. 3. That he will accept
the bill, if that the drawer will pay. If in default of any
of these, he becomes liable to the payee of his indorsed in
kind, when, performing the requisite duties on his
part.
In case of non-acceptance, he is also liable for the interest
on the bill, of the damages resulting to the holder for
the non-payment.
The damages allowed differ according to the va-
riant customs of the mercantile law in different places.
Before the revolution 20 $t lent on the amount of the
bill was receivable over all the colonies, in cases of
bills between America and Eng. But different customs
have now grown up in different parts of the Union.
A man may render himself liable without actually drawing a bill, as where he writes his name blank on a piece of paper, and delivers it to a third person with power to draw a bill upon it.

Formerly it was disputed whether the drawer had the same liability for acceptance of a bill as could be incurred before the bill became due. It is now settled that the drawer's liability commences instantaneously upon the true acceptance; one of his duties having failed of being performed.

The Indorser's Engagement

He is to all parties subsequent to himself quasi a new drawer, if liable to them equally with the new drawer.

Nothing will discharge the indorser except what will discharge the drawer viz. the payment of the money for an ineffectual judgment against one of the indorsers on the drawer after the holder has made his election is no satisfaction. This principle is unknown to the common law.

Even an ineffectual execution which does not raise the money is not a satisfaction by the lex mercatoria. Nor by the common law is it, by the law Merchant, a discharge of one taken on an execution as no discharge to the rest, contrary to the rule of the common law.
The reasons for giving notice

It is very important for the drawer to be so notified, that he may adjust his accounts with the drawer's debtor from whom the property was to have of the drawer, or else that he may make jus-
Saw Merchant.

The endorsers have all of their remedies against any person, they therefore must be notified that they may pursue their remedies and secure themselves.

If the drawee accepts a bill variant from the tenor or of it notice must be given to the drawee of endorsers as before.

Whether accepted or not, the holder must present the bill for payment, if this within the time at which it was to be paid, including the days of grace: for the law presumes that the drawee will pay, or at least afford him a locus peritutiae or an opportunity to pay.

The Time of Giving Notice.

Notice of non-acceptance of all foreign bills must be given by the first post, or after presentation for payment by the first post afterwards, that it is not paid.

When there are no posts the first opportunity must be improved.

In inland bills the same rule prevails. When the parties are near neighbours the first opportunity must be embraced.

If the drawer have no effects of the drawee in his hands, the holder may sue the drawer without notice.
Whether the holder has properly done his duty is a question of law arising from the facts, if it be tried by the Court.

When there are no effects in the hands of the Drawee, other notice is requisite to the Drawee; the Indorsers to made liable must be notified.

The manner of giving notice.

In inland bills no particular form is necessary or requisite, nor in promissory notes.

In foreign bills the mode prescribed by the law must be precisely observed, if any deviation from it destroys the claim of the holder.

The holder calls upon the Drawee to present the bill for acceptance. The Drawee refuses to accept it, he must then apply to a notary public, who takes the bill of estates, if himself presents it to the Drawee, for acceptance.

The notary then minuted upon the bill, the time of its presentation, which is termed minuting the bill. He then draws up in his official capacity a solemn declaration, stating the facts as they have been, of this declaration is a protest for non-acceptance. All this must be done within the regular hours for doing business.

This protest thus made out must be sent away by the next post to the party concerned, of a copy or duplicate of it taken by the Notary of left in the post of...
on the holder is the evidence on which he is to rely, as admissible as such in all Court of Justice. The holder can adduce no other evidence.

After this at the ultimate period of the bill's being payable the holder must go to the Drawee again and demand payment, or the refusal of which the same formalities are again to be acted over, if a protest is to be obtained for non-payment.

The bill itself together with the protest is then to be sent back to the Drawee by the first post of this city, necessary notice.

A copy of the bill taken by the Notary Public is sufficient as the protest for non-acceptance.

If the Drawee is incapable to contract a protest is made by a Notary in a similar manner.

When the Drawee accepts variant from the tenor of the bill, a protest for non-acceptance must be entered if also for non-payment, in case he will not pay the whole bill; but if the holder agree to accept of collateral articles in lieu of Cash no protest is necessary.

If the holder have his bill accepted if suspect the Drawee to be in failing circumstances, he must for the benefit of the Drawee demand of the Drawee he the security proposed on a refusal to find such security, he must protest on that ground.
This has been in a great measure anticipated by what has already been observed.

After the holder has complied with the requisitions of the law, he is entitled to recover his money, the interest, 
his costs of damages. —

A law. Law damages are recoverable only for detention which is supplied by interest.

Originally, these damages by the law, were uncertain but the declaring them in such particular cases, was a matter of so much perplexity, that a definite sum is now given, for least varying according to the customs of different places.

There is one species of bills, which the law has purposely avoided mentioning until now viz. Bills drawn to be accepted on the account of another person who is indebted to the drawer, as if A, in N.York, draw in favor of B, a bill of credit, on C, in London, on the account of D, in London, who is indebted to A. In this case a contract is raised between the drawer of the bill, and the bill, drawn to be accepted on a certain condition, which the drawer of the bill has at his option may accept or refuse. But any person, at whose option may accept a bill, in honor of the drawer, in which case a contract is raised between the drawer of the bill and the acceptor, so also any person may accept an account of any or all of
Then a third person accepts in honor of the drawer or indorser, on refusal of the drawer, the holder gets it protested; and the acceptance goes also before a Notary Public &c. &c. to make a declaration in writing that he accepts it in honor of the drawer or indorser. To whom all these proceedings are sent by the notice hereby given, raises a contract between the acceptor and the drawer.

If the acceptor has in the interim received from the drawer any assurance of his acquiescence in the acceptance, he may pay it; he may pay it instantaneously giving notice to the drawer, otherwise he must give notice pro scripta. I deem when accepted in honor of the indorser.

The presumption of law is that the acceptor is indorsed to the drawer, until this presumption is removed. Therefore, he is liable to the drawer for not paying a bill which he has accepted.

If the drawer pays the bill having no effects of the drawer in his hands, the latter certainly becomes his debtor of the money of sundry receivers. But is his remedy by the mercantile Law? A must he resort to his own law remedy. As before is inclined to his own law remedy, whether he has been at the no decided cases to this point.—See 443.

A general rule of the is, that: an accept-
The holder, however, may discharge the acceptance of a bill, not only by writing on it, but also by novel declarations or acts equivalent to such declaration. — Doug. Holphol, 120 Pulleney. Tingwall & Duane.

No length of time, nor of statute limitations, discharges the acceptor of a bill, nor does a receipt from the Drawer discharges him from his liability to pay the remainder.

If written promise on the bill by the Drawer that he will pay it, only adds a lesser sum to that at collissas, ready existing by the I. M. but does not at all exonerate the Drawer...

The principle of the lex loci govern a bill of Exch.

When the bill is accepted variant from the tenor of it (as for part of the sum), the holder may receive such part as the Drawer will pay for the benefit of the Drawer, but must protest the bill for the whole.

A receipt of part of the money from an indorser, does not discharge the Drawer says Mr. Greer.

Does not a receipt of part from the Drawer, discharge the liability of the first indorser of all those previous to the holder, if does not the same rule apply mutatis mutandis to the case above.

Formerly it was held, that the Drawer must be
resorted to before the Indorser could be sued, but this rule has attended with inconvenience of avoiding circuity.
Law Merchant.

A receipt of part of the money from the maker
of a promissory note discharges the Endorser.

Of the Remedies

When a priority of contract exists between the parties,
the Com. Law remedy may be resorted to as Ind. Cts.

But the L. M. gives a special action on
the case founded on the Custom of Merchants if un-
known to the Com. Law pleadings.

Formerly in setting out the custom, it was usual
175. to begin by defining precisely what the custom was,
mentioning its particular provisions, then to bring
the case within it. But now as the custom is under-

Now not to stand on the ground of a Com. Law.
custom, it is usual only to allude to it, but not
as formerly to give its provisions in detail.

And give a right of recovery, the case must be stated with
all its circumstances if protest notice etc.

In all cases, the following circumstances must be
stated: That the drawer wrote on the Bill of Exchange,
and directed it to the drawer, requesting him to pay the payee
in order a certain sum of that the bill was delivered
from the drawer to the payee.

The time at which it was made need not necessarily
be stated, although it may be useful to state it in particular cases as in disputes on the Statute of Limitations. The naming of the deed by the maker of it need not be stated. Suppose the deed is to be brought against the acceptor by the payee, and above what is mentioned as necessary above, an acceptance must be stated, which implies a presentation.

The manner of acceptance need not be stated, contrary to the general principle of the Common law which requires a statement of the quittance, as well as the quittance.

I may not be amiss to remark here, the rather disquieting that evidence of acceptance at the time of payment is good.

If the indorsee bring the action against the acceptor, this more is necessary to be said, that an indorsement was made.

If the indorsement is intermediate (supposing any between the payee and indorsee were Blaught), the indorsee may declare the indorsement to have been immediately from the payee to himself. If they are filled up they must be stated in form of their order.

An indorsement implies a written assignment of delivery, which therefore by the L. And need not be specially stated.

If a Bill is made payable to bearer, it is unnecessary to state any indorsement, unless there being
Law Merchant.

When an actual endorsement, you wish to see
the indorser.

If the action is brought by an endorser
who has paid the bill against the drawer, it must
be stated that he has had the money to pay, in
consequence of which the bill is not having been paid.

The decree is of course that it is not necessary to
state a promise to pay, in the draft, but merely the facts
which render him liable thereby, the delivery of the bill
is averred, if the bill imports a promise.

It is now an established principle that an endorsee on
Payee may pursue all his remedies at once, he may
have suits against the drawer, acceptor, all his indorse-
ers at the same times. He may recover judgment
of takeout detention against all, if they are a Com. Law prin-
ciple, as well as a principle of Equity, he can recover but
one satisfaction, yet he may recover costs against each.

Suppose when all are sued one checks to put a
complete stop to the proceedings, he must pay the debt
and all the costs in all the actions, but if he pays the
debt of his own costs, it stops further proceedings agst.
him, if the other parties by tendering each respectively
his own costs, of pleading full payment by the party
aforesaid may stop the proceedings.

If however judgment procured against all of against
each to the whole sum, yet the Payee can take out but one
satisfaction, if the cost from the other parties, if the cost is
Saw-Merchant.

more than one satisfaction he is punishable for a contempt of court.

So if the parties after judgment tender the debt of all the costs, the taking out Exemtion is a contempt.

**What must be proved.**

All the necessary allegations which have before been mentioned must be proved.

The acceptance itself is evidence of the bills being the

Act 18 of the 1945 Act of Deed of the Drawer. If the acceptor cannot allege it

Act 18 of 1848 to be a forgery, of course in an action against the acceptor

Act 18 of 1845, the handwriting of the drawer need not be proved.

But if the acceptor honored the bill without seeing it

the rule does not hold, for allegations are not ipso

suo lex.

The acceptor's handwriting when the acceptance is in writing, is the acceptance of the in other case it may

be traced by hand.

If the action is brought against the acceptor by the holder

dee of a Bill payable to order, the handwriting of the In-
dorsor must also be proved, for the acceptance does not

go to prove the handwriting of the Endorsor.

When there are several Blank indorsements, the

handwriting of the first indorsor only, need be traced,

but if the manuhandwriting indorsements are filled up

in the handwriting of each indorsor must be proved.
Law Merchant

When the acceptance was upon condition, the condition must be proved to have happened.

In an action brought by the Endorsee against the Drawee, for non-payment of the Drawee, the handwriting of the Drawee is proof. If it is not original, the handwriting of the indorsers must be proved. If this is insufficient, unless there are intermediate, special endorserments, it will suffice as has been observed, the handwriting of each individual special indorser must be proved.

If the bill is payable to A or Bearer, no Indorsers need be proved, nor the handwriting of any person but A. If to Bearer, no Indorsers' handwriting need be proved.

In an action Indorsee vs Indorser, it is sufficient to prove the handwriting of the Indorser, who is quasi a new Drawee, if neither the original Drawee's handwriting nor that of the intermediate blank indorsers need be proved, but the handwriting of all intermediate special indorsers must be proved.

In an action Drawee vs acceptor. The Drawee must prove the acceptance, by the handwriting of the acceptor at demand of payment, if shown that it was not paid, by the ordinary evidence of a return of the bill with a protest.

It is not necessary to prove that there were effects of the Drawee in the possession of the Drawee, for the law presumes this, if the record probandum is on the drawee.
Law Merchant.

Suppose the action is brought by an Indorser who as yet has not been dunned and, but notified of course, has himself paid it (use the words of the

| 12 R. 741. |

In the case above it has been decided that the technical law payment by indorsement is sufficient.

12 M. 18. This decision certainly does not symmetrise with the principle of the Merchant Law generally, it is disapproved of by Mr. Greene.

Drumee vs. Drumee. The drawer must prove that made the bill, that he paid the money, having no effect of the drawer in his hands.

A protest is prima facie evidence of itself if requires nothing to substantiate it unless the other party attempt his protest. In this case it is not necessary to prove the handwriting of the Notary, but merely to prove a certificate from the Executive or other officer to certify that J. A. is a Notary Public.

When the D def. has suffered a default, it is not necessary to prove the handwriting of a Note be proved to be merely an accommodation note, not given in consequence of any indebtedness.

11 M. 10. 1863. If when in course of circulation such note or bill returns to the Payee of the Note, or drawer of the bill, be as indorsee he cannot recover.
Saw Merchant.

Bank Notes.

Are substantially the same as bills, pay able to

Beneath, they are considered for most purposes as mo-

ney. Bulwer Justice says, "This court have never yet deter-
mined, that a tender of bank notes, is at all events a le-
gal tender, but if they have been offered, if no objection made
on that account, this court has considered it a good ten-
der." Of again, "We have always been inclined to consider
them as money." This rule would not be in with propriety
be adopted here in the present state of our banking system.

Bankers' or Goldsmith's Notes.

Bankers' or Goldsmith's Notes.

Always amount under Merchant's ready Cash.

They are drawn on a certain description of persons, time,
Bankers, if note payable either to bearer, or to 1st, or order.
A demand must be made immediately or within a reason-

able time at the request of the holder.

If the Goldsmith, alias Banker, fails, he who delivers
the note, in payment of a debt will not be charged, as
the drawer of a bill of Exchange, but the receiver is suppo-
sed to give credit to the Banker, the note is regarded as
ready money payable immediately, if so it is optional with
him to accept, or reject it, he takes it, if at all, on his
peril.

But if the note to whom the note is given demands the
money within a reasonable time, if the Banker a Golds
Smith agrees to pay. The charge of the note.

A goldsmith's note involves a bill of exchange against the indorsee.

As to what shall be esteemed a reasonable time, the decisions seem to say; it must at all events be very soon after the note is received.

I received a goldsmith's note at two o'clock, 4:15 P.M. If presented at 9 the next morning, the bank had stopped payment 3 1/4 of an hour before. If this was held to be a reasonable time, I think it says that it will always be time enough. Provided that the presentation of the bill is not delayed till the afternoon. The distinction taken in Strange, 416 is not satisfactory to Mr. Reeve.

**Policies of Insurance.**

A policy of insurance is a contract between A B C, whereby the insurer undertakes to pay a premium equivalent to the hazard run. The insurer indemnifies the insured against a particular event.

**What may be insured and who may insure.**

The whole or part, whole cargo, or whole freight may be insured. The benefit of policies is not confined to mercantile transactions.
Law Merchant.

for any injury may be ensured against any casual loss, as lives, houses, or many contingent events.

This kind of contract must be in writing, if the writing is termed a Policy; the Insurers are generally called the underwriters, if the sum given for insurance, the premium which is paid in advance.

No enhancement of premium can amount to liberty.

It is a general rule, that no person not interested in the thing insured, shall recover upon the policy; there has formerly some doubt respecting this until it was settled by Statute.

But Mr. Blackstone supposes the Statute to be merely in accordance with the Common Law; for it is entirely contrary to the whole spirit of the Act. It is no encouragement to commence, if repugnant even to the genius of the Common Law, which discourages gaming. Wagering Policies therefore says Mr. Blackstone were not allowable even of Law. Double Insurances come under this description, if are allowable only under special circumstances as when the Insurer is insolvent or dead.

A wagering policy is here said, at the stipulation of "interest or no interest" to be inserted; neither can property be insured for more than its value or more than the quantity of interest had on it: 3 T.R. 668.

Money lent on responsibility or bottomry bonds may be insured.

Bottomry is in the nature of a mortgage of a
ship when the owner lends up money to enable him to pursue his voyage, & pledges the bottom as keel of the vessel (part pro toto) as a security for the repayment. If the ship be lost the lender loses his money; if it returns in safety, he receives it again with the premium agreed upon.

This originated from the power of the master Molloy 361 to hypothecate the ship in a foreign country for the purpose 131 of raising money to refit. In this case the ship of account as well as the person of the hirer are liable. In respect to 136-39, debenture bonds, which differ from bottomy in this, that the merchandise of goods are bound & pledged for the repayment of the principal with the premium on the safe return of the ship, instead of the ship itself.

I owe the lender of the money having the interest in 22. In order 20.4. the ship may yet it insured, signifying particularly 22. 719. that the interest that he has in the ship is money lent 34. 182. at respondents or bottomy. 139.

If property is overvalued to any unreasonable degree, this can be proved the policy may be avoided. It had been decided that East India bonds could be insured as money.

If goods are insured they must be so under the denomina-
tion of goods of no other.

A reassurance is a contract of indemnity made 22. 162. to 16. 162. between the original of collateral insurance is allowable only when there is an act of bankruptcy or death in
The modes of Insurance.

The modes of Insurance are various, the most usual method is for each insurer to subscribe individually, usually as much as they choose, until the policy is filled, of which time additional subscriptions are made.

Sometimes vessels are insured lost or not lost, by which is meant that if a vessel having been some time at sea instead of, it is insured, if in the date of such insurance is lost, the underwriters are liable, or if lost before the date of the policy, if the assured did not know it, the underwriters are liable, but if the words are general, if the words "lost or not lost are not insured," if the vessel is actually lost before the date of the policy, the underwriters are not liable says Shepperd 324.

Vessels are sometimes insured at from a place in which case the underwriters are liable for any loss in detention or in part, unless such detention or loss
Laws Merchant.

arise from the negligence of the owners. But if the accident causing such loss or damage might have been prevented by the exercise of due diligence in the owners, the underwriters are released. So also if the voyage is laid aside.

If the ship and cargo are insured at a premium, if before the cargo is put on board, the ship is lost, the underwriters are liable for the ship only.

If a vessel be insured from a place the liability commences from the time of setting sail.

Insurance may be made against any casualty of the sea. Capture, mismanagement of the masters or captains or agents of the owners of the ship, mismanagement of the owners or of the masters of the vessel. Insurers are not liable unless by special agreement.

Thieves, which is construed to extend to pirates and fell

Insurance are sometimes made upon requisition.

Mon. 6th. As to that the vessel shall carry a certain number of guns; shall depart with convoy if other things of a similar nature. Now in such cases if the condition is not complied with, the insurers are not bound.

In the case of convoy it is held not sufficient to depart with the convoy only, but the convoy being bound to a different port, but the convoy voyage must be made in company with the convoy, unless unavoidable accident separate them. In these cases it has been said, that
Law Merchant

The business was liable for the receipt of property insured, from the time that it left the port, to that of its arrival at the usual place for taking conveyance, according to the opinion of Smith.

If the ship is separated by some unavoidable accident from the convoy, the underwriters are liable, otherwise if separated by any wilful default or negligence.

If the vessel does not depart into convoy, the insurers are to restore the premium; for there is no loss on them. But suppose a vessel is conjecturally to go from one port to another to meet the convoy, if before she had insured the conveyance, but shall the premium be refunded? The general rule is that the insurers shall keep the premium if the voyage has commenced, but shall the whole premium be refunded in this case where the vessel is so small? This is still unsettled. It would be endless to particularize all the various modes of insurance, indeed two insurers rarely agree in all particulars.

Let us then proceed to consider what discharges the parties.

What discharges the Parties?

This has been in a considerable degree anticipated by what has been mentioned under the preceding heads. A fraud in any shapewhatever will entirely destroy a contract under the mercantile law. Any false account of a fact, any misrepresentation or concealment of facts, which if known might tend to operate upon
the minds of the parties, so as to induce them to enhance the premium of any proposal to induce the underwriters, will certainly initiate and invalidate the contract.

As a fact not mentioned was one of general public notoriety, such as one as the underwriters must be supposed to know, such as a declaration of war, the omission to mention it will not vitiate the insurance.

Neither is it necessary for the party applying to reveal to the underwriters his opinions or communications arising from facts not exclusively within his own knowledge, even if such opinions be sound or natural.

Moist elementary writers lay it down that a Policy of insurance is not much higher in its nature than

paid evidence, which may be explained by means of evidence paid by paid. These have formed their opinions upon the authority of a case in Southfield 445.

Mr. Reeve Knows of no decisions recognizing this principle, but the one in Southfield 445, one in Skinner. He conceives the authority in Southfield not to be law, for it is opposed to the Spirit of The Law. Law 445 tends to ruinous consequences.

Hulke mismanagement of the capt. or mariners discharges the underwriters from their liability. A deviation from the course without any objection. 
Law Merchant.

Going from one port to another,

even if the security is not considered as a change of voyage,

if done after the vessel has made her destined port, or

the vessel arrives at the port of destination, or

the vessel is discharged upon another, it is actually lost before she arrives

at the destination.

This rule at first glance appears not to be reconcilable with the rule that an intention to deviate does not discharge the underwriters.

A deviation which does not arise from the

fault of the agent of the insured, however, but arises

from unavoidable necessity, or accident, such as a

deprivation in search of convoy after departure, or in

consequence of the effects of weather, he does not discharge

the underwriters.

When there is manifestly an intention to deviate,

but the intention is not executed, it does not discharge

the insurers.

If a vessel deviates, the underwriters are liable, as far as to the deviation point, at which the

vessel leaves the course to the place where she is

ensured, even if the intention of the owners was known

to the underwriters before the sailing of the vessel.

But if a vessel insured for a certain voyage, actually

deviates upon another, it is actually lost before she arrives

at the deviation point of the two voyages, the insur-

ers are discharged.
SIR RICHARD.

But the difference is. The cargo consists in this; in one instance the vessel was cleared out for the same port to which she was instead, and actually intending to go to a different one; here when the cargo left before she arrived at the point of deviation, the underwriters were held liable. In the other instance, she was not cleared out for the same port to which she was insured, if the insurers were held not liable.

When a man has insured his vessel insured twice, only one of the policies is valid, if the party must take his election which discharges the other who is bound to return the premium.

But this can only happen when the first insurers have on one likely to become bankrupt.

When the insured is insured against the liability of the master, for the interest of the owner, underwriters are liable. The underwriters are discharged, for bankruptcy is a wilful and criminal mismanagement of the or deviation.

But if the master had deviated to gratify his own feelings or interest it would have been otherwise.

When the crew compel the master to alter this course it is not bankruptcy in him.

Vessels are sometimes insured "until they arrive" by a certain time after, which is commonly specified as being part of the voyage, or most countries is
Limited to 24 hours within which period if any loss happens the underwriters are liable.

A vessel insured in this manner arrives in port. If it be gone 24 hours after she has been there, it is ordered to go back a certain distance if performing it she is lost. The underwriters are liable.

Sometimes vessels are insured until they arrive if are discharged. The word discharged is now settled to mean, unloaded of cargo, therefore.

52. By when a ship arrives, the underwriters are to see the goods unloaded if the owner or master has used its lighters or other boats to convey the goods onshore if after they are taken from the ship an accident happens to them by which they are damaged or destroyed, it is no charge upon the insurers; but if the goods had been sent ashore by the last which is considered as part of the ship's voyage, it would have been otherwise.

Insurance against the perils of the sea in

includes all damages from winds, waves, tempests, lightnings to

If no accident is not heard of within a reasonable time, she is considered to be boundered at sea.

In the case cited from Strange, in a voyage from Carolina to Eng., when the ship had not been heard of in 4 years, it was presumed a reasonable time.
The word total as used in the mercantile law does not mean the same thing as total in common parlance. A loss less than total may be a total loss by this Act.

When there is a total loss, the insured must abandon the property saved to the insurer of this property is termed the salvage.

Generally, if a ship be captured by an enemy afterwards recaptured, the loss is considered total.

Where the salvage amounts to more than the freight, it is an average loss, if generally an average loss is any loss less than a total loss.

The insured may abandon in the following cases:

1. Where the salvage does not exceed the freight.

2. In case of capture, as soon as the owner hears of the capture, he may abandon; but if he do not at that time abandon of the capture, he may only save a hindrance; it may be a partial loss.
In the case of a re-estimation, the re-estimator is generally have
30th. 1892, a reward for - which is termed salvage.

If a vessel is recaptured this is reduced to her part
of delinquency before abandonment, the whole average of the
abandonment is before it arrived at with part the
loss is total.

The ship Susie, being induced from London
to Carolina was taken by a Spanish privateer, and
atwards retaken by an English vessel. It carried to Boston
30th. 1895, and was a person appearing to give security, she was con-

30th. 1890, demand of sold by the court of admiralty, the vessel
was then mainy of the remainder remained with the def-

30th. 1250, hands of the court. It was order that the lot was a total
one of that the money should go to the underwriters.

Since there have been an immediate ransom, it is
an average loss.

At the close of the revolutionary war, a let-
ter of Marque sailed from N. York, took a valuable
prize, soon after which she was lost. The owners not know-
ing that she had taken a prize, abandoned, the next
day the prize arrived which was more valuable
than the vessel intended, the loss was considered total, if the
prize the property of the underwriters, as belonging to the
letter of marque.

A declaration formed to recover upon a total loss is good to
recovery upon a partial or average loss, if the action when a total loss, he may upon the declaration recover.
Charter Parties.

Charter parties are drawn up when a merchant agrees with the master of a vessel to hire the vessel to take goods to a certain port, or bring others back, he is said to charter the vessel, if the written instrument containing the agreement is called a charter-party. This is either at a certain rate per ton, or for any agreed sum in gross.

Refunds are said to be chartered either outward or inward for voyage, or outward and inward.

What is peculiar in this species of contract is, that if the vessel is lost before she reaches her port of delivery, provided she is chartered for the outward voyage, the freight is for nothing; if she is chartered outward and inward, arrived safely at the port of delivery, but is lost returning, only the outward freightage is lost. If she is chartered outwardly only, if is lost the freight pay nothing; if chartered for the voyage, if is lost going or returning nothing is paid.

If the vessel is chartered outwardly, if goes out delivers her cargo, if for default of the factor of the freighter takes none on the return, the freighter pays as much as if she had brought his goods. But if it is by default of the master, that she did not bring the freight.
ar Merchant

ten goods, the freighter is only liable for the outward voyage.

If the master imprudently contrary to custom sail
in a storm, or if a master do in other dangerous places
without a pilot or any damage ensue therefrom, the owner
master are held liable.

Sec. 344.
855. dow by relinquishing his goods, release himself from the
freightage. But he must abandon his whole interest or not
at all.

If the vessel lie disabled without the fault of the
owner he may repit if he can do it within a short time so
he may be entitled to freightage.

So if the vessel be captured
if recaptured or stranded, or if it be disabled & the freigh-
ter choose to take the goods anywhere except at the port of

return delivery, he shall pay a salable proportion of the freight
as if when the accident happened the vessel had just finished
the voyage, the freight shall be paid proportionally.

Merchants sometimes freight refusals without putting their agree-
ments in writing. This is not a safe or correct way of doing busi-
dness, but it is recognized by the Law Merchant. Thus this
peculiarity is it viz. if the freighter from any cause choose
to rescind from his bargain he may do it at any time
before the loading is commenced, by relinquishing to the Mas-
ter the amount the earnest money, which is a sum al-
ways paid by the freighter to the Master if necessary to
The master may also rescind from his bargain by paying back double the earnest money, i.e. by repaying the merchant the earnest money advanced by him if as much more.

But by the same law of Eng. the party dammified may bring his action on the case of serious damages arising from a breach of the agreement.

When a merchant freight a ship, but does not hire her (as when the owner supplies everything for the voyage or receive the goods at a certain premium) this is termed freighting without charter-party.

Where any injury happens to the property of the freighter, through the misconduct of the master, whether it be omission of duty, or commission of wrong, the master is answerable; but injuries arising from no default or misconduct, but from inevitable accident, subject neither the master nor owners, good morrow!

In usual contract between the master and owners, that the former shall have the benefit of the freight does not affect the freighter, nor in anywise alter the liability attached to the owner in case of a misconduct or neglect of the master, for

in 1943, the freighter not so disposed to be liable to the usual

master.

Sometimes a special contract is made between the freighter and owner, this subject the owners no less than when the law itself would subject them, except
that if there be a solemn assurance to the agreement,
that is performed also, it may seem to show that the
freighter are to look exclusively to the owners, to whom
the masters is a true liable.

Embassment or any thing of the kind,
either in the master or manner subject to the owners to
the whole extent of the embassment.

It is a general principle that persons embassed
to carry property from one port an harbor to another at
pocket masters, freedom to stand on the same foot
ing or common carriers liable not only for neglect,
but at all events, except in cases of inevitable acci
dent or by act of Providence.

If a freighted ship is at sea, if an accident happens
which ordinary care could not have prevented, the owners of
master are excused, but if a loss happens in port, they
are governed by the law of common carriers.

The maritime law gives to all masters of vessels when
abroad, the power to contract for necessaries for the ship
so as to bind the owners. Having punished the master
with money for such purposes it does not discharge the
owners, for the master is to be credited as their servant on
whole contracts. They are liable. He may even name the
ship for necessaries. The master is also personally liab
le in this case.

An owner of a vessel cannot get free of his
liability to persons furnishing provisions, or necessaries.
as when an owner takes his vessel for any number of months or years, if within that period it becomes necessary to furnish the vessel with tackle, or provision, the owner thereof may not know where the vessel is, or may have no interest in the freight is.

195. Still liable in default of the master. This is not fair.

376. The law principles, for such owner it is said is not liable for the fault of the master, if the master, or he contracts as agent for another, is also.

218. Contrary to the law rule holder liable.

When there are joint owners of a vessel, the majority of such owners in interest shall direct its course of destination, but cannot compel the minority to make the voyage that suits the majority. But this they may do without the consent of one to the wishes of the minority in interest, yet it cannot be done without their consent.

189. If the voyage is a profitable one, the gain shall be equally divided among all proportionately to their several interests of the minority shall become liable to pay their proportionate share of all expenses of disbursements.

219. Most if the majority choose they can take all the profit of the voyage to themselves by giving sufficient security in the form of Admiralty to make up all losses to those of the owners who do not consent.

Indeed the minority may by applying to

219. The court of Admiralty, to give security for the value return
Dear Merchant,

of the voyage. The ransom is payable in the admiralty court.

Nov. 2973. 1 Mod. 182.

But when two joint owners

Nov. 2974. want out a vessel without the consent of the third, if she was lost, the third was obliged to bear his proportion of the loss, because had there been a profit in the voyage the

Nov. 2974. would have been entitled to his share; but in that case there had been no application to the Admiralty Court, as there ought to have been.

The amount of the voyage settled by a majority of the owners binds the rest.

Where a loss happens at sea in consequence of a storm of weather, danger is much as it is a principle of the law, here to equalize the loss as much as possible among the owners of freighters of a ship, for it would be extremely unjust that the whole weight of the loss should fall on the person whose goods are exposed in time of extreme danger for the preservation of the rest.

In such cases the laws of Oleon (which are the foundation of the maritime law of Europe) make it the duty of the master first to throw overboard the heaviest articles of those of the least value, of the goods of the mariners that the property was thrown over for the preservation of the rest. He fell discharged the master.

So goods damaged according to the laws of Oleon are cleared by the oath of the Master and mariners.

This principle which uniformly governs in annoying the
Lever Merchant.

Losses, in the event they are to be assessed, only when the loss of the property, or damages contributed to the preservation of the remainder.

There has been a decision which the principle does not entirely correspond with that principle. If, where a master took in more freight than he agreed to do in consequence of which part of the goods were thrown overboard, the loss was not considered average. June. would not the master in this case be liable?

When goods are taken away by pirates, the loss says the master, must be borne exclusively by those whose goods are taken, but in this case might not exuiring up a part of the goods preserve the rest from plunder, it to contribute to this preservation?

A vessel was condemned with 5000 marks, and the silk belonging to one person of the oil to another, the vessel charged with 2500 marks, a small fraction of one of the silk. The master seeking that the vessel was not safe, got out the oil, and the silk, and left assistance on board, when it was started; but the bulk of the oil precluded the possibility of landing it. If it was taken, the owner of the oil filed a bill in Chancery to compel the owner of the silk to average the loss, but the Court refused for the saving of the silk did not contribute to the loss of the oil, nor did the loss of the oil to the saving of the silk.

By the Court. Case the Master of a ship can not insinuate the ship or goods for these cases in time no help, unless general or special. If no such power is given case 22 or to him by constituting him master.
Law Merchant.

Yet the law, law has extended the terms of alienation, so that which empowered the master to sell, even on hypothecation, the ship for necessities, and the ship for necessities.

A hypothecation of the ship by the owner without a real necessity meant for such hypothecation, subjects the owner equally as one made up of the least necessities, for he is the confidential agent of his employer, to the reason, to converse the real fact in hypothecation, is not to judge whether or not there be any necessity for it. But the owner is left to their remedy ag[t] the master.

Of Bottomry Bonds.

Bottomry bonds agree in many particulars with hypothecation. For in bottomry bonds, the ship is taken as pledge as a collateral security for money lent to the obligor in case of a safe return or personally liable.

A bottomry bond may be defined to be an instrument by which the owner of a ship pledges his ship, if it is the slide personally bound for the repayment of money lent, depending upon the contingency of his making a safe return. If the ship is lost, also to the money of the lender, but if performs the voyage in safety, he receives back his principal together with the premium agreed upon, which in every instance in the rate can render extensive, for the result may happen unattended by the lender, balanced the extra interest which he may receive, if renders the con-
that reciprocal.

In this species of contract the taker as well as the giver (of bright houses) is liable as well as the
person of the Borrower.

But if the money be borrowed upon the
value of goods or merchandize only, the Borrower is liable personally for the contract. It is said to take up money at
respondentia.

The general nature of a respondentia bond

Observe is this, the Borrower binds himself in a large penal sum, upon
a condition that the obligation shall go void if he to repay the
lender the sum borrowed, if so much per annum, from the
date of the bond till the ship arrives at a certain port,
or is lost or captured in the voyage. The respondentia interest
is often 40 or 50 per cent.

The Law of Partnership.

To render a man liable as a partner, there must be ei-

ingly, 377. Then a contract between him of the ostensible person to have
378. joint in the profit or loss, or he must have permitted the
379. or to make use of his credit, or to hold him out as one
380. 998. jointly liable with himself.

Men liable to trading in partnerships are not as tenants
in crockery for the life. It does not recognize the few
and second of a right of survivorship incident to joint

...
Deceased partner.

An survivor partner may not join in one declar.
then a demand amounting to him as survivor, if a demand amounting to him in his individual capacity.

Survivors of Merchant in partnership must sue
when sued by themselves, that is the Co. or Admin. of the deceased partner must not be joined with them in the suit.

The Co survivor must account with the Co of the deceased partner of how him has propositional share of the partnership property. It has been contented whether the surviving partner shall take all the goods of account for one half of their value, in the case of an equality of interest between the partners in lake only one half of the goods. It has been said that the surviving partner has the absolute control of the joint property. This idea with.

Mercer considers as being very incorrect, for an absolute control deemed to be equivalent to an a complete contro.

The true rule seems to be that the money rests in the Co. by reason of the inconvenience of joining the survivor. of executor in an action since in this case if one would sue in his own right it would be liable to costs.
A merchant.

of the other in the right of another and would not be so liable.) The surrogate is authorized and it is in the power of the court of equity to control any of the joint property as it is in action. The joint property of the firm is always liable for partnership debts if the firm continues solvent. The private debts of each partner is liable for the debts of the firm provided it exceeds the private debt of the joint partners.

While the partnership continues solvent, any creditor may levy execution on the goods of the partnership for a debt of either of the partners; may sell the whole of the property in which he has levied, if none of the other partners in the partnership has an interest proportionable share of the goods.

In which case it is usual to levy on a much larger quantity of property than is sufficient to pay the debt, as he may only a small amount to pay the debt, if it does not exceed the proportionate share of the joint property, in which case it might be better to levy on the whole of the surplus to the other joint partners.

If the partnership be insolvent, the private estate of each partner is first liable for his private debts. The surplus of any thing goes to pay the partnership debts. Each partner is not bound for the private debts of the other, for if one of the partners becomes insolvent.
Law Merchant.

This partnership is dissolved if the company funds are divided among the partners.

Therefore, both partners are liable for the company debts, but the company is not liable for the partnership debts. If the partnership debts are first discharged by it, the rule law. For it is settled that the estate of a deceased partner cannot pass to a principle of convenience. For it is joined in a suit but by an agent, the partnership concerns, yet he is invested with every other power which the surviving partner himself possesses.

Of the surviving partner be unable to respond the damages which may be recovered against the estate of the deceased person is liable. In this case, the creditors having obtained a judgment against the estate of the deceased partner, which is ineffectual to obtain set aside, may bring an action of debt on the judgment against the estate. In England, this action is customarily brought in a court of equity, without the apprehension of unnecessary inconvenience. In rescuing, it is brought in a court of law.

Money may be paid to the East of a deceased partner, of very reasonably, for the East might discover the surviving partner to be in failing circumstances, in which case he would have no remedy. If the creditors would eventually come upon him, it is reasonable that
Law Merchant.

If a partner in changed beyond his proportion, guilt gives him a lien upon the partnership effects.

When partners in have become bankrupts, the mode of settling the estate is to apply the joint property to the payment of the Company debts, of the private estates of the partners (in the first instance) to pay off their respective debts. If there be a surplus of private property, it is also liable for the debts of the Company.

If there be a surplus of the joint property, and a deficiency of the private, so much of the former as belongs to any one of the partners may be applied to the payment of his debts, but not to the payment of the private debts of any other partner.

If one of the partners be insolvent, the other solvent, if there is a surplus of the joint property, the surplus is divided, one proportional part being applied to pay the debts of the insolvent partner, if the remainder to be divided among the remaining partners.

Before either of the partners become bankrupts the foregoing principles are not applicable; for this property, that part of several is liable indiscriminately for every
for every debt joint of privy, if a duty may be made
upon the estate of either or both the partnership property,

But when they are incapable of paying their debts
the before-mentioned principles apply.

However when A one of the firm and a
private debt no execution can be levied upon the
private effects of B another partner; after the com-
pany's property may be levied upon, but in this case
the property of B who never consented to pay the debt of
A is taken away at the remedy this defect or injustice
two modes have been devised. I. When the goods of A
of the merchants in company are attached for the pri-
ivate debt of either, only one money of them is sold if
it is not sufficient to discharge the debt, and if a duty
was made upon two barrels of flour, one only must
be sold; if it is not sufficient to discharge the debt, two
more must be levied upon, and so on until the
debt be discharged. II. But the mode which has been
found most convenient is to levy upon it sell
property to twice the amount of the debt of return a nearly
or proportional part of the money to the private estate
of the other partner.

For the difference between a partner
a life of a sub. contract see 1 St 70.37.

Bom 478. One partner cannot receive in Indebtedness
a sum of money received by the other in the partner-

Last Merchant.

ship account, itself then be a balance struck.

After the dissolution of a partnership, the partner
17626135: its his partners authorized to receive & pay the debts
296118: cannot bind the others by giving a security in the
name of the firm.

If one of several partners contracts as
74v 1779
1727 for himself, i.e. without discharging the partnership; still
1793345: if the contract be made for the partnership, proof of
49. This fact fasting at the time of constructing making the
contract it was unknown to the party contracting with
the partner will render all the parties liable.

A contract made by one of several partners rela-
176292: long to the partnership business, binds the rest.— And
1793993: even after partnership is ended or discharged, a contract
449: thus made will bind unless he has notice of the dissolution so given.

Factorage.

A factor is one employed by a merchant in one coun-
try to transact business for him in another.

The factor acts under a COMMISSION from his principal,
to the terms of which he must strictly adhere, if the authority
of which he cannot transgress.

COMMISSIONS are either general, or special. a general
1721195: commission of which the essential words are "buy if sell appear
442: own" invests the factor with a discretionary power of rendeithim
Dear Merchant,

liable only to grief, ignorance, neglect or mismanagement.

A special commission in which the important words are

told of despise does not give a discretionary power, the agent or

unless

fines are a general commission till the goods are under receipt. He left at his

own risk, for in the due exercise of his authority he ought to receive

or guide his goods, or he delivers the one to receive the other.

The remedy against the factor was formerly in

England account if deemed to here; but in Eng. recovery

is obtained by an application to Chancery.

But if the same factor may act as agent for several

merchants, who tender may be strangers to each other in fact

the joint risk of his actions; as if five to merchants should

raise to one factor five distinct bills of goods if the factor makes

a joint sale of them to one man who is to pay one moiety down

and the remainder at 6 months — if the vendor fails before the 2nd

payment each merchant must bear an equal share of the loss if he

collects with his apportion of the money received.

But it has been decided that if such a factor draw a bill of

exchange on all of these five merchants if one of them accepts the

bill, the others shall not be obliged to make good the payment.

And since given to him.

Fidelity, diligence, honesty is expected from the factor and

nothing further if he is not liable for damages, occasioned by

inevitable accident, or even for those which extraordinary
diligence might have prevented, as theft of the like.

And so on the other hand these same things

are required in the principal — for if a merchant by fraud
The factor represents to the party, the seller, and causes any damage to the party, he shall not only make good, but remedy satisfaction to the party, damifiable by purchasing under such false representation:

It has been decided that when a factor defrauds the party to customs by running goods, in which case he encountered the buyer, and of a capital punishment, without being discovered, he was allowed to escape the duties on his principal of security. The Party thinks that to lie in the teeth of every rational idea of principle in an abominable practice, but is entirely of opinion, that if the principal is cognizant of the act done by the factor, he is not to pay the duties; for in running the goods, he runs the risk of his life, but a contract with a factor to run the goods would not be binding.

The sale of goods by a factor known to

118. 2. he shall, well bind the principal, but a factor cannot pledge them for his own debt.

When a factor is known to be drunk.

2. 117. 3. he can, beyond his commission purchase his goods of promises to pay for them, the principal is held, but it is not expected that every one dealing with a factor, who is an accredited agent of his employer is to examine into the extent of his commission. But has the principal his his remedy ag.

Thus, the factor:

If the factor does not follow his commission, he not only leaves himself open to damages, but subjects his commission itself to his pay, which at least, Law be conduct.
When a factor was hired to ensure, if neglected to do it, he
was held liable.

When the factor is publicly known as for-
the principal money if he apprehends the factor to
be unsound, modify his debts not to pay what is due the
factor as factor; if afterwards he caused him it is at
their own expense. This applies only to public factors,
for if he is only a private agent if sells merchandise ad
mon the same account, the person dealing with him is not
at all accountable to his principal, more than to any in
different person.

Factors have a lien not only for their commission,
but for the balance of a general account if for which he may re-
main them. Camp. 251.

It is important in the law of factorage that the factor
is sometimes obliged to take better care of his principal's interests
than of his own; as where he sells the principal's goods of his
own interest, he must apply the money first received to
the payment of the debts of his principal.

If the factor having property of his principal in his
possession, dies, or becomes a bankrupt, his debts or
assigned have nothing to do with the principal's goods.

But if it is money, unless it is kept segregated, it must be
that it will go to the offficers of the principal it is the property of the principal's debtor. But as his
agent.
The stopping of goods in transit.

This stopping of goods in transit is a matter of the mercantile law, or at least, law of a man sells his property, it absolutely vests in the vendee at the time of making the contract, that the thing sold may remain in the possession of the vendee, but according to the L. M. when goods are delivered to the order of the vendee, they may be stopped in transit, that is before they come to the actual possession of the vendee.

But this stopping in transit is never allowed unless the vendee is never within a bankrupt or is supposed to be in failing circumstances, if it intended to become merchants in their property.

The bankruptcy ends when the goods are paid for, they are actually delivered to the vendee, or even to his agent, provided it be at the agent's place of residence.

Suppose a bill of lading has been consigned or delivered over to the agent of the bankrupt, if he for a valuable consideration assigns it over to a third person. If the bill of lading is negotiable, the assignee of the consignee will have a vested property, neither the consignee or vendee can reclaim the goods.

The bill of lading has of late been determined to be negotiable.
Of Mariner.

The contract which a seaman enters into is a ordinary one, every thing respecting it is regulated by the law merchant.

When there is no especial agreement to the contrary, mariners are entitled to their wages at the port of delivery.

If bonds are taken from the mariners or officers of the ship not to demand their wages until the ship returned to the port from which she sailed, of the arrival at the delivering port, it is afterwards taken the seamen or officers shall have their wages to the time of the arrival of the ship at the delivering port.

Indeed the law has restrained mariner from contracting as to lose their wages for if a seaman contract not to receive any wages until the vessel shall have returned home, of the vessel not returning is lost, he loses his wages only from the last port left.

Interest is due on the wages of a seaman from the time of the vessel's arrival at the port of delivery.

Seamen lose their wages by making a disturbance on board the vessel, in which case the master may confine them or put them on shore; also by selling against the master until the reasonably report.
EMITTED 1. Dissolution rules, examples of.

At common law whenever there is a time stated, within which any act is to be performed, if the day of the expiration of the period falls on a Sunday or some noted fast day, the act may be done after. By the law merchant it must be done the day before.

So when any number of days are allowed for the performance of any act, the common law computes from the expiration of the day on which the instrument is dated; to the completion of the last day allowed. For instance, the common law would make a bill payable on the fourth day, when by the law merchant it would be required to be paid before the expiration of the third day of the days of grace.

Mr. Greene has never found a case in which any act was done within the last day of the days of grace, but all could seem to think that it has been set forth, and verified in the cases quoted in 4th Ser. 146, the margin.

Draught 237 8, 19, 15.

At common law a right of action once accrued...
cannot be given up by hand without a valuable consideration; but it may by the law merchant— as where a Payee or indorsee of a bill or note discharges the indorser or acceptor.

It is to be noticed that such indorsers or acceptors of notes or bills as the holder charges to hold responsible, must have notice given to them, as it requires to be given to the drawer in case of protest.

The last rule is not to be misunderstood as applying to a person not interested in the bill to its full extent, for the stranger become bound by his endorsement, liable to the indorsee, yet it will not render the note assignable.

It is said that if the agent of the drawer show his power of attorney to the payee or indorsee, the latter must consent to his (the agent's) acceptance of the bill.

That a bill is good in the hands of an innocent holder, after it may immediately have been acquired by fraud or even theft; see former 452.

When a bill by some unavoidable accident,


Mollar's, p. 151 in c. 1. where winds, is detained until the time of payment is


Mollar is

the holder must never the less present it for

acceptance and payment if get it protested; if not accepted, to paid if the parties shall be found as in other cases

It often accept the drawer absconds, proof being made of


Prop. 710. if by the protest of a stranger; the drawer may be compelled to give better security.

Protest was not required to indorse bills.
Law Merchant.

ill the statute 9 of 10 of W. 4. & C. 17. now does the want of it since that statute destroy the holder's remedy at law. 35th 3d. law. to recover all last interest of costs. Protest is not necessary for 5 miles.

If the drawer pay a part of the late it shall be allowed 16 16/98. in favor of the acceptor. So if the drawer pay the whole, the acceptor is discharged.
Evidence

Evidence is a term so universal and comprehensive that to analyze all its relations and see its connections with all its ramifications and the various incidents of life would require more time and attention than any lawyer can afford to devote to a single branch of his profession. But there are certain great leading or governing principles which have obtained on the subject that come properly within the scope of a lawyer's inquiry of which therefore shall engage our attention in these lectures.

But before we enter upon a particular examination of the substance or application of these principles to legal science it will be proper to consider them on a general scale. And we shall therefore at present take

General View

To understand with accuracy or precision the subject of evidence it is indispensably necessary to define the three radical terms with which it is most conversant. First, they should be compounded of mistakes.

Witnesses are persons who testify.

Testimony is what they declare, and

Evidence is the result of these testimonies. It is an universal rule applicable to all cases, to every
Evidence

The nature of the case would admit of... ready to show what it was as the best proof which the nature of the case would admit of.

I. The first great division of Evidence is into written and unwritten

I. Written Evidence consists of several kinds viz:

1. Deeds and Evidence. This consists of the memorials of the legislature of all courts of justice. As conclusive beyond all manner of contradiction. No oral proof will ever be admitted to dis

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Evidence.

signification by the context. Thus when debt is brought on a judgment, the record of the judgment, the bare record of the judgment is a copy of it must be produced, nor can it ever be dispensed with. And nothing else will suffice, unless it has been lost by invariable accident.

2. Deeds — If the law in any case requires a deed in order to have a title, it must be given if produced in Court in order to establish it. No articles of agreement will suffice. No memorandum of having sold will suffice in such cases, since a good deed is indispensible except when it has been lost by invariable accident when other proof will be admitted to show what it was. And even in cases where the title itself does not depend on the deed, yet if it appears that a deed has been given, this is the proper evidence to be introduced in order to establish the title of the donee.

3. Written Contracts, as than deeds. — In such cases where the Statute of Frauds or Parries requires a contract to be in writing, it must be proved to be so, or the case will not be supported. Because the law declares that nothing else shall be evidence, if not because the best evidence the case admits of is not introduced. And where the law does not require the contract to be in writing, yet if it appears to be in writing the written contract must be adduced. If the Court will not suffer a partial contract to be proved. For it is a general rule that no partial proof will be admissible, to restrict enlarge.

Wels. 775.

or explain a written contract. And if the partial proof is ad-
writing, or in the language of lawyers, the Contract speaks for itself, and nothing will be admitted which this presumption. True indeed, the written contract in such cases is left in the hands of the party's antagonist, and proof may be admitted to show what it was agreed to by the universal rule, that it is the best evidence which the party can adduce, if the general rule is suspended.

II. Oral Evidence

consists of facts derived from the mouths of witnesses, if he is one must consider who are totally excluded from testimony.

1. all persons interested in the matter in question.

2. All persons legally incompetent.

3. Many persons are excluded on principles of justice.

The interest which excludes persons from all testimony must be a pecuniary interest or an interest in point of property, the quantum of which cannot be fixed. To bias anxiety from relationship, friendship, or intimacy, will exclude—this only goes to their credibility.

Again, this interest must be an interest in the event put in the question. By an interest in the event we do not mean that Execution must issue in the name of the witnesses to exclude him, but merely that he must have a direct or consequential interest in the issue of the suit about which he is to testify. A direct interest in the event is where the witness is to be immediately affected by the judgment made to be rendered—as where the witness agrees with the Defendant to pay half the judgment which is obtained against him.
Carden.

A Consequential Interest in the event is where the witness is not directly or immediately, but indirectly affected in point of property by the judgment to be rendered in the present cause. As where the witness rends bail for the debt in the suit about which he is called to testify.

The universal rule of evidence in these cases, if to which there can be no exception is this: If the judgment to be obtained in the present suit can ever be used either to found an action against or in favor of the witness, or can ever be used as evidence against or in favor of the witness in any action whatever, such witness must be wholly excluded as incompetent.

But an Interest in the question does not exclude. This interest in the question is almost undefinable. It consists in the anxiety or interest of the witness to have the judgment rendered in this case in a certain manner because it may eventually benefit him, as where he has a case depending on the same principles it is altogether distinct from an interest in the event.

Neither will a mere contingent interest exclude a witness unless the judgment to be obtained in the case may be made use of in favor or against him. But such an interest merely goes to his credibility, if not to his competency. And an heir may be a witness for his father in a suit to recover land, which must in all probability in a short time come into his own hands.

2. All persons legally disqualified are excluded from being witnesses. To be infamous in this case, they must have been convicted of the crime of false which is any offense which goes directly to impeach the integrity and honesty of the man
Evidence.

who is convicted of it. As Stealing, Burglary, Theft, etc. All these cases the record of his conviction must be introduced in order to exclude the witness on this ground.

2. Many persons are excluded from principle of policy, among those are husband and wife who are forbidden to testify for or against each other. And they are not allowed that even at that no objection should be made of both should wish it. In this respect they differ from interested witnesses who may testify in all cases if they please, whereas there are no objections.

So also an attorney cannot testify in his own cause, any thing which he has derived from his client, when he should wish it. Tat all no objections are made to his testimo ny. But anything which he derived from any other source, or before he was employed in the cause, he may testify as any other person.

It is also a principle whichJudge Greene, the

perhaps was introduced by Lord Mansfield, that whenever a person has given currency to any instrument, he cannot impeach it afterwards in a Court of Justice. As the En
dorseer of a Bill of Exchange, etc. This principle has not relin
ished by later Judges, has not however been broken in

As if it may now be considered of recognized as settled law

in Connecticut. See Black's Evidence, where the old doctrine

is reviewed. It is on the ground of policy that Atheists are

excluded from being witnesses. The Law as it once stood

was supposed to exclude all infidels or persons not be-
EVIDENCE.

Living in Christianity as does Hinduism, but this has long since been exploded, if atheists are now the only persons excluded on the ground of faith. This exclusion results only from the nature of a form of an oath, which is a solemn appeal to God.

No person is a witness in a Ct. of Justice without an oath unless the parties agree to dispense with it. To this general Rule there is one exception, where the witness is of such very tender years, that he will be supposed not to consider himself under greater obligations to tell the truth with an oath than without it.

The declarations of a person in articulo mortis, however, may be testified to in a Ct. of Justice. This proceed on the ground that a person in that awful situation will feel no solemnly bound to tell the truth, nor when under oath, and will not dare to make a statement with a lie in his right hand. If however the person himself be in no apprehensions of this situation, then in reality he as in articulo mortis his declarations are not admissible as proof.

It is a General Rule that hearsay testimony affords no Evidence. To this there are several exceptions.

1. Where the character of a witness as to the truth of a matter being in issue is below the common level of mankind or such that his testimony is not to be credited, but who has not been guilty of the "Crim. False", or this evidence of opinion respecting his character to this alone for they are not permitted to give their own individual opinion, belief or knowledge respecting it. And hearsay evidence is the only evidence
Evidence.

2. The declarations of old people respecting boundaries of land &c. may be testified to, on the same principle, &c., &c. All these circumstances are evidence, &c., &c., &c., when they were not under oath when they made them.

3. The general & prevailing report respecting persons long absent, when it is doubtful whether they are dead or alive may be testified to; &c.

4. Where a witness is dead, who formerly swore to certain facts, other witnesses may testify as to what he swore. But if the first witness is alive, it can be obtained the testimony of others is inadmissible.

And so if the first witness swears differently in a case from what he swore before, other witnesses may be introduced to testify to the difference. As if the party thinks proper, he may introduce other witnesses to contradict his present testimony, whether it is questioned or not, by swearing that what he testified before is the same as that which he testifies now.

So if one swears differently from what he had before related in ordinary or private conversation, other witnesses may testify as to the story which he had previously told, if this impeach or contradict the weight of his testimony, so even to constitute direct evidence of the facts; since the truth in many cases will belie the story before the testimony which contradicts it.

The first great division of social evidence is into direct, where a witness swears directly or positively to a fact, &c., &c., &c., &c., &c.
Evidence.

Here evidence would be to certain circumstances from which the Court are to infer the fact, not the fact itself. This where the combination of peculiar circumstances is such, as ordinarily attend the existence of a certain fact, this is as much as may be in their present state can expect to obtain. If the times will be justified in inferring the fact, then sometimes the inference is absolutely necessary from the laws of nature. But the last are peculiar cases.

Sometimes prescriptive property is the constructive evidence that is, where the only evidence in the case is in writing. As, if a lease should be made of land reserving $10 per annum as rent, and if the lessee enters improvement agreeably to the lease, at the time there is no express agreement of his to pay the rent, still there is constructive evidence from the lease that that was the agreement.

Another great division of oral proof is into two kinds. 1. Stated 2. Depositions.

In Eng. the first only is used in the C.P. of Law. In the last only in their Courts of Chancery. In Am. at we use both kinds promiscuously in both Courts.

At Common Law, depositions in Courts of Law are not known and they cannot be admitted in our Federal Courts unless expressly authorized by Statute.

It is a general rule that no proof will be admitted to construe a writing.

If there is a patent ambiguity or an ambiguity on the face of the writing, oral proof cannot be admitted to clear it up; and if it admits of no construction, the instrument is void.
as where, if I gave in his will, all his Estate to the best man in Whitehaven, this was void in toto.

Part of the ambiguity, it was said, arose from a variance in the spelling of the word of the instrument. Sound proof may be admitted to clear it up.

It also of the said ambiguity arises from the use of an equivocal term, if not from the construction of the sentences. Sound proof may be admitted to explain the draftsman's intentions as to where an Estate is given to "all of his children" if he had children they take equally with him, but if he had none the term "children" is construed to mean "the heirs of his body." It is an Estate tail. Here sound proof could be admitted to show the state of his family in order to explain the meaning of the Estate.

Whenever the law requires any thing to be resorted to give effect to the thing itself, as Deeds in Court, it is a universal rule that written evidence is absolutely necessary to be introduced in proving it. But where reserving it as not absolutely necessary to the existence of the thing itself, other proof besides word evidence may be admitted, as marriages of births in Connecticut, both are required to be made of both may be proved by other evidence.

During witnesses are used, Depts. in the suit to prevent their testifying, the mode of proceeding as for the attorney on the part of the Depts. to move the Court to hear all the evidence against such unlawful Defendants in the first
Evidence.

place of their residence, the court will name the names of such of them as good witnesses. 2 Mar. 237.

a little experience on

But if there is only slight or a little evidence against them the court will order a trial of them such before the others are tried, so that the last may have the benefit of their testimony. We have thus concluded the general view.

A particular view of the foregoing subject.

It has been observed in the general view, first taken of this subject, that the competency of witnesses was to be tried by one of three general rules. 1. Their interest. 2. Their infancy, or thirdly by principles of policy.

Of Interested Witnesses.

The interest which excludes a witness must be a genuine interest—be that arising from relationship, friendship, or intimacy will amount to this interest. Still however witnesses in some cases are excluded from principles of policy, on the ground of the relation in which they stand to one or both of the parties.

I. Baron and Zeme.

106615. The husband of wife cannot be a witness for or against each other. These are not excluded on the ground of interest. But it is an established principle that an interested witness is not objected to, may testify if he chooses. Whereas the husband and wife
20th 685.
20th.

20th.

20th.

20th.

20th.

20th.

20th.

20th.

20th.

20th.
II. Of an Attorney and Client.

An Attorney stands in the same relation towards his client as a husband towards his wife with respect to whatever he is entrusted with by his client. He is not allowed by the Court to testify as to this affair, both parties wish it, he is willing. But this disqualified...
Evadne.

citation is confined to the knowledge which he obtains from his client, for he must testify as any other person whatever he has acquired in any other manner.

Suppose a confidential entrusted is made to an intimate friend, but who is not an attorney, agent or she is laid under an obligation to keep it secret. If these words had been fully satisfied, had the Counts thought proper to have excused persons testifying, but the law to otherwise. Such persons are compelled to testify all which is detrimental to them. It was decided in Court that judges to do.

One accomplices to crimes, he good witnesses against their companions. They do not fail with or either of the rules of Evidence above mentioned directly or confidential witnesses, although their credit may be impeached by these circumstances. Sometimes from the circumstances they must be believed in spite of all their infamy.

Of Interest in the Event and Question

§ 225. No. Thus a person interested directly or consequentially in the event he cannot be a witness. The difference between an interest in the event of an interest in the question had been remarked on.

Interest in the Event or Question, is either direct or consequential. Where the judgment to
be resorted to immediately of right to afford the witness in a summary manner his interest or interest in a suit. But when the judgment only lays a foundation for another suit or can be sustained as evidence in favor of or against the witness, his interest in the event is consequential. To where a guardian brings the suit in the name of his ward, he has a consequential interest in the event; for he is liable for the costs incurred in the suit, to the opposite party, if they may be recovered out of him.

An interest in the question is where the plaintiff of the grand jury presents him for a breach of the peace. In this case he can be a witness, for this judgment can lay no foundation for his suit, nor can it be given as evidence in the private suit of that he is interested to prejudice the public mind against him by his conviction. Before his suit is commenced goes to his credit, may always be shown.

As a commonutron, in such cases, the lessee of money for taking money, the lessee of the money can be admitted to testify, for he has merely an interest in the question.

It may be laid down as a general rule that any in terest in the event of a suit excludes a witness.

In this there are several exceptions, particularly where a civil action is brought against a tort-feasor his interest may be a good witness. Yet he is constitutionally interested in the event as a judgment against one sort
Evidence.

Leader is a bar to an action against another for the
same trespass. As their Act to beat C. If he is sued.

It is a good witness in the cause ex rei.

Formerly an interest in the question did sometimes exclude
in Great Britain at their cost. But a no reason could be given
in favor of its destruction. It is now abolished, yet none excludes.

The old rule was that if the witness in a suit, but was inter-
ested in the question, he was excluded; that no interest in a crimi-
nal suit, were interested in the question merely, he was ad-
mitted. Sure it is, interest to be more careful of property
than of character, being a life.

This ancient and practice of ex-
cluding witnesses present interested in the question prevail-
ed at one time throughout the U.S. States. The U.S. States
were divided in the southern districts of the Union immediately.
In, after the old rule was abolished in England, decided
likewise that no interest in the question merely should ex-
clude. But in the middle circuit, the old rule was
retained; and it was also abolished in the eastern dis-
ticts. The Superior court of this state about two years
since, adopted the present English rule, that no interest
in the question merely shall exclude; and to have the
Court in almost all the States throughout the Union,
the President it is still retained in Pennsylvania of New-
Jersey.

Even under the old rule some witness interested
in the question in a criminal suit, were excluded.
as in Surgery, signage, filing. But Lord Hardwicke in Burnet broke up at once all these distinctions of the new rule was established in the leading case of But v. Barker in Term Reports where it has ever since remained.

Dem. 27 ed without contradiction that he interest in the question should exclude a witness. 1 S. R. 60. For the money not paid.

The mode of proving witnesses interested in order to exclude them from testifying are two:

1. By an examination of other witnesses to prove it on the 29th of the same year that their witness died.

Either of these modes may be adopted, but not both in every case whatsoever. For it would certainly be improper when you preferred the last method to introduce other witnesses to prove that one of your own was prejudiced. And it would impugn the great general and rather universal principle that no man shall impeach his own witness – But R. Force does no reason whatever against examining the witness upon his own voice, after you have endeavored to prove him interested by the testimony of others. If it neither impeach so your own witness nor leads a witness into a more by pretending to rely on his testimony, yet it is settled law that since established, that it is a reciprocal choice, if that if you adopt the one you cannot take advantage of the other.

The general rule that all persons interested directly, or consequentially, in the event of a suit are exclu
Evidence

These are all founded on one great leading principle, the necessity of the thing.

This principle never works an exception, except where the objection goes to the competency of a witness on the ground of interest in the event of the suit.

The first exception to the general rule is where a state, reciting certain persons liable in damages to persons damaged in certain cases, will not be carried into operation without admitting the party in interest to prove the diminution.

In all such cases he is admitted the directly interested in the event. As when the statute of Wilson providing giving persons robbed in action against the hundred in certain cases, could not receive of the hundred unless admitted as willing or without they had been robbed in company. Then for the person robbed has been admitted to testify against the thief in order to give effect to the statute. As the jury when none of the state in this state or in many states may be admitted to testify against the thief, either by the statutes in their state he is entitled to testify damages.

There is a distinction however, however, to be observed between those cases where the action is brought by a mere common informer. In no case is the party admitted to testify.
for this cause, except where the action is given by the statute
to the party damaged — and a Common Informer is never
admitted without the statute should be expressly

It has been said that the Supreme Federal Court of the
169 States have excluded the party himself from testifying
in all such cases, if he have infringed this English prin-
ciple. But this is a mistake since the case which they
determined was where a Common Informer sued and
offered himself as a witness, if this is properly connoted

As Rom Law there some set of
cases where it is difficult to perceive how the principle of law can be

for where it is difficult to perceive how the principle of law can be

carried into effect without admitting the party to testify. Etc.

where the goods of a guest are stolen at an inn. The keeper of

an inn. Law is liable, but the guest alone knows the quantity

stolen. Yet there is no case in the books where he had been admt-
test. So I says the party cannot be a witness in this case.

2. It is mentioned as another exception, that where a master for

one for detaining his daughter, she is admitted to testify against

the Def. from the necessity of the thing. But this is not the prin-
ciple for the court neither interested in the event. nor the ques-
tion as the common law being particeps criminalis is there

fore in legal contemplation a disinterested witness.

3. Where the Sheriff of a county is sued, for suffering a voluntary

escape, the Sheriff is a good witness against him as those he is

interested in being free. From the necessity of the thing. All of the

Creditors once the Sheriff either he nor the County comm
1. Upon the conclusion of the case, the court or jury shall render a verdict in accordance with the prevailing law of the jurisdiction.

2. On the same principle, the debtor, in an action of account, admitted as a witness, for this is a suit upon a debt, is an event of interest from the person to the debtor, which he can not show how the defendant or defendant's sureties admitted to testify.

3. In Connecticut, the statute does not permit a debtor to testify in an action of debt, on the same principle. The statutes in other states also prohibit it.

4. And the plaintiff, in an action for a refusal of account, is also not admitted to testify in this state by statute.

5. By another common law exception, however, joint wrongdoers are admitted to testify for the plaintiff, in an action against their companions, if no objection on the ground of interest will avail any thing, as they are interested to exonerate their companions with the guilt; for one judgment on a tort is a bar to any other action for the same.

6. And also agents of creditors are not witnesses of negotiable promissory notes in an action between their principals. As where A lends money to B, to B. If he is sued by C for the debt, he may introduce B to remove to the delivery of it to C, although C may charge his cause he is exempt from the payment of the money and is therefore directly interested in the event. But if A had not been taken by B, he cannot be admitted for his
testimony is not the best evidence the nature of the case admits of. But if the law indeed requires a receipt of
if none is taken, he must be admitted from necessity.

10. Members of corporations are frequently sometimes admitted as witnesses in any case where the corporation was interested, sometimes not, according to their respective interests. If their interest were great they were excluded if trifling they were admitted to testify. Thus provisions of uncertain and unenforced in Great Britain until by a series of statutes the de
gress of interest to exclude are more evenly ascertained.

In courts and cases admit members of corporations only when the necessity of the case may never where
other testimony is equally to be had. In accordance in
this state, the inhabitants of towns have been admitted
when the town was interested.

11. The agent of a corporation appointed to manage the suit
has been excluded without any reason whatever, but that he is
too spiritit to continue. This indeed is novel reason for the exp
ulsion of a witness, but it has been anguished in.

12. Whence persons have become interested subsequent to
the commencement of a suit by their own act, this will nev
er deprive the party of the benefit of their testimony if they are

AMBIBLE, good witnesses notwithstanding. But if their subsequent
interest arise fairly by honorably, or by the act of God they

et. 466. are not witnesses. As when land taken a vote withfere
by his two sons if died before it was collected, the sons
Evidence.

Agents of God between.

The more urgency of a man will not preclude him from giving testimony in favor of his principal. 1 Bk. 87. 326. To incapacitate a sufferer as a witness it must be proved that he is interested in the event of the suit. 11 Mod. 226. Should he, therefore, accept out of the money received 2 Bk. 735, to receive payment of a debt due to himself, it is 3 Will. 40. an insuperable objection to his evidence, that if he be only to have a commission on the leading, it is no obstacle to his being examined.

Whenever a man is equally liable to either 1 St. or 2 Bk. 665, shift the event of the suit it is indifferent to him, of course. He is a good witness. 2 Gill L. 246. 7 T. R. 481.

Where A. receives money from B. to be paid to C., on an application whether A. was the agent of B. or not. A. may testify. In the sale of lands the rule does not hold. 20. 12 Bk. 115. 1 Bk. 90.

As to the general doctrine of evidence in memoirs. See 20. 12 Bk. 115.

A person is not a competent witness to impeach a writing which he had subscribed. 1 Sam. 296. 1 Bk. 15. 28. Days 17. Contra. 30. 601.
Evidence.

If a servant is admissible as a witness in an action brought by his master for beating him, for good reasons it is said on the ground of necessity. But this is not so for the servant is not interested in the event. Directly or consequentially, if it is in these cases only that necessity works an exception.

Peculiar Cases of admission of Witnesses.

14. Where a title has passed through several hands, they may all be liable, one after another, as in case of several buyers of sellers of a house; or any one of the persons may be liable as in case of covenants respecting land which passed through a variety of hands. In either of these cases all the persons are excluded from being witnesses for they are all interested in the event.

A question has arisen whether the grantor of a quitclaim deed can be admitted to testify in a suit respecting the title to the land. The whole question turns upon this, is he liable? The liability is not on any covenants in the deed, for it contains none. Yet on this ground alone it would appear that one cannot have admitted him. But we ought to go further. If we inquire whether he is not liable to refund the money in case the grantee was misled by his lying, for if he is liable he is not admissible. This liability...
must say, with the various cases, if I apprehend depends up
on this distinction—of the sale was a bargain of hazard
of the purchaser bought at his peril, if without the use of any
fraud, the grantor would not be liable to refund. Of
course the grantor is a good witness. But if on the contrary he has sold
land pretending that the title was good when it was bad to
his knowledge—or has sold mere moonshine for a futile
vessel of his own, if the grantee's title is disputed, or if he is
excused, the grantor is liable to refund, yet because it
is consequentially interested in the event as to be an incompetent
 witnens. Our courts seem to have prejudged over this species
of liability in their consideration of the question, if have
therefore admitted the grantor in many cases very improperly.
In all these cases, oral proof must be admitted to
prove it a bargain of hazard in order to admit the
granter.

2. We have a statute in Connecticut rendering garnishees
liable to be summoned as witnesses in a suit against the
principal. It has been made a great question who is he a
witness for? And it was first decided that of the creditor.
And he might rely upon other witnesses to prove the gar-
nishee's liability if this excluded him. But upon a more
mature consideration of the statute, it has been thought that
it was made as well in favor of the garnishee as the
creditor, that he might when how he had destroyed of
the goods of his principal, he and thus clear himself, and
it is now settled, that at this he is neither a bore. Law
nor a Chancery witness, yet he is a good Matter witness in this state, if in every other where there is a similar statute.

As to admitting witnesses in Chancery the Rules are the same as in the Courts of Law with this one remarkable difference—that in Chancery the party has a right to appeal to the conscience of his adversary to compel him to disclose whatsoever rests in his own knowledge—but this can never be at Law. Yet in this case the party does not stand precisely on the same ground with a witness, for if the former does not disclose, it is taken for confessed; whereas if a public witness does not testify, he is imprisoned for a contempt of Court.

And in this case there is a difference between the English & Connecituck Law. By the latter the answer of the party is conclusive as on a Voice of the testimony to impeach his can be admitted, since he is considered as the party is own witness. But by the English Law this answer is not deemed conclusive of the other party after an answer is made may proceed to adduce other proof, although directly impeaches the answer of proves the party

The English law judge believe consider as the best calculated to arrive at the truth of point

But in this state the party requiring a disclosure may afterwards receive his appeal to his adversary's see.
Evidence

...science of civil cases on the record of them, and to other testimony to make out his case.

...here a witness is interested equally for both parties as where he is liable, yet either negligent, he is a good witness, for he is supposed to have no bias in favor of either.

...if a release of all his interest is given to the witness by the party to whom he will probably be liable, in ordinary cases where he loses his cause, the is admissible. And either he should refuse to accept of it, being opposed to testimony, still the party should not be deprived of his testimony by that, but may tender a release of lodge it if refused, with the clerk of the court for his witness, when he may compel him to testify.
II. Of Persons legally Infamous.

Persons who have been convicted of some crime amounting to the crime itself are inadmissible as incompetent witnesses in any case.

This crime is any one which goes directly to impeach the integrity & common honesty of the person so convicted, as a member of society and as a man.

This is the only crime generally speaking which will exclude a witness. And the conviction with the infamy of not the punishment in any case. For the last has not the least possible effect upon the person as a witness.

In all such cases the record of the conviction must itself be produced as the only proper evidence to induce the commission. Exclusion.

Of the operation of a Pardon—How they would operate in our different States & Provinces knows not, but this is the English rule would not obtain in every respect. The rule in G Britain is, that in many cases where a pardon is obtained from the Crown, the punishment is not only taken off, but the stigma of the crime, so that the person can be a competent witness. The distinction which has obtained between the cases is this: if the incapacity of the witness is the consequent result of the judgment, merely, and not a part of it, the pardon relieves or
renovates the offender.

But while the incapacity of an 

individual is a part of the judgment itself, by statute as in our 

jury, the Pardon will not restore him to the condition of 

a good citizens.

This Pardon is always considered an act of 

mercy if the person pardoned is really guilty. For it never pro-

ceeds upon the ground that he had been convicted un-

justly by the Court of Jury. How then can it even erre-

uate the criminal I make him a good citizen?

This of a Pardon once proceeds upon the ground of an 

injustic Conviction it places the supreme magistrate 

over the heads of the judiciary in legal proceedings. If 

which never was tolerated in any well regulated community 

where a reverence of liberty was to be found. Hence it has al-

ways been deemed unjust in such communities as 

our infatuation insists upon the liberties of the people for the 

chief magistrate to assume the powers of a judge ad libitum 

by a Volle Presquei. (Yet has the Chief Magistrate of the 

first County on the Globe audaciously presumed to issue 

a Volle Presquei against law required every against the 

constitution to arrest the aim of justice from inposing a 

eight times penalty upon one of his Minions, if to arrest the 

bless which the equal Justice of free laws had aimed at 

this mendicant Son of Empire. — Jefferson & Duane 

let their names go to hostility together & let America 

blush!)
In court: we have adopted a new principle of pursing the infancy of such a conviction by a long course of good conduct. If the life of such an one for a long series of years is not stained by a blot nor a blemish, the court has said in two cases that this does away the presumption arising from the record of his being incompetent. This principle that novel appears to be very salutary & useful.

There is one crime which seems to be an exception from the general rule respecting the innocent person. The same statute excludes the person convicted of a Vice Banister at London. Law in a string upon suits by petitioners, &c. The law disqualifies Banisters from being witnesses, but there is no statute which has imposed this punishment.

III Of Persons excluded from principles of Law.

There are 157 Acts respecting whom see the General View. And it may be worth our while to observe further, that it is of no consequence what is the character of an Atheist in society. Although he is the most holy & exemplary man, he still must be excluded for he cannot be under that sanction of an oath which is absolutely necessary.

Puritans have made a great question in many States as the Union. Once before the Supreme Court of Maryland, whether municipalities should be...
from Winchester. I believe with their leader Huntington, that there are no public rewards of punishments can be admitted to testify at all. I hope the question will never come before the courts, but believe that no such person can be excluded from testifying on sound principle. For tho' his beliefs weaken his testimony, yet who shall say that he does not add a sanction to his evidence by an oath who appeals to his maker of the Creator of all things, in whom he believes. Judge Reeve does not feel prepared to exclude him.

So also Villains were formerly excluded in Eng. But before this state of infidelity was also granted their salvation mediated they were admitted as witnesses in the union. So also slaves are admitted except where particular statutes of particular exclude them.

2. Pagans are now admitted to swear in all cases, tho' they were formerly excluded; but they must be sworn according to the solemn ceremonies which are adopted among them.

3. Idiots, Lunatics for are also excluded from principles of policy without a question. No remarks respecting such persons are here necessary.

3. Infants under a certain age are excluded for want of discretion as in the last case. Respecting thefe there is no settled rule. Judge Reeve has never found any case where a question has been made about admitting them above 12 years old unless their education has been remarkably deficient. For has he found any case where a witness
Continued

has been sworn under the age of twelve years. -- Between
the age of nine & twelve. The best & usually enquiry of a child is
learned whether it is able to know anything respecting the ob-
ligation of an oath or not, and admit or reject him ac-
cordingly.

Frequently the simple story of a child is told
of a child, as told
of oath not under oath. This is a
peculiar case.

4. -- Quakers have been excluded from testifying in any
case in law, until a statute admitted them there in civil
cases. Still however they are excluded in all criminal
cases to this day. -- Such a shameful, such a disgrace-
ful law has never blushed at the annals of America
from its first settlement to the present time; for in this cen-
tury they have always been admitted.

Miscellaneous rules respecting this branch of evidence.

1. The best evidence the nature of the thing will admit of is always
required. Thus if a note in bond is sued, it must be proved by
the subscribing witnessed, if by no other testimony. This rule was
formerly rigidly adhered to, but of late it has been relaxed, if
the witnesses are dead, you will now be permitted to prove
it by other testimony.

In fact, our courts always admit the
party's own confession of the writing as the best
evidence, & as dispensing the necessity of calling the subscribing
Evidence.

The Judge Reece believes this not to be Law in Eng. As our Courts have admitted other witnesses' testimony than the subscribing witnesses, where it appears that they are at a very great distance from the Court. But we have no settled rule, each case depends on its own peculiar circumstances.

Thus are cases when the law requires certain evidence to a transaction which has not been obtained, that the party may as well suffer a non-suit as proceed after having commenced his action.

But where the party has obtained other evidence, which is admissible, but not the best in case would admit of, he may proceed to adduce this if it will merely operate with the Jury against his right of recovery, on the presumption that the better evidence behind makes against him.

2. The evidence adduced must go to the issue, or in other words, the testimony must be relevant, as it will not be admitted. Still however if the testimony is relevant, that is goes to the issue, either the issue is wholly immaterial, still it must be admitted, as where in an action of slander for calling the Def. a Spyer and a justification is pleaded, the the issue is immaterial, still a witness could swear to the Def's Lying must be admitted; since his testimony is perfectly relevant.
Evidence.

Of Hearsay Testimony.

It is a General Rule that Hearsay testimony on that which one has said without being under the sanction of an oath cannot be admitted.

But what one has said while under oath may be testified to by others on two or three occasions:

1. Where the reason for saying cannot be brought to the Or on his testimony cannot otherwise be obtained as if he is dead or at a great distance from Court.

2. Where it is introduced to impeach what the same witness declares in the present cause. Or where it is introduced to corroborate his present testimony where it is impeached by the opposite party.

Again, the confessions of a man against himself have always been considered admissible as the best possible evidence. But these are confined to public and whatever the party has inferred respecting his case from certain acts committed cannot be given in evidence. As when one had confessed himself guilty of saying this was not admissible, but if he had confessed that he had done one way when he knew that the truth was the other, this would have been admitted as a good confession against himself.

Also the voluntary confessions of a criminal before a Magistrate against himself have been deemed good evidence. But as the Magistrate has no power to obtain these, if any at
Evidence.

It has been solemnly determined that in a criminal prosecution you may give notice to the Deft. to produce a paper in his possession; and in case he neglects to produce it, you may give the evidence of it—2 Dunc. 3 East. 201.

If a man destroy a thing designed to be evidence against him, hand-bill of the contents may Woodson be given in evidence.

Proof that an witness has confessed himself interested in a matter in the event of a suit, is not sufficient to disqualify him. But where it is proved that the party by whom the witness is interested has acknowledged him as interested, the witness ought not to be discred. —
unning, or fraud was practised in obtaining them, or if any
threats or promises were made for that purpose all such
confessions are inadmissible.

To this general rule there are likewise several
other exceptions.

1. Hearsay testimony may be introduced, as
was observed in the general view, to prove the boundaries
of land. 2. To prove a man's death by General Report when
he has been absent a great number of years. 3. To
prove the general character of witnesses. This is confined
merely to their character for truth of veracity, if no other enquiry
can be made respecting them. Some have supposed that
this question refers to his truth of veracity as to his legal engage-
ments. But in the contrary it refers to the reliance which the
world in general, or not the witnesses, place on him when he
relies a story—Whether it is as much or as great as is placed
on men in general.

In certain cases questions may be asked
respecting the general character of the party, that it is generally
true that you cannot inquire. This is only when the party himself
puts his character in issue by his plea or declaration. And when
the quantum of damages to be recovered depends on his general
character, or where the right of recovery rests upon it. In
some cases the party's general character may be engendered into
him where I found A in danger for charging him with stealing
the sheep of J. B. the Dept. may prove that he is a thief
for the purpose of lessening damages. Or where Bonds
Evidentiary

Evidence is given to a theft by theft as consideration of past solicitation. If fraud is said to be based on an illegal consideration, the effect will depend on the circumstances of the case. Such a bond will be void in law. If the bond is not voided, the general character of the theft is in issue, and is an essential inquiry.

But the general proof is confined in all such cases to the absence of crime, with which the theft has charged the officer. This is the action above mentioned. Between theft, it would not be proper for the prosecutor to prove the officer guilty of stealing or dealing with stolen goods. The officer, in most cases, is acquitted of stealing and is allowed to prove the officer guilty of receiving the stolen goods.

Miscellaneous Rules

Regularly no witness can be introduced to swear to a writing except the subscribing witnesses. This rule judge Greene considers very unreasonable and rigorous. 3 Bro. 1244.

It was formerly law that no person should be allowed to testify to his own turpitude or baseness. But this is now permitted. All of the witnesses is about to confess himself guilty of a crime which will subject him to punishment. The court will acquaint him with the consequences. But if he then...
Exhibit:

No preterit is possible, he cannot be testified. On this principle, a Mother alleged to swear her Child a Bastard, the court cannot be compelled to.

So also may a person who is a whole trustee having the legal title but no interest in the suit, be a witness. As the Judge of Probate in Court, whenever his hand is sued, he appears upon the record as witness. Of the parties are generally excluded on the ground of interest. But the new Act of 506, now does not operate in this case, therefore he is admitted.

Of the number of Witnesses.

Generally no particular number of Witnesses is required in ordinary cases by the Eng. or Court Law. And there was a time when the Law of G. Britain as a Court, required more than one witness to swear directly to the point in issue, as circumstances equivalent have always been deemed sufficient.

But by the civil law, two witnesses were indispensably necessary to the establishment of any fact. And this rule has been adopted by many of the European States.

Why it did not prevail in Eng. must be attributed to the circumstances of being tried by twelve jurors from the neighborhood, or to the idea that their knowledge would usually be equivalent to the testimony of one witness; and the single witness under the English Law must be credible or his testimony will avail not in the least.
There are several exceptions to this general rule;

1. In Eng. when the answer of defendants in Chancery may be impeached, the testimony of a single witness will avail nothing in impeaching him; but there must be another to the principal facts, or there must be circumstances equivalent to the testimony of another witness in order to impeach him.

2. In proving Perjury in a Court of Law, two witnesses are necessary, as a single will stand against death.

3. As also it is said that in Eng. two witnesses are necessary to prove Treason. But if there is one witness direct of circumstances attending proved, which are equivalent to the testimony of another, this is sufficient. And tho' they go to prove different acts, still this makes no difference.

I know not how it would be in this country.

In all other crimes the testimony of one witness is sufficient in England. A bond having been executed by A. if attested by one witness was carried into an act, joining room of shown to B., who was desired to attest it, also which he accordingly did in the presence of A. held that B. was a good witness to prove the execution.
Of Compelling the Attendance of Witnesses.

The first process is by a subpoena or summons, which will usually bring them to court. But if not by this means, the party must tender them the legal cost for travel & attendance the first day of their refusal to come to the cause, unless on the trial through want of time, provided this summons is returned into court with the OFFICER'S doings thereon, if he is called three times if does not appear he is liable for all the damages sustained an amount of this absence.

Or in case he refuses, the party may issue a CAPTIVUS to be of course from the court, attahing his body, bringing it before them. And if he hides the CAPTIVUS he is liable as in the last case.

If the witness refuses to testify after he is brought into court, the court will imprison him for contempt during the session of the court but no longer.

Where it is necessary that the witness should bring certain documents a summons is suit with a direct summons requiring him to bring them if in his power as when a town Clerk is summoned if his Records necessary.

Of Depositions.

It is a general rule in Eng. that depositions are never used in a court of law, if that they constitute the only testimony in Chancery. In court, we use depositions of civil suits testimony from depositions.
Evidence.

All these are admitted in the English Courts of Law if the parties agree to it if they all most unanimously do whereby the Court recommends it as in cases of taking safe. But if it is objected to by either party it cannot in any case be admitted, since it is there no legal exhibit, as it is in Connecticut in a lot of Law.

But where an if one is directed out of Chancery since Chancery never tries a point of fact of deposition which were taken for the Chancery Court are read to the jury in a lot of Law yet here no new evidence is introduced.

In Court the Court as a Court of Law try the facts or send the cause to Commissioners appointed in such case if not to the jury.

If in Court no deposition is ever admitted in any Criminal case, then the parties both agree. The witness for a prisoner in a Criminal prosecution are always summoned at the expense of the State, if he is unable to pay there. And on any suggestion of his counsel that any person is a witness, the Court immediately order him summoned.

**Depositions in Connecticut.**

The Law has guarded them in every possible manner from fraud or corruption. The requisites to a good deposition in this State are 1. That he be sworn before a Magistrate. 2. That it be drafted by the Justice who swears the witness; the witness himself or some indifferent person chosen by him or not by the party or his at
Courteny. 3. That it be scaled up by the Magistrate before it goes from his presence, to prevent tampering with it or altering it.

4. That this deposition be laid into Ct. sealed, if there be no

in court. 

5. That the witnesses deposing live more than twenty miles from the place of holding the Court or rather not within twenty miles. 

6. That this opposite party be notifies of the time and place of taking it, and if he has not an attorney nearer than he is, if the party know it, he must be summonsed. if the jury is not, in either he must be first.

The 5th Rule holds generally to all Courts, but there are some exceptions, as where the witness is sick or unable to attend Ct. in person, or where he is about leaving the state before the Court, or where he is not amenable to the process of the Ct., as living on the boundaries of another state, or he is within twenty miles, yet owing his deposition he taken in either of these cases.

But if there is any the least fraud or deception or trick about it, the deposition will be rejected, as where the party procures the witness to ride away twenty miles, or neglects to take and deposition until he has got away.

It is now settled, that a deposition once taken in a suit between two parties may always be introduced in all suits to be between the same parties, but no others. This rule applies equally well to General of Court. If it be so the following--

When an witness gives a deposition while his character was good, afterwards it becomes infamous, still it may be read. Where one has given his deposition while it
Evidence.
hated interest of witnesses and become interested. It would
seem the deposition ought to be read an every principle.
but the current of authorities is against this. If all such
depositions are held inadmissible.

Witnesses cannot be arrested in going to Court nor in re-
turning from thence, nor while they continue there, provided
they consume only a reasonable time. Of the case is the
same with distressers. They are in justice entitled to this
protection from the C.t. because they cannot shelter
themselves in their own castles. If otherwise the practice would
be deemed of their testimony.

This right of protection is the same in Eng. as in Court.
The English mode however differs from ours of granting it.
Sure by that, the witnesses must go to Court without any pro-
tection, unless after he has arrived there, a subpoena has
been served on him as a writ from the Court signed by the Clerk,
prohibiting all Sheriffs from delivering process on the witness.
But an arrest while he is going to Court. By the Sheriffs can-
not be false imprisonment unless he has a subpoena.

Then it is—The last has been a great question in England.

By the practice of Court, the witness has a protection secured for
him by the party desiring his testimony, before he leaves home.
It is false imprisonment to arrest him when he shows this

There is no analogy between the English cases of arrest, because

When the witness has no subpoena as going to Court. This
question has been argued these times before the national
Court in this state before Judges Paddock, Cushing,
Eviden

Even if it was finally decided by Judge Chase to be false imprisonment in the Sheriff—indeed there is such a position in Jenkins Eviden, a valuable, but rare book.

To arrest any person in the Court house or near it as some authors say, "in the view of the Court" is a contemplt of Court.

The mode of examination is this:

The party who calls a witness to establish any point, or a witness is to proceed from the examination first before his adversary can examine it. And that side which has the obtaining of any question always first proceeds to prove it.

It is a general rule, that positive testimony is always to prevail over negative. No rule has been more absurd of late understood with reasonable restrictions, since negative testimony in many cases ought and must prevail.
Written testimony is of several kinds; but it is usually
ranked under but three distinct heads. — 1. Records. 2. State
writings on specialties. 3. Writings not sealed.

I. Of Records.

Records are of two kinds. Public, as the memorials of legisla-
tions or charts of justice. — Private, as records of Deeds.
Laws of Executions &c. The first only are records strictly
speaking.

A Public Record, when added as conclusive testimony of
nothing can be introduced to control or rebut it. The only pro-
cept of answer in any case, to this is, and the record which
denies its existence.

As Records must remain in the custody of the Court, copies of them are good evidence, authenticated
by the certificate of the proper officer who keeps them, if who is un-
der the sanction of an oath to certify true copies alone.

If a copy be obtained the copy may be certified by the
judge of the Court, who, being a proper officer, seals the copy of
the Court, in Court, he certifies & seals it both.

If neither a judge
not the proper officer can be obtained, any indifferent per-
son may take the copy, but he must swear to its con-
tenstion in Court, or by deposition.
Evidence.

General Statutes are not to be pleaded or adduced in evidence regularly, as the Court notice them ex officio. There is however an exception to this as in 1. Where such aStatute recites a security it must be pleaded specially as the Statute itself makes void all Uniform Contracts of 2. Wherever one is indicted on a Statute which has been modified or relaxed by a subsequent one—If he would take advantage of the subsequent one, he must specially plead it.

Private Statutes must be pleaded specially. If appeal upon the Record, since the Court are not suffi-
to be acquainted with all these, if they must be certified by the proper officer, to be authentic evidence.

In Court we always give them in evidence under the general issue.

The laws of another State may be adduced precisely as private Statutes of our own. And the printed laws are good evidence when they are print-
ed under the sanction of the Legislature.

Where there is no statute in another State respecting certain transactions—But an existing law, it is presum-
ed to be the same with theCOMMON LAW or BRITAIN—But the Judges of their Courts or eminent Lawyers may testify that it is different. If this is good evidence. This practice has gained very generally among the New England States. But where the Law has been proved to be different, per-
edly, the Court will not enquire respecting it, but dis-
Evidence.

...seed upon it as completely apparent... as where it is generally known in Court that the interest of money in New York is seven per cent. per Annum. This result will take this to be the legal interest without enquiry.

Histories, also, where many may be added to prove certain facts which have taken place, but these can never be used to establish a particular right.

So also heralds' books are good evidence to prove a pedigree in 9/6. The most solemn reliance of former... is now placed upon them, as they have become corrupt. We have no such thing in this country.

Annals are also good evidence in many cases, as to ascertain the rising of the sun or a certain night which may be very important in certain cases.

Family Bibles &c are good evidence to prove the birth, marriage or death of persons where they are recorded. They are usually very correct of place.

A verdict in a former suit is sometimes added as evidence, but in all cases it must be very slight.

5 Mod. 316. for the testimony may be very variant in different cases.

It can never be admitted however in any case unless it is between the same parties, depending on the same right of the same point.

The amount of the verdict is nearly the opinion of twelve men respecting the same point.
Evidence


In cases of Public Records a copy is good evidence, but Private Records as Deeds cannot be introduced as evidence by a Copy in Eng. in any case as a General Rule, but even in the Countries where they are required to be recorded. These are not necessarily confined to a certain place as public records are - if the contents of a deed of those alone were disputed, might probably be rescued from the Record, yet if the evidence was denied, this cannot be annually confirmed except from the deed itself.

To this rule there is an exception where the person claiming under a deed cannot be supposed to have it himself, as one holding under an execution in such case the Copy from the record will suffice. This principle applies directly to our mode of acquiring land in Conn. by levy of an execution. If the title is disputed, as no deed can be produced by the levying creditor, he may procure a Copy of the Deed and draw from the Records.

The same principle enables the Deft. or Lft. to produce a Copy where the Deed has been burned or destroyed, viz. that it is out of his power to produce it. But this must be very clearly proved to the Court.

As to the Last in Conn. Whenever the dispute is between the original grantee or grantor, or any other person of the original immediate grantee, the Deed must be produced under which he claims, if a Copy will not suffice.
Evidence

But he is not bound to produce the deeds of any other person—as in England—to illustrate the rule. A conveyance to A, B to C from D. Now in Eng. if C disputes D's title, he must produce all the deeds from A down to himself. Since in Eng all the title deeds are delivered to the grantor in a conveyance of land, and he is always presumed to be in possession of them. In Connecticut the case proceeds on the English principles of requiring all the deeds in the party known as the best evidence the case admits of, still, he is only required to produce the deed of his immediate grantor. If he may want to the records for the copies of the other title deeds, if necessary, since in Connecticut all the title deeds are not delivered up. This practice is fraught with a great variety of evils. But in this, as in many other points of our Law, Community Error prevails.

When Bonds' Deeds of a, are printed in detail, they must be proved to have been executed or delivered by formal testimony. In the first place the subscribing witnesses of no others must be called if they are living, as the best evidence the case admits of, since they were specially requested to attend unless the party has confessed the execution of it, which supposes the necessity of any proof besides. Lastly, nothing can be presumed. These witnesses may be called who state the execution or delivery, and if these are wanting it may be proved by inference from circumstances, as the hand-writing of the maker or grantor.

The evidence of a delivery may arise from a great variety of circumstances, if need not be actually delivered, but as a deed to
Evidence.

be Good. — Even profession is prima facie evidence of a deliver.

y, tho' it is liable to be rebutted. The admission of partial proof
to control a writing, or even its terms, or nother a condition
is never proper but merely to establish certain facts from
which the intention of the parties may be inferred. As an ab-

olute deed is given from 1 to 2, no partial proof is ad-

missible to show that it was on mortgage a contract was
made that it should be a mortgage. — But to show certain
facts as that the grantor had continued in possession ten
years of receiving all the rents of profits, partial proof may be
admitted from which the jury might infer that it was inten-
ded as a mortgage.

The consideration expressed in the deed
is not conclusive between the parties as to the quantum, tho'
not as to those being a consideration, for the quantum of the
consideration expressed is wholly immaterial as to the valid-
ity of the deed. — But as against third persons as creating
a consideration expressed is not conclusive as to its existence,
as they may prove no consideration was ever given to any
upon the land as belonging to the grantor then delinor.

A deed may be delivered as an exposure i.e. to a third
person for another benefit to be delivered once on the happening
of some contingency or event, then to be the persons act and deed.

As a general rule it cannot be delivered to the grantee to be
the act of Deed of the grantor on the happening of some event and
otherwise not, but it will vest the property in him absolutely.
Can it be delivered to the party himself under any circum-


Evidence.

...in this subject there is great confusion in the books. But Judge Payne believes the books can be reconciled on the principle that where the act required to be done is concurrent with the delivery of the bond, it is considered as to exist at the same time; it may be delivered as in Exchange to the Grantee. As where a bond is delivered to a person if it is expected he will pay the money at the same time, where it ought not, it is true to be considered as delivered unless the money is paid, on this ground was the case in 3 Ch. 835 decided.

...says that the title vests immediately since no condition of this kind can be attached to this writing — if that is the case of such a fraud the party had his remedy otherwise.

This seems to be decided in 3 Ch. 210 of 834. But as the same judge determined these cases, if the other without assigning any reason for the apparent difference, we must suppose they took the distinction laid down somewhere, between cases where the condition was concurrent with the delivery, where it was not, but dependent on a future event.

Many contracts are necessary to be made by a sealed instrument if verbal proof is inadmissible because nothing but the sealed instrument can ever prove the contract — as where a sale of land is unfaulably by deed, no verbal proof could possibly prove the sale.

In cases of writings not sealed in some instances verbal proof is admissible, in others not. But when admitted it cannot be added to if it is opposed to the writing, for it must stand well with that. And it is only ad-
Evidence.

mitten where an ambiguity arises from something extraneous or foreign to the writing; or to explain equivocal terms which were used, to rebut an equity, or to enforce a right in Chancery.
Evidence of giving Verdicts in Evidence.

Where the master has been subjected to damages in consequence of the negligence of his servant, the verdict may be introduced as evidence in an action by the master against the servant. See the Law upon this subject in Gill D. & 32. 43. *No record of a conviction or verdict shall be given in evidence, but whereas the benefit may be mutual, i.e., where either party could introduce it provided it was made for him.* Gill D. & 32. 68.
Writs of Error.

A Writ of Error is a Commission to Judges of a higher Court to examine the record on which judgment was given in the Court below, in order to affirm or reverse according to Law.

Writs of Error are of two kinds. The first is principal kind are taken upon error in Law, if for the purpose of correcting mistakes in Point of Law which happened in a lower Court.

The second kind are Writs brought upon Error in fact, if may as well be brought before the same Court as any other. But the consideration of these is reserved for a future occasion.

1. Of Errors in Law. These must appear on the face of the Record. If the Error may be brought to some Court superior to the one which rendered Judgment.

It is not material how many mistakes the Court makes, these can be no reversal of their judgment unless these appear on the Record.

Therefore, a question of law is made of a judgment rendered herein, as it appears on the Record of the Superior Court. a Writ of Error always lies but whether successfully or not is a very different question.

No question of fact can be tried on this writ, if no testimony can be adduced as if the Def. should demur to the Declaration as insufficient, if it should be adjudge
Hills of Error—

sufficient, here the whole question appears on the
Record & a unit of Error lies. — So if there is no plea-
ing but a default, if judgment is rendered on an inap-
propriate declaration, a unit of Error lies. This is some-
timed beneficial but it is a dangerous experiment.

So another unit of Error lies when an issue is found
yet if no interlocutory judgment is rendered wrongly
during the trial, this unit of Error lies — as if a wit-ness
should be offered of the Court should reject him while
he was competent. Yet no unit of Error lies for this un-
less the matter is reduced to the record, which is done
by filing a bill of exceptions stating the facts & then
it becomes a part of the Record, if a unit of Error

lies.

It is a rule which holds universally true, that if there

ref. 742.
2 Pet. 99. has been error committed, or claimed to be committed,
9 Edw. 4, 5. 5.
3 Pet. 805. upon rendering judgment on interlocutory questions, as
20 H. 133. excluding a witness, or overruling a good plea in abate-
18 Edw. 134. nent. No unit of error can be laid until the conclusion
18 Edw. 16. of the suit. For this reason the party testifying taking

the suit may indeed obtain the cause on the mer-
its, if therefore will want no unit of Error,

A is a general rule, subject however to a few exceptions

Edw. 766.
2 Pet. 66. 287.
299.

that of the court neglects to issue in abatement and the pro-
secutor in an abatement, also this as all appears on the record

ref. 124.

Still no unit of Error lies.
The exceptions to the last rule will be noticed hereafter.
The object of a Judgement or writ of avoir possession what is lost— must be to prevent it from going forth or being executed. It may be done by habeas corpus or the writ of scire facias. The principle of the English Law is, that if one takes out a writ of avoir possession without a bondsmen, this should not serve as a suspender of the proceedings. If a writ is made in England and a bondsmen was necessary, it must be made in the same manner as a suspender of the proceedings.

The object of the Bond is not to find security for the costs or for the good behavior of the debtor. But for the purpose of securing to the prevailing party in the Court below all which he shall by any rule or in consequence of the writ of avoir possession. In the Court of Error, in Error might depend his prevailing adversely, by staying out a writ of Error or by staying the proceedings of absconding.

To this Bond no defense can be made. On this the bondsmen is not only liable for what costs have accrued by his staying the judgment, but for the interest on the judgment also.

The form of a Writ of Error is extremely simple. It may summon the Debtor to appear before the Court, to hear read the Writ, Proceed to Error or not. The cause of in the Court below of the Error therein contained in the words following: If these do declare that manifest Error has intervened, and the Error must be assigned, and it may be assigned as
The writ of error operates as a supersedeas, if the rule established as this. When the judgment on which the writ is taken is executed, the writ has no effect whatever upon it, but until the writ is executed, the writ operates as a supersedeas.

Suppose the property is levied upon and sold before the writ comes, there is no question but what the writ is ineffectual. But suppose the property is levied upon but not sold at the outset as the law directs before the writ of error is taken out of court, it then unquestionably operates as a supersedeas, since the judgment is not executed within the meaning of the rule, until the property is sold, the money collected is applied to the execution.

The writ of error becomes a supersedeas of the execution in the officer's hands, by a copy being delivered to him.

But where the body is taken on the execution, the judgment in all cases may be considered as executed in the eye of the law as much as if the money was paid; so that this writ does not operate to release the body or operate in any manner as a supersedeas.

"The general essence to a writ of error is this: Nothing Executed."
The English Courts of Error are the Common Pleas to
which Writs of Error can be taken in civil but not in crim-
inal actions. From the Common Pleas in all
cases whatever writs of Error lie to the Court of King's
Bench. From thence they may be taken to the Court of
Exchequer, thence to the Exchequer Chamber, finally
to the House of Lords. Or they may be taken from the
Kings Bench to the House of Lords directly. The Kings
Bench however is the highest Court of Error from all infe-
rior Courts in Civil or Criminal Causes. And if the
case originated in the Court of Kings Bench, the Writ
of Error is taken to the Parliament.

The Court of Exchequer was constituted merely for a
Court of Errors, since all cases before which were decided er-
roniously in the Kings Bench were necessarily taken
to Parliament, which was not in frequent frequent enough.
If this Ct. was undoubtedly intended originally as the
denier resort, then when this question came before the
House of Lords, they determined that this Court could not
and took from these jurisdiction---where the House of
Lords is a definite tribunal in its itself for the decision of
questions of Law, yet it has been well managed as a
majority of them have always decided the questions before
this House, invariably for this two hundred years with
out an exception.

The judges of the Exchequer are the judges of
these lower Courts who have not tried the cases as
of a cause was taken from His Maj's Bench to the Exchequer Chamber, the Judges of the Court of Common Pleas together with the Lord Chancellor would decide upon it.

The method adopted by the Courts in G.B. to enforce the great principle of restoring to the party what he has lost, is this: if the first Ct. of the lower court is affirmed, costs merely are awarded in this court but no execution issues anew, since the old one stands in full force of law. This case is not affected by a writ of Error. The judgment of the superior court in such case is this according to the old law Books. Now the earlier case ante, if decided in perpetuum, this rule applied equally to any State as to the Courts of G.B. Britain.

When the judgment is reversed in G.B. Britain, the Ct. above will render the same judgment which the Ct. below ought to have done, if it is consistent with the constitution of the Court. This is the Off. in the original suit brings action on the ground that his declaration in the lower court was not a sufficient basis on which to declare the judgment is reversed in the Exchequer Chamber, a jury of inquiry will of separate damages after the judgment of reversal has been rendered together with all the costs.

But if such a suit is led to the Exchequer Chamber, as there is no jury to this Ct., if the judgment is reversed it must be remanded back to the first Ct. having a jury where it was last tried, for it is not consistent with
The constitution of this court to restore all which was lost according to the Rule supra and this is the only object in remanding any cause back to the Court below for if in such case the Ct. of Exchequer should find that the declaration was insufficient on the dem., taking the fact that the Ct. of King's Bench had found it sufficient, their judgment would be reversed here if not remanded back, because they may as well restore what is lost as any other Court.

If the remand is on an interlocutory judgment, a new plea of abatement which was decided insufficient in a lower Court. Here the judgment is respected aud so is the Court of Error, if it is consonant with their constitution. And here they restore all which was lost by declaring the Writ.

But if the judgment on a plea of abatement in the King's Bench should be adjudged erroneous in the Exchequer, a new record and new judgment should indeed be awarded, but it must be sent back to the Ct. of Error for its order to be tried by a jury on the merits.

In short, our Superior Court have adopted the English principles, but enforce them in a different manner. Our Courts of Error are the Superior Court of the Superior Court of Error. The first has exclusive cognizance of all errors committed by Justices of the Peace, Assistant Justices of Common Pleas. The last only tries the errors of the Superior Court. No error of Error can be taken from the judgment of a Ct. of
println the State, the appeals in the nature of Writs are taken, if the jury men, rendered in this is the same as an writ of Error.

These Writs are taken to the Superior Court for every possible Error in point of Law. And if представлен contrary to the intention of the Legislature — as they must show intending that the County Courts should be the dernier resort in many cases of exclusive jurisdictions as respecting highway suits. But this practice is now otherwise.

The Court, a judgment upon a Writ of Error operates as in upon a demurrer plea, after which the Deft may obtain a trial of the cause upon the merits. And this within the Deft. obtains the reversal of himself. He may in either case by the cause in the higher Court as to it was appealed.

But if the Deft. in certain cases after the Court have decided the question in error, should enter for a trial notwithstanding, he must be pursuing a Phantom — as if the Ct. should decide his declaration to be altogether insufficient.

Thus suppose A dies in the County Court, he offers an objectionable Witness to prove his claim, who is admitted.

Suppose that B as a Bill of Exceptions the merits of the case are then tried, A, recover £100. B dies out a Writ of Error upon his Bill of Exceptions. If obtain a reversal, there it may be politic to A to enter for a new trial in this Court, notwithstanding this the Deft has obtained a reversal against him, for in all likelihood he will gain it on the merits.
Writs of Error.

But where the decision is that he never can recover, as where
the suit action is wholly void of substance, it is ridiculous
for the Orf. to enter for a trial on the merits.

And in the state writs of Error lie from decisions
of Chancery, where the Error is apparent on the record or
from decisions in Courts of Law.

Of the Ct. of Errors to which the cause is taken,
can try it quiser, they will put an end to it. But
if from the want of a Jury or any other cause, they can-
not try it, they send it back to the Ct. from which it
came. Thus, in our Supreme Ct. of Errors no dam-
ages can be adjusted, if where there are no jury, the
cause must be sent back to the lower Court.

On a Writ of Error the Orf. never recovers any costs
in this state. But if the judgment on the Writ is in fa-
vor of the Orf., in Error he recovers costs.

Our law limits the time of bringing Writs of Error to
three years after the judgment.

Of the Effect of a Reversal of a Judgment.

This is materially the same every where. If the Or-
f. from the body of the judgment is reversed, he
is not liable to a new paper for the judgment he en-
remedies, or for all purposes until reversed. And the ex-
section shall take effect upon such a judgment was a suf-
Two cases.
If property had been taken & sold before the judgment
unresolved, the party obtaining the reversion is clearly
entitled to all that he has been dammified. But if
a favorite topic of Open are taken & sold to a 3rd
person at the Post; it is judge obvious opinion that
the law did not intend that what he lost should be
restored specifically; hence the purchaser would hold
the cattle of the party must be paid in money. This
idea is founded in policy merely, for no person would
purchase under an execution, if he could not be quiet
safely in the enjoyment of his purchase.

First suppose we
had a unit of cattle & an Corp. in which the cattle
were assigned off the Creditor of not sold in such case
if the judgment is reversed, the party takes back his
cattle at their value, since no third person is injur.

But if the Sheriff sell property taken in Execution even to
a stranger when he is not bound by law to sell if it has
been restored by renewal. As if goods of an outlaw are taken
by a legislature at legalization when sheriff is not bound
to sell them but to keep them for the King.
The Rule laid down by Coke is that Collateral things execu
ted, are not diverted by a renewal. But Collateral things ex
cuted are—so one in Execution on the original judg
escape if before judgment reversed ago. The Sheriff for the
escape, the original action is restored, the section for the ex
scape is gone—A letter of good ty at Execut. had been obtained
Writs of Error.

(in the action of the escape) before the judgment
864.43.2 recited then the judgment would remain notwithstanding
the court. Standing the writ of error for here the collateral
thing is executed. Next in that case the sheriff
824.234.ought to be relieved by an audit (Quinela) 302.676.
In Count where land is leased upon the judgment
creditor gets possession of the judgment is reversed
the title to possession is reversed back to not the value
of the land.

But suppose when the judgment creditor gets
possession that he sells to a third person. Shall
the debtor on a reversal recover back the land of the credi-
tor on its value in money. This question never has been
decided now remains to make a great figure in our courts.
It is contended on one hand that by analogy to the sale at the
past the vendee ought to hold. But contra it is urged
that no principle of policy justifies it in this as in that
case. Judge Kent thinks that the original owner ought
Middlesex not to be deprived of his property. That the vendee should be
County.
Writs of Error.

This question was decided 824.805 in the magazine
of testimonials
Judgments may be affirmed in reverse in part
only. This is difficult indeed impossible where the judg-
ments are entire. But where it is for two distinct things
as a debt of least, hire it may be affirmed in part as to
the debt of reversed as to the least. This is the great
question can one divide the judgment, or at least
in trespass the statute in certain cases allows no more
cost than damages, if the St. should render judgment for so much damages as full costs amounting to more than the damages. Here the Court of Errors would affirm the judgment as to the damages & reverse as to the costs. Where judgment is in favor of the plaintiff, where the Court say that all the maintenance shall be recovered at once. So if husband & wife vs. G.B. suffer a fine of Common recovery where the wife is a minor, this is said as to her, the year as to the husband. This is the nature of a judgment.

In short we have improved this distinction in one instance three times not been in G.B. to Where A fine is not for instance if 10 or a minor. If judgment is rendered against both, the English courts reverse it as to both. Since I was not used by signature but.

Our Courts have affirmed this judgment as to 10 for it as to be on the most correct principle in my opinion. When one judgment depends for validity upon a prior one, the reversal of the prior one, has an effect upon the latter, but the latter cannot be said to be reversed by the reversal of the first; for on this subject there is a difference of opinion. As if an Executor should be sued as and if Executor should issue against the assets in his hands. But if he is not pay in this case, we will suppose a mere power to issue against the Executor himself to be his property, unless if the first judgment is reversed. This undoubtedly is a good ground for an Audita querela.
but does not reverse the last judgment.

And if the execution in the last case has been satisfied after an auditia truea, the money so paid can be recovered back in an action of *intitulatim* against the estate. It is no objection to this action that a judgment has intervened for the proceeds on the ground that something accruing since judgment was rendered, makes it inequitable for the party any longer to retain the money, as in this case of a *sumpits*—if one sued forers bail, if execution follows a judgment against him, it is returned. Son est—Here the bail is liable only if the judgment against the principal is reversed—This is a good foundation for an *audita truea* for in favor of the bail who the judgment against the latter is not reversed by it.

Thus some set of cases where actions are based on bonds conditioned for performance by instalments—wherever the first becomes due if the obligor fails, the period.

In the bond is perfected of the whole is recovered, but the credit. Court will examine the bond to what is due at the first payment and require the bond in court as a security for the performance of the rest. And upon a second failure, when a second instalment becomes due, a *seque facit* issues on the former judgment if it also is collected. Even if the first judgment is reversed, there can be no ground for a *seque facit*. Yet a judgment upon the *seque facit* will not be erroneous but an *audita truea* is the proper remedy for the obligor.
Writ of Error.

It is a common mistake with the jury to find in many cases more damages than are demanded. A judgment rendered in pursuance of such a judgment will be erroneous. But the Rule in all such cases may be avoided by executing a discharge of the judgment on the judgment or execution.

So when the cause of damages is certain, proof of definite damages as in actions on Notes or Bonds, if the jury find more damages than are strictly due by the instrument, the Court thinks this also must be allowed to prevent Error.

It might be otherwise where there is any reason for presuming damages, as in Rome, Scotland, etc., before.

II. Of Error in Fact. Writs of Error of this kind are founded upon the suspicion that a fact in dispute is not shown by the record, which renders the judgment erroneous. As a judgment should be rendered against a person being a minor, who is acting without his Guardian upon defendant.

These facts, however, cannot appear on the Record. 3 R. 1, 6, 9, 157.

If the Error lie in the Neglect of the Court, viz. the court refuses to render judgment. T. N. 321, Oct. 3, 1831.

And when the Error in law is occasioned by default of the Clerk of the Court, or Sheriff or other officer of the Court. 5 R. 356, 9 Ira. 1, 231, 174.

This suit may be brought as usually is in Eng. before the Ct. 3 R. 159, 325, 203, R. 3746, 656, J. 13, 83.

This suit is brought in England, below the Ct.
to those suits but for errors in law which are denomina-
ted "Coram Volis". This was not our practice formerly.
That it is now becoming quite common in Connecticut.

formally all suits of error of both kinds were taken to a
higher court than the one which rendered the judgment
complained of. This was not a good practice as the party
ought may as well correct errors in fact as any other fact
in Connecticut.

Of Assigning Errors. It is

a general rule, that errors in law of error in fact cannot
be assigned together. In all except in part if denied must
be tried separately. But McReeve see no objection to
assigning them as well as a demurrer to one part of the
Heads of the general issue to the other part. But Our
late mode of practice respecting the mode of bringing
errors of error Coram Volis seems to prevent them being
joined. If they are joined it may be denied to for
duplication. Thus it is said that a general demurrer will
reach the defect.

So assigning several errors in fact amounts
to duplicity, or if several errors in law are assigned
so also it is another rule that no part to against the re-
cord can be assigned for error for the record is conclusive.

as to all allegations of facts which it contains. A for judge
ment should be rendered in this manner. It is not the
atorney. The party cannot assign for error that E. S.
was not his attorney for he was dead two years before.
Write of Error.

because the Record is conclusive. The Court will seek some other mode of redress for this mistake.

This has been much disputed whether of Judgment is rendered by one as a Justice - Error could be assigned on the ground that he was not a Justice having never taken the oath required by Law as a necessary qualification. And if so, whether this is not an assignment against the Record. On this question there are but six decisions reported in the Books - Three of which are for the assignment, three against it. The question therefore remains sub lite.

There has been considerable discussion likewise on this question. Can a party reverse a judgment rendered in his own case? It is settled that he never can reverse the judgment unless he can show it was clearly to his disadvantage. And how can he show this since no witness can be introduced to show it? Judge Paine declares himself very much perplexed with this question; he finds no clear idea as to how it is to be settled.

Suppose the Error be an Error in Law, but the Record as to involve a question of fact as if the Court in the Record had that since the judgment complained of was rendered there is no release of all debts ordered.

This is reversed if must go to the jury, if the Court has one, and the point of Law assigned as Error stands for an after consideration of the defendant's plea is insufficient otherwise the Work absolves.
Writ of Error.

A summation of the record is where is where the Writ of Error recites only a part of the Record — and this is alleged — when the Court proceed to issue a mandate to the lower Court to certify up the whole Record — and if it comes up certified if it agrees with the present Record, then it awaits nothing, but if it is variant from the record as recited recited, it is substituted in its place, if the cause proceed not inferior.

New trials are granted on principles of Equity, and are grounded at present it is admitted that a power to grant New in all cases whatever, of a general jurisdiction, the Courts of limited jurisdiction (canon law courts) have no such power. Have these originated in very ancient, there is no statute authorizing them, neither can they be derived from any common law principles, but were most probably established by the canons of law without any restrictions. Hence were they so framed as to substantial justice between the parties when one trial was not could not do it. They were very rarely granted, until within one hundred of fifty years—so that the subject remained free from those shackles which the right ideas of those who administered the ancient Roman law would really have imposed upon it.

The great object of granting new trials is to do substantial justice between the parties independently of all general laws, if in a state of nature. Thus the verdict of a jury in many cases may be contrary to law yet, the county courts have refused to grant a new trial, because it was not alleged substantial justice, the contrary to right law.
In granting new trials, the court do not decide the cause in favor of the parties obtaining them, but merely gives them another opportunity to try their cause.

Error is not predicable of the decisions of courts in granting new trials.

The effect of a new trial is to introduce the same cause into court de novo, and all the former proceedings are as completely done away of as though they had never existed, as if execution had been obtained in the cause on the first trial, if cleared of the property had been sold. In the latter case, the possessor is immediately for the money as though no former judgment had been rendered. If land has been leased when conveyed to a third person the title derived under the execution is void. Indeed in every possible case, except one does a new trial sweep away all former proceedings. This exception is where property has been taken and sold at the first trial, it cannot be recovered as freely from the bona fide purchaser because that the principles of equity demand that third persons who purchase according to law should be secured in their purchase.

The general effect of new trials is sweeping away all former proceedings, fraught with a variety of evils. But the court has exercised a controlling power which prevents these deleterious consequences. Thus they limit the party petitioning for a new trial to give sufficient security to the prevailing party in the first trial, that he shall receive every thing he succeeds in the new trial, which he could have ac-
New Trials.

If it had not been granted, any on the former execution, the body of the petitioner for a new trial was committed to gaol. If this is granted he must give security to the adverse party that his body shall be forthcoming if he prevails in the new trial. As this power is discretionary with the court, they fix what terms they please to the grant. And almost always they direct the petitioner to pay all the costs which have hitherto accrued.

Where a new trial is granted to the plaintiff in the former suit, the defendant's bail in the original trial is completely discharged. The court will not grant new trials where there is no equity in granting it, or that the verdict was contrary to law.

1. Where it would only tend to minister to the passions of men.
2. Where the object of it is to introduce a new defence, which is in fact legal, but opposed to the justice of equity of the case.
3. Where the former decision had been otherwise, it would operate merely as a punishment upon the party. On this ground, it is unjust to expose a person to punishment twice.

Causes for granting New Trials.

But court will grant new trials for many important equitable causes. As:

1. When the verdict on the former trial was contrary to law.

In this case there is no dispute about the facts in the case between the court of jury and the decision of the jury on the facts, is entirely against law. Thus if a claiming under $6,000, should sue $15,000 judgment, if it should appear that there was
II

Where the Verdict is against the evidence. But in such cases the Court is very tender of granting new trials on the ground, for it seems to be the exclusive province of the jury to judge of the evidence. But no cases as yet have been found where a new trial had been granted, except where there was none, not the least evidence to support the existence, or if any so very slight that it could have no influence in a man of common understanding.

And in no case will the court grant a new trial because the weight of evidence is against the verdict. For in Little Fork County where there found. Witnesses swore positively of directly as that there is a single witness of the jury found agreeably to the testimony of the individual, the court would not grant. Yet a new trial is never granted at the the verdict was entirely contrary to the whole evidence. If against law, provided that the court are convinced that substantial justice has been done by the
Mr. Trials.

former finding

III. - Where excessive damages have been given by the jury.

Judge Steele has been petitioned with a view of all the cases en-
ter on this point, amounting to one hundred and seventy-
and first new trials were granted upon them all - and out of
there is no reason in the books. This means
that for this cause new trials are very seldom granted, indeed.

Even in all the Wilkes cases not one new trial was granted, the
sum 277.

6th. 65. if very high damages were given, it is to the court felt in no way

6th. 184. is desired to favor John Wilkes by his adherents.

2nd. 267.

It is very difficult to lay down any rule on this subject with per-

cision of certainty, Judge Steele however presumes that the court
will never grant new trials for this cause unless the amount of the
jury in finding the damages is such as will foster the the court
in inferring great partiality in them. This is the best rule which
he can lay down. [Ref. to Ch. 38 § 591 257]

IV. - Where the damages given by the jury were too small.

1st. 140. In all the cases of New trials in the books not a single case is re-

2nd. 168. jectcd where the court have granted in cases of a fact. But in an

10th. 385. treason loss an assault where the damages are not simply certain

10th. 835.

2nd. 267, if the damages given are too small this must arise from

2nd. 845.

10th. 647.

some mistake or partiality in the jury.

V. - New Trials are sometimes granted for Misleading

1st. 261. By this it is meant, that where the defence made a bad

10th. 321.

3rd. 188. are, when the party had it in his power to use a letter

2nd. 154. are. But this course is operation only with certain
New Trials

1. The party must state not only what was mispleaded, but the defense which he wishes to use in the former case. If the court when enquiring into it find it all frivolous, they decree a New Trial. If a distinct defense is set up, this must be expressly stated. If testimony must be adduced to show to the court what can be proved, and it is unreasonable, the court in such case will grant a New Trial.

2. Where the party pleaded in bar where he ought to have pleaded the general defense, he shall not be denied a New Trial. As if A dined B for a direct assault, if it should be pleaded that an inheritance was present, if the Off. should reply that he was infamous, or on a demurrer judgment should be given for the Off. Where a new trial will be granted in order that the Off. may plead the general defense. Where his special plea in bar fail to hold if in fact it is reasonable that he was not guilty. As if A's defense should be overruled and the cause thus go on, a new trial might be granted in order to have a trial on the merits, which the Defense has verted. But this depends upon the circumstances of each case, if the Defense was frivolous the court will not grant a new trial.

VI. Another cause for a New Trial is New discoverd evidence.
New Trials.

So soon after trial in the English courts, that there is very little reason for the discovery of new evidence. Still it is such a reasonable ground for a new trial that it is frequently obtained in the English courts. And as the New Trials are not reported, but in all the United States, partly.

New Trials, clearly in Connecticut. New discovered evidence is the great principle ground for granting New Trials. But agreeable to the principles of equity (not of equity), it is a rule that New Trials shall never be granted for New discovered evidence, if it might have been discovered had at the former trial by using due diligence.

Either well or new trial be granted because a witness whom the party introduced at the former trial forgot a most material fact, which he now remembers or did not relate it.

I think the principles of policy and general equity, prevail over the particular equity of felony cases. For if the witness were allowed to come in again after proceeding what was wanted to make out the case, jury of grand would walk out in our Courts of Justice. From he most dangerous!

In courts the party in this case stated in his petition the whole trial, the facts in every word, that he has since discovered new of material testimony from such a witness, that this witness is y. If that he will swear this it is. The court will then enquire of the witness what he will swear. If it is so the jury states, they will
grant a New Trial.

The testimony adduced at the former trial will not be heard on the new, for the judges are supposed to know that. But if the whole Court should change at once, this rule must be dispensed with.

VII. New trials have been granted where a judgment has been obtained against one party without a trial, either by fraud obtaining, or by the false return of an officer. In Eng. the nisi prius judge files his report of the case, and on the day in Breach he reports it, which is a concise statement to the whole Court, so that no testimony is admitted. If the nisi prius judge reports that he is satisfied with the first trial, there is no instance in the books where a new trial has been granted.

VIII. New trials are granted for some mistake, defect in the conduct of the jury. As if the jury should neglect to find a verdict, or if one of the parties is interested, or if he should concur with one of the parties about the verdict.

In Eng. this cannot be done made a ground of arrest, as it is here in Court. In this state, however, if the party knows of the interest of the person in time to allege challenging him, a new trial will be granted for this cause.

As to the laws respecting the conduct of the jury upon trials:


The jury may sometimes mistake. The Judge Re(e)ceives a notice if such one case in the English Books of this cannot,
apply here. — The mode of returning a Verdict in Eng. is for the Clerk to ask "What say you, Mr. Foreman?" The answer for the Pf. to return is of the verdict is not written in Eng. as in Count. — In one case the Jury after some hesitation found for the Pf. But the foreman in returning it said the Deft., which was immediately accepted if recorded without a discovery of the mistake. In this case a new trial was granted.

X. New trials are granted for some mistake in the opin

5 the 244. in, or some defect in the Judge of the Court. This has been very much agitation in Eng. But it certainly is a reasonable cause. As if the Court have misdirected the jury, if this is now settled in Count. As in Eng. New Trials have been granted where the Court admitted in

Proper notice and testimony of no bill of exceptions was filed. But it is certainly proper where the Court are conscious of having or delivering a wrong opinion, if this last has obtained in Connecticut.

XI. As the Court have been guilty of misconduct or a mis

10. 645. A new trial shall be granted as where improper testimony has been admitted by the Court without an objection. If afterwards its relevancy is discovered, a new trial shall be granted the party. But where the

15. 267. 235. 282. 843. 222.


20. 10. 202. 282. 3 43. 222.

the day of trial, for a new trial will be granted for if


is the party's fault to employ such counsel, still however an action lies against the lawyer in such a case.
for his negligence.

XII. New trials are sometimes granted when the witnesses summoned were absent at the time of trial, if sometimes not.

If the witnesses may be sued for not attending, or if he takes refuge in his poverty, refuses to attend the court will will issue a capias to bring him up, the court of the trial in ordinary cages until he can be had.

If, however, the witness is arrested by the adverse party or

by him desired away from the court, or if he is prevented

from attending by a sudden accident or sickness, the court

will grant a new trial, provided the witness makes affidavit

of what he could swear, and in their opinion it is material. If

no other condition will be granted for this cause.

XII. If a cause has been lost by the testimony of a person legally

by imputations, a new trial will be granted in Equity. There

is some difference in the book on this point. The last cause

decided proceeded on the ground of neglect of carefully

not taking advantage of it at the trial of adding the Record

when it was known at the time. In other cases where the

fact was not known at the trial, or the party was surprised

being by it, Judge Reeve presumes a new trial would be

given by the Court. Vol. 649. The known of work in the books, where mere incompetence in a witness, who
New Trials.

ought therefore not to have been admitted. was urged in affirmance of a New Trial. But he thought it ought to be held if in such cases he prevailed in Connecticut for this case.

XIII. New Trials have been granted where the jury have found a general verdict, when directed by the Court to find otherwise. This is not illegal conduct, for the jury are not bound to find the verdict 236. This direction is generally grounded on the application of the opinion of one party or both, if the verdict be against the opinion of the Court, a New Trial will be granted.

A New Trial in such case has been refused, but because it was after a trial at bar in which New Trials were not easily obtained formerly.

XIV. New Trials may be granted from the peculiar circumstances of the case. There are but two causes in the books which form this principle. The first was where the party demanded of his adversary to produce a writing which was material, as he had a right to, provided he had given notice previously. The party objected to producing the writing which was made against him, on the ground that he had not been notified that it contained his case. Here the Court granted a New Trial on the ground that he had, unjustly recovered by a spurious legal process of trick. The other case was where the defendant challenged that the objection, obligation was obtained from him by means of inducing also that it was substituted by forgery. On the trial the whole drift of the Counsel's arguments went to show the forgery under the General Issue of the Jury. 239. One looked the plaintiff in vain a verdict for the Court there.
the court granted a new trial, as the jury had outlaid the main object viz, the damage. I then moved then verdict on the sole ground that there was no forgery.

**XV.** This amount of the parties - as treating the jury, or of his counsel, as any wrong influence, or any kind of intimidation is another good ground for a new trial. Vide: 11 Edw. I, 59, 292. 1 Rob. 452. 5 B. & C. 252, 3. 20 Vent. 175, 11 Edw. 119, 10 Vent. 126, 416, 140.

**XVI.** Intimidation is an attempt to influence the jury can only, to one side, by promises of pecuniary or.
New Trials.

Cases where the Court will not Grant New Trials

It is laid down in the Books that a New Trial will never be granted after a Verdict. But this is not true Law. The first position has of late years been acknowledged untenable.

Still, however, it has been contended that a third New Trial could not be granted. This also is not true. For the 6th are not bound to any specific number of times in the case. They may as well grant a thousand New Trials, as one says.

Per Mansfield in Rouen: if will in certain cases so often as the Jury oppose the Court. Still however if it rests on a question of evidence, it is presumed the Court would not grant several New Trials, but leave this as within the province of the Jury.

A New Trial will never be granted on the part of the public in a Criminal Prosecution. This rule has, except when the accused has pleaded fraud on the former trial, where the Court may grant.

But on the part of the Criminal if he has been unjustly convicted, a New Trial will be granted.

The above rules apply only to all Criminal actions where a penalty is to be recovered if to all penal actions unless to all actions where the judgment shall operate.
The question remains to be agitated in this State of to make a frame in our Courts at some future day. Whether the Court will grant the Party a New Trial to prove error, after he has once pleaded it if failed? There is no case of this nature in the Books, nor has it met with a judicial decision in Connecticut. But the Court in one instance said if the question was not before them, they would not have granted one. If Judge Rense thinks they never ought to grant a New Trial, because first, the object of our Law was to do justice between the parties. If not for the sake of the State? Now the Plaige is to meet the Party of this whole demand, as well that which is equity alike as the remainder. But this is administering to the corrupt passions of men for the purpose of evading the Laws, which is very unproper.

This plea operates upon the Party as a public punishment. As a suggestion, if since the Party in case of a Public protest no can never be put twice in jeopardy, the Party in the case surely is entitled to the same privileges.

3 17th 5 760 It is a rule in L.R. that four years acquaintance under the first trial is an express rule to a New Trial. But in Eng. there were statutes of limitations.

In Court a statute of 1804 limits new trials to three years after the first. The ground of the petition there was discovered. Since this refers to 4 years from the time of at which the grounds of the
New Trials.

New trials are never granted to plead the statute of limitations, for this is considered an inequitable plea.

[Handwritten notes]

New Trials.

New trials are never granted to plead the statute of limitations, for this is considered an inequitable plea.
General observations upon Real Property.

Real property as distinguished from Personal Property, says Judge Beer, is a difficult matter precisely to define. Real property, however, is immovable, as houses, lands, 

but it is not true that all personal property is movable: for a lease of lands for years is immovable as real property, although it is true that the lease can be carried about in one's pocket. But then the point is, what property, something which cannot be removed. Again, real property as lands and houses can be held, where I lived in, but this alone is not real property, for our equity of redemption is real property, it cannot be lived in or used upon. But further it is said that all property which descends to the heir upon the death of the owner by the law of the land is real property; but if it will go to the Ex't, it is personal property; but this is not a complete definition, for a life estate does not go to the heir, if it is real property. I can see it clear that an estate to a for life of B, goes to the heirs of B upon his death, if still living, it cannot, because it is only an estate to A, to A's heirs. It cannot go to the Ex't, because it is the whole estate. The donor cannot take it because he granted it out for the life of B, who is still living. Who then can take it? for it seems "it has not place to lay the sole of its foot." It was open as in a state of nature to the first.
Real Property.

It is a point made in the statutes of 13 Edw. 2. which directs the Esq. to sell it for the benefit of the heir.

There are not 3 kinds of estates known to the English law which estates have certain unalienable privileges or incidents 1st. Estates in fee simple. 2nd. estates for life of which there are several: as an estate to one for his life, an estate to one for the life of another; also estates resting on contingencies, are generally ranked under this head.

Real Estates may not only be acquired in houses lands &c. but in some incorporeal hereditaments. corporeal hereditaments is the legal idea of lands. It is in fact land itself. *Ligamentum* land, *rubes* everything ab inpeius ad suapet for brevis est tolens unus et mox quo ad caelum. In incorporeal hereditament is something issuing out of a thing corporeal which is neither tangible nor visible, as a right of way, a right of fishing, a right of office, a right of common.

From what has been said it would seem that every estate, not in fee simple, fee tail, or for life would be personal property, to go to the Esq.; but there is an estate which would go as would appear, neither real nor personal, which is an estate at will. It cannot go to the heir; it cannot go to the Esq.; it must then on the death of either of the parties lie at an end.

So a lease of an estate of ten years, there must be some words
of inheritances which in England is the word "heirs." Now is this, or to make personal property inhaldible it would not be necessary? Originally, the western nations founded in upon the Roman Empire of long after them the feuds of the feudal system. The chiefs of those races had at first no idea of giving out any other estates than those of will. Afterwards, estates were vested for a longer time. Estates for years were then granted out. The tenants were unwilling to rest there, they were both to part with property after they had made improvements upon it. Afterwards became a principle that they should hold the estates for life, but no one then thought of a longer estate. Hence an estate given to Thomas not being mentioned for years was considered to be an "estate for life." At this sometime the tenants became anxious to have their estate descend to their families after them, and for this purpose it was necessary in grants to use the word "heirs" to distinguish a descendible estate, from one for life only. Hence the word "heirs" was rendered essential it had been continued ever since.

When in treating this upon the nature of estates, conceive it unnecessary to cite authorities, for every elementary authority. It is however unnecessary to enter into all the old feudal codes. Blackstone's commentaries on this subject is recommended as the most perfect outline. Some further historical observations will be made on the nature and properties of real estates or Real Property.
that it was under theGreek of roman Empires. Then the noble Nations before spoken of soke in upon the Western of Eastern nations a more permanent prosper, in lands was desired. It was in the first place customary for the chief men to grant it out upon the condition of the fidelity of the grantee. These persons (as has been mentioned) afterwards held it for years, then for life, if afterwards it was made descendent. Grants were then made to the Baron of their heirs. The word heirs included every native direct descendant, but the grantee must have been of the blood of the first purchaser or assigner, for at that time, a man could have no collateral heir, and if the first assigner had no heirs, children, he had no heirs, for children only could be heirs. The eldest son on wife, children, etc. And then upon his death, his brother inherited, not as heir to him, but as heir to his father, as being of the blood of the first purchaser. During all this time, the means of obtaining land was by buying or selling it for price. But when money was wanting to buy for expedition to the Holy Land, selling became customary for the purpose of raising money. It was of first custom to sell only a small part of ones Estait land. Afterwards became customary to sell half, if finally by the Statute of Usesenfections 18 Edw I a man was empowered to sell the whole of his lands. Also lands could not be devised by Will until the Statutes of Wills 32 & 34 Hen 8th which made all lands devisable. It may not however be unnecessary to remark that previous thereto, land itself could not be devised.
Real Property.

The use of it could i.e. a man could devise lands to the use of another, which doctrine courts of Equity favored. But in consequence of this devising to uses, the Statute of Uses 25 Geo. 3, ... was enacted which declared that he to whom the use was devised should have the land in fee simple. Here there was an inconvenience remedied by the Statute of Wills above-mentioned 32 & 33 Geo. 3, by which every man had full power to devise the land itself.

When lands became alienable by the Statute Quae existentes 18 Edw. 3, the descent was confined to the blood of the absence of first purchaser.

1. The first incident: these inseparable from an estate in fee simple. is 1st. That it is alienable. There cannot be granted a fee simple without a restraint of alienation. No attempt it would be vain.

2. Another incident to such an estate is that it was descendible to the heirs general of the purchaser. But, supposing there were no lineal heir?

It would descend to the next collateral heir of the whole blood. Here the collateral relations were lost in. It would be well to remark that lands cannot lineally descend. Due from 2nd to 3rd. In cases may be look for instances of this in the English law. Lands then are alienable and descendable to the heirs general. By this it must be understood that it descend to every child alike. This means according to the law of descent.

3. Another incident is that when a man dies seized of an estate in fee simple, the Wife shall have dower.
4. If the wife was seized of land brought by her into marriage, the husband shall have custody.

5. No waste can be committed by a man owning lands in fee simple. But how must the estate be created? Formerly in England, words of peculiarity of descent were required, but now an estate to a man and his heirs will create such an estate: for the word heirs is indispensable. But it is not said what heirs. This is regulated by the law of descent. One may justly conclude that this word heirs, means only to give the quantity or duration of the estate; for it to specify the way in which it shall descend.

From all the foregoing I am induced to think that the last definition which can be given of a fee simple is, "that it is an estate in a man or his heirs." In Commentaries, it is supposed, "allodium" a fee simple to be equal, if the same; I think he thinks the lands don't extend here unless pointed out by a statute.

With respect to the creation of an estate in fee simple, by devise, it is very different from a grant. What will make an estate in fee simple in a will, will by no means make it in a deed. What is the reason of this? About the time of the making the Statute of Wills, mankind were less hampered by technical terms. This being at a more later period, the legislatures thought themselves at liberty to say that in this new created estate, any words used by the donor which made it appear that a fee simple was intended to be created would create such an estate. In a deed technical must be observed.
In a devise the words, "all my estate, all my effects," I mean all I am worth will convey an estate in fee simple. But there is in England one curious exception, for where a man devises an estate describing it "for life" to one, it will be only an estate for life. It will be otherwise in bounty. Yet the intention of the devise is the whole point in both countries. Here you see the only difference between England and bounty in the construction of Wills for in no other case have we gone all lengths with the English.

But in all the intention of the devise is never to be regarded when it is against law. As where there is a devise to the brother or sister exclusively, this would be such an estate as the law knows nothing of. To make an entailment the word here is necessary. It would not be a fee simple because it would be restrained. It would not be a fee tail because heirs of the body are not used.

2. The next estate known to the English law, is a fee tail, but as once it is treated of particularly a new observation will be made, on an estate not now in existence but out of which the aforementioned estate grew, "was the forfeit or moiety of Estates tail." It was a fee conditional at common law. Among the nobles yeas as spirit of custom and family pride was so predominant, that they could not bear the idea of their estates as out of their families. Hence they...
introduced grants to their children or the heirs of their bodies. This was not a fee simple because it restrained alienation. The Judges construed these estates not such as must necessarily descend in the family, but they construed them as free conditional, which depended on the condition or contingency of having children, if when the condition did happen (i.e., the having children), the Estate was passe, of a free simple estate in the dower. This construction given by the Judges (who were at that time at enmity with the nobles &c.) struck up by the root of this private scheme of the aristocrats. They did not abandon their plan here, but caused the Statute de clonus conditionalibus 13 Car. I. to be enacted which restrained the Estate to descend in the family of the grantee in infinitum. This Statute could not be evaded. It was a one grievance and at length a remedy for it was found, which is called, creating an entailment. This was by friendly suit. John Stiles wishes to abide or dispose of his lands in Part to Tom Notes. John tells Tom to sue him for the land, that he will make no defense. Tom accordingly commences a suit, John in Court denies the grievances known or not by the matter. A nominal sum is recovered against the suit. A judgment goes against the defendant. It gives the title a regular and complete title to the land. This is a Common Recovery.
An estate tail general is an estate to a man and the heirs of his body. But what heirs? This is regulated by the law of descent. collateral relations are entirely excluded. This was restoring estates descendent only to the blood of the first purchaser. An estate tail special is where lands are given to a man and the male heirs, or female heirs of his body.

An estate tail female special is where the lands are limited to the female heirs of his body, being gotten on a man's present wife. But how if there are no such heirs, if the entailment is not revoked by a recovery. Here the estate will revert to the donor. An estate tail then may be said to be a life estate caused out of a greater.

1. It is incident to this estate that the wife has dower. 2. And the husband butyry, as the case may be. 3 And that the tenant is not punishable for waste. Therefore cannot be dismissed upon for it. If derking estates tail.

In brief, there is a statute creating entailments. It has not affected the English doctrine of estates tail only in point of limitation, or duration. It remains an estate tail until the grantee has issue upon the happening of which an estate in fee simple vests in them. If in I presume nearly allied to fees conditional at the Comm. Laws.
The Statute was made to prevent the man from spending his property from his children. It has been said that the Statute of Limitations makes a free simple in the children as soon as they were born. The words of the Statute are that "the Estate shall vest in a fee simple in the children of the grantee." It has been said that the grantee by these words takes only an Estate for life, if not an Estate tail.

I mean fully contradicts this, for if an Estate passes it certainly must be an Estate tail; or why the words Estate "in tail." The term made use of was quoted with a view to Estates tail in England.

For a proper construction we must then refer to English books. Here the Statute does not give us any indication as to the legal proceedings. The fact is, the grantee takes an Estate "per proram donec" that is an Estate tail; if the donee has it not in his power to expel the Estate by a fire or recovery, for then the intention of the Legislature would not be answered. It has been determined that the wives shall have power in their stead, which is decisive of the question.

The Olive this subject is to make it familiar with the doctrine concerning Estates, he will unavoidably be led into repetition.

Estate in fact of Estates in fee simple are the only Estates which can descend, and the former being regulated by the Statute, to descend "per proram donec," does not descend as the latter. Still the last of descent regulates both; if in both the eldest son takes first for the word "heirs" in a fee simple only refer to the quantity or duration of the Estate, if not the manner in which it shall descend.
Estates of inheritance are freehold estates, but yet there are some freehold estates not of inheritance, as estates for life of any kind, or as to which estate is esteemed estates for life, depending on a contingency which may last for life. Hence we see that one may have the friends of another for simple. If there has spoken, I will for sometime continue to speak of estates in land, which is a corporeal heritage. It includes everything whether mines or water. Incorporeal heritaments are neither visible nor tangible. If some of them are as much real property, and as regularly descend as any things else among which are a right of fishery, a right of office, etc. Thus Judge questions whether a right of office can be granted in this country. These incorporeal heritaments, like all of something corporeal. They are real estates.

As to the operation of deeds. The word land, houses, barns, orchards, waters, fowes, meadows, heaths, islands, sands, etc., are often used in deeds but they are by not means necessary nor ever have been so. How comes it then that they are used? We have the rise of them to not a very honorable cause, namely, that clerks who wrote deeds were paid very handsomely in proportion to their length. Hence they introduced these unnecessary words. By the term "land" passes everything. If the word "farm" when properly described, will convey as much as land.

A man may convey land and part of a fee simple
on any other estate, in the word or houses ye: I mean he may sell anything on the land if retain it to himself or convey it to another. If the house is disputed, it will be a lease of the land, whereas it stands, as long as it stands. 56 187: There is one species of property of an immemorial nature, which appears to be personal in every other respect than that it descends to the heir of not to the Est. I mean an Annuity which is a claim upon the person of another. Go 5th 2.

If a man gives an estate to A of his male heirs forever, what estate will pass? Why a fee simple, as the unlimited estate was clearly intended. If in this case it dies without male heirs, but with female, the latter will inherit, because the law knows of no such estate as was intended. The intention to convey thus is an illegal one, consequently no vain intention. In the grant whose words of inheritance, if words of perpetuity make it a fee simple.

Any words in a devise which will make clear the intention of the devisee will convey just such an estate as was intended. No words of perpetuity or inheritance are necessary in devises.

Intestate in 5 2, a Deed an Estate is given to A of his heirs? Here for want of knowing what heirs were meant, this was construed to be an estate for life. It would have been otherwise in a will. If a grant is made to A for life,
there will be only one estate for life.

In corporations the word "successor" answers the same purpose as the word heirs to individuals. The grant to corporations aggregate will convey a fee simple without the word successors.

Exceptions to the general rule that the word heirs is necessary to convey an estate in fee simple. Men who hold their estates together as partners, where one wishes to convey his estate to another, there needs no words of inheritance. In the case of corporations, so of devises. (The reason that men could not be partners in England was that estates never descended equally to all the sons, but they did so to all the daughters.)

If was a maxim before devises were customary that a fee simple could not be limited upon a fee simple; for by the first grant all the estate which the grantor had passed to the grantee. This Greene thinks savors too much of technical reasoning. In case of Wills, however, a new estate arose which is called an executory devise, which shall be treated of hereafter, by which a devise of land might be made to a in fee simple, provided the payee to $1,000. but this cannot be done in grants. bro. 6. 590. 1. By an executory devise a fee simple may be limited after a fee simple.

But however true it is that you cannot limit a fee simple upon a fee simple, yet there is an estate which can be created.
and which answers almost all the same purposes. It is a condition, if a fee simple. To have a qualified fee on an estate to it while he is owner of the Manor of Dale up to 1727. If you can create an estate in fee simple by devise different from what you can buy by a deed, so you may create an estate tail in a devise by different words than are required in a deed, as by the word his heirs his issue go. Hereone conveys it to be a lamentable circumstance that mankind have been and are now so trammled by etiquette.

A tenant in tail has power to sell the estate so as not to affect the heirs. He may sell the estate for his own life only, if it will be good against line. He cannot charge the estate tail to pay debts after his death. It may go to the heirs clear of incumbrance. A tenant in tail may convey an estate in fee simple, if it will be voidable as to the heirs. Estates tail are subject to be sold in case of Bankruptcy by a Statute of 1791.

A man may create any special entailment. But it is a rule that where there is granted an estate in tail male general, or special, they must take these males only. If an estate in tail female, they must without these females only. So 1720.

Hereone was nice advice that in case of a fee simple of the tenant thereof dies, without any heirs, would become of the es
state in this country? The reply is that in most of the states they had made statute-regulations, 

is bound, in such cases the estates would be sold by the counties of the money put into the public treasury. But where there were no regulations made, the supposes the estate would (as in a state of nature) be open to the first companion, for land here is perfectly alloidal.

There is an estate which seems to form a medalline link, between an estate tail and an estate for life. It is tenant in tail after possibility of issue extinct. At where there is a special entailment to the heir of the body of John Stiles in his present widow, willing to be begotten. Now if a man Stiles dies without issue, he is tenant in tail after possibility of issue extinct. He is tenant in tail in every other respect than that he is determinable for waste. The successors cannot sue him for waste. 4 Co. 53.

Estates for Life

Estates for life are sometimes conventional, or created by the contract of the parties themselves, others are merely legal or created by the operation of law. The former is where a lease is made to one for the term of his own life, or for the life of any other person, or for more lives than one. Any estate given to one which may or may not last for the term of his own life, depending on some contingency, is esteemed an estate for life.
was all its properties. But any lease for a determinate time of for one thousand years, will be only an estate for years which is merely a chester in England. But no estate long lease have become as purchase in Estates.

In 1679 Penn's leases of lands in Pennsylvania were expressed thus: "To hold the land as long as mountains have rocks near, if trees grow." These are sanctioned by them as Estates in fee simple. But this kind of estate is clearly not the a fee simple, fee tail, or any other kind of Estate known of in the English books.

The estate for life created by operation of law, an

Tenant in tail often property of space extinct. Tenant by

The incidents to conventional Estates as well as one created by operation of Law are the

same. 1. That in these Estates the tenant may take upon

the land reasonable quantum. Notes 2. That the tenant

shall not be prejudiced by any sudden determination

of his estate. 3. A third incidents relates to under ten-

ants, for they have greater indulgences than their life

of Estates for life created by operation of Law.

And 1. of Dower. The intention of Dower is to provide

suitable'maintenance for the wife. In some particular
Deed Property.

It differs from any other estate. By the English law the wife has 1/3 part of all the real property of which the husband was seized in fee simple or in fee tail during the lifetime. For the wife to have taken dower it must have been such an estate, as that of the husband by the wife, it could have inherited. But in this there is one exception. That an estate in special tail would have been so made, as to render it not inheritable in this way. As to that we can only say "ita lex scripta est."

This right of the wife to dower created great embarrassments in prohibiting sales; for if any lands sold the wife had a right to claim her dower. To remedy this in England the husband suffered a fine of recovery which barred the wife of her dower, in which however, the wife must join.

This estate has some particular incidents privileges not incident to other estates, as. 1. An execution from paying the debts of the husband; for if a man dies insolvent, having in possession a large real estate, the creditors may in vain attempt to deprive the wife of one third which is her dower. 2. Another privilege is that a woman's dower cannot be devised away by will; neither can it be cut off from her by any act of law. The husband is empowered to sell all personal property of necessity, he can bar the wife of dower.

A woman may be a lawful wife and yet cannot be
endowed, as an alien wife. For either an alien may hold property
of it is not taken from him, which it is always subject to be
yet it can never descend from him. So that.
A woman divorced a vincula matrimonii cannot be
excused, if it proceed from the ground that she never
was a lawful wife. If a wife is under nine years of age
it is a rule that she cannot be endowed. This I believe
thinks a very abominable rule. So that.
A wife may have as much by an act of her own, as
is an elopement with an adulterer, if the husband not
renounces to her. Elopement itself according to an idea of
the word, will not be a bar, so that. 32. Bull. 880. 3.
I suppose that elopement itself meant formerly elopement
with an adulterer.

Where dear statutes have not made them
we have almost uniformly adopted the English rules of Es-
tates in fee simple, fee tail, demise.
A sitting in law of the husband is the same for
securing the wife's estate, as where he is dead. 24. 1st,
if he is not dead. 35. in fact the wife cannot help it. 37.
In case of joint tenancy the wife cannot be endowed,
because of the jus adscendi or right of survivorship
to one joint tenant in case of the death of the other.
Estates in joint tenancy cannot be devised because the
tithe is ambulatory: or as I shall suppose it, the agility of the
tithe in right of survivorship is so great, that it survives before
the devisee can have a title.

A wife is also entitled to possess in an incorporeal Estate
as a right of commons, a pheasant, but this is real property. She
cannot be evidenced of any title, for she has not the capacity to
perform the duties of it.

A wife may be barred of her dower by a jointure,
which is an provision made by the husband for the wife in
lieu of dower.

1. This must be done before marriage, for then the
woman is due justice, capable of judging of the competency of the
jointure. If it is not made the execution of the husband, for if it
was not thus made before marriage, she might be barred of
the jointure by an insufficient jointure.

2. It must be a competent livelihood, by which I mean a liv-
elihood proportioned to the husband's estate.

3. It must be taken in immediate possession of, on the death of
the husband.

4. It must be a real estate, because real estate is more per-
manent, I cannot be easily spent.

5. This conveyance must be made to her if not to trustees
for her. 1 Tim. 5:8.

If all these requisites are complied with it will be a complete
Real Property.

A Jointure at common law was not from

twin law, but was made so by statute 25 Hen. 8.

To make a marriage settlement it must not be of real prop-

ty, therefore marriage settlements cannot be never.

But jointures are frequently made after marriage. Then

if changed by the wife will be her dower at common law.

As a jointure by devise but it is altogether at the election to

accept or not. for she is under no obligation, but may take

her dower at common law, but she cannot have both.

It is holden in the English Reporter, that if the husband

devise legacies to the wife (which consist only in personal prop-

erty) however large if important, the residue to be in lieu

of dower, that they shall not be considered as dower, but that

she may take both legacies of dower, 4604.

In short if a man has dowered people have got

an idea that they must aspire in this will their words.

"I devise 1/3 of my property to my Wife charity to hold dur-

ing her life," not recollecting that (or rather not knowing)

the wife will have her dower at all events. This then is

not expressed to be as dower, or in lieu of dower, but I believe it

would be improper and unjust to give her 1/3 more as

dower, when the testator intended as he devised in his will

as dower. This is certainly a question but our Courts of prob-

ate presume, that it was intended in lieu of dower.
and never allow him to take both. I have supposed that when
the matter is brought before the Superior Court by some more
sagacious like woman, it will be tried that the shall take but
one. No decision has however as yet been had in the Supe-
rior Court upon this question.

Dower is lost by the death of a son, a daughter is not
however, because it is vested before marriage. It cannot
afterwards be affected by any of the husband.

As to the wife's curtesy for her dower. She may new
main 40 days after her husband's death in her house during
which time, if she is not married, it is the heir's
duty to set out her dower. If he does not do it from a want
of will, or if he is too young to do it, or if he dies out of she is
not pleased with it, she may make application to the court of
have her suit of Dower. In all cases when the heir is a minor,
she must sue out her suit of Dower.

But in case the husband passed out to have been the hus-
bands property, if she is entitled only of a part of it, she may
relinquish it of take her dower at Law. Nort Peep. 717, 720.

Wherein the Doctrine of dower in Connecticut
differs from that in England.

In Connecticut the Widow can be endowed only of
third part of what her husband actually dies seiz. A man
then wishing to defraud his wife of his dower may com.
very away his property before his death. But to remedy this as much as possible, it has been determined, that of property conveyed away in contemplation of death, the wife shall have her dower, as where an aged man made deeds to his children, but did not deliver them to them, to their saving they might deprive them of the benefit during his life, but left the deeds with the testator's executors of the Parish (28) ordering them that the moment he heard of his death, to run to the registrars office to get them recorded, which he accordingly did. In this case the court of probate for Suffolk district determined that the title was not complete in the grantee, till after the father's death, if therefore she was not barred of her dower in such lands. Again, the court of probate of Superior court in another case decided that the wife was not barred of dower where the deeds were actually recorded before his death. But these conveyances have not been considered as deeds, but as wills because made in contemplation of death, for an instrument of writing thinks made is not the less a will because it does not begin in common form. That this is not a new idea introduced by our courts, see 2 Decr. 431, 440.

In Indian law, a woman is entitled to dower even in case of divorce a vinculo matrimoni, if she is not the guilty party. It must be recollected that divorces in India are for expediency causes.
In short, a woman may be entitled to a joint tenancy because the doctrine of survivorship does not obtain here.

In short, the widow cannot forfeit her dower by the treason of her husband.

It has been a questioned point, whether a woman can have a jointure in an estate which is not real. Such a thing certainly would not do, for if personal estate was allowed the husband might dispose of it immediately on the marriage taking place. On a thorough examination of Reeve, it appears that the words "other estate" in one statute means other estate which may be the subject of jointure at com. law.

So much may suffice to be said concerning dower, if I see it will now proceed to the consideration of estates held by the courtesy of England.

Tenant by the courtesy is where a man marrying a woman seized of lands of inheritance, has a child or children born alive, which if one could have inherited. Now upon her death the husband shall hold the lands during his life as tenant by the courtesy of England.

The regulations concerning tenants by the courtesy are positive regulations, for which there is no apparent reason.

The difference between dower and courtesy:

1. In dower the wife is entitled to 1/3 of all the husband's
property. In custody, the husband has all the property of which the
wife was seized.

2. In order to take away there is no necessity for issue: the custody here
must be given to one alone.

3. The wife may have dower in lands of which the husband was se-
ized in case to entitle the husband to custody the wife must have
been seized in part.

Wherein they agree. They agree in these.

1. That each is a provision made for the one for the wife the other
for the husband.

2. In both there must be death: in dower of the husband in casu-
ley of the wife.

3. In both the estate must have been such an one as that the if-
cest would have inherited. But cannot the issue always inherit
it, in case the estate is one of inheritance? It has been already ob-
dered. that an estate in tail special may be made so to pre-
vent the inheritance of issues. In such estate therefore the
wife can neither have dower nor the husband custody. But that

There has been an opinion entertained in court if one decision that
the English doctrine of custody could not be adopted altogether here be
cause we had no Statute adopting it. This one decision was about
40 years ago. in which case the children claimed the estate of their
mothers against their father. They contended the law carried out
a limit of no longer than their minority. The court decided
Real Property.

But where the heirs were collateral, as brothers to the husband that survived during life. A few years ago the question came up again, but was decided contrary to the other decision of that we had adopted the English law of custom. Concerning damages we have a statute made in accordance with the English doctrine with some small variations.

There are a great many various customs in use in England, among which the two principal ones are called kind of borough English, both of which bear a great deal of custom ground. Several kinds prevail in the county of Kent for the present all the lands inherit together where the husband is entitled to customary whether he has issue or not. As the charter of the county grants our lands to be held according to the tenure of the greenwich in the county of Kent (where another kind prevails) the tenure of greenwich therefore is said to be ours where we have not altered it by statute. In this respect we may agree with greenwich, but in every other respect we have adopted the common law custom.

It has been a great question whether a husband could have a customary in a leased estate of his wife. There are many kinds of estates. In equity or redemption, one of the husband can have customary in it. The wife can...
not in England be endowed of a trust estate as has been determined. Although the Lord Chancellor Talbot declared that this determination in case of divorce was a hasty one, yet he would not rip it up, but decided that the husband could be tenant by the curtesy of the estate. The superior court of counts decided in Fairfoul Society about 1507 that the wife could be endowed of a trust estate.

A question has been made whether the husband, departing from the wife, be her heir of curtesy, or decision that it does not.

Another question of some magnitude in England of becoming so in counts is whether the husband can be tenant by the curtesy of the estate given to her of her heirs for her sole and separate use? The lords of the Britain that it is plain by the grant of the donor that the husband was not to have anything in her estate, but the use of her heirs separately and solely. And it is completely within her power at any time to sell it or do as she pleases with it.

Another estate for which grows out of the wife's estate, if not granted to her sole and separate use is the estate which the husband has in such property during coverture. They have in this adjoint-
estate, but the husband has exclusively the usufruct, which is any thing produced on the land by his labor and which does not pertain to the usufruct of inheritance.

It is in fact the crop. The annual produce. He being entitled to the usufruct he may have an action in his own name for any injury done to it; the wife is very often joined. But if an injury is done to the inheritance or freehold which is the graft, land, or trees, she must join her husband in an action, because the injury in this case is done to her.

The foregoing Estates are all created by operation of law.

Of conventional Estates.

Conventional Estates created by the act of the parties, one such as are given to a man by some instrument expressly for life. They are sometimes for the life of another person, if sometimes for more lives than one.

It should be noticed that the incidents inseparable from a fee simple are: 1. Admission. 2. Being assignable to the heirs general. 3. Power of the wife. 4. Buntesy of the husband. 5. Being dispensable for waste.

That they can be divided. To an estate for life, so that the tenant may take upon the land reasonable esleven or lofts. 2. That he shall not be prejudiced by any sudden determination of his estate. 3. A third incident relates to under tenants or lodgers, for they have greater indulgences than their lessees.

A tenant for life has a right to commit waste, except there is an express right granted in the lease to commit waste.

The statute of term (which has been laughed at a great deal) declares that the tenant in Dower must leave the estate in good repair, as if any satisfaction could be had of the infringer dead, if she did not thus leave it; but the object of the statute appears to be clearly to subject him to damages, unless she keeps it in good repair during life.

These tenants have all a right to take off from the land what is necessary for fuel, or for carrying on the business of the farm, which is in the spoken language sufficient. Horse live. They hole. If live hose.

It has been observed that any estate resting on a contingency which may last for life, will be esteemed an estate for life. If have its qualities. But an estate for a determinate period can be a life estate, nor possess its qualities.
It is a maxim of the English law that no Estate of freehold can be made to commence in future. This is broken in upon by no other conveyance than that of wills. But why can not this be done? All conveyances were formerly by delivery of seisin, because they did not then know how to write. A sale could not then be perfected except by matters of notoriety. Since writing has become customary the delivery of a deed would as completely convey a title as any thing. All the reason of this rule has ceased, yet the rule itself remains. That an Estate of freehold, if it passes at all must by a deed, and the deed is delivered. But on a statute or descent it is declared that no Estate in fee simple, fee tail, for life, or any less estate, can be properly given, or will unless given to a person in being, or to the immediate descendants of a person in being. Of course an Estate can be made to commence in future, for it can be given to the child of one who is born.

In executing devises the longest term in which it can be given is for life or lives in being or 21 years of 7 or 10 months other wise.

In this an Estate granted to A for life, remainder to B. Here the Estate does not commence in future, but it passes out of the grantor both to A and B at the time of the grant to A.
to shew the truth of this if there is any waste committed during the life of aforesaid remainderman or reversioner must

This doctrine applies to inco-

The operation of the Statute of Frauds on

Estates in antenuite in another's own

Estates could not escheat because it is certain that part of an

Estates could not escheat. The heir could not take it be-

Case, and in case of the death of the tenant

case, it would take the estate. For

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Estates would take the estate. For

There is one principle in this in cases of estates for life, which we

have not adopted which is "that the alienation by a tenant of a great

estates than he has in a lease of his estate." But here the

estates does not govern. If such a sale will convey all

estate the tenant had. Therefore it cannot be learned.

If any of the reversioner joined with the tenant it would be
considered as a renunciation of a complete conveyance of all
their estate.

That is a great litigation of which I can in these
circumstances give but very imperfect sketch which will follow. It is
a rule included in case (194 cases), "and which the law declares one of opinion, that if an estate is given to a man for life," in
the same instrument the estate to his heirs less notwithstanding
the grantor, it will be a fee in the quittance or deed.
- If it is given or devised to the heirs of his body, it will be
an estate last. The words as for his life are construed as some-
thing, if this according to the feudal idea. The word heirs in
this case, will be a word of limitation or it will mean the
heirs general) is not a word of purchase as descriptive per-
sonage, a word of description. In all this there is no disagree-
ment. The judge, recollect, has spoken of agreements upon
F. if not expendable

let us proceed one step further. If we will
find the "notty point", which has excited the whole called
both the inquisitiveness of the greatest legal characters in Europe.
The construction given to a will so devised combined in the words
preserving being manifestly contrary to the intention of the
grantor or devisee, it has been contended that at the time
when alone in a grant must be construed in a legal way yet
if there are any other words, besides merely the words to A.
for life or to the heirs of his body, inadvisable of an evident meaning, that it should vest only an Estate for life in the grantee. That it should be considered as vesting only an Estate for life in him. That the word heirs should be considered as a word of description or purchase of not as a word of limitation. This is evidently in favor of the intention of the testator or grantor. But on the contrary it is said that there cannot be a construction different from the known principles of law, that it is an acknowledged principle that whenever the word heirs, is used, it must necessarily vest a fee simple or any thing, because heirs is the word by which a fee simple must be made. That this operative and legal word must of will control the intention of the party conveying the Estate.

Judge Reese is of opinion with these one are for laying hold of all the words and construing them according to the intention of the testator. We all know that where there are no words used, the construction must according to the intention of the donor or grantor if that any estate could be given if not contrary to the principles of law. Could the grantor therefore give an Estate for life? He could. Who can continue an evident intention to do what was legal, because the word heirs had power to be used? If Reese does construe that all depends upon the nature of the estate quern and not upon the words made use of.
Real Authority.

The case of Bagshawe v. Shenoe (4 Term 2679) was of this nature: an estate was given to Sir Bagshawe for life for the purpose of preventing a forfeiture, it was then given to trustees to preserve for his heirs. Here there were other words used to show the intention of the grantor, in assuming to such intention it was determined that Bagshawe had only an estate for life. Hence the heir took as described in the instrument. This case seems to be a very important case. There is also much important doctrine developed in the case of Rives v. Blake of many cases in point, e.g., Mansfield, Hardwicke, Kettle, were for observing the intention of the Declarer. Is the intention to be shown out of the question if certain terms to be observed? No. The intention whenever it is a legal one, ought certainly to be observed. No man may so explain terms as his intention to contradict terms. Hardwicke's argument is excellent (in one of the cases cited) of coincidence with Judge Breese. The case of Bagshawe v. Shenoe on another of the latest of most satisfactory. The doctrine however from this case is not well.

Pearl, Pearson, & Yates are for observing terms, P. Rose to Hardwicke, Kettle, & Mansfield.

The question came up exactly in Barnt. It was learnedly argued by D. Daggett & Minott, Sherman on one side, O. Edwards & J. B. Sherman on the other.
The reasons of the Judges were in favor of the intention, but the point was not settled.

**Emblements.**

This is a species of amputations proprie, sometimes real and sometimes personal, called emblements which may be defined to be any thing which is the annual product of labor and things as are raised by the industry of the tenant. In short the emblements are the crops made on the land held. These emblements adhere to the freehold as well as trees or grass, but yet they are not always real property.

They will pass by a grant of the freehold; therefore, they are in that point of view considered as real property. They cannot be committed on them except vested in the freehold, in that point of view they are also considered as real property. But in case of the death of the tenant they will not descend to the heir, but go to the Executor. In this point of view they are considered as personal property.

It is a general rule that the emblements will not pass by a devise; Therefore a devise is made of the freehold sometime before the death of the tenant say 8 or 10 years, the emblements clearly will not pass because they were not had in view at the time of making the devise. But suppose the devise of the freehold is made to say, to pass instantly, the ques.
there is well the emblements page? This is unsettled.  
When a tenant in fee simple dies or when a tenant in fee tail dies, the emblements will go to the heir. But what will become of them in case the tenant for life dies. They will go to the Executor as effects in his hands. Otherwise if the tenant for life determines his estate by his own act.

Where a man dies, whether the tenant for life, tenant at will, or tenant by sufferance for years, having no knowledge of the time at which his estate will determine, he shall in case of a determination have the emblements of free ingress, egress if required to get them off the estate. If he dies the emblements will go to the Executor as personal property. But remark that it will be invidiously the case that when the tenant puts a period to the estate by his own act, he will have no right to the emblements and of course they cannot go to his Executor. So much for emblements. If there having finished his remarks on freehold estates, he will now consider estates at lives than a freehold, which are.

Leases for years. Estates at will by suffrage

2. An estate in lease is a contract for the use and occupation of lands or tenement for some determinate period. This estate also, not in lands or real estate, but a chattel interest. It goes to the Executor upon the death of the tenant.
Real Property.

...can't, as other Chattels, is applied to the same use, as that it may be ten times as durable as a Life Estate, which is a freehold. If any Estate is leased only for one month it will be an Estate for years as much as if for one thousand years.

Every Estate which may continue for life, as an Estate during adventure, during widowhood, or until married, are estates for life. But what distinguishes leases for years from these estates, is that the former begins at a determinate period. All the principles of common law, an estate of freehold cannot commence in future. Estates in years may be made to commence at any time. In making a lease for years, if no time is mentioned, it will commence on the delivering of the lease.

The words generally used to create this estate are, "demise, lease or to farm let." But these terms are synonymous nowadays. Any words which will show a certain intention of the lessor, will convey just such an estate for years as is expressed, or was intended.

In some law it is said that leases in years might be made by words, but by the Statute of Frauds it requires there can be no estate created by a parole agreement, reserving the exceptions there made. But by the construction given to this statute by some a lease by parole would be good. But Greene thinks that even before the statute
Real Property.

A principal ingredient in leases to have been good which have been in writing, if he thinks the true construction of the Statute is that that all leases - whether for a longer or shorter time should have been in writing; but that if a lease is made for less than a year, it is unnecessary to record it.

If however a man does make a lease by parcel, in consequence thereof a tenant entered; it will not be void as to all purposes, for it will be a licence to serve him from an action of trespass, for his entry will be lawful.

Again, if a parcel lease is made with reservation of rent, if entry in consequence thereof, the rent shall be paid, but not as on the ground of the lease being a good one, if the tenant thereof acquiring an interest in the land, but simply on the ground of the tenant receiving profits or advantage for which he ought to pay.

Who can make a lease? Tenants in fee simple can make a lease at any time he pleased because the whole freights resides in him.

But tenant in tail can make no lease that will be binding in his lifetime, except by the Statute 30 or 31 Jamst. 5th, which enables the tenant in tail, to lease lands lives no other wise might last longer than his life for long estate, and last the heirs would or as in truth, can tenant in tail...
Real Property.

...make a lease? If it be held upon principle that he may, but he knows of no safe determining the point...

...seven years is liable for waste either actual or permissive; if it is such as the law deems so to be waste. But the tenant cannot be sued in trespass because he came lawfully into possession.

...With respect to the manner in which long leases in count are acted upon, many rules cannot be laid down. But if in such case the judge has been entitled of the husband entitled to curtesy, a man being before under one of those long leases had been deemed a freeholder; one, none of which things could have been done unless the property had been considered as real.

...the lessor for years may under let or assign his whole term.

II. What is called an Estate at Will? Judge Reeves contemplates as no Estate at all, yet something must be said about it. It is not real property, because it cannot descend. It is not an Estate for life because the tenant may be turned off in a moment. It is not an Estate for years because it is not for a determinate period, it depends upon the whim of caprice.
of either party. It is in fact only a licence from the owner permitting a man to enter; if then it is held at the will of each party —

What right has he acquire by an entry? He acquires the right if it can be called one, if not being a tenant. 2. What is the produce of his labor he is entitled to. He is in fact entitled to the emblems. If the owner wishes to determine the estate before the emblems are reaped, he may do so, but he must allow the tenant free ingress, egress, &c. He must not carry away the profits. But if after the determination by the lease, the tenant enters for this purpose of reaping the land, so he will be a tenant. The lease shall enable so far to take advantage of his own wrong as to send off the tenant if he keeps the emblems to himself, for it was his own act to obtain the tenant to enter.

A tenant at will may be determined. 1. By notice of the lease. 2. Any act of the owner inconsistent with the occupancy of the tenant at will. It has been before remarked that all the consequences of the determination of the estate.

This tenant at will is not liable for waste, but if he does any injury to the estate which would have been considered waste by another tenant, it will be a tenpado in him. This licence is personal, if he must therefore in no sense exceed it. If he underleases it will be a determination of his estate.
III. Tenant by Suffering, is where one leases an estate for years, if after the lease has expired the lessee continues on the premises the lessee knowing it. If Breece says that this estate is and is in every particular to a tenancy at will, therefore nothing more will be said on it.

The doctrine of mortgages of estates upon condition generally should have here followed, but Judge Breece an account of being obliged to commence the circuit jury, and will take up the subject of the distribution of estates under the statute 22 & 23. Jac. II. c. 9. amended by the 29 & 30. Jac. II.

These statutes at this the subject in England whose the distribution of personal property is foundations for statutes distributing real and personal estates in most of the U.S. states. In the first place it may be necessary to premise, that a title to things real is acquired in one of two ways:

1st. By descent or 2d. By purchase.

By descent as when an estate comes to an estate upon the death of his intestate, without any act of the parties. This is by single operation of law. By purchase as where a title is created in a man by his own act or agreement. In fact according to the English idea purchase includes even mode of coming by an estate, except by descent.

The constituent mode of distribution of the hold to be involved in difficulty, yet by a proper attention it is believed that we may
require a more precise idea of it than almost any other legal subject. A person understanding the common mode of descent will not be at a loss in any other state in the union.

The distribution of property under the Statute of 1790 in England will give complete stepping stones to the doctrine in dominion.

After a knowledge of common descents is acquired, it will be no difficult matter to understand the English course of descents which will be intentionally omitted until the last.

There are in the Statute of 1790 six principal clauses.

1. When a man dies intestate, his property is given to his children or to their legal representatives, if no survivor of them.

2. To the next of kin of their legal representatives, if no representation is to be admitted among collaterals, being brothers of deceased children.

3. As to the first point, there will be no difficulty, in a man who dies intestate, leaving a widow of children, 1/3 of his property goes to the widow, the remaining 2/3 to his children in equal portions, or if dead to their representatives, in to their lineal descendants, if there are no children or their legal representatives, then a majority shall go to the widow, if a majority to the nearest kindred in equal degree of their legal representatives.

If no widow, the whole goes to the children.

4. As to the second clause, in case there are none of these, if there are neither widow nor children the whole shall be disposed of.
[Handwritten text from the page, not easily legible]
The statute of 1442 provides only for the case where a son dies after the death of his father without issue. But it has been determined that, where after the death of his father the found leaving a wife, but no issue, leaving also a mother, children of a deceased brother, or sister of children of a deceased brother, or sister, this was within the statute. That the intestate wife should have an moiety.

3. Representation does not extend among collaterals further than the children of the intestate, brothers or sisters; their in lineal descent representation may go on forever.

It is a settled rule that when a part of the brothers or sisters are dead, leaving children, the children take in strictures.

As 219, so by representation, but when all the old state that is the brothers and sisters are dead, the nephews and nieces being all in equal degree, they shall take per capita share if they share alike.

Recalled that the last part of the rule holds to all who claim as being related in equal degree; as where the children of the brother or sister and one uncle or aunt, or nephews or nieces; no representation is here allowed but they all take per capita.

Under the statute of 1616, where under consideration, no preference is given to the whole blood over the half.
dead Property.

2 Oct. 1671. A child or son of a man will take in the same manner as 20th.
30th. 44 b.
30th. 346. one born in the father's lifetime.

It is a rule that the brother of a sister shall exclude the 21st. grandfather, which arises in the same degree with them both being in the second degree.

If all the brothers and sisters are dead leaving children, the grand father who is in the 2 degree will take the whole estate, in preference to the nephews or nieces who are in the 3 degree.

From the construction given in the preceding rules the judges have never differed only in case of a bankrupt's bastard J. Revere never could amount.

10th. 42. 4. Act 3. they are equally entitled to take the estate.

That the civil law construction is adopted 20th. 24.
20th. 64.
60th. 26.
10th. 32.
30th. 50.

under the statute of bar I also to prove the point next above vide an. in the margin. But when there is a brother the uncle of nephew will be excluded.

No matter what the branches are of they are in equal degree they will take per capita, if any of the old stock are living the greatest difficulty is in understanding correctly the words representation. In the claim, not to take by representation there must be some of the old stock living, if none are nearer than the claimant.
herself, and if there is not the distribution will be per estate.

Representation can never go further among collaterals

than brothers or sisters. Children in representation shall

not go further among collaterals than the 3rd degree.

It has been determined in England that when there

are 2 grandfathers, if both living, in the same degree

the brother shall take the whole. But there is no reason

for preferring him, if J.P. thinks that in a locality where

there are no determinations, those in England would not be

binding under the same statute.

For the distribution of Estates under the

Statute of Can. See the conclusion of the Title of

Executive and Administrators.

Distribution of Real Estates under the

Statute of Connecticut.

Previous to the making the Statute of Can. the Stat.

ute of Can. was the rule in both real and personal property.

The great object of the Connecticut Statute was to secure the

property in the family of the ancestor from whom it descents

that it should be inherited only by his relations. Under

the Connecticut Statute the widow has an absolute estate

in 1/3 of the personal estate forever, if a life estate

in one third of the real property.
In the Statute of Seton, there are two important clauses.

Real property which the intestate acquired by descent, devise, or deed, from any ancestor does not descend in the same manner as that which he acquired by purchase himself from one not a relation. The former descended from the ancestor of Deed calls Ancestral Estate. The latter one by purchase.

1. If the intestate has no issue for if he has issue the Statute of bar will furnish the rule, goes to the brothers and sisters of the whole as well as half blood provided the half blood be of the blood of the ancestor from whom the estate came; or failure of these, it will go to the next of kin, provided they are of the blood of the ancestor from whom the estate came. Then must the brothers or sisters of the intestate if of the blood of the ancestor from whom the estate came, then no half brothers not of this blood can take.

What is meant by the blood of the ancestor? No one has ascribed any doctrine concerning it. The old feudal idea was that in descent was said to be of the blood of the ancestor, except the issue legally descended from him. But this is not the idea adopted in bounty; for his sisters and nieces can take, neither is the meaning of the Statute of Seton, that since the estate was to go "proviso consanguinei" to the next of kin, the
in fact means no more than a brother or sister of him to the ante
tar or not a lineal descendant.

2. clause respects Estate which the intestate acquired by purchase
from some one no way related to him. This estate goes as follows:
If a man dies intestate it goes to his brothers & sisters of the whole
blood of their legal representatives; if no such to the father &
mother as being of the next of kin; if they be dead then to the
brothers & sisters of the half blood of their legal representatives
and on failure of these to the next of kin.

It must always be recollected, that in the distribution
of personal purchased Estates, brothers & sisters of the whole
blood are always preferred to brothers & sisters of their kindred
of the half blood of the same degree. If the half blood are of
a nearer degree of kindred than the whole blood they will be
preferred. Under the Connecticut Statute as well recollected that
of even brothers & sisters of the whole & half blood, the presen-
ess of their legal representatives are preferred to grand par-
ents, others in the same degree of kindred to the intestate.
This rule as well prevails on ancestral estates of personal
property as on purchased Estates. — Representation a-
monst Collaterals does not extend further than brothers
of sisters children.

Distribution under the Connecticut Statute.

1. case. The distribution of Black Rae.
John Stiles died intestate seized of a black line of White Ace. The former came to him by descent, devise or deed of gift from his father Reuben. The latter he acquired by purchase. His relations living were his mother Mary, his half brother I am a son of his father by a wife not the mother of the intestate, John & Sally brother & sister of the whole blood of John & Susan Rowe of the half blood, children of his mother by a husband not the father of the intestate; his grandfather Solomon Stiles, his uncle George of Edmond Stiles.

Will: In this case his farm called to Black Ace will go equal by to his half brother I am to John & Sally of the whole blood, to the exclusion of John & Susan Rowe & his mother Mary. This distribution is found on the following rules. 1. It goes to the brother & sister of the whole blood equally, for the Statute allows no distinction in estates descending from an ancestor to whom both the whole and half blood are equally related. It goes to the exclusion of John & Susan Rowe for the Statute requires that to succeed to such an estate that they shall be of the next of kin to the intestate who is of the blood of the ancestor from whom it descended.

I base as the last only claim is dead leaving a child A.
And in this case the estate will be divided equally between
Tom of Sally & A the child of Tom for the statute de-
clares it shall go to the next of kin of their representatives
in case. Tom is also dead leaving $P$ & $L$. They take the
representation for reasons assigned in the last case.
4th case. Sally is dead leaving $D$ & $F$. Here they can
not take by representation, for the original stock are
all dead. But Solomon is now living I will take the
estate in exclusion of $A$, $B$, C, D, E & F. Because
he is next of kin of the blood of the ancestor from
whom the estate came.

5th case as the last but Solomon is dead. Hence the estate
will be divided between the uncle George, & Edmond, of the
children of John Tom of Sally, because they are in equal degree of
the next of kin.

6th case as the last but George is dead leaving $F$. Hence the
estate will go equally between Edmond of the nephews of
John Tom, to the exclusion of $F$, as an statute does not al-
dow of representation among collaterals, beyond brethren
of children.

7th case Edmond is also dead leaving $C$ & $F$. Since the es-
tate will go equally between Tom's, Tom's of Sally's chil-
dren, to the exclusion of the children of George & Edmond.
The distribution of White land.

1. Case. John Smith died single of White land which was acquired by purchase. His relations living were as in the first case in the book.

In this case the land called White land was equally divided between Tom and Sally of the whole blood because the statute proceeds that brothers and sisters of the whole blood to those of the half blood.

2. Case. Tom earns a living of the whole blood is dead leaving a child. A. Here White land goes again the last case for the same reasons.

3. Case. Tom is dead leaving children B, C, D. In this case the estate will be divided between Sally, B and D who are the representatives of Tom, for instance, if sisters of the whole blood to those legal representatives are preferred to those of the half blood.

4. Case as the last only Sally is dead leaving D, E, F. In this case the mother Mary will take as being the next of kin; as representation is now at an end there being no more of the original stock living.

5. Case as the last, but Mary is dead. Here the grandson, father's brother leaves that estate to the next of kin, estate will go to Jane Smith of the half blood under the new statute of 1803 which says that for want of Parent
Real Property.

In the absence of the estate shall go to brothers or sisters of John B. and their
half blood. But in this case if John B. were dead the estate
would go to the grandfather Solomon as next of kin.
6. case Solomon is also dead.

In this case the estate goes to George of Edmond of the
children of Tom B. Kelly as next of kin all being in the third
degree.
7. Case: George is dead leaving J. living. Here the estate
will go to the children of Tom B. Kelly, i.e. Edmond the uncle
and J. will be entitled representation being at our end.
8. Case: Edmond is also dead leaving B. Here the estate will
usually be in this case.
9. Case: as the 5th day May is dead. Here the estate
will go to father of Susan Rowe of the half blood. i.e. to all
the children of Sam who takes as Sam's representative
10. Case: as the last only John Rowe is dead leaving B.
J. Here the estate will go to Susan Rowe i.e. to all the
children of Sam by representation, of to J. of J. representatives
of John Rowe.

11. Case: as the last only Susan Rowe is dead leaving B.
J. Here the estate is divided between B., J., of J.

The statute of descent differs from the statute of bar in
this: that the statute of bar gives the property to the next of kin
in failure of legal representatives in the lineal descending line.
By the Statutes of Court, it goes to the brothers of sisters if it is plain that sometimes they may not be of the next of kin, for a father or mother would be nearer of kin.

It has been said that Posthumous children have been are as much entitled to a distributive share, as any children born of or before the death of the intestate. If it is settled that

Posthumous child may have a will in favor of an

junction to the most committed on the property.

The new Statute has made some very important alterations. It regards nearly ancestral estates. Instead of giving the estate to the next of kin ye as the old Statute, for want of brothers or sisters of their legal representatives, it gives the estate equally to the children of such ancestor or those who legally represent them from whom the estate came. And for want of such it goes to the brothers and sisters of the ancestors from whom it came. And it applies to the children of such ancestors without any regard to their being next of kin or not to the intestate. As if a man devises away his Estate from his children to his nephews, this Statute may take effect. But if it came from the father, the new Statute makes no difference from the old. By the new Statute the Estate may go to the children of the intestate, children of the ancestor of his legal representatives, or to his brother or sister of his own
may be nephews of the intestate living.

So long as there is anyone living in the descending line, no matter how remote, he will exclude all persons whatever, either in the ascending or collateral lines. And this whether the estate was acquired by descent or purchase, for it makes no difference.

General observations upon the English law of Descent.

It is necessary to understand something of this, not only because we should otherwise be at a loss to understand English books, but because in some of the United States, the Statute of Uses is adopted only in part, of the remainder is left to be governed by the English law.

It is a maxim of the English law of descent that the heir must be of the blood of the first purchaser, or according to the feudal idea, lineally descended from him. If when it was feudum nuncum it would only go to the issue of the first acquiree, but if it was purchased by the intestate, by a fiction of law it is supposed to have descended from some ancestor of this all his relations would be let in in their order.

To be a little more explicit, if a man died of a grand of his own acquiring a feudum nuncum, it would not descend to any that his own offspring, nor not even to his brother, because he was not descended nor derived
his blood from the first purchaser. But if it was vendum antiquum, that is, one descended from ancestors, then the brother might inherit to the inheritance, as being of the blood and lineally descended from the ancestor. Vide reason in 2 Gil. 224.

But the rule as to property vendum antiquum has since been enlarged by a legal fiction, by granting the party a vendum antiquum to hold at vendum antiquum, i.e. with all the qualities of a fund of indefinite antiquity. If such collateral were admitted to succeed in infinitum, not because they are known to be of the blood of the first purchaser, but under a supposition that they might be so. Here the law will supplant any of the ancestors to have been the first purchaser.

The half-breed to the ancestor can never inherit. The property shall not be a second first. This is nearly a positive rule in which there is no reason or sense. And this rule of this complexion is, that the estate shall never linearly ascend.

Rules of Descent.

We will suppose J. to have died of a feud which he had acquired of which he holds as a fund of indefinite antiquity. 1. The estate goes to the line in the lineal descending line and first the eldest son and his issue to take the whole in infinitum of all the brothers and sisters. So that if the eldest son is dead his issue in infinitum exclude his uncle's children.
2. For want of issue, it goes to their daughters altogether, as in equal shares as coheirs among their issue, per stirpes, per capita.

2. In case of issue, it goes to the next kindestman of the whole blood. Here the same rules are to be observed. It goes to the eldest male; this male, if an failure of those, it goes to the females altogether.

3. In case of issue, it goes to the next kindestman of the whole blood, as uncles by aunts, surviving males of the eldest male, if there are uncles by the father's side, and by the mother's side. Those they are equally related to females. In this case the preference must be given to the father's line, if there is no kinsman on the father's side, then resort to the mother's line of kinsmen the male first.

Both males and females must be exhausted on the father's side before you can resort to the mother, the northiest of them being preferred.

Rules of Descent under the Statute of New York:

1. In case of intestacy the property goes to the descending line, by representation ad infinitum, exactly as under the statute of Canons in England.

2. In the ascending line, the father takes all, if consequently the mother nothing, unless the estate came to the intestate by his mother. There is no provision in the ascending line but for the father, if of course he only can take.
3. But in the collateral line, if the estate came by descent, devise, or deed of gift, it will go to the brothers and sisters of the blood of the ancestor from whom it came.

4. If the estate came by purchase as under the statute of wills, it will go to the brothers or sisters of the whole or half blood equally, excluding the mother in all such cases. If some or all the brothers or sisters are dead, it will go to nephews and nieces per stirpes, or never per capita.

5. If it came from his mother, it will go to his brothers or sisters of the blood of the ancestor from whom it came.

On failure of all these, it will go according to the English law of descents.

Of acquiring Property by Purchase.

There are 3 principal methods of acquiring Property by purchase:

1. By devise. 2. By deed. 3. By operation of law.

Acquiring property by operation of law means getting it by judgment of execution thereon. It does not mean property obtained to which one had a right before as that obtained by an action of ejectment, but the right acquired in consequence of an execution, without any previous claim to the land.

By Common law a title to real property or lands, could not be acquired while the owner was living, but when he was
dead, the land would be liable to pay such debts only as the heir to whom it descends were bound to pay. In such cases there were the heirs bound to pay the debts of the ancestor. They will be bound in all cases when the ancestor bound himself of his heirs, as in bonds of other transfers. The land descending to the heir will be affected in his hands. The heir in such cases will be bound to pay from any lands descended to him of the heir hands. But in cases of simple contracts, no levy can be made upon lands to satisfy them.

But how was it if the heir to avoid paying such debts as he would be bound to pay sells the land to a bona fide purchaser?

This was an inconvenient, to remedy which there had been a late statute enacted in the reign of St. 3 which binds the heirs to make payment to the extent of the value of the land sold.

This statute to prevent frauds subjects the lands (a præmum) in the hands of the grantor. This is a question concerning which there has been a great variety of opinions; but hence thinks the property liable in the hands of the purchaser. In case of a devise made to defeat the payment of just debts, the same statute subjects in the hands of the devisee.

and what kind of title or estate does this devise set? That an estate is vested will be by continuing it. The appraising lands is meant appraising them off to so much until the debt is paid.

Whether a levy by an appraiserment vests an estate in see simple, is
now, Dec. 1793), a great question in Virginia. The act cannot precisely determine when it seems to think that by such extent of few examples was never intended to be resorted to England.

It has been mentioned that in England a tradition could never be upon the lands of a debtor while the debtor was living; the heir personal property could have been taken at any time. In England in England it is much more reasonable than it is here, where lands can be levied upon in the debtors own time. Where is a man to act? If any just debt his land cannot be sold, it is not reasonable to imprison him. To obligate him to sell it.

Levis faciatis. There is a species of execution de terio

et catellis called a lying in which the emblements may be levied upon. By the law cannot be taken of a fee simple.

The estate, but it may be appraised to suit the emblements are cut and carried away. In this way cattle may be levied upon or common law. But now where a debtor to evade pay by a the creditor seizes the land of receives the pledge himself? Then the creditor seizes until to compel the before giving him notice to pay the emblements to the creditor.

That is the right to receive the rents or emblements.

Egrett. In England there is another remedy for the payment of debts which is by Egrett Stat. 6 & 7 Wm. 3. But by this statute a mere, only of the lands can be taken, if that mostly may be stolen.
did i.e. appropriated for the payment of debts. Land thus taken is not considered as a lease in years, but it is held with the incidents & qualities of a freehold. Every thing of all personal property may be appropriated to under the States. These are the only methods of acquiring a title by operation of law to real estate in England.

**Conditioni Coiponas**

In most of the States in America the process is by a writ of Condi-
tion Coiponas, by which the real estate of debtors is sold at pub-
lic auction; thereby a complete title in fee simple is vested in the purchaser. Thus is the law in most of the States, but it is not so in New England.

In court there is but one ex-

provision which is, that all lands in fee simple (which in the supposes comprises 99/100 of the land in the state) may be taken & appropriated to, which rests a fee simple as much as if they had been a deed given of the land in fee simple.

The appraisers must be of the same county in which the land lies, because they are better acquainted with the value of the lands in that county than other men in other parts of the state. They must appraise of as many acres as the debt due amounts to. This appraisal is taken after being read in the town where the land lies to the town clerk's office (if it is read thereon).
and therefore at full length, which completes the title.

In short, a creditor cannot levy upon the lands of a debtor, or any deficiency of personal property be shown. Yet eventually turns out that there is not a deficiency when it was apparently sufficient, then the land may be levied upon.

Both lands and debt are exempt if there is enough personal property, but if not the giving up of the body will not secure the land; so the offering up the body will not exempt the land, if the land is desired, but both cannot be taken.

But now a payment to be made, on estates tail, for life in

In short, if estates for years, being that in the
the statute had made no provision, if it is a fundamental principle, that all a man's estate must be subject to the payment of his debts. He must pay his debts! There is a new
case of that in extending such estates, as those greater estates
but none of them can be extended longer than for the life of the
debtor, if none of them can be sold at the post. We see that
all as man's property is subject to pay his debts, whether that
property be real or personal.

In America, when a man is dead, all his property of every kind is subject to the payment of his debts, which is not the case in England, for there men as in debt, real property will not be subject to pay debts on simple contracts.
The question has arisen in Court, whether we can have any use for a levanti faraid, which is a hoping upon emblements. Mr. is clearly of opinion that by levanti faraid would be the proper method of obtaining the emblements. For the practice here is a very inconsistent one, which is by buying them on the land until ripe at which time the Office issues them to be reap'd. The shea brings it to the first of sold, which would be altogether unnecessary, could they be taken possession of by a levantifariad on the land.

In case of lease by the debtor, Mr. is supposed that the emblement should be devised upon by a levantifariad, as this is not done if were be again in practice, he would try the principle when ever an opportunity occurred.

When a man argues to the property by levy of an execution on a debt due. The question has arisen, whether the levy is to be a profit in possession or whether it was necessary to bring an action of ejectment to possess him of such property? It was formerly understood in few that possession was given by the levy of an execution. If Mr. B. thinks that possession is not given by this process, no ought to be in the following reasons.

1. Because some person might claim the property and have a just title to it. 2. Because the title to lands is not
Real Property.

A question in question by the levy of an execution for the
man who levies may omit some of the legal requisites, as omis-
ting to have the levy of extent recorded; in which case it will
be clear, that he has no complete title, and man shall so
for his advantage of his own wrong as to vest a little in
himself when he has been too negligent to perform what was
necessary.

In a second of adjustment will bring the title in ques-
tion. With respect to this practice we cannot go the the En-
glish practice, from the English books.

There is one great difference to be pointed out between a
title acquired by Allotment, and one acquired by operation, as
it respects the grantee in the one place of the grantor in
the other.

Let James give a deed of land to Tom Stokes,
and Tom omits to do something requisite, as to get it recorded,
if James Race knew nothing of that, it is a deed from
J.R. of the same land in the mean time, I get it recorded
before Tom does his. Have James Race will unquestionably
have a title. But suppose that Tom Race knew that
James Race knew that Tom Stokes had intended
but omitted getting his deed recorded. James would not in that
case have a title, for the law will esteem his knowledge of
the transaction sufficient to have banned him of taking
of the convenience of his neighbour. The deponent here
is the "point" on which the case turns.

But the case of acquiring

Property, by Execution is quite different. Suppose Tom
a Tenant is a creditor of John's. John has not
paid rent. If John neglects getting it recorded as the law
requires, James, a tenant, a creditor, of Tom, knows that
Tom has not paid rent. He is a careless kind of fellow
and has not got this Execution recorded. If James, an Ex,
himself gets it first recorded, then James has the

title; for prior in time, power and in fame. What

then is the reason of this difference? 1. In the former case,
there was no Equity, for James, Rowe had no claim. But
in the latter, James had as much an equitable claim as
Tom. 2. In the former there was a complete title vested
at the Execution of the Deed, for at brand, Tom a complete
title vested at the execution of the Deed, for at Common
law a complete title passed without recording, recording
was not requisite. In the latter there can be no title till
all the legal requisites are complied with, for this is
entirely a creature of the statute.

18962

Of Execution on account whereby lands
are claimed to which the Plaintiffs had a right
before. As in an indenture. Then this is a plain.
Forcible Entry. There is a case in which a man may have an execution to put himself into possession without any the least compulsion into a title. To prevent grumble, riot, &c. The law will allow no one to be forcibly put out of possession: if it is done, the person who did it shall not benefit himself thereby, but he may get possession by craft or cunning. And the law will not suffer him to be put out in this way. Provided he does it fraudulently. If a man does thus forcibly put himself into possession, a bout is immediately called which is known by the name of the freeholders bout (being generally composed of justices, 2 or more.) This bout will immediately give copy to put the tenant thus turned out into possession. If however the person thus turned off by the execution has a good title he may afterwards recover: for in the freeholders bout no title is ever gone into in case merely of forcible entry; but in case of detained the title is some times tried.
But what violence or force is it for the arising of which a man may be turned off? The arising any violent words or violent actions which may tend to disturb the tenant and drive him off. If a man gets into possession without such words or actions, he cannot be turned out by this means just as tenant.

担好其处，或曰，只要任何"暴力"或"武力"。
Of Estates upon Condition.

An Estate upon condition is one which depends upon some uncertain event by which it may be created, enlarged, or defeated.

2/36.152 Estates upon condition are of 2 sorts. 1. Estates upon condition implied of a
2 Estates upon condition expressed. Under the last of
3 estates are included Estates upon Annuity.

1. Estates upon condition implied, are such as have
2/36.153 some condition annexed to them from the very essence
2/36.153 and nature of which the thing itself. As the grant to a
man of an office &c. Here it is implied as his part that the
2/36.154 duties of the office shall be faithfully performed, or which
2/36.154 on the part of the grantee also that he shall do no act in
2/36.154 con
table with the nature of the Estate granted, as the subject
2/36.154 ing a stranger to.

2. Estates upon condition expressed, are such as have ex
2/36.154 press
2/36.154 ed qualifications annexed to them, by which the Estates
are to commence, be enlarged or defeated.

Express Conditions are divided into Estates upon
Condition Precedent & Subsequent. The former is
where the event or condition must actually happen be-
fore the Estate can vest or be enlarged; an an Estate grant-
ed to his upon his marriage or with 6. Provided he goes
An Estate upon condition subsequent is where the Estate is vested but upon the happening of some event or condition the Estate may be defeasible. As where an Estate is granted to A. upon the condition of an annual payment of rent. When the Estate is vested. But where an Estate is granted upon the condition of a payment of rent, unless the grantee actually makes a demand of it at the due date, he cannot often receive it. The condition is here construed strictly against the grantor.

There is distinction to be observed between an express condition in deed, a limitation or condition in law:

When an Estate from the nature of it cannot possibly remain or continue after the event to be done, the qualification is called a limitation, or where it is not necessary for the grantee to do any act in order to vest the Estate. The words "so long as"... "until" are words of limitation.

But if the qualification annexed is a condition in deed, the Estate does not cease immediately as of course after the happening of the condition. Only an event is necessary to the grantor or his heirs to vest the Estate. This is called a condition in deed. The words "provided" "upon condition" do that of all times of condition.

The distinction between a condition in deed.
ten articles it would seem to be merely verbal, yet it is very important. It is not universally true that these words of donation as provided, do not, to operate as words of condition, for it is a rule that where an estate is granted over to 2 persons and these very words will be construed as words of limitation. The reason is, as the grantor or grantor and grantee neglect to take advantage of the non-performance of the condition, therefore persons shall not be prejudiced by the negligence of others.

It has lately been settled that an express condition, that the leasehold term shall not assign it is good. Therefore, he should make an assignment, it will be a perfect one of the term.

But if a lease is made to all the executory with a condition that the executors shall not assign, without an agreement, whether it is a question whether they may, not assign, without a forfeiture of the estate. The better opinion seems to be that they may assign, such condition notwithstanding.

If we hold an estate for life, under a deed which is void, if the attempt to assign under such void instrument, this attempt to assign will not destroy his estate.

It has been settled, that if the lease be made within 3 years, that the term shall not be subject to bankruptcy.
it will be good.

It seems also, that it may not be taken under an eviction by the creditors to the defeat.

If an exigency condition subsequently annexed to an estate be impossible at the time of its creation, it vests the estate intended to be given upon condition, in the deferee or grantee, for such a condition is void.

So also if the condition becomes impossible by the act of God, or by the act of the grantor, the estate becomes absolute for the party to whom the estate is granted shall not suffer by the doings of another, when the former has done what he can.

So also, if the condition lie against law, or repugnant to the nature of the estate granted, it will be illegally void, and therefore an absolute estate will vest. For the nature of sound sense is followed, for there never should be a temptation laid to commit an illegal act.

The reason of such an exception: subsequent, but not to conditions precedent: there is no material difference for in condition precedent no title can possibly vest at all, whether the conditions be unlawful or impossible. If it is impossible it clearly cannot, because the creation of the estate primarily depends upon the impossibility. If it be unlawful the estate can never vest, because the law can never recogni-
PLATE 1: The performance of a condition either precedent or subsequent to a bond is usually paid for, and of course receivable by paid evidence.
Mortgages

There is held no pledge are of two kinds, the first of which

is called vivum viadrum, or living pledge, which is an

estate granted by a debtor to his creditor, to hold until the
debt is paid or satisfied. This species of pledge is called a

living pledge, because the thing pledged survives the debt

and when it is discharged the property reverts to the grantor.

The second kind of pledge is called mortuum viadum

dead pledge, and is an estate granted by a debtor to his creditor, upon condition that if the debtor pays the
debt on a certain day, the estate shall become void in
one of three ways. 1st. That the mortgagor shall re-en

title, or 2nd. That the mortgagee recover on 3rd. That the

mortgagee shall disclaim all interest in the premises.

It has been observed that conditions in

the subsequent or present being matter in pais may
be proved by hard evidence, so in mortgages the ex-
tinguishment of the debt, for which the estate is

given, is provable by hard testimony, and the estate

thereupon reverts. Therefore a clause or provision for

a reconveyance is merely a cautionary step.

It is called a mortgage, because if the mortga-
Mortgages

It could be observed that when the question is asked how many kinds of mortgages there are, it is generally answered that there are two, viz. nuncum cavius and mortuum vadium. This is he says means to say that a living pledge is a mortgage as it is absurd to say that a living man is a dead man. A recurrence to the derivation of the word will show this.

A mortgage then is substantially an estate pledged by a debtor to a creditor as a security for a debt. The word "mortgage" then refers to the estate pledged and not to the deed, as is often understood. The deed then should be called a mortgage deed instead of a mortgage.

The debtor or surety or guarantor is called the mortgage. The creditor or grantee is called the mortgagee. Every mortgage then is an estate pledged upon condition, and this condition is usually called a defeasance, because its office is to defeat the estate granted to the mortgagee.

Thus a precise technical form indispensable in making a mortgage deed. The defeasance may be a distinct instrument; it may be in the body of the deed, or it may be annexed to, or endorsed upon its face. It is a rule that two instruments executed at the same
Mortgaged

As soon as the estate is created, the mortgagee may take possession tho' he is liable to be dispossessed.

The usual of almost universal practice, is for the mortgagor to remain in possession until the condition is broken.

There is a distinction at law, how between a grant made to secure a gift, or gratuity and one made to secure an antecedent debt.

In the former a tender made not only discharges the sum or debt but the whole obligation. The promise of a gratuity or gift does not in fact create a legal debt. In the latter a tender at the day fixed of the money does not discharge the debt; it still remains a legal debt being already created.

The condition in a mortgage deed is always a condition subsequent, as formerly it was considered as a condition precedent.

Formerly after the condition was performed, the wife of the

mortgagor was entitled to dower in the mortgaged estate, and it was subject to all the covenants of the husband.

And for this reason it is customary in England to grant very long terms for years by way of mortgage. And this
Mortgages continued to be the practice in England, other the reason 2 Lew. 16, which gave rise to it has ceased, for the wife is not en- libled at this day to dower thee, in such estate. 3 H. 8, 12. 5 &c.

Mortgages in bon. are almost always in fee-sim-

ple.

If a bond is given by a mortgagee, conditioned for the performance of the covenants con- tained in the mort- gage deed - non-payment at the day is a forfeiture of the condition of the bond. This was formerly decided contrary, as in the James. 2 8 1. 9 8. 2 1 6.
Mortgages

Non-mortgages are considered in Courts of Equity.

It has been remarked, that at common law, if the condition is not strictly performed, the land or property mortgaged, vested absolutely in the mortgagee in quantum nullum; as very grievous hardship was the consequence of this for a large and valuable estate would not infrequently be lost for a trifle some. Concerning this there was a great controversy between the Courts of Law and Chancery. The former contending that upon a breach of the condition, the thing mortgaged was gone from the mortgagor vested absolutely in the mortgagee without the possibility of a redemption; the latter (Courts of Chancery) contending that the transaction was not a mere personal contract, but the land or property only a security for the performance of the condition. All so that the mortgagor was actual owner of the land notwithstanding the non-performance of the condition.

In this controversy, as with all others between Courts of Law and Chancery, the Courts of the former prevailed.

In consequence thereof, Chancery has cognizance in private of all matters concerning mortgages. The courts contend that whenever the debt is paid, the interest-
Mortgages.

of the Mortgagor determined, and if it is not paid and there
is no performance of the condition, the Mortgagor becomes
trustee of the legal estate for the Mortgagor.

As then in Courts of Equity the whole transaction is
considered as a personal contract, and the land as security
for the performance of the condition, the debt is the prin-
cipal and the land is estate is the incident. 

"Ano sex
visum non duct. sed sequitur tum prinpialle."

This equitable right which resides in the mort-

gaan after a breach of the condition is called the

Equity of redemption: some see that it is merely

a creature of the Courts of Equity.

But at the law is considered as the mortgagor

not until the redemption, the mortgagor's interest

continues in Equity so far as to entitle him to the prof-

its, and of course the possession.

From this view of the subject it maybe

inferred that a mortgage is not such an alienation of

the property as to alter any previous disposition, ex-

cept so far as any previous disposition is necessarily

affected by it.

It is an alienation instanta, i.e. to the

amount of the debt for which the property is mortgaged

to secure. As also in ease of devise—Mortgages will
only affect them pro tanto, and will not be considered as a total revocation. It is however a rule on devises that any subsequent disposition of property devised will be at law an entire revocation; but in equity it is clearly settled to be a revocation pro tanto only.

But still if the owner of land devises it to A. and afterwards mortgages it to B. it is a total revocation of the devise even in equity; for it is said that A. cannot stand in two characters, i.e. as mortgagor to himself. But Mr. Gould does not believe the rule to be founded upon this seemingly technical absurdity; it proceeds upon the presumption of an intention in the party to revoke, and the presumption of such an intention cannot be rebutted.

Every contract for the loan of money or payment of a debt secured by the conveyance of real property not intended to be conveyed is a mortgage and so considered.

It is also a rule that all private agreements in 1902, between the parties made at the time of the mortgage 17 Jan. 1804, against claiming the equity of redemption are void. 22 Mar. 1921. In case they differed they would enable mortgagors to take unreasonable advantage of Mortgagors for
Mortgages

Mortgagors are considered every man at the mercy of the mortgagees. The maxim "once a mortgage always a mortgage" applies here: and it is really true that where a condition is added to a mortgage deed, that "if payment be not made at the time limited, the land should be considered as sold," such condition would be void.

21 Va. 34. As to this point it makes no difference whether the proviso is in a mortgage deed, or in a subsequent instrument.

59 Va. 283. The rule proceeds further still for if there is an agreement at the time of making the mortgage deed that the conveyance shall become absolute, provided the mortgagee advance an additional sum of money it will be void, such agreements are considered as radically vicious.

But still an agreement that in the case of the sale of the equity of redemption the right of pre-emption shall be reserved to the mortgagee will be good—such an one cannot be oppressive.

So also, a subsequent agreement for an absolute sale executed by the parties, is good: that is, it is not necessarily void, but subject to be
Mortgages.

avoided when there are any badges of fraud—

So also if the mortgagor makes a subsequent re-
lease of his equity of redemption, and agree for a recon-
versione. This agreement will be good.

Conditions precedent are construed strictly; but con-
sitions subsequent are construed liberally—

There are also other exceptions to this general rule,
that "once a mortgage always a mortgage," as in
cases of family settlements—Any settlements thus
made, as charitable or gratuitous, will be good, as
where the estate is settled that the equity of redeem-
tion shall not be claimed except during the life of
the mortgagor

These being gratuitous acts of the mort-
gagor, show him to be in such a situation as that the
mortgagor cannot take advantage of him, and
render their good, an exception to the general rule.
above—

According to rules observed in
domicil of the estate an absolute deed, without any de-
ervation, may be considered and treated as a mort-
gage where there are any circumstances which induce
a belief that the equity of redemption should be claim-
ed—As where the grantor or mortgagor is under
Mortgages.

To remain in possession to pay no rent, but pay taxes.
The Supreme Court have asserted in two instances as
upon this ground, and no breach occurs upon prin-
pies of the highest justice, for the statute of frauds of the
RUL. 26 juries is but a rule of evidence, and a rule of propri-
The court of errors have as often reversed their de-
terminations. This is therefore left in doubt.

But proof evidence is clearly admissible to prove a
fragment, and is therefore sufficient to defeat the in-
terest of the mortgagees.

But a fraud agreement between two to-
obliges that the whole shall rest upon one of them.
will lie within the statute of frauds if it comprises,
fore proof evidence cannot be admitted to substi-
tuate it. If lands are devised to certain trustees to hold
until the rents and profits shall discharge certain
specified debts, and no power is given them expressly
to mortgage the lands, yet if a sufficient sum cannot
be raised within a reasonable time to pay the debts
from the rents and profits, the estate may be mortgaged.
Mortgages

When an estate is created, the mortgagee has most
property may have immediate profession, but if there is an
agreement that the mortgagee shall remain in profession
for a certain fixed period of time he is tenant for years
to the mortgagee. But if the mortgagee is left in profes-
sion without any agreement as to the time, he shall
remain in profession, so far as it respects the right of
the mortgagee he is tenant at will, or quasi tenant at
will to the mortgagee; he is not tenant at will in every
particular, for he may be sued in ejectment by the mort-
gagee without notice, which is not the case with a com-
mon tenant at will.

But on the other hand a mortgagee thus in profession
is not liable for rent to the mortgagee, as other tenants at will
are. The rents and profits are suffered to be taken by the
mortgagee in lieu of interest paid to the mortgagee.

On the other hand such tenant is not entitled him-
self to the enfranchisement after ejectment for all the profits
Mortgages.

are to go towards paying the debt. So from the whole
Par 678, the mortgagee lends nothing by not being able to claim
rent.

Aug 22.

Again a common tenant at will cannot lease
or under-let the land, but it is otherwise, with mortga-
gesee, for the mortgagee may, if he pleases, defeat
the lease against the lessee, for the lessee stands in
the same situation as the mortgagee.

Such a lease will be good against the mortgagee and
all strangers, and will entitle the lessee to the equity of
redemption.

Aug 22.

As the mortgagee has it at his election to

1.Mk 600.

treat the lessee as a wrong doer or not, it follows
2.Mk 266.

that by giving him notice, he may treat him as ten-

767.

ent, and compel him to pay rent, and. But he

cannot be compelled to pay rent which he has paid
13.12.60. to the mortgagee; for he would then be paying it twice.
48.

It is now settled that the mortgagee when sued in

1 Par 25. Rejection to the mortgagee, cannot set up the title
47.4. of another as a defense, for he is estopped to do
3 Bl 298. this by his own deed. Par 508.

So on the other hand, the mortgagee is estopped to
deny the title of his own lessee, while the lease continues.
Mortgaged.

in his title is good against the mortgagee, against all
and strangers. From this it follows that this possession will on
6304.
1677.
59.

The mortgagee being deemed in [ing], the true owner of the land
1709.
252.
and the interest of the mortgagee a mere chattel interest as
1709.
the security for the payment of the debt, it follows that if
1709.
252.
the $600 a freeholder is mortgaged. The right of redemption remains
252.
in the mortgagor. If he interest will descend to his heirs,
51.
252.
and it will pass by devise, and whenever possessing this right
375.
interest against a settlement tenancy. The only difference
375.
between this interest and a real freehold, is that this
375.
the title after forfeiture or breach of the condition
375.
cannot be enforced at law—

But tho' the mortgagee is considered as real
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Mortgages.

Of the interest of the mortgagee.

The interest of the mortgagee in the premises mortgaged may be considered at four different periods of time. 1. The interest of the mortgagee from the time of executing the mortgage, before possession for full performance of the condition, while possession is as usual in the case in the mortgagee. 2. After the mortgage is instituted by non-payment of the money at the day on which the mortgagee enters into possession. 3. After the mortgagee enters into possession, if before foreclosure and 4. Of foreclosure, of which I shall now treat hereafter.

1. Of the interest of the mortgagee's estate between executing the deed of the mortgagee of the condition.

Before foreclosure the mortgagee's estate continues what it was at law, law before change of interest. The legal interest is in the mortgagee, the equitable interest in the mortgagee, the equitable title which results to the mortgagee after foreclosure of the condition, which gives Chancery cognizance of this mortgagee. This Court then has no
Mortgages.

sort of concern with them until breach of the condition.

Before any conveyance or any lease made by the mortgagor, during this period, is void as against the mortgagee.

And this rule holds as well where there is

section of the premises and the reason is that the

This rule holds as well after forfeiture, as before.

But if the mortgagee does take possession, he is liable

for the covenants that run with the land, like

But such mortgagee is not liable for covenants

which run with the land, unless he takes actual pos

which run with the land, unless he takes actual pos

which run with the land, unless he takes actual pos
Mortgages

The assignees, for he takes it eum once; and engaging
the profits he must submit to the losses

2.3. The two next periods of time will be con
sidered together: the difference being remarked whereas any
1. 2. 3. 4. 5. occurs—That is the interest which the Mortgagee has after
the forfeiture, and before possession, and after possession
and before foreclosure. The interest between these
points is considered by courts of equity as a chattel
interest.

3. 4. 5. 6. 7. 8. 9. The interest of the mortgage will rest under a
1. 2. 3. devise of lands before forfeiture. 2 Cent. 351.
4. 5. Then the Mortgagee devise at one time be
6. 7. 8. 9. 10. when forfeiture of foreclosure, his interest will attach his
4. 5. 6. personal representatives; and on the same principle
7. 8. 9. of considering it a chattel interest, it follows that the
4. 5. 6. 7. 8. 9. 10. payment of a debt does itself convey his interest.

3. 4. 5. 6. 7. 8. 9. 10. Hence also the Mortgagee before foreclosure must
8. 9. 10. 11. 12. not do or exercise any act of ownership which will
6. 7. 8. 9. injure or incumber the mortgagee's interest.

In such a case as this, although the wheel may
be otherwise that a case would be void, it made
to avoid a case, he would think this doctrine of
losses unjust, were it not had.
Mortgages.

As the mortgagee under foreclosure cannot do any act
212, that will affect or involve the mortgagor's interest reg.
592, therefore he cannot before foreclosure commit
waste, for if he does a purchaser will issue an injunc-
tion to stop it. This rule holds as to mortgages in
fee.

But if the mortgagee's security is defective, a
209. Mortgagee in fee will not be restrained from com-
mitting waste even before foreclosure. But in all
cases where he does commit such waste he must
212, account for it, for it must be applied to ease
the estate, and not to the mortgagee's benefit.

But then the mortgagee cannot incumber the
584 estate, yet he will be allowed expenses for making
212, necessary repairs. These expenses are to be added to
196, the principal of the debt against the mortgagee,
it will bear interest.

If a mortgage is made of an estate to which the
mortgagor was not entitled, and afterwards the true own-
er conveys it to him, the mortgagee, the mortgagee shall
have the benefit of this, if it is called a grant upon the
old stock.

The mortgagee is not bound to expend money
upon the estate except for necessary repairs; but however
Mortgages.

The acts of fraud in defending the mortgagor's title the may add it to the principal, for it is to be remarked that if the title is attacked it is at the risk of the mortgagor.

The mortgagee takes the estate mortgaged subject to the same incidents, to which it is incident in the hands of the mortgagor.

If the mortgagor has done any act, that amounts to a forfeiture, the mortgagee will lose his security. The good apprehends that the following distinction will hold, that where the mortgagor has done any act which is incidental with the nature of the estate, it will be a forfeiture contemplated by the rule; but where the forfeiture is the commission of an offence, it is not such an one as will affect the mortgagee's interest. In the last case, the forfeiture does not amount to an account of an injustice done in the remainderman's, and the thing can take only what interest the mortgagor had.
Mortgages.

Of the Equity of Redemption, who may claim it.

The equitable interest which results to the mortgagee on the breach of the condition by non-payment at the time appointed, is called the Equity of Redemption.

This interest is properly speaking a trust. The legal estate remains in the hands of the mortgagee until redemption is in the hands of the mortgagee, as trustee from him to the mortgagee.

A mortgagee really, is often the perfectee, complete by a trust, a defeasance of which is, the legal title is in one for him to hold, till a certain purpose is answered, and then to be conveyed to another.

As the mortgagee may redeem at any reasonable time by paying the debt and interest, so may any one claiming under him, his where there was a voluntary conveyance, and afterwards a mortgage of the same premises to another, this attic it was subsequent against the mortgagee, yet it was good as to the equity of redemption, and would hold that, for a voluntary deed will bind the party that made it and his heirs.

A second mortgagee may redeem if a first mortgagee is a 3d. or a 2d. or for the rule is that any person having the same interest with the mortgagee
Mortgages

had may redeem.

The assignees of a bankrupt may redeem.

Sec. 190. or assign an equity of redemption.

1836. 22.

So also the lessee of the mortgago
can redeem. So a purchaser of assignee of a mort-
gage can redeem. So also after the death of the
mortgago, his heir may redeem.

If the interest-mortgaged was a leasehold, and
desendible, the equity descending will be real estate.

An equity of redemption of a mortgage in fee, is governed
by the same rules of descent, by which the legal estate
is governed.

And as an equity of redemption is desirable,
a devisee of the mortgagor may redeem, for he has the
same interest which the mortgagor had.

Sec. 111.

Sec. 122.

At law, it is also a judgment creditor of the mort-
gagor may redeem, because a judgment obtained is a
compendium, then until that is done. Co. Lit. 102. 3 Bl. 72.

2 Mt. 440.

At the a judgment creditor in Connecticut, cannot
redeem as such, yet if he has actually levied the
execution, he may redeem, for his levy gives him an
equity interest in the equity.

It has been matter of much doubt in
Connecticut, with respect to the way in which an
Mortgages.

Equity of redemption shall be levied upon. The different practices have arisen. The first is if the executory debt is large enough to swallow up the whole of the equity of redemption, the whole is to be levied upon and apportioned off to the creditor, and this extinguishes the mortgagee's interest, but when the debt is not equal to the equity, execution may be levied upon a part, and that apportioned off to the creditor.

The second method is by apportion of the whole equity of redemption to the creditor, whether the demand is great or small, without entering into any inquiry what the value is, and in this case the debt from the mortgagee to the creditor is not extinguished, nor the right of redemption taken from the Mortgagor, but such levy places the creditor precisely in the same situation as if he had been a second mortgagee, and hereby he gets security for his debt to the extent of the value of the equity which may be redeemed by the mortgagor if he chooses, and the levy does not operate as an absolute sale of the equity to the mortgagee, but as if the Mortgagor had given to the second creditor a second mortgage.

Sum P.22. In King the King may also redeem when the mortgagor has committed an offense which works a forfeiture.
Mortgage

Sec. 110. Tenant by Estoppel, Statute merchant or Staple may redeem.

If a mortgaged estate or equity of redemption descends to an infant, his guardian may without the direction of a Court of Equity, apply the profits to the discharge of the debt.

Sec. 112.

When his widow may redeem, if she has a jointure in the land, and after the jointure be severed only part of the estate, but when she may redeem the whole if she pays more than a third part of the principal money, she shall hold the land until reimbursed. It appears that if the mortgagor requires it, she must redeem the whole.

Sec. 112. The husband of a mortgagor may redeem of the debt of the wife by the curtesy of the equity of redemption.

But in order to entitle the husband to this there must have been a seisin of the wife during coverture i.e. not a corporal seisin, but an equitable seisin; and it would seem that the perception of the rents and profits would have been a sufficient seisin.

Sec. 98. 30%.
Mortgages

If a subsequent mortgagee redeem of a first, the mortgagee or his heir, or his devisee may redeem of him. It is in fact a rule that property in this situation may be redeemed until it is redeemed by the one who is entitled to the whole interest—legal or equitable. For if the lessee of the mortgagee redeem still the mortgagee may redeem of him—but when the mortgagee or his heir or devisee redeems he will receive the whole interest—therefore there will be an end of redemption.

Psa. 119.

If a mortgagee may redeem even after a release of the equity of redemption, if it appears from circumstantial evidence that it was made upon a secret trust for his benefit.

Psa. 120.

If there be tenant for life with remainderman, or reversion in fee of an equity of redemption, they shall contribute proportionably what is due on the mortgage.

As a devisee of an estate for life in an equity of redemption may redeem and hold on until those in remainder contribute.

Psa. 122.

And if the remainderman or reversioner will neither of them contribute, the tenant for life may
Mortgages

hold the land until they pay 2/3 of what is due for principal and interest.

In precedents in Chapter 44 it is advanced that a tenant for life is to pay 2/3. McCardel 44. thinks this incorrect, but believes one third to be the exact proportion.

The general rule is that the estate of the tenant for life in the premises shall be rated at one third, and that of the remainders man or reversioner at 2/3 of what is due for principal and interest.

If the mortgage money is payable on a contingency not assured, he in remainders or reversion may exhibit a bill in Chancery called a quiet Lisit against the tenant for life and compel him to contain: that is that he shall pay one third being his interest in the premises, or else relinquish the remainder. The object appears to be to compel the tenant for life to keep the interest drawn of the land he charged; for he cannot be directly so assessed compelled to redeem, tho' he might indirectly by purchasing in the mortgage.

5. The tenant for life of the equity of redemption may of the whole debt, and takes a conveyance of the estate, makes improvements therein.
Mortgages

...and dies afterwards, the remainderman or reversioner comes to redeem, they must pay 2/3 of the last
thing for the other 1/3 because he received the benefit thereof during his life, and no interest
shall be allowed during the life of the tenant for life, for the money he paid, for he is bound
to keep the interest down during his estate.

But as to the proportion of money to the head, between
the tenant for life if the remainderman, this distri-
tension is to be taken— as has been said, if after
redemption by the tenant for life, the remainderman
applies to redeem during the life of the tenant, the
tenant is to pay only 1/3.

But if application is made after the death of the
tenant to his representatives, they must allow only
for the time the tenant for life enjoyed the es-
tate, and the remainderman would consequently
be subject to a greater distribution than in the for-
mear case.

An equity of redemption on a mortgage in fee.

is not a set at issue, for the estate of the mort-
...
Mortgages

such equity of redemption is assets in Chancery, and if
an heir alienes or releases his equity of redemption to
prevent creditors from having satisfaction for
their debts, Chancery will follow the money in the
hands of the heir or Ex.

3.41. 341.

However an equity of redemption is only
equitable assets, and cannot be touched only when
the interposition of Chancery, the creditors are to be paid
pro rata without respect to the degree or
quantity of their debts.

3.41. 341.

In Connecticut all equitable redemption are
real assets i.e. assets at law. An equity therefore may be
attained as common law assets, as in case of execution
therein in the same manner as real property is levied
upon. And as in Eng. when he makes out an inventory
must include the equity of redemption. Even in Eng. the
mortgages exercised expectant on a mortgaged term
for years will be assets at law, liable to debts, and
will attract the redemption.

3.41. 341.

So also the execution or a chattel interest expectant on the determination of a mortgage of
real of the estate, is assets, but it is assets personal
in the hands of the Eq.

3.41. 341.
Mortgages

and therefore would re-vest in the hands of the heirs of the

not of the

and if the judgment in these cases will be of

sanguis accidenti i.e. when the rail of the cred-

tor cannot say a bill in Chancery or compel the heir to

sue the reversion, but must expect until it falls


An equity of redemption is devised, for the payment

of debts, if it is in case of its being descindible that it

becomes capable of not legal effect


It was once supposed that if a devise was made to

the estate, with re-vest or would be legal effect.

But it is now settled that such a devise, either to

the heirs or any third person that shall be considered as equita

ile effect and shall be paid to the creditors' pai


But this equality a devise of such have no pri-

vity when the land consists of more than one set or

a second mortgage shall be preferred to any other

creditor, he he has priority not as creditor, but as

an incumbrance having a specific lien on the

land.

An equity of redemption has never been held to

be limited to a second creditor during the life of the mort-
gage.
MORTGAGES.

It has been a great dispute in law, whether there can be a "succession of a son," as an equity of redemption. The better opinion seems to be in the affirmative.

If a man has a son and a daughter by one wife and afterwards has another son by a second wife, if the eldest son dies seized, the estate goes to the daughter in exclusion of the half-brother. This is called "succession of a son," but if the eldest son had never been seized, the younger brother would have taken, because all descent is from the person last seized.

If this opinion in the last case were more of the eldest son died in possession, would the daughter take? In Joseph's book, it was strongly inclined to think she could not, but the current of authorities are against him.

For a definition of "succession of a son" see 3. Tho. Ray. 218.

In general no person is allowed in equity to redeem unless he is entitled to the legal estate according to Powell; but Mr. Gould concludes this to be absurd, for he that has the legal estate needs no redemption. What Powell means must be this, that no person shall be committed to redeem, unless he...
Mortgages

had an interest in the equity of redemption, which ought to have been the rule.

But if he in whom the equity of redemption is refused to redeem any person, either directly or indirectly interested, will be permitted to redeem.

Where a mortgagee becomes a bankrupt, if a majority of the creditors would not suffer the preferences to redeem, the other creditors were permitted to file a bill for redemption under head of costs.

2 Vent. 350.

If the mortgagee's lien is from the equity of redemption, he will not redeem the creditors have no right to interfere. It implies the rule contemplated simple

1 Com. 601. without *content.* It is a leading maxim of the law of Eng. that the right of redemption is a creature of equity, a creation of equity will always make it subservient to its own rules.

It is also a leading maxim that he who seeks equity must do equity. Hence it follows that a court of Chancery will decree a redemption, either absolutely or conditionally, or the justice of the case may require.

The right of redemption is not then absolute. If therefore the mortgagee should apply to redeem in payment of the debt, provided he should not be able to set aside the mortgage at law, the Court will not
Mortgages

indulge him, for he must relinquish his suit at law, or his application to a Court of Chancery.

Sec. 526. So if having applied previously to a Court of law and failed, the mortgagor applies to a Court of equity, the Court of equity will compel the applicant to pay the cost and charges of the suit at law.

Sec. 527. Again: if the mortgagor cannot compel the mortgagor to redeem before any of payment, yet in case of a hard bargain against the mortgagor he will be permitted to redeem before that time.

Sec. 528. Again: if the mortgagor should obtain possession against the mortgagor by fraud, finding a suit, on petition for restoration he must restore the premises before he can redeem.

Sec. 529. In substance also of this it is a rule that if C. Mortgage Blackacre for one debt, and Whiteacre for another, and one is more than sufficient to secure the debt, the other security being less sufficient, he cannot redeem the sufficient without redeeming the other at the same time.

So if the heir of such mortgagor wishes to redeem...

Sec. 530. So where the heir of such mortgagor endeavors to defeat the mortgage of one of the estates by setting up an entailment afterwards applies he shall redeem.
Mortgages.

A purchaser under the mortgagee shall hold the
land against the mortgagee and his heirs for the
sum due on the mortgage, who he may have bought it for
less money, or given more than it was worth, for he
stands in the shoes of the mortgagee, who assigned,
and who might have given it to him gratis.

But as against subsequent incumbrancers, a cred.
the purchaser shall hold for no greater sum than
actually paid.

So also if the heir of the mortgagor purchases
the first mortgage at a discount, this incumbrance
shall not stand against a subsequent one for more
than the sum paid.

It is a general rule that if an heir at
law, trustee or executor assigns his of the mortgage pur-
chase in the mortgage at a discount, the creditors of
heir or legatees shall have the advantage of it — and for want
of them the benefit shall go to them entitled to the
suffrages.

This rule applies as well to effects generally as to
mortgages.

These rules are all founded upon the general
principle first laid down viz. that the right of re-
Mortgages

demption is a creature of equity of the Courts of Chancery and will always make it subsequent to its own rules. But if the mortgagor's heir be in incumbrances to protect others to which he himself is entitled, the whole money due shall be allowed on account, although it was purchased for less.

Mr. Gould thinks that in this case the general principle has not been rightly followed. Why might not the doctrine of taking securities be applied here? If why should the heir or trustee be allowed to hold, not having paid and adequate or equitable consideration against bona fide creditors? What distinction is there in principle between this and the case of an ordinary purchaser, except so far as it goes to protect his own incumbrance?

If the mortgagor becomes indebted to the mortgagee otherwise than on the mortgage, the former debts as well as the latter must be paid in discharge before the mortgagor will be permitted to redeem on his own application for the condition being broken, the estate of the mortgagee becomes absolute at law and he must as equity before he can have equity.

But if the mortgagor in the case supposed, with his bill to surmount, the mortgagor is not bound before it.
Mortgages.

demption to pay the said debts.

C. 502. It is a general principle in Ch. 7 that a change of
the relation between the parties, as to being P. in
P. 511. Def. is a change in equity.

For instance if the mortgagors
heir would redeem he must pay every debt due to the
mortgagee by bond, as well as by simple contract.
Shew 245. The application him self, but the debt must
be by bond, or at as high a nature as a bond debt,
otherwise the heir is not liable for simple contracts
will not bind real estate in the hands of the heir.
ubi cadet ratio ibi idem, just how different if the
mortgagor redeems.

In coincidence with the same
2. 640. 1777 rule if a lease for years is mortgaged, and then a
3. 512. new debt contracted by the mortgagee an bond, the
3. 240. Ex. must pay both; indeed, McNair supposes
that he must pay other than bond debts, for a
lease being personal is certainly liable for debts
on simple contracts.

But if there be several incumbran-
3. 240. cess upon an estate, if the first incumbrancer has a
bond debt, it will be postponed to all real incum-
3. 356. brances on the land whether by mortgage, judgment,
Mortgages.

or statute, for the bond is no specific lien on the land, and the first incumbrance has not the same equity against a prior incumbrance, as against an heir at law who is liable to the land in respect of assets.

... 1287

... since the statute of fraudulent

... devise, the devisee of the estate of redemption cannot demand payment of the debt on land notwithstanding a mortgage, because the devisee takes with a superior right as against creditors; and then the devisee stands in the same place the heir would have stood if no devisee had been made.

... 1456

... before the statute, however, such a devisee would not have been liable to a bond creditor.

... further, if the assignee of the mortgagee has a land debt, he has the same equity against the mortgagee and his representatives as the mortgagee himself had and no other.

... 2 refute.

... 2475, etc. an bond was prior to the mortgage, the rule is the same, as where it is subsequent to it.

... 1456

... Where the mortgage is subsequent, the bond will take the debt with the interest of the bond, if the bond is interest

... 616
Mortgages

But this can never be done in an application of the mortgage to foreclose, for it would alter the contract.

There are many cases in which the mortgagee and his representatives, on a petition to redeem, are bound to pay the debts not due on the mortgage as well as those that are.

Where the mortgagee has fraudulently induced a third person by the consent of a debt due on land, the mortgagee shall be permitted to redeem on payment of the principle money only.

And if part of an original mortgage be paid off and then a further sum be borrowed on a future title, the last sum must be paid as well as the first on redemption by the mortgagee.

But the purchaser of an equity of redemption for valuable consideration may redeem without requiring the debt not secured by the second mortgage.
Mortgages

for he is not the debtor. The purchases the land
2.2662 in the hand of the
indebtedness and the debt alience cannot be charged
to a greater amount than the indebtedness itself?

Indeed the mortgagee's claim to have his consideration
paid, as well as those secured by mortgage, is good alone a
against the mortgagee and his heirs.

Length of possession by the mortgagee after forfeit
abandonment is not of itself absolutely a bar to the mortgagee's
right of redemption. For mortgages are not within the
Statute of limitations.

But the length of possession

of property is not absolutely considered a bar to the
mortgagee's right of redemption, yet points of equity have
so far followed the Statute of limitations in Eng. as
not to say that twenty years possession at the bar of
primary evidence of the mortgagee having aban
donned his right of redemption. And indeed it is general
ly concluded evidence, unless there are some incapaci
ties or disabilities, on the part of the mortgagor which
rendered him lm time redeeming.

This equitable bar to the mortgagee's right pro
ceeds principally upon the presumption the mortgagor
has abandoned his right; if this presumption can be
Mortgages

removed or extinguished, the mortgagee's right will not be
bared.

This presumption is rebutted or rather may be rebutted by proof
of such circumstances as amount to the mortgagee's not
sustaining, consistently with his not having abandoned
his right — such as inquisition, or having been beyond
sea, &c.

This presumption may also be rebutted by facts show-
ing that the relation of the mortgagee has been
recognized within twenty years in Eng. and fifteen in
Can. — indeed anyone of the mortgagee's acts by which he
has recognized the mortgagee's right of redemption will
in 20 years will prevent a evasion of the redemption.

Supra.

If the mortgage has within 20 years exhibited a
bill to foreclose, it will preserve the equity for it is a
6th rule of recognition of the mortgagee's right within the time
limited.

If the mortgagee has received part payment, within
21 years, the time limited, the mortgagee's right is not voided.

The time allowed for redemption after the removal
of any of these disabilities, is the same as that prescribed
35th sec. in the statute of limitations in all States. — Ten years
at
35th in Eng. and five in this State.

But if any fraud has been practiced upon the
Mortgages

mortgages to prevent his distraining in length of time whatsoever will bar his right of redemption, for it is a maxim of equity as well as of law, that no length of time will be construed so as to suffer a man to take advantage of a fraud.

As to these disabilities, the rule is the same in equity as at law — for if the Statute of Limitations has begun to run the intervention of any of the legal disabilities does not prevent it, i.e. does not prevent a bar against the person before having a right to redeem. As for instance A. sets into possession of B's land and remains in 15 years and then B, without taking any notice of it, goes off to sea or is gone so long that the 20 years in Eng. of the 15 in Con. is passed over, this going to sea will not stop the Statute of Limitations from running upon the land. This rule is not much adhered to in Con. as in many cases it might work great injustice.

2. 21st & 18.
1. 315.
2. 315.
3. Articles 333.

These disabilities to have any operation in effect must exist at the time when the right accrues, i.e. when the equity of redemption commences, which is at the forfeiture by the breach of the condition.

When it is agreed between the parties, the mortgagee
Mortgages

may take possession of the premises, hold until it is satisfied, from the issues and profits of the land, no length of time shall bar the mortgagee's right of redemption.

In case of a mortgage in Wales or a Welsh mortgage, the possession of the mortgagee for any length of time is no bar.

If Welsh mortgagee is one by which money is advanced, to be paid at a given day in a certain year, or in the same day in any subsequent year, there then is no need of the interference of a court of Chancery for it may always be redeemed at law; for there is an everlasting subsisting right of redemption descendent to the heirs of the mortgagee, which cannot be forfeited at law like other mortgages. Therefore there can be no equity of redemption.

Again, the length of the mortgagee's possession can in no case be a bar to a three years' right of redemption; if the mortgagee will submit to a redemption; but if the mortgagee does not avail himself of this right, he will be deemed to have waived it.

Further, if the mortgagee remains in possession no lapse of time will bar a redemption. By an
Mortgages

Eng. Stat. 24 & 5 Will. IV, c. 5. If any mortgagee is deprived of his equity of redemption of the equity of fraud on the mortgagee by concealing any prior incumbrance, we have no such statute in Can. But Mr. Gault supposes that the courts of equity would adopt a similar rule—that is, if we can suppose a case in which a second mortgagee can be injured. Our records are considered as constructive notice of the situation of the lands, therefore, the rule cannot well apply.

If any person who shall have mortgage lands for valuable consideration shall again mortgage the same lands, or any part thereof, to any person, the former mortgage being in force, I shall not assume the same in writing to the second mortgagee, such mortgagor shall have no right in equity of redemption against the second. Mortgagor, but such second or third mortgagee may redeem any such one.

An instrument on the mortgagee under the Stat. 24 & 5 Will. IV may pass to a second mortgagee of his lands to give the mortgagee notice in writing under his hand of all prior incumbrances.

A second mortgagee of the same subject is a mortgage of the land itself. If not the equity of redemption, for this is all that preserves the right of the mortgagee after a second mortgage; for were it not so, he would not redeem the title until he redeemed the second. This means can be a mere nominal distinction, but it is very important.
Mortgages

Of a devise of lands mortgaged, by the mortgagee

The interest of the mortgagee like that of the mortgagor is demiseable and the devisee as he stands in the place of the mortgagee may have foreclosure.

It was formerly the case, the whole of the mortgagor's interest in a mortgage in fee, would not pass in a devise under the general words "all my mortgages" but the devisee would have had an estate for life only, and the reason is that his interest may not be deemed a chattel interest.

But now the mortgagor's interest being deemed a chattel interest only, the whole will certainly pass under the general words all my mortgages.

On the other hand the interest of the mortgagor will not regularly pass under the words "lands, tenements and hereditaments" in a devise, for these words are used to denote real property, therefore they will not regularly carry the interest of the mortgagor.

But this is the general rule it is not universal; for if the mortgagor had no other property at the time of making the devise which would answer the description of the words, such property as did an answer the
Mortgages

description will pass under these general words. When the price of the mortgagee, that is the devisee, has in the property answering the description, the mortgaged premises will pass.

If foreclosure obtained by the devisee of the mortgagee, is not had against the mortgagee of his own, but against the mortgagee of his heirs. The heir of the devisee is not party because he has no interest in the lands.

It is laid down that a devisee by the mortgagee of money due on a mortgage, does not carry the interest due on the debt at the time of the mortgagee’s death, but the principal only. Mr. Goddawhorne thinks this rule too broad, for he has no doubt but that the interest may pass in certain cases.

The question has incidentally arisen whether the mortgagee’s interest will pass under a devise not attested under the Statute of Frauds and prejudice. It seems that it will, for this statute refers to real estate, the interest of the mortgagee is a mere chattel interest, and therefore not embraced by the Statute.
Of the priorities of Incumbencies, and of taking of prior and subsequent Incumbencies or Incumbrances.

1. The general rule is, if there are several mortgages or other incumbrances upon the same estate, the priority takes place among the incumbranciers as equal, as to the respective dates of the respective securities, but the first incumbrancer who has the legal estate shall be preferred to the second, and so on.

2. Incumbrances in England stand upon the same footing in order of time, as Stale Oudgments, &c., recognize.

In Latin, neither Stale judgments recognize, exercant, for we have no statute which interposes, but the Latin maxim processors, prior in time, fecit est in jure.

But this priority under some circumstances is displaced, a later one last in order, prior incumbrancer.

This rule of priority may happen 1st. when the prior incumbrance has been guilty of any fraud or neglect of getting a subsequent incumbrance.
Mortgages.

Mortgage by power in artifices conveys his mortgage to induce another person to lend money upon the security of the same land. If the person does actually lend his money, the first mortgagee shall be preferred to the subsequent mortgagee.

So also if a first mortgagee be a witness to a mortgage deed made to a subsequent mortgagee of the same premises it shall not affect the second mortgagee he shall be preferred to the latter if it is to be remarked that the law always presumes that the witnesses knows the contents of the instruments which he has attested. And this throws the onus probandi of not knowing the contents upon the first mortgagee.

In all these cases the first mortgagee is deemed to be guilty of fraud.

But further it has been said that if the first mortgagee has been guilty of any neglect whereby any person is induced to advance money upon the security of the same land, the first mortgagee shall lose his priority, because he permits the mortgagee to retain in his hands the evidence of a complete title; so the mortgagee should have taken the title into his profession, if he were provided with...
Mortgages.

danger. The maxim of equity which applies here is, that where one of two innocent purchasers have been guilty of neglect, if one of them must be a sufferer, the loss shall fall on him, from whose omission the mischief arises.

Again, if one who is about to lend money upon a mortgage, request to know if he has a mortgage of it, and he denies that he has any, he conveys his property with the notice that he informs the first mortgagee an application that he is actually about to lend money on the same security to the mortgagee. If he does not so inform him the first mortgagee will not lose his priority by such denial. For the first mortgagee is not bound to answer unless he knows the intention of the applicant.

As an incumbrancer may lose his incumbrance by the second incumbrancer purchasing in the privy incumbrance to protect his own.

When a subsequent incumbrancer obtains the legal estate, he may make all the advantage of it which the law will admit of, and thereby protect his own title. Where the equitable interests are equal, it is a rule that where two equities are equal, that which has the law on its side shall prevail.

But in order to entitle the subsequent incumbrancer to a priority, he must have given his credit to
Mortgages.
The mortgagee without knowledge of any intermediate incumbrance, for then he will have lawful equity on his side.

But where a subsequent incumbrance gave credit to the mortgagor knowing of the preceding incumbrances, he will not be admitted to take on his security u e. he shall gain priority, Gen. 187, 8.

To exclude the subsequent mortgagee from the privilege of taking, he must have had notice of the intervening incumbrance at the time of lending his money or giving credit to the mortgagor; for such knowledge after the money lent will not exclude the taking a priority.

This privilege of taking mortgages is called by Lord Hale, "Vabula in mortagia."

A subsequent incumbrancer may take in this way his equity not only to the first mortgage but to any other incumbrance or mortgage that carries the legal estate.

In all of the above cases the subsequent incumbrancer, against a priority over all the intermediate incumbrances until his own debt to gather with the interest of both are satisfied.
Mortgages

To the general rule that equitable interests have priority according to the dates of their respective securities, there are certain exceptions. As where any one of the parties have more equity to claim the legal estate than the others, for he that hath more equity shall be preferred. It being a maxim in equity that what ought to have been done, is always to be considered as done.

But if the prior incumbrance which carries the title attaches on a part only, and no more, only of the subsequent mortgage, it will prevent that part, and no more. And therefore if a man being seized of 60 ares of land mortgage 20 to A, and then the whole to B, and afterwards the whole to C, then if C purchases in the first incumbrance, that shall not protect more than 20 ares, but it shall so protect more 20 ares, that B shall never recover them until he pays all the money due on the first and last mortgage. It will be understood that B, in this case, will have a right to redeem the 40 ares of the 60 if he pleases without redeeming the 20, but if he wishes to redeem the 20 he cannot do it without redeeming the 40 also.

But if the prior incumbrance brought in, attaches
Mortgages

upon the estates as well as that offered by the subsequent mortgage, the subsequent mortgage shall hold all the estates comprised in the incumbrance bought in, until he is satisfied as well for his own debt, as for the money paid by him in purchasing in the first mortgage.

1. £492.
2. £375.
3. £923.
4. £212.

If there are three mortgages in more of the same property, the first of which covers more than the two others, the subsequent incumbrances may by purchasing in the first which covers the two others, hold the whole until both debts are paid.

A satisfied incumbrance or mortgage is one paid after the day of payment has expired. This payment it seems does not vest the legal title, but the mortgagee has remedies in bar only.

In all cases a subsequent incumbrance may take by purchasing in the prior incumbrances.

It is presumed however by rule that there may be cases so incumbranced as to prevent this looking on gaining priority.

Prior incumbrances may always make use of his satisfied incumbrance at least except when there is a good legal defense to. This rule however of course looks to its great length. It is difficult to discriminate.
Mortgaged.

equity in it, for the right purchased in, is merely nominal and exclusive, by the supposition in this case, an actual, legal, equitable interest.

The rule goes further, it seems, to be settled, that the subsequent encumbrance by purchase, charging on this, nominal satisfied estate, without paying a valuable consideration, holds against intervening encumbrances. This is certainly extremely inequitable.

But when the prior encumbrance thus purchased is on, and in, is deficient in any of its legal requisites, it will give priority to such subsequent encumbrance.

As a recognizance entered in, hath not been enrolled in proper time, or in case of a judgment if it has not been docketed.

Indeed the subsequent encumbrance can gain no priority except by purchasing in the legal estate, for there is no such thing as tacking an equity to any encumbrance. But that which carries the
Mortgages

legal estate only, with it.

A mortgage is allowed to take the judgment or Statute of
creditor in Eng. cannot gain a priority by purchasing in the legal estate, so as to take his own equity.
Equally, for he has only a general lien and no specific lien upon the land. This is not deemed
therefore to have equal equity with an intermediate mortgage incumbrance.

The law of taking is founded upon the general maxim that where equities are equal, that which is on the side of law shall prevail.

The purchase of the first mortgage will give no priority to the purchasing subsequent incumbrance, unless the first mortgage be extinguished at the time of purchasing, for before that time the estate is indeniable at law. Law by paying the money or fulfilling the condition, is not a subject of equitable jurisdiction; for the power of equity has no thing to do with mortgages until the condition is extinguished.

All prior incumbrance, having a legal estate, take may take a subsequent, notwithstanding its

352.
Mortgagor

And truly bostic himself against mesne inamblian.

Sec. 663. as to this subsequent he stands in the place of 16th 2199 a subsequent mortgagee who has purchased in the

former mortgage i.e. the legal estate. In case, he supposes to give him this privilege of taking, he must have

had no notice of any mesne inambliance at the time

d of advancing that subsequent sum. This he could

suppose to be the equitable qualification, after no

such is laid down in the books.

Sec. 234. So also if there are two or more mortgagees, and

the first make a subsequent loan to the mortgagor.

Par. 224. After the subsequent mortgagee if takes a judgment

par. 225. for security, he may suit this judgment to his

original mortgage, to protect himself against

2196. the intermediate inamblance. The hath here the

2196. legal estate, of the judgment, which, though it passes

no interest in the land, operates as a lien thereon.

This rule with respect to notice has an explication.

Sec. 674. Just as we rule that when the intermediate inamblance

is defective, the subsequent inamblance may take,

and hold to the exclusion of the mean inamblances

also he knows of the time of suit the money of

the intermediate inamblances.

Sec. 674. So also if the mortgage is defective in legal re-
Mortgages

unless, the last shall lie good against the first inum

Pra1236.

Pra2115.

Pra2132.

Pra2132.

Pra2334.

Pra2441.

Pra2456.

Pra2459.

Pra2459.

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Mortgages

the rule of parties, if notice is charged by one party, it must
254. be admitted, if justly denied by the other, or he will
255. be deemed to confess that he had notice 2 ch 93. 2ch.253.

Hartwell denied by the subsequent incumbrancer.

He has purchased in the legal estate, of the part is
249. attempted to be proved by the testimony of one witness.
254. only, the bill will be dismissed — for this is oath against
oath, it is not sufficient, proof according to
the rules of evidence in Ch. 100.

250. It is a rule of the court of Chancery, when the
Def. charges not only notice in general, but also
252. special parts, if circumstances, that they
must be denied as well as notice in general.

But if there are circumstances corroborating
253. the testimony of the witness advanced,
254. when the Def. denies, an issue will be directed
254. in a court of law, whether the Defendant had
notice or not, but if the circumstances are sat
satory to the Chancellor, he will dispense
with such issue, and find the fact in issue.
Mortgages.

Of Notice express and implied.

Notice is of two kinds: actual or implied express and constructive or implied.

1st. Actual Notice. One is said to have had actual notice when he is party to a deed of which he has notice periodically served upon him.

2d. Constructive Notice is considered as actual notice in a case where a party interested in a transfer to the contract, or someoneone party to him, *has a mortgage on the same land.* This cannot be denied as actual notice.

3d. The 6th Ed. Notice, is a conclusion of law that one had notice of the fact, this there is no specific of actual notice, as where one cannot make out a title but by deeds which disclose a material fact, by which the person to whom notice should be given, must, or may, be necessitated, lead to a knowledge of the fact. As where A. conveys to B. reserving a power of reversion. B. conveys to C. C. is here deemed to have notice of the power of B. to revoke...

4th. A. conveys lands to A. subject to liens of C. B. mortgages the land to B. B. is presumed to have notice...
Mortgages

When land is charged with incumbrances, it is the duty of the new owner to search for and notify the original mortgagee of any such charges.

If a deed sale is made to a purchaser, the purchaser is presumed to have notice of any prior charges. If a mortgage is made by indenture, the mortgagee's duplicate is delivered to a subsequent mortgagee before he lends his money. This is deemed sufficient notice.

The general rule, however, admits of one exception. In case of an assignment of a tenant's interest to an assignee, the assignee is not deemed to have notice of the contents of any will in favor of creditors and legatees; otherwise, the assignee cannot know the amount of debts payable and the offset.

A creditor of an assignee stating, or necessarily implying, that there is an incumbrance on the land by a prior deed, is deemed sufficient notice to a person professing the deed.

It is laid down as a rule that whatever is sufficient to put the land charged with notice upon an enquiror is an equity deemed sufficient notice.

Upon the same principle it would seem that notorious possession by a prior mortgagee would be a sufficient notice of the incumbrance to a subsequent mortgagee.
This rule holds also when one is agent for both parties, as is frequently the case in marriage settlements.

Further, if one, who has himself or

enough act for another, without authority, and makes a mortgage or in purchase, and the principal afterwards ratifies the act, or agrees to it, he makes the former his agent

But notice of an act of bankruptcy will not be presumed against a bankrupt mortgagee to prevent him from availing himself of the right of taking.

To also a subsequent mortgagee, may take his equity to the real estate not with standing an intermediate judgment obtained against the mortgagee in a court of law, although no matter of record, for judgments obtained by intermediate incumbrancers are deemed to be as unknown as to third persons, I cannot or at third persons until they are proved to have had entire notice thereof, nor even the last time money
Mortgages

A question arises in some cases whether a subsequent mortgagee can take the equity of the legal estate by purchasing in the first mortgage or legal estate, as the intervener in the

parties whose deeds are recorded. On principle such

corpus. 8, 615. records ought to be deemed as notice, for third object is to

give notice to third persons merely if not to the intermediate

parties. But in this the part of registering intermediate

instruments, has not been considered constructive

notice.

C. 712.
W. 64.
2. 146.
3. 475.
4. 646.
5. 664.

But a subsequent mortgagee having notice of a prior

mortgage not registered, cannot gain priority by

purchasing in the legal estate. The courts in enforcing their reasons for the

case, consider the subsequent mortgagee as having

that notice which the statute was intended to require.

A subsequent mortgagee registered is paramount, if

registered to a prior one, not registered, if the subsequent

mortgagee had not actual notice. This is indubitably

agreement to principle; for the Statute regularly

gives priority to incumbrances according to the

dates of their respective deeds.

But a purchaser for a valuable consideration

shall hold against a prior voluntary conveyee.

911. . . . at the time of taking his deed; for a convey.
Mortgages

And fraudulently made to cheat creditors of bona

fide purchasers is less prone to avoid and the making a voluntary conveyance always raises a presumption of fraud. This rule holds as well to incumbrances, as to common purchasers.

It is a rule if one purchases of a prior incumbran

ce without notice, and then sells to another who

has no notice, the notice given to the grantor or vendor shall not affect the grantee.

If J. S. mortgages an estate to A. if then

mortgages the same to B. who has notice at the time of purchasing, if then B. sells it to C. without notice, C. who has no notice at the time of purchasing, is not affected by the notice which B. had.

If a person purchases for a valuable consideration with notice of a prior incumbrance who had notice the last purchaser is not affected thereby, for so doing, he in no manner injures the prior incumbrance, subjecting him to no more inconvenience than that he would have experienced under the grantor himself, to the last purchaser standing in the place of the grantor.

This principle has been extended one step fur
Mortgages.

Then, if A. purchased with notice of a prior mortgagee, A. afterwards sells to B. who has no notice, B. sells to C. who has notice, the last purchased is in no way affected thereby.

The relation in which A. stands to B. falls under the first rule, and that of B. to C. under the second.

So whom the interest of the mortgage on a perfected mortgage shall belong after his death.

Formerly it was much doubted whether the money due on the mortgage should be the death of the mortgagee go to his real or personal representatives.

This distinction was taken, that if a bond was given conditioned to be paid to the mortgagee or his executors, it went to his executors. But if there were no bond, or one was given conditioned payable to the mortgagee, his heirs, executors, or assigns, payment was to be made to his heir.

But more recently the court of chancery has considered the interest of the mortgagee as much personal because the mortgage itself entailed gives to the executors, as the mortgagee himself has manifested a contrary intention.
Mortgages

and contrary intention may be manifested in a variety of ways. Any act however which indicates an intention to convert this chattel interest into a real
will cause his interest to be considered if treated as such.

As if he purchases the equity of redemption or obtains a foreclosure and takes possession.

Another reason for this money going to the personal representatives is that the loan or debt for which the security of which the mortgage was
held to here comes from the personal estate of the mortgagor. If the payment of the debt ought therefore to accrue to the same fund.

If the money is made payable to the mortgagor his heirs or devisees, the mortgagor may on the day of payment, pay to either of them at his election, for how he prevents the jurisdiction of equity by fulfilling his condition in law.

If he pays to the Ex. the heir must reconvey the land for he is a mere trustee, if the trust is satisfied. But in Equity us between the heir and Ex. the money belongs to the latter, and the heir if it is paid to him is considered in bankruptcy to pay it over to the Ex.

If there are two or more Ex. one may give it to the other.
Mortgages

Sec. 26. To either, and a discharge from the C. to whom it is paid, is a full and complete discharge.

A request of a specific legagy to the C., does not bar his right to the money, for holds money as trustee in an act of debt.

Then there is no C. appointed the money belongs to the administrator, the heir must convey to such C. when there are no debts due from the estate, for the claimants under the Act of distributions, have more right to it than the heir.

So where the mortgagor releases his equity of redemption to the heir of the mortgagee, the personal representative of the mortgagee have still a right to the mortgage interest, but not to the whole estate as was incorrectly expressed.

But where is the mortgagor's heir self considers it as real property, it will be so considered after his death, and the money if the estate is resumed will go to the heir, as where the owner of the estate purchased it under an absolute deed.

As also, if the mortgagor devises his estate, the mortgagee real estate, the heir of the devisees point has C. will be entitled to it after his death.

But the mortgagee's intention of considering it as
Mortgages.

real estate, does not operate upon the mortgagee or any claimant under him, but merely upon the mortgagor's representatives.

Again; if money secured by mortgage is entited to be laid out in lands settled in any certain manner, it is bound by the articles of grant as the land would have gone purchased with such money, for equity considers that as done which ought to be done.

If two persons make a loan of different sums and take a joint mortgage for the security of both debts, they are not joint tenants, but tenants in common, if the jius acressendi consequently does not take place.

And such is the rule even if they foreclose the mortgagee.

Of the interest of the mortgagor's wife in the premises.

As the wife may have her right of dower by joining her husband in a joint or common reversion, so in the same way she may incumber it with a mortgage.

Then her right of dower is then postponed to the mortgagee; but her right of dower is paramount to that of the mort-
Mortgages.

When the mortgage is made by the husband alone, of lands mortgaged by the husband, the mortgagee may redeem if the representatives shall attain possession until they are repaid the whole of the principal and interest which she has paid for the redemption. This supposes a case in which she has not joined to redeem, in which case she must bear the proportion of the burden, i.e., 1/3. This rule holds only (says Mr. Gould) when a jointure is made by the husband after the land is mortgaged, i.e., the mortgage is prior to the jointure.

This rule holds when the jointure is in an executory, it is not executed by a deed of settlement, and if after such executory jointure the husband mortgaged to one without notice, she has only the right of redemption.

If after mortgage she joined in a fire, a mortgage, she must in redeeming pay her proportion, i.e., 1/3, if she do not redeem during her own estate she must keep down the interest.

If the mortgagee gives further credit on the same security, to the mortgagor not having notice of an intermediate jointure, he may take his last sum and hold for the whole against the jointure.
Mortgages.

But a jointure in mortgaged lands, settled after marriage, and merely voluntary, i.e. without consideration, is void against the subsequent mortgagee even if he had notice.

2d. 94. If a husband before marriage gives his wife a bond, conditioned to leave her a certain sum at his death, and she survives him, she may redeem his mortgage in the character of a creditor.

2d. 99. If a husband takes a mortgage in the joint names of himself and wife, and he dies first, he is entitled to the whole of it, if there are assets to pay debts without debt; but, if the assets are insufficient to discharge the debts, a mortgage in fee the mortgagor's wife is not entitled to dower in an equity of redemption; therefore, as dower and dower in the husband's equity is considered in the nature of a joint tenancy of which there can be no dower. 2d. 137. But a husband may have equity in his wife's mortgages. And in Connect. it has been determined that a wife may have dower in the husband's equity.

2d. 133. In Eng. the wife is entitled to dower in the reversion expectancy on the determination of the estate or term mortgaged, for the determination
Mortgages—

Of Mortgages by husband and wife of her freehold and his interest in the mortgage money due to her.

A husband by marriage obtains no other interest in his wife's estate of inheritance than a freehold during their joint lives, unless they have issue in which case he obtains an estate for his own life by the curtesy. The cannot therefore make a mortgage of her freehold for any longer period than that for which he holds. If therefore he should mortgage the estate for five hundred years, it would cease on his death.

At common law the rule is the same, even if the wife joins her husband in a deed, of her own volition.

In bono, the husband of wife may by their joint act, i.e., by deed, alienate his inheritance and of course they may freely mortgage it.

And in case if the wife joins her hus,

And in laying a fine, either for the purpose of law, or on mortgaging her inheritance, it will be binding,
Mortgaged

But acts of the wife with her consent amounting to a
new grant or resumption will give validity to a mortgage
made by her husband of herself or by her husband alone
during coverture to the mortgage by deed. And this
is not on the ground of her deeds being voidable, for her
contracts are absolutely void, with one exception (where
she makes a lease for years) but on the ground of its be-
ing a new execution or resumption.

If the wife joins in a fine to secure a mortgage of her
estate, and the mortgage is foreclosed, the estate will be hol-
den by the mortgagee not only for the original sum borrowed,
but if a further sum be borrowed it will also be hol-
den for that.

The principle on which the courts have
decided is that the mortgagee has by the mortgage the le-
gal estate title. In addition to that as much equi-
ty as the wife or heir has to be restored to the per-
sion, if where the equity is equal the legal title shall
prevail.

But on the other hand if the wife's land is mort-
gaged to secure the husband's debt his personal estate
shall first be applied to the discharge thereof. She
has lent a fine, even in exclusion of the claim
of his legatees, for the mortgage.

The act being originally the debt
of the husband, the wife consenting to charge her lands
with it, she does not make it less so than it was be-
fore.

The following it will follow, that if the wife
joins in incurring the jointure to secure her husband's
debts, she does not absolutely part with it, but will re-
possess it upon discharge of the incumbrance.

If the wife joins in incurring her own es-
tate to discharge her husband's debts, she dies first, she
will as to her heirs be considered in her estate standing
in the place of the mortgagee and entitled to the
benefit of his estate, for she is virtually considered
as a purchaser of her husband's estate, the heirs of
her estate is liable to the mortgagee.

If a subordinate mortgagee marries her
husband upon the marriage makes a settlement of his
own estate upon her, in consideration of her fortune, this
settlement will be considered as a purchase of the mort-
gease. If she dies first it will go to him, but if he dies she
living it will go to his representatives and survive to her.

But this rule does not hold in case of a voluntary settlement
after marriage, for whereas 2. catchy the husband does not
in this case become a purchaser of that accession of fortune
and the ground upon which he went upon was that there was no
mortgaged.

contact on the part of the wife, for often marriage she was
invaluable of contracting.

If a settlement is made upon the wife before mar-
riage, but in consideration of part of her fortune only, it
will do away the general presumption that it was in con-
sideration of the whole, and in such case it is of particular
that what is not specially conveyed to the husband will
survive to the wife.

And when according to the above rules an actual settle-
ment is made by the husband would amount to a purchase
of the wife’s fortune; an executory agreement will a-
mount to a purchase, even tho’ the wife should die be-
fore an actual settlement has taken place. If in this
case the husband had been guilty of no default or neglect,
the portion will go to the husband or his representatives.

But it is to be observed that this executory agreement
would be enforced against him in favor of the heirs in
a court of Chancery. Ch. 312. 1 Eq. cl. 70.

The settlement made by the husband in consideration
of the wife’s fortune falls short, or does not amount to what
was agreed upon, it will in reason be considered as a pro-
ceed, but she will hold the whole against the hus-
band’s creditors.

Further where the wife is mortgaged the
Mortgages

Par. 352. Husband is entitled to the mortgage as he is to his causes in an
action of trespass, if he reduces them into possession during coverture.
And an alienation or assignment of the wife’s mortgage by the husband (she being mortgagee) will
be void, if made for a valuable consideration for this act is considered as equivalent to reducing the mortgage
into possession. But if the alienation or assignment is made by voluntary, i.e. without consideration, the assignee
has no higher claim to the estate of the wife than the husband or his heir could have had, had there been no
assignment made.

If the husband creates a get possession of the wife’s mortgage, so that she is obliged to apply to a court
of chancery for relief, such court will not interfere to
as to take from them any legal advantage which they
may have acquired. As in case of an assignment by
commissioners of bankruptcy. They have the evidence
of a legal title in themselves, for an high an equity as
she has, for the husband might have disposed of it to his
creditors.

On the other hand if the wife herself or her tustees have possession of the title deed equity will not inter-
fere in favor of his creditors, when there is no claim
ed at law against her.
Mortgages

But if the husband will make some reasonable division in her favor the court will in tenue, and good conscience thinks that the bankrupt's creditors have the same right.

...But the court of equity will not interfere against the wife in favor of the husband's assignees, it will be in favor of a special assignee of the mortgage by the husband for a valuable consideration. It will not interfere in favor of creditors who have a general lien on the husband's property, but only in favor of those who have a special lien...

...A mere executory agreement by the husband to assign for a valuable consideration his wife's mortgage as security for a debt with a delivery of the deeds will bind the mortgage for tanto i.e. to the amount of the debt for which the assignment was made.

Out of what funds mortgages are to be paid...

There are several general rules on this subject which are important, and which, if thoroughly understood, will greatly elucidate the particular causes which have been determined.

It is a general rule in the}
Mortgages.

It is, that the fund which has been increased by contracting a debt, is in the first instance to be charged with the payment of such debt. Thus, the mortgagor's personal property, having been benefited by the debt, it is first to be applied in its reduction.

If there are personal assets, the "eq. ad compendium" in Latin, to advance the redemption money for the lien, in lieu of the heir. If there are assets the heir does not have to take the estate even once. This proceeds on the above rule laid down:

This rule is general is not universal for it may be qualified and affected by the intention of the mortgagor.

Further, if the mortgagor should sue the heir of the mortgagor upon the bond, which in Eng. is usually given, the heir may in chancery compel the

Ct. to advance the assets if satisfy the demand in suit.

The devisee of the mortgagor who is quasi an heir is entitled to the same privilege; he is not indeed to use the money but guard how he is trustee for his

estate among his transactions relations. It must still
Mortgages according to the general rule be applied to the benefit of the heir, i.e., the mortgagee's claim is a debt of the estate, and the claims of creditors are prior to those of legatees, they being mere volunteers.

But if the testator directs otherwise, the preceding rules do not hold, i.e., the heir or devisee takes the land view once more.

So is the principle of the prior liability of personal property pursued, that even if the real estate is charged generally with the payment of debt, such charge renders it liable only in case of a deficiency of assets.

However, the real estate be so charged as to make it manifest that the mortgagee's intention was that it should be applied in the first instance, it will be so applied. E.g., land devised to A. to be sold for the payment of debts.

To apply this rule—The mortgagee devises his real estate to J.S. and his personal to P. A. and dies leaving debts unpaid; now all the personal estate is first to be applied to the redemption of the mortgage, albeit of a contrary intention is clearly manifested.

In Connecticut these rules are not so important as in Eng. for here the real property in general is...
Mortgages

...ends to the same persons who enjoy the personal and heir all the property of the testator or intestate is liable for all his debts, whether due on specially or simple contract. It is understood however that personal is first liable.

This general rule is never suffered to operate in favor of the heir, to the prejudice of any creditor, the his debt is by simple contract nor even against general legatees.

The rule last laid down seems to clash with one laid down before, respecting the liability of personal property unequivocated among the testator's relations or of the testator. Indeed it is plainly contradictory of it, thus, this "exemption" is not taken notice of by any lawyer. It might be reconciled on the hypothesis the heir is exempted to among the remotest relations of the testator was entirely void on the ground of uncertainty, and of course as if there was no request at all. But this could does not positively lay it down that this is the proper explanation, because nothing in the reported case expressly warrants it, and if it was void on the ground of uncertainty, the report of the case would probably have noticed it particularly.
Mortgages.

It seems obvious that Mr. Pinkel uses the word general in contradistinction to residuary legatees. As distinct from specific legatees.

To return to the main subject. If the personal fund is exhausted by general creditors,

owing to the simple contract creditors and general legatees,

interest may arise upon the real estate, pro tanto, for so much as the special creditors have taken from the personal fund, so that in equity simple contract of general legatees are preferred to the heir.

This rule holds also in favor of specific contract creditors of legatees against the mortgagor's devisee; unless the devise is specific, in which case it does not hold as to legatees but merely as to creditors by simple contract, for a specific devisee is preferred to a specific debtor, simple contract creditor, but not to a general legatee.

Where the devise is taken, and the heir of the mortgagor is made to take by purchase under a devise, he stands in the same situation as a common devisee, specific or general as the case may be.

By the devise of being taken it is meant such a disposition of the estate, that the heir cannot take it as heir, for if the estate be so disposed that the heir...
Mortgages.

Might take it as heir, I must take it as heir, for

he must be under his better title. In case of a de-
scentor being broken is when a tenant in fee in Eng.
devises to his eldest son (who is heir) in tail.

By sect. 292.

But notwithstanding the general rule, the heir of the
mortgagor is not entitled to the use of such of his ancestor
personal property as is specifically devised, bequeathed, or
by money of it he so situated that it can be identified.

may be specifically bequeathed.

To render a bequest of personal property specific

2602.422 it must be clearly, certainly, if exactly identified or de-

fined.

In pursuance of the general principle, it is ac-

1140.336

1060.336 and the mortgagee devises his estate to one, "with

the intmbrances thereon" yet the personal fund is, un-
der the preceding qualifications, liable to dismember.

The real estate bequeathed unless there are other words

which clearly manifest our intention that the devisee

shall take the estate eno. - The words "with

the intmbrances thereon" being descriptive of the

particular estate bequeathed are not constituents re-

strictive of the interest devised.

2602.429

And if it clearly appears from the instrument

deviser that it was the intention of the devisee that
Mortgages

This devisee should hold the estate dismembered even the heir must pay the inrem佘ness out of the
real property, after the personal estate is exhausted.

If the mortgagee sells his equity of redemption, the
hee of the devisee or purchaser has no claim upon his
the purchasers) found to dismembrane it for the per-
sonal funds of the purchaser has not been benefitted,
may it has been diminished and the real estate en-
larged.

The rule is the same as to the devisee of such
purchase. So also if the money due on mortgage
is not the debt of the owner of the equity of redep-
tion, the estate mortgage shall itself on the death
of the owner bear the burden; and the heir or de-
vicee of the owner shall not have the aid of his
personal fund, but if he will have the bond shall
dismembrane it himself. In this case it is evi-
dent that the assets of the owner of the equity have
not been benefitted and of course they are not lia-
bile.

Of the payment of interest of money due on
mortgage

In New the legal rate of interest is fixed by Stat. of Conn.
Mortgages

Part 21. At 5 per cent per annum. In Can. it is 6 per cent.

It is a general rule in all contracts, mortgages as well as others, that the receiving more than lawful interest makes the contract void. The receiving more convicts the penalties of the Statute.

But this the receiving more makes the contract void it does not of itself involve the penalty—nor does the receiving more of course render the contract void.

D. Houghe has said that if a mortgage be made per 5 per cent and the mortgagee receives 6 per cent the mortgage is void. In this he must intend the reception of more in pursuance of the original agreement between the parties or a receiving at the time of the loan, which is a reservation.

The same chancellor has also held that a deed given in Eng. mortgaging an estate in the west Indies (where 1/2 is allowed) is vicious if more than 5 per cent is advanced reserved. Then he must allude to cases where the payment was to be made in Eng.

The chancellor an arbitrary distinction has been adopted between an agreement to pay 4 per cent interest.

With a clause of entailment to 5 if the mortgagor does not make punctual payment, and an agreement that 5 per cent be paid with a
Mortgages

cause of reduction to 4 in the event of principal payment. The latter agreement is enforced in C.P. the former is not, for says the Court it is in the
nature of a penalty. This distinction says Mr.
Gould is frivolous, and without a real difference
and subject to perpetual evasion.

It is agreed that the covenant to pay the addi
tional one percent is good in equity and it is
not expressed to be necessary that the covenant be
in a separate deed from the mortgage.

An agreement to raise the interest from one
sum to another (not exceeding lawful interest)
in case of non-payment is good in chancery if an in
dulgence be given by the mortgagee to the mort
gagor and such indulgence is the consideration
in the contract, for in this case the agreement
is considered as a liquidated satisfaction for such
indulgence and not as a penalty.

Compound interest is not regularly allowed either in
Chancery or at Law. Plut. 116. 2 Chit. 331. 1 B.R. 662.

But if the mortgagee assigns his interest with the
concurrence of the mortgagee all the money paid by
the assignee (including interest as well as prin
cipal) shall he accounted principal and draw in.
Mortgages

This is in the nature of a contract between the mortgagor and assignee that the latter shall pay the debt of the former.

But if such assignment be made without the assignment commence of the mortgagor, the assignee has no claim for more interest than the mortgagor had, for this is not such a contract between the mortgagor and assignee as in the last case.

The assignee will not draw his compound interest.

It must be the assignment by bona fide and the money actually paid for a mere collateral assignment to obtain compound interest is of no avail.

When on the assignment by the mortgagor an account is taken by the assignee of mortgagor of the money due from the mortgagor this account is not binding upon the mortgagor.

It was ever held that the mortgagor should have compound interest when the estate was paid. This is now exploded. The report of a Massachusetts case in Shaw, computing interest on the suit pending between the parties, converts that interest into

Principal from the time the report is confirmed by the Shaw, for such report so confirmed is in the nature of a judgment at law.
Mortgages.

But a master's report when made against an infant does not in all cases convert the interest into principal.

At never does when the infant is defendant in a suit for in that case the infant is never guilty of any neglect in not having previously satisfied the claim of the mortgagee according to the master's report.

If however the infant is plaintiff in whom the cause made up against him by the master does turn the interest into principal, for in that case the Deft. is driven into debt by the infant the decree passes as to him in invitiation of he may take what advantage he is able of the situation in which he is placed by the Deft.

Again if an infant intitled to the equity of redemption agrees to pay compound interest for the purpose of preventing some substantial benefit and does actually receive it he shall be bound by such agreement.

A mere signing or acknowledgment by the mortgagee that so much is due on interest, does not convert that interest into principal; for interest is not to be computed on interest except after a report of a master confirmed.

And express agreement at the time of making the mortgage to pay compound interest is not binding.
Mortgages.

So it is treated as privity of prescriptive, but often interest has actually accrued such agreement would be good.

1. The tenant, for the equity of redemption, may compulsorily the remainderman or reversioner to keep down the interest during his own possession. Indeed the remainderman may indirectly compel him to redeem by purchasing in the incumbrance himself, and then if the tenant will not redeem he must abandon the possession.

2. On redeeming the tenant must pay one third of the original debt. The remainderman must pay the remainder 2/3.

But the tenant in lieu of the equity of redemption the in possession is not at all compellable to keep down the interest during his own possession neither by the reversioner remainderman or his own representatives, for he has all those in expectancy in his power, and may forever conclude them by leaping a fine or suffering a common recovery. Indeed his estate may by possibility last forever and certainly must endure while he has heirs of his body.

3. If such tenant in tail be an infant, his guardian must keep down the interest during his minority, for the infant while such cannot have the remainder; unless it be under the king's privy seal which will
Mortgages

never be used for such a purpose.

If however the tenant in tail in fact does keep down the
interest, the remainderman or reversioner shall have the
benefit of it. The reason of this is that there can be no
proportion established between the value of a tenant in
tail and an absolute fee.

If the first mortgagee takes possession and allows the
mortgagor to take the profits, without paying them
to the payment of the interest, still in favor of a second
mortgagee, the profits thus taken shall be applied to
the payment of the interest on the debt due the first
mortgagee.

When a bond is given to the mortgagee, the holder
of the bond has a right to receive the whole debt, prin-
cipal and interest, and the giving up of the bond extinguish-
ates the debt. But the holder of the mortgage deed has
no right to receive more than the interest. The giv-
ing up the deed will not extinguish the debt, but
the mortgagee is still liable for it to the holder of the
bond—indeed it is difficult to assign the reason why
the mere holder of the deed should be entitled to rein-
the interest, but it probably arises from the fact, that
she has no power to obtain the possession of the prom-
ises.
Mortgages.

A tender of the money by the mortgagor after the day of payment, has stopped at law. But in equity, if after advertisement the mortgagor makes a tender to the mortgagee, which refuses to accept it, if the mortgagor has given notice of his intention 6 months previous to the time of making the tender, the mortgagee loses his right to interest from the time the tender is made.

Such tender will also give the mortgagee the right to recover interest of the deceased of the mortgagee if probably of his common assent.

But in this case the mortgagor must make oath that he has received the money, from the time of making the tender, ready to be paid to the mortgagee, if that in this interval he has derived no advantage from the money. This is in analogy to the rule of law respecting tenders.

But the tender of a bank bill has been decided to be sufficient, when the mortgagor had no objection to receiving it, on the ground of its not being a legal tender, of the mortgagor offered to exchange it, if the mortgagor wished. This decision is questioned by Powell.

It is a general rule that the tender thus made must be wholly legal, or it will not bar the mortgagee right to interest.
Mortgages

The debt due being a sum in gross, must regularly be

tended to the person of the mortgagee. The rule contains
places cases in which there is no place appointed at
which the payment is to be made.

On the other hand if place and time one appar-
red, the mortgagee cannot make a tender at any other
place; but a tender at the time and place is good,
even if the mortgagor is not present.

In equity if no place is appointed, the mortgagor
give notice when he will make payment, a tender at
that place is good, if the appointment be a reasonable
one. No objection be made to it at the time of giving
notice.

And it has in one place been decided that when
no place is appointed, a tender at the house of the mort-
gagor is sufficient. This indeed was a case when
the mortgagor kept out of the way, to avoid a tender
from the mortgagee.

Yet if the mortgagee has doubt
as to any legal question arising from tender he shall
be allowed, a reasonable time to satisfy himself by
counsel.

So also when a tender is made by a person
claiming the equity of redemption he shall be allowed.
Mortgages.

Time to investigate the fact whether such claimant is the real owner of the equity.

Dowel says generally that interest on a mortgage may be altered by a fraud agreement, but the case to which he quotes does not support the proposition; that was merely a case of substituting an equity, which may always be done by fraud.

If however the mortgagor had been paid could the rule would undoubtedly be otherwise.

The method of accounting.

A mortgage being a pledge, is not an alienation of the land. The mortgagor has a right to the profits until he takes possession. Of course the mortgagor remaining in possession is not bound to account with the mortgagee for the profits, if an additional reason is that the debt due on mortgage bears interest.

But the mortgagor must account for profits received during his possession i.e. they are to be applied first to the payment of the interest and secondly to the reduction of the debt due from the mortgagor.

The mortgagee in this case is in the nature of a
Mortgages

If the mortgager manages the estate himself, has no allowance for his care or trouble — and all that is meant by this is that as bailiff, he is to have no compensation for his pains; for he is certainly entitled to the clear annual value of the rents of profits, subducting the labor and expense employed in producing them.

Even then the mortgager, contract with the mortgagor to allow him instead a compensation as bailiff. Such agreement will not be enforced in Chancery.

But it is laid down that if the mortgager con

r. 316.
5174. 57.
2. 12.

pays a bailiff he shall be allowed for the compensation made to such bailiff. So God this would not apply the in the Southern States it might. Why.

1 Eq. 16.
328. If a mortgagor in possession assign his mort
316. 65.
2 12.

gage to a person in solvency, he shall be liable for the profits which accrue after, as well as those which accrue before the assignment.

1 r. 175.
4 76. The mortgagor is to account with the mort.
1 EQ. 16.
328. mortgage for those profits only which he has actually receiv
ed, unless it appears that he might have received more but for some fraud or wilful neglect or default in himself.

But if the mortgagor having taken possession.
Mortgage

keeps the incumbrancers out of possession, he will

be charged in favor of those other incumbrancers, with

all the profits he might have made... Prov. 46%

It is to be understood that he is not bound unless he has

notice of the subsequent incumbrancers.

If the mortgagee out of possession permits the

mortgagee to make use of his (the mortgagee's) legal

title to keep the incumbrancers out of possession, he

will in that favor be charged with the profits at which

they might have had possession without his interference.

This is called "leasing" or "leasing" the legal title in the

mortgagee, by which he is enabled to fence his interest

from the attacks of subsequent incumbrancers.

But if the incumbrancers subsequent were voluntary

on the part of the mortgagee i.e by his own act, it

must by operation of law, he cannot fence against and

subsequent incumbrancers.

If the mortgagee has assigned his interest a bill

brought in redemption against the assignee must

join the assignor mortgagee as a party, for he must

account for the profits which he himself has received.

If there are several mortgagees the amount sta-

ted between the mortgagee of the first mortgagee will

be conclusive on the rest unless there be some fraud pro-
Mortgagor.

This contemplates merely the mortgagor of the first mortgagee, if not the amount between the mortgagor and any subsequent mortgagee.

But an account made up between the mortgagor and his assignee of the debt due from the mortgagor to the mortgagee will not conclude the mortgagor.

After a great lapse of time, a several assignment of the last assignee is not bound to account for the profits of his own time, if they shall be set off against the interest that had previously accrued.

If the mortgagor after having endeavored to defeat the title of the mortgagee at law, exhibit a bill to redeem, the expenditures of the mortgagee in defending his title shall be allowed in accounting.

There are two methods of accounting. 1st. By annual rents. These are an application of the surplus of the annual rents of profits over the interest to redeem the principal. These are never made except when the profits considerably exceed the interest. If when allowed it is very advantageous as to the mortgagor, operating in a manner exactly the reverse of compound interest.

2. By bringing all the profits into one aggregate sum of all the interest into another, or subtracting the less from the greater.
Mortgages

Of Foreclosure.

As soon after forfeiture will issue a redemption for the benefit of the mortgagee, so also it will issue a foreclosure in favor of the mortgagee, for the great object is to distribute justice in equal proportion to each party.

22st. 198. A decree of foreclosure is a decree that if the mortgagee does not pay the debt within a time limited by the Court, he shall be forever barred of his equity of redemption. This decree is irreversible except under special circumstances; it is not preeminent but conditional.

Where a reversion is mortgaged the usual practice is not to decree a foreclosure but a sale of the premises. This rule is in favor of the mortgagee and perfectly equitable for the reversion may fall in at a very distant period, if be of no great advantage to the mortgagee, unless be sold. Besides it is commonly more valuable to the owner of the estate than to any other person.

There are several instances of foreclosure in 16 Nov. 368, 2 Bent. 365, if there are several mortgages they must all stand as to the bill.
Mortgages.

A foreclosure will never be decreed till after petition.

It is an error in the cases, that on a bill for foreclosure the
title of the mortgagor cannot be investigated but must be
settled at law. This is very incorrectly expressed for on our
application the court whether the applicant has the insubstantial
title to the interest of a mortgage may be investigated—
The meaning of it is, that on a bill brought to foreclose
Chancery will not aid the legal title of the mortgagor.
The bill is brought for the purpose of proving the equity
of redemption. If for that purpose only, if on this bill
Chancery can do more than to order a foreclosure, or
deny a decree for that purpose—

A mortgagee may pursue all his remedies at the same
time, of the perjury of one is not pleadable in bar or abate-
ment to the others.

In bar, after judgment is obtained on the bond
or personal security of the mortgagor, the mortgagee may
levy his execution upon the equity of redemption I have
it appraised to him— Not so in Eng. for there the
equity of redemption is not legal ejectment—

Under special circumstances Chancery will
grant an injunction against an action of ejectment
brought by the mortgagee—

Chancery may refuse a decree in a foreclosure where
injustice would evidently be the consequence of

If the mortgagor's heir brings a bill to foreclose

So without any demurrer if it ap-

But unless the mortgagee is of a chattel inter-

But if the heir of the mortgagor has obtained a fore-

If the personal representative of the mortgagor was not a party, the heir may redeem the

Pars. 479.

38th. 267.

38th. 267.

Sec. 680.

Sec. 680.
Mortgages.

If the heir does not pay the debt to the personal representa-

tive, he may be compelled to convey the land to him; for the prin-
cipal i.e. the debt due on the mortgage goes to the personal repre-
sentatives of the mortgagee. If the incident, that is the mort-
gage or security to the heir,

In a decree for foreclosure the time allowed
for the same mortgagor to redeem is computed by calendar months.
A decree to foreclose a tenant in tail, is binding up
on this term in tail of all in expectancy.

But if these be tenant in tails for life of the

equity of redemption with remainder over, the re-
mainderman, is not bound unless he be made a par-
ty to the bill. The reason of this distinction is proba-

bly, that the tenant in tail has all those in ex-

dentity completely in his power, which the ten-

ant for life has not.

If there are several incumbrancers, who

are not made parties to the bill for foreclosure, still

the first mortgagee may foreclose such as are made

parties to the bill. But those not made parties
to the bill are not foreclosed if may afterwards
redeem.

When all the interest of the mortgagor is de-


cised away the devisee may bring a bill to redeem
without making the heir of the mortgagor or any party to
the latter has no interest in the mortgagee—

A decree may be served against an infant,
but he has a day given him in court after he attains
at full age, to show cause against the decree. This
day in Court, as it is termed, consists of 6 months after he
shall have arrived at full age, if proof to appear I show
cause shall have been served upon him—

Such a decree then is not in the usual form for
it contains a clause allowing the infant his day in court.

If within 6 months after having arrived at full age
and having proof served upon him, he does not show—
cause against the decree it is binding upon him, but
if he does show cause, he may on such showing put
in a new answer, if made a new defence—

In this case however the infant is not allowed to go
into the account anew or of course to redeem or pay
ment of the money— This privilege extends no further
than to enable him to shew that the decree was unew
ness or unjust & to enable him to take advan-
tage of that which is known at the time of mak-
ing the decree would have prevented its being made—

Indeed it is said that the proper remedy of the mortgagee
when an infant is aware of the equity of redemption
Mortgages.

is to have a sale prior to foreclosure of the lands or deeds.

This kind the infant absolutely is perfectly equitable,
for the surplus after payment of the debt belongs to the
infant.

The same rule in her ancestor mortgages lands of
the equity of redemption vests in her after convinture
a decree obtained against her for foreclosure is pre-
emptory. If of course she has no say in court to shew
cause against it for her incapacity is a voluntary
and not necessary one. If she has given her author-
ity to her husband, if it appears however that any
injustice has been done her, she may avoid the de-
cree after convinture.

If the mortgagor has been guilty of any fraud or
unfairness in obtaining a foreclosure, the court will
open the foreclosure which is a revival of the equity
of redemption. 9 Nbr. 163. 1 C. P. 602. 607.

Thus if the mortgagor obtains a foreclosure after a judgment
creditor has given him notice of his demand & tendered
him the money due on the mortgage the court will
open the foreclosure. If however no notice is given,
the foreclosure will not be opened. 2 C. P. 1206.

When a foreclosure is opened in favor of a subsequent
incumbrance, the first mortgagee is allowed all his
Mortgages.

expenses in obtaining it. This rule thus laid down without qualification, seems unreasonable when the first mortgagee knew of the subsequent incumbrance.

Under special circumstances the time limited to the mortgagee for payment may be enlarged. As where the mortgagee without any fault or wilful neglect must be greatly a sufferer by a foreclosure.

Indeed one foreclosure has been opened enlarged several times five times or even when the mortgagee had entered into a new mortgage.

A foreclosure is never opened in favor of a mere volunteer, that is the one who has the equity of redemption without having paid any good or valuable consideration. As a devisee of the mortgagee.

If the first mortgagee obtains a decree against all the parties concerned, if afterwards devised the land to the mortgagee the foreclosure is if so fit dissolved.

The reason of this rule obviously is that the interest of the mortgagee in the lands is vested. If the mortgagee due to the subsequent mortgagee is in the nature of an equitable estoppel.
Mortgages.

So also if the mortgagee having obtained a foreclosure,
317. upon his security, or his bond or note such suit

is a waiver of the foreclosure. In boro. a foreclosure
with prejudice taken is a satisfaction of the debt. This
however is a decision not conformable to principle.
2 Eq. 477
599. the mortgagee has acquiesced for several years in the 
11th same section of the mortgage under the foreclosure. 2 Eq. 1111.

In Eng. it is the practice when the mortgagee does
not pay within the time limited in the decree, to make
it absolute by a further order. In boro. it becomes absolute
of itself.

In Eng. a mortgagee may obtain a foreclosure how
ever small his debt compared with the estate. In
boro. the debt must amount nearly to the value of
the estate, or no decree will be granted. Hence one
principal ground of foreclosure does not exist in boro.

In boro. a foreclosure is seldom heard. Mr. Recce
recalls only one instance, of that where the mortgago
on his way to pay the mortgagee paid debts within the
time limited fell sick upon the road.
Of Estates in Joint-tenancy, coparcenary, and common.

Where an estate is held by an individual only, it is termed an estate in severalty, in contradistinction to an estate held by a plurality of persons.

There are three kinds of joint-estates of which we propose to treat in this order. And

I. Of an estate held in joint-tenancy. This species of estate never arises by mere out of law; as by descent, but always by purchase. It is distinguishable from other joint-estates by this criterion: An estate given to more than one grantee, is of course a joint-estate, tenancy, unless the deed contains words expressive of the intention of the parties that it should be an estate in coparcenary, or common.

It is observable that in the state of New York, this rule is altered by statute, where every estate held jointly, is construed to be an estate in common, unless explained to be in joint-tenancy or coparcenary.

The properties of an estate in joint-tenancy are: (1) Derived from its several, which are four: Unity of Interest, Unity of Title, of Time, and of Possession.
Joint tenancy.

1. By unity of interest is meant that it be one and the same quantity in all the grantees.

2. By unity of title is intended that the estate must be vested in one of the donees out of theanties in all the grantees.

3. By unity of time that it must vest at one and the same period in all the grantees.

4. By unity of possession, is meant that each owner shall have possession of the whole estate, as well as every part of it.

From these units result many consequences and incidents to the estate. Rent received or a lease to be paid to one joint tenant shall be the benefit of all.

As in surrender, a lease of a grant is made to one of the grantees, all such made by one, shall be the benefit of all. Indeed any act respecting the joint estate, the act of one is the act of all.

Thus also by the English law no suit can be joined or be joined without joining the other. Not so in law, nor in equity, for here a custom has grown up, which has been sanctioned by the law, that one alone may sue a stranger.
Joint tenancy.

Jure, when the owners may be separated from each other at a great distance in this widely extended country.

One joint tenant cannot sue another in the suit for
each has a several right of entry. But neither has a right by himself to do that which may injure or destroy the right of his
cointenant. On this principle by the statute 1632, 22
it is enacted that one joint tenant may sue another in waste.
So too by Stat 17 & Ann., an action of account against
which would not lie at Com. law unless one joint ten-
ent had made the other his tenant over.

This account will be fairly taken, if the tenant in possession is com-
pellable to account for the surplus over & above his share
of the net proceeds which he has received, and he is answer-
able for that only.

By the Eng. law there is incident to all es-
tates held in joint tenancy, a right of survivorship;
"jus survivendi."

This doctrine is rejected in the meancurtil
law. If in case of joint ownership of stock on farm in
Eng. and in Com. it is entirely exploded. —

One joint tenant may at any time convey his estate
as a third person (which makes a survivor,) in Eng. however
he can never devise it. But in Com. a joint tenant may
devide his estate.
Joint tenancy.

At common law no real estate was devisable, but in the Stat. which rendered it so in England, estates held in joint tenancy were expressly excluded. This was done on the ground that from the very nature of an estate in joint tenancy, an estate rendering it devisable by one joint tenant would be insuperable. For say the Eng. books, the title of the surviving joint tenant takes effect instantly upon the death of the other, if this having more equity than any other title the law has, would exclude the idea of a title being given to the deceased?

By the Stat. of Wills in 1792, it must otherwise hold. In those States which recognize the jus sucessionis, it would be a serious question under such a Stat., whether an estate held in joint tenancy could vest in the devisee. Mr. Pomeroy thinks that it would. See supra, 2 Bl. 186. 2 Dall. 185.

An estate in joint tenancy may be severed in various ways or modes. It by agreement of the owners. Before the Stat. fraud of prenuptial this was done by making a practical division, partly, but since the enacting of that Stat. (the Stat. of frauds of prenuptials) all agreements of this kind must be in writing. It is therefore necessary after the Stat. is made practically, that mutual deeds of quit claim pass between the joint tenants...
Joint tenancy.

27. By common law no one joint tenant could compel the other to make partition of the land. But by Sect. 31 Ton. 3 c. 14, 32 Ton. 8 c. 32, a severance may be compelled by one joint tenant. This is done by bringing a suit of partition. The mode of accomplishing it is as follows: A joint tenant wishing to compel a partition states to the court (either of law or equity) that the estate is held in joint tenancy, and that he wishes a severance.

In this the court orders a suit to the Sheriff's command, and him to take a jury of 12 men to make partition. This is done, and, unless the parties object, is final.

In Cor. the Sheriff takes these men only, if his return when once made, is of course proved and recorded and at all events conclusive. This is a great defect in the Cor. code and needs correction.

28. An estate in joint tenancy may be severed by an alienation of one of the joint tenants which destroys the unity of title. So by destroying any one of the constituent units, the estate in joint tenancy is itself destroyed. — 2 Blun. 185.
This estate is always created by descent, if happen when an estate of inheritance descends from an ancestor to more than one person. At least, that includes descent only to their legal representatives, to whom the estate descend as to heirs, are termed co-partners or more briefly partners.

By the custom of one kind lands descend to all the male alike, who of course take as co-partners.

By the law of Conn. all the children inherit as co-partners, female as well as male without distinction.

Estates in coparcenary must have the unity of interest, of title, of possession, in the same manner as estates held in joint tenancy. The unity of time, however, is not required. For if A dies leaving A, B, his heirs tenants in common, coparcenary, and C. dies leaving C, his heir B. and C. are still tenants in coparcenary, the the estate vested at different times. Yet the descent must have been cast at the same time.

The coparcenary can maintain an action of waste against each other. Partition might be compelled a coparcenary.
Tenancy in common.

The only unity necessary to constitute a tenancy in common is that of possession. There need be none of time, title, or interest. But the interest of tenants in common is joint as to its possession, merely, every estate held by a joint tenancy, not being a joint tenancy and not coming by descent, is because a tenancy in common.

Wherever an estate of joint tenancy or separate is dissolved, so that there be no fraction found but the unity of possession continues, it is converted into a tenancy in common.

It may also be created by an express limitation in a deed, when the conveyance is specifically a tenancy in common.

Each tenant has the whole of an undivided half or moiety of a tenancy in common if not an undivided moiety of the whole as in joint tenancy; but no one knows it unless severally. They all therefore occupy...
Tenancy in common.

Tenants in common are compellable to make partition by Art. 69. There is no joint ownership in a tenancy in common, if the tenants may sue separately as each as well as both, or in other respects it agrees with other estates held joint.

Lands to be given to A. & B. "to be equally divided between them" have been held to be given in joint tenancy when the expressions were used in a deed, if in common when used in a will. Mr. Beece supposes the words ought to be construed alike in both instruments.

It is laid down that where one tenant in common is forcibly turned out of possession he may bring an action of ejectment against his co-tenant. It is to be remarked that he can do this even for the usurpation of getting in to possession himself, not for that of ejecting his co-tenant.

One joint owner of an estate may hold for so long a time as to gain an exclusive title to the estate against the other joint owners, as in common cases, the statute of limitations does not run against this species of estate. This can happen only where the tenant in possession holds it by a possession adverse to that of his co-tenant.

See 67. Com. ante, page 172 to 174, inclusive. 

See respecting adverse possession the act of authority.
Tenants in common in Eng. must bring several suits
to recover their share of the estate held in common, I cannot
join. But in Connecticut the courts have decided
that they may join in being separate actions at their
election. For all trespasses committed on their land they
must join to recover damages; I cannot sue separately.
To recover a thing, which in the language of the law
is impaupable, they must join in the action.
Of Devises.

The term devise, when prospect used, signifies a testamentary disposition of Real Property. Wills are the instruments by which a man conveys personal property.

As soon as we are at an end of our consideration of the

Roman conquest introduced the feudal system in its full

rights. The machinery existing at that time is involved in

uncertainty. By the feudal system all alienations with-

out the consent of the Lord were restrained; Tenures as

well as Custom alienations. Indeed the restraint upon alien-

ations in devise continued long after that by alienation

by deed had ceased.

The introduction of the ideal estate

of uses distinct from the legal interest gave rise to the

practice of devising the use. A in the Court of Chancery

Att.uses

27 Term. 3. the custumary gave rise, could compel the trustee to execute

the devise of even the tenants for his benefit. But when

the use of uses had annexed the possession to the use,

these uses being prior to the very land itself, became no

longer Devisable. This consequence extinguished

that kind of devising, first on the Stat. of Wills 32

Vern. 8. c. 1 & 2 & 5. which

gave to all persons his seised of lands in fee simple fe
kept it were in solid tenure) a right to devise with certain restrictions as to the quantity desirable (which were afterwards taken away by the Stat. 6 Geo. 2.) and as to the persons to whom it might be devised. The exp
planatory Stat. of 34 Geo. 3, excepted Thomas, two
sons to 7000 of whose memory. For that in trust does not except Thomas Croft.

There is a remarkable difference between the construc
tion of words in deeds and wills. In a will certain words which if used in a deed would convey no interest, will convey an estate.

In a deed the word heirs is neces
dary to create an estate of inheritance, but in wills any words expressive of the intention of the testator, to cre
ate such an estate will have that effect. The gen
eral rule is, that the intention of the testator is to govern. But this rule may be understood too broadly; for an estate can be conveyed by will, which could not previously have been conveyed by deed. The Stat. of 34 Geo. 3, upon the testator to create a new estate, but merely to enlarge his estates under the previous restrictions which existed upon the alienation of lands by deed.

This rule understood with the preceding qualifications is a very important one in devises, I will devote a great
number of cases which have been decided.

The rule there is nearly this; that in the construction of Bills, technical expressions yield to the intention of the maker of the instrument; in that respect they prevail. This rule
however (says J. Pown) will not warrant executory devises
which are unknown at Rom. law; if they may be considered as an exception to the general rule. It is not the
intention of J. Pown to explain executory devises
in this place, but he will just mention the manner
in which they originated. At Rom. law no estate of freehold could be made to commence in future
if a remainder was limited it was necessary there
should be some intervening estate to support it.

The operation of a will
may be very different upon real or personal estate.
Disturbing J. Pown makes a will giving all his re-
al estate to A. if he afterwards purchase real
property, it will not pass by this devise. But
if he devise his personal estate to A. all he dies by

does, will pass. It will then operate upon re-
al proper from the time of its estate, as personal property from the time of the testator's death.

The effect of a republication of a will is to give it efficacy from the time of its republication, or its effect giving it a new date. A devise that of all real property made before the purchase of other estate of the same description, if republished after such purchase, will operate as well upon the estate immediately bought, as upon that originally devised.

Wills are imperative until the death of the testator. They are therefore amenable to revocation express or implied. Indeed before the Statute of Frauds, they might be revoked by fraud when such revocation was made solemnly of animo revocandis.

No particular form of expression is necessary in a Will. Under the English Statute it has been questioned whether a probate, i.e., an estate depending upon a contingency could be devised. In many it was held that it could not, but must go to the heir, but it is more settled that they are devisable even before the contingency happens.

If an estate were granted to his heir ante vice, his heir would take during the life of the
Writted.

As the word held in this case, is a word of description, it would seem that the same might dispose of the estate by devise. But by the Eng. Stat. Estates for life are not rendered devisable, if it therefore remains as at Cor. c. 3412. (Frauds &c.) Estates new article may be devised by will, having the requisites of that Stat. Pro. 2c. 13.5.

In Cor. all estates are devisable, whereas such an estate would unquestionably be by devise. Even in Eng. in those places where all lands were devisable by custom this kind of estates might be devised.

Subsequent to the original Stat. of Devises made in the reign of 36. c. 8. the Stat. of 29 bar. P. renders the solemnities requisite to the validity of a devise.

This last Stat. has been almost universally copied by every State in the union, with very few upon

variations.

there were a number of cases under

the Stat. of Thomas and before the Stat. of bar. which have been adjudged good since the Stat. of bar.

It was content, between those periods that the whole

Stat. 114.

it shoul be made & executed at the same time;

but it is now settled not to be necessary; for that may be
written at one time & part at another, if the will or devise will be good.

2. In case a man has 3 or 4 or more Wills which contemplate distinct pieces of property, if all they are perfectly consistent with each other, they will all be good; but if the last differs, or is inconsistent with a former, it of course revokes it.

3. In case however where the latter will may seem in some measure inconsistent with a former one and yet both shall stand. As where God makes a Will by which he gives Black are 15 to his heir apparent all his property. Then afterwards marries and wishes to give some estate to his wife, instead of making a new Will entirely, he makes another giving Black are to his Wife for life upon the condition of her paying 600$ per annum. This last will operate as a revocation of the former as to the estate given to the wife.

4. Another point settled was that if a Will may be made to take effect referring to another writing, by disposing of an estate according to that writing, without inserting in the will what that writing contains. As a will conveying to such a person, with property as is mentioned
in a certain instrument of writing, ye.

Judge Pierce will
just remark in this place that a codicil to a will is no
thing more than an addition to a will, which will become
a part of it, it will add, explain, or subtract from,
the will to which it is an addition.

Another point settled during that period is, that
where a man mentions in a letter to a friend the way
in which he should dispose of his property, this letter
shall be his will.

Where the devisee was in such a situation, as to
render the writing of his will at the time present im-
possible, but gives the manner in which he wishes his
property to be disposed of to an attorney, who having
written it, brings it for his approbation to the testa-
ator, asks at that time is incapacitated to approve
it. This was (on the presumption that the At-
torney obeyed his instructions) determined to
be a good will. These questions of difficulties
however sanctioned the 2d. Statute of Wills in 24. Edw. 2.

This statute declares: 1st. That all devises of lands
divisible either under the Stat. of 12. Hen. 8. or by custom
Should be in writing.

2. That they Shall be signed by the devisee himself.
A Will must be subscribed or attested (i.e. witnessed) in the presence of the devisor.

4. The devise must be done by 3 or 4 credible witnesses.

This is all the Statute requires, and as the same requisites are here to be, so very plain, yet almost every word of every one of them have been subjects of litigation. This has made no alteration in the form of draughting Wills. No techniques are necessary. The intention of the deviseer must be perpendicularly expressed.

A Will when made in a foreign County, the deviseer omitting the Statute requisites from an ignorance of them, will be good. But when this ignorance does not prevail, all devises must be made according to the laws of the Country where the land lies.

It is common for men in making devises to give power to the persons to dispose of certain properties. The property here is over the test. Will, in the case we will make by the devisees, or confidential person should omit any of the legal requisites, it will not be good. The Will to the appointed must have the legal requisites.

Judge Price will now consider these requisites in their order. And

1. That the devise shall be in writing needs no comment.
III. That a Deed be signed in the Devisor's or some person in his presence or by his express direction is an essential consideration. What respect to signing what is it? When the Devisor executes his name himself at the beginning of the Deed, it is sufficient. In this case three of the judges determined that sealing was signing within the Statute.

The next question was, suppose a man had written the whole of the Deed, if the Devisor himself had sealed it, would this sealing be a signing within the Statute? It has been determined that it would not.

A new question has been made: -- suppose a Devisor attempts to sign, and from incapacity, cannot.

If will not be good. The rule is that whenever you have complete evidence that the Devisor intended to sign and did not, it will not be a signing, but where he writes his name at top, if there is no evidence of an intention to sign at bottom, it will be a sufficient signing.

III. A third requisite to the validity of a Deed is that it shall be attested. I subscribed in the presence of the Devisor. 1. So the court hold out of signing by the Devisor. 2. It is said that witnesses attest to the sanity of the Devisor. But what is an attestation to signing? It is settled.
Had an acknowledgment by the Devisee to the entry as that he himself did sign the will is sufficient to enable the witnesses to prove the will. Whether they themselves did not see it signed.

Any thing short of this acknowledgment if this may, will not validate a devise.

But the witnesses must subscribe in the presence of the Testator. What
then is to be constricted in the presence of the testator? It has been settled that if the subscribing was done in the probable presence of the testator, it will be sufficient. i.e., if the testator could have seen the witnesses sign it, it will do.

But if the testator could not have seen it will be insufficient; for it has been said if it is probably less that of the witnesses were in view of but directed themselves at the time of signing lest the testator should attach his mind, this fraud induced the devise.

It has also been decided that were the testator
was surrounded by certain, he might have seen the witnesses sign, it will be a sufficient signing in the presence of the Devisee for he might have seen a view.
After the witnesses do subscribe in the corporal presence of the testator, yet if he was deprived of his mental faculties, so as to incapacitate him to exercise, it will not be subscribing in his presence as contemplated by the statute. There must be a capacity. Now the subscribing is to be proved when the question comes up at law.

The first is that the witnesses may not only swear to the testator's signing, but also to their own subscribing.

There is a great convenience in all the witnesses being present at the time of their subscribing for then it is easy to prove the signature of the testator if that of the other witnesses.

There is an inconvenience which sometimes arises, of which sometimes is indelimitable, indeed many wills are hence defeated: if it is when the witnesses are all dead. It is true that in this case you may prove the handwriting of the testator also of the witnesses, but this does not prove that they subscribed in the presence of the testator. This in fact is not proved. The law is in such cases by hold of all the circumstances of the case, if from these may infer the subscribing in the presence of the testator. But
where there are no circumstances from which such inference may be drawn, the court will presume the instrument to have been irregularly made executed.

But suppose there is one witness? If he did not see the other subscribe? In this case the handwriting of the witnesses must be proved. However J. Pinn does not seeing this proof should not be admitted, as it is a question res resal in England. Such proof will clearly be admitted. But suppose one witness comes in to court and swears to all the requisites to the validity of the will i.e. that the testator signed, that he himself and the other witnesses subscribed in his presence of another witness swears directly contrary? In this case the truth of the witnesses as to the fact will be judged of by the times. But courts are so much inclined to favor the due execution, that one witness swearing to it when supported by circumstances, has been believed in preference to two who swear directly by the contrary. But it is held that those witnesses attested not only to the fact that the testator did sign but also to his sanity at the time of signing. If (get change to say) these same witnesses will be allowed to prove his insanity to contradict themselves. The fact is that their testimony may be re
butt as that of others, if the matter will be left with the

There is a case which seems to contradict the doc-

ture. That witnesses may contradict themselves.

As to the number of witnesses.

The Statute declares that there must be

three or more witnesses. - Cases.

1. Will made having two witnesses, to wit, and
   to wit, 2 witnesses. Now, who will as this has
   been held not to be good, upon the ground that
   he who signed witnesses the will knew nothing of the codicil
   it being on a separate piece of paper. They were there
   four but 2 witnesses to the will.

2. A will to which there were no witnesses; codicil
   thus, executed in three witnesses. The codicil recog-
   nizes the will. Yet this was held not to be a good devise
   upon the ground that the will was not present at the time
   of executing the codicil. If the will had been pres-
   ent, I decide supposes that the execution
   of the codicil would have been

3. The will and codicil on the same piece of paper,
   and a sufficient number of witnesses to the latter,
Here the will must necessarily have been present at the creation of the codicil; therefore it was held to be valid.

4. A will containing 8 or 9 separate sheets, each signed at the bottom by the testator, if the last sheet is subscribed by 3 witnesses, it will recognize the whole as one will, if of course, make it valid.

Thus has been a distinction drawn between a will and a codicil, but I cannot confess the cannot see it.

5. A illiterate man made a will, if being ignorant of the legal requisites, omitted to have a competent number of witnesses. Afterwards finding it out, drew up another writing altogether consistent with the former to which he had the legal number of witnesses. All constituted one will and was valid. That all the witnesses must be present, see 1 Pet. Ch. 184. 2 Tit. 1779.

IV. A fourth requisite is that it must be witnessed by 3 or 4 auditors, witnesses, I in the presence of the testator. For what purpose is the word "credible" added? Some contend that any credible person would be admitted to prove a will, if therefore devisees then.
selves, if credible, would be admitted. Thus say
they must be competent witnesses. But upon the
whole, we may conclude that the word credible was
"festus," i.e., meaning nothing more than legal
witnesses. In fact, Denece supposed it to be suc-

Yea, Succe.

Denece, so purge himself of interest, mat¬
ter of fact, is to be supposed to prove
a will which made him a devisee? In answer-
ing this another question involves itself, which is,
whether witnesses must be competent or disinter-
ested at the time of subscribing the will? The
fact is, that at the time of proving the will, they
have no bias on their minds. They will be competent
witnesses, notwithstanding their interest at the
time of subscribing. This is Denece's opinion.

A devisee, being a devisee has only a con-
tingent interest, i.e., it is contingent at the time
of attesting, for the will must afterwards be al-
tered, and is not an heir at law whose further
proceeds an action of ejectment more interes-
ted than a devisee? Then the can be a witness
in such a case. Denece thus favors the idea of
the admissibility of a devisee as a witness.
In the spiritual courts it was always practised that a legatee in releasing his interest might become a witness to a will, for to call strictly speaking, no witnesses are necessary.

It was contended by the advocates for excluding the devisee, that a new system of evidence was intended to be introduced by the statute. From this hypothesis, it seems entirely difficult, for statutes do not affect the pleadings or evidence collaterally. And besides this adoption of this idea would lead to great difficulties and obscurities. Suppose the devisee at the time of subscribing did not know of the devise to himself, he would have no bias, which could on any principle exclude him. The decision in

24th 25th 2 v. 5.
Statute 25 Feb. 2 v. 5., by which it was enacted that all legacies given to witnesses should be void.

From this statute no inference can be derived which will militate against the doctrine contended for by J. Reeves, for the statute might as well he made in favour of the complainant, as in alteration of it.

In England 6 judges have decided in the affirmative of 6, in the negative, so that now this is a great question. In Conn. this question has been
several times decided in the affirmative by the Superior Court and the last determination has been reversed by the Supreme Court of Errors. So that here also (as to issue) this is question undetermined. With due reference to the opinion of the learned judge, it strikes me that the question in Court is completely set forth at first. For if it has been so decided by the highest law tribunal in the State, it has become the law of the land.

V.

Thomson mentioned in the Stat. it is necessary that the "devises be published." This was held necessary under the Stat. of 1810. It was introduced from analogy to a deed which must be delivered.

Indeed a Devises may be delivered as a deed.

Under the Stat. of 1810, it is not strictly required that a devise be published, but Weaver thinks the subscription of attestation required by the Stat. of 1810, to be equivalent to a publication.

VI.

It is required that the entire devise be present at the time of attestation. Whether it was present or not in a question of fact, is to be left to the determination of a jury.

As has been hinted, the uncertainty of everything human, often renders it necessary that
the great part of the Devisor's signing the will in the presence of the subscribing witnesses be moved by slight evidence.

Of the Revocation of Wills.

Revolutions are either express or implied.

In Eng. there is a statute respecting the solemnities requisite to an express revocation, which has been adopted in some states, but not in all. It is not adopted in Conn.

The greater part of revolutions being implied, are not operated upon by the statute.

Before the statute an express revocation by word of mouth, would annul a will.

So expressions of an intention to revoke are a revocation.

An implied revocation may arise from some

1. Biol. 511.

A collateral act of the Testator which absolutely implies, or by some act of his, furnishing ground to presume a change of intention, or from the mere operation of law.

A second will inconsistent with a former one is an implied revocation, if it be inconsistent with
the same one in any particular point, it entirely revokes the former.

On principle however it ought to revoke it only for tanta to the extent of the inconsistency.

A bonâ fide may be a revocation of a former will, but not unless there be an express clause which operated as a revocation, if no further than such express clause extends, for the codex recognizes the former will.

Where a second will is made under a false impression as to a matter of fact, without which false impression it would not have been made, it is a revocation of a former will, however inconsistent with it, it may be.

But when such will is made under a false impression as to the law, it is a revocation. Then the intention to revoke is apparent, but in the former case the rule holds to reasons of policy, so a contrary mode of procedure would produce much confusion.

Suppose a will is impliedly revoked by a subsequent inconsistent one, if that such 2° will is afterwards expressly revoked, is the first will revived? Present to the intention of the testator. By this I mean, as it will generally be found the safer way to revive the first will, and so it is decided.

But if the first will be cancelled and destroyed, it is not
Divest

revived by the destruction of the second.

Suppose the 2 Will expressly revokes the first, it
is afterwards destroyed. Still the first is not revived. J. C. thinks the distinction not sound on principle.

In the case cited from Bowen, both the first and se-
cond Wills were cancelled, but there was found in the
testator's house a duplicate of the first, uncancelled, but
it was held to be no revival of the first.

Such a great alteration as takes place in the circum-
stances of the Devisee by marriage of the birth of a child
is an implied revocation of a devise previously made
as well as of a Will.

So also marriage and the birth
of a posthumous child work a revocation. These cases
proceeded upon the ground of an implied change of inten-
tion in the Devisee, arising from the alteration in his
circumstances. It has been said indeed that unless the
devise works a total disinherison of the issue, the circum-
stances all mentioned, do not amount to a revocation.

But J. Reeve thinks this by no means correct, but that
the intention of the testator is exclusively to govern.

It was formerly contended that subsequent insanity
of the Devisee which rendered him incapable of altering his
will, when he probably would have done it had he been

[Note: The page contains some handwritten annotations and corrections which are not transcribed here.]
The power amounted to an execution. But it was otherwise determined.

Another species of implied renunciation arises from an intent of the instrument designed to invoke the first will, if deficient in some essential requisite to its validity, as a will yet shall operate as a renunciation. This is on the ground of the intention of the devisee, Judge Green observed that the principle seems hardly to warrant the decision, for certainly in such cases the hand cannot pass to the devisee in the second devise because it is different in operation as a devise, but it will go to the heir at law who may be a very different person from him who is the object of the devisee's bounty, if this his intention will be as effectually frustrated as if the first will had been admitted to stand. But the law is settled and so we must be bound.

The rule last mentioned applies to all devises when they are made to devisees incapable of taking, as a corporation &c.

Hitherto P. Preece has treated of renunciations implied by the intention of the testator, he will now treat of renuncations which are implied from an "Alteration of the Estate," and which are therefore an exception to the general rule that: "The int
Devise

Section of the testator is to govern? Cases.

1. When a testator devises an estate to a man & then sells it, and afterwards repurchases it, this will be such an alteration as will make the devise.

2. A devise to B in fee, afterwards marries & wishes to make some provision for his wife, makes a trust estate for his own life, remainder in trust for the life of his wife. Where the intention was evidently not to defeat the devisees estate in fee; yet this was held a renunciation upon the ground of an alteration. In this the Legislature sees no reason.

3. But the courts have gone even further. A, being possessed of an estate in tail devises it, to give validity to the devise, suffers a receiver. This was esteemed of held to be a renunciation on the same ground.

4. But to do ridiculous lengths have the courts carried this principle, that an intention to alter has been held to be a renunciation. As where A, seized in fee devises to B, afterwards thinking the estate was in tail, suffers a receiver to break the entailment, and therefore to give validity to the devise. This was held a renunciation on the
ground of an intention to alter. No doubt the precedent establishing this case was made by an interested judge, at first, & other subsequent judges have followed like a flock of sheep. This want of adherence to the intention of the Devisor has destroyed the symmetry of the law upon the subject.

It is an established rule that where there is an **equitable estate**, chancery will not consider such alterations a revocation, but in legal estates chancery will rescind the legal rules. So in the words : whereas legal estates are made equitable ones, an alteration will not be a revocation, but when equitable estates are made legal ones, legal rules govern.

38. P. 240. Dequisitions of estates after devises will not amount to revocations.

Again, the alteration best a-

63. W. 153. A short or mortgage is no revocation i.e. as it is not a reason 74. 9. 05. (as) for the devisee may at any time 74. 9. 05. 2. 9. 9. 8. 3. to. The mortgage money of takes the estate.

But there is a distinction between the mortgage of a lease for years or a term for years, the mortgage of a fee. As where A, owning a lease for 40 years dies it is to B. Afterwards A mortises to C a part of the term (say 20 years) in that case it will be a re-
Devises

434

Devises.

When devisees only at law. In Cury, the devisees may redeem at any time.

Ac devised of a farm of land to
B. and afterwards mortgaged to C. B. being ignorant of
the Will. This will lie a revocation upon the ground of an
intention to attain.

In all Estates of which a devisee has
suspension, alterations will only make free tenants. If
such alterations as in mortgages to one almost uniformly
made for the purpose of paying a debt, or answering
some other specific purpose merely, which when done the
devises intention is answered, and the devisee will
take the estate, or in the first instance the devisee
may be said to take the estate cum once.

Thus for acts alterations, of now for other
causes of revocation, which indeed may be called alterations
of the estate.

The act of a stranger may cause a revoca-
tion; to digest the following it is necessary to remem-
ber that no man can devise an estate of which he is not
seized at his death. It would probably now be the devisee decided
To devise an estate to B. C.
dispossessed A, and holds him out at the time of his
death, B. the devisee cannot take. But again; when
Devises

A devisee makes use of any friend, even to alter the disposition in will not be a revocation. As where A. devises a part of his Real, if a part of his personal Estate to B., if also a part of each to C., both being his children, now C. not liking the disposition changes his father if holds him out until after his death. the court in this case will interfere and not suffer this trick to vitiate the will.

2 Deo. 474.

So also where a stranger or other person takes up or destroys a will, now if the contents of the will can be substantiated in any way, it will not be revocation.

One thing in the act to the alteration of an estate.

Notwithstanding what has been said yet if there has been a will made, and a subsequent conveyance or making merely as an acknowledgment, it will be a revocation.

Wills 516.

Case 23. leases it to C. now this is a revocation pro tanto i.e. for the life of C. as has much for implied revocations.

In the same Statute of 29 Car. 2 in which there is a Devising clause (which has been considered) there is also inserted a clause Expressed Revoking Wills, which will now be considered. It has relation only to such as are therein expressly mentioned.
Devils.

Proof may be admitted to prove the facts out of which revocations may be implied; but in express revocations, there are 5 specific clauses pointing out what must be done in order to a revocation.

1. The first part is, that no devise shall be revoked, unless by some other will or codicil in writing declaring the same (that is containing a clause of revocation) or
2. If it must be revoked by some other writing of the devisee signed by himself in the presence of 3 or 4 witnesses, or
3. It may be revoked by tearing, burning, cancelling or obliterating the same.

If a second Will is made without a clause of revocation, it will imply one; but this revoking part of the statute was made to prevent fraud revocations by the testator. Before the enacting of this part of the statute any oral declarations significant of the testator's intention, or any instrument of writing whatever was a revocation. This was at common law.

The first and second requisites are only restrictions; do not introduce any new law. They only exclude any writing or any oral declarations
being necessaries, except such writing is signed with the con

I. As to revolutions by Will or Codicil, and

II. As to revolutions by some other writing signed by the
  testator in the presence of 2 or 4 witnesses, which will here
  be considered together.

When you judge of a revolution as a Will (i.e. a De will) the first question to be determined is whether this De will be a good one. Whether it be duly made and be a good disposing will as well as all the other requisites. So if it is not it will be no

means be a revolution. If it is not a good disposing will, but will come under the 2nd rule of "a writing duly signed by the testator in the presence of witnesses" it will not be a revolution. The rule is that if a man attempts to dispose of property at the same time in an instrument, attempt to make a

formed will, it will not be a revolution according to this

second is a good disposing will. But if the object or

intention is not to make a disposing will, the instru-

ment being signed by 4 witnesses, will be sufficient

to revoke a former will.—Cases—

A devises to B a will, and then makes a
disposition of the same property to C. Now the leg
in their special verdict found that there was a first
and also that there was a second will containing a
clause of renunciation, but because the witnesses to
the I will did not subscribe in the presence of a
testator the will was not good, and therefore not a
renunciation.

You have already inferred that a will may
be revoked by a will or by will duly made in
accordance to the devising clause of this statute, and that you
may also revoke a devise by an instrument, which for
distinction's sake I hence will call a revoking will
which need not have the requisites of a devising will.

In Court there is no revoking clause adopted.
Therefore the deviser may revoke by any writing signi
by himself and signification of an intention to re
voke. I hence does not know but that there may
be a point revocation in Connecticut.

III.

A devise may be revoked by the act of the deviser,
in burning tearing, cancelling or obliterating the
devise. These acts or any one of them to be done would
revoke a devise at common law before the statute,
but this does not render a consideration of this part of
the subject the less necessary.

But let it be remarked that these acts themselves don't con-
constitute a revocation. The intention must be referred to, for if any one of these acts be done by accident, it will be no means a revocation. But in general if a man attempts to destroy the device, if it is manifest that he aims at its destruction it will be a revocation.

To prove the "ext animo"

1. 486. i.e. the intention which influenced the testator in making the Will, such proof must be admitted as the best evidence which the nature of the case admits of.

There are cases where a man commences the destruction of his will, if the same course of facts, if the same facts will not be void, will stand. Ad where a man having a Will wishing to revoke it makes a second Will, but before the second is signed, he commences leaving off the old one, fining the new one properly executed. But finding it not to be unlike the old one carefully, puts it away until the new one should be properly authenticated; in the interim he revokes the former will and signs the new one. Now the new one having been witnessed, it has been determined that the old one stands, and this [i.e. substance] arises from the ground of intention of the testator.

No matter in what shape or manner the testator, being twice, come, or in what is his will, yet if he does "animos dissimulendi", it will be a revocation.
Devises

If however the will is merely amended, and not at all torn, or not burnt, or not in the least cancelled or obliterated, it will probably not be a revocation express without the statute, then it might have been one

I have not heard of a doctrine further. It has been held that when a testator had made some obliteration, so as not materially to affect his first design in destroying it, there was no revocation. As in case where the devisee altered "400" to "450," the word "daughter" to "daughter's" and this without materially affecting his first disposition. See page 459. Revocation, in the margin.

Of the Reproduction of Devises.

It is possible that a devise may be completely (and I mean to think expressly) revoked, and a reproduction of the same will, will revive it.

It is a rule which must not be left out of sight that Real Property purchased after the making of a will will not pass by the same will, but personal property purchased subsequently will pass by it. Real property will not pass because it is capable of being clearly ascertained, defined and identified. If not mentioned in the last will it is supposed not to be intended; but personal property is
Debts.

Various unsettled. A very often misunderstood. Therefore, it is not proper to be contemplated by the testator.

Lease hold estates subsequently purchased will not pass after a mortgaged personal property. If this is, because they pass to be of the identity of identity of Real property.

The republication of a Will causes the land purchased subsequently to the making of the Will to pass — in all the land, re-purchased previously to the republication, operates from the time of republication. It speaks the same language as if it was actually made at that time.

But be careful to observe, that a republication will not pass what was not mentioned or intended at the time in the Will in the first instance. E.g. Where the words in a Will are “I devise to all my lands being in Litchfield.” This will pass all the lands lying in Litchfield if purchased subsequent to the making the devise, of previous to the republication; but lands subsequently purchased and lying in Boston will not pass.

I have having pointed out the effect and operation of a republication, will now consider what is necessary to constitute one.

Before the Statute of Frauds & Parries any words spoken by the testator “aminim republicandi”
with reference to the will would have been a good republication. But since the Statute of Frauds, an express oral republication will be good. Yet there is no clause in the Statute which says that an express oral declaration will not be a republication. There is no clause requiring a writing instrument to make a republication, as there is in case of revolutions. The determinations which require a writing signed by the testator, proceed upon the ground that the republication of a will is making a new one, but I think does not see why this reasoning would not as well operate before the Statute as since.

A republication to be good must be in writing. It must be in writing. If not in writing, according to the Statute of Frauds & Perjuries, because even this not the case, proof must necessarily have been let in to prove a republication, i.e., a declaration by the testator, which was the very evil the Statute was intended to remedy.

If you are about to make an express revocation, it is necessary that you write the same will over again, and that it must not be superseded by the witnesses, yet the testator must sign and acknowledge it in their presence.

A partial republication now once, will help personal property purchased subsequently to
A codicil to a will made and executed according to the Statute, i.e., the devisor clause, will republish the will to which it is a codicil. But it was a doubt whether there should be a clause in the codicil, showing the testator's intention to republish.

It has been questioned whether a codicil to a will, executed according to the Statute, without a clause of repudiation, will republish the will?

It is the opinion of Blackstone that a codicil so made die republish it, upon the ground that whatever makes a codicil must contemplate the will, because its very quality is to alter or subtract from the will.

Another question has arisen whether it will make any difference whether the codicil was one of real or of personal property? It has been held that if the codicil is annexed to the will, it will be a repudiation, if its subject matter be personal property only.

But what difference does it make whether the codicil be annexed to the will or not? At N. 1 Rum 821. p. 139. 149 182. 159 p. one contra, yet G. Bruce says the current of authorities comp. 158 make the codicil a good repudiation of a will disposing of real property even though it be not annexed to the will.

The doctrine relative to making a will, I speak
from the time of its repudiation, is certainly sound.  

observed in all these cases. — But let it be remarked, that 

if a codicil republishes a will, yet it does not give it new 

jurisprudence; it will only give it operation as the same will 

from that time.

Suppose a will and a codicil are both made 
at the same time, in some days, can the executing or sign 

ing the codicil be applied to, or validate the will? It may 

be otherwise; there are two authorities which seem to be contra 

however. I believe, suppose that they were not intend 

ed to contradict the principle. — 2 N.B. 599. 3rd. 176.

One thing further. A will made by a mi 
nor will be good if republished by him after he comes of 
age. —

Of the admission of parole. Evidence 
to explain both latent and patent ambiguities 
arising from Devises.

With regard to the admission of parole evidence to explain 
both wills, it is certain, there is not so much real difference as may 
at first be conceived. That is nearly the same evidence may 
be admitted as to both.

It may be laid down as a general, if 

not an universal rule, that no parole declarations of a testator
of what he intended are admisible to explain, alter, enlarge, diminish, or rescind his will or to give it any import or make it any way different from the will itself.

Nevertheless, this rule, there are a few cases, where the declarations of the testator, previous and subsequent to the making the will, have been suffered to be moved. But these were declarations not made with specific reference to the will. They have been merely the testator's story, indicative of the manner in which he intended to dispossess or had disposed.

There is no testimony so vague, uncertain or questionable as that which refers to what a man has said. Men understand the same language very differently. Indeed what they meant at one time, they may conceive of, and think quite differently at another time or after five years. Hence the necessity of the general rule above which goes to cut off testimony of the declarations of a man in his lifetime.

It will probably be asked what then may be proved by proof concerning declarations? The answer is, that you may prove matters of fact by proof from which conclusive and satisfactory inference may be drawn. As in case of mortgagor where a man sells land, it keeps the deed himself or remains in possession now, and proof of these facts is satisfying evidence very often.
not an absolute sale. These facts are such as may be proved without the danger of misrepresenting, or misunderstanding, for let it be remarked that the Statute of Frauds of
injuries, was enacted not only to prevent fraud or injuries, but the innumerable mistakes which were introduced, previous to the enactment, from the admission of oral testimony.

It is to be observed that no assessment will be suffered to be made unless it "stands well with the will" i.e., does not in any degree contradict the will. Any fact which "stands well with the will" from which the intention of the testator can be collected may be used.

There are sometimes doubts which arise concerning the will, of which may be explained by facts adverse to the will, of these are called latent ambiguities. Oral proof will here be admitted to explain the testator's intention. I mean oral proof of those extraneous facts. As where a man desires property to his son Thomas, if he has two sons of that name. Also in case of a devise of "Black Acre," and the devisee has two farms of that name. In this case oral proof will be admitted to explain the testator's intention. Also where a man made a devise to his children naming them, and left the youngest, a favorite child unprovided for. Said
Journal was admitted for this fact. In all these cases of extant
ambiguities, or ambiguities about the will, proof of
some extraneous facts may be admitted to explain the
testator's intention but no evidence of any of his decla-

But if this ambiguity appears from the face of the
will upon reading, it is not deemed the will, if it is there,
face an ambiguity patent. Now if the ambigu-
ity is so great that it is impossible to form any opin-
ion of what is intended, if no sense can be made of it,
no proof must can be admitted, if the will must have
done fall, but if the testator's intention can prudibly
be collected by taking the whole together the will is
good. — As to the first... Where lands were de
n. 635. raised to one of his children, if no one could pros-
sibly tell which was intended, this destroyed the will,
for no proof could be admitted to prove the in-
tention entire. Also a devise to A. to the use of her
redemption because the Latin was here so corrupt as to
give no data from which to form any opinion who was
Bult 180 intended, of course the will was void.

But a devise to A. B. there being two of that name
1 Will 77, but living in different places. Now proof proof was ad-
mitted to the fact that he knew nothing of one, if of course
the other was intended.

Where the ambiguity arises from the sentence of a will, a construction must be given to them if possible, therefore no pardon testimony can be admitted to explain.

26th 136. As a devise to the right heirs on any mother's side. Now to know what heirs a construction must be given.

Ambiguities deserve the will. It has been observed, if necessary to be remembered, that no averment can be admitted unless it "stands well with the will."

A devise of £500 to the 4 children of his cousin Es. B. Now Es. B. had 6 children; shall pardon evidence be admitted to explain which is most intended? "Yes, for it will "stand well with the will."

This is one of the cases where pardon testimony was admitted, so to what the decision had said (which was a story of what she had done.) if having no particular reference to the will in question.

A devise of £400 to the children of Es. B. Here testimony will not be admitted to prove what 4 children were intended, because it would not "stand well with the will."

A legacy of £500 is given to a charity school in Kent. Kent here were two charity schools in Kent. Were the pardon proof of the decision's position.
Cases of False Description

Where personal evidence is admitted to explain words but would not be admitted as to deeds. As if the devisee is named by a wrong name, yet if it was evident from any description given that he was intended, he may claim.

As where a man had a niece, and called her by a nick name. A devise to her by this nick name, but a description of her, for the devisee had other nieces. Then the court let in evidence to prove the circumstances from which it was inferred that she was meant.

So also where there were 2 sons devised to, by nick names.

So also where the devisee forgot the name of the devisee, but devised to him describing him as being in the service of the Duke of Savoy.

No proof like this would be admitted in cases of deeds. The rule only extends to admit evidence that such an one was devised.

When there is a devise giving £500 to Mr.

Having the name Blank. It will be void for no evi.
sence will be sufficient to explain whatever is intended.  

**Ambiguities present arising from Equivocal words.**

- Proof is sometimes admitted to explain equivocal words, but not equivocal sentences in a will. Here, proof of facts from which it may be inferred, is not meant. As there two common were contemplated if mentioned in a devise, if at least in a sweeping clause, it is meant “I give all my estate to her.” New proof was admitted to prove who was meant by “her.”

Also, in case of a devise “someone’s heirs” proof was admitted to prove whether a son or daughter was intended as devisee.

Again: The circumstances of a man’s family may introduce ambiguity: another there is a devise to all of his children. Now the word children in its legal signification has a different meaning according to the State of a person to whom lands are thus devised. If lands are devised to a man of his children, it will go to himself of them in equal shares as tenants in common, and in this case the word children will be a word of purchase. But if he has more the word children will be understood in the same light as if the devise had been to him, if the heirs of his body that is, it would be an estate tail, and in this case the
word children would have been a word of limitation. Now part testimony will be admitted as to the fact of his having, or not having, children.

The following case depended upon the words "I devise to A the whole of my Estate". It is though proper to observe that devises to the Statute of Wills nothing but a life Estate could pass by the word "Estate" in a deed. There must have been the word "heirs", to make it a fee simple or a fee tail. But after the practice of making wills was introduced, the intention of the testator began to be attended to. If it was clear that a larger Estate than one for life was intended to be given, it would be construed as an Estate absolute. But where a man devises all his Estate to A for the payment of debts, and it so happens that his personal Estate will not pay all, does his Real Estate pass? This was long a question, but it is now settled that partial evidence may be laid hold of to prove the circumstances by which it may be collected what Estate the testator intended. In this case that the personal property would by no means satisfy the demands, if the therefor the devisee must have intended to pass his real estate.

For now also clearly settled, that a devise of all one's
Estate, with "in re termini" has an Estate in fee simple, unless it is not the case in deeds.

In all these cases of equivocal terms, physical proof will be admitted of circumstances which may make clear the intention of the Testator.

But this doctrine of admitting physical testimony is carried still further. For words not equivocal, more attended with any apparent ambiguity may, when applied to testator's property, throw light upon these words, by covenants respecting the state of property, and by these means receive such a construction as will suit the state of that property, the contrary to what they technically import. Case: "I give to J. A. the house called the Bell Tavern." So far there can be no doubt, for in England where a thing is named for it only has a life estate; this in estate it passes a fee simple. The word Estate is therefore not equivocal. It has a certain definite meaning. The facts were, however, that J. A. was a lease tenant in tail of the Bell Tavern, of the devisee himself, and the reversion after the Estate tail was spent. When the death of J. A. occurred in tail without issue of his body, the Tavern was divest.

Then the question was, did the reversion pass by the devisee of the Bell Tavern?
And evidence was given to prove the circumstances, and that when taken altogether were conclusive to prove that the devise intended to pass the remainder notwithstanding the words was inequitable. It was determined that he intended that he intended to give a different estate from what the words technically import, an estate in fee simple. Judge Holt being sitting, no unit of men was taken, but judgment was affirmed.

Another case turning upon this same ground.
A woman devised $100 shares stock in long annuities to A, and $100 stock in long annuities to B. $100 stock in long annuities to C. $100 stock in long annuities to D. of the rest of residue of her estate to the farmers.
But it turned out that the woman had in all but $100 stock in long annuities for annuities. The rest have been intended to raise $500 by an absolute sale of the annuities which would be done if each devisee would then have his request. There would have been a remainder for the farmers. The point evidence was admitted to show the state of the property notwithstanding the terms made use of were made inequitable. This was affirmed in the House of Lords. The general rule which ought to be here laid down is that no hard proof shall be admitted unless it stands well with the will, if neither will any evidence
be admitted unless it stands well with the will, nor to con- 
tradict the least operation of words in a will.

The case reported in Law Tr. before referred to, of a De-
vers to Louis C. B. of his 4 children. The having 6
children, and proof was admitted to show what 4 children
the testator meant. But in the same will, there was a
gift to 8 children. An attempt was made to introduce par-
evidence to show that by this, the same 4 children were
intended, but not admitted, for it did not stand well with
the will.

It has been said that where a devisee appoints his
executor Executor the debt will thereby be released. But if ap-
pointed B. & C. as Executors, one, viz B., owed him $6000.
after his debts of legacies were paid if satisfied, he gave the re-
son to B. & C. his execs. Here proof was admitted
to show that the debt was not released, but was ordered to pay
the residuary legatees, viz B. who owed the $3000, of C.
No proof could be admitted to show the testator inten-
ded to release it. It would not have stood well with the will.

Where there is a devisee of lands directing them to be sold
for the payment of debts, it is construed according to the En-
glish rule, that they are not to be sold for that purpose until the
personal property is first exhausted. As when a man made
a will, directing his lands to be sold for the payment of debts
where in fact he was proposed, if personal estate to a large amount. In this case it was contended by the heir at law that the real property could not be sold until the personal was first applied. It was attempted to introduce proof to show that the testator intended the personal property to be first applied but this would not stand well with the will. It would contradict the legal operation of the writing which can never be done.

Again, it has already been stated that whenever there is a will giving no money to the executor, or if there is any property remaining after the payment of debts of legacies, the residuum will go to the Exe, i.e., England. It is however different in Scotland where the Exe is paid for his trouble. Parol testimony was here not admissible to show that the testator intended that the residuum should not go to the Exe.

Imprest this rule well on your memory that "Whatever the legal construction is, parol testimony can be admitted to contradict it."

A further branch of this doctrine is where parol evidence may (sometimes the declarations of the testator himself) be admitted for the purpose of Rebutting an Equity or ousting an implication of Law. As Pascal says it does this, Parol declarations even of a testator are likewise re-
D. Wells

willed in all cases to rebut the constructive declarations of a trust put on words contrary to the legal sense of them which rebutting an equity; for in such case the estate is as the devise of the executrix in support of the letters of the will.

Judge New's definition may be a little more precise, viz. the existence that law of Channey have given different constructions to the same will. In words it is the same will.

And where there is an equitable construction of a legal one, proof of proof may be admitted to rebut the equitable one as they may make way for, or let in the legal one.

From example will illustrate this definition. As where A devises lands viz. Blackacre to B, (whom he appoints his Exec.) for the payment of debts of legatees. Now B, having paid all the debts of legatees, there was a residuum; the legal construction is that the C. will take this residuum, but the equitable one is that it bears a resulting trust in the hands of the C. for the heir at law. Now the question is can prudent testimony be introduced to rebut the equity, that is to show that it was the testator's intention that this residuum should go to the C.? It certainly can, for the Estate is vested in the devisee.

Again: I make a Will of appoints B his Exec. directing him to give a legacy to C. and then all to himself. Now if there had been no legacy to C., then all was to himself. If the legacy to C. was void, then the whole must go to the devisee.
by to the Cts. the legal construction would have been that the Cts. should have taken the residuary; but the equitable one was that it was a resulting trust for the heir. But even in this case, where the Cts. had a legacy independent given him yet usual proof was admitted to rebut the equity of the implication of laws, viz. to show that it was the testator's intention that the Cts. should have the residuary estate.

It is a rule of equity that whenever a man mortgages an estate of devise, the heir of the mortgagee has a right to redeem. He may call upon the executor to furnish him with money out of the personal property. But notwithstanding this rule, where a man owed money by mortgage, if an heir death made his executor, now hand proof was admitted to show that it was the testator's intention, that his executor should have his personal estate exempt from debts; and in consequence of this, the heir could not have side of the personal estate to pay off the mortgage debt, notwithstanding that by the rules of the court, the same was liable to be so applied.

But there are cases which are decided upon grounds not perfectly understood by a lawyer. These are where hand proof is admitted to explain the testator's intention in

Repealed Legacies — Judge Rawe
21 May 1324.

It is also settled that when there is a devise to A & B, if afterwards at a future day, the devisees made a note giving the same sums to A & B. This note was deemed a rescission and therefore was an addition to the will, and gave $250 more. Proof was here admitted, showing that the testator had declared that he would make up $500 to A & B.

It should be particularly remarked that in all the above mentioned cases, proof in testimony is admitted upon the ground of "standing well with the will."

Upon the same principle of the evidence not being contradictory to the will, it has been held that proof...
may be brought to show that a devise is meant as a performance of a preceding agreement; for in such cases no evidence is made use of to conclude the will, but to explain whether this one thing is in satisfaction of the other—whether a man before marriage covenants with his intended wife to settle an estate on her but neglects until near dying, if there in his devise gives in what he had covenanted to settle upon her, how the question is can proper proof be admitted to show that the testator gave it in satisfaction of a duty? Yes, for this will in no way contradict or infringe the devise.

Such evidence may be admitted in all cases to contradict fraud, because to devise otherwise would be to make the will instrument not in encouraging that which it is its object to prevent.

If a testator having executed a devise of lands in the presence of three witnesses to two persons as joint tenants in fee, afterwards strike out the name of one of the devisees if there be no republication, the devisee will only operate as a revocation of the will pro tanto. 3 Bost. Rul. 16.
Of admitting *Prob. Evidence* to explain Devices.

Judge Black has taken the pains to write a synopsys of the grounds on which admitting prob. evidence to explain wills for the use of students, of which the following is a copy: "relating to literature." He has given the different classes of general rules.

1. Prob. evidence, orements of the testator declarations of his intention at the time of his making his will, are not admissible for if those declarations are in conformity to the will, they are useless; it is against the principles of the common law if opposed to the statutes of frauds to admit them to explain, amend, diminish, or restrict the language of the will, or give the words therein used a meaning different from that by obviously import.

2. When there appears an ambiguity on the face of the will, not arising from the use of equivocal words, but from the construction of the sentences contained in the will, no parol proof of any kind is admissible to prove what the testator intended.

3. If an ambiguity arises as to the will, as in the case of two houses, tenements of the same name, or of two farms known by the same name, since only is decided in this case,
461

4. When there is no ambiguity respecting the persons who are intended as the devisees, the being sufficiently described, but called by a wrong name, avowments may be made of the true name.
5. When an equivocal word is used relating to a person, an averment may be made as to who was intended.
6. When a word is used that is equivocal, because under some circumstances it is a word of purchase, and under other circumstances it is a word of limitation, a verbal averment of these circumstances may be introduced.
7. When an equivocal word is used as to the quantity of the property, a construction can be made of the words of the testator so as to agree in substance with the circumstances of state of property of the testator may be made, to enable us likely to discover what quantity of property the testator meant to devise.
8. If the words are not equivocal, and of their technical meaning, and under the devise be ridiculous, if the context of the devise is unreasonable, such meaning not aside the state of property of the devisee, then the state of property may be ascertained for the purpose of producing such a construction of the words of the Will as will comport with the state of property, the contrary to their technical meaning.
9. Proof evidence of even verbal avowments of a testator are admissible to what an equity. It frequently happens that the
construction of the wards of a Will in a Court of Law, is equitable construction in Chancery. To restore the legal construction and thus to rebut the equitable one, parol testimony of the testator's intention is admissible. This may be explained by the following case. A makes a Will giving many legacies, among others a legacy to 1/6 of constituted to his Exz., after all the debts and legacies are paid there being a residuum. If no residuary legatee, the legal construction respecting this residuum is, that it belongs absolutely to the Exz. The equitable construction is that the hold of the residuum as trustee for the testator next of kin, and will be compelled to distribute it among them. How to rebut this equity, a equitable construction, parol evidence may be admissible to prove that it was the intent of the testator that the Exz. should have the residuum absolutely, if this restore the legal construction.

10. Parol evidence can never be admitted to rebut the legal construction, if there is no residuum.

11. Parol testimony is never admissible unless the construction intended to be produced by it stands well with the Will. This may be explained by the case in strenu, where the testator gave a legacy to the 4 children of his servant Esq. The first and Esq. Esq. had 6 children, 2 by his first husband, 3 by his last, and parol evidence was admitted that the testator intended that the 4 children by the last husband would have the legacy for this.
dissent does not contradict the will but stands with it. In the
same will there was another conveyance to the 4 children, but
to the children of C. 5. Said testimony was offered to show
that the testator intended the 4 children by the last husband, but
this was rejected, for the word "children" includes all the children
and to confine the construction to the 4 children would not stand
well with the will.
12. Said testimony is admissible to prove that a legacy was
intended as a satisfaction of a preceding agreement.
Of Executary Devises and Remainders

The best law judge would think it necessary to make some observations on the difference between Wills of Deeds, by way of introducing the subject of which he intends to treat.

In the beginning of the phrase in devises, it was observed that the principal

tasks in devising Wills, was the intention of the testator. It is a rule of prime importance, that the intention is always to govern in devises, provided it be consistent with the usage of law. Now if the latter part is to be understood in a certain sense, there would be no distinction between Wills of Deeds. But this is not the case. In deeds testamentary terms are adhered to, in Wills, the intention of the testator, provided such intention can be ascertained. In Wills, "fee simple," "all my Estate," "to one forever," or well coming or fee simple, but in Deeds the word "fee" must be inserted.

In case that the intention is to govern in Wills, provided it be consistent with the usage of law, does not refer to technical terms made use of to convey reserving, but to the nature of the estate given. Now if the estate given is such a nature as can be given, no matter what terms are made use of, it will pass if it is fairly the intention of the testator that it should pass. If a man wishes to extend his dominion after his death, and therefore devises to one, if after him to another, it is from genus.
Deemed

in the generation, it will not be good, for although the estate's
intention is plain and indisputable, yet it is an illegal one.

There seems to be a deviation in the rule in the cases of suc-
cessory devises, for in these an estate can be given inconsistent with
the rules of law; which is in direct opposition to the rules of law.
In Escheat, a devise differs from an estate in fee, an estate in
tail, an estate for life, or an estate for years. It is in fact a
new kind of estate. It was anomalous.

Remainders in Escheat. Devises agree that they are
estates to be enjoyed at some future period. The right in one
estate is vested by deed; in the other by will. But let it be re-
membered that a remainder can always be created by will, as
by deed. It is where a man by deed gives an estate to A for
years, remainder to B of his heirs forever. So he may do it
by will.

A man cannot give an estate by deed to commence 20 years
hence, because it would be no remainder, but he could by devise.

It is an estate which would be good by deed, it will be in an Escheat
Devises. Whenever an estate is subject to technical rules, it will
be a remainder or devise, an Escheat devise.

No estate made
to commence in future will be good, unless supported by a par-
ticular estate. It is the very "false" on which remainders

in Devise given to A for years, remainder to B. etc.
Here the interest is reterent on out of the grantor or ancestor to
the particular estate. The remainder man of the estate will have all the privileges of survivor and the estate while in the
possession of the tenant for years, as the grantor would have had
the possession remaining in him. This is a vested estate,
because the estate is clearly in the remainderman. I can
not be defeated, but when the estate of the remainderman
rests on some uncertain event or person, so that it may or may
not vest, it is a contingent remainder. Where John
Stokes gave an estate to A for life, remainder to B's eldest son,
but the moment he dies the remainder is no longer contingent,
but vested. B's son must be born during A's life, otherwise
the remainder can never vest during the continuance of the par
ticular estate, or so instant that it determines. If A merely
conveys an estate to B for life, the remainder is no as a matter
of course still remains in him. A

vested remainder.

To make either a contingent or
vested remainder, there must always be a particular estate.
This rule that a contingent remainder cannot be vested upon
any estate than one for life, because the freehold must
pass out of the grantor. If vested in some one at the time of granting,
if when it vests upon a contingency, there is no one in whom it
can vest, for a freehold estate cannot vest in one for years.
Another maxim is of so much importance as to demand at
tention. It is 'that no deed a fee simple cannot be limited up on a fee simple,' which may be done in a devise. As when J. S. gives by a deed, an Estate to A. of his heirs, but provided to die before he arrives to the age of 21 years, then to B. of his heirs; it will be void. But in a will it will be valid.

One thing further is to the difference between deed of wills. By deed no man can create a remainder in a lease for years, be in personal property, because in law a life estate is greater than an estate for years. But in a will this can be done.

Judge Trench has said it unnecessary to refer to any authorities for what he has laid down, but recommends A. B. C. Om. 166. of Wodensons Lectures containing all the important matter.

Of Remainders

"A remainder is an estate limited to take effect if to be enjoyed after another estate is ended." As when J. S. grants an estate to A. for years, remainder to B. of his heirs forever. Now J. S. has parted with all his estate of interest, it has vested in estate in B. The remainder is not part a present estate but to be enjoyed in future.

When an Estate is greater than for years,
lively of orig in necessary to pass it. It is for this reason actual
being a suspensio in theory to know not the delivery of the deed is sym-
bolical of it.

A remainder can never be limited but upon an estate
while persists out of the grantor at the time of creating the partic-
ular estate. It is not especially necessary that the estate rest in the
remainder man, for it may be a contingent remainder, but it
must vest in the remainder man during the continuance
of the particular estate or so instantly that it determines.

Yet does not, it cannot exist at all.

A remainder may
be limited to take effect upon an uncertain person or upon
an uncertain event. The uncertain person must be "potestas
impingua" a probable contingency, if not, "potestas remedi-
ionis" a remote possibility.

1. As to an uncertain person. The estate to it for life remain-
der to his eldest son or now the event of his having a son is "po-
testas impingua." But an estate to it for life remainder to
his eldest grand daughter is "potestas remediionis."

An estate to it for life of the heirs of the eldest son being no
this is also "potestas remediionis." To his eldest son named John it
remedies also. If this estate is void in its creation, it can never
have effect. As who, all the contingencies happen.

2. As to the uncertainty of the event. An estate to it for
life, remainder to B, provided B survived him; now if B. dies before A. the remainder is gone; I can make rest. These remainders are contingent.

If this particular Estate which is said to support the remainder, is destroyed before the remainder rests, it can never after rest, for then the foundation is swept away, the fabric itself must tumble.

In cases of contingent remainders, the tenant for life may destroy the remainder by forfeiting or surrendering up his own Estate, as well as by his death before the remainderman is in esse. This has introduced the practice of constituting trustees to support contingent remainders. As where there is an estate to A. for life, remainder to B. if he survive A. Now if A. does any act by which he forfeits his estate, it will destroy the remainder. But B. to prevent this has a clause inserted in the grant, that D. shall be a trustee to preserve the contingent remainder during the natural life of A. This is in fact throwing another rope under the building, as was first known in the reign of Queen Isabella.

Judge Thorne observed, that the doctrine of remainders has been called difficult. Yet it is difficult only as learning to be a shoemaker is difficult. It is merely mechanical, it requires only attention.

An everyday question, so to speak, is an estate created by
Will to be enjoyed at some future period, if it must be such an estate as cannot fail under the denomination of a remainder.

1. The first difference between a executory devise and a remainder is, that no particular estate necessarily to support the former can estate to commence on the marriage of a female heir, or estate to commence on her death, or marriage. This is a freehold made to commence in future, if upon a contingency too, as an estate unknown at law, for there every freehold must commence in present, if such it is to be enjoyed in future.

This practice of making estates to commence in futurity was created entirely by the court. The example above stated is not an executory devise, because created by will, but because it is made to commence in futurity without any estate to support it. 2 Must. Com. 176.

2. A second difference between an executory devise and a remainder is, that in the former, it is simply on any life estate limited, or on life tenants upon some contingency. As a man devises land to a heir, being, but if he dies before the age of 21, then to his heirs. This remainder is said to be given by way of executory devise. But in both of these kinds of executors, the contingency ought to be such as may happen in a reasonable time, because otherwise perplexities would be created which the law shews. 20 s. 1. 1. s. 3.
his heir, but if no heir one hundred years hence, then to 64 of
his heirs. This would be ill.

The length of time which it was first
determined the contingency should happen in, was during a life
or lives in being. — Afterwards the time was extended, as in
case of a devise to the eldest son of 13, now in the first instance
the eldest son must have been born before the death of 13.
in the 2 instance it was extended to the time at which
13's son should arrive at the age of 21, which might be 21
years after the death of 13. — In the 3 place, if finally the
period was extended to a life in being which was the life of
the mother of the subsequent infant of her son. Making in
the whole a life in being 21 years & 9 months afterwards.

The reason of this 3 advance of 9 months was when the father might
sixty leave the mother intact with the plan to whom the first
age of 13's son was devised in his arrival at 21 years. This time was
allowed as the usual time of gestation 8 Feb. 177.

3. Any Executor, devise a remainder may be created on
a term for years. As a life for years may be given to one
man for his life if afterwards limited over in remainder to another
which could not be done by deed; because in law a life Estate is
esteemed greater than one even for 1000 years. As e.g.,
A may give a life Estate to B for a term for years with re-
mainder over to C. But in order to avoid suspicion which
The law abhors with its concomitant inconveniences to society, it is settled that the remainder man, or remainder men, must all be in eye at the time of the limitation—otherwise a man might extend his dominion from one generation to another for 1000 years which would be creating perpetuities. But all the remainder men must be in eye, so that the candles may all be lighted at burning at once. Such remainders may not be limited to take effect, unless upon such contingencies as must happen (if at all) during the life of the first division.

The Statute of Connecticut places remainders in executory devise upon one and the same footing. Such a Statute, however, if there be none, had not been enacted in the Statutes generally. This Statute of Remains declares that all kinds of Estates may be given by deed or will to any person or persons in fee or to the immediate descendants if those in fee what completely descends away the remainder of lands, that an Estate cannot be made to commence in fee simple. By Statute, barn or an Estate may be given to the eldest child of B. and his issue, or to the youngest child of B. and his issue. It can go no further, he cannot have dominion beyond the second generation.

I have just breeved in this place that there has been a great deal of foolishness in the books about the legal construction given to the words "dying without issue." as an
Estate to 16% of the residue "without issue" then to C.

If there never had been a lawyer, every body would have known how to have construed these words; for the meaning of them naturally would have been "without issue of his body," without extending it to future children, generations, or to grand children, great grand children, &c. But according to the legal construction a man may die without issue or 100 or one thousand years, after his natural death. This law however remains unchanged in viro, but appears to be ridiculous and absurd at the same period in some of our Courts.

There can be no executory devise if it falls within the rules respecting remainders. It will not be an executory devise if limited upon an uncertain estate. Therefore in order to be an executory devise it must have a particular estate to support it.
Cases exemplifying the nature of Remainders and Executory Devises.

1. I devise an estate to B for life, remainder over to C. This is a good remainder vested.

2. I devise to B his life for life, remainder over to the heirs of his eldest son, his son having then no heirs. Now this is a good contingent remainder, if no Executory Devises, for it has the properties of a remainder.

3. I devise an estate to B for life, remainder over to C if his heirs forever, but if my son D peris to my son & £500 within 3 months after my mother's death, then to D & his heirs. This was an Executory devise for a fee is limited upon a fee. 10 Mol. 426.

4. A further safe which has been a leading one. I devise to B his heirs forever, but if B dies without issue living I then to C if his heir forever. This was an Executory devise. 1 Exch. 570.

5. I devise to the heirs of J. d. at J. d.'s death it is an Executory Deviso. 1 Exch. 226. See Esq. 878.

One word in this place with respect to the distinction between a contingent if vested remainder. A remainder is not contingent because it may never vest, for a remainder vested in interest may never vest in possession. A distinction may be drawn in this way.
Devised

If there is no capacity in the remainder man in fee if he is unable to take at the time of the vesting of the remainder, it will be a vested remainder, but if he is not incapable he will not have capacity to take, therefore it will be a contingent remainder.

Of Devises conferring power to Executors and other persons to sell the Testator's property.

If a man does not have power to devise his estate himself, he has power to give away that property if dead or Will.

The power is given most commonly to Executors, but often it may as well be transferred to others.

Sometimes a more naked authority is given to dispose of the property, at other times an interest is combined with such authority.

1. As to the first. Where there is a devise that the Executors shall sell, that they may sell, or that they have power to sell, etc., it confers but a naked authority, if any conveyance made by such Executors will be valid. So that we see that the law from indulgence to Testators permits them to have some sort of dominion over their property even after their death. 1 Sel. 322. Camp. 264. Chit. 113.

2. As to the second. Where I devise to my Executors to sell my property, they have not only a power, but an interest
is the legal title to them. This distinction I never deemed an unfounded one, for he supposes the object in each was the same; of so he thinks it will be determined in court, when the question comes fairly up. At

an instance authority demands as a work. If there is a mere

marked authority, given to a man to sell, it can be con-

sidered in no other light than as a power of attorney;

and of course if this power is given to two executors, a conveyance cannot be made by one alone, because powers of attorney are always construed strictly. The conveyance must be exe-

cuted jointly except it is otherwise provided in the will.

The Executors do not take as Executors, but as appointers.

But it has been determined that in case there are three

Executors, if one of the other two may convey or sell.

This that if a man has given power to his two sons

in law, to sell a joint conveyance is a conveyance by

them all, will only be good. But where such power was

given to his sons-in-law, a conveyance by any two will be

good. See El. 26. 524.

If this power is given to any of them, then the act of one will be sufficient. See El. 26. 594.

It is a principle established in Chancery that whenever

has such a power to sell in disposal of the estate or subject

be so compelled by so to do by the legsate or executor, filing
Deeds.

A letter in Equity for that purpose. But the appraisers are if no means complainable to act. The case above supposes them to have consented, which if they are so, they are obliged to act.

It frequently happens that men devise their lands to be sold without saying by whom. In such cases it has been determined that the executors may sell, if the sale will be void. But how if they do not sell? If the devisee have no authority to compel them to do it? The court will appoint the heir to sell, if he will not do it. The court will appoint a trustee for the purpose.

All the difference between a naked power and one with an interest is, that in the latter case, the Exec or appraiser have in them the legal title until they do sell, if therefore they may enjoy the Estate until that time, but they will be compelled to sell.

When an estate is given to Executors to be distributed, or to give to maintain children, in both these cases they have an interest as well as a power.

Anciently there was a practice for the testator to devise his property to his Exec. to dispose of "for the good of his soul." In this case it seems that the heir had a right to claim, which if he did not, the Exec. would be sure to sell, for it was pleasing to him to have the money to use as he wished.
Deeds

Observations applicable to those States in which
the Statute of Uses regulates Wills of Deeds.

Before the Statute of Uses 27 Hen. 8. there it was usual and common to the coheiress to trust to pay over to him the
lands, ye profits of. The practice of granting these trust
Estates (as has been observed in the Tracts on conditions)
more from the frequent forfeitures of Estates during the
civil wars which convulsed England. The several lands
would convey them to some persons to the use of themselves or their friends to save them from forfeiture. The
practice lost along with the great confusion of immense
inconvenience, which induced the creation of the Statute
of Uses, declaring that the man to whose use the lands
were given, should not only have the use, but the profits,
being not the beneficial, but the legal interest. A fee
simple was vested in the coheiress for use.

But suppose
an Estate devised to B for the use of C. would this Statute
operate upon it? It certainly would operate to vest
both the title and possession in C. the use man. In
these States however where the Statute of Uses has no force
this would not be the case. If then this Statute cuts up by
the estates of such estates as these, given in trust, how happens it that in
those countries where this very statute operates that there are so many
trust estates? How is this statute enacted, for certainly it must be if trust
estates are allowed? It was defeated by connecting 4 parties in the
same conveyance, as where A gives an estate to B for the use of C in trust
for D, the latter of whom was to be preferred by the grant. And this
principle has introduced the whole doctrine of trust estates.

Should a man then attempt to create a trust estate by a
devise to B for the use of C, the statute would cut it
off as quick as lightning. In short, where the statute of
use is rendered nugatory by another statute, this would consti-
tute a good trust estate 2 T. R. 873. 1 Cow. 79. 167.

Thus has been a most useful statute entirely voided, but it is
just to observe that courts of Chancery
have so wisely regulated trust estates that little dan-
gy need ever be apprehended from them.
Of property devisable under the English Statute of Desises.

It was enacted from the English Statute that no property is devisable in England except as an estate held in fee simple. But to enable a man to devise, it is not necessary that he should be in actual possession, for a man may devise his remainder in fee. So a reversioner may devise his reversion. But a man in order to devise must be devised. The point is, that in case of a reversion, the seizin of the reversioner is tenant in tail or life, is his seizin. So, if the remainderer man.

But if a man is actually disqualified in tenement or in possessio, he cannot devise the premises of which he is so disqualified.

A man may devise all possible contingent interest, in the nature of a fee simple.

An estate in reversionary cannot be devised. Nor can an estate in tail, nor an estate for the life of the testator, or to be enjoyed by the testator for the life of another.

In regard to all persons may devise any estate of which they are possessed. Except estates in tail. A part tenantry may be devised here. A man need not be dignified here to enable him to devise.
Devises

How a devise may become ineffectual.

One way in which a devise may become ineffectual has already been largely treated of; of which will not be taken up again.

Reveals her a 6. to Revocations.

1. First, then a will may become ineffectual by being revoked.

2. A will may become ineffectual by reason of its invalidity.

As where a devise is in these words: "a devise to the right heirs of my name of my estate, a freehold for 3 years, and after my death, a devise to my wife for 5 years," if in a devise made afterwards "if my estate is out of freehold before the 5 years are expired, then to be a devise to the two best men of the White House." Or also "to the present man in Derby," or also "to one of the sons of the states," &c. having several.

In all these cases the will is unintelligible upon the face of it, if it is even ineffectual, because when taken together no rational interpretation can be given to it.

But a will may become ineffectual by reason of which arises defects of the will. As where a man gives an estate to his son John, having 2 sons of that name. Now we have already seen that such proof may be admitted to identify the person of such explanation the testator's intention. What suppose no evidence can be produced explanatory of his intention? The will in such case must be ineffectual.
3. A devise may also become imperative when the manifest intention of the testator is contrary to the policy of the law or opposed to it. Cases of this kind have occurred very frequently. As a devise by A to B or his heirs forever, that B shall not have power to alienate the estate. It is a principal ingredient in a fee simple, that the owner have power to alienate; the intention of the testator is therefore contrary to law. It will be reasserted however that this by no means renders the will void. It will only initiate the legal process upon the estate which is contrary to the law. The devisee will completely take a fee simple.

So also a devise of an estate to A of his heirs male forever will be an intention to create such an estate as the law knows nothing of. To have devised to the heirs male of the body of A, would have been a legal intention, for there an estate tail would have been created. As the case is stated a fee simple would vest in the devisee.

It would also be the same if a man should devise an estate tail to A of the heirs of his body prohibiting him to alienate such estate by five or common recovery.

So also in case of a devise from one generation to another.
4. Another set of cases, which formerly occurred, of which will be mentioned, now for the sake of regularity, as opposed to legal policy, are where testators having several children devised all their estates to their oldest son, who would have taken as heir. It formerly made a great difference whether in such a case one would take as devisee or heir, for in the latter case the property would have been liable for debts in the former it would not. But now in either case or in all cases the property will be liable for the testator's debts.

The specific legacy, however, is not liable for the payment of debts until the personal property deserts to the heir is first applied. But the personal property of the devisee of the heir is liable, before the real property of either.

5. A devise may become inoperative by the devisee's dying it, which he may always do. This will very frequently be the case, where the legacies or debts will amount to more than the property devised. In such cases devises will not burden themselves for nothing.

6. A devisee may have done the very thing in his lifetime which he devised to have done at the expense of his property after his death, which will always satisfy the will and render it as to that ineffective. — So when a man
Devises

makes a Will and gives £400 out of his personal property to his son, for the purpose of building him a house, the remainder of his Estate to his other children. The testator does not die as soon as expected, and so builds the house for his son during his lifetime, if then dies. This is a satisfaction for cans. — 1 Rev. 95.

7. Devise may be defeated or become inoperative by a statute which subjects the lands devised to the payment of debts.

Who may devise

All persons were incapable of devising real property before the statute of Wills 32 Hen. 8th, except those who lived in parts where there were special customs. Before this statute every person could devise personal property. The statute of Charles gave a power to all persons to devise real property, except Infants, Idiots, and persons of unsound memory.

These it seems were incapable of devising personal property at common law before this statute.

Fensed covert has also a positive disqualification set forth by the statute of Hen. 8th.

1. Minors or Infants are prohibited on the ground of a want of discretion.

243. Idiotic persons and nonsane persons are also disqualified.
the ground of incapacity, or want of discretion to direct the course in which their property shall go. Whether persons have sufficient capacity is to be investigated by the production of evidence. It to be left to the determination of the trier. A man is not to be excluded on the ground of idiocy or insanity merely upon the belief of suspicion of one man. The court of jury being the trier must judge for themselves.

If a man has capacity to take due and proper care of his property of affairs to manage them with ordinary direction he is not a subject of disqualification within the statute. However a man to enable him to devise, must not only be capable of answering familiar questions, but he must have a sound disposing mind.

As to the power of a woman to devise.

James Bloom are positively disqualified to devise by the statute of 1811, notwithstanding some content that their disqualification arises from an incapacity to devise at common law. But can James devise devise in those States where this statute has not been adopted, is the great question? In both it has been determined that they can devise property which they have to their sole separate use without the consent of the husband. If I were considers determined correctly.

It was first determined in the court of Probate in the
affirmative. It was then taken to the superior court of своем
was determined in the negative. There to the supreme court of Essex
which it was determined in the affirmative. And upon applica-
tion to the legislature to have another trial, it was refused to be
granted. In the council there was but one dissenting voice.

This is a case as a novel question. This principle
determined conclusively, - namely, generally, upon the ground that
games are void under the judgment of solemnity, which
it is inferred that they alone can sustain. Since this
determination is correct as cannot it is certain correct in all the States
no positive disqualification has been stated by statute. It then
first becomes us to scrutinize the subject that we may become the
better able to judge concerning it.

In fact there is nothing in the

 statute which "by

 the words of the statute " Infants, idiots of persons of insane mind,

 and all others legally incapable," are disqualified. Does this

 statute include a specification upon games courts with a

 legal disqualification? - If they were intended by the legislature

 at the time of making the statute, why were they not named, which

 could have been easier than this? Why other persons except those

 mentioned are legally incapable, these no others are incapacitated

 and these words "all others legally incapable" are mere words of a

 redundant section. There is to be some persons under them for the
absolute control of others, as persons under overseers who could not de-
vote. But females bound are certainly not excluded under this
language.

Having attempted to show that the statute of kent does not
exclusively or virtually exclude or disqualify mar-
ried women, the question remaining is, could females court
divide their personal property at common law, but then no
one could divide real property? If in England by the com-
mon law they could divide personal property, it is agreed on all
hands that they can divide real property here; for one statute
regulates both.

If there can be a single case, it's circumstantial
that a married woman can divide her personal property in
her own right) without injuring in the least with the mar-
itual rights, or with the husband's legal rights, then we can
see no obstacles to prevent her exercising such property. If
deciding she would in such a case affect her husband's mar-
itual or legal rights, it is agreed that she cannot divide.

But let me ask if she has property on her side of sepa-
rate use, who has the common law restrained her dividing it?
Why should the husband have control over it when it can
neverpossibly go to him. Why are her wishes not to be gratified
as well as his when it will not injure him or affect his marital
or legal rights in any remote possible degree?
But these are only arguments which if against law, must yield however plausible or convincing. But is this the case?
1. The opponents of this determination do not say the wife cannot contract a devise alone because the two husband are one. This is ridiculous, for if they are one, how comes it to pass that the husband can contract, devise yea without the concurrence of the wife?
2. It also said that the wife has no will of her own. This is not true in any sense. If she has no will, why it is monstrous that she should join the husband to make a fee simple? Her consent must be had to pass her life estate, so her consent is wanting to pass the fee simple. Besides when the wife is guilty of an offence, is not she as subject to be lenient lest she even her husband? Most certainly.
3. The opponents of the principle refer to the case in the books. Herein it is said that the will of a married woman is good over the will of her husband. Therefore anything is not to good without her assent. The answer to this is ready. All these cases without a solitary exception are cases where the wife willed away the property of the husband, which do not at all reach the cases of a will of her own property.
4. In James' history of the English law there is a note cited from Bracton saying that femes covert cannot generally devise. The meaning of Bracton is obvious.
DeWitt.

cannot generally devise, because they have not generally property is their sole or separate use.

Both Lynwood and Fitch propose that you think it strange that there should be a question with regard to a same courts having power to devise her separate property.

Lynwood 170.

5. It was formerly a practice to enuev ad action exclusive with personal property, 4 Lynwood maintains that the wife could devise this property. These cases stretching into antiquity show how and a decree what was then considered as law by men of conscience.

6. Before the statute of 1827 which statute makes the husband administrator of the wife, if therefore gives him her estates in action for the payment of her debts. Before this statute if the wife had estates in action never meddled with collected, or reduced to hight, he being by the husband during coverture, she could devise them. Her incapacity to do this arises from an incapacity introduced by the statute above-mentioned. If this is correct, she may devise as conjointly property which she holds in entire rights as Eel, distinct from her husband. It has been so determined.

The summed cases of separate property which is continually arising in F. Reeves opinion unequivocally decide the question.

In every book it is found that a same court may do what she pleases with her separate property. Why then may she devise
if it cannot be so in England because of the position as modification of the statute, or not because an incapacity arises from intoxication. If intoxication disqualified her, then she would not have the liberty to sell or convey her property which she finds she continually does under the protection of the law, and without offering the husbands' marital right.

The property must be subject to the husband's property, and vice versa, in the same way.

If there any crime could not be decided in those states which have interferences by statute? The only specific reason against the abolition is that women are under the section and control of their husbands; if even this reason upon slight examination vanished into smoke,—For if this argument proves anything it proves too much. Were this reason to have its full latitude, then a woman's consent would be incapacitated to convey her separate property which she deems own, or nearly this coercion would operate in sales of conveyances as well as decrees. If it similarly, it would create the other.

It is fact that women, when deemed they are generally weak in body of mind, for purposes are subject to coercion, the answer is at hand. This does not apply to their power to discretion, for it has called the policy of validity of committing, death bed dispositions.

The question is can James coexist, or man when well is healthi
Dears.

Since July 5th, 1830, I have not seen you. I hear of you.

This is inclusive to the law respecting the power of a husband to convey to his wife.

If a husband is married to a bankrupt, the wife can certainly convey.

The ground on which the husband entrusts the wife in the disposal of her property is to give up his own right, and not hers.

But say to the opponents of the principle of the wife's conveyance: 'Would they not convey against their wills?' There is no statute controlling them from conveying. The fact is that by this conveying he would reserve his will to deprive himself of the use and enjoyment of his property, during life, which he has an indispensable right to. A privation of which would affect his marital rights.

Besides, this would contravene a settled maxim that a freehold cannot be made to commence in future without it would be the case if he conveyed should have validity without his consent. He could not be permitted to create a remainder, it would contravene another maxim of the English law, that the remainder must commence at the time of vesting the particular estate which is said to support it.

The Roman law then does not disqualify.

By reason of its devise, they have power so to devise all the estates, where they are not disqualified by statute.
There is one argument in favor of this principle which I
have not yet mentioned, but will now mention it.
It is a principle in England that the person devising
must have power to devise at the time of making the will, or it will
never become valid. Where a married woman devises after
an agreement being dissolved, republishes the devise, and it is
thereafter revocated at the instance of Will, her devisees will not
receive it valid.

There was formerly a practice in England that
where men had good houses in the city, they would set apart for them a
portion of their property called their personalities, and which
they could devise, and which was immediately valid. Now this was
not because devisee was a deprivation, for if it had been,
the concurrence of the husband could not have made
it good, which in its inception was said.

The custom of devising was retained after the Roman
laws, and was in this certain local limits in England, if moreover
we find this to be the case, married women could devise.

The following are some of the principal authorities with
the foregoing principle:

- 1 Petre's History Co. 367, 111, 101, 40
- 1 Petre's History Co. 176, 175, 174, 173, 172
- 1 Petre's History Co. 170, 169, 168, 167, 166
- 1 Petre's History Co. 165, 164, 163, 162, 161
- 1 Petre's History Co. 159, 158, 157, 156, 155
- 1 Petre's History Co. 153, 152, 151, 150, 149
- 1 Petre's History Co. 148, 147, 146, 145, 144
- 1 Petre's History Co. 143, 142, 141, 140, 139
- 1 Petre's History Co. 138, 137, 136, 135, 134
- 1 Petre's History Co. 133, 132, 131, 130, 129
- 1 Petre's History Co. 128, 127, 126, 125, 124
- 1 Petre's History Co. 123, 122, 121, 120, 119
- 1 Petre's History Co. 118, 117, 116, 115, 114
- 1 Petre's History Co. 113, 112, 111, 110, 109
- 1 Petre's History Co. 108, 107, 106, 105, 104
- 1 Petre's History Co. 103, 102, 101, 100, 99
- 1 Petre's History Co. 98, 97, 96, 95, 94
- 1 Petre's History Co. 93, 92, 91, 90, 89
- 1 Petre's History Co. 88, 87, 86, 85, 84
- 1 Petre's History Co. 83, 82, 81, 80, 79
- 1 Petre's History Co. 78, 77, 76, 75, 74
- 1 Petre's History Co. 73, 72, 71, 70, 69
- 1 Petre's History Co. 68, 67, 66, 65, 64
- 1 Petre's History Co. 63, 62, 61, 60, 59
- 1 Petre's History Co. 58, 57, 56, 55, 54
- 1 Petre's History Co. 53, 52, 51, 50, 49
- 1 Petre's History Co. 48, 47, 46, 45, 44
- 1 Petre's History Co. 43, 42, 41, 40, 39
- 1 Petre's History Co. 38, 37, 36, 35, 34
- 1 Petre's History Co. 33, 32, 31, 30, 29
- 1 Petre's History Co. 28, 27, 26, 25, 24
- 1 Petre's History Co. 23, 22, 21, 20, 19
- 1 Petre's History Co. 18, 17, 16, 15, 14
- 1 Petre's History Co. 13, 12, 11, 10, 9
- 1 Petre's History Co. 8, 7, 6, 5, 4
- 1 Petre's History Co. 3, 2, 1, 0
Devises.

During imprisonment, and in many of cases in public or private, the courts will go great lengths to set aside

Where a man is sick or
his death bed, and being over impressed, to procure a wife from trading, has made a will according to the desires of those who
have impressed him, it will be set aside. As when a

man deemed his husband to favor a particular child.

All the disqualifications to Devisors have been mention-
ed. It remains to say that all persons who are seized of real

property legally, may devise it, so may all persons who have an

equitable claim, or tracing, for it is all the tracing which such

a claimant can have.

If Devisors to whom property is devise-
able.

It is most impossible to find a man who cannot be a
deviser. It is clear that all persons may, unless they are under

some statute or civil disqualification.

A devise may

be made to a person in ventrie or more; therefore a joint

deviser's has nothing to do with devises. A devisee can-

not however be compelled to take the property devised to him.
In grant to the property granted, it does immediately, therefore the noise made about the amount of the grantee is naught. Property devised rests instantly upon the devisor's death.

Sovereign is no disqualification of a devisee. It is said the husband may agree in absentia to be taking as devisee... It is acknowledged that he may do so during his life, but as an estate by will may be made to commence in future, he cannot hinder her to bring as devisee after his death.

It was another question whether a husband could devise to his wife. It was said he could not because he was if he were one, if to have devised to her would have been devising to himself, which would be absurd. But when it was considered that the estate devised was only to commence after his death, it put an end to this

A man was also grant land to his wife thrice a medium—by convey to another person, if he immediately to her. This is now the practice in Don. But in England the statute of Uses has given to husbands a more direct way of conveying to their wives. Let a man convey to Jon. To his for the use of his wife, this is by the same deed one immediate conveyance to his wife.

It may be seen then that this
**Deeds**

There is no such difference between deeds of sale as is pretended by some.

**WILL:** It has been said that aliens cannot be devisees. It is true that aliens cannot legally hold property devised, but yet in case of a devise the interest does pass out of the devisee to the alien. The certainty can take as devisee; for the property would be perpetuated upon office found, i.e., as soon as he was legally found to be an alien by the commissioners appointed for that purpose.

**Illegitimate Children.**

It has been said that illegitimacy ceases "quoque colligationis festinat potestate" which cannot take as devisees. By the same

I suppose a man devises to his eldest son if his eldest son is illegitimate, would he take? No. The law presumes no illegitimacy, but that he intended his eldest son born in lawful wedlock.

But suppose a man makes an estate in remainder to his eldest son then unborn, whether legitimate or not, the rest of illegitimate would not take having
Deeds.

no name by reputation. But a devise to his illegitimate children would be good. If, however, he had 3 illegitimate children born of 3 women, the former would only take. If he should not say "to his sons" but of to them by name, if they had obtained names by reputation, the devise would be good.

An estate cannot be either devised or granted to illegitimate children unknown.

In a devise where an estate is made to commence in future, it is not necessary to particularly describe a devise, but in deeds which must rest an Estoppel, unless the grantee must be particularly described.

To a devise to A on his marriage.

No. 38. woman of a certain name, now this devise will vest the property on such marriage.

In devises uncertainty as to the person who is to take is by no means uncommon. As a devise to one of a certain man's children who shall first get married.

Concerning Persons not in issue.

A great deal has been said with respect to persons not in issue. Looking by deeds and wills, devises and devises do vary in this particular, for an estate may be devised generally to persons unknown, if not too far extended. No estate can be created by deed to vest in future except in the
Devises.

In devises, all estates conveyed to one or to certain persons, and not for the value only, by way of remainder, in case of death, the whole came distributed the estate devise to one or devise, for

meres with others.

Formerly a devise to one other than born (as a de Precedent) would lie good; but to an unknown, born (as a future) child, not so. But now in both cases they are valid. A disgraceful distinction.

It is well that,

if you can effect from the will that the testator intended a full
devise, to take effect at the child's birth, it will be a good devise.

In devises, an estate may not only be given to natural persons, but to civil persons also. With

the testator by any words in the will which will direct us to the

person intended, unless sufficient, unless no name be men-
tioned. A devise to the sheriff of Middlesex. to the

person of Middlesex of a society. Also a devise
to a man's son, he having but one. To A of children to

child of A. There are all kinds of description of purchase

of devises will to take. As a devise to the relations of A it will be given for the statute of distributions.
Devises.

A devise... in that any devisee is devided the price
13th 84.
10th 35.
7th 71.
Heirs is not used, for the word heirs will make it an Estate
20th 13. tis, if a word of limitation.

But if a man should use the word heirs unadvisedly or improperly, it will not be a word of limitation. As a devise to the heir male of A, here is an evident intention to describe a particular person. If the word
W9th 33.
37th 2.
heir is a word of purchase or description. So also a devise
29th 11. to J. A's heir whilst J. A is living, it will not be a word of limitation; for nearest heres viventis. Though when the heir apparent is meant by the word heir, the devisee will take as "describe persona."
Lands amicably were not considered as capable of being enjoyed as they now are; for among the germand and other Heathen Nations (from whom the whole feudal system was derived) they were never held as alienable.

Lands were said to be held at the pleasure of the Lord. At some time estates for years were conveyed, if they were rendered upon the condition of rendering certain services to the Lord. But something more permanent was introduced. A life estate became alienable at the time of the Norman Conquest. Lands at this time were given for life only, if all conveyed were taken most strongly against the grantor, as they were incapable of being conveyed away for any longer time. Hence it is the doctrine arises in the books that unless you have some particular words as "heir" for instance, it will be considered as a life Estate. And by that word alone all Estates in fee simple have been made descendable. But the restraint of alienation lasted longer, for it was not until the reign of Henry III. that a law was passed permitting a man to sell or dispose of the lands which he himself had purchased—and even then he could not dispose of the whole of his acquirements so as totally to deprive his heirs of...
Alienation.

any part of it. — If a man purchased an estate to himself of his
freind, he could not alien it, for the term heirs venes to shew
that the estate is descenble, it cannot be alienable. But
if man, purchased an estate to himself and of signes he
might alien it, for the word of signes shews to shew that
the land is alienable — and afterwards a man seems to have
been permitted to part with 1/4 part of his inheritable Es-
tate. by the great charter of Ken 3 Ed 3 was permitted to be
ceded, and at length by the statute 15th Ed 4th called the sta-
tute of victuallers all custom be once taken off, and freely to
persons except the kings tenants or squire men at liberty
to alien all or any part of their lands, and these tenants
were by that. 3 Ed 3 permitted to alien and paying a fine
to the king. And by that. 12 Ed 2 all fines were abolished.
During this period lands were not subject to debt, it was
until the 13 Ed 4. but now by a Stat 27 Ed 3 all
lands may be extended by Statute Staple and Merchant

Instead of enquiring into may one, it would be
more proper for us to make a negative enquiry, and see who
may not alien. These are persons whom the law hastain
under some special disabilities.

W. I mean there be (as a general rule that all person
in possessioh the not actually deposed) may alien this unless
under some special disabilities.
Animation.

It is true that a man out of profession can convey to a person out of profession, but this is not effectual to the law, but even this kind of conveyance was not allowed at home. Law, then, it has since been allowed of by Stat. 1 Geo. 3, which declares that no person shall convey a household, i.e. a definite title to any person out of profession, and adds that if they do such act is void, and subjects the person so conveying to enormous penalties.

Now there is no difference between the statutes of Rom. law except the addition of troublesome by the Statute. — The reason that the defendant out of profession can't convey is that his title is adverse to the buyer's in profession. If therefore the former's necessity that he should bring his tenant in common of the latter profession, and he will have full power to convey.

But the doctrine of a joint tenant remains for as they may be adverse, no man has a common away, because the defeasance of the tenant in common is the defeasance of both in remainder or possession.

1811, 37. — The interest may, however, be conveyed. But the conveyance of a joint tenant to a single remainderer, may be devised by the

It has never been determined that this may be altered by

Hodson is of opinion that they cannot. Purvis coincides with his in opinion.
Alienation

...ms attained of felony or treason are incapacitated from con-
veying, if these crimes with a forfeiture of the Estate. But
we cannot we have never considered, the crimes of felony
as working a forfeiture or as preventing the person to be
considered from alienating. And if we adopt the law in prin-
ciple it works a forfeiture only from the time of conviction.
We have a Statute known which makes a man guilty of mar-
diag of his own act. Mr. Price thinks it very
unreasonable that in a State of society like ours, that the
land should be forfeited. If thereby deprive the innocent chil-
dren of their support & expectations.

III. One notice is sufficient, which is usually taken no-
tice of, under the head of Contracts, & Price should be
notice in. That is a Law contrived. If a man om-
promises makes a conveyance, it is voidable, tho' not absolutely
void, by act of the death of the conveyancer, he said may
avoid the, he himself cannot. But there was a time in
the reign of Edw. 3d. when no conveyance was a suf-
ficient title to avoid a man's own land. There was a case
...
Lunation.

not be permitted when they receive their intellects, to take an advantage of their own incapacity.

But all the they can't come into a state of law, I found an immediate deprivation of reason, yet as the king is the guardian of all estates, lunatics for they may be his chancellor amidst their suits, if this to even in the life time of the alienors.

As in the case of their bound and some manners may be found in the name of the king against the quarter of the non-compress, requiring him to two cause why he holds the property.

IV. Minors under the age of 21 are capable of saving conveyances as grants, but they cannot when as their conveyances are either void or voidable. The late cases consider them as voidable. This is the privilege of the minor to consider them voidable.

V. Exception. If a person should sue a purchaser as a grant or conveyance be made to her, the husband by defect only may destroy the conveyance, but Chancery must interfere if the justice done her.

But if the purchase, if her husband consents it binds him, and all he is consent he necessary yet after his death she may dissent from it, as she may have been under the control of coercion of her husband.
Annuation

She may after a annuity cease all her contracts except a contract to pay the
owner by prime remainder. Here she is bound unless the husband
be dead. But for this he may do as it affects his martial
rights, unless he be joint in the jointure. But she is bound with
whether she join or not. This is a solitary exception to the
general rule, that the wife must absolutely bound her con-
tracts during a annuity. The ground is not as Pavel says,
that she is considered as a joint sole. This is law in Scots,
as well as in England.

VI. The case of alien born is somewhat peculiar. For he
may purchase any thing; but after purchase he can hold
nothing, except a lease for years of a house for
convenience of merchandise, in case he be an alien friend.
Of Alienation by Deed.

Alienation originally took place by the laws of law without the aid of written instruments. But it is otherwise now. There can be no contract whatsoever, or conveyance relative to lands since the statute of frauds begins unless it be in writing.

Conveying of land originally by the canonic law was affected by the parties going up on the land in presence of witnesses, making liberally of executors, which was done by taking up a piece of king's turf and delivering it over into the hands of the purchaser.

There is a difference between a writing about land to convey, if an absolute deed, for an executory agreement need not be sealed, but a deed always must be otherwise, it is said.

There is a certain species of property that none can be conveyed by liberality of executors, but always by deed. If there be personal reversion in land as rents, tithes &c. When wills were first introduced, sealing was not necessary, the bare subscribing of the witnesses being deemed sufficient to prove the authenticity of the instrument.

But now there is no such thing as alienation of
A deed may be defined to be a written instrument executed and delivered by the parties. The delivery of this instrument conveys as absolute a property in the land, as the delivery of a horse to a bona fide purchaser.

It is said that a deed

must be written in paper or parchment; if it were conceived that a deed upon parchment, or other similar substance would be good.

As to the subject of considerations, If Reese will omit it generally for the purpose of taking up one particular branch of it, as he has treated upon it fully elsewhere in his essay on the subject.

The branch of fraudulent conveyance the judge will now attend to, is where a deed is made by one man to another with a view of cheating his creditors of their just debts. This will be deemed a fraud.

Reese: if the grantee is deceiving to the design of the grantor; whether it be a bona fide purchase or not, for the enquiry in such case is not whether there was a bona fide purchase or not, but merely that the views of the grantor were in dis-
Satisfaction.

Satisfaction is the placing of the land. If A conveys a piece to B without consideration, the law considers it as holding the property in private trust for A. If it is an honest trust it will never be objected to, but when the conveyance is made to defraud creditors of their just claims it will be a fraudulent one as was before observed. The law looks not into the consideration (for the grant is good as between the grantor and grantee) but merely into the effect which it has upon будитор

creditors. Therefore may one the grantor make out execution, relying upon the landas the bonds of the fraudulent grantee.

If there is a partial consideration only of the object of the residue is merely to defeat the creditors of their claims the conveyance will be fraudulent as to the whole and of universality, for the grantee might have taken a mortgage of the land if he was unable to pay the whole of it, and that would secure himself only in the land.

There is such a thing as a fraudulent conveyance even at the time, but there has been a full consideration paid if it proceeds upon the ground that the grant is to benefit the grantor at the expense of his creditors, but the grantee must be knowing to the intention of the grantor as when a man sold his farm and was going off without satisfying the claims of his creditors.
Affirmation.

It is immaterial what shape the sale of land, if the grantee takes the land, with the view of selling it from the hands of the grantor's creditors, as in the case of a partial sale and assignation, for instance. —

So where the grantor was indebted to the grantee to the full amount of the land, but conveyed it to him not with a view of its going in satisfaction of the debt, but merely to defeat his creditors. —

And so if there is a full price given, if the object is to defeat the grantor's creditors, it is fraudulent.

The statute, etc., against fraudulent conveyances, is very frequently resorted to by our courts (and it is actually, adopted by many of the States) it being in accordance with the common law.

It has been already observed that the grantor as the true owner of the fraudulent grantee, legally holds the land the conveyance. —

But then the grantor cannot rescind his land, may he not recover its value from the fraudulent grantee? This is quite a regular case. If the whole design of the law is to beat hard upon the grantor, he certainly cannot. But if the law proceeds upon the principle that the grantor shall be satisfied by his own deed.
from questioning the validity of the conveyance of that the
grantee is a binding one between the parties. It would seem
that the grantee ought to give a quiet possession of that the
value may be recovered from him.

But the late decision
of the Supreme Court in the case of Bruce v. Beath, it seems
to be the opinion of the Court that the value of the land cannot
be recovered by an action, but by the grantee against his fraud-
ulent grantor. Still, however, it is quite indeterminative.

It is now settled that an actual fraudulent conveyance is
void as against both subsequent and prior creditors. But
a void voluntary conveyance with no intention to defraud
is void only as to prior creditors. This distinction runs
through the whole doctrine of conveyances.

The statute of Ohio
further provides, that all fraudulent conveyances shall be void
as against the party or parties for whose benefit the conveyance
is made, and as against their heirs, executors, and assigns.

But can a bona fide purchaser of the fraudulent
grantee hold against the fraudulent grantor's creditors?

Here comes the claim of the bona fide purchaser of the
mortgage creditors equal in point of Equity. But notwith-
standing he is full of opinion that it would not be good in
the hands of the bona fide purchaser. But his opposite
...say could not - & the fraudulent grantor have convey
this land to B, the bona fide purchaser, he having no know
edge of A's rights. Why not, he certainly could - well
then, this way, if A can convey the land away, B the
fraudulent grantee can do it, for he stands in the shoes of
the grantor. But A argues thus: the fallacy lies in this:
that the law is protecting creditors does not mean that the
grantor shall never be allowed to convey, but that he shall
get a quiet pro quo by settling himself in a bona fide
manner before he gets thus, and is thereby enabled to meet the
claims of his creditors - who may obtain satisfaction either
by attacking his property or person - but if B was permit-
ted to convey, B's funds would not be increased, but on
the contrary diminished. Is this way actually defeat the
creditors? Further, if the bona fide purchaser was to
hold, it would defeat the whole operation of the law upon
the subject - but the maxim here applied is, 'prior est in
tempore potior est in jure.' The creditors having the first
claim of equal equity with the purchaser, they ought to be
allowed to retain the land, or secure its value in money.
The only way to acquire this money would be to sue the fra-
dulent grantee for money had and received - That the fra-
dulent grantee, if called upon ought to refund is reasonable
but that the creditors of the grantor should be compelled to call up-
on him appears extremely unreasonable, as the grantee may be a bankrupt.

The question in such cases has been made a question whether a conveyance may not be made with a view to defeat creditors in any case whatever which will be valid. The question then seems to be, whether property can be so conveyed as to enable, when other real property is left sufficient to meet the claims of his creditors.

And it seems not to be made fraudulently, for it does not deprive the creditors of their security, if it be made reasonably to ease questions whether it would be considered as a fraudulent conveyance.

Another question is: May there not be cases where a mere voluntary conveyance made with no intention to defraud, be valid as against both prior and subsequent creditors.

Here answers this question in the affirmative; put a very startling case which happened in one of his cases of elucidating his opinion. Mrs. Stanford was the wife of a young gentleman of large fortune, exceedingly distinguished, but subject to occasional paroxysms of relapse. In one of these intervals of worse complication, finding his estate rapidly wasting, he made a conveyance to a person who conveyed it to his wife of a small estate amounting in value to about $800. After a lapse of 10 or 12 years his whole fortune was exhausted. The creditors saw the rapid diminution of Stanford's prof-
Himation.

Some, but took no measures to cure their demands, if afterwards
were prevented from coming upon the estate, by the ground of
their negligence. This was decided by the Su. Court.

This declaration of voluntary conveyances is not
granted upon statute, nor upon any other principle of the
common law than this: "That a man must be just be

Covenants in deeds that are not quit-cla
releases, are usually of two kinds. 1. COVENANT OF

2. COVENANT OF WARRANTY.

In all deeds (except quit-cla) the vendor 1. Cov
Covenant 2. Warranty that he is well seised of the premises if 2. Warranty

defends them against all claims whatsoever.

Whereas a man seised tells a purchaser, not owning it,
you may bring your action on the covenant, for the
covenant of seisin is his as from the moment the action
is sustainable on the ground that the money was paid with
out a consideration.

If there has been a breach of the cov
Covenant of Warranty, you cannot bring a new action on the
breach, until after being required to prove such breach.

The ordinary mode of proceeding, then, to see B claiming
under A, for B to give notice to the Covenantor
A, who sold to warrant the land, by a writ of notifica
Affirmation.

Action to be a "warrant-. This being done, it is at his option to appear or not, if make defence in support of the title vested in B. But if B is suitor he may sue on his covenant of warranty.

The damages to be recovered in equity are always equal to the full value of the land at the time of eviction. But in England the damages to be recovered by the grantee are merely what he pays for the land and the interest arising from it, with the emoluments. If not the rise in its value at the time of eviction.

Suppose B now reposed in fixing B was evicted by B can recover of A in an action on the covenant of warranty. This is not conclusive as against A. if B can do no more than move for a new trial on the evidence furnished by A. if in this case B lapses his cause, but if B had given notice to A if then A had neglected to appear B may have his action on the covenant of warranty.

It has been a question greatly agitated in England, whether written notice is necessary to prove the covenant. If it seems to think that if it can be shown that the seller had actual personal notice it will be sufficient, but the safer way is to give written notice, in which case the re.
Attention.

Among the most conclusive, if the covenantor as soon as he is
within can bring his action on the warranty against the
convenantor.

These covenants of warranty may be
available of not only by the parties entering into them,
but likewise by third heirs or assignees.

If the covenantor be
a dead one, there has been a breach of the covenant of warn-

When the covenantor who is entitled to the action is not
the heir of the covenantor, the rule is this: that
in every covenant real if the covenant be broken during
the lifetime of the covenantor, so that he would have
been entitled to damages when he died, it will go to the

And this upon the ground that damages have already ar-

Now, of a personal nature, being to the E. But if
the covenantor were until the hand, as if it were broken in the

life, or the covenantor the right of action goes to the heir
upon the covenant of warranty entered into by the covenantor.

Again, if the tenant a man a riding land, should use
it, if the lease should covenant to repair the house upon it,
but should break the covenant in the lifetime of the leas-

or so that damages had accrued at the time of his death.

Why in this case the right of action would vest in the E., up
on the principle of damages being of a personal nature.
Hienation.

But suppose the lessee should covenant to build an house

&c. 52. within seven years of before the time elapsed, the lessee

should die: why in this case the land descends to the heir.

But, if the lessee neglects to fulfill his covenant, the heir may have

an action on the covenant with his ancestor. But if the

lessee makes a covenant that does not run with the land, the assignee of the lessee

is not bound; but in all cases where the covenant runs with

the land, the assignee is bound: this not on the ground

of any priority of covenant raised between him & the lessee, but

because he takes the land "cum onere."—

All covenants unbroken that run with the land
descend to the heir on the death of the ancestor.

If the covenant respects a thing in use, i.e. a covenant about the land, laesed, it is a covenant that runs with the

land.

But if the lessee covenants with A, the lessee to

repair a certain house standing on the land, without a limita
Estimation

1. If the lease has expired, assigns over this lease to B, it will be obligatory on the assigns for the covenant running with the land. And every person who takes the lease being assigns takes himself under obligations to repair the house, for the assigns must take it "cum anece!"

Again. Suppose B the assigns covenants to pay A the lessee $20 a year for 40 years, if soon after covenants sells the lease to C. C is bound to pay the $20 annually for the length of time that he shall be in possession of the land. If after a few years C should convey this lease over to D, D is under the same obligations for the land is only shifted on to the shoulders of another person; and the assigns in these cases is not liable by virtue of any privy of contract entered into between him and the leasor, but merely because he takes the lease running with the land.

Again. If the word assigns or names of the lessee is erroneous about the lands this is not for the main

3. Sum. 127. Because of a thing in case, but to do something de non it is

bined the assigns, so the covenant runs with the land.

The property over assigns, commits the sale is otherwise. As the document is to build a house, not a lie, and a wall or
do any thing to move, the assigns will be bound dimen-
tioned, otherwise if not.
Alienation.

1. If the covenant be to make a ditch, repair a house, build a wall, or do any act respecting a thing in freehold, the assignee will be bound, whether the ruin of assignor is mentioned or not, if the thing to be done is on the land, otherwise not.

2. If the time limited in which the thing is to be done has expired before the assignment of the lease, the assignee will not be bound.

3. But when the covenant by the lessor with the lessee is to do a thing which is entirely collateral, to the land, the assignee will not be bound the same — as where "t" the lessor, 12th covenants with the lessee to build a house on a piece of land separate from that which was leased to him, it will not be binding on his assignee, for the covenant does not run with the land.

4. The lessee in all the preceding cases (with the exceptions mentioned) is notwithstanding his assignment liable, the assignee having nothing more than an additional security to the lessee.

5. It was formerly a question whether the mortgage of rent from the assignor did not discharge the lessee. It was decided that it did not, for it is no waiver of the claim against the lessee, if the assignor is only liable on the principle of enjoyment.

But if the assignee assigns to a 2 assignee.
he is discharged from his liability to the lessor, but not to his assignee, in case of an insufficiency in his assignee.

Part of the lessor

521. if the assignee

527. assigns, his assignee is entitled to the benefit of the covenant in the same degree that the lessor himself would be entitled to

398 it. 1 Salk. 81. 6 Barts. 197.

The assignee of a lessor has the same

525. right to sue the lessor for a breach of covenant as the lessor himself, not by priority of contract, but as between him and the lessor, but by the benefit of the covenants running

392 with the land.

These cases suppose the lessor to be

520. But suppose the covenantor dies, who is to be

390 sued, the heir, or lessor? It is a general principle of the

443 English law, that the lessor is always liable to be sued on the lessor's covenant or covenants. This is so, because there is a right of damages incurred by him in his lifetime.

The heir is bound by all contracts of the

440 real or personal, and the same as the lessor, and is bound himself by specially, to the extent of this covenant. But it is not so in

437 but when that is exhausted may come upon the real property, to discharge the debts of the lessor, or the heir whose

434 is not liable except in some except cases in bankruptcy, for
is presumed to have received nothing from his ancestor.

It may be that a real covenant is entered into, which has not been broken on the time of the covenantor, but afterward by the heir. Here the heir is liable of not the Eas for the lands have descended into his hands if the breach is committed by him. The rule is the same if there is an assignment made.

There is a certain species of conveyance unknown to the English law called quit claim deeds. These deeds contain no covenants whatever, but are mere transfers of the grantor's claim to the property in question. This species of conveyance raises a very important question; which is: whether the purchaser under a quit claim deed for a valuable consideration can, on these turning out to be no title in him, recover the money paid to the grantor? The true distinction to be taken in all the cases is this: where a grantor says the deed to be quit claim, the latter praying a valuable consideration knowing it to be a bargain of hazard, if it turns out that he has no title, that the purchaser shall not be permitted to recover back his money, for the bargain was made at his own risk.

But a quit claim deed is given both parties supposing it to be a good conveyance, if it turns out to be the contrary, the grantee shall be permitted to recover
Alienation.

A deed may have a condition to it, which will defeat the operation of it entirely, as in all mortgage deeds. — For if A conveys a farm of land to B with this condition: that if he pay a certain sum of money within a limited time, the conveyance to be void of not, it is to vest absolutely in B; now if A pays the money within the time agreed upon, the deed is defeated. If this payment is to be proved by oral evidence.

June is commonly a date to a deed, and is the apparent time of its delivery — for the presumption always is, that the deed was executed at the time of its date, but this is by no means conclusive. Of the manuscript that fresh proof cannot be admitted to contradict a written instrument does not apply here, for the delivery is irrevocable of being proved by any other than fresh proof. But if there is no apparent date to a deed, if you can make it out its delivery, it will be good, for it is from that time that all deeds begin to operate. A case came before our Supreme Court where a bond was dated the 1st Jan. 1774, when in fact it ought to have been 1775. Fresh proof was admitted to show the time when it was actually signed.

Another requisite to a deed is, that it must be read
of the parties require it. If not then done the deed is void as
2d. if it be read falsely it will evidence at least as much as
miswritten, and so be agreed by confession that the deed
shall be read false for the purpose of making it void. If
in such cases it shall bind the fraudulent party.

Another requisite to a deed is that it must be signed.
This is agreeable to the English law; if signing is
supposed by a seal to be necessary.

Another requisite to a deed is, that it must
be delivered, or it is not good. And the proof of the deliv-
eroy depends entirely upon front evidence. But the ques-
tion here arises, what is evidence of a delivery? It is con-
idered written conveyances usually attest to the mere corporal act of
delivery, if not the delivery, for they cannot be relied upon
as proper evidence, but persons who were present at
the time of delivery are to be obtained if any such there
are. Words without any act whatever is a good
delivery, as where one man says to another, "There is my
Deed lying upon the Table, take it.

In many instances
there are no witnesses present, at the delivery of the deed.
This has reduced the party to the lowest kind of evidence
with the profession of the deed. Which is prima facie
evidence of its having been a legal delivery, but this presumption may be rebutted. The mere circumstance of the grantee's being in possession would not of itself furnish very strong evidence of the legal delivery. But the deed being sealed or executed presupposes a consent on the part of the grantor. It carries evident presumptions against him.

2. In such a case as a deed being delivered as an esrow, the giving of the deed to a 3rd person to hold for the use of another until the happening of some particular event, or the happening of what the deed must be given for, or is the delivery of a deed to a 3rd person to hold until the performance of some condition by the grantee. The deed in both these cases is delivered as an esrow. If upon the happening of the event or performance of the condition, becomes a deed to all intents and purposes.

This deed held in trust as an esrow may possibly be delivered up this mistake supposing the event to have happened, in which case the delivery will be of no effect, but this mistake must be proved by hard evidence.

It has been a great question whether a deed as an esrow can be delivered to the grantee himself to take effect.
Annulment.

The rule of any such consideration to be this. That if the deed is delivered in the grantor's name to become this act and this on the happening of some future event, it will be as good as a deed without consideration, the condition here fore is void if it cannot create an event.

If the once declared, can never be defeated by a condition subsequent. But to have this effect, it must always be a condition precedent.

There are certain technical rules with respect to a certain set of cases, which selection happens, but which the law will not take care.

These are cases of this kind. But where a deliverer first delivers was not good, a grantor in incapacity, if the grantee, as being a same concept, but afterwards having obtained this incapacity, the grantor makes a second delivery.

And so where the grantor was incapable an account of some impediments being in this way, as being a defect in the title, or of representation, should after removal of the impediment make a second delivery. In certain cases these second consequences will be good in others not, which cases now remains to be pointed out. — As to the first cases. — Suppose a woman during levirate make delivery of a deed and
At the death of her husband, a she makes a 2nd delivery. This 2nd delivery makes the deed effective.

But what if the party having the power of entail, wanting capacity, delivers a deed as an exchange after attaining capacity, viz. after her husband's death, she should make a second delivery, it would not be good.

As to the 2nd case, where a person has capacity, but laborers under some impediment as being out of profession. Here if the desirer makes a delivery if afterwards gets into profession, it makes a second delivery of the deed not to be good. This is a mere prejudice rule of law, this judge cannot see the reason of it. But suppose the desirer laboring under an impediment should deliver a deed and afterwards having the impediment removed, should deliver it a 2nd time it would be good.

Yet ceremony by our laws is, that there must be two competent witnesses. Under the English law they have none, this is not absolutely required.

All the requisites to an English deed are necessary to its having effect, except sealing. But we have two additional requisites that are not common to the English deed. viz. those of acknowledging and recording. The first is effected by going before a magistrate and an
Estimation.

This rule is the same as the one at first. The 2d that if
not done in order, it is not done to benefit the immediate
party, but as between the grantor & grantee, the title is good
without it. It is to prevent the grantor from making other
subsequent fraudulent sales of the same land. For
this amount the law says that if one farm of land be
done to two persons, he that gets his deed first recorded
shall have the best title.

To this rule there are two exceptions.
1st. Every man must have reasonable time to
get his deed recorded, if the common law protects the gran-
tee until he has been guilty of negligence, in which case
the law operates to give him the preference who gets his
deed first recorded. For "præx in tempore potest esse juris."

The 2d exception is where a man is not a bona fide
purchaser. So that a man should go and purchase a farm
of land which he knew was previously sold, but the
purchaser has neglected to get his deed recorded — then the
second grantee shall not avail himself of the legal title
by getting his deed first recorded, for it would be openly en-
ouraging a principle of fraud or collusion.

Exceptions are sometimes made in deeds.
So in a conveyance where the embellishments are specially
reserves, or timber growing upon the land.
Alienation.

Every thing adhering to the feuhold passes under a grant, unless specially excepted, but whatever is of a personal nature will not.

No any special exception

Cod. 47.
4 Mod. 12.
1 Tho. 311. a thing certain of particular 'is 6 kes lang rage. But
Ex. 5:22.
2 Mat. 45:4. of those concerned the rule to be perfectly foolish.
How deeds may be avoided.

A semblance of a title i.e. one wanting some of the requisites may be avoided either in Chancery or at law.

And if it wants witnesses under our law it will stand.

A deed may also be avoided having all the requisites as by variance of estate. In which case it is argued it is not the act of one of the obligors.

If an obligor alters it in a place material, an immaterial it may be avoided, even if the alteration is in favor of the obligee—this is grounded on policy.

This has been somewhat relaxed in the mercantile law; but the propriety of this relaxation is doubted.

If the obligor alters it, the obligee ought not.

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626 to be a burden, if proved may be made of the alteration.

If a stranger alters it in a material part it invalidates it, if in an immaterial part it does not.

Question. Suppose after the deed is executed the parties agree to alter it. This does not destroy the obligation. Ordinary of proof proof is admissible to prove the agreement.

In many cases there is a difficulty. Suppose the subscribing witnesses are not present at the time.
Titulation.

of a declaration of alteration, and they attest the instrument as attorn. No. This no other witnesses are admissable to prove the execution—this may be unreasonable.

Deeds may be avoided by a breach of the duty of the seal in England. He is not able to adopt at this day. And Locke says that if the seal should be broken or lost in the custody of the county, the he

majority of the county is such as not to invalidate the instrument.

Signing is always practiced under the English law, this is not required by any positive rule—by the consequence of the grantee's deed may be avoided. So by a curse of乙方 which is paramount to all others.

Various kinds of Deeds.

The law of Deeds in this is Eng. except under the Statute of Uses. as

1. Leasment, which was made without seal by levy of seignor.
2. Grants which convey Incorpnal hereditaments.
Decoration

1. Leases are properly a conveyance of any lands or tenements made for life, for years, or at will, but always for a lesser time than the lessor has in the premises.

2. Partition, in which two or more joint tenants, held in common, or tenants in common, agree to divide the land so held among them in severalty, each taking a distinct part.

3. Indemnities, is a deed creating on some other deed which may direct it.

4. Release. The absolute, ought to be understood. This vested the grantee with the title of itself. This could never be made unless to some person in possession, having some estate in the land. This is on the ground of least of release.

The deeds now in fashion originated from the doctrine of Uses, of which not to be here explained.

Of the doctrine of Uses

Originally there was no such thing as the land being conveyed away to one person if the use to another. About the close of the reign of Edward 3rd, this was introduced into England. a usucration from the men
in contemplation of death, to convey their lands to ecclesiastical bodies. By the statute of Mortmain this was absolutely, at some unwise ecclesiastics, in order to avoid it, by the doctrine of vested, which was not held by the Ecclesiastical Chancellors. It is stating. This was sanctioned by the Legislature except when the conveyance was made to ecclesiastical bodies, it was found very useful.

The law of vested

This is analogous to the doctrine of trusts. The trust

come could always arise in his claim by opposing to claim

the true title, descend to the title of the

of the true or use man of the legal title to the lands of

the trustee. They were also divisible should he sell

the use donor a conveyance could be had to them. This

introduced in trusts. It could not be extended fur

to either of the use man or legal holder. But

by statute they were made liable, if an interest could be

brought against the estate or use of his conveyance

was confirmed. It could not extend to be suspected. In

convenience arising from this doctrine introduces the title

of vested, which vested the legal and beneficial interests

in the vested case.

Lowing to technical difficulties.
this statute was multiplied in effect, for a man could not
be limited unless in a case. If a warranty were to be to B for the
use of C, it is good as to B, but if B held for the use
of D, the tenant would go no further than to B of the benefi-
cial interest could not rest in D. This threw back the busi-
siness to OH, who declared it a trust in B for the use
of D.

Again, in the statute of Uses, the word "seized"
was introduced. If the rent were due must have been
"seized" to rest the use. This applied to freeholds more-
ly, and by

under this the conveyance of

"seized," was given to Chamber.

When, says Trusts,

"seized" can be understood of alienable exactly as real proper-

But it was not liable for secured, but for existing it was,

But it has been decided to count that it is equally liable
for the same as the latter,

In England, a trust estate is not
liable to forfeiture.

Two modes of conveyance have ori-
ginated: 1. Bargain of Sale. This was done thus:
A for some consideration covenants with B to sell
him a farm of land. A is considered as selling
the use of B, so that, in fact, the land is sold of


Innocent.

connected with the title. These fees are required to be enrolled only in pure homicides in one of the Courts of Western Hall within 6 months. In counties it must be fee simple.

2. Letter of Release. This is the most common mode. call to mind the doctrine of Release. A lease to B of this land for one year if B stops from the rent. B then is in possession under the statute, as rent is due. Then I may release to B to whom he has previously leased, if who is in possession I have an interest.
Of Injuries to Real Property.

There are many injuries to Real Property under the English law, of remedies substituted, which are not used in this country. These will be omitted.

These of no importance to us are trespass against property - Digest.

Waste - Nuisance, of others, is no particular nuisance which are not immediate, but consequential injuries.

The injury of the person is remedied by an action of trespass.

The injury of trespass is remedied by an action of Trespass

The injury of Waste is remedied by an action of Waste, besides a preventative remedy in

The injury of Nuisance is remedied either by removing the nuisance, or by an action on the case.

The other injuries which are consequential are remedied by actions on the case. As where a man should put up a spring on his own house, so that the water is conveyed on to another's land, it would be a case.
Respaß

sequentij injurj remedies by an action in the case.

These actual injuries will now be considered in their order.

1. Respaß in e et armis.

Respaß in its fullest extent is not here to be considered, but merely as it relates to Real Property.

Respaß of this kind may be declared to be an entry into another man's land without permission of doing damage. It is sometimes defined to be an entry into another man's land without tenements or rights, but the word lands includes all of these things. The law is to understand by this rule that a man can never enter on to another man's land without leave, for there are many cases in which he will be justified, as to get his just share or to pay money for it. Here the law considers it as injuring the owner as giving. The action will lie for every injury to another land; however small, for the right of men to build are still by statute.

The principal thing is the remedy. This action rests on the D.'s possession, i.e., it is necessary in order to maintain the cause that the D.'s has possession of the land must be an invasion of his possession in order to entitle
Resoa

here to an action. The action of Entente proceeds upon the
idea of the right being out of possession.

One thing here ought at once to be noticed, it is the difference
between the English and our law. Under their law there
must be an actual possession. Our law proceeds upon
the ground of a right to possession, which will be sufficient
to entitle the true owner to an action. We treat reality as
they do, personally of both alike. Ex, if a man dies,
if he does not take immediate possession, there is a
breach before committed in the interim, the heir by the English
law can maintain an action; but with us he is presumed
to be in possession from the death of the ancestor
of course entitled to the action of trespass or to an

If in want of another in actual possession, then the owner
out of possession cannot maintain trespass.

What kind of possession is it that will entitle
a man to an action of trespass or at all are

It extends to all who have any right on licence to improve
the land. Every kind of Estate, free in fee simple,
fee tail, for life, for years or at will, is sufficient to
entitle a man to this action. An action lies against
the lessee if he enters during the lessee's term.

As it respects tenants-at-will the law is different
they can maintain no action against the owner of the
lands, without he inludes the emblemens. to, he may
against all strangers.

Even the lease of a Rentace for
one season has a right of action against all who invade
his rights.

But if a mere intruding continue possession or try
his title to maintain an action.

If a lease of will does that which amount
in a tenant for life, he is liable to an
action of trespassing.

Can the defenser having the legal
title bring trespassing against the defenser, for the
using him and 2 eyes, he may, but if the defenser con-
tinue in possession after this, he must bring his action
of ejectment, if not the possession is himself, if in the
same action may recover damages of he pleader, but
this is not common, for after his gaining possession, he
by a fiction of law, he is presumed to have been in all
the while, if he may bring his action of trespassing at
arms for all damages in which he recovers for all the
rents of profits while the defenser had been in posse-
sion. But there is no need of this additional action to re-
cove the rents of profits, for it might be done in the action

2 Nov. 557
6. 21. 45. prosuming possession will not be sufficient to enable the

2 Nov. 557
5. 25. 45. tenant or trespasser to maintain an action.
of ejectment.

In the case there appears a difference of opinion among the learned writers. This is very plain, viz. that a man often has got possession may maintain ejectment. Suppose a disceisee who claims title in possession, during which a stranger enters and suits claimante for ejectment, the disceisee on regaining possession maintains an action for damages? The difficulty is here; the disceisee can bring an action if shall the stranger be answerable to claimante of the disceisee? Certainly not. But it is said the disceisee may sue the disceisee. If he is a bankrupt shall the stranger suffer the loss? Has he no remedy? Powell on his treatise on抵押, cites 11 to 53. He says that the disceisee cannot sue the stranger, but, in 2 Rolls ab. 554. It is said that the disceisee may sue any stranger. It seems consistent with Powell's opinion. Another argument which might be used in the question is, that the disceisee might have brought his action of ejectment at any time. This seems to be principle enough to defend a deputy; destroying the arguments on both sides of the question.

2 Rolls 6:69. If a man sells his lands he does not sell the right
a well settled principle that

222. Any person enters into a house by the command of another he is liable. A servant by the command of his master, if the person thus doing the act did not do so on the ground of one of a number of wanton wrongs done for the servant here can call the master to account. If done, as in this case, in an action for damages committed by the master's direction by which the servant was injured, the master is not subject to be su

If half a dozen men go together by the influence of one of the party, and they all

This action of trespass has not only against the master, servant to see injures done by them but also for dam
age done by their cattle by breaking into their neighbors cloyst
Or case of adjoining proprietors of the battle break the
Deft. part of the fence, he is liable whether the fence is
good or not, for if the fence is bad he ought certainly to answer
all damages: but if the fence is good, for their cattle
his creatures are nuisance. But if they get thru the Defts part which
is not good, then the Deft. is not liable, as the injury of any is caus-
ed by the Defts own neglect, otherwise if they get thru the
good lane of the Deft. When battle get in from the high
way, it is different. All commonable beasts with
all meat cattle & sheep may run in the highway accor-
ding to the common law, but not to the own advantage of
any person. Therefore they beast once as hence, hogs & wi-
et-arms will lie against the owner, but not if the fence
is bad. Hogs as no hogs are commonable beasts, unlike
by virtue of some local by laws. & acts. The Pure super-
power would not be considered as commonable. The assump-
tion in New London decided the owner of hogs was liable for
damages done by them. If this was affirmed by the supreme
court of errors. If commonable battle break into any pre-
domains unless the owner are liable. The only advantage there-
fore of these bye laws is that the animals are not liable to be
impounded while running in the highway.

[Note 24.] The injury in is these cases in order to constitute hat-
fess must be immediate or not consequential.

It is a rule of the English law that if a man is guilty of a trespass, the same act is a felony, that you cannot bring an action of trespass for straying the trespasser is merged in felony. But this is not always true, because there is no felony of trespass. The true reason is: if the offender is convicted, the law forfeits his estate. Therefore, a recovery of damages against him would be the MPT. a good. But suppose he is not convicted, then may you not have your action for the trespass? Yet unquestionably. But it cannot be done because there are no penalties of trespass. There can be no objection to an action being brought for the trespass.

There are certain cases in which the law gives a person license to enter on another's land: if a man enter under the license committed a trespass he is consid-

\[2 D e l. 541, 346, 322, 86, 148.\]

But when the party injured gives the license, if the person licensed commit a trespass, he cannot be considered as a trespasser ab initio. This may be explained by a man entering into an area from which the law allows of there is guilty of any injurious acts, he is a trespasser ab initio. So when one pushes a hog dam and a hogs is killed, he was a trespasser ab initio. It is generally true that a man who had been guilty of a
negligence negative abuse of an authority or license given
him by law does not thereby become a wrong done at initio, be
cause he has only been guilty of a nonprevarication.

It has been observed that entry is in many cases justifi-
able. As where one enters a house by authority of forces,
which sometimes may be and sometimes may not be done.

If an officer has a wrong either civil or criminal, and
he finds the outer door open he may enter and break for
any inner door to execute his process, but where the door
is shut it cannot be broken open for his house is consi-
ered as his castle.

The privilege of the Individual always yields to the interest of the public in all criminal cases.

This is the point, therefore a criminal process justifiable
when any door.

If it be a civil process the general rule is you cannot break open the outer door. But to this rule
there are some exceptions. As when a person having been
and answer escaped, or where a house is in your possession if
you have a right to break open an outer door to retake
him.

The rule must be understood with this restriction
that the house is only a casette for the protection of the
inhabitants, i.e., those who dwell in the house, if not a
Resolves.

The house of the master is the asylum of the servant or other person living therein. This has been long the English law, and is generally recognized in this country.

The English reason seems to be valid, generally applying to large cities (as London, in that country) to prevent thieves from breaking into houses which would have more frequently if officers were allowed to exercise of breaking into houses to expose the house to thieves and robbers. But the other more general reason applies with great force to this country, where an officer comes with a number of men, to seize all the persons in case he is likely to meet with obstruction, this would disturb the family of the house of the aforesaid to be broken open.

Any attempt of a man to shut himself up in a building made for that purpose will not answer. As if a man should build a small house to conceal himself, this does not come within the rule, if it will not be considered as his castle.

The outer door must be fastened for a sure preservation from the aforesaid will not be sufficient to prevent the officer from entering.

There are two cases which contain the whole of the law upon the subject; the 1st is Semaine.
case in 5-60-93, the other in 8-6-93. These two cases are
good in every thing but this: is a where the officer does
break our outer door would the lye be good? In 9th
Caye, it was held that the breaking down of the outer door
was a trespass, but the lye upon the goods was lawful.
But the case in Caye (Gansel v. Lee) was variant.
Gansel hired a room in a boarding house, the
Sheriff entered the outer door which was open, then
he opened the door of Gansel's room. Gansel con-
cluded that his room was his castle, that the door
was the same as the outer door of a dwelling house,
but the Sheriff considered it as an inn door; it was
clearly of opinion that he was legally arrested, that
they considered a lye after breaking the outer door
as not good.

The J.C. is of opinion that any thing
done as consequence of an unlawful act is void. There-
fore a man has been guilty of a breach of law, it is
not least that he should receive any benefit under it. As
where a man is detained on the Sabbath and kept till mon-
day, if then accused the arrest is illegal, for no such construc-
tion ought ever to be held out that a man shall be
detained by breaking a law. Again: if conveyed a pain
of 13 or 16 cases in profession. This was an illegal conveyance
under our statute. Therefore both had incurred the pen-
ally of the statute, lesseved the great long uad. He granted claimed that he ought to receive of the grantor on the conditions in the deed, but the court said that he should not derive any advantage from an act which was a breach of law.

A Change in break open an outer door of the officer is going to it the assault will be an illegal one, but if the door is broken without his knowledge, if he enters the room will be otherwise.

When a man高压 me as I have been him, I may enter his house to demand payment or to tender the money i.e. I may lift the latch of an outer door.

A person may enter an Inn without any express or particular license, for the law gives a general license. But the inner doors of an Inn are as much privileges as the outer doors of other houses; the reason in this case is a duty to such come at rest there. It arises that boarders in a tavern are protected on the ground that the peace of the lodger of boarders are not to be disturbed.

This privilege of the inner doors of a tavern is not on the principle of protecting the debtor but lest the companions of family should be distinguished from thieves. The maxim of policy is this: that a greater
elsit should be awarded for a life, if a life should give away
to a greater:—

Bell in his Nisi Prius says one may enter
of distrains the goods of tenant for rent or assise: If the ten-
ant has got his goods into a tavern they are demurred: But
if they are put into the tavern for the sole purpose of
serving them, no lodgers are there to be distrained: They
probably may be distrained there.

If the person in whom the reversion of a house
is gone into the seeking open, to see if any waste has
been done this action will not lie against him.

Farming careless beasts on another man's lands
is admitted by the common law of England provided
you do not injure the crop growing or grain be not dig-
up the earth—this was formerly upon principles of
failing.

When bees are found upon another's land the
law allows the hinderer to take them off.

It is thought in this country no man would recover in
an action of trespass vi et armis without making
out actual damages something more than the un-
requited consequences of. According to the strictures
of the law the least entry is sufficient to entitle the
owner to damages. He's nominal.
When a finder of bees cuts a tree to get them, the first\nthing to do is to allow a compensation for the tree to the owner.

Sometimes a man is justified in cutting another man's\ntree to reclaim and bring away his own property, but if his\nneighbour's horse should step on his property on the same\nland, or any horse should happen to get onto his neighbour's\nland, I may enter and bring him away.

It may be that a man has told me a farm or\nthe middle of his farm, and the law allows me a licence\nto cross his land to get to his mine. But if by virtue\nof an execution, I leap upon a piece in the middle\nof his farm, as there was one case in Bennett,\nthe law allows me no licence to cross his other land. I\nshould purchase a road to it.

Again, when a man has a title to land, but in a cloud\nof title if he is sued by the person in possession, this\ntitle is a sufficient justification. This is not an uncommon mode of trying the title to land.

We have a Statute in England on\nthe subject of tenancies in real property. The Statute\nsets forth the common law in a variety of cases. It not\nonly gives to the party injured a right to damages for\nthe cutting down timber, but a right to recover a
Penalty of ten shillings per every tree of a foot and a half of greater dimensions three times their value besides 1s. each £ 5 for those under a foot of the damages occasioned are liable. The statute cannot, because this unless the owner brings his action on the statute.

You cannot always recover of course on the statute, for it has been construed to include cases only where the cutting was done without authority. The statute was intended to repress any selfish enterprising of cutting down another's timber, if not for any accidental cutting over bounds on to his neighbours' land. The statute meant that the trespasser must have gone on with a trespassing intention. If such acts only the statute was meant to furnish a remedy.

These penalties of treble damages are recoverable in a civil action, so that it is not considered as a crime or a public injury.

A man may be voluntary in cutting down the trees, yet not liable under the statute as where the person cutting does it under claim of title. Here the man does not go with a trespassing intention, nor with a design to take the property of his neighbour, but to take his own. Whose you bring your action upon the statute.
but do not make out that the Deff. trespassed voluntarily with a trespassing intention. If this part of coming under the Statute, still if you can make out that the Deff. has trespassed if your declaration is sufficient a remedy may be had at common law, in the Deff. recovers us if he has brought an action at com. law for the real damages.

Another clause where a misdeem or negligence being on leaving a gun to fire, gives or permits is punished with a fine not exceeding $5—of a moveyg of double damages.

Another clause of the Statute is that if any person shall set fire on lands, which runs on to another person's land, he shall be answerable for all damages. The learned have said that this Statute was merely to affirm the common law on the subject. By the common law of Eng. it is understood that where one sets fire at an improper time he injures his neighbour, he is liable. I can no longer some reason of the wind. But in this Eng. and a man sets fire of it appeared impossible for it to do any injury, but at once the wind suddenly shifted about if the fire ran on to his neighbour's land, then the learned said the man was not to blame if there fore not liable to an
There is another clause in our statute which is quite a singular one. That where a theft is committed by the deft. suspects another man, the witnesses shall make oath that he suspects such person, if the proof can be had; then damages may be recovered of such suspected person, unless the deft. was being made oath that the had no hand in the theft. But in the second part of the clause it is inserted, this being practiced upon, it requires that the deft. should make out other witnesses than his own oath, "that it is highly probable" the deft. is the thief; for — The wording by which the theft was committed, does not render it highly probable that the deft. had it within the meaning of the statute. Therefore as the deft. is to adduce other proof to render it highly probable before he can swear under the statute, this clause is seldom if ever used. Besides if the deft. fails by the deft. in answering himself upon oath, then the deft. recover of the deft. double his debt occasioned by the proposition. This probably has deterred persons from using this clause of the statute.

Another clause in this statute declares, that if any person commit any of the thefts here to be mention, having their faces concealed, painted or in any way disguised, or being so disguised shall cheat or abuse any person, they
II. Dispossessing or Disposing another of lands.

This is remedied by the act of ejectment. It consists in an adverse possession, or occupation of another person's land, even when the owner is not absolutely excluded, for he is deprived of the full enjoyment of the land other than the use of the whole, if he may elect his remedy of trespass or ejectment.

The ancient remedy to recover real property are all done away. We have no such suit of ejectment as the English have. I believe their mode of proceeding is used in all the U.S. except North Carolina. There was an ancient remedy in England to recover the term for years, which is now made use of by us, being a much more simple thing to try the title. This is the suit of "ejercitio primae," it was brought where a lessee of a term for years, was turned out of possession to recover his term.

This was adapted to the purpose of the recovering the fee by the lessee (i.e. the claimant) entering on the land of the lessee, being assisted by an ejector agreed on. The lessee brings an action against the unlawful ejector, if then the title of the lessee is tried. Dec. 3 Vol. 200.
Dissent.

since that they have adopted a new plan, by which it is done more expeditiously. No. 82 of the 6th of June, in which
him, and 1 is sends a friendly letter of notification to D, who
is made. Left one exercising the entry of A, lease to
B, of an entry by C. Here then the title comes up again. It
may be that I will not consoled, if I do not make any thing, the court will order to name to be unit
in the room of D. I then it will go by default.
The damages recovered are nominal. If an action lies
for the mean profits. However we have notice of the kind in Count. I shall not go fully into it here, but refer you to 3 Bl. Com. 207.

In Count, the action of Ejectment is brought by
the owner of the land. He states that he was owner of, if possessed the land of being so licensed he was
likened out of new demands possession with his dam-
age of costs. This on principle it would seem ought
to be a bar to an action for the mean profit. But
the practice is universally otherwise, unless the right
goes for all the damages in the action of ejectment for
we have no long (80 or 100 years) practised to bring an
action for the mean profits, to recover merely nominal
damages in the action of ejectment, that it cannot be
set aside. To be sure the plaint is settled that you may
become the whole damages in the action of ejectment or
only nominal. If it appertains in the judgment in eject-
ment that nominal damages only are recovered, then an
action for the mean profits will lie.

The Statute of lim-
itations runs upon this, the substance of the ac-
tion is quantum, if not trespass. This is contrary to first
principles in Jersey opinion, for the nature of the
transaction ought to govern.

It has been several times
decided by the Supreme Court that the power of the ac-
tion where trespass to recover is convenient, decides
whether it is within the statute of limitations; for we
have no statute of limitations barring trespass.

Of declaring in Trespass on Real Property.

Having men about to enter into practice of the law are
sometimes frighted with an idea of the insurmountable difficulty
of drawing declarations of pleadings. Let them console
themselves with this inconstancy, that if they understand
the law, they can never be mistaken in declaring.

In trespass and
annuis, you must aver in your decla-
ration, that you were tenant in fee of a certain lot of land (de-
scribing it) you need not state that you are tenant in fee.
Dissuasion

simple as a few years ago. The profession is the thing: next state that the Def. with some of arms broke the Def.'s field close (this does not mean an actual blow, but a legal blow) that with the like force he entered the close, cut down the tree, taking what he actually did to the Def.'s damage as much, for which he lost the business his suit.

You see then, you have got to state profession in yourself, but the grant of your profession need never be stated.

If the injury is done by the Def.'s battle, you state he entered with some of arms together with the battle, not that his battle entered merely.

A Declaring in Judgment. See Eng.
you must state profession of a time for years by the demise of such a person. It's enough when no factor is used, you must state a defective if it is a freehold, i.e., that the Def. was seized at such a time, i.e., such a time the Def. entered the same, i.e., that he still holds him out of profession, to his the Def.'s damage so much to recover reeds together with the surrender of the land if the action is brought.

In case judgment in Ejectment is recovered for a sum in damages also surrender of the land, if the Def.'s suits before it is enforced, how is it to be enforced? Where personal property (i.e., damages) only are recovered, an execution may all
MISCELLANEA

aways expose the judgment—but that is not the case here, for real as well as personal property is recovered. There must be two suits to be made, one by the heir to recover the land, the other by the executrix to recover the damages. The suit for the land must be by the heir at the order in many cases the Executor is to have to pay debt.

another injury which may be done to real as well as personal property is a

III. Nuisance

1. That a nuisance is 2. The remedy. Nuisance is not merely an injury to real or personal property, but in a certain sense it may be said to be an injury to a man's person.

Nuisance is any thing done to the hurt or annoyance of lands, tenements or hereditaments, according to the definition of the elementary writers. There is a species of nuisance which is public, concerning this nothing more will be said here, except that such nuisances affect the public only, therefore must have a public remedy. In case of a public nuisance no one man can have an action unless he has received a personal or special injury.

A private nuisance is an injury to personal
on real property, but it is not a direct attack upon it, but operates consequentially, for if it was the former it would be trespass, or it again. Here it is that a man by using his own property may commit a nuisance.

The rule is "ne ut alium non facias nocem." 1. Overhanging a man's house is a nuisance. 2. What are ancient rights? In looking into the books we find that it is agreed on all hands, that they must have been made or erected a long time. D. Hansard (I am informed) in a late decision in Jews' Reports has called them ancient if they have been erected 20 years. All nuisances in these cases depend upon priority.

3. The exercise of any offensive trade in the erection of any offensive buildings are nuisances, as Tan says, fellow to handlest stoves. In the erection of certain kinds of buildings too near another house or lands, as stables when the noise of the horses interrupt the neighbours) Jones. A case at Hartford where stables were extended back so that they came close to a bed-room where the man of his wife slept, the Superior Court decided it to be a nuisance. Perhaps the circumstance that the near is such a place to build his stable was the case. The nuisance of a fine piece but is not a nuisance.
4. There are also many nuisances in another Land. In the
Ponds or ditches so as to encroach on a neighbour's land. Thus
the encroaching had proved to be beneficial to the land it has
been determined to be no nuisance.

Sec. 59.
2. Poisoning by mixing of waters: this also affects real property.

Sec. 59.
141.
So when a stream or water runs through a man's land
if it is diverted from "ubi solabat unum" it will be
a nuisance.

Sec. 218.

But will be a nuisance if man abuse poison
or corrupts a water course by building dye houses, if
waste &c. To be a nuisance however it must interrupt
some use to which the person below had been wont to apply
it. So that whether these will be nuisances, again, or may
will depend upon first occupant. It matters not
whether the spring issues on the man's land who does
the injury. He cannot claim the water if say he will turn
it off, raise it, or corrupt it. He may however turn some of
it off if it will be no nuisance, provided he leaves enough to
answer his neighbour's purpose.

Sec. 218.

Whenever there is a good
site for a mill, below, the water above must not be de-
verted from it, so that not enough is left to carry a mill.

Sec. 141. When a mill below would be of more use than the wonder...
VVisiness.

ing battle above, the latter would be prohibited to the advance ment of the former, priority notwithstanding.

There are cases where a man professing the same calling, trade, or avocation, will not be allowed to follow or pursue the same near another of the same calling, for up on the ground of its being a nuisance. As when a man sets up a ferry near another having a permanent right, which is an incorporeal estate. But where a man having such right attempts to keep a ferry, he must do it with fidelity.

It is the case in many parts of country where lands have been granted to persons on condition that they keep up a mill. Here they are obliged to keep up the mill in order to hold the land, if of any person undertakes to set up one above it. To the injury of it, it is undoubtedly a nuisance.

There was an estate granted to a man early in the settlement of this state, lying about half way between Hartford and New Haven, on condition that he kept up a furnace at that place, the estate is still helden of the furnace still kept up. Would it be a nuisance to erect a furnace near this?
The remaining injury to Real property, called Waste. Relation to this injury there is much law in England which will be applicable to these U.S. States. Some general observations. The action of waste at law was formerly maintainable only against tenants for life made so by operation of law, viz. tenant by the courtesy of tenant in Demise, because there tenant might have encumbered in their lease or deeds to present waste. But by the statute of Gloucester 6 Edw 3 other tenants were made liable as tenants for years.

Waste supposes some injury done by the lessor, or by some person under him, or by his permission, if the reason that neither trespass nor Gompert could be brought in these cases, is for the want of that peremptory which the law in such cases requires the party to have. A lessor to B, the latter being in possession cannot be sued (if he pulls down a house) in trespass by A, the lessor, because he is not in possession.

By the Stat. of Gloucester damage was not only necessary, but the thing wasted, i.e. it is a pernicious of the property. As it respects this, it is immaterial whether the waste was voluntary or pernicious.
Waste.

It is probable that in many parts of the U.S. States, they remove the place wasted but they do not in Court.

There is likewise a remedy in chancery to prevent waste which will be noticed presently.

There are 1000 instances given in the books applying either to houses, lands, or trees.

It is waste if the tenant suffers the house to be destroyed by injury from or by the act of another. If he is not liable however to the full extent for providential accidents he is not.

2 Del.815 of these breaches. The tenant must use due care of diligence.

The devise is liable to repair unless there is a lease or to the owner.

It has been held that when a man builds a new house or enlarges an old one, even if it be in repair the premises will be waste, on the ground that there must be no alteration in the estate. It has been held that changing one kind of field into another is waste. Mr. P. premises that it would not be considered waste in Court.

With respect to:

Waste.

[Further content with specific legal references is visible, but the text is not legible due to the quality of the image.]
tave "without improvement of waste," but twenty weeks
old mines.

But husbandry is held not to be waste, cutting
down timber in Eng. is held to be waste, in whatever is sup-
posed to be timber for building is never allowed to be taken
by the tenant. The word timber is appropriate in Eng-

The tenant has a right to take what is called "kote" as

"k" kote, "k" kote, "k" kote, k" kote, k" kote, k" kote, but he is
not at liberty to cut down another wood for other purpo-

If there is dry wood on the premises, green wood must

not be taken for fuel. — 56. N. P. 39.

Timber may be cut
down for repairs. But the tenant is bound to repair if there
is no timber on the premises.

It has been determined that

where a man had timber not suitable, but sold it to ena-

ble himself to buy more which was suitable, he was qui-

erty of waste. — I have presumed it would not be consis-
ted to be, if the question should come up. — All these

rules are made so rigid for the purpose of restraining think-
ing to be, of hindering leases in an undue degree.

If the lease excludes the woods in the lease of the ten-

ant unto to, it is not waste, but a fine for the lease.

and property, for he had never disposed of the woods.
Who may bring this action?

It must be brought by him who has the immediate estate.

The estate may be so framed that no one can bring the action, as suppose an estate is given for life, remainder to B in fee. A cannot sue because he is not the remainderman. B cannot sue because he is not the immediate remainderman. A hard case!

The Person knows of but four or five actions of waste which have been brought in Court.

This is a personal action. It must be brought against the person who does the waste, not against his representatives, therefore if the tenant dies his wife or A. A. are not liable. See note 4. See note 14. See note 15.

See notes V. at the end of this title, where all the authorities are brought together.

Tenant at Will has not been mentioned because he cannot commit waste, for he has not a sufficient possession. See is liable as a trespasser and any suit out of this which would be called waste is a determination of his estate.

The tenant it is said is not liable for lightning, or the cultivation of the common enemy, yet has been determined
Waste.

That the tenant is bound to repair, if the property thus wasted
is tenantable, i.e. it is not so fully or totally destroyed by
the lightning or enemy, as to render repARATION inconvenient
or impossible.

The mayhing this action is more fully treated
of, in Notes IV.

Leases "without impeachment of waste," and
Power of Chancery to prevent Waste.

Such being the law it has become the prac-
tice to make leases with the words "without impea-
ment of waste." In such cases the trees timber &
may be cut down if used by the tenant, for by such lease
he has a vested property, in them, but he must take them
off during the existence of his estate.

It will be recollected that
Chancery grants injunctions to stay waste whereas an
action of waste might be brought at law. Chancery has
gone further. This Court has granted an injunction to stay
waste where a lease was given "without impeachment of
waste" if the timber or trees so have been taken unlaw-
fully, maliciously or enviously.

When lands are leased without impeachment of waste
a property in the timber &c is thereby vested if it has been
thought a stricti of scarce for Quanry to interfere. This
will not be done except in cases of malicious or malicious
waste either upon houses or trees, if where in part such
was not intended to be permitted at the time of making

Nov. 9, 28:

Nov. 9.

sheds of their leads or per stages.

There are other cases of waste in which snow interferes
as where it is tenant for B, there the legal title is in B
and C, but still snow will not allow him to abuse the property
Wasting it to. The certain que trust must not abuse it.

So where there is an Estate to A for life, remainder to
B for life, remainder to C in fee, due at the it is the law
against being sued for waste, yet snow will
grant an injunction to stay waste, an application of the
remainder man in fee.

Another set of cases where snow have interfered at the
instance of a stranger, in behalf of an infant, he the stain-
yee clearly can have injonction of wastage.

There is one

set of cases, where snow, interferes upon
10.8. 5,77
on a different ground, as where there is a lease, without im-
provement of waste of the tenant during his term does
not cut down much of the timber until just before the
expiration, if he then concludes to make a sweep of the
whole, if this to answer no beneficial purpose. Snow.
Waste.

will in such cause interfere.

The Estate of the mortgagee

...is not a tenancy at will, but a distinct species of tenancy, the mortgagee here has not a right to commit waste, because he only leases the security.

Where a mortgagee in possession dies, the Cst. must receive the mortgage money, but may such mortgagee commit waste? If he does he must apply it to the payment of the mortgage, if it will be payment so far as it goes.

The law on the subject of Waste in States

Waste is defined to be a short or destruction or

...houses, gardens, trees or other improvements to

the extinction of lien also with the remainder in reversion

...will be ample or fee tail. Whatever tends to the depre-

...sion of the value of the improvements is waste.

What acts shall be deemed

waste in lands.

...consecutively capable, would, as consequences, is waste.

...or, for it not only changes the course of husbandry, but the field of his evidence. 2 Rob. 282. 20th 296.

Dividing a great meadow into many Parcels by draining is not

...waste for the meadow may be better past, if more easy of profitable
Waste.

Converting meadows into orchards is waste, the same to the right of the owner.

Digging up the surface of the land, off, or away, is waste. 2 Boc. 814. 6 Boc. 679.

It is no waste of the land, his pasturage, by which means it is overrun with beasts of the wild, it is not husbandry. 2 Boc. 814. 6 Boc. 679.

What shall be deemed waste in trees and woods.

In all situations those trees that are usually used for building, being burnt, they are for that reason considered as timber, if to cut down such trees or to sell them, or do any other act whereby the timber may decay, is waste.

2 Boc. 814.

Timber is a part of the inheritance. 4 Boc. 62.

6 Boc. 52. If the tenant suffers young germins (or shoots) to be destroyed, the tenant is waste. 6 Boc. 679. But it is waste if the tenant in cutting down young germins (as he may rightly) destroy or cut up the 6 Boc. 52 young germins. 5 Boc. 463.

If the tenant cut down or destroy any part trees in the garden or orchard it is waste, but if 6 Boc. 52 they do not grow in the orchard or garden it is not waste.

Cutting down trees standing in the defence of a safe guard of 2 Boc. 56. The house is destruction for which an action of waste will

535. Boc. 53. 5 Boc. 463. 2 Boc. 126. 4 Boc. 63. 64. 1 Boc. 587.
Waste.

Cutting of trees is justifiable for house lot, hay lot, plot lot, fire lot, 6-3. [Note: Illegible handwriting.]

The tenant may take sufficient wood to repair the walls, fences, and sheds he has erected, but he cannot break the new fence, 6-3. If he cuts down trees for unnecessary repairs, it is waste. 2, 8-2-2.

Cutting dead wood is no waste, but it is 5-3. 7-5. When alive, they were timber 5, 8-2-2. 6-7. 5-3. 2-8-2. 1-8-14. 6-8-1.

Cutting trees into cord wood for fuel, when there is sufficient deadwood, is no waste, 5-3. 2-8-2-2. 5-8-1.

If the tenant sells the trees, he is entitled to the proceeds for repairs, 6-7. 6-2. 5-8-1. With the money received, it is waste. So if he buys the trees, 2-8-2-2, and repays it with the first settlers.

If the tenant cuts trees for repairs, he may sell the trees to the first settlers, it is waste. 6-7-5. 8-1-12. 6-1-4-7-1.

Cutting wood to burn, when the tenant has sufficient hedges, is waste. 5-8-1. 6-1-4-7-1. 6-8-1.

What waste shall be deemed excusable or just.

It may be observed in general, that waste which arises from the act of God, is excusable, 6-1-4-6-6. 10-8-1-3-9. 6-8-1. 5-8-1.

If apples trees are torn up by a great wind, and afterwards cut them, it is no waste. 6-7-5. 8-1-4-6-6.

Cutting of trees is justifiable for house lot, hay lot, plot lot, fire lot. 6-7. 6-3. 2-8-2-2. 6-1-13. 6-8-1.
Who may bring an action of Waste.

This action must be brought by him who hath the immediate estate in the inheritance in the dower or for tise; but sometimes it may be brought by another. 15 Coke 673.

The action must continue in the same state that it was at the time of the waste done, i.e., grant. 35 Eliz. 2. 359.

If the tenant commit waste of his own inheritance, the action shall not have an action of waste for the waste done. 1 John 304. 35 Eliz. 2. 359.

If the life of his ancestor, for he cannot buy that the waste 56 Eliz. was done to his slid erasure 57 Eliz. 472.

The who has the

41 Eliz. 325 who has not an estate of inheritance may join another with him, who has not an estate of inheritance, in an action of Waste, as husband and wife may have waste, when the reception or remainder is to them and the heirs of the husband.

53 Eliz.

As if the reception be granted to 41 Eliz. of the heirs of B, they may join. 58 Coke 673.

As a surviving spouse, if the husband of another Parson, 6 Coke 621.

58 Coke 673, being tenant by the curtesy may join in a waste. 41 Eliz. 328.

62 828.

As it is, sufficient, for the plaintiff has the immediate inheritance at the time of the action, that he had not at the time of the waste.
It has been decided in several cases that a tenant at will cannot be liable in waste if the landlord is in possession of the land at the time of its commission. For this reason, the action of waste is brought against the landlord by the tenant. In other cases, it has been decided that a tenant against whom the action of waste is brought is not liable if the landlord is in possession of the land at the time of its commission. See Gills L. & C. 484.

Against whom the action of waste lies.

It is common law that waste was punishable in several cases. 1. Tenant in possession, tenant by the curtesy or by the remainder. 2. Tenant for life, tenant by the curtesy, tenant for years, tenant for years at will, tenant for life. 1. Root 244. 323.

So in Connecticut, it has been adjudged that the action of waste is brought against the tenant by the curtesy. This adjudication was in the case of Robt. v. Hays, 71. New Haven County, June Term 1791. So it has been adjudged that the action of waste is brought against the tenant for life. 1. Root 244. 323.

But it will not lie in favor of a remainderman against a stranger, for there is no privity between them.

The action of waste shall lie against a tenant by the curtesy, if tenant for life. 1. Root 244. 323. If tenant by the curtesy, he is held to his estate if another. Beal Br. 14. If tenant to waste, an action 2. Root 244. 323.

The action of waste lies against the tenant by the curtesy, for notice. 1. Root 244. 323. Standing the assignment, the privity of estate still remains.

For the action, in such cases, must lie against the tenant.
by the tenant, if not against the assignee. 2 Inst. 301.
and authorities to the last rule.

If the lease and over his own.
show that the priority of estate is gone, if his grantor cannot
being waste against the tenant by the grantor, for waste done
by the tenant's assignee — or in other words — if tenant by
Inst. 301.
convey grant to the assignor, the grantor shall not have
Inst. 175, waste against the assignee for waste after words-commit.
for the priority is gone.

Inst. 302. 2 Inst. 302. Winstanley, 127. but Brown. 239. says that an act of
which is an action personal, which died with the person.
by the testator.

Inst. 132. 2 Inst. 302. Winstanley, 127. But Brown. 239. says that an act of
of waste lies against Est. for waste done
by the testator.

Inst. 132. says that if the act committed
by the testator in an estate has benefited his Estate, the
Est. is liable, but if the estate has not been ben-
efited the action does not survive; against the Est. and even
though the party against had been injured by the tort.

Inst. 132. however, that the inquiry ought not

Inst. 132. however, that the inquiry ought not
to be whether the effects have been benefited, but whether
another has been injured by the tortious act.

The action of waste is not a part of the case. 2 Swift 84.

The declaration should describe the lands, set forth the

the title of the Plaintiff, of Defendant, of the particular acts

of waste done, for which he recovery single damages if

there is no forfeiture of the land wasted. 2 Swift 84.

SIMILARLY.

It is the custom of the county that what is some trees, timber, which in their nature

generally speaking are not, by "timber" is meant such

trees only are fit to be used in building or preparing houses.

Walnut (the says) being no savage proper for this is defin

England are not.

"Again it is the custom of the county which is certain

which are timber trees, making some to be esteemed such, which in their nature generally speaking are not." And

the Chamilton in this case directed an issue to try what

trees are by the custom of the county to be accounted

timber.

The cutting down deceased timber is not much

waste as the cutting down and other timber for 2 Other

30th 95. Notwithstanding this, the Dept. ceased attempting to make a

distinction between cutting down young timber trees

that are not come to their full growth, of decayed timber,
30th 95. I know of no such construction as "transferring to me." The Pst. may enter into the rent to a

20th 193.

other person. 

Can the Pst. from committing waste even if he has only threatened to do it? nor is it necessary that the Pst. should have waited till the waste is actually committed, unless the intention appears as if the defendant and by his answer insists on his right to do it.

If a suit is brought by an owner of a possession against a tenant for life, if no proof appears of any waste, yet if tenant for life insists upon his right, if it is proved that he has none, this court will grant an interjunction.

This must has gone greater length to stay waste, than the courts of law have in giving actions, or granting prohibitions against it.

In order to obtain an injur-

Browne Ref. 57 how to stay waste, a particular title must be set

out.

32 injurions for staying waste. By the common law a prohibitation went out of

Dawson 297 waste before it was begun to be committed. In accordance

3 Woodson to this practice, but more general in extent is the modern
Waste.

...en usage of inhibiting waste...on a bill filed for that purpose.

Who is entitled to such injunction.

This remedy lies, not only where an action of waste might be brought, but in many cases where the party could not be sued at law. 2 Ch. Ca. 32. Per. ca. 114. P.T. 213.

The words of Lord Mansfield on this point are as follows: "This court has gone greater lengths to stay waste than the courts of law have in giving actions or granting prohibitions against it.

A bill to obtain an injunction for

The distress of the incurring the commissure of the waste may be filed on behalf of an infant in the same manner. 2 Term. 111. 1802. 555.

Some have said that Bost. Dig. is no good authority. As Conway so frequently cited to the foregoing rules, it may not be unsafe to remark that Lord Mansfield has declared that Bost. is a good authority. So says J. Reeve. To says D. Tenenon. 2 Term. 361.

Actions for Waste which have been brought in Connecticut.

1. This was lost in 1772. As't tenant for life. I adjudged to be. 1 Root. 244.

2. This was lost. As't tenant by the court of 1752. I adjudged to be. 1 Root. 325.
4. This was an action brought by a remainder man against a stranger; the adjourned not to be, for there was no admixture between the plaintiff and defendant. — 2 Q. 2c.
The general powers of chancery are not easily defined.

The principal difference between a court of law and a court of equity is said by D. Harris to consist in two particulars:

1. That it is the province of a court of Equity to abate the rigour of the common law. 2. That a court of Equity decides according to the spirit of the rule, if not according to the letter.

Again: it is said 3. That fraud, accident and trust are peculiarly cognizable in chancery. 4. It has been said that a court of Equity is not bound by rules or precedents.

As to the first, particularly: a power to a date

5. The rigour of the common law was never seen claimed by a court of Equity. In many cases the rules of the common law operate inequitably; but in such cases it appears upon a fair construction, that they are within the common law rule; it is impossible for a court of Equity to afford any relief, it being perfectly clear that Equity cannot control law.

As to the second: a court of chancery is as much bound, as a court of law, to decide according to the spirit of the rule. "Dui hast in litium, hast in urbe". The rule of construction is the same in both courts.

As to the third: Fraud of perhaps every kind, is in some way cognizable in a court of law, it sometimes ex-
Powers of Chancery.

As to the fourth head, Courts of Chancery.

1. As to the mode of proof. A Court of Chancery compels a defendant to disclose under oath all such facts affecting the rights of the parties, as he, not only in his private knowledge, but the jurisdiction of Equity, are entitled to make the discovery, being thus obtained, the judgment is the same as it would have been in a Court of law.

2. As to the mode of trial. The trial in Equity is by entering a verdict on which stipulations are taken at a Court.
cases are already in shortly about to leave the country in me.
aged or insane. The depositions are to be taken by a commission
leaving out of Chancery for the purpose. In consequence of
this house, to take depositions. Chancery exercise a jurisdiction
which would be exercised at law if the witnesses could
attend.

3. As to the mode of relief, a Court of Equity can grant specific
relief, which a Court of law in ordinary cases cannot do - as
an ease of executory agreements to sell or lease of land. In
this ease, a Court of Equity will compel a specific perform-
ance of the agreement, i.e. will oblige the party who is bound
by it to execute it specifically. But a Court of law in such
case, can only give damages for the non-performance of the
agreement.

Upon these three, or two other incidental at least
484,
2. 9. 1822. The true construction of securities for money lent, and

the effect of a trust, rests the jurisdiction of Equity as contradictory
dissenting from a Court of Law.

The draft seems not to have pleased with sufficient
6th. 429. attention, the pages of Judge Blackstone; where this subject
is considered, particularly the two last grounds of equitable
jurisdiction.

The Power of Chancery to decree the
specific execution of Contracts.

It is shown that Chancery exercises exclusively, in that of de-
manding a specific performance of Contracts. It must be
not understood, that Chancery can enforce an execution.
Mors of Chancery.

... carry its decree into effect. The mode of enjoining is to impose a penalty in case of disobedience.

An 67.16, common law, this power of decreeing a specific performance did not exist, but the only remedy on a breach was in damages. This power is not exercised by Chancery because its remedy can be had at law, but because justice in many instances requires that a different remedy should be had. And it is a general rule that a contract to be enforced in Chancery must have all the requisites of a con- tract binding at law. No statute ever vested Chancery

... with a power of decreeing specific execution of agreements, but... 368, from the time of Edw. 4th, such a power had been exercised

... by the court, or since the great contest between Chancery and

Kings Bench in the reign of Geo. 5th, this power has re- mained undisturbed.

The jurisdiction of Equity is distinguished

... in most cases where there is a remedy at law or not.

... Marriage agreements before assenture, will be enforced in

... Chancery after marriage. A bond also to due marriage

... settlements. It is considered in Chancery as an agreement and

... entered accordingly. Such a bond is now good at law.

... 4 Rawson 5 6.

... When these agreements to be an agreement for a

... in substance though it be void at law, Chancery will carry

... into execution according to the intention of the parties.

... When a bond is given before marriage by a woman to her

... intended husband to convey land to him after marriage, it was
considered in chancery as a good agreement.

If one of two joint obligors pays the whole sum and

...on the bond, this may qualify to chancery to obtain a quittance.

But the nature of chancery is to bind an action of debt. If

...for many years 2nd. is rendered to the Deb'r. case. In bank, a

...the nature of an Indent. also, lies in such case to render what the obligor ought to pay. But no

...in effect of joint tenancy or wrong dues.

If either the persons contracting on the sub-

...to within the local jurisdiction of a county.

...will take cognizance of the cause. This rule is in-

...a new hand, to apply to those cases, in which the subject

...for equitable jurisdiction.

It is a general rule when...a court of law will give damages for the non-performance

...of a contract respecting real property, a court of chancery will

...a specific execution of it. This not against a purchaser,

...for a valuable consideration without notice. In other ca-

...chancery will not generally interpose.

Yet in cases where the a-

...agreement arises under the acts of the land itself, or where there

...is in substance a bona fide contract or agreement, but by

...of some formal defect, a court of law cannot give

...damages, chancery will decree a specific execution. 1 T.R. 515.

...is a practical rule that chancery will not interpose to
to enforce the specific execution of a contract where there is no adequate remedy at law, it has been more judicially addressed to in Connecticut than in England.

This power of Chancery is usually exercised about contracts concerning real property only. The equity of Chancery will not generally intervene to enjoin the specific performance of contracts respecting personal injury, because it must be seen the damages given by the courts of law for non-performance, are considered a sufficient compensation.

But if a contract concerns personally an one party,

reality on the other, to hasten and to secure execution of both parts.

Whenever a party obtains a decree for the specific execution of a contract which is at the party's favor he will be enjoined under a penalty, to perform that, to which he was bound on the contract.

But when damages would not be an adequate compensation for a personal thing. Chancery will decree a specific performance, in case of an agreement to transfer a thing which is continually rising in value. 2 Swan 578.

In such cases, the value of the article at the time is the rule of damages.

If a statute enacted after the making of a contract renders a complete performance impossible, part performance once will be deemed, in case the party claiming performance devices. So if the same event is produced by the act of God.

And it depends from the contract that the obligation was to have...
his relation whether to perform the contract or receive money.

It is a rule of the English law where one conveys by devise,

grant for life of to two issues, or to the heirs of his body, the
guarantee devisee to take an Estate in tail. But if any of the devisees
receive an equitable part of the other a legal Estate, they
will not be tenants in common. If the devise be made to a man for his
life of to his heirs generally, a free simple would vest in the
first to him. Yet if from the terms of the devise, it appears
the intention of the devisee, to give a life estate only, to the
first taken count of law will give effect to the intention.

A distinction is to be taken between cases in which the
first devisee has children at the time of the devise, if
the issue with he has not. I am inclined to "A for
life of to the heirs of his body, or to his heirs general" are con-
idered as giving an estate for life only, if no other words are
necessary to manifest the intention of the devisee, except
in cases of unalterable agreements.

Whatever is agreed to be done
shall be considered as done from the time of making the con-
t and in case some other time is fixed for the purpose. And
32. 32. 32. 32.
11 Mod. 46.6.4. Even if some other time is fixed for execution, the property will
be considered as already transferred, if the terms are settled.
if the formal act or execution only remains to be complet.

This rule however is not allowed to to operate as to statute
46.4. 46.4. and lease. For if a landlord or tenant, after entering into a contract
32. 32. 32. 32. to convey holds the title deed, he is thus enabled to sell the
land a second time; this second sale of a bona fide
purchaser shall be binding the articles notwithstanding.

When there has been no actual contract of sale, but
merely an agreement in future, it has not considered the
property as transferred, but as belonging to the original ow-
er, who of course in case of a sale, must bear it.

If a contract was originally mutual of equal, Ob-
1 Poc. 415. will enforce a specific execution of it. This, by subsequent re-
1 Poc. 156. ceives it has become unequal: otherwise, if that was ori-
ginally a want of mutuality, or uncertainty,

Money agreed to be paid out in the purchase of land
is in Chaney considered as land. It will pass by the devise of
all one's real estate. Yet a person who has the absolute
ownership of a free simple of money, thuscircumstanced,
may at his election consider it as personal, or as re-
aal estate. In case therefore suggest it by a will not execute
by restrictions.

Money agreed to be paid out in land, is subject
to the antecedent tenants, but not to the wives devises.

When a bill is bought for the specific execution of a con-
tract for money, that if the debtor does not deliver or object
to a trial in Chaney that court will decree a specific
performance.

So of an agreement is denied in Chaney for an
issue is decreed that court will require the equity, arising
from the title found, to make a decree accordingly. 2 Poc. 276.
if none be given for the performance, or a variety of
10th. 35.2d suits for every breach, fix a penalty, which will either compel a strict performance or be an adequate compensation for non-performance. Articles of agreements between merchants are thus treated.

Agreements to indemnify debtors are specifically enjoined always. When a contract will sometimes decree a specific execution of an agreement, against which they would not grant relief; as in the case of an unreasonable contract inconsistent with

friend.

This unfairness in the relation in chancery will pre

2 Par. 24.1
2 Par. 72. may an inference of its favor in his favor.
2 Par. 72. A contract must be certain and originally mutual.
2 Par. 72. or no decree for a specific performance can be obtained.
2 Par. 72. The executory contract mostly voluntary, is seldom enforc

ed in chancery. On such a contract even if under seal, nom

10th. 10. real damages only can be recovered at law. What the

2 Par. 44.12 Daniel means when he says that nominal damages

2 Par. 44.12 only can be recovered at law. He could not conceive;

for in contracts under seal the consideration can never

be gone into in a court of law. I presume he must

that when it appears upon the face of the instrument

that it is without consideration, that chancery will not

enforce a specific execution.

When nominal damages on

2 Par. 24.2 by one given at law chancery will not decree a specific execu
Private:—

It is a general rule of law that it is to be presumed that parties, if capable of entering into agreements, were capable of making them in writing. In cases of mistake, it is to be presumed that the agreement or contract would not have been made, and will prevail.

... so when parties have entered into a contract, a contract, in the nature of a bill or bond, it will be set aside by law. If presumed by mistake, misrepresentation, false suggestions, or by means of a bill or bond, it will be set aside by law. If presumed by mistake.

... as when a lying, sharper, had prevailed upon a man to devise his estate from his family by intrigue, he was himself defeated by counter misrepresentation, which induced the testator to revoke his devise and to give his estate to his family.

When there is a fraud in real contracts, law will not suffer it to prevail. In cases of personal losses, these interests are not universal. Yet even if the contract be personal, if one of the parties is to be injured, from the breach of trust, the party to the other.
Chancery will step in to his relief.

Judge Pearce supposes inadequacy of price will render a lien without void in Equity. This inadequacy at least furnishes evidence of something that will make a lien legal void.

Intervention is a sufficient cause for setting aside a contract in Chancery, if it were unconscionable by the opposite party.

Judge Pearce thinks that where ought to relieve where one has advantage of the intervention of another in order gain, whether he was instrumental in the intervention suit.

Chancery will also interfere and set aside contracts entered in

2 Wam. 16 to prevent the unjust 3 person. 2 Pov. 6, 675, 75.

Fear occasioned by some unlawful violence, the it does not amount to legal damage, is a sufficient ground for Chancery.

1 Pov. 118, 659.

Pov. 367, to proceed when it restraining a lien contract that a suitable 2 Pov. 160.

184, 264, degree of observance the plaintiffs other suspicions furnished no ground for relief. A breach of law can give damages only in case of a legal damage.

Contracts repugnant to sound principles of policy, will be extended in Chancery. There is no injustice, so the Pearce thinks why a remedy may not be had at law in all those cases. Indeed, some of the laws have made advances towards granting remedies on the sound principle of Justice, but they clearly took their stand and can stand thus far will endure, no further. And now in all those cases in which agreements will be set aside at law, there are no need of the intervention of Chancery, since an illegal contract
is a mulctity, and need not be remedied.

But there are two classes of cases under this head to which classes of law have never extended their jurisdiction. The first of these is the case of marriage bonds of contract, which are set aside in Okanee on the ground that they have a tendency to destroy domestic peace.

The other class of cases consists of cases in which grants are made for the sale of young lives, acts that are called in the books, such contracts are set aside in Kanee because they tend to encourage profligacy.

Both classes of law extend their own principles so as to embrace these two classes of cases. The interpretation of a marriage would be superfluous if unnecessary. In Eng. marriage enters a jurisdiction over various contracts. In India, such contracts are set aside in a court of law. When the statute on the subject was first enacted, if a man was held on a covenant bond, if compelled by force of law to perform it, he might come into a court of law against another on account. This in case of an action brought on the contract was an adequate remedy. But the party in whose favor the contract was, might delay to bring the action, till the evidence of the event was lost, in which case the delay to part

The grounds on which Okanee interferes in various contracts is the presumption that undue advan-
...lue has been taken. The had the law extended relief to these cases only, where such advantage had in fact been taken. If principles would have been pressed on him, but machinery will relieve against all species of contracts whether they were obtained by undue advantage or not. The words by a party going into Chancery in Eng. it is, that he has three or remedy which he cannot have at Law, by appealing to the conscience of the Deft. The statute against usurious contracts it is true, subjects the criminal party to a penalty of it is a rule that a man is not compellable to testify, where by to doing he will subject himself to a penalty. But as the penalty in Eng. is given to the party injured, he of course may move it, if call in his opponent to testify. The party demanding unlawful interest, is made liable to a penalty which is given to any common informer, if therefore according to the same rule, such party cannot be compelled to testify. But this case is provided for by statute. For if an action is brought on an usurious contract, the Deft may file a bill in appeal to the conscience of the Pltf. who if he refuses to testify will be conducted, or compelled to pay costs. If he do testify if the contract is found usurious, judgment is that the Pltf. recover the principal only of the sum advanced. There are the provisions of the statute, that judgment must always be for the Pltf. For if the contract upon which the action is bid, be wholly usurious, that as such an one as is entered into, to enforce unlawful interest on another...
The courts will give nominal damages only.

Chancery's interference to set aside unlawful contract.

The idea that a man might avoid a contract at law is a novel one.

Originally no proof of fraud could be admitted.

To show fraud, the statute, or mistake, is hence we see the reason for the interference of Equity. But now in England proof of any description.

This is gone a still further, and admitted such proof to show fraud of any kind.

Words given in consideration of past cohabitation, are now held true, that are given in consideration of future cohabitation are void.

Arguments merely voluntary are not in general considered in chancery, yet in some cases they are, as where a man after marriage makes a reasonable settlement on his wife.

If one seeking a specific execution of an agreement, has himself shown he had cause, in performing his part, that will greatly interfere in his favor, especially if circumstances are altered, by her conduct, or during her delay.

When a contract had been dormant for a long time,

Chancery will not decree a specific execution unless the special circumstances warrant the neglect.

When contracts are rendered void at law by reason of the Statute of Frauds, Chancery will in some cases interfere.
enforce them: and where the contract is executed, or partly executed on one part, or where something has been omitted in the written contract be found or mistake.

In latter times, Chancery has exercised a power of enforcing against penalties. But longer ago than when Sir Thomas More was first Chancellor, this power never been exercised. Since that time, statutes on the subject have been made in England and in several of the States. These statutes embrace all cases where one binds himself under a penalty, to pay money, in a certain time, to do some collateral act, if not in terms of law, the power to chance does such bonds to what is justly due. We have such a statute in Court. The ground on which Chancery gives relief in these cases, is that it is contrary to sound policy, to give extravagant penalties. If the court in its instances have given relief where the penalty is small.

If it appears from the contract, that the sum to paid, is in the nature of actual damages for non-performance, Chancery will not relieve. But if on the other hand the sum to be paid is merely a security for performance, the Court will change on it. If neither of these meanings can with safety be collected from the face of the contract, the sum conditioned to be paid, the sum is always construed to be in the nature of damages for refusal or a penalty.

Yet it seems, where who can give some compensation or damages, if where there is some value or rule by which to esti
mate those damages, and will relieue the covenant or agreement actually operated by way of a penalty. —

A bond with a penalty is given for the performance of a contract, or if a penalty is inserted in a contract to ensure performance, the party seeking specific execution must lose the action, waive the penalty.

If a bond has been given for the performance of contract, Charney will direct an issue of quantum demand against it, as it is an action as an action is brought. If that may be as often as any breach happens.

Charney will never relieve against a penalty, however large, imposed by itself, to compel obedience to its own demand.

If a contract be entered into respecting real property, if the parties bind themselves under a penalty, which happens to lie in the nature of damage for non-performance, Charney will not decree a specific execution of the agreement. But if the penalties appear to be a security for the performance, a specific execution will be decreed. Thus it seems each case under these rules will stand on its own merits.

The subject of equitable jurisdiction is a mortgage, The same suit originally erected upon mortgages as upon personal bonds, is equally called for the intervention of Equity.
A law mortgagee is regarded as absolute estates in mortgagees, de jure but not de facto, upon the performance of the conditions. Thus the mortgagee was often in peril, since it would frequently happen that he could not perform the condition by the time stipulated, and since a mortgage was frequently held as a security for a debt not amounting to one half of the sum. The doctrine which prevails in Chancery is very different. The mortgagee is considered as merely a trustee, to the mortgagor, when the condition is performed. The estate is in the mortgagor. If it be a general rule that every vested trustee is compellable in Chancery to reconvey, such a trustee, the mortgagee after the payment is considered. In compelling the trustee to reconvey, Chancery will always do complete justice between the parties, without adhering to the sum that might be assessed at law.

There is one case that falls within the jurisdiction both of Law and Equity. Where compound interest is received on a note, and the want of payment of annual interest, both Chancery and Law will relieve against the compound interest. Yet interest is always to be paid annually, unless it be otherwise agreed, if therefore a constant renewing interest when interest is not renewable. The principle upon which the court interposes in this case, is found in the books to be, that to allow of such interest is unreasonable. But it proceeds upon the policy of the true ground of interference, for if compound interest was allowed, some who would otherwise support their families, if educate them so as to be useful, would be reduced to beggary. They must be rescued from the consequences of their own folly.
The injunction to stay waste, may issue from chancery, in all cases in which action of waste will lie at law, or in many cases where the actions of waste will not lie. Thus where law is a remedy, chancery may issue an action of waste against one who has the legal title as a trustee, yet chancery will issue an injunction against such trustee.

Chancery will also issue a similar injunction against

The action of waste will lie at law against one, having a larger interest than an estate for life. And no person can maintain an action of waste, unless he has an estate of remainder, 2 Bl. 281.

The action of waste will not lie in favor of a remainderman in possession, if any other estate intervenes between; if any other estate intervenes between his remainder, of a particular estate in issue, yet chancery will grant relief by an injunction in favor of a remainderman

If a lease for life is made without imprisonment of waste

If chancery will not understand these words issue an injunction against the lease if the lessor commits wanton waste. 2 Bl. 289.
tions among other things, old mines often may be wrought
by the tenant. But according to the authority, new mines
cannot be opened. This rule must frequently be contrary
to the intention of the parties, especially when no mines are
opened at the time of making the lease.

An injunction to stay proceedings at law, or after the suit
commenced; after verdict or before judgment, after judgment
before execution; or even after execution. This injunction
lies against suits on all contracts, while the good at law
are void in Chancery.

Chancery when it issues an injunction lays
a penalty to enforce obedience; which penalty is committed
may be enforced in courts of law. The Federal court however refused
to sanction, or retain an action for the collection of such
penalty.

Injunctions are either temporary or perpetual. Injunc-
tions are usually to the parties on the suit, but not always.
In Chancery, fraud may be pleaded in bar of an action at law.
Any party injured by the fraud may have a remedy in Chancery,
and if the opposite party may delay to bring his action, till the
inquiry of fraud is left.

In England of one in suit, which on a bill filed,


Injunctions are sometimes granted without any trial; as if
one be sued on a contract where a recovery must be had at
law but which is void in Chancery. Yet the injunction is tempo-
If a mortgagor covenants that he will not apply to a court of Chancery to be relieved against a foreclosure, if the mortgagee suits for a foreclosure, Chancery will grant an injunction to stay proceedings notwithstanding the covenant. If a suit at law is brought on the covenant, an injunction to stay proceedings in this suit will also issue.

Vol. 481. A court of Chancery will relieve against frauds; so
They will grant an injunction on petition of fraud to stay proceedings in a court of law.

Chancery will issue an injunction against an Ex.

Injunction is power of authors, against such as attempt to republish their books, even if the court has no jurisdiction.
The Statute of Anne. This statute has given authors a legal remedy, a common law taken away by the Statute of Anne.

It was however the opinion of Lord Mansfield that authors have an exclusive right to their works at common law. In the House of Lords, Judges were of opinion that the remedy was common law taken away by the Statute of Anne.

The English courts of Chancery have lately refused injunctions to prevent a party from multiplying suits, by repeatedly bringing actions of Equitable for the same cause. It is the case of an action, in which the action is founded in Eng. law, petitions, numbers, doubts might be brought on the same cause of action; if there were no such interference.

In chancery, if the proceeding is Equitable and not equitable no such interference is necessary.

This house of chancery, if an injunction has been made in criminal cases, must the courts will interfere only in cases particularly circumstanced. If there is a contest as to which party, of law makes it criminal, to instigate that right, a prosecution is commenced under that law, Chancery
Powers of Chancery

...well, if the injunctions to stay proceedings, till the right be decided. But when it appears that the right is soon to be tried, in a suit pending in a court of law...

In Great Britain, the power of chancery is exercised over all the estates in the kingdom. In Court, an injunction never issues against a court of Probate, because an appeal lies from every decree or order of that court to the superior court as a court of law, and not as a court of chancery.

Power of chancery in other cases.

In England, chancery has jurisdiction of the payment of legacies. The principle upon which chancery will compel the payment of legacies, is that the executor trustee to the legatese, of that whenever there is a trustee, chancery will compel him to execute the trust.

In courts, legacies are by statute recoverable in courts of law, if they adhere strictly to the rule that where an adequate remedy can be had at law, chancery will not interfere. Our rules in chancery are generally the same as in England, only where an statute has given the Courts of Law concurrent jurisdiction.

As a rule in chancery, that whatever is agreed to be done, is consid...
Powers of chancery—

a sale of the lands of a tenant for life is personal property, vice versa. But this rule must be taken with one qualification.

If a man devises land to be sold for a particular purpose, the amount of the sale is more than sufficient to answer that purpose.

If the residuum is considered as remedying breach of the lease by the tenant.

If there are no provisions of Statute to the contrary, it is incident to Chancery where lands are devised by will for the payment of debts to compel a sale on a bill filed by one of the trustees. A common law if the Court having refused to sell, in this case the creditors were left without a remedy.

If an owner refuses to accept the trust where lands are devised to be sold, et sic, Chancery has the power of appointing another, and the voids of the sale will be ordered to be brought into Chancery, it distributed among the creditors in pari passu.

The principle upon which Chancery intercedes in this case is that the Court of Chancery having no authority to fix the trust, is a trustee.

In the event of the Court of Chancery may direct the Court to sell where lands are devised to be sold for the payment of debts, if he refuses the plea to his lands, but lands are devised to be sold, et sic, by some trustee, other than the Court, if he refuses to execute his trust, the Court of Chancery has no authority once such trustee, since he does not give lands to the Court.

3. Chancery has power to compel an equity of redemption. The equity of redemption is unknown to the common law. In the sale of a mortgage, as considered absolute or in the mortgage of an estate, but it is otherwise in Chancery.
Hence Chancery will add a date to a Equity of redemption, for the payment of debts on the ground of a trust.

In law, an Equity of redemption may be attached in the lifetime of the mortgagee, after his death, it goes into abeyance with the rest of his estate; hence in this instance we have no need of the interference of Chancery.

4. Another power of Chancery is that of marshalling assets.

In England, only the personal estate of deceased persons is liable for the payment of their debts, except debts by judgment and specially. And specially creditors by judgment having a preference to others, may exhaust the personal fund by which claims of an inferior rank are entirely defeated. But in these cases Chancery will set in the simple contract creditors to the amount of the personal estate taken by the specially creditors.

If the specially creditors come upon the real estate where the personal fund is sufficient to satisfy all claims, they have in Chancery may compel the Cx. to refund him, the same sum which the specially creditors have taken from the real estate. The Cx. in this case being considered as trustee to him.

5. If one gives an estate in trust to A for B, it must be done to his trust according to the circumstances of the case. If it appears from the trust that the donee or grantor intended that the estate should pass at a particular time, when that time comes and before Chancery will compel compliance, so the trust was intended that the residue will re-pass should have any beneficial interest. In this case the design of the grant
will be executed, whether it may be. This has special interest the estate you were shall always have, if the trustee cannot deprive him of it. For to this rule there is no exception. If the trustee conveyed the estate to a bona fide purchaser, the latter will hold, for it is presumed that he is ignorant of the trust, otherwise he would not he considered a bona fide purchaser.

In some cases there can be no such exception, since we have no evidence that there is conclusive evidence of title.

In case of implied or private trusts, whereby reason of the statute of frauds no remedy can be had at law against the trustee. Chan, will enforce performance of the trust. If proof can be presented by the conveyance of the trustee, by circumst.

2 M. 207. Trial testimony, viz. third of C, hired B to sell land for him. 4 M. 175. If makes out a deed of the land to him, B. The latter refused to sell but retained the deed. As if he sells if refuses to pay over the money. Chan can only consider him as trustee to C.

This is an implied trust arising without writing, if may be

2 c. 150.

It is sometimes said that is making a fraud agreement respecting lands. But this is not true; it is making an unava.

You in some cases to this rule, when a man takes a deed of land for his wife. 2 C. 61.

Fraudulent trust is not regarded as a default of chan., the estate cannot be recovered after it is conveyed.
6. Chanery has power to grant what is called a bill of discovery, by which a party to a suit at law, who has not legal evidence, is enabled to discover other evidence.

After discovery, that the opposite party knows the facts which are wanted in evidence, if the case to which the facts relate is proper to be sustained in Chanery, the court will sustain if the party petitions for it; but if the case is proper to be tried at law, Chanery will in some instances sustain it in other

not. If these clauses be false, then able to find my ge-eral rules of diminution between the cases.

1. If an agreement is made in Chanery, and an issue is made that the court will reserve the equity arising from the facts found of make a decree accordingly.

In former Chanery, as a committee, if does not send the cause into a court of law to be tried by a jury, for their interests may be introduced if con-ceived into a cause. There's no in England.

8. On a memorial presented to Chanery, they will appoint commissioners to take depositions. But the memorial must show that there was more than ordinary cause for the proceeding, not that the interests were used such as.

Formerly the same practice prevailed in Chan. Now, but now application may be made to a court of law.

9. Court of Chanery have the power of ordering a person to produce evidence of debts after they have been paid but not cancelled.

9th. Of course rule to the obligation. They have also power to order every

1st. To the queen rule, when it becomes improper that
the holder should retain them, as no case of mortgage, when the debt secured by it is paid by the mortgagee. In consequence, deeds take effect by being recited, the mortgagee therefore may be compelled to recover an received payment. The reason why a man was compulsorily compelled to go into bankruptcy when his debts were left, was that in one action at law, upon a written contract or agreement, the party may make profit of it, when the deed was cancelled or destroyed by the opposite party, there was indeed another reason; for the fact that the deed was cancelled by the opposite party was in most cases known only to himself; if suits of law cannot appeal to the conscience of the party.

But now both in bankruptcy of Eng. an action at law may be had on such instrument, this it be left, if the contents can be read by other persons, if it may be ascertained that the instrument is lost this time, and evident.

The party, still in Eng. can go into bankruptcy, but not in law. Does we adhere to the rule that where an adequate remedy can be had at law bankruptcy will not intervene.

Another power which bankruptcy exercises in Eng. is that of compelling joint tenants liens and others to make partition. Now a tenant, become invested with this power is intestate. No person supposes that it might originate from the circumstance of one tenant's having taken possession of the title deeds, for in what case the other would have no remedy at law, so as each tenant owns the whole estate, bankruptcy may hence coincide with each tenant as turtur to the estate.
became involved with this power, they have appointed commissioners to make partition, whose acts are binding on the parties. In court, the parties never go into Chancery. But the Sheriff appoints three men, whose acts are final, without any making returns to the court. This depends wholly on practice.

11. Chancery will in some instances relieve against mistakes in instruments, as if different words are used in the writing from what were intended by the parties. But if there are words used that are intended, Chancery will give no relief, the words having an intent at law, different from what the parties really intended. Proof of proof is admissible to prove the intent.

12. When the instrument is defective, this want of proper form, Chancery will rectify it if such interference does not affect the rights of persons, or if a deed have but one word. But it has been in cases where Chancery has rectified in favor of more voluntary. In such deeds are required to be recorded. If a grantee then fail that the estate will be attached, delays to procure his deed to be recorded, the estate has never been attached. If he cannot procure his deed, Chancery will compel a grantee under a suitable penalty to procure his deed recorded. If he is a bankrupt and cares not for penalty the grantee will record it proceedings, which will complete the title.

13. Chancery has the power to protect the separate property of married women. The practice of times bound no one to separate property, has grown up within a century. But now
the husband is a mere stranger to the sole and separate property
of the wife, if he invades her rights she may have a sole remedy in
chancery.

2 Pet. 2:25. Federal wife are exposed in these after marriage. In other
2 Tim. 7:93. cases also where the remedy at law has become extinct by the
union of the rights of obligation, chancery will sustain the contract
as where a testamentary debtor is made executor.

All varieties of agreement entered into by husband and wife
for the purpose of separate maintenance, are cognizable by chancery.
A husband may convey an estate to a third person to the use of
his wife, if chancery will compel the husband to execute the trust.
This now by an Eng. statute, an estate conveyed to a trustee to
the use of another, used to absolutely in the latter. No principle
decides as to why a man may not convey directly to his
wife.

Then one enters into a liquid condition to leave
2 Pet. 2:14 a certain sum to his wife, after his death, this is good both in
2 Pet. 2:97. chancery, of at law.

Contracts between husband and wife have been unlawful
1 Th. 2:7. in chancery. This principle supposes that all important
1 Th. 2:6. contracts are good without the interference of chancery.

If a husband borrows money of his wife, she is a creditor
1 Th. 2:5. of chancery after his death. This
1 Th. 2:6. shall be applied to the rights
1 Th. 2:5. of the wife.
of 3. persons are affected.

15. Counts of chancery have taken it on themselves to relieve against the lapse of time. There is great relief when a man this accident has been allowed to perform his contract by the time limited. So they have relieved even in cases where there was some degree of negligence, as where a man was to pay a sum of money by a day certain, failed of possessing the money for that purpose till a week before hand, if then they fell sick. If one entreat into a conditional agreement, that in another person pay by a certain day he will convey, this raise the agreement to be void if takes a notice of hand Chancery notwithstanding the agreement these conditions will compel a conveyance, whereas no the note is collected.

16. When a controversy cannot be settled at Law without a multiplicity of suits, as in matters of account, concerning which there has arisen a number of disputes & claim will take in the whole controversy, if make a final settlement. The remedy at law is not deemed adequate, in cases of this kind, since the expense of a number of suits would ruin the parties. A bill of The bill brought in Chancery in this case is called a bill of peace. A bill of peace has been brought in our Court of Errors, but never in our Superior Court.

17. A common law. Suits are not negotiable. By a bill of the assignment. To in Court, where Notes are not negotiable. — 2 Corn. 246. 2 Corn. 540.

18. A Court of Chancery will decree the performance of an
award, on the ground of an agreement to abide by it. This rule obtains to prevent litigation. The personal solvency of the subject is disputed. 3 P. W. 187.

19. Where one of two partners dies, and actions which have been laid against both, had both been joined must be laid against the survivor, and of both parties be paid. The Cts. of him who survived the other is liable. Yet if the two partners died a bankrupt, Chancery will give a remedy against the Cts. of him who died first. In Eng. application is always made to Chancery in this case. Formerly it was so in Connecticut. But has lately become

solved by the Superior Court that an adequate remedy may be had at law. It is requisite to state in the dec.

dlaration the circumstances, showing the necessity of con-

sidering upon the Cts. of the partner who died first.

20. Chancery will order an offset when otherwise injustice would be done— as where a person is sued by a bank-

rupt, there being mutual debt of credit. In cases

the remedy in this instance is in Chancery. But in

4th. 123. Eng. Actions of law will order a set-off under the

5th. 124. Stat. 2d. 8 Geo. 3. 2 16 36. 440. 69 Geo. 456.

21. It is a rule in Equity that when one asks Equity he

must do Equity; if therefore when one asks a specific perfor-

mance of a contract he must show that he has performed

on his part. So strict is this rule that where it becomes

impossible for one to perform by inevitable accident that

will not interfere. But if other part performance or total
Part of Chanery.

Performance becomes impossible before one to perform the
will interfere. If it becomes impossible to perform in toto the
part performance is lawful. Chan. will decide that the
party perform in part only. — 3 Ves. P. Ca. 339.

2. If there be a contract about land, which at the time of
making it was good of substantial doubts respecting the title
afterwards arise, Chan. will leave the decision to law. Yet
if the title is probably good, Chan. will decide since a de-
nee of that land does not raise the title.

2. A vendor from the time of making the agreement is
considered as a trustee to the vendee if wise or not, tho' the
agreement wants some formalities, for whatever is agreed to
be done is considered in Chan. as done from the time at which
it ought to have been done. In Eng. every bond creditor
is considered as having a lien upon the land of which the de-
btor died seized. But if the debtor in his lifetime had atti-
ed to convey, Chanery will not consider him as having died
seized, on the ground of the general maxim often repeated.

A question of great importance is, whether in every case of
an agreement respecting the sale of property, the vendor or
vendee shall lose it? If the maxim that whatever is agreed
to be done, is considered as done notwithstanding, is this case, this can
be no doubt as to the decision of Chanery in this instance. There
has however been a variety of opinions on the subject.

Analogous to this would be the decisions in a case of law
in certain cases. If A agrees to sell a horse to B, when
B should produce the money in payment, both engaging
to perform, the necessity of the house. Held in law to be

transferred. This point was first settled by a decision in the
18th Edw. which decision has never since been contradicted.

A distinction, however, to be taken, between this case of those
cases, where it is left optional with the parties, whether to

perform or not.

Notes taken by A.B. on continuation of the Power of Chancery

Land intended to be sold, is considered and treated as

money, if willing to the Exe. 1 Powell, 23.

1. Forb. 414.
2. 20. 637.

The property being considered as transferred, the vendor

shall suffer the loss of any happens. The parties

are bound from the time of the agreement. The pro-

erty is considered as transferred from the time of the

agreement, so far as that if a loss happens after the

agreement entered into, before it is to be executed, the

loss shall fall upon the vendor or Covenantee. This

rule appears to be well established.

When the agreement is not an agreement of sale, but

merely an agreement to stipulate at some future time

The property is not bound from the time of the agreement when

a loss happens.

In case of a tenant in fee of the money, it

will be considered as money, unless he shows his cles-

3d. 26, 26, 28, to consider it as land. 1 Pont. Ch. 223.
The presumption that the tenant in fee intended it
shall be considered as land may be rebutted. 2 Inst. 108.

A breach of ch. will not always vouch a specific
performance of an agreement where they have
recognition of the subject matter. The extent of mu.

Quoted 20.

A breach of ch. is a decisive objection to a decree of performance
thus: where one agreed to convey but the other does not
agree to accept, here the agreement is on one side

2 Inst. 108. 4/15. if therefore will not be enforced. 116. at this want of

10th. 70. mutuality is no objection at law. 10th. Ch. 106.

In case of penalties, if the party does not waive the
penalty in a bill for specific performance, the party
may solely decree to it. A breach of ch. will not en-
due the penalty where the substance of the agreement can be
obtained without it. There can be no rule of compensation
where there is no rule of damages furnished by the contract

where the penalty is in the nature of a

restituted damages thus the court will not relieve against the

penalty.

113.
10th. 13.

Ch. 15.

Pen. 6.

Pens. 3.

If the substance of the agreement cannot be obtain-
ed without enforcing the agreement. Ch. will on

force it, notwithstanding there is a penalty, which might
be recovered at law.

Ch. 118.

Ch. 2.

Pen. 5.

Pen. 3.

If a creditor agrees with a debtor that

he will pay within a certain time, that he will ac-
cept a less sum, if the debtor does not pay within the

time limited, a ch. of ch. will not relieve against the penalty.
The rule of law is that the party 11114. may pay the penalty or perform the agreement. — 2 Chit. 371.

If a party into a bond to the amount of $10,000 to convey land, it is not competent for him to deny or a Ct. of Ch., on a bill for performance, that he is ready to pay the $1000, for the agreement is considered as the substance of the contract. But where the penalty is in the nature of damages, the Ct. will not relieve against the penalty if it is in the nature of a penalty in 164. 20. 11119. tenorwise the Court will relieve against the penalty. 4 Bvm. 222.

In Eng. the Court of Ch. never prize the damages quantum but direct an issue of damages to be tried at law.

The Ct. will not ratify a contract merely because it 12. 5. unreasonable. 5 Tine. 529. — 2 Cy. ea Ch. 28. — Than settlement will not interfere in such cases but will leave the party to his remedy at law.

Contracts obtained by improper means, i.e., of imposition a Ct. will not enforce but vacate it. Improper hardship of imposition is where undue advantage is taken of the party's situation. It sets aside the 114. 15. agreement so far forth as it is oppressive. Thus a 11. 13. agreement is not absolutely void but avoidable only. Of course it may be ratified when the party is relieved.
A party of the first part will never devise a specific performance where there is anything unfair in the conduct of the other. The maxim in the law of Chan. is that he who seeks equity must do equity. A suggestion of vice is as much fraud as a suggestion of falsity. Unless the other had conformed to the rules of strict justice the other will not interfere in his favor. In some cases, when there is a mere misconception, the parties will refuse to do even justice. This would be no objection against a suit of law giving damages.

If the mistake was the cause or signification of the agreement, the other will vacate the contract or set it aside. As where there were 3 brothers A, B, and C. I supposed that B was the youngest would be the heir to C because he had been informed by a schoolmaster that cousins always descend to nieces as descend and therefore makes an agreement with C to let him have a part of the lands. B keeps it himself—now B, being under this mistaken apprehension, the other vacate the contract the misconception being the signification of the agreement.

The compromise of a doubtful right is a sufficient consideration on which to decree an agreement. This is where the parties are not deceived but contemplate the doubtful right at the time of the agreement. They intentionally make a bargain of half and both act
willing to abandon what he hath given to the last right according as does
59. abandon. 2 Pet. 1. 2. 1. do. 142.
10. 11. 18. 23. 34. 8. 39. 18.
When there is caution or duress the bit of Ch. will
set the contract aside. 2 Pet. 1. 18.

But if there is due respect paid to a Parent his influ-
ence will be no ground to set aside the agreement. 10. 11. 18.

Intoxication will be no ground to set aside the agree-
ment, unless some unfair advantage has been taken.

Weakness of mind is not sufficient ground to set
aside the agreement, if the party is legally compas-

ted.

Contract which in some instances are not binding at
law, will be enforced in Ch. if it is for the Infant's ben.
10. 11. 18. 11. But this is a discretionary business with the Ch.
34. 8. 39. 8. 11. Where a person lent money to an Infant to pur-
chases, and the necessary, he was allowed to stand in the shoes of
the person who sold the necessaries.

Contracts which tend to

defraud B' persons will be set aside—such are marriage
broachage contracts. A Ct. of Ch. considers these contracts as
illegal. Foo.

Fraudulent contracts shall be set aside

where it will defeat the interest sought. But if enforcing
then will defeat the ground they shall be enforced. 1.
34. 8. 39. 8. 11. 11. 2. 4. 2. 4. 4. 4. 1. 1. 1. 1. 1. 1. 1. 1.
impossible for the parties to satisfy the contract in these cases.
apparent for the purchase of his expectations are always set aside in chancery on the ground that it tends to degrade him from a proper line of conduct, of induce estrangement of dissatisfaction. It makes no difference whether the heir is a

2 Rev. 14.

2 or is a minor or an adult. If the heir is such a case conveyed away the land in pursuance of the agreement after the death of the ancestor, it will be set aside unless the heir had full knowledge of his right to avoid the con-

2 Rev. 14. tnat if it was done unfairly.

A bill of chancery has the power to make a set-off, which cannot be done at common law. But by Stat. Geo. 2. it may be done by a bill of law. A set-off

2 Rev. 14.

will not be denied in chancery unless the party is an insolvent

2 Rev. 14.

circumstance.

A court of chancery will not regularly interfere in cases of personality, but where one is wrongfully professed of title deeds of another chancery will

denial them to be delivered up.

An inferior court sitting as a bill of chancery. Think themselves authorized to decide where the sum in demand

2 Rev. 14.

exceeds $1,000, unless an exception exception is taken to their jurisdiction. If the sum in demand is uncertain

2 Rev. 14.

the alleged value shall decide the jurisdiction of the court.

2 Rev. 14.

A court sitting as a bill of chancery.

When the object of a bill is to recover nothing more than a sum of money the bill will not interfere, but leave the party to his remedy at law.
A settlement made before marriage is considered

Sec. 14. therof, is good against every one; if after marriage a

settlement be made in consideration thereof, it is volun-

tary, if fraudulent against creditors, whether so at the
time, but not against those whose demands are of a for-

mier date, if the settler were then in solvent circumstan-

Sec. 92. ces or not engaged in trade.
Criminal Law.
Of Public Wrongs,
or
Crimes and Misdemeanors.

This branch of the municipal law, which treats of public wrongs, is called "criminal law," folowing the Crown or Crown law.

The term, Public wrongs, includes all crimes and offences against Municipal law — 1 Bla. 1.

A Crime or misdemeanor is an act committed or omitted in violation of a public law forbidding or commanding it. see 1 Bla. 5.

Crimes and misdemeanors are strictly synonymous, though in common acceptance, the former denotes offences of the more atrocious kind, and the latter those of a less serious character. The difference between crimes and civil injuries, is, that a crime is an infringement or violation of a public right, whereas in the whole community considered as a community. Civil injury is the violation of a private right vested in an individual, considered as an individual.

In almost every case, a public wrong actually includes a civil injury, or a public and private offence, as a battery, libel, murder, theft, robbing, and the like.
Public Wrongs.

And in every case it may include or produce such an injury, for so far as an individual is injured it is a private wrong; as an instance, in a public nuisance, but the principal offence is the public injury. In all these cases the object of the law is to give, as far as possible, a twofold relief. That is, a redress to the public and to the individual—But this rule, as with regard to nuisance, does not always hold, for should no individual sustain any damage by such public nuisance, it is not then a private injury.

One act may constitute a number of offences, and on the other hand one offence only may arise out of a number of acts—no man can be twice punished for the same offence, but he may for the same act as an offence of a higher nature may arise out of the same act. Therefore when the public prosecutes for an offence it is not material how far the individual has sustained an injury. Thus if the offence amount to felony, the private injury is regularly at common law suable in the crime, and no private redress can then be had as of treason, murder, &c., and the reason is, the policy of the Law, the object of which is to prevent offenders from escaping punishment.

But the only true and rational foundation of this doctrine of nuisance seems to be, that the punishment for the public nuisance renders it impossible for the offender to make reparation for the civil injury it being in general a forfeiture of the life and property, and having forfeited his all, every he cannot repair.
Public Wrongs

If a crime, not amounting to felony, injures any individual, he has his remedy, on the offender liable to an action brought by the individual; for the public offence does not in this case hinder him from complaining, as in battery, libel, nuisance &c., for have the punishment being less severe than in the cases above stated, leaves room for compensation—

In Cor. the doctrine of mergers seems not to have been regarded; Civil suits have here been sustained for perjury and abortion; there has been a forfeiture of property for crimes in two cases only, viz., destroying magazines &c. of the United States, in time of peace—and for Manslaughter, in neither of these cases however, is the forfeited—

The right of punishing for crimes is founded upon the law of nature and, in some instances, it is authorized by the revealed law of God also, as in the case of murder—Next, then, the law of nature be violated with impunity here? no: also then it is in fact the punishment due, why deny the person inquired Therefore, in a state of nature, the right of punishing the offender was vested in every individual; in otherwise, there would be no execution of the law and therefore no sanction for it. But how then does the civil society have a right to punish? In a state of society, the right to punish is transferred to the sovereign power from the individuals, and is derived by the express consent of its members, where then men are no longer their own judges or avengers—
Public Wrongs.

1. Blac. 2. 9. Society's right to punish there is derived from the consent of its members either express or tacit, and therefore is said to be founded on compact. This foundation is broad enough to authorize many punishments, but not all—as in capital crimes, called mala pro sita. But it is otherwise as to mala in se, for the individual who had a right to punish in a state of nature has a right to transfer it, see Paley, Mor. Thi. 341. The consent of the criminal is in no case sufficient to authorize capital punishment. But the most rational ground upon which society has a right to punish, not only in cases of mala pro sita, but for all offenses, is necessity—by expedience. Society must then make laws for its own preservation and enforce them or it cannot exist. As in the case of treason, shall it not punish a treason? For it has a right to defend itself as much as an individual, therefore it has a right to that punishment which is necessary to this end.

A foreign state, though regarded as a moral person, has attributes different from those of a physical individual, different rights, duties & nature. The end of human punishment is the prevention of crimes. This end is to be obtained in one or more of three ways—1. In such a way as it may reform the offenders. 2. By depriving them of the power of doing future mischief. 3. By such punishment as will deter others, by the example. Punishment to reform is confinement, chastisement. Punishment to prevent future crimes is death. All which serve to deter others.
II. Of persons capable of committing crimes.

Regularly all persons are liable to punishment for all

acts, whether acts or omissions, which are committed

under the laws excepting such as are expressly exempted

from punishment. All the excuses which protect them from punishment

are reducible to this single consideration, viz., the want

of will or the defect thereof. To constitute a crime, there

must be a will and an act concerning which one man is

criminal, unless his mind is criminal. Numerous more

excuses may be found, for the will must concur with the act—

But in trespass considered as a civil wrong it is otherwise;

Defect of will is in three cases.

The mind may be said not to concur with the will

where there is a defect in the understanding, and the law

will not annex any crime committed by such person.

Thus, persons under the age of discretion are incapable of

committing crimes, as the act is not capable of distin-

guishing between good and evil, and is not punishable by any

criminal punishment in any case. Whether who is not a

moral agent can't be guilty of any criminal act.

If the offence consists in omission, Infants are

not generally punishable at common law even tho'

of the age of discretion. As the neglect of repairing

roads, bridges, and public places—but here the exemption

is not from want of will but his legal incapacity—

The age of legal discretion as the law now stands is

fourteen years; under this age the presumption is in

favor of the Infant. But as to all infants between

the age of fourteen and seven this presumption is
in capital cases be rebutted; if under pain it cannot
in any case be rebutted. This distinction is laid down
by Blackstone in the case of colonies only. They are not
men, and as such they cannot be punished for a breach of the
peace riot and common misdemeanors—S. 22
idiotic and lunatics are not punishable for their acts
outside of these incapacities. Not being capable of
it is otherwise within lunatic at fixed intervals—
If one commits a capital offence and before arraignment
becomes insane, he cannot be arraigned; if after
arraignment then he cannot be tried; if after trial &
verdict against him, he cannot receive judgment; and
if after judgment, he cannot be executed.

If it be doubtful whether a prisoner is in compos-
ment, the fact must be tried by a jury—With respect
to madmen, when they commit murder, by the inci-
ment of any one who is not insane or an idiot, the rule is
that he who thus incites borne to an unlawful act is himself
the offender—and the principal.

Voluntary drunkenness is no excuse, but rather an aggrava-
tion in committing a crime. In case of habitual de-
ability of mind produced by a long course of drunkenness
it is otherwise. So if the intoxication be not voluntary but
produced by force or fraud it is excusable—

[5] There is a defect of will where the understanding is
deficient does not exist itself, as if one commits an
offence by chance, as in thinking at a thing he happens
to kill another man; he is excused for the will is not in-

[Page 635]
The general rule is that if one commits an unlawful
act by misfortune or chance, he is excused, for here is a defect
of will. But if one in doing an unlawful act, does
mischief which he did not intend, he is not excused.

Ignorance or mistake in point of fact is excusable,
but ignorance in point of law is not. Ignorance is not
non excusant. In the former there is a defect of will, in
the latter the will concurs with the act. And evidence
will not be admitted to show want of knowledge in
point of law—Co. 358 c. Blac. 27. Tew. 371.

3. There is a defect of will arising from compulsion
necessarily, here the will opposes the deed or at least does
not approve of it, as if a law commands him to punish
another, for if the legislature enacted an mitigating law
commanding an act contrary to religion or morality,
here the subject is excused from obeying by the
obedience of a civil obligation. 4. Blac. 28.

A home servant is in many instances excused, where
she does an unlawful act through the coercion of her
husband, which is the same thing in his company,
as for theft or burglary. But if she commits these with
the own accord voluntarily or by the bare command
of her husband, she is not excused, who did in no way force
her but rather tried to prevent, the circumstances of her
being with the husband will not make her culpable
qui non protract, cum prohaerere proficit. Juv. is the
maxim—we not theft and burglary mala in se.

In the case of treason, murder and treasonable
coercion by the husband, does not excuse the wife, and
Public Wrongs.

So likewise, in manslaughter, sedition as to robbery, as the husband breaks the civil obligation by which he is liable, the wife is not subject to the offence is to take
now an extent to commit by his order.

No man shall our servant, as such is excepted for any

crime by the command of the parent or master.

Another species of compulsion amounting to defeat of will
is that by which, which excuses many unlawful acts,
thus, reasonable acts are excused by compulsion of the
enemy, or rebels. Blac. 90, for his necessity near his will.

But this holds chiefly with regard to positive offences only
wart of natural offences, as killing an innocent
person to escape death. Blac. 51.

Another kind of necessity arises from legal com-
pulsion; the will is here passive, as such an off-
vie of Law is bound to make an arrest, or despoilers,
and resistance is made, killing them is justifiable —

Healing to relieve from extreme danger being justified.

Of Principals and Accessories.

One may be a principal in an offence in two ways —

A principal in the first degree is he who, to the extent of
absolute perpetrators. A principal in the second degree
is he, who is present aiding and abetting the actual perpe-
tration — according to which the offender in the actual
are principals in the first degree —

The presence necessary to make a principal in the second
degree need not be an actual standing by, in their sight
or hearing, a constructive presence is sufficient.
Public Wounds.

When keeping watch or guard at a convenient distance to aid and assist the perpetrator—

Even a constructive presence is not always necessary to make a principal in the first degree; As preparing passion and exposing it, whereby it is taken in the offender's absence. And placing a perilous or trap, setting out a wild beast with intent to do mischief here the offender is a principal in the first degree.

An accessory is one who is not the chief actor in the offence, nor present at its perpetration, but in some every concern of it either before or after the fact.

In high treason there can be no accessory, for then all concerned are principals, and this is on account of the atrocity of the crime: Besides the bare intent to commit treason is, in some cases, actual treason even tho' no one act be done.

Whosoever will make an accessory in felony will make a principal in high treason; but as to an accessory after the fact, it was formerly questioned. In general all felonies, except such as are unpunished by statute, or of accessories. In petit larceny there can be none, nor de minimis non curat lex.

Theories may be in petit treason murder either felony, except those which in judgment are unpunished as crimes and thefts, on which there can be none before the fact.

An accessory cannot be guilty of a higher crime than his principal; e.g., a servant causes a stranger to murder his master or wife her husband: the servant that absent is accessory to the crime committed only; but had he been present, and assisting, he would have guilty of petit treason as principal.
Public Wrongs.

The stranger would have been guilty of murder, as accessory; or of two descriptions, before and after the fact — an accessory before the fact is one who procures, counsels or commands another to commit a crime — being himself absent at the time of the act committed, the absence is necessary, otherwise he is a principal —

He who abets another in an unlawful act is accessory to all that occurs upon that unlawful act, but not to any thing substantially distinct from it and not directly arising upon it. Thus, A. commands B. to beat C. — B. beats him till he dies. Here A. is guilty of murder as accessory — So A. commands B. to poison C. but B. makes or stabs him — A. is accessory. If C. dies is the substance or the thing intended. But if A. commands B. to burn C.'s house, and B. in doing it robs the house, it is not accessory to the robbery of the abettor retracts before the act done, he is not accessory. (2 Black 1445. 254. 275. 8)

The bare concealing of an intended felony is said to be only a misprision of felony, which is punished only by fine and imprisonment. What is misprision? (2 Black 1445. 254. 275. 8) Persons who are accidentally present when a felony is committed, and do not endeavors to prevent it, and to apprehend the felon are guilty of fined him imprisoned. Except in felony in infancy. (2 Black 1445. 254. 275. 8)

An accessory, after the fact, is one who excuses, relieves comfort or assists a felon, knowing him to be such. But a distance gives must be with intent to hinder public justice, as to prevent the
Public Wrenches
jewel from being apprehended, tried or punished—
Thus, by harboring & concealing, furnishing with
a house &c. to escape; saving, assisting an escape
from goal, by instruments, bribing the gaoler; but
to achieve a felon in goal with necessaries &c. no office.

Buying or receiving stolen goods, knowing them
to be such, made no accessory at Common Law, the offence
was a mere misdemeanor; but now by statute. (It is
The receiver is made a principal.

Felony must be complete at the time of the assent
given, to make an accessory; as in the case of a mortal
wound, assistance given before the death.

Assist as was observed, is excused for assisting her hus-
band the a felon. Hindering is presumed, but no other
relation excuses, as parent, child, master, &c. and even
a husband is not excused in assisting his wife, a felon.

By a General Rule of Common Law, Accessories
suffer the same punishment as their principals.

But accessories after the fact are now by English Stat.
allowed the benefit of the clergy in most cases.

It was formerly holden that accessories could not
be compelled till the principal was attended; for now
the contrary is holden, that he cannot except by that
be tried, unless he desires it, till the principal is atta-
Ined, or unless the principal is tried at the same time.
But now by that statute, the accessory may be tried in
certain cases, though the principal has not been
attainted or even tried. 4 Blac 320. 2 Hawk 253.
Public Wrongs

If the principal is acquitted, the accessory is likewise discharged; and if the attainted of the principal is reversed, that of the accessory is also reversed, but is otherwise, while the first attainted is unreversed, although it be erroneous. 2 Hawk. 459.

But the death, or pardon, of the principal after attainted does not, even at common law, avail the accessory; and as at common law, the death or pardon before attainted of the principal (the after conviction discharge accessory) is otherwise now by statute (as Anne, before enacted.)

If one is acquitted as accessory, he may afterwards be indicted as principal, but if acquitted as principal it is dubious whether he can after be indicted as accessory before the fact, if there appears no good reason why he may not be. 2 Hawk. 550. So as accessory after the fact, he may be indicted.

The indictment against one as accessory need not state that the principal committed the offence. It is sufficient to state that the principal was convicted, or were then to charge the prisoner as accessory (1 Torn Rep. 165. 1 Hals 625.) Yet it seems that the accessory on his trial, though it be after the conviction of the principal may controvert the guilt of the said principal, either in point of law or fact. 2 Hawk. 456. 2 Blac. 494. Tosner 121, 365.

This end, the lecture on principal and accessory given by Mr. Gould, and having treated on the several heads of this subject, concludes next in order to lecture on Salony.
Public Wrongs.

Of Felony.

Felony is any offence which at common law occasion a
total forfeiture of goods or lands, or both: but the term
is generally not designating any one specific
violation of the law, but a whole class of offences.

Herein it is of murder, manslaughter, &c.
The word did not originally denote any crime, but the
general consequence of certain crimes. It was synonym
more with "forfeiture of a fee", or feud. It was afterwards
used to signify the offence working the forfeiture and
by an easy definition to denote offences working the
forfeiture of goods only.

Treason is strictly a felony causing a forfeiture, anciently
considered under that name, but it is now classed by
itself as a crime standing alone by general usage.

Capital punishment is not necessarily a consequence of
felony (the generally suspended). As self-murder and
homicide by another merely.

On the other hand some capital offences are not felony, indeed
at common law, standing alone, when arraigned on indictment.

All felonies are punishable without
work for forfeiture of all lands or for simple abolition;
goods
and chattels—other of goods and chattels or by

But by general usage the word felony is now made to
import a capital crime, and indeed to include all
capital crimes below treason. 2 Blac. 98.

Hence if a

And creates a new felony, the law implies that it shall
be punished with death as well as forfeiture.
Public Wrongs

Do, on the other hand, if the Stat. annexes expressly a capital punishment to any offence, that offence is in construction felony — But if a Stat. prohibits an act "under the pain of forfeiting all he has" it is only a misdemeanor, for no offence is made felony by ambiguous and ambiguous words — Bac. 612. C. 1391. 1792.

Crimes which in long cause a forfeiture are in civil called felonies, the major forfeiture ensues — excepto.

Black. 373.
387. 399.

Common law) it was allowed in high treason and in most capital felonies, but not in all, not in high treason, nor high larceny, or mere misdemeanors — It was allowance and extended to petit treason —

Originally this benefit of the clergy was allowed only to clerks in orders, or the clergy. afterward, it was allowed to every man who could read; for reading was evidence of his being a clerk, but never to women, they being excluded by this law from the clerical office —

8 370.
De 379. 374.) this privilege is extended in civil clergy (able offenses) to all persons whatever, reader is not —

But common persons are burnt in the hand or whipped, or imprisoned or fined or suffer some other interment of punishment, but clerks, from hence you are not burnt &c.
Public Works.

But lay persons are entitled to the benefit of the
Clergy but once, clerk as often as they offend, i.e. as
often as they commit chargable offenses: By its all-
awance for any particular felony, the offender is disch-
arg'd forever, not only of that, but of all chargable
offences he has ever committed. 4 Blac. 374. —

As present in Eng. it is allowed in all colonies neither
by Stat. or by common law, unless expressly taken away by
act of Parliament. — The Benefits of the Clergy were
formerly pleaded in Eng. as a declaratory plea, now
it is prayed before judgment after conviction usually
In Can't there is no such thing as benefiting clergy.

Of Homicide.

Homicide is the killing of any human creature
Of homicide there are three kinds. 1st. Justifiable,
2nd. Executable and 3rd. Felonious. 4 Blac. 977. —

Homicide therefore is not necessarily criminal; for the
1st. kind has no guilt, the 2nd. very little even in judgment
of law, and only a nominal punishment. 4 Blac. 974. 975.

1st. Justifiable Homicide. —

Homicide is justifiable when occasioned by necessity,
As a sheriff in the execution of the duties of his office,
when he executes a condemned malefactor, he is here
under a legal necessity. — But in this case the law
must require the act to be done; and it must be done
by the person required by law to do it or his deputy.

1st. 637 and 503.
2nd. 614.
3rd. 186. for a private person voluntarily slays a
person attacked, condemned & it is murder —
Public Offices.

The sentence must be by a court of competent juris- 

cracy. Thus if C. D. in Comp. Pl. give sentence of death 

on a prosecution for a crime of which they have no clo-

rime, and it is executed, the officers who execute 
and the judges who condemn are guilty of murder. — 

But if the court has cognizance of the offence and has 

sentence of death when the offence does not subject 
to it, the judges only and not the officers is guilty — for 

this is not cognizance.

Homicide is justifiable in certain cases when com-

mitted for the advancement of public justice. As, an 

officer in making arrest is robbed and killed, depo-

sition, and this last holds private persons justifiable, 

if justified by permission of law rather than command,

2. if an actual felon resists or flies from his pursuers, 
even private persons without warrants are justified 
in killing them if necessary to prevent escape. — 

And even if an innocent person, indicted for felony, 

pursues the officer, having a warrant, killing is justifiable, 

But it is otherwise if a private person without autho-

by attempt to arrest an innocent person upon suspi-

sion. Homicide is justifiable when an officer att "

tempting to make a lawful arrest in a civil case, 
is resisted so that the death cannot be as premeditated, 
and so in many other cases —

It is justifiable to prevent any forcible and atrocious 

crime. A when one attempting to rob or murder another 

and is killed by him. or a when one breaking a house in 

the night. But it is otherwise of crimes not forcible,
or unaccompanied with force, as picking pockets or the base breaking open a house in the daytime.

Homicide is not justifiable, in merely defending one's house goods or persons from a bare trespass—though if the trespass is against the person it may be excusable only by defending it.

If the trespass is against property, it is stealing, manslaughter, and one kills another (breaking his windows to arrest him in civil cases suppose)—it is manslaughter—may it not be homicide sedemnon.

This is the general principle: when a crime, in itself capital is attempted with force, the force is lawfully repelled by the death of the party. Hence homicide is therefore justifiable.

A woman may lawfully kill one who attempts to violate her chastity with force. So a husband or parent may lawfully kill the ransacker, and I suppose any other person (except). Hawkins 109. 3 Inst. 138. case of relation.

According to the old opinion, justification of homicide may be specially pleaded. Later opinions are that it must be given in evidence under the general issue—it is however always agreed that no excuse cannot be pleaded for it is frivolous and nugatory, and does not amount to a denial of guilt, but merely a mitigation of it.

Justifiable homicide is not liable to punishment, as it is justifiable—nay, it is not even nominally a crime. Indeed it were absurd to punish what the law justifies—see 4 Blackstone 102. and Hawkins P.C. 105.
II. Excusable homicide

"The difference between justifiable and excusable homicide is that one is lawful, the other venial." - Exceable homicide is of two kinds, 1st per infortunium by misadventure. 2d by defending one's self. The first is purely involuntary. The second is voluntary, but committed from motives, and under circumstances constituting an excuse.

1st By misadventure - this happens when one is doing a lawful act, without any design to do hurt, and involuntary kills another. Observe here that the lawfulness of the act is essential. As, in using an axe the head flies off and kills one standing by; so, if a third person whips a horse and he runs and kills another, the rider is guilty of homicide by misadventure and the whipper of manslaughter.

A parent moderately correcting his child and by accident kills him, or a master his servant, a schoolmaster his pupil, &c. It is homicide by misadventure, likewise an officer punishing a criminal. It is excusable.

But if death accidentally ensues in consequence of an unlawful act, the author is guilty of manslaughter at least. In some cases of murder. Distinctions:

1st If the act is trespass only, it is manslaughter. Stearn, 199. Rel. 197. March 192. 7. C. - If one accidentally kills another in the execution of malicious and deliberate to do him personal hurt, it is murder. 1st Blae. 200. 1st Blae. 192. Rel. 147. Rel. 39. 175.
Public Wrongs.

1. Blac. 192.
2. Black. 119.
3. 246.
4. 184.
5. 113.

So if it be in consequence of any unlawful act which naturally tends to bloodshed—

If one does an idle act which must necessarily endanger the life of some one, and accidentally kills; it is manslaughter. As throwing stones at another in sport, this is an unlawful act. 1 Black 112. 4 Black 132.

But if death accidentally happen in consequence of any lawful sport, as football, wrestling &c. it is then homicide by misadventure. 1 Black 112—

2d. By self defence, se defendendo. This obtains where one in a sudden affray, kills his assailant in his own defence. This is excusable. It is distinct from that which is committed to prevent the perpetration of some thing said not to be material, who gives the first blow, if he who kills in self defence is forced to fight. But to excuse this kind of homicide, it must appear the only reasonable and probable means of preserving one's own life, or at least of avoiding great bodily harm. (When it is to preserve one's life, it seems nearly akin to justifiable homicide committed to prevent an atrocious crime. 4 Black 183.)

It is often difficult to distinguish this from manslaughter. The general rule is, if both have fighting, i.e., striving for victory, when the mortal blow is given, it is manslaughter; but if the slayer has not begun to fight, or having begun, tries to decline, and cannot without danger to his life, or great bodily harm, it is then homicide se defendendo, in defence of his life. 4 Black 184. 246.
Public Wrongs.

According to some, the aggressor himself, when preparatory to rape, is excusable in killing to save his own life, but it is now held by the contrary — for it is his own fault that he has harmed to the third and, therefore, with malice prepense, and having the avowed intention of rape, kills the other, it is murder.

A. Hawk. 1. 329. in order to save his own life, it is murder.

Kel. 129. 59.

At both agree before hand to fight a duel, and one being pressed by surmise kills the other, he is not excused

Blac. 189. 3.

Kel. 129. 2.

R. 179. (New 22)

129. 129. 12.

The same rule applies to cases of fighting in general, by a preconceived agreement, where it is not one continued act of passion. Hawk. 129. 129. 1. 22. Kel. 179.

So the seconds of him who kills in a duel are also

Blac. 199.

Kel. 129. 2.

Hawk. 129.

Pres. 129.

Kel. 129.

The excuse of self defence extends to the civil and natural relations, as husband & wife, parent and child, master & servant. The act of relations is confined to the party with a right to kill by law. Suppose A & B are fighting, and A is like to be overcome by B, now if the master or servant or parent or child to B are present, and in rescuing B kills A, he is excused, not so if he had not been a chip off the old block. A stranger may justify killing preparatory to prevent a forcible capital crime, but not in any other case.

As if one in attempting to prevent another from committing rape or murder on a third person, and in fact kills him, it is excusable for he does it to prevent a capital crime and would be inexusable to suffer it.


Public Works.

No one can excuse the killing another by pleading misadventure, or self defence, it must appear in the evidence under the general issue.

Excusable homicide (whether by misadventure or se defendendo) is said by Coke to have been anciently punished with death, but by later writers it is denied.

The punishment seems to have consisted anciently of a total or partial forfeiture of goods & chattels, it total the offence would be felony, as Blackstone observes. It seems to be strictly a felony but is not ranked with felonious homicide because not capital. Felony being now used as synonymous with capital crime.

But as far back as the English records reach, the party has ever been, as he still is, entitled, of course, and of right, to pardon, and restitution of goods & chattels.

Do that the punishment is at worst but nominal; indeed the judges in England usually direct or permit a general verdict of acquittal in Blue 188.

In excusable homicide there can be no accessories, and the reason is there can be no felony.

III. Felonious Homicide. Is the killing of a human creature without justification or excuse: and may be committed either by killing oneself or another person.

1. Homicide by killing one self is called suicide, and the party a seducer. Blue 189.

Judeo de se, is one who deliberately purpose and to his existence, or commit any unlawful malicious act, the consequence of which is known death. As, one in attempting to kill another the gun breaks and kills himself.
Public Wrongs.

But if one requests another to kill him, and it is done, the former is not the done; but the latter is a murderer. An agent or request merely, against law, is void.

A person to be killed, must be of years discretion, and consent given — as in other felonies. Infants cannot.

In insane minds, crime are not punishable —

Murder of accessories before, not after the fact, as if one persuades another to this crime, he is a murderer.

The consequence of this self-murder is, an ignominious burial, in the high way, impaled, and the forfeiture of all his goods and chattels. Not of his lands for there is no attainder. The latter no such consequence follows — 1 Blac. 190, 397.

1. The second kind of felonious homicide consists in the killing of another person without justification or excuse.

Hence there are two kinds, manslaughter & murder.

The former without, the latter with malice. Malice is here any unlawful or wicked motive. 4 Blac. 193, 199. It is an evil design. See Post Cl. 250 (p. 260 p. 261).

First, Manslaughter.

An unlawful killing of another without malice expressed, or implied, and not of voluntary or involuntary. See Hale, 6. 166. 4 Blac. 191.

In manslaughter, there are no accessories before, but

Next, Voluntary manslaughter. If two persons, are

a sudden quarrel, fight, and one kills the other, it is

manslaughter. So if two go out aside to fight, this being

one continued act of passion.
Public Wriers.

The last case is different from the case of duelling by an
agreement, for where there is a deliberate intent to kill, a
previous malice, therefore it is murder. And so in case
of preconcerted agreements to fight generally—

If one is greatly provoked by another's misconduct, or
by killing his wife, or any other great indignity, and in
consequence of it, immediately kills him, it is only
manslaughter generally. But it is otherwise if there has
been sufficient time, intervening, for passion to subside,
for then it would be murder, and so in every case of
homicide upon a provocation. Black 191.

So, if on a sudden provocation, one executes his
revenge immediately, but in such a manner, as does
manifest a deliberate intent to kill, or to do some other
great bodily harm, and death ensues, even accidentally,
it is murder. As by killing a boy to a horse's tail &c. &c.
Parent in correcting his child in an outrageous manner.
the boy or child dies in consequence, it is murder.

If a husband detects a man in the act of adultery
with his wife, and kills him instantly, it's manslaughter
there and in the lowest degree. Black 191.

Black 200. Oure words, or gestures, breaking a promise, a bribe.
Rel. 126, 127. 128, 129, 130. on land, is never a sufficient provocation, to reduce even
3 191. 192. 193. 194. Black 200. a sudden killing to manslaughter; where the killing is
1 Hals. 195. 196. voluntary; or the manner of beating manifestly tends
to endanger the life. Sott 292. But it is otherwise if it appear
clearly, from the manner, that he intended only to chastise,
so that the killing was unintentional or without
Public Wrongs.

1. Black 192.
   1st, 101.

2. Black 112.
   1st, 112.
   2nd, 112.
   3rd, 112.
   4th, 112.
   5th, 112.
   6th, 112.
   7th, 112.
   8th, 112.

   1st, 174.
   2nd, 261, 292.
   3rd, 126.
   4th, 126.

   1st, 192.
   2nd, 192.
   3rd, 192.
   4th, 192.
   5th, 192.
   6th, 192.
   7th, 192.

   1st, 193.
   2nd, 193.
   3rd, 193.

6. Bla. 201, 337.

Manslaughter on a sudden provocation, differs from homicide; self-defense, in this: that in the latter case there is apparent necessity for self-preservation; in the former there is no necessity. Being the act of a sudden revenge. 1st. Of involuntary homicide.

This (as the term import) is always unintentionally but arising upon some unlawful act, differs from homicide by misadventure, for that ensues upon some lawful act. 1st. Bla. 192. Corp. 830.

If one accidentally kills another while engaged in any work, idle & dangerous sport, or by sword-play, it is manslaughter. These acts are unlawful. 1st. Bla. 193, 192.

So if an act, initially lawful, be done in an unlawful manner, for here, under its circumstances, the act is unlawful: as by throwing a piece of timber or stone into the street, in a city, tho the party gives warning. Or shooting where people usually resort: and in either case kills, it is manslaughter.

If the unlawful act be a trespass only, the killing is manslaughter only. If felony it is murder. 1st. Bla. 193.

2. The Punishment.

This being a clergymen's felony, etc., is not capital in Eng. in the first instance. But the offender perjures all he good and chattels, and is burnt in the hand. But if he pray not his hands, the crime not being capital.

In Cor. it is different (Bide. Stat. 285) when however it is involuntary it is not within the Stat. But voluntary may be punished still at cor. law in Cor.

As in 3. at common law. is in 1. only a misdemeanor.
Public Things.

Of Murder.

This term was ancienly applied in Eng. to the secret killing of another, for which the Bill, or if too poor, the Hundred was answer'd. 3 Bac. 664.

Murder is now described to be: "When a person of sound memory & discretion, unlawfully kills any reasonable creature in being and under the peace, with malice aforethought, either express or implied."

The difference between this and voluntary manslaughter is, the one proceeds from sudden passion, the other from wicked & malicious intent. — 6 Blac. 190.

He must be "of sound memory," so must every killing of an offender be, to be punishable.

"Unlawfully kills": the unlawfulness arises from killing without warrant or cause — the killing must be actual, for an assault with an intent to kill, is by itself, a misdemeanour only. The formerly it was accounted murder.

Not only directly and purposely taking away life, as by a blow or stab, is killing within the definition,

3 Bacon 662, by a blow or stab is killing within the definition,

Palm. 343.

so the law 413.

4 Blac. 196, death and which eventually occasions death, and of wilful and deliberate; is murder, as by poisoning during Vs., modes of killing are infinitely various.

As was the case, likewise of the son, who carried out his sick father against his will in a cold, frosty sea.

1 Wake 242.

1 New. 110.

Palm. 345.

4 Blac. 197, yield, covered with leaves only, & marked by a stake.
Public Writs

As was the case of the parish officers who shifted the child about till it died; and also the gaoler, knowing a prisoner to have an infectious disease and confining him with another, who takes it; or if he confine him in a low unwholesome room, denying even the necessary conveniences—these are all murders.

And so in some cases, where the actual killing is by another. If he incites a madman to kill another—or lays poison for one man and it is taken by another, or by default of imprisonment, or gives another to accuse an innocent person, who is condemned on his evidence—see 7 Ed. 3 a.

Whether bearing false witness with intent to take away one's life, is such a killing as to amount to murder, provided the innocent is condemned, is a question. Arises by the ancient common law, that there was no instance of it for many ages. —

(See Cont. bearing false witness willfully and of purpose to take away any man's life, is punishable with death, see 7 Ed. 3 a.)

If a Physician gives a potion to cure, but which kills, it is homicide by misadventure, but it has been held, that if the person be not a regular Physician, it is at least manslaughter. Sed quae

for quacks would not be so numerous. It was —
Public Wrongs.

But no person can be adjudged to have killed another in
law, unless the death happens within a year and a
day from the time the act was committed, computing
which, the whole day on which it happened is reckon-

ing. — But if he die within the time, it is no
excuse for the other, that he might have recovered, had
he not have been neglected &c. but if the wound or hurt
be not mortal, and the party is killed by the remedies
used, not by the wound, it is not homicide, but there

Appear clearly —

A person indicted for one species of killing, is not
to be convicted for a totally different species. As if he
is accused of poisoning, shooting, starving, but where the
differ only in circumstances. As if a wound is given
with an axe, club &c. but alleged to have been given
with a sword, it is otherwise —

But if several are indicted, A. as giving the
blow. and B. present aiding and assisting. evidence
that. B. gave the blow. and A. was present, aiding &c.
we'll maintain the action. the indictment —

"A reasonable matter in being and under the
peace." Aliens and snows not trace are within this
part of the reck — killing any person whatever, except
an alien enemy, in time of war, is murder —

Killing a child in ventre suae is a great injury;

killing one only, it is not in reason nature, for this purpose.
The prisoner is a high offence, under the degree of cap.

But beware of the general crime. it generally consists in
the concealment of crime. something hidden. —
But if the child be born alive and afterwards dies, the wounds he received in ventre sanae, it is by the better opinion, murder, but the death must be within a year and a day, from the time.

The epithet "reasonable" in the definition means I suppose "human"—not having the faculty of reason. mudmen, Points de, one who incites a madman to kill himself, is guilty of murder. This term reasonable is used in opposition to a brute —

If one compels another to kill a child in ventre sanae, and being born it is killed in pursuance of the act, he is accessory to murder. — State 824. 1861.

By Stat. 24. Jac. 1 and Stat. 20. the mother of a bastard child conceals its death by burying it privately or in any other way, she is deemed guilty of murder, unless she can prove, by one witness at least, that it was born dead. The construction practically given to these statutes, here, and in Eng., makes it necessary to the conviction, that there be presumptive evidence at least, that the child was born alive.

"Malice aforethought, expressed or implied."

does not mean strictly spite or malevolence to the object, but any evil design in general; the dictum of a judge, Ray 1393, deprives, malignant mind of the court, not the jury. Bunt 363. 1734. We are judges of the malice; that is, of what amounts to malice, so that the facts being given the point is a question of law. — Malice preposterior expressed or implied. It is said to be expressed when one with a deliberat eformed design to kill or otherwise 10
Public Wrongs.

personally injures some particular individual, does
actually kill him in the execution of this design: As
lying in wait, former menaces, old grudges & are all
evidence of the formed design—

(Express malice, seems to me to be), that which in joint
of fact concurs with the act of killing—

Phiped malice, that which so concurs only by the
implication of law.

Where one kills another in consequence of an
act, which incites enmity to all mankind. As by
throwing into a crowd, it malice sufficient for murder—

Do in the case of deliberate dwelling, it is malice
propose, expressed. And it is no excuse that the
other attacked first, or that he accepted the challenge
reluctantly, or that he did not intend to kill him, but
to disarm him. 1 Blac. 199—So the second, in the
persons killing, are guilty of murder by express malice
and according to some, the second who of the person killed
are guilty of murder—Id quaece—

If a person upon no provocation or at least a slight one, do
suddenly attack one and kills him, it is murder by malice
express, for so cruel and ferocious an act, in such a case,
is evidence of hardened deliberate malignity towards the
person slain. Blackstone calls it implied malice (p. 200)
Vol. 1, but it seems to me express.

Generally, given on a sudden & great provocation, one
beats another, in an unusual, cruel manner, and kills
him, it is murder by express malice. Though the case
(let alone) of the boy tied to horse—1 Blac. 199, i Hal. 457.
Public Wrongs.

Vol. on a sudden quarrel, he who kills appears to have been moved of his passion at the time, it is murder by
propr justice. — Note, p. 229. Pet. 56. — And if one,
committing a breach of the peace, party fighting &
suddenly kills an officer of the peace, who attempted
to suppress it, is guilty of murder. — But the object of
the interference must be made known, except in the
case of an officer, known to be such, and acting within
his district, otherwise it is only manslaughter. Pet. 66.
9. Malice is implied when the killing is in con
sequence of an unlawful act, whereby a principal,
intended, for some other purpose, than that of killing,
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Public Forces.

[Text continues from page 660]

One kills an officer, in a struggle to escape from arrest, it is murder, by some police implied the design here was principally to escape, not to injure the officer.

[Text continues with copious footnotes and references]

... All homicide is presumed to be malicious, and the onus probandi lies on the accused.

Therefore all homicide is murder of course unless it be justified by command or permission of law. If excused on the ground of self-defense, or alleviated into manslaughter, by being either the involuntary consequence of some unlawful act, not amounting to felony, or occasioned by some sudden and great provocation.

The punishment for murder, is death; originally it was execrable, so that unlearned offenders only were capitally punished—4 Blae. 201.

Now, by the Eng. Stat. 23 H. 8. 183. c. 185. 05 of Mar. the benefit of clergy is taken away from murderers, their abettors, procurers & counsellors, the state seems not to extend to accessories after the fact—1 Blae. 201.

If a woman is condemned during gestation when quick with child, execution is suspended till her delivery. But this is no excuse, for not pleading, or for the judgment being delayed. In spite of this case can be had but once—but becoming insane before execution will delay the same—1 Blae. 395.
Public Wrong.

Execution is not completed till the convict is dead.

17. 174. On removal, he must again be executed, for a former hanging being no excuse.

Petit Treason.

There are certain instances in which murder, as being more than ordinarily heinous, is denominated Petit Treason. It is now, indeed, no other than murder, in its most odious form & degree.

At common law, many offenses are called treason, which are not now so considered. As piracy by a subject, Grand juries discovering the King's council, anwife's attempting to kill her husband &c.

Now, by Stat. Ed. 3. no offense can be petit treason, except in the following instances. 1. When a servant

4. 18. 203. kills his master. 2. when a wife kills her husband. 3. (a)

7. 174. 191. Eng. when an ecclesiastic kills his prelate. [this last has no force in this country.] 5. 190.

37. 107. 124. 396. It is called treason, by reason of a violating private allegiance, in addition to murder. 1. 203.

13. 38. 99. 80. Killing a husband &c. is not petit treason unless under such circumstances as would make the same killing of another person, murder. 3. 134. 135. 203.

2. A wife, divorced, a mensa et thoro, kills her husband.

5. 192. 203. She is a traitor; otherwise, of divorced &c. 

If a wife procure a stranger to murder her husband, being being absent, the hire she is accessory to murder. 1. 135. 4. 132. 203. 5. 132. 292.

17. 174. 191. 4. 171. 223. only, but a stranger procure the wife to do it, she is accessory to petit treason. For his killing is murder for her petit treason. 3. 114. 20. 139.
Public Strongs.

The murder of one erring, or master's wife is petit treason, though not within the letter of St. Edw. 23. — And the murder of one who has been master, upon malice conceived during service, is petit treason; because in executing a treasonable intension. Will. 132. 4 Blac. 260. No. 99. — The murder of a father by a child is not petit treason, and is the latter if by a "reasonable construction, a servant." Both punishment in case of a man in petit treason, is to be drawn to the place of execution and hanged. If females, to be drawn and burnt. 1 Blac. 204. 2 Hare. 397.

Of Arson.

Arson is the willful & malicious burning of the house or out-house of another. 1 Blac. 220. 1 Hare. 338. — Not only the dwelling house, but all out-houses that are barcelo'd (i.e. within the cartedge or horn-tall) as barns, stables, &c. may be the subject of arson. 1 Blac. 221. A barn, filled with corn, is without the definition. Though not parcel'd — burning a stack of corn was anciently arson, but it is not so now.

Burning the same merely, of a house is not arson, because not within the meaning of "arson." 1 Hare. 186. Arson may be committed by burning one's own house. It is said, if, in consequence of it, another's house is in danger (for here the offence consists in burning the mill) anyone, seized in fee, or prepared for years only, of a house standing at a distance from all others, burns it, it is no arson. 1 Hare. 166. 4 Ser. 397.
Public Wrongs.

Public Wrongs.

187. The burning must be malicious, otherwise it is only a trespass, burning by negligence or accident, is not arson. If one is shooting, accidentally sets fire to a barn, or house, 1 Hurl. 167, Black 569, 4 Blac. 222.

Yet if one, intending maliciously to burn the house of T, and accidentally burns the house of B, it is arson, on account of the felonious intent.

Arson is a Common-law felony, punished with death. In the reign of Edu. 1, it was burning to death; and it is noteligible. But it seems to have been entitled to clergy, by Stat. 32 Edu. 3, but was ousted of it by 21 Hen. 8, which being repealed, by the 6th Edw. 6, it was again ousted by Stat. 3&4 Wm. 3, on condition it is entitled to clergy. — 4 Blac. 291.
The benefits of the clergy is also denied to accused persons, by Stat. 13 & 14 Car. I. c. 47. a

By this, this offence, if committed by a person of age 16 or more, is punished with death.

If prejudice or hazard happen to the life of any one, the person, being under sixteen, commits the act, it is punishable for a high misdemeanor. — By another Stat. of Cor. if any male of the age of sixteen or more, shall wilfully and feloniously burn, by setting on fire, an dwelling-house, shop, store, ship, vessel, and no prejudice or hazard accrues, he is sentenced to Newgate, at the discretion of the court, not exceeding seven years, and to satisfy the private damage. [For a vessel &c. of the U.S. or this state, if burnt by a master &c. the Stat. adds a forfeiture, of all the goods and estate. — Stat. 35. 6.]

(For a second offence, it is confinement in Newgate for life or any limited period, but according to the general rule, the second offence must be committed after the conviction for the first. — In case of a female, it is confinement in the common work-house, or commitment to goal, in the county, in which the offence for the same period as males in Newgate. St. John. 166.)

Do the words, “attempt to burn,” by setting on fire,” mean such burning as falls within the common law definition? If so, it may be argued that the burning punished by the Stat. must be total, indecent, burning has a determinate meaning in law. — Does then a partial burning of a ship, or house, come within the Stat? if it does, the same act is contemplated in case of a vessel, as in the case of a house.
Burglary is the act of breaking and entering into the mansion house of another, in the night season, with intent to commit a felony. 4 Blac. 221. 1 Bac. 355. 1 Haw. 159.

But as to the place, it is not necessary absolutely, that the breaking should be of a mansion house, for it may be a church, the walls of a town. The necessity of its being a mansion house attaches in the case of a private building only, and the definition ought to include the walls of a town & churches.

The insertion of the word "mansion" seems indispensable in the indictment, when the breaking is of a private house, otherwise not. 1 Haw. 162. 1 Bac. 355.

The term "mansion house" includes all outbuildings, which are parcel of the estate and within the curtilage, or homestead, being protected and privileged by the capital house. 4 Blac. 225. 1 Male 553. 1 Haw. 163.

The curtilage seems to be that portion of the ground which is enclosed with the house, by one common fence or is connected with it directly. It is a fence; therefore, an out-house 8 feet distant, separated by an open passage, and not within or connected by any fence, that encloses both, is adjudged not within the curtilage.

Rooms or lodgings in a private house, if the owner does not lodge in it, or if he enters by a different outward door, are the mansion house of the lodger, and are included as such in the above definition.
But it is otherwise, if the owner lodges in it and enters by the same outward door; for there is only one mansion-house, that of the owner.

If I have a shop &c. within his out-house and let it to B. to work in, who never lodges in it, burglary cannot be committed in it. It is not a mansion house, being sever'd by the lease; nor B. for he never lodges in it, but otherwise if he has bad lodged in it—ibid. 225

A house, in which one sometimes reside, the less for a short season, "ameno retentit" is a mansion house tho' no one be in it at the time of the breaking in.

So a house, which one has hired to reside in, and brought part of his goods there, tho' he has not yet lodged in it, yet is broken &c. amounts to burglary. 1 Bl. 143. 3 Bl. 177.

The house, who, of a corporation, is within its definition. Its officers living in it makes it a mansion house of the corporation. But burglary cannot be committed on a tent, or booth, for they are mere temporary—

(Under the Stat. Const. burglary may be not only in at corn, law, but breaking &c. a shop in which are goods, wares & merchandise; though at a distance from the main house, not lodged in: and it was decided that the cabin of a vessel containing goods, was an object of burglary.)

"Night season": formerly it might be committed at any time, between sunset and sunrise, but now the term "night season" includes only the time between the evening and morning twilight — dusk or dark, when one cannot distinguish the features of another clearly. — but must not be moonlight.
Public Wrongs.

As to the manner, bold breaking and entry is necessary, but they need not be at the same time for breaking on one night, and entering on another is sufficient.

The breaking may be not only by thrusting open a door, but by breaking or taking out a pane of glass from a window, picking a lock, opening it with a key, pitying a lattice, or unloosening any fastening whatever in order to get in. And coming down a chimney, for it is as much closed as the thing will admit. 2 Blae. 226.

Entering by an open door or window is not breaking within this definition — but if having entered he does break an inner door, it is burglary.

According to some writers, if one assault a house with intention to rob, and on the owner opening it to drive him away, he enters, it is a breaking within this meaning — the opening being occasioned by the felonious attempt, is unexpected to him.

Whether breaking out the party having entered without having broken in, or being in by the owner's consent, is a breaking within this definition, is doubted at law. Opinions are contrary. By Stat. 12 Ann. it is declared to be so. — Here the entry is before the breaking. As by taking lodgings with intent to steal. And being in a house without a previous intent to rob, he commits a felony, and then breaks out, is within the Stat. But in both of these cases, if he goes out peaceably and quietly without breaking, it is not properly burglary within the definition, nor within the Stat.
Public Klings.

Entry procured by fraud, with intent to steal, or
otherwise burglarious. As if one be let in under pretense of business and then steals, or if one procure or of
fices to enter, under pretense of searching for traitors, and then steals. This is a breaking, an opening, which is occasioned by a felonious attempt, for the law is not thus to be avoided by cunning.

If a servant opens, and enters his master's chamber door, with intent to rob, or if a lodger in a private house, or inn, opens and enters another's door, with this intention, it is a burglarious breaking and entry — for it is the mansion house of the proprietor.

And if a servant conspire with a robber, and let him in by night, that he may rob both are guilty of burglary.

Of entry. The least entry, with the weapon or a part of the body, or the thrusting in an instrument or weapon (as a pistol, hook &c.) or discharging a gun into it, is a burglarious entry. Law 161.

But it seems that the instrument must be intro-
duced for the purpose of committing the felony. As a hook to draw out goods, or with a pistol gun to
demand one's money, &c. It was decided in Bailey 1805, that having a hole two, the door, so that there were chips on the inside, was not a complete entry,
as it was not introduced to take the property, or to
intimidate for the purpose of robbing.

As to the case put, of turning the key of a door, that is locked on the inside, hence there, whether it is burglarious. Vide 1 Law 162, Part 350, 351.
Public Wrongs.

To constitute Burglary, there must be a felonious intent, otherwise the breaking &c. is a mere trespass.

It was a decided case. A servant having runaway, reformed, broke open his master's house, to take his money. It had been otherwise. Had it been to murder &c.

It is sufficient if the intended act is a statute-felony, though it be not at common law. As it must be to commit a rape, which is not a felony at common law, for a theft, a felony has all the properties of a felony at common law.

It is not necessary that the intention should be executed, the intent alone is sufficient. And by the intent, the jury are to judge. 1 Blac. 227. 1 Burns. 159.

Of the Punishment. Burglary is a felony at common law, but clergyable. It is now punished with death, and the benefit of the clergy is taken away by statute. 1 Ed. 6. and 1 2 & 3 Ed. 7. It is also taken away from the accessories before the fact, by Stat. 38 Hen. 6. but these statutes extend not to accessories after the fact.

In Cont. for the first offence, newgate (i.e., male) not exceeding three years— for the second not exceeding six years— for the third during life. But if he be also guilty in the perpetration of any personal abuse, force or violence, or so armed with any dangerous weapon, as clearly to indicate any violent intention, it is then newgate for life, even for the first offence.

It was decided in Cont. that burglary being an offence at common law, may be prosecuted as such, and that the statute only declare the pro-

for positive punishment. 59.
Of Larceny.

There are two kinds of larceny or theft. Simple.

1. Simple larceny.
   - Simple larceny is the felonious taking and carrying away of the personal goods of another. If the goods are above the value of twelve pence, then it is grand larceny. If the value is under ten shillings, it is called petit larceny. If the goods being above the value are taken by several, each is guilty of grand larceny.

2. Simple larceny under this value, at several times, from the same person, is not grand larceny.

3. The only difference between grand & petit larceny is in the value of the goods. Hence the rules laid down with respect to the nature of simple larceny in general, apply to both grand & petit larceny.

4. The punishment they are essentially different.

5. Of the Trespass. It must be from the taking, being actual or constructive. The general rule is, that every felony includes a trespass—hence if the party is guilty of no trespass in taking, he cannot according to the rule be guilty of felony in carrying away. Hence if one finds goods and converts them, "animus levandi" it is not larceny—on the contrary it is no trespass committed in finding them.
Public Writings.

And generally, one passing, under a delivery by the owner, it is said, is not guilty of larceny, by afterwards embezzeing them. As by a carrier of goods, who convert them, or a tailor of cloth &c., but in these cases of delivery, the felonious intent is supposed to be subsequent to the delivery; therefore the possession is by the delivery, parted with.

If one obtains a delivery with intent to steal, and carries it away or embezzeles it, it is larceny. Thus, the obtaining a bill of exchange, under pretence of discounting, but with intent to steal, and then converting it, is larceny. — 1 Hals. 193. 194. Hals. 63.

This is no exception to the general rule above, for the felonious intent extinguishes the contract of permission, therefore the owner retains the possession in law, and the taking includes a trespass of course, and for the taker, shows his original intent to have been not to take on the contract, but with intent to steal.

To obtaining goods from an officer, with intent to steal, under an adverse protest by virtue of an execution on a judgment obtained by fraud on the court &c., is a felonious taking; for the protest & judgment are void.

Were, as in the case of delivery to a tailor &c., supra. For lately it is held, as a general rule, that when the delivery is for a certain special purpose (the owner having a right to countermand and the delivery), the possession is in the owner. Therefore embezzeing amico fuundeci, is a felonious taking, as one watches makes embezzeles amico fuundeci a watch delivered.
Public Writings.

C.B. 1773.

3 Post 67.
1 Hale 505.
2. Boll. 173.
1. Daw. 136.
2. Blac. 230.

Naw. 155. 6.

The taking & converting with a felonious intent is a
felonious taking from the owner — would the taking
in this case be a true trespass? (p. 66.) It possibly the act
of converting with a felonious intent is considered as
determining the bailment.)

It seems clear that carrier, having carried the goods
to the place, if he takes them "a primo suspendi," the
taking is felonious, the no intent felonious was origin-
ally cogitated; for the bailment is determined then
therefore he is a stranger —

To if a carrier opens a bale of goods, and steals away
part. or pierces a cask of wine d. it is a felonious the-
king — because (as some say) he had no property in
the goods. (see gure.) tho' he had in the thing containing
them — And Blackstone says it is because the animus
suaedae, is manifest. — The true reason seems to be
that the bailment is determined by the acting of
the animus suaedae — or that the pagisjon is all
the time in the owner.

His said that if A lends B. a horse. and B. rides
away with him. it is not larceny, and the true
reason seems to be that the constructive pagis-
jon is not in the baior — he having no right to re-
demand. or countermand. the loan of him. till
the time of agreement is at an end —
Public Wrongs.

4 Blae. 250. The bare non delivery of goods by the bailee to the bailor, is not of course evidence of a felonious intent, even in those cases, in which converting animo furandi is larceny, for it may happen from various causes.

4 Blae. 251. At common law, if a servant runs away with goods committed to his custody and possession, it is not a felonious taking, but a mere civil wrong, a breach of trust. Now by Act 11 H.8. this larceny is the good use of the value of 40l. except in servants and apprentices and eighteen years of age.

1 Huna. 505. 8. But at common law, if the servant had not the possession, but merely the care and oversight of, then the running away with or embezelling them is accounted a felonious taking. As in the case of a shepherd running off with the sheep, or a butcher with provisions.

1 Huna. 156. If one steals goods in the county of A. and carries them into the county of B. he is guilty of a felonious taking in the county of B. and may these be prosecuted for every moment's continuance of the offence of taking is a repetition of it. He may also be prosecuted in the county of A.

2 Flet. 169. Of carrying away. The least removal from the place, is a carrying away, within the definition. Though he afterwards leave them, or is detected. Thus, leading a horse out of the stable, and afterwards ended—so carrying goods down stairs only. And so taking of things out of a trunk and laying the same on the floor, with felonious intent, and is caught in the act.

3 Inst. 108. 2 Vent. 215. 1 Huna. 505. 1 Huna. 31. 2 Blae. 371.
Public Wrongs.

1. Raw 141.
2. Blae. 293.

1. Raw 141.

O. 1786.


Bearing a bail of goods on its end, is not a carrying away but means not being removed from the spot. But removing from one end to the other of a wagon is sufficient, as was the case of the diamond earring—"Solenious"—the taking and carrying away must be felonious, i.e., animo saciendo. Hence those who are wanting in understanding are excused, and so are mere trespassers. As if a servant privately takes his master's horse to ride and returns him. So the taking away ones though without leave and using it, but returning it again—The felonious intent must be determined by the jury.

"The personal goods of another"—Things real, or growing, of the realty are not the subjects of larceny. Land, not in its nature be taken and carried away. Corn, grapes, apples &c., growing, are not within the lace, as they adhere to the freehold—that is, if they are severed and carried away by one continued act, for then they never were as moveables in the possession of the owner, actual or constructive, but if made larceny in many cases, by Stat. 14 Geo. 2.

If however the thing is severed at one time and taken at another and carried away—whether severed by the thief or by the owner, or any person—here, when they are taken they are personal in the owner's possession. The reason for the distinction between personal chattels and things taken from the freehold, may be, that as the latter are not so easily taken &c. removed, they are not so liable...
Public Wrongs.

liable to be stolen - therefore no severe laws are not necessary to them - difference of reason, generally they are not considered so valuable.

Taking charters of land cannot be laesvery for they relate to the reality. They are evidences of the freehold, & descend to the heir - yet an action of trover will lie for them. 1 Blac. 1470. 2 Blac 254.

The goods must be of some value in themselves and some one must have some property in them. Since the taking of chaps in the action cannot at common law be laesvery, they being of no value, intrinsically, but merely by a relation to something else (see the right of which they are evidence) and this right is not property in possession because they might answer the purpose of money at the any.

Taking animals serve naturae, don't someone confined cannot be laesvery at Common Law. No of intrinsic value. As deer in a forest, fish in an open river, & wild fowls in their natural state, for there seems to be no property.

But if they are confined, and claimed and may serve for food - it is otherwise. As deer in a park or fish in a trunk, for here is a property - But such animals serve naturae as will not serve for food are generally deemed of no value in the law on this subject. Therefore, tho' reclaimed or confined, taking them cannot be laesvery at common law. As foxes, monkeys, 
& yet even in these cases a civil action will lie for taking them. 1 Blac. 1470. 2 Blac. 254. 3 & 4.
Yet the taking of a hawk framed may be larceny—

It is said by common law, as well as by statute—

But domestic animals may be valuable, though

not serving for food, as horses, mules, &c., and are there

subjects of larceny, so those which do serve for food,
as near cattle, sheep, swine, poultry &c—

some domestic animals are not deemed valuable

in the law on this subject, as dogs, cats &c. Therefore the

taking of them is not at common law, larceny—

Goods of which no one is the owner, at the time of

taking, are not subjects of larceny. As treasure trove;

m了, estrays &c., before they are seized by the person

having the right. Here, at the time, the property

is in dubit, or rather in no one. It may become the

Kings, or in certain events, be vested in the crown.

But though there must be a property in some

person, at the time, yet it is said that the owner need

not be known. And that the indictment is for stealing

the goods of a person unknown. And where

the king shall have the goods—

But it is said, that at the trial under the property

proved to be in a stranger, it shall be presumed to

be in the prisoner—L. 1. Touchin 16. metes 63. 1705—

stealing the goods of a parish church is larceny for

they are the goods of the parish, the parishioners—And

of stealing a shoe or from the dead body—For it is still

the property of them who was the owner when it was

first put on. Stealing or taking what a dead body is no

larceny, but an indictable offence: a misdemeanor. Suppose—
Public Stocks.

1. In re. 116.
2. Inst. 110.
4. Inst. 145.
5. B. 1785.
6. R. 146.
9. B. 279.
10. Sir. 12.
11. Inst. 35.
13. Inst. 228.
15. Naw. 146.
16. B. 1786.
17. B. 237.
18. B. 95. 47.

It was said, without a question, that in one case a person may commit larceny by taking his own goods. As if one delivers goods to a carrier, or a taylor, and afterwards secretly and fraudulently takes them away with intent to make the tailor answerable. If the goods of A. are bailed to B. it seems that a person stealing them away may be indicted generally for stealing the goods of B. —

The Punishment. — Simple larceny, whether it be grand or petty, is at common law, felony — Tho. 59. Grand larceny is a capital felony at common law, but within the benefit of the clergy, which however in many cases is taken away by the Statutes, as in the case of horse stealing —

Petit larceny is forfeiture of goods and chattels, and whipping or other corporal punishment, but not forfeiture of lands, it not being a capital felony — Blackstone says that it is punished by imprisonment or whipping at common law, yet he calls it a felony, and says that it subjects a forfeit — By that it is transportation for seven years —

In one: there is no distinction between grand and petit larceny — this a fine, not exceeding seven dollars, and if the value of the goods amount to $3. 34, whipping not exceeding ten stripes — If the value of $2. cents or more an underr 3. 99, it is whipping or fine, or failure of paying the fine. If under $2. cents there is no whipping. But treble damages to the owner in this case. —
Public Wrongs.

II. Of Mixed Larceny. This has all the properties of simple larceny, therefore the rules laid down, as to simple larceny will apply to this. But it is also accompanied with the aggravation of taking from one's house or person or both.

1. Larceny from the house. This, though now more aggravated than simple larceny, is not distinguished from it, at common law, either in its general nature or punishment: if indeed, it is accompanied with a breaking of house in the night season, it differs most essentially; but then if so, it falls under a different description—it is not larceny, but Burglary.

But by the Statutes in England, the penal consequence of larceny in a house, differs from those of simple larceny in general—Benefit of the clergy, being taken away from the former, and in almost all cases.

2. Larceny from the person. This is either by stealing privately or by open and violent assault. The latter offence is called robbery.

The offence of privately stealing from the person (as by pocket-picking) is, at common law, a felony—and if above the value of twelve pence it is capital—but else punishable at common law. The theft, however, taken away, the theft, being of the value of 12 pence or under, is not capital. The difference then, between simple larceny, and privately stealing from the person, unless another, is, that in the latter case, the benefit of gravity is taken away, if above the value of twelve pence, see the authorities above.
Public Wrongs.

Open and violent laving from the person, or robbery, is "the felonious and forcible taking from another of goods or money of any value by violence" or putting him in fear — the value here is immaterial —

1 Hau. 447. 2. "Taking from the person." There must be an act —

1 Hau. 592. 3. Taking — in attempt to rob, is not, at common law, felony, though it is formerly holden to be so, but it is a high misdemeanor incuring fine in prison and.

1 Hau. 448. It is now made felony by statute. For transportation —

1 Hau. 448. If one takes the goods of another in his presence by violence, and putting him in fear (thee it be not literally from his person) it is the taking from the person within the definition — As, first putting one in fear, and then taking away his horse, which is standing by him — or driving away his cattle, which are in his presence —

1 Hau. 448. If, having put one in fear, he takes goods from his servant in his presence, it is without a question a taking from the person, forcible taking —

And he, who receives any money by my delivery, while I am under terror from his assault, is guilty of a taking from my person. — So if putting me in fear, he exacts an oath from me, that I will deliver it, and I do it in presence or the oath —

But a taking, which is not directed from the person of the owner, or in his presence is not within this definition. — It is clear no robbery —

If several persons join to rob A., and nip him one of them goes from the rest, and without
Public Wrongs.

1. Haw. 118.
2. Haw. 147.
5. Stat. 537.

their knowledge and out of their sight, rob. B. and then returns to them, all are guilty because of the intent to rob, and each other in robbing. Sedgman, unless they collected for the purpose of robbing any person whom they fall in their way.

2. Blue. 243.

A sedelivery, after the taking is complete, does not purge the offence of taking, but is still a rob.bery. The definition of the act does not require the contem.

2. Roll. 1707.
3. Roll. 1702.
4. Roll. 2702.
5. Roll. 2707.

bance of the goods in the robber's possession.

2. Roll. 1707.
3. Roll. 1702.
4. Roll. 2702.
5. Roll. 2707.

By violence or putting in fear. The criterion which distinguishes robbery from other larcenies, is this; for otherwise there can be no robbery.

2. Roll. 1707.
3. Roll. 1702.
4. Roll. 2702.
5. Roll. 2707.

"Violence" in this case, denotes more than is implied in the mere act of taking, which is violence in mere judgment of law. Thus, there is a violence in picking a pocket. It denotes violence of some kind offered to the person, but it ought to be such as calculated to excite fear — but actual violence is not necessary, putting in fear is sufficient — as in the case of an old lady.

2. Roll. 1707.
3. Roll. 1702.
4. Roll. 2702.
5. Roll. 2707.

The violence or putting in fear must be previous, or at least, must not be subsequent — as if one steals pri.

2. Roll. 1707.
3. Roll. 1702.
4. Roll. 2702.
5. Roll. 2707.

vally from a person, and afterwards keeps the thing stolen, by putting him in fear, it is no robbery.

2. Roll. 1707.
3. Roll. 1702.
4. Roll. 2702.
5. Roll. 2707.

The violence must be purposely for the purpose of ob.

Public Writings

As to the putting in fear. It is sufficient that so much force or threatening by word or gesture is used, as might naturally excite apprehension of danger — and such threatening as is likely, according to common experience, to excite an apprehension of danger to ones character or good name, is a sufficient putting in fear. (As threatening to accuse one of an unnatural crime — this is so held by all the judges in Eng and)

Putting with a drawn sword is robbery for putting in fear — do, forcibly extorting money from another under pretence of a sale — whether compelling any merchant, or any buyer, by violence be to sell his goods for the full value, is robbery & dubious, it is not for these issues felonious intent.

Putting in fear, is not necessary to be stated in the indictment by violence is sufficient — When the offence is laid to have been committed, "by putting in fear" it is not necessary to prove actual fear — such circumstances of violence or such threats & as are calculated to excite fear are sufficient. As, that one knocked another down without warning & stripped him while praying — it being robbery though no actual fear was sustained.

A taking of property in the goods taken, without any colour of right is no excuse — Whether openly taking goods from the person without violence, or putting in fear, is felony of any kind is doubtful — According to Harduin it is not as stealing — but from ones head running away with it —
Public Crimes.

The last case does not strictly fall under either of the divisions of larceny from the person.

Of the Punishment. — This is punished as a capital

felony, whatever be the value of the goods, but at least

1179. 1520. 21 Dec. 1854.

It is therefore in England, death; both in the

principals & accessories before the fact.

(Impr. it is like burglary. Newgate — 6. If with

personal abuse, force or violence, or to armed as to excite

terror, Newgate for life.)

Of Forgery.

Forgery is a common law, & at common law is

the fraudulent making or altering of a writing to the

prejudice of another right.

Records, & other authoritative writings of a public nature

as parish registers, &c. Deeds, wills, are subjects of forgery

at common law, there is no decision at com. law as to

wills: but at any rate, it is mere forgery by Stat. 2 Geo. 2.

But according to a great number of opinions, the

making or altering of any private writings of a nature

in favor to deed & wills, is not at com. law forgery —

but Notes, Bills of Exchange &c. are not called

specialties — And according to some, there is no pun-

ishment in these cases.

22 Aug. 1481. Since Hinde's time, however, it has been held.

3287. 747. 757. 737.

That the fraudulent making, &c. any writing by which

another may be prejudiced is forgery, at com. law.
Public Wrongs.

Fraudulent making & of a bill of exchange on paper unstamped, is considered forgery, see the case T.R. 1

By a variety of English Statutes however, almost every species of writing is made the subject of forgery -

The case T.R. on this subject includes all private writings - by the words in it, "any other writing"

Not only actually making a false instrument & subscribing another's name to it, and fraudulently alter

By one already executed, is forgery, but many other acts are also forgery - As if one who is employed to

write a will for a sick man, falsely inserts legacies not directed to be inserted - Now here the name is

not forged, neither is the writing altered, after being ex-


כיונ in this case, the will is never executed, it is not forgery as I conceive, because there

would be no complete instrument.)

So writing an obligation, or base & over one name,

found at the bottom of a letter, &c. here, clearly the

the name is not forged

And if one inserts in an indictment, the name of

one against whom it was not found, this is properly

an alteration within the definition

Fraudulently altering a deed in a material part, is forgery - As altering the name of B. for the name

of A. £100. into £10. - But in 3 Inst. 169 the contrary

is held, because it is not made in the name of another

than the true signor, and neither hand nor seal

is counterfeited.) But this certainly wrong, for it

is clearly within the definition
Public Wongs.

1 Mar. 210. Done having found a bill of exchange, forges on it
in instruments, to get it discounted, is a proper
forgery,
at common law see 2 Leav. 1481.

One may be guilty of forgery by making & executing a
deal, himself in his own name—before having given
a deed of blank or to it, and afterwards grants the
same to B. and antedates the deed. This is fraud, and
to the prejudice of A. —

But he who writes an instrument in another's
name, and signs, and delivers the same person and
in his presence, and by his direction is not guilty
of forgery; it is, in law, the act of the latter
the making of it must be fraudulent. Therefore
if an obligee changes the word pound, in stead of
pence, it is not forgery; it is injurious to himself
only. But here the security is avoided by it.
Yet it is said, even this alteration is made with
a view to gain the advantage to himself, or to pre-
judice a third person, would be forgery. Thus, the
obligee might be bound to assign the obligation to
a bona fide creditor of his own creating.

Regularly a non solvence cannot amount to a forgery
though the intent be fraudulent. As by omitting a
legacy or a will, forgery being a positive act, that
it is said, if the omission of one bequest materially af-
ters the limitation of another, it may be forgery—
As omitting an estate for life to one, whereby the devi-
e of an intended reversion or another, is made to take
effect in present. for here the omission does
Public Wrongs

do operate in favour of the latter as a positive
divide for the life of the former—

It is not necessary that anyone be actually prejudi-
ced, but it is sufficient that from the nature of the act,
someone might be prejudiced—As where the ob-
ligation is never enforced—Burnard 10.

It is not necessary to prove that the writing th-
ought be published—for it is punishable, although the
party keep it in his desk, the intent being clear—

Suppose an alteration in a paper immaterial? If
by the obligee, it is regularly injurious to himself only;
if by a stranger, or the obligor, it can be of no effect,
but yet, if it was by the obligee, it might in some
cases prejudice another. As another might have the
beneficial interest—So, by an obligor, or stranger,
it might be injurious to the obligee, because the au-
thers of the alteration might not be known—

Quasi would it then be forgery in either case if
the intent was fraudulent?

On a prosecution for forgery, a writing, purporting
to such an instrument, the defendant cannot be
convicted if it does not, on the face of it, purport, to be
the instrument described. On the indictment the
forged instrument must be set out in words figure—
The Punishment—At common law it is fine
and imprisonment and sifting—By a variety
of English statutes it is more severely punished;

in most cases it is punished with death—see
Blackstone 247. 250—
Public Wrongs.

Of Perjury.

Perjury is a crime of swearing wilfully, absolutely, and falsely, in a matter material to the issue or point in question, under a lawful oath, administered in some judicial proceeding.

It must be a wilful, false swearing, with some degree of deliberation, and the oath to appear clearly, for it is not perjury, if through surprise, or by mistake or through inadvertency. (See Ch. 29, 2 Baut.)

The oath must be taken in some judicial proceeding, i.e., before some officer having authority to administer an oath, over court, or in some proceeding relative to a civil suit, or criminal prosecution. It is immaterial, whether the court of record or not. As in a Chancery, Ecclesiastical court in Eng., or in any other law suit court. (See Ch. 219, Evl. Ept. 185.)

Any voluntary or extra-judicial oath is not within the law. As an oath before a magistrate or mark, etc.

But perjury may be assigned in an affidavit or deposition, the the affidavit to be never improved or used in any way by the party taking it. (See Ch. 315.)

Perjury is confined to such public oaths as affirm or deny some matter of fact—It is not predicable of promissory oaths, as ordinary office, but the violation of the latter is a misdemeanor. (See Hawkins 323, 2, Com. 124.)
Public Wrongs.

But perjury is predicative of any false oath, when material to the point in question, in judicial proceedings—this not affecting the principal judgment. Thus, respecting the ability afore offered in said &c. and to, upon any introductory question—

A party when allowing his oath in judicial proceedings, may commit perjury as well as an indifferent person or witness—Thus, the deceit in his answer in Chancery—The party's affidavit in by upon collateral points in courts of law. New. 322.

But a juror who swears his oath in finding a verdict is not guilty of perjury—For he is not sworn to testify the truth—but to decide upon the testimony of others—As oath is promisory—

It is said not to be material, whether the matter sworn to be true or not in fact; if the witness did not know it to be true, he is perjured. If he is to swear to those facts only, which are within his knowledge.

The swearing must be absolute and direct, for swearing under such qualifications as "I think" or "I believe," ne cannot be perjury. If. if the witness not think so. for it has the weight of common sense. Wrong. May not the law be thus evaded? Gold. 660.

The swearing must be to a material point. An irrelevant or idle testimony cannot be perjury. As, if the question be whether I was conformed to own, and the witness gives the history of a journey to see S. and represents some of the accidents of the journey—This not material—New. 335.
Public Warnings.

But if the false evidence be circumstantial and not directly applying to the issue and tends to aggravate or extenuate damages it may be perjury—

If it is said if the immaterial and false part of the evidence is likely to induce the jury to give a man credit to the substantial part—best this point is not well settled. See 1 Shaw 234.

Swearing that one beat another with a sword when in truth it was with a stick, is not sufficiently material to constitute a perjury—the beating is only material. [Per. may not be the kind of instrument, tend to aggravate the charge—]

It need not appear in what degree the false evidence was material, sufficient it be circumstically so. and much less necessary that the evidence be decisive of the issue, for it may be very material and yet not sufficient to govern the findings.

It is always incumbent on the prosecutor to prove the evidence material.

It is not necessary that the false evidence should have been credited to the Ame—nor, of course, that any person should have been actually injured.

This crime does not consist in a damage done to an individual, but in abusing public justice.

To convict for perjury, two witnesses at least are necessary, otherwise, there is rash against oath.

It was held in Eng't till lately, that the perjurer injured by the perjury could not testify against the offender in a public prosecution.
Publick Wrong.

This was overruled in Engl. but still prevails in
3 Term. A. 27. Conv. — Two persons cannot join in a prosecution
for perjury, the offence not joince, see 8 Term. 221,
1 Blac. 225. 2 Blac. 589.
2 & 3 Rev. 98. — see also 1 Blac. 246. 2 Blac. 7. 25. Comp. 194. Blac. 94. 5.
1 Star. 925. Subornation of perjury is the offence of procuring
a Blac. 198.
1 Coll. 415. 417. joince, to commit perjury — but the perjury must
July. 7. 397. be actually committed, or it is no subornation.
122. Prov. 3. 38.

Perjury and Subornation of perjury is punished
at law, not variously — anciently with death.
4 Blac. 137. afterwards banishment or cutting out of the tongue
v Than a forfeiture of good — more by fine and
imprisonment, and inability to give evidence, the
penalties are superseded by Mat. 5 Dec. 92. 9.
1 Blac. 325.

Writing one to commit perjury and it not being
actually committed is punished as perjury by
fine and infamous corporal punishment.
3 Blac. 363.

Consequece of a conviction at law, of perjury
that the offender can never be a jury — A variance in
the indictment, by the omission or addition of a
letter is not material, unless it makes another word —
by misspelling — or leaving out letters,

Under that law, perjury and subornation is pun-
ished by forfeiture of sixty seven dollars. Navigate for
six months, disqualified to take an oath in any Court.

Perjury in a Court of Record, and of record
is punishable at common law, by fine in imprison-
ment and inability to give evidence.

Take affirmation of oaths also, in Court is consid-
ered and punished as perjury.
Public Wrongs
Of Bail

1. Blac. 246.
2. In 189. 290.

When one is arrested for a crime, and not before
a magistrate (on charge of a crime not cognizable by
law.) the latter is to enquire into the facts charged, to
determine who the person charged to be held to bail or not

But he has no right to examine the prisoners at
Common Law. For Eng. it is authorised by Stat. 2 and
3 Ch. 5. (In Cont. no statute warrants it)

If on enquiry it appears, that the offence charged
has not been committed, or that the charge against
the prisoner is wholly groundless, he is to be discharged.
Otherwise, he must be committed to prison - or give
bail for his appearance.

Bail is delivering one to his sureties, on their
giving security for his future appearance &c. And it
is regularly given and demanded for all offences below
felony, whether against common law or statute, the
offender ought to be bailed, unless prohibited by statute.

(Stat. taken by a strange after commitment in the
name in Bill is seldom good) see Dickew v. Kingsby, c. 1605.

Common law according to Blackstone all felonies
were bailable - except treason and murder - According
to others all offences except homicide, so that the ac-
cused was admitted to bail in almost any case at any
time. But the Stat. Whist. 3 4. Stat 1 denies bail in
treason, and many felonies - and further provisions
are made on the subject by Stat. 3 4. 5. 6. 7. 8. 9. M, a. and 18. Phil. M.)
Public Things.

When the party has confessed or is notoriously guilty, and without the facts in Amy, murder &c. the accused is not bailable. — But by the English Statutes, taking away the power of bailing in certain cases do not extend to B. A. in Eng. This Court or any one of the judges of it, in vacation may now bail for any crime, even for murder or treason — They extend only to subordinate, or common bailing officers, as they did.

But the Court of B. A. will not admit to bail in those cases, in which bail is prohibited by Statutes; unless under special circumstances, in the parties favor, where the prosecutor has unreasonably delayed the trial, where the evidence appears very weak, or where the persons life is in danger from confinement, and such like cases. — But in case of illness, it must arise from confinement.

After verdict against the defendant, he is not admitted to bail till judgment, unless the prosecutor does consent; (in Eng. this rule has often been dispensed with) (in Eng. all crimes are bailable except capital, and contempts in open court. Swift 91.)

A general rule, that the re-jeudice of the offence may be render at common law, ex officio.

If a magistrate do take insufficient bail, and the principal does not appear, he is punishable.

In Eng. four sureties are generally required in case of felony, two in inferior offences. (In Cont
Public Warnings.

Preparing bail which it ought to be granted — in a misdemeanor at common law, and as such, is punishable by fine or imprisonment, and in this case the party injured has also his action —

Granting bail, when not grantable is at common law, punished by fine, as a negligent escape — is also punished by several English Statutes.

(If has been decided in Cont. in a prosecution for a forgery, that the deft. being out on bail after trial, the verdict could not be received, unless he was present in court. I. e. has not this practice been got different?

Of Costs.

By the Act. Cont. a person charged with, and tried for any crime, is acquitted, pays the costs — provided the prosecution was occasioned by any unlawful or blamable conduct of his — If not thus occasioned, he is discharged without costs, and then it is paid according to old law, out of the treasury, into which the fine would have gone, if he had been convicted, and in general fines are inflicted by Superior Court to the State treasurer — but now by Stat. 1792, Costs arising in public prosecution in the Courts of Common Pleas are paid by the State Treasury — and those recovered go into the State Treasury —

When costs arise in any criminal proceeding, and there is no acquittal or conviction, the State pays, if the crime was cognizable by the Superior Court. Does the new Stat. apply to this case —
Public Worns.

As a person cannot be apprehended or being apprehended, escape without the officer's fault, before he is committed. - the State v. &c. (as supra)

If the person charged and tried, is liable to pay costs, but is unable, as having not property sufficient - he is bound out in service, to any inhabitant of this state, or the United States - but when it can not be thus obtained, it is payable out of the State Treasury, if tried by the Superior

When the evidence before a court of enquiry is not sufficient to hold the accused to trial, cost cannot be taxed against him - R. v. 462. —

In England no costs are paid on either side, when the Crown prosecutes, except in particular cases, by special provision of the Legislature

As to the law with respect to discharging fines in criminal cases. See Inst. C.S. 24, 347. 46.


In criminal cases, unless of venire facias de novo have been granted 3. Ray 15 84 and even in capital cases. 15 85.