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Notes on Senior Law Taken on lectures delivered by Prof: Jno B. Minor of the U of Va [line of two swirl details with quotation marks.] Session 1846 & 7.

I H Carrington Charlotte

I H Carrington Charlotte Index Page Statute of Pretence Titles — — 77 " " Descents — — — — 65 " " Fraudulent Conveyances — 82 " " Conveyances — — — 106 " " Frauds — — — — — 106

1 Lecture 1st Oct Notes on Coke It is a fundamental princi— ple of the law of England that all lands are holden of some superior. Lyttleton wrote a trea— tise upon the tenure by which lands are holden in Eng. Coke made this the foundation of his work. He followed his order & began with lands in fee simple. After— wards Lord Hale made a new arrange ment followed by Blackstone. Coke has been admirably rearranged by Thom as, and for this reason his edition is pre— fered. Coke wrote from knowledge that he had accumulated & without reference to books. His work is esteemed a complete institute of laws & his opinions taken as absolute law. (Chap 1st) Reason, according to Coke, is the life of the law. That is, an artificial perfection of

{law} reason gotten by long study. Nothing contrary to reason can be law. Hence the success of those common sense judges who know little law. Lord Coke's course of study partic— ularly recommended. Elements should always be mastered first. In the time of Lord Coke, there were only about 15 vols of reports. Glanvils Treatise was

2 the first being written about. It was confined to such matter as came under the jurisdiction of the curia regis. Bracton's Treatise was a complete system of law; in the Latin language & was superi— or to Glanvil's. It was written in the reign of Henry 3. [blank space] Fleta was intended as a sup plement to Bracton. Called Fleta because written in the Flete Prison. These were the elementary works of the time of Lord C. The 1st reports were the yearbooks socall ed because they were written yearly. They are in 11 parts distributed among 8 reigns viz: 1st Edward 1st 6 Edward 4th 2nd Edward 2nd 7 & 8 Edward 6th 3rd Henry 4th 9 Henry 7th 4th Henry 6th 10 & 11 Henry 8th (Chap 2nd) In the realm of Eng there are divers laws. The common law includes all those mentioned in the text except the statute law. But many yet retain their separate names. 1st Blackstone 64. (note C, page 10) It is said that the com: & stat: law flow from the legislature alike. It is true that much of the common law came from this source. The Magna Charta being the first written law, the statute law be— fore this period was mingled with the common law. Hale mentions two of them

3 sources viz judicial decisions & com— mon usage. The laws of Eng were the laws of Va. down to the revolution. In May 1776 the assembly of Va declared the colony free & independent, & not having time to enact a system of laws, enacted that the common law & all the statute law made in aid thereof, & not local to the realm of Eng. passed prior to the 4th year of James 1st was adopted; because it was the date at which our colonial existence commenced viz the date of the first charter of Va. 1 Henning 57. The courts construed this to extend only so far as the principles of the law were appli— cable to our constitution. There was a revisal of our code of laws which was completed in 1792 when all British statutes were repealed with a saving of the judicial & remedial writs awarded before the passage of the act. See Tate 37. At this time all British statutes were adopted applicable to our country; but they derive their authority from this adoption not because they were British statutes. Our law then is composed of the common law modified by the courts & the acts passed by the General Assembly. Besides these the laws

4 of the general govt are in force here as elsewhere. The common law is the basis of the laws of all the states except Louisiana. She has adopted the civil or imperial code. (p 12) A maxim of the common law is, that all contracts shall be judged by law of the time when the contracts were made. Hence the importance of knowing the dates & changes of the law. (p 13.) Presumptions. In some cases the law will admit no proof against its presu: 1st Leigh 574. Thus if a husband be with in the four seas, the law presumes a child born of his wife to be legitimate. No man is suffered in law to deny wh he has affirmed under seal. (note E.) In Va. all forfeitures of goods & lands for treason or felony is a— bolished. There is no limit— ation to the time a bond may stand. But here as in Eng, there is a pre— sumption payment after 20 yrs. What is meant by a bond is this. I promise to pay W.E.S. $100 writing, my hand I seal this 20th Oct 1846. Stat of limitations applies only to prom— isory notes (...) Johnson R 500. The ease of a bond the presumption of payment must be repelled

5 after 20 yrs by the creditor. The proof of payment made within 20 yrs must be proved by the creditor's end or meet of the payment before the 20 yrs have expired. 2 Robinson 622. (p 14.) The law respects not the quantity of the estate but the quality. Thus if a slave is to be free after 30 years & has children before that time expires they are slaves in perpetuo. (p 15, n F) Minor says that law is "a rule of civil conduct transcribed by the law— giving power in a state." (p 20, note H.) Coke says a common opinion acted upon will be taken as law. 4 Hen & Mun 293. (p 21) 2 Leigh 195. The most summary ac— tion for recovery of debt is action of debt. Originally this could only be brought on a bond. Holt refused it on a promisso ry note because there was no precedent.

6 Lecture 2nd A stat is a decree pronounced by the 3 depart— ments of the legislature, an ordinance by one or 2. The term ordinance is now applied to the decrees of corporations &c. (p 25 note 16) The 1st difference resulting from the dis— tinction between public & private acts is in their degrees of notoriety. A private act must be specially pleaded a public act need not. But we have a statute here which prevents private acts to be given in evidence without being specially pleaded. This entirely abrogates the common law principle. (Tate 34, Acts of assembly). But although private acts may be given in evidence, the courts are not required to notice them as if they were public acts. (5 Munf 324.). It is not necessary to produce these acts

in evidence; it is per— mitted, not commanded. If the jury be prejudiced it is advisable to plead these acts, the only reply then being, nul tiel record, & then the record must de— cide. {If the issue be one at law, then the act must be pleaded,} {for the judge is to decide.} If it be decided that the decision should be by the judge then the act must be specially pleaded; if by the jury, it must be given in evidence. The proof of private acts, is either by a copy of them certified by the keeper of the rolls, (i.e. clk of house of delegates) or by a copy which a witness will swear

7 he saw compared with the record, and found cor— rect; or, perhaps (not certainly) by a copy struck off by the public printer. Tate 34. In Va, if statutes have no date from which to take effect, they go into operation on the 1st of April next succeeding their passage. Acts of Congress take effect from the date of their approval by the President, if in time be men— tioned. [blank space] Prescription. A title by prescription is nothing more than a title to property acquired by an uninterrupted and peacable possession, from a time whereof the memory of man runneth not to the contrary. 20 yrs in Va gives a man a title by prescription to incorporeal hereditaments, if the possessor be adverse & unin terrupted. Customs cannot exist here, for we a— dopted the great body of the common law, without its exceptions. No customs in derogation of the common law can arise, for they would be within the mem ory of man. Title by prescription however exists here, for there are many practices here of which no man can tell the origin. 7 Leigh 632. [centered on line] Lecture 3 Oct 9 1846. The difference between custom & prescription is, that custom is a rule of law, & prescription a title to property. Refer to 2 Coke 268. Book 2nd This book treats of real property. Land, as a general term means all kinds of soil. Tenements is a more comprehensive term, compassing every thing which may be holden in a feudal sense. Hereditaments, includes all property which may be inherited; not only real property,

8 but things annexed to the realty, as heirlooms an heirloom is a limb of the inheritance. By the common law whatever could be con— veyed by solemn livery of seissin required no deed. The English statute of 29 Chas 2 requires that no contract for the possession of land for a longer term than 3 yrs should be valid, unless in writing. We have two statutes upon this subject, the statute of Frauds & of Conveyances, for these see pages 106 & 82. Tate 159 & 717. By the common law all waifs & estrays be— longed to the king. A conveyance of this right is often made to the lord of the manor. Messuage is the house, the garden, the or chart & the curtelege. Curtelege — the space of ground enclosed by the fence surround ing the principal messuage. Messuage in a deed will pass all of these. 2 Blackstone 427. Common. The most

common kind is com— mon of pasture, which is divided into 4 kinds Appurtenant, appendant, per cause de vici— nage, & in gross. Appurtenant, according to Blackstone, can only exist in case of immem orial custom; but this presupposes a grant, therefore it may exist here; but Jdge Lomax thinks otherwise. Common ap— pendant arose in England in consequence of the feudal principle, it consequently cant exist here.

9 Common per cause de vicinage, cannot ex— ist here, for we have no manors. But we have a similar right of common recognized by statute, which provides, what the fence around a mans land, being of a certain height, (4 ft if of stone, & 5 if of rail) the owner of any hog cow &c breaking through such enclo— sure, shall pay for the 1st offence the amount of damage done, for the 2nd double the damage for the 3rd the animal may be killed. Thus recognising the right of pasture in those lands which are uninclosed. Common in gross may exist here. A right of fishing in all navigable rivers (ie where the tide ebbs & flows,) in common to every member of the commonwealth. If a person [entrap] an exclusive right, he must show it by pre— scription or grant. If above tide water, the owner of either bank has the exclusive right of fishing to the middle of the stream, (un less some person shows some lawful claim to itsuse) subject to use as a public highway. We must recollect that the owner of land on navigable streams & on the seacoast, has exclusive right to land down to low water mark. Prescription! See. 4 Randolph 15. 29 [Chance] Reports 162. 3 Kents Comm. 431.

10 We have reenacted the stat 5 & 6 Ed 6 with the proviso that sheriffs & clerks may still appoint deputies. Tate 706. 4 Munf 150. It was decided in (1 Leigh 42) that sheriffs may sell their offices after they receive their commissions, but if they contract for the sale before the commission is given the contract is void & the party is punishable. [centered on line] Lecture 4 October 12 1846. By the construction of the Ct of Chancery, money left by a testator to be laid out in lands, will pass just as if it were land; & the land will be sold. For an explanation of tenure, see 5th chapt Blackstone. Rents. Ld Coke is mistaken in saying that rent cld not be reserved out of a part of the prof— its of the land. He means the whole profits could not be reserved. There are three kinds of rent, Rent Service Rent Charge, & Rent Seck. At first rent service consisted in a return of personal service for the use of lands, but afterwards denoted any retri— bution for the use of lands held under the feu— dal connection of lord & tenant. Rent charge, is an annual sum arising out of the land. It is so called because it is a charge upon the land & is accompanied with a right of distress if payment is in arrear. Rent seck (from (...), dry or barren) is so called because it is a barren rent, i.e. there is no

11 clause of distress. Rent service was {so} called {because it was accompanied with a clause} of {distress} rent proper, or, "of common right." In case the services were refused a speedy remedy was necessary. The services were often military, & it was necessary for the defence of the kingdom that they shld be promptly rendered. Rent Charge was not necessary for the defence of the realm, but was a mere device of the lawyers; hence it was not distrainable for of common right, but required a clause to that effect. To have the right of distress it was necessa— ry that the distrainor should have the reversion of the land. Hence if the tenant for life assigns his term, he loses the right of distress; but if he reserves in himself the smallest part, his right is saved. Lord Coke says that rent may be reserv— ed on a parol grant of land, but it is presumed that the statutes of frauds & fraudulent conveyances have abolished this right. [centered on page] Lecture 5 Oct 14 1847. In addition to the reason mentioned in the text why rent cannot be reserved out of an incorporeal hereditament there are 1 These incorporeal here ditaments being rights granted for the com— mon benefit, it was contrary to their nature

12 that they should be transfered to another reserving rent. 2 When a writ of apise was brought, the jury would not know where to look for the title. The reversion must be in the lessor or the re —version is void. This holds good only as re— spects rent service. Not in respect to rent— charge &c. We have not reenacted the stat— ute of quia emptores, but we have abolish— ed the whole system of temeres, while the stat of Quia Emp: only abolished the connection between undertenants. Therefore, if, in Va, I grant a tract of land in fee reserving rent annually, it cannot be a rentservice, but will be a rent charge or rent seck accor— ding as there is or is not a clause of dis— tress added to it. A fee farm rent is the perpetual return of 1/4 of the profits of the whole land. This can— —not be a rent service, as there is no rever— sion in the lessor. It must therefore be a rent charge or rent seck. Page 454. The rule of the civil law in regard to election seems to be the just one; for as the debtor has the right of election at the time of pay— ment, it seems but just, that if neither make application, the application should be most favourable to the debtor. It has been doubted how far this rule of the civil law has been adopted by the com—

13 mon law. Lord Mansfield, who has always been favourably disposed towards the principles of the civil law acknowledges that the doctrine does not hold to its full extent. The last case decided in England seems to have settled it that the application must be made by the creditor at the time of the payment, or the courts will apply to the satisfaction of the oldest claim. 2 Saunders Re 415. The Va cases seem to favour the principle of the civil law. In a case reported in (1 Washington 128) it was decided that the creditor must make ap— plication {after} within a reasonable time after the payment of the money. The case also came up in a case reported in (5 Leigh 333) & the opinion of one of the judges was, that the rights of the creditor had been strained beyond all reason. The question that a— rose was, whether the creditor could make an ap— plication to a debt not in esse at the time of payment. This was justly considered unreasona ble. In the case of (Ross vs Overton 1 Call 309) it was decided that when a man rented a mill, & agreed to make improvements, & the mill was actually consumed by fire, he was bound to rebuild, & then make improve ments as though the mill had remained standing (12 Leigh 61) (3 Johnson's Reports 44). In (Briggs vs Hall 4 Leigh 484) a man rented a farm {from} to another, & then went on the land & reaped a crop of hay from a small portion of it. It was de— cided, according to the common law principle, that this suspended the whole rent.

14 476 in P. Until the statute of G 2 the courts of com mon law never divided entire payments or an annual rent. We have reenacted this statute declaring that the rent of lands & the hire of slaves shall be divided in proportion between the person having the uncertain interest & the heir. (Tate title Executors & adminstrators) Page 477. Stat 4 G 2 allowing distress for rentseck has not been reenacted in Va. Therefore the distinction between Rents charge & seck still subsists. 481 refer to 485. Ch XV The statute Chas 2 abolished all tenure, save those of free & common socage. The word "heirs" in Va is not necessary to create an estate in fee. Our stat declares that the grant of an estate to appear without condition or without a particular estate shall pay an estate in fee. (Tate 102 title Conveyances) (10 Leigh 602)

15 Lecture 6th Oct 16 1846. Attornment! is nothing more than the as— sent of the tenant to a change of lords. We have dispensed with it here, as they have in England. Conditional estates in England or fee tail, be— fore the statute de donis, might have been aliened upon the having of issue. This stat protects the rights of the issue, & forbids such alienation. The lords procured the passage of this act for two reasons. 1 The reversion now remained in themselves without possi— bility of being lost. 2 To keep the estates which they themselves possessed in the family

&c. We abolished estates tail in 1776. There were, before this, several methods devised by the lawyers, by which the land could be sold & the issue defrauded. Such were fines & common recovery. Feigned conside ration &c. Lecture 7 Oct 19, 1846 According to our law, all lands descend ing in fee, are liable for debts of the an cestor evidenced by writing, whether the word heirs be mentioned in the instru ment or not. There are two things nec— essary to an Estate tail. 1 That it be of real ty. 2 Of inheritance. If a man have an estate to him & to the heirs female of his body, & die,

16 leaving a son & a daughter, the daughter shall take the inheritance by the [instruc] tion of the grantor. But not so in case of purchase. As, if there be an estate for life remainder to the heirs female of the body of A. A dies leaving a son & a daugh ter. Neither can take, for neither answers to the discriptio personae. This doctrine has been overruled & the distinction between descent & purchase abolished. Estates Tail existed in Va as in England till 1705. Where our ancestors favouring them, still more even than in England abolished fine & recovery, the common modes of alienation & declared that nothing but act of assembly should justify their sale. (3 Hen Stats at Sge. 320) In 1734, another act was passed to rem— edy the inconvenience attending on ap— plication to the legislature by poor peo— ple who wished to alien their petty es— states. It provides, that any man seized of lands, tenements, & hereditaments in fee tail, of a value not exceeding ₤200 & not adjacent to other lands, might sue out a writ in the nature of ad quod damnum directing the sheriff to summon upon the land, a jury, & inquire as to the value & the situation of the land. If upon such examina—

17 tion it was found that the land did not exceed ₤200 in value, & was not contiguous to other lands of the same kind — then, by deed of bargain & sale—— reciting the inquisition of the jury, the land could be conveyed in fee. In 1776 Estates Tail were abolished. The preamble of the act runs thus. "Whereas the perpetuation of property in certain families by means of gifts in fee tail, is contrary to good policy, tends to de cieve fair traders who give credit on the visible possession of such estates, discou– rages the holders thereof from taking care of & improving the same. & sometimes does injury to the morals of youth in rendering them independant of & disobedient to their pa— rents, and whereas the former method of dock— ing estates tail by particular act took up much of the time of the legislature, & the same, as well as the method of defeating such estates when of small value was burthensome to the people. It was therefore enacted that any person who had, or should afterwards have any estate in feetail {in} general or special, in any lands or slaves in possession, or in the use or trust of any lands or slaves, or who

now is or may hereafter be entitled to any estate tail in {possession} reversion or remainder after the determina—

18 tion of any estate for life or lives or any lesser estate, whether such estate be cre— ated by {devise} deed, will or act of assembly, or by any other means, shall from hence— forth, or from the commencement of such es— state tail, stand, ipso facto, seized possessed or entitled, of, in, or to such lands or slaves so held or to be held in possession remain der or reversion in full & absolute feesimple as if such will deed or act of assembly had so enfeoffed him. (9 Hen Stat at Sge 226) In 1792 slaves were made personal prop— erty. At the same session some modifi— cations were made of the statute abolish— ing estates tail. It was declared, that all estates in lands and slaves which in 1776 were estates tail shall from henceforth be deemed from that time, & shall contin— ue to be estates in fee (1 Hen Stat Sarge new [series], 86). [blank space] It will be observed that our statute converted into feesimple those estates only which were estates tail under the stated "de donis". And as our stat refers to lands only so held under that statute, it is now a question what es— tate a man would have in an annuity or in other tenements than land, as, rent & since the 1st remained an estate condition— al at the common law & the other an estate tail under the statute.

19 Stat of 1792 found in Tate 332.

20 Lecture 8th Oct 21st 1846— The great division of estates in Eng is into estates of freehold & those not of freehold. 2ndly estates of freehold are divided into estates of inheritance & those not of inher. Estates of inheritance into feesimple fee conditional, fee qualified & fee tail. Estates not of inheritance into estate by the curtesy in dower & those created by act of parties. Estates by the curtesy. (p558) There are 4 requisites of an estate by the curtesy. 1 marriage 2 seizure 3 issue & 4 death of the wife. Seizin by deed was necessary, for it was necessary that the issue might inherit & the husband by common law cld not take by curt unless issue cld inherit. This was not the only reason. Its principal reason was to stimulate the husb to litigate the claims of the wife and bring the property into her possession. There is a distinction made at

p558 between seizin in deed & law. Actual seizin is not necessary in Va. Tate 277 title descents. [extended dash illustration] (558n6) Possessio fratris. By the common law the children of the halfblood were excluded from the inheritance

21 if a man left a son & daughter by the first marriage & a son by a second & the son of the first died without issue, the son of the second succeeded because he was heir to the person last seized viz the father. (560 n E.) In Va the right of survivorship is abolished, consequently the husband can be tenant by the curtesy in the case of jointtenancy. Tate 725. (569) In Va our stat allows to a widow 1/3 of all the lands tenements or other real estate of which her husband was seized during any time of the covert— ure & to which she has not relin— quished her interest. Tate 289. Dower (571 [n.C.]) We have no ecclesiastical courts in Va. Causes tried by them in Eng are decided by the ordinary courts. Those courts will declare no mar— riage void after death of either party. So that curtesy & dower are allowable in this case though the marriage be voidable. If the marriage be void by law of Eng the children are illegit, but by stat of leg though courts declare marriage null & void issue is legitimated. ([5]72) Minor thinks that by equity the wife of an alien may be endowed

22 though Jdge Lomax is of a contrary opinion 1 Lomax 80. (574) Dower is defeated by recove— ry by title paramount to the title of the holder. If there be collusion between the hus band & new owner to defeat the wife of dower she shall not be defeated. Tate 291 dower. (576) "There may be curtesy of trust es— tates but no dower." This is abolished by our stat 3 Hen & M 332. Equity of redemption so looked on as an estate in law. If the husband dies owning [an] equity of redemption the widow has the right to redeem 1/3. ([no G]) Instantaneous seizure. If there be no actual posses— sion but a mere nominal sale the widow has no dower.

23 Lecture 9th Oct 23rd 1846. Every estate in dower in Va must be such that the heir to the wife might inherit. The law of Va. gives more advanta— ges to widows the English law. 1st they are allowed to remain in the house for forty days & as long afterwards as her dower is with— held. 2nd She is entitled not only to the messuage but to the planta— tion. 3rd She may have a

[vicon]— cial writ, that is one directed to the sheriff, who is commanded thereby to go upon the land, and enforce the apportionment of dower & this without the formality of a re— turn. Tate 290 & 1. (585 [n.] R.) We have the stat of Westminster 1st which allows a widow to bring a writ of "unde nihil habet," although she has received portion of her dower. Tate 291. Dower. The usual mode of getting dower here is by bill in chancery by which commissioners who go on the land assign the dower. No damages can be allowed unless the husband died seized. Therefore they can be demanded only from

24 the time of issuing the subpoena or from the time of [restituting] the suit for lands sold during the husband's life. (592.) In Eng: 1/3 of the land is assigned as dower. Here 1/3 of value is assigned, with the reservation that it must be in both wood & ar— able land; not exclusively of either. 4 Henning & Mumford 386. (600) [blank space] (609) We have no right of survivorship, consequen— tly a woman may be endowed of a joint— tenancy. A divorce a mensa et thoro is granted on the plea of cruelty, adultery & just cause of bodily fear. Perpetual separation may be decreed for these causes by the courts. This has the same effect as to property acquired afterwards, as a divorce a vinculo. Tate 688. (610.) Elopement & continuing willingly with an adulterer is just cause of divorces. {Tate [492]}

25 Lecture 10th Oct. 26th 1846 The reason that jointure at common law cld not bar dower, was, that no grant before or after marriage cld bar dower. Before, because no right accrues until marriage, and no right can be barred until it accrues. After, because 1st after marriage the wife could not make a valid contract, & 2ndly she has an estate of freehold, and no estate of this quality can be barred by a collateral right or title. If then the husband wished a release before marriage, she could plead that in title had accrued, and consequently there could be no release. If he wished a release after marriage, a plea of non sui juris could be entered. If he wished to make compensa— tion for dower. It cld be pleaded that no collateral satisfaction could defeat an estate of freehold. After marriage therefore, a wife became absolutely entitled to 1/3 of her husband's lands & tenements. But these lands must have been held in legal or actual seizin. Hence, of a use, a wife was not dowable in law, because the courts of law insisted that the possession must go with the use. But a use has been held in the courts of equity to be suf— ficient to endow a wife. When a husband wishes to deprive his

26 wife of dower, he conveys his title legal & reserves to himself the use. The courts of law would not allow the widow of the feoffee in use, dower, because he was not beneficially seized. To remedy this the [freeholds] of the wife before marriage insisted that he shld withdraw a portion from uses & declare a new use to himself & wife, remainder to the survivor. Afterwards by 27 H 8. The legal title was transfered to the use the consequence of which was, that the widow should have both dower & jointure. To obviate this, a clause of the statute declares that a jointure shall bar dower. Our stat provides that if any estate be conveyed by deed or will either expressly or by averment, for the jointure of the wife, in lieu of her dower to take effect. & to continue during her life or determi— nable only by those acts which bar the dower at common law, such conveyance shall bar her dower of the residue of the lands of tenements or heredit. wh at any time were her said husband's. But if such conveyance were made before marriage & during the infancy of the feme, or after marriage, in either case the wife might waive the jointure & take

25 dower pro tanto at her election, Tate 293, dower. In Eng: jointure bars though it be made before marriage & while an infant. See Tate 169. When the husband wishes to convey lands he must obtain the consent of the wife, who must formally renounce her interest. The following formality must be observed. 1st If the deed be acknowledged before two justices they must be together in the same room & [in] their own county. 2nd The deed must be executed by the husband and must be signed by the wife 4 Leigh 438. 3rd She must be examined privately and apart from her husband. The deed must be read and explained to her, she must declare that she signs it willingly, and does not wish to retract it, all of which must appear by the certificate of the justices, which will be then as authority upon the subject. 11 Leigh [494]. 4 Leigh 498. 4th The certificate of this private acknowl— edgement must be handed to the clerk to be recorded, until then it is of no effect. 1 Peters 338. 16 Johnson 100. 5th The wife must be above 21 years of age for the statute only allows her deed to be as valid as if she were a feme sole 6 Leigh 9.

28 Besides the methods of barring dower mentioned in the text the following are in force in Va. 1st Elopement & continuing willingly with an adulterer. Tate 292 dower. 2nd Divorce a vinc: a divorce a mensa et thoro does not, but our courts may decree a perpetual separation, for cau— ses a mensa wh has the same effect as a vinc. Tate 288. 3rd Husband's death before wife

attains 9 yrs. 4th By detaining title deeds of the estate, wh only suspends the dower until delivered. 5th Release after husband's death to one of whom she might have demanded dower. 6th By the wife's writing with the husband in a deed as before directed by the statute. 7th Tate 292 By jointure. Between Dower & Curtesy we have the following differences distinctive. 1st Dower consists of 1/3 curtesy of all. 2nd Seizin in law gives the wife dower but seizin in deed is nec. for curtesy. 3rd Issue is required to take by curtesy not by dower. 4th Dower must be assigned. Husb may enter as tenant by the curtesy. 5th Wife forfeits dower by adultery & elopement husb does not lose his curtesy by the same.

29 Lecture 11th If a deed be executed by a wife in conjunc— tion with her husband, and it afterwards be alleged that there was fraud in the transaction, it shall be inquired into not— withstanding the certificate of the justices, in pursuance of the principle of law that no judgment is so final & conclusive but that it may be inquired into, if there be fraud alleged. (621) A discontinuance is such an {decration} [alienation] of an estate that lies in [covery] as taketh away the right of entry from the person possessed of the next estate after the death of the alienor. When the tenant in tail aliens to another for life of alience he acquires a new estate in fee by disseizin— & the estate tail is discontinued. If now the alienor die, the issue intail is reduced to the necessity of bringing an ac— tion to get possession instead of entry. Sir Henry Spelman derives estovers from a word mean ing materials. Blackstone derives it from the French word estover meaning necessaries. (note Z.) Emblements. If a person die in Va before the 31st Dec. & after 1st March, all the crops which can be reaped before the 31st Dec go to the executors or administrators & are assets in their hands. If he die after the 31st Dec & before the 1st March the crops shall go to him in the remainder or reversion. Our statute only provides for the case of the death of tenants & consequently all

30 other determination of tenancies would stand as at common law, though the framers of the act probably meant it to extend to all deter— minations by an uncertainty. Lomax 38 Tate 405. By the common law if a man attempted to [pass] a greater estate than he had, he forfeited his interest & conveyed no estate. Blackstone gives 2 reasons for this. 1st It amounted to a re— nunciation of the feudal connection, and put the remainderman or reversioner to his action to get possession & as a punishment he was allowed to take possession immediately on such alienation. 2nd By granting a larger estate the tenant clear— ly disclaimed the title by which he held & he cld not afterwards claim this estate because it wd be repugnant to the act of the alienor. 2 Blackstone 275. In Va, our stat provides that no grant shall pass a greater estate than

the grantor posses— sed, and as no harm cld now result, the necessity for punishment is taken away. 1 Lomax 45. (627) There can be no occupancy of any thing that lies in grant, for there can be no possession taken. It is not tangible. General occu— pancy is abolished in Eng by 2 Stat 29 Chas 2nd & 14 of George 2. 1st provides that estates pur autre vie shall be devisable & if not devised shall be assets in the hands of the heir provided that the estate fall upon

31 him as special occupant, & if he be not en— titled as such, it shall go to ex. & ad:. This gave rise to 14 G 2 providing that in case of intestacy the estate shall be dis— tributed as personal property. Tate 891. Our stat blended the two making the land divisable as assets in hands of the divisee, & distributable if there be no de— vise. Descendants to the heir as special occu— pant if he be named & if not to the ex & ad: for the payment of debts & in their hands is distributable. If tenant for life lease land, & lessee dies after 1st March the land shall be held by ex & ad: un— til the first of Jan paying rent. And so if slaves be hired, their hire shall be paid for the year if tenants die after 1st March. We have a statute authorizing an estate of freehold to commence in futuro Tate 175. In Eng. the executors will be prefered to the heir in case of emblements but the deviser was prefered to the executor. Our stat avoids this disntinction by declaring that if the testator or intestate die on or after 1 March the emblements shall go to his executor. ([note] 8) Tenant for years under tenant for life take emble ments on the death of the lessor. By Va Stat emblements accrue on the death of the lessee. In all other cases emblements are here as at common law.

32 Lecture 12th Oct 30th 1846 (645) Waste is either voluntary or permissive. Voluntary, when it proceeds from some act of the lessee. Permissive, when it is the consequence of neglect. By the common law those only were lia— ble for waste who were possessed of an estate for life by act of laws. Estates which were obtained by the acts of (...) had no such provision annexed, but each one was left to take care of his own interest by a provision in the convey— ance. [blank space] But the statutes of Marlbo— rough & Gloucester made all waste punishable, making no distinction between voluntary & permissive waste. Stat of 6 Ann provided that no tenant should be punishable for waste by accidental burning. Statutes of Marl: & Glouc: have been re— enacted in Va. but not that of 6 Ann so that in Va all tenants are liable for waste whether accidental or not. This is the strict construction of law. But, as Chancellor Kent remarks, the sense of the country is so much against it, and such an universal silence has prevailed in the cts, that it can hardly now be regarded as law. 4 Kent 82. (n19) See 3 Coke 285. Burning house through negligence is waste. —"—"—

33 (648 [N.F.]) The courts are opposed to [misslaying] an es— tate at will, and in doubtful cases such [an] one is declared to be one from year to year. Mis stat of parol lease is in consequence of an express provision of stat (...) Tate 718. In the cities & towns 3 rents notice is required, in the country 6, from the Lessor to the tenant at will. & notice must be in writing. Tate 795. (680) In Eng only females cld inherit as par— ceners unless in case of there being an heir to one of the parceners. We have abol— ished all distinction of sexes in our laws regulating the descent of property — except Tate 277 descents. (682) "Parol shall demur" means that the pleadings shall be stayed. In Eng this was allowed in the case where one parcener was an infant, but is not in Va. See Tate 129. Our stat declares that no parcener shall claim precedence or election, Tate 281. (698) We have adopted the stat of 31 & 2 Henry 8. It provides that, "[All] jointtenants, and ten— ants in coparcenary of their own right or of right of their wifes, seized of an es— tate of inheritance or tenants by the yr shall be compelled to make partition

34 by a bill in chancery Tate 723. Allotment may be made by giving to each a separate parcel or by di— viding each parcel. When the shares of some of the joint— tenants are not known, the law pro— vides that, publication be made in the papers for 6 weeks, & if after 4 months have elapsed from this publication, the jointtenant appear not, then the commissioners may proceed to make division. 3 yrs are then allowed for the appear— ance of the jointtenant, if he appear not in that time, then partition cant afterwards be defeated, [blank space] Tate 726. When the share of one of the joint ten— ants amounts to less than $300, then the ct may divide the land to be sold & the proceeds distributed. This supposes that one of the jointten— ants is an infant or non compos, or a feme covert, or beyond the seas, for otherwise the court would have no jurisdiction in the matter. Tate 280. 8 Randolph 361 4 Randolph 493 & 74.

35 Lecture 13th Nov: 2nd (05.) There are two statutes in Va which alter the com— mon law upon this subject, viz 1 stat: of frauds, 2. of conveyances. The first provides that no {land} title to land can be passed by parol to exist longer than one year. The stat: of conveyances provides that no land be passed for more than one year by parol. The distinction between the two

statutes is, that the 1st relates to contracts the 2nd to the pas— sage of land. Holchpot. This rule is extinded in Va, Pennsyl vania & Massachusetts to all advancements of personal & real property. Tate 282 & 279. (25) In Va, those give up their possessions in hotchpot, are bound only to deliver their value at the time of original acquirement. This has also been adopted in England. (28) There may be jointtenants of an estate for years & at will. (32) The exception mentioned in the text is in con— sequence of the statute of uses, for tho free— hold remains in abeyance; this therefore is no real exception. As if I grant land to the case of A, the freehold is still vested in me. (34) The reason why an action lay, was that partition could not be enforced.

36 Survivorship was necessary to a joint estate in England. It is abolished in Va for statute on this subject see Tate 726. (740 N.L.) The case of Thornton vs Thornton 3 Rand: 182 was cited, viz. A man made a divise to his sister & husband & heirs forever. The sister died leaving two children. The children brought action against father, alleging that no interest survived to him. But the court decided that the husband & wife were not jointtenants, but each had an entirety of interest. Each was seized per tout non per my et per tout. Consequently the interest of the wife upon her death rested in the husband. (748) (753) We have reenacted these statutes with regard to the enforcement of partition.

37 Lecture 14th (754.) Releases. Refer to (2 vol 460) A release generally supposes some prior estate in the release. If there be none, then in order that the release may take effect, the law requires that there be feoffment & livery. This was to give the matter notoriety. If there be pre— vious possession, then there is suffi— cient notoriety and the release alone is sufficient. Releases are made for four purposes. 1st To pass a naked right. 2nd To extinguish a right. 3rd To pass an estate. 4th To enlarge an estate. The first, entitled a release "mitter le droit," operates to pass a naked right to some one who has the possession. Ex: when the disseisee releases to the disseisor, it vests the right in one who has the pos— session & his title becomes perfect. When the disseisee releases to one of two disseesors his title becomes paramount to that of the other. But the case is diffe— rent with two feoffers, & the second can only lose his title by [blank space] [blank space] for they came in by notoriety & can only lose right by equal notoriety. 2 v. Coke 459.

38 The second called is the case in which the relessee cannot take the right released by reason of his not having possession. Example: If there be tenant for life rem— ainder in fee. Tenant for life is dis— seized, & then the remainderman re— leases to him. He cannot take by reason of his not having possession; the remain— derman loses his right by reason of his having passed it, & thence the title of the desseisor becomes perfect. 2 v. 489. The third called mitter l'estate operates to pass an estate to one who is rightfully in possession with the right to some part, as when one jointtenant or coparcener releases to another. Here no ceremony is necessa— ry as there was before sufficient notoriety. Tenants in common cld not pass their right by simple release, were compelled to do so by distinct notoriety. The fourth called d'enlargir l'estate operates to enlarge an estate, as wh the remainderman or reversioner re leases to the particular tenant. It comes in place of feoffment. This was the common way of passing an estate in fee to grant an estate for life remainder.

39 to himself in fee & then release to tenant for life. This was called "lease of release." (65) To "deraign the first warranty" means to vouch the first warrantor. (66) refer: to 448 (77.) Tate 726 Lecture 15th Nov 6th (87 (...)Q) ref to: 1 Chitty 178, 2 Johnson 468. 3 Johnson 175. 15 Johnson 179. 2 James 166. This rule adopted in Va. viz. (88) Action of account allowed in Va by one jointenant against another provided he has made him his bailiff. ((...)R.) Stat of 4 J 5 — Ann is so far adopted in Va as to allow action of account by one joint tenant or his ex pd. against the executors or administrators of the other who has re— ceived more than his part. Tate civil suits. (89) ref: to 2 v 450 n F. 1 Blackstone 323. Minor disagrees with Coke & Blackstone in the opinion that coparceners must make partition by deed. 4 Kent 369 H.D. Tate 723. Partition. Partition of personal property can only be enforced by the cts of equity, as the statute only refers to real 21 Randolph 102.

40 Lecture 16 Nov 9 1846 Analysis of The 1 vol of Coke. The first division is into real & person— al property. Real {Lands Property Tenements Hereditaments {Corporeal Hereditaments Incorporeal hereditaments Incorporeal Heredits {Advowsons Tythes Commons Ways Offices Dignities Franchises Rents. He next considers real property Real Propt {Tenures by which they are holden Estates Held therein Number & connexion of owners. Estates {Freehold {Inheritance {Fee simple {absolute qualified, & base. Fee tail Less than inheritance {Estates for life Less than freehold. {For years At will At sufferance Number & connexion of owners {Estates in, severalty,

Joint Tenancy, Coparcenary & common. The second vol treats of modifications of these estates & of the passing of them. The right of equity of reclamation exists un til a decree of foreclosure or until such a time has elapsed as supposes the mortgagor

41 to have relinquished his right. This right is invariably incident to a mortgate & no words of the parties can separate the two. There are frequent endeavors made to evade this rule. One is by an apparently absolute sale. Notwithstanding the rule in law that parol evidence will not be ad— mitted to contradict written propt the cts of equity allow parol evi— dence in this case to prove that the sale is a nominal one made for the security of money. 1 Call 429. 4 Johnson 167. 1 Powell on Mortgages 104. To determine between a conditional sale & a mortgage observe this rule if it has any of these marks it is a mort gage. [blank space] 1 There is no price named. 2. The vendor remains in possession. 3. There is a covenant for the payment of money from the vendor to the vendee. 1 Washington 127. 1 Randolph 125.

The hardest lesson in Coke. The corks shower— 42 [centered] Lecture 17th Nov 11 1846 An additional consideration may be pro— ved by parol evidence in case of a mortgage, as proved by the following cases. 2 Call 154. 1 Rand 234. (P. 19 nK.) The civil law followed by the canon law deem— ed all clogs upon marriage inexpedient & void. The common law wd not allow restrictions entirely forbidding marriage but allowed re— strictions as to time peace & persons. Legacies charged upon personal estate were cog— nizable in the ecclisiastical courts, & these cts made conditions void which tended to restrict the freedom of marriage. The ct of chancery adopted this rule in order to make justice uniform throughout the kingdom. The ecclesiastical cts had no jurisdiction over devises & wills relating to real property & the cts of chancery exercised in these cases their own jurisdiction allowing restric— tions on marriage but nothing forbid— ding it. But even in personalties the cts of chancery did not adopt in full the rule of ecclesiastical cts. Wherever there seemed an intention implied of giving the property to some one else in case of noncompliance with the condition, they caused the intention to be executed. In considering legacies the first question is whether they be out of real or personal property.

ed down like rain 43 If out of real— whether the condition be precedent or subsequent. If it be precedent the estate cannot vest until the condition be performed, although it be illegal or impossible. If the condition be subsequent you must determine whether it be or not be legal. If it wholly restrain marriage the condition is void & the legacy absolute. But if only restrictive, it will be a valid condition subsequent. If the legacy be of personal estate we must consider whether it be given over in case of nonperformance of the condition. If it be given over, the condition whether precedent or subsequent must be complied with, to make the estate good in the hands of the legatee, unless indeed the condition absolutely restricts marriage. If it be not given over you must consider whether the condition be precedent or subsequent. If subsequent & illegal the condition is void & the estate vests, if legal it is merely in terrorem, & no less of estate on account of a marriage condition. If precedent & illegal it is void. If legal it must be strictly pursued. Stor 4: equity 282—8. 2 Williams on executors 791.

44 (21 nS) In considering conditions that cannot be performed the most important distinction to be noted is, between conditions precedent & subsequent. Where there is a precedent condition, no estate can vest though the condition be impossible, whether it become so by the act of God, act of parties, or be so at time of creation. If the condition be subsequent we are to consider whether the condition be im— possible, how & when, whether by the act of God, of the feoffor, or the feoffee. If it be impossible at time of creation it is void, and the estate is absolute. & any condition will be considered im— possible which is illegal or repugnant to the grant. If it become impossible by the act of God or of the feoffor, the estate is absolute, because the act of God worketh injury to no man, and the grantor shall not take advantage of his own act. If the condition be rendered impossible by the act of the feoffee the estate is avoided altogether. The effect of an impossible condition in a bond differs but little. If the condition be impossible at the time of creation & known to be so by the parties the bond is absolute.

[pencil sketch of a circle quartered] 45 If it become impossible by the act of God or of the obliger, the obligation is sa— ved. If the {obligation} condition become impossible by the act of the obligor it still exists. The obligation is saved when the condition is illegal. Lecture 18th Nov 13 1846 Charges in the peer are those created by act of parties. In the post by act of law. (34 3) Where money is lent on a pledge. Where there is a pledge a loan is implied. A loan implies a debt, therefore where a pledge is lost or destroyed the money may still be demanded. 12 Leigh

170. 5 Munford 527. Deeds of trust have taken the place of mortgages in a measure. A deed of trust is a conveyance to a 3rd person of lands &c to discharge a debt due another, accompanied with a declaration as to the terms on which he is to hold them. They generally are 1 That he shall permit the grantor to hold the property & endeavor to discharge the debt, so long as it will not endan— ger the payment of the debt.

46 2. As soon as the creditor shall demand [it he] shall sell the property, provided this sale shall not be manifestly disadvantageous to the grantor from improper time &c. & that that the proceeds shall be applied 1st to the pay ment of the expenses of the trust. 2nd to the liquidation of the debt. The trustee may sell as soon as the trust is made. Not so in case of a mortgage. This is permitted because the law relies on the justice & impartiality of the trustee who is supposed to be the friend of both parties & willing to do justice to both. 4 Munford 259. No trust to a creditor is a deed of trust but is looked on as a mortage, & requires a decree of chancery to fore— close it. 1 Randolph 306. 3 Leigh 654. 1 Robinson 153. It seems to be settled in Eng & N York that a power of sale may be vested in the mortgage in case the money is not paid. 1 Lomax 322. 4 Kent 145. The Court of Appeals of Va have man— ifested a tendency to allow the same. 2 Robinson 172. A trustee takes the legal title & he can convey the legal title whether the terms of the trust have or have not been complied with. But any error in the proceedings will vitiate this title in a ct of Equity, though in general Cts of Equity are unwilling

47 to set aside any sale made by a trustee when every thing has been conducted in fair & impartial manner. 8 Munford 366 & 368. 5 Leigh 310. 1 Call 5 24. 11 Leigh 348. In Eng, trusters receive no compensation unless so expressly stipulated. Here they are entitled to 5 percent on the debt or so much of it as is paid. 4 Hen & Munf 415. Trustee should be impartial &c. He may apply of his own motion to a ct of chancery to assist him, remove difficul ties &c. Gilmer 132. 25 S. Carolina R. 369. If the trustee fails to take measures the party injured may apply to the ct 11 Leigh 547. Death of the creditor has no other effect than to make the debt payable into the hands of his ex, ad, or heirs. Death of Grantor determines the Grantee's power 5 Leigh 374. For it is considered a personal trust made from personal motives. Death of trustee devolves the legal title to his heirs, but as the trust was partly a personal one they have no power to sell. The proceeding usually is to apply to a ct of chancery to appoint a new trustee. 11 Leigh 348.

48 Lecture 19th Nov 16th 1846 (36 nY) A deed of trust may provide for sub sequent advancements as well as a mortgage. This opens a way to fraud, but still the doctrine is unexceptionable. 3 Cranch 89. 2 Johnson 306. 6 Johnson 429. Equitable mortgages are unknown in Va. For, 1st, our statute of conveyances provides that no title for more than five years shall pass unless the contract be in writing and under seal, & 2ndly, because the same statute provides that deeds & mortgages shall be de— posited with the clerk of the county for recordation. John 155—162. 6 Munford 5[5]6. A mortgagor in possession by force of the com— mon law in Va may vote & be a grand juror by reason of this estate. In Eng: a stat: gave these privileges. 2 Va: cases 319. Our statute provides that all mortgages & deeds of trust shall be valid as against subse— quent purchasors without notice for valua ble consideration, & against all creditors from the date of their recordation. Hence the doctrine of tacking is obsolete in Va. For our statute mentions the very class of obligations that would be tacked. Before 1819 our register laws declared mortgages & deeds of trust void as against creditors & subsequent purchasors unless recorded. But said nothing about their effect when duly recorded. And by an extra—

49 ordinary decision, it was declared that the recor dation could not be considered construc tive notice under this statute, though its language seems plainly to indicate this. Hence before 1819 tacking might have been allowable in Va. In Va there may be dower of an equity of redemption & of all other trust estates. Tate 290 1 Randolph 344. Judgment creditors have an action against an equity of redemption, as though the land were not mortgaged, and the whole would be liable to satisfy the judgments. 1 Leigh 140. The mortgagor shall not tack his bond against speciality creditor, but may against the heir. Any subsequent incumbrancer may redeem the mortgage &c. 6 Leigh 536 Chancellor Kent says that 20 yrs continuance to bar the equity of redemption was taken by analogy from the statute of limitations, but it seems to be the better principle that it is founded on presumed consent. 1 Washington 18. In Welsh mortages no time of default is mentioned, hence the right of redemption cannot be barred by lapse of time. They arose from the pride of Welsh families who worked always to maintain in their families the right of redeeming their estates.

50 It seems that in the case of a negotiable note payable on demand at a certain place the de— mand must be actually made in order to charge the bond. But if it be on demand generally and a certain place be named to pay the money, if such demand be not made, it does not discharge the bond— for the demand is not a condition of the bond. An example of the 1st would be, Sixty days after date, I promise to pay A.B. $1000 on demand at the bank of Va. Of the 2nd. On demand sixty days after date I promise to pay AB $1000 at the bank of Va. 11 Leigh 512. "Money paid to a party & to a stranger &c." There would seem to be no difference between the cases, but the feoffee is to lose his estate by the performance of the condition, & it is not reasonable that he should lose his estate by a bargain between the feoffor & a stranger with which he has no concern. Hence the condition must be precisely performed. Payment of a lesser sum at the time & place is no satisfaction, because it is impossible that $50 should be worth as much to me today as $100. But a party may relieve another if he wishes by the release of a part under seal. But if the time & place may make a difference from circumstances, for instance a

51 man might prefer $50 now to $100 next year &c. (note G.) Lecture 20th Nov 18th By constitution of U.S. each state is forbid den to make any thing save gold & silver a legal tender for the payment of debts. Congress is not restricted. Regulations with regard to foreign coin belong to Congress. The latest acts provide that the Spanish Milled dollars of 415 gra m wt shall pass current for 100 cts. The dollars of Mexico Peru Chile & Central American shall pass current by tale for the payment of debts & demands of not less than 415 grs in wt. And those restamped in Bra— zil of like weight & of a fineness of 887/1000 of pure silver. And the five franc pieces of France of not less than 900/1000 & 384 grs in wt. at 93 cts. The gold coins of Gr. B. of not less than 915 1/2 / 1000 in fineness shall pass at 94 6/10 cts per penny wt. & the gold coins of France at not less than 899/1000 in fineness ct 92 9/10 cts per pennyweight. The gold coins of Spain Bolivia Portugal Columbia & Mexico are not current in this country since 1843. Gordon 762 money of U. State. ((...)1) When a tender has been made and refused party may plead it in ac tion. Sanders reports 33.

52 (p74 n C2) The ancient practice for obtaining a foreclosure was to file a bill in chancery praying that the defendant (mortgagor) should be allowed a cer— tain time to pay the money [off] before ever after foreclosed. This is the prac tice at present in Eng. Another method is, to pray that the defendant be compelled to sell his land and pay the debt. Or that the land be sold. In this case the residue after satisfying all other debts according to priority &c was paid into the

hands of the mortgag{ee}or. This practice ac— cording to Chancellor Kent prevails in N. York, Maryland, Virginia, South Carolina—Tennessee—Kentucky—Indi— ana, & probably in other states. 1 Lomax 331 4 Kent 401. (75. E2) If, after the foreclosure, the mortgagee brings an action for the balance of his debt; it opens the foreclosure: for the mortgagor ought to have the full value of his land. But if there has been long possession of the land the court will rather permit it to re— main as it is. It is now admitted that after foreclosure & sale of land for a fair price, he bring his action

(not owned) 53 against the mortgagor for the residence. Thisis the rule now whether he be in possession or not. If he be in posses— sion, the amount of the residue is de— termined by evidence. If not, then by the price he obtained for the land. It is also an unsettled question whether the opening of the foreclosure revives the right of redemption in the mortgagor. The weight of Eng— lish authority seems to have settled it that he may redeem provided the land be not sold. If sold, the stranger shall not be prejudiced. If the balance be inconsiderable, it has been said that equity will decree a perpetual injunction. But the case in which this was decided involved no general principle, and it is certain ly unnatural to prevent one from asserting his claim because the amt be small. The courts of law in Va have no pow er to prevent a mortgage from pro— ceeding to a foreclosure. We have not the statute mentioned in the text. (88) The feoffor and his heirs may originally take advantage of condition broken

54 (p88) The feoffor & his peers might originally take advantage of a condition broken & they alone, but by the Stat 32 Henry 8, grantees have the same right as the orig: feoffors. This was enacted at the time of the dissolu— tion of the religious houses, to enable tenants to enter for condition broken. We have adopted the same statute al— most in terms. Our stat provides that &c see Tate title Rents. Attornment is now abolished in Eng. & Va. And now a tenant is bound to perform the same services to an assignee without his consent as to the orig: lessor. 1 Co. Lyt: 469. [n]41. (98) Upon reentry upon condition broken. The feoffor is in posses— sion of the same estate as he originally had, except in case of necessity & impos sibility. As if before Stat of R 3 the cestuy que use had aliened & reenter— ed for condition broken. He is not in as cestuy que use, but has an abso lute estate.

55 Lecture 21 Nov 20 1846 (102) The mortgagee in possession of mortgaged land is only responsible for the profits actually received unless there has been gross negligence on part of mortgagee. An assignment to set the profits off against the interest of the debt is usurious when such profits greatly exceed the interest of the debt, and will be set aside by our own courts. The surplus is applied to extinguish the principal. When a condition defeats a freehold estate deeds must be shown in a plea upon this condition. But [deeds] in chattels real. When the condition is in law, this is not necessary. Coke mentions, guardians in chivalry. Tenants by statute—merchant—staple & elegit as excepted from this rule, but these come under the second head viz chattels real, and are not proper by exceptions to the rule. Tenants in dower need not show deeds, because theirs is an estate in law. A release to one of two joint obligors is a release to both. So in Va a notice from one surety to the obligee of a bond operates as a notice from all the sure ties. 5 Leigh 153 Tate 880.

56 Any person interested in an estate may release though he be not an obligee of a bond &c. In 2 Leigh 29 a ward sued upon the bond of his guardian. The surety satisfied the ward, and took an as— signment of his claim and a re— lease of all suits and action upon the bond. It was decided that this op— erated as a release to the guardian. A covenant not to sue operates as a release only to prevent circuity of suits, & can only be such a release when the covenantors & coventantees are singly bound. Hence the covenant must be perpetual in order to operate as a release, because it would not otherwise prevent circuity of suits. If the covenant be broken, the covenan tee would have his action for cov— enant broken, and the damages would be just a set off to the suit of the covenantor. But a covenant not to sue one of the joint obligors would not operate as a release, because it is not coextensive with the bond, and thence would not prevent circuity of suits. 4 Bacon &, 6 Munford 6. By a statute of Va the assignment

57 of all bonds bills promissory notes & all writings obligatory is valid— & the assignees may bring an action in their own names upon such in— struments. Tate assignments. Lecture 22nd Nov 23 1846 Wherever there are joint obligers, they must be sued together. This is an indispensable rule. A defea— sance is a collateral deed executed in order to defeat some estate already granted. An estate executed by livery cannot be defeated by a subsequent defeasance. An assignee may sue in the name of his assign or although the statute permits him to sue in his own name, 4 Randolph 266. Also an assignee may still sue in Chancery and his legal right is

merely superadded by the statute. 5 Munford 23. (118) The trust of an executor shall pass to his executor, in case of death & so on ad infinitum. Our statute has made some modifications. It provides that, The court shall require the exec— utor of an executor to give bond in a sum sufficient to carry into execution all things mentioned in the first Testa— tor's will. & if he fail to give such bond at the time of qualifying for as exec— utor he shall be considered to have re— nounced all authority over the 1st estate

58 and an administrator may be appointed just as though the executor had died intestate. Remainders [blank space] A vested remainder is so limited upon a certain person upon a certain event, as to have a present capacity to take effect in possession should the particular estate determine. A contingent remainder is one limited to an uncertain person, or upon an uncer— tain event, or so limited as to give no present capacity to take effect should the particular estate determine. Contingent remainders may be divided into two great classes embracing [Fearne's] four. 1st When the contingency consists in the event's occurring at all, & where the event is collateral & independent of the estate. This embraces 1, 2, & part of 4. of [Fearne]. [blank space] 2ndly When the event is certain but may happen after the de— termination of the particular estate. This includes 3 & pt of 4 of [Fearne]. It has been questioned whether, an es tate "for 80 or 90 yrs if a man so long live" be an estate for yrs or freehold. The better opinion seems to be that it is an estate for yrs, and this is according to Coke. 1 C. Lyt: 612.

59 (Note F) Distinctions between a conditional lim itation & a remainder. 1 A cond: lim: puts an end to the particu— lar estate. A remainder awaits its termination. 2. A cond lim: maybe limited after a fee, a remainder never 3. A cond lim is created by will, or by con— veyance under the statute of uses, a remainder may be created by any of the common law conveyances. An estate to support a remainder must be a freehold at least if the remain der be a freehold. By our statute, a freehold may be created to commence in futuro by deed as well as by will. It has been said, that as this was the reason that a freehold was necessary to support a freehold in remainder, this might now be dispensed with. But not so, for a deed has no more force than a will under the same circumstan ces. A contingent remainder of freehold by will, must have a freehold to sup— port it. Therefore it is necessary in a deed. This statute may be construed to extend to the sales in case of executory devises, to estates created by deed. 3 C. Lyt 102 N Y. (137) The statute of 10 WM 3 wh places a posthumous child upon the same footing with those born in the life of the father is reenacted here. & our state applies to an estate created by any conveyance whatever. Tate Estates Tail.

60 Lecture 23. Nov 25. 1846. Why is it that a conditional limitation cannot be {executed} created by a common law conveyance? In a common law conveyance the freehold passes out of the grantor & vests entire in the grantee. & in such case the entry of the grantor would defeat the remainder but in a conveyance under the statute of uses, only so much of the estate passes out as is necessary to answer the use. There is still a scintilla juris left in the grantor. So by a devise, the estate need not take effect at once as the estate naturally descends to the heir in whom the freehold vests until the subsequent estate arises. (n S) Before the statute de donis, it is said by the annotator that no reversion remained in the grantor after a grant of a conditional fee. It would be more correct to say that the stat converted the mere possibility of reverter into a reversion. 1 Co Lyt 527. (143) 1. Co Lyt 157 n1 Knight service Rule in Shelly's case. Refer to Butters Notes 3 & 4. The origin of this rule has been assigned by Mr Justice Blackstone to two causes. 1st because the freehold would be in abeyance. 2nd in order to facilitate alienations. Mr Hargrave has assigned it to the prin— ciples of the feudal tenures, viz to preserve to the lord the wardship & marriage of the

61 heir, & to keep up the distinction between descent & purchase. The judges say that the inference in these cases is, that 1 the testator wished to make the heirs general of the devisee inher itable to the estate. 2 to give the devisee only a life estate. These being incompat ible, they supposed that he must have preferred the first & more general. Lecture 24th Nov 27 1846 See Tate Estates Tail for stats of 1776—85—& 1819. Also Tate Conveyances 8 Leigh 449. An executory devise is an estate in fee upon an event which determines an estate in fee, which event must happen during a life or lives in being &c 21 yrs afterwards. "Query without issue" meant at com mon law failure of issue, but by stat of Va means failure at death of ancestor. Refer to 9 Leigh.

62 Lecture 25th Dec 2 1846. [remainder of page is blank]

63 [page is blank apart from page number]

64 25 & 26 in one. Lecture 26 Dec 1846. All estates are derived by descent or purchase, that is by act of law or by act of parties, or by act of law concurring with act of parties. The Va law has abrogated the common law forming within itself a complete perfect code. 6 Rand 355 2 Call 370. It was drawn up by Mr Jefferson & so perfect was it that no dispute arose concerning its provisions until the case of Davis vs Rowe. Our law was taken from the civil law & it is to be interpreted by its analogies. 1 Munf 337. The persons & classes of persons who are to take are laid down with clearness & precision. As to the persons the statute lays down two rules—viz. 1st Henceforth when any person having title to any real estate of inheritance shall die intestate as to such an estate, it shall descend & pass to his kindred in parcenary in the following course, viz— 2ndly And where the children of the intestate, or his moth er brothers & sisters, or his gr mother uncles or aunts or any of his female lineal ancestors living, with the chil— dren of his deceased lineal ancestors male & female in the same degree, come into the partition, they shall take per capita, that is to say by persons, and where a part of them being dead & a part living, the issue of those dead have right to partition, such issue shall take per stirpes, viz the issue of their deceased parents.

65 Provisions of our stat: of Descents The 1st section provides as before mentioned under heads 1 & 2nd. It thus abolishes the common law principle that seizin is necessary in order that an estate may be transfered, here title only is necessary. It abolishes primogeniture, it is to descend to all and it abolishes the preference of males over females. It provides that then such title shall descend as follows. 1st to his children & their descendants if any there be. 2nd If there be no children or their descendants, then to the father (thus abolishing the rule that the the inheritance can never lineally ascend) if there be no father then to the mother brother & sisters if any there be. 3: If there be no mother brothers or sisters, the inheritance is then divided into two equal portions, one to go to the paternal, the other to the maternal line. (This abolishes the common law principle that he who inherits must be of the blood of the first purchasor.) each moiety being independent of the other shall pass as follows. 1 To the gr father

if any there be. 2 To the gr mother uncles & aunts. If none of these then to the gr gr father. Then to the gr gr mother brothers & sisters of the grandmother & father & so on.

66 The sections 11 & 12 provide for a different mode of descent when infants die seized of real estate received by descent gift or devise from one of the ances tors. If such infant die, the property shall descend only on that side from which the property was derived, provided there be kindred on that side within the required degree. Wh includes gr father mother uncles & aunts. If there be none of these, then it shall go to the other side if there be any of the required degree. If these fail, the property shall then pass accord— ing to the general law. No person shall be qualified to take unless he be in being & capable of taking at the death of the ancestor, except children of the intestate. At common law any person at what ever period, who would have taken had he been living at the time of the death of the ancestor, is capable of devesting the estate which has vested in another. In consequence of this, the same estate may be vested, devested, & revested several times. Ex: An estate descends to an only child who dies seized without issue— for want of an uncle in [esse], the estate vests in an aunt. An uncle is afterwards born, & the estate immediately vests in him while the estate of the aunt is devested. A sister is now born & the estate vests in her. A brother is after— wards born & the estate is now absolutely vested in him. Our statute has cut off the possibility of this fluctuation. It appears from the language of the statute the person must

67 be actually born in order that the estate may descend upon him. But this has been made a question in the case of a post humous child. When the inheritance is divided into two moie ties, if there be no kindred on one side it goes to the other. If none on either, it goes to the husband or wife as the case may be, if none of these, then to those who would have been heirs to the husband or wife had they died seized. This is another instance in which our law has departed from the common law; in Va it is almost impossible that lands should escheat to the commonwealth. The 15 sec provides that in case wh the the inher itance is [devested] to pass to the ascending & col— lateral kindred of the intestate, if part of the col— laterals be of the half blood {they should have only half portions} those of the half blood shall take only half portions, but if all be of the half blood, they they shall take whole por— tions, giving to the ascendants double portions. The 16 sect provides for the proportions in which they are to take. It provides that, when all of a class are living (a class comprehending all in the same degree) they take per capita. When some are living & some dead, the descend— ants of the dead take

the shares of their deceased parents. That is they take per stirpes. The statute does not contemplate the case when all are dead. In this case

68 the question is, whether they should take per capita or per stirpes. The only case involving this question is that of Davis vs Rowe 6 Randolph 355. [chart of Anthony Gardner's family tree follows] Anthony Gardner Propositus /\ /\ Sister of A.ty Brother of A.ty Deceased Deceased /\ /\ /\ Ly Rowe Mrs Rowe F Rowe/ /Mrs. Shack. Mrs. Davis /\ /\ Wm B./ /Sucy B. Martha/ /Anthony/ /Eliza/ /Judith/ /Catherine/ /Maria Anthony Gardner died in 1819 intestate & without issue & possessed a large estate real & personal. He had one brother & one sister, both of whom died before him, the brother left one daughter Mrs Davis. The sister left two sons, James & Frank Rowe who both survived A.G. & two daugthers Mrs. Boyd & Mrs. Shackelford both died before A.G. The former leaving two children, Wm & Lucy the latter six. The question was, whether Mrs. Davis should take 1/2 of the estate as representing her father or 1/5 in parcenary with her four cousins the

69 children of Mrs. Rowe. If the statute only altered the common law in some particulars, & left those on which it was silent to be regulated by the principles of that law, then Mrs. Davis was entitled to 1/2 on the principle of the jus represen tationis. But if the statute is understood as wholly abrogating the principles of the common law, & forming a complete new system in itself, then the case is to be interpreted by the principles & an alogies of the statute itself. The court took the latter view of the question, & determined that they could not look to the exploded theories of the common law to supply a clue to the interpre tation of the statute. They decided that one of the great principles of the law was "equality," another, that it is founded on the affections of the heart. & follows the current in its natural flow presuming that the nearest in blood is the nearest in affection. Upon this reasoning they founded this rule, "That where sev— eral persons are found in equal degree of relations to the intestate, they shall take per capita." Mrs. Davis & her four cousins were related in the same degree to A. Garland, & was presumed to have enjoyed no more than an

70 equal portion of his affection. Besides, being related in an equal degree, she was declared by the rules of common justice to be entitled to no more than an equal portion of that property, which descend— ed solely on account of that relation— ship. It therefore decided, that Mrs. Davis, Francis Rowe, & James G Rowe, should enjoy each 1/5 of the whole estate & that the children of Mrs. Boyd should take 1/5 & the children of Mrs. Shackelford 1/5. This decision settled the law on this pt. Lecture 27 Dec 4 1846 It will be recollected that the English canons of descent are 1st Inheritances shall descend to the issue of the person who last died actu— ally seized in infinitum, but shall never lineally ascend. 2. Male issue shall be preferred to female. 3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females alltogether. 4 The lineal descendants in infinitum of any person deceased, shall represent their ancestor, that is shall stand in the same place as the person wld have done had he been living. 5 On failure of lineal descendants or issue of the person last seized, the inheritance shall descend to the collateral relations.

71 being of the blood of the 1st purhcasor, subject to the 3 preceding rules. 6 The collateral [line] of the person last seized must be his next collateral kins man of the whole blood. 7 In collateral inheritances male stock shall always be preferred to female, except in the case wh the land was derived from the female. In the ascending line preference is given by our law to males over females, but this is the only case in which this preference is shown. Half blood as has been said take half portions except when all are of the half blood & then the ascendant takes double: [blank space] the most important exception to our general principle is in making the inheritance from an infant go to that side only from wh it came. The question decided in the case of Davis vs Rowe regarded collaterals only; it is yet undecided whether or not the same rule will hold in case of lineal descendants. Opinions are divided though the better opinion seems to be that the rule would hold. The case referred to will be seen on the off page. [decorative flourish]

72 [diagram of family tree follows] Ancestor. Explained in the /\ Junior Class Jno Dead Wm Dead March 13 1847. Son Son /\ The question to be decided here is, wheth er David shall take 1/2 of the estate as the representative of his father Jno, or 1/3 in par– cenary with his cousins Henry & Anne. By the principle laid down in Davis v. Rowe he wd take only 1/3. Comparison between the English Stat & ours. (1) The jus representationis at the common law was universal in the ascending the descending & the collateral lines— at the civil law it was in infinitum in the descending line, not at all in the ascending. & in the collateral extends to brothers & sisters chil dren alone. Our stat differs from the civil law in this, that it extends the jus representationis to

the descending & collateral line, but is only used to designate the prop ortion in which persons are to take, not who are to take. [6] Rand 371. Lineal ascent is permitted in Va. [See as] at common law. Seizin a facit stipitum was the pithy maxim of the common law: our stat only requires lawful title. 1 Lomax 594.

73 The Eng stat prefers males to females; our stat only prefers them in the ascending line. "Blood of first purchasor" The only trace of this doctrine in our law is in the case of an infant's [dieing] seized. "Oldest Male". Our stat abolishes primogeniture "Half blood shall never inherit &c" by our stat half blood take half portions. [family tree diagram follows] Mother /\ Bastard Brother of Both Propositus If bastard die seized without issue his mother would take double portions & brother 1/2 portions. If a legitimate brother die, the bastard wld take 1/2 portion & the mother whole: if the mother die the bastard & brothers wd inherit equally. Possessio fratris. By our law the younger brother of the 1/2 blood would take 1/2 portion & the sister double portion, whether the died brother was seized or not. Purchase: There are two important differences between descent & purchase. 1 Land (abolished) acquires by purchase a new inheritable quality, & will descend to the heirs general. 2 He who takes by purchase is not bound by the acts of his ancestor. It is therefore very impor tant to determine the difference between these two modes of acquisition.

74 As we have abolished the distinction between different sorts of heirs, this difference is of no importance here. By virtue of a statute of Va the heir is bound though not named, even for the simple contract debts, so far as assets descend. All estates are created by law, or by act of law concurring with the act of the parties. When blood is legally extinct it amounts to the same as if it were in fact so. When a person is attainted, he is not only disqualified to take, but to transmit, & two brothers of the same attainted father could not inherit to each other by the old com— mon law. We have abolished the doctrine of attainder in Va & the U States generally. The constitution declares that Congress shall have power to declare the punish— ment of treason, but no attainder shall work corruption of blood or {forfeiture} exc in the person's lifetime. In Va: lands escheat to the commonwealth only for want of heirs. The mode of proceeding in order to com— plete a title by escheat is briefly the follow ing. — The escheator shall take a jury of 16 returned by the Sheriff. & The inquisition shall be by indentures between the escheat or & any 12 or more of the jurors.

75 The counterpart of which shall remain with the foreman of the jury & shall be returned by him to the county court, & the other shall be sent by the escheator to the superior ct of law for the county where the land lieth within one month after the inquest taken: the escheator of each county shall within 60 days after said inquisition found transmit to the register of the land office a list of the tracts of land escheated by such inquisition. By the law of Va, bastards are capable of inherit— ing & of transmitting inheritance on the part of their mother, as if they were born in lawful wedlock. If the bastard dies without issue then &c 8 Leigh 379. Aliens may inherit in Va if they take oathin in ct of their intention of becoming citizens. If there be a possibility that the child of a mar— ried woman was begotten by her husband it will be presumed to be legitimate; if there be a clear impossibility, the child will be a bastard. [blank space] In Eng the sons of an alien born cannot inherit to each other because they never had in them any inheritable blood. Secus as to the sons of a person attainted who are born before the attainder of their parent as they once might have inherited from their father. In Va lands escheat to the commonwealth. In Eng to the lord of the fee. Tate 330.

76 An escheator is appointed in every county by the governor upon the recommendation of the county court. He gives bond in the penalty of $3000 & must act in person & not by deputy. The question has been raised whether the state takes the lands subject to all incumbrances. It is presumed that the commonwealth would take subject to all the trusts of the estate. In Eng trusts could not be enforced & hence this doctrine but here, as trusts may be enforced this doctrine is not applicable. This is confirmed by the opinions of Judges Lomax & Tucker. This is father strengthened by a stat of Va providing that lands shall escheat subject to debts &c. In case of debt: The creditor must proceed in the cty or superior ct agst the escheats. The escheator may plead the act of lim itations. Our law provides that when a testator directs land to be sold & the proceeds distributed his will shall be pursued. The question was raised whether the proceeds of land thus sold cld be given to an alien. The Ct of Ap— peals decided that the law was enacted to prevent aliens from holding lands; & as the land was sold & bought by a citizen the purpose of the law was fulfilled, & the alien might take the proceeds. 6 Munford.

77 There are two kinds of prescription, that of incorporeal hereditaments, which is the common law provision, & that by wh the recovery of land is barred wh is a statutory provision called the statute of limitations. Custom is an exception to a general law. Prescription, the extinction of a right by long possession & use of another. The doctrine that memory runneth as far back as the time of Rich 1st is erroneous, according to Lyttleton & Coke. There is no particular limit in Va. Custom cannot exist here, because in adopting the common law, we of course adopted none of the particular customs hence every usage must be within the memo ry of man. This however has been doubted, & it is possible that the next decision of the cts will be that contracts must be made subject to the usages of particular places. Lecture 28 Dec 9 1846. We have seen that in Va forfeiture for crimes is abolished, & also that there is no forfeiture for attempt ing to pass a greater estate than one possesses. Since the conveyance passes only such estate as the alienor possesses. But we have a statute saying that "No person shall convey or take any pretended title to any lands or tenements unless the person conveying, or those under whom he claims shall have been in possession of the same or the reversion or remainder thereof one whole year next before

78 and he who offendeth herein knowingly shall forfeit the whole value of the lands or ten— ements—the one moiety to the common— wealth—& the other to him who sues for himself & the commonwealth." But any person lawfully possessed of lands or tenements or the reversion or remain— der thereof, may nevertheless take or bargain to take the pretended title of any other person so far & so far only as to confirm his for— mer estate Tate 170 title Conveyances. This statute it will be observed forfeits the whole value of the land—but still the convey— ance is valid. 3 Call 362. The statute does not as at common law make the whole estate void, but forfeitable, unless it has been in possession a year, if there is a dispute about the title. 2 Co Lyt 260. A. The forfeiture for disclaimer of record though a— rising from feudal [tenure] exists in Va. A species of forfeiture not mentioned in the text is when waste is committed by a partic ular tenant, —forfeiture of the place wasted. In Va an alien is allowed to take & hold lands, pro— vided he goes into Ct & openly declares his in tention of becoming a citizen. For the law [upon] the question whether or not a man is allowed to plead his own insanity to avoid a contract, see Toublanque's equity 65 Notes D & L.

79 At law no feme covert can take from her husband, but a ct of equity will allow her to receive any bona fide gift or grant from him. 2 Story's equity 670. A grant to an association not incorpo— rated is void. The question arises usual ly in cases of bequest or devise. 4 Wheaton. 4

Leigh 61 & 427. In pleading persons & things must be de— scribed with the utmost precision, but in a grant any description sufficient to indicate the person & thing with cer tainty is sufficient. 1 Chitty on pleading 320. Lecture 29 Dec 11 1846. Our stat declares that there shall be no for— feiture for attainder, but when a felon is executed his property shall descend to his heirs as if he died intestate. The question here arises whether a felon after convic— tion can convey his lands &c. Jdge Tucker thinks not, but that they must descend as if he had died intestate. This doctrine is questionable, as it is a principle of our law that the felon should be allowed any consis tent liberty with regard to his property. In Va Aliens may make a valid con veyance before proceedings instituted by the escheator. Tate 42. In Va a wife may bar her dower by uniting with her husband in a deed

80 executed before two justices, wh justices must act together. & the wife must be examined privily & apart from her husband & must declare that she willingly signs seals & delivers the deed & that she does not wish to retract it, which must be pro— ved by the certificate of the justices. Tate 169. Bacon's abrdg just of peace E. 5. As to how far the certificate must conform to the language of the law see 4 Leigh 224 —498. 11 Leigh 294 & 12 Leigh 445. The statute of conveyances made in 1745 required a deed to be indented seal— ed & recorded. The law was adopted in its present form in 1785. & even before this it seems to have been only necessary that it should have been mentioned in the instrument as an indenture. 2 Wash 63. Our present stat requires the deed to be de— livered written sealed signing not being necessary & in order that it may be val— id as against creditors & subsequent pur chasors, for valuable consideration with out notice, it must be recorded. As the statute was before the revisal of 1819, it declared that a deed should not be valid as against creditors & subsequent purchasors unless recorded, but did not speak its effects if it were recorded & in 3 Leigh it was decided that recordation

81 was not constructive notice. But at this day such a construction could not be made, as the stat declares that wh so recorded it shall be valid as against subsequent purchasors & creditors. The construction in this case is apt to confuse the student, as it was deci ded since 1819. But in truth the cause of action arose before 1819, & it is strange that the parties did not no— tice the change in the law. The Va stat as before remarked, requires only that the deed be sealed & delivered not sign ed. But as our stat of frauds declares that no conveyance of lands &c. for a longer term than 1 year shall be actionable unless such contract be in writing & signed by the party charged thereby, it wld seem that in order to bring an action upon a deed it is essential that it be signed but that it is valid between the parties with out signing. It wld seem also that a

fem must sign, as the certificate of the jus tices declares that she signs seals & deliv ers the deed, & therefore this wd be neces— sary in all cases where the deed is made before two justices. 4 Leigh 498. Under our law this seal is a mere scroll & it has been said that our law is a mere confirma tion of the common law in this respect,

82 (...) though in its original it was some soft substance. 1 Wash 1 Munf 487. 4 Munf 44 2 (...). This scroll with the word seal written in it is not sufficient, but the seal must be acknowledged in the body of the instru ment. But if the seal be acknowledged in the body of the deed the scroll without the word is sufficient. 7 Leigh 301 9 Leigh 511. Whether an acknowledgement of the seal in the clause of attestation be sufficient is yet undecided. In a case of emancipation it was decided that this was sufficient & this case turned upon the fact that the witnesses proved in court the recogni— tion of the seal by the party; so that this decision settled the question. Statute of fraudulent conveyances We have the statutes of 13 & 27 Eliz. incorporated in one but retaining the characteristic differences of both. Our stat provides that "Every gift grant or conveyance of lands tenements or hereditaments or goods & chat tels &c. to the intent or purpose to delay hin der or defraud creditors of their just & lawful actions &c., or to defraud or deceive those who shall purchase the same lands tenements or hereditaments &c. shall be from henceforth [denied] & taken only as against the person or persons &c. who by such guilty & covinous

83 devises & practices as is aforesaid, shall or might be in any wise disturbed or hin— dered, delayed or prevented, to be clearly & utterly void. Any pretence, colour, feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding. Provided that this act shall not extend to any land goods or chattells, or any rents commons or profits out of the same wh shall be upon good consideration or bona fide lawfully conveyed. or [blank space] to any per— son or persons bodies politic or cor— porate towns. Tate 178—183. A more apt division of the conveyances com ing under this stat than that contain— ed in the note on the text is, into— 1. Those men with intent to defraud creditors & subsequent purchasors. 2. Those made with no fraudulent in— tent, but conveyances merely volun tary. Lecture 30th Dec 13 1846. Conveyances intended to defraud credi— tors & subsequent purchasors are al— ways void. It has been said that our law only confirms the common law in this respect, as that would have done the same. 2 Hen & Munf 302.

84 But the common law only extended to subsequent creditors, while ours extends to all creditors. If the conveyance be intended to defraud creditors it is void, however valuable the consideration; but this supposes that the grantee is privy to the fraudulent intent. In a case reported in—[blank space] a bona fide creditor took a deed of trust from the debtor, & agreed to hold it without interest for ten years. This was considered a sufficient participation in the fraud to vitiate the deed. In all cases both parties must be privy to the fraud in order to affect the par —ty who is innocent of any such fraudu— lent intent. 7 Peters 393. The badges by which a fraudulent intent may be ascertained, are, Where the grantor reserves nothing to himself, not even his apparel. 2. Where the grantor remains in possession. 3. Where there is a secret trust be— tween the parties, & where the con veyance was made in secret. A second division is, voluntary convey— ances. A good consideration is one of natural love & affection, in contra

85 distinction to valuable consideration, which means, money lands &c. &c. Our stat does not mention a voluntary conveyance, but only such conveyan— ces as tend to defraud creditors & subsequent purchasors. But the courts have construed voluntary conveyan— ces as coming within the terms of the statute. It has been presumed that he who gives away his estate intends to defraud his creditors & subsequent purchasors. Some hold that this pro— vision extends to all debts due at the time, however small. With them the doubt is only as to the subsequent credit— ors, & they consider indebtedness at the time as prima facie evidence of fraud, especially if the debt be considerable. If there be no debt, a fraudulent in— tent may be proved by subsequent circumstances; as if, the grantor im mediately after contract a large debt Kent says that if the person be in debt— ed at the time, it is an inference of law that fraud is intended, but the fraud must be proved as to subsequent debts. Others are of opinion, that fraud must always be proved, & if proved it is so to all the world. They say that if the man be indebted at all

86 it is prima facie evidence of fraud, but that this may be rebutted by proof to the contrary. As, if the debts be inconsiderable, or but a part of the estate be grant— ed, or a provision be made for present debts or there be estate sufficient left to pay all the debts. If there be no debts at

the time they say that a fraudulent intent may be proved, as by an immediate accumulation of debt, or other badges of fraud. This latter opinion is that adopted in Va. & it seems to be the more reasonable one. That a voluntary conveyance is void as against subsequent purchasors with— out notice, is admitted by all, for it comes within the general policy of the stat, & is shown by the proviso of the act [blank space] 3 Cranch 156. 3 Rep: 80. There is however some dispute as to the validity of the conveyance when the sub— sequent purchasor has notice of the conveyance, but the better opinion seems to be that such voluntary conveyance is good. 12 Johnston 557. The later English decisions however are to the contrary as we have seen in Coke. As between the grantor & grantee the conveyance is always valid, & thus the fraud is often turned to the [det] riment of those who are the workers of it. 4 Rand 375. 10 Leigh 329. 8 Leigh 512.

87 The principle contained in the proviso of our act allows a man to make a deed preferring some creditors to others. Nor does it vitiate a deed that those creditors agree to release a part of their debt. 8 Leigh 270. We have also a provision agst usury— it declares that "Such contract for more than the legal rate of interest shall be void," and punishes him who lends money at such rate by the for— feiture of double the amount of the debt. One moiety to the commonwealth & the other to the informer to be recovered with costs. It further provides that any borrower may exhibit his bill in chancery against the lender & compel him to discover upon oath the money or thing lent. &c. Tate 514. Lecture 31 Dec 16 1846. One of the earliest acts of the legislature was a provision that all views [essoins] & vouchers should be abolished, but the warrantia chartae was not mentioned. The feudal primciple that the warrantee should recover other lands of equal val— ue from the warrantor in case judge ment should be rendered against him has given way to the modern person al covenant by which the person recov— ers the value of the land, but not the

88 land itself as in the covenant real. The cove— nant real of the common law is now obsolete, but the learning is useful be— cause it serves to explain modern cove— nants. A grantee of land with warran ty had 3 remedies. 1 by rebutter wh he was impleaded by the warrantor or his heirs. 2. By voucher when a third person disputes the title. 3 By writ of warrantia char— tae. [blank space] Voucher, we have seen, has been ta— ken away by the statute. Warrantia char— tae was at first a supplementary rem edy to give a lien on the lands from the time of voucher & the tenant was afterwards to call in the voucher to secure the title, but it is used as a principle action in an assise, writ of entry &c. Bacon's abridg warranty no 10. In these possessory actions,

when the remedy was speedy, the remedy upon the judgement upon the writ of warrantia chartae was sufficient. Some have thought that as it was supplementary to voucher, the abol ition of voucher also abolished war: ch: but this would rather be an argument for its greater force & its more frequent use. The ancient covenant real real may exist in Va. & as it has not been abolished by stat there is no reason why this remedy shld not exist. In a case decided in Va. it was pleaded that a certain covenant was a warranty & the ct decided

89 agst this plea upon the ground that the word defend was used, wh was never used in the ancient [covt] real. 9 Leigh 448. The words "grant & demise, yealding & paying" are said to create a warranty by implication but this must be understood of a leasehold estate for years not of a freehold. The reason that a warranty descending upon an infant does not bar him, is, that the law does not impute any laches to this class during the life of the ancestor. This full age is only required in collateral warranty, because in lineal the right des— cends at the same time with the warranty. We have a stat wh declares that no aliena— tion or warranty shall operate to pass [agr] estate than the grantor may lawfully con vey, & therefore the warranty does not bar the heir or remainderman. But if any heritage descends from the warranting ancestor the heir is barred to the extent of that heritage— 1. If a heritage descends afterwards it must be ap— plied to the purpose of compensating the grantee of the estate which the ancestor cld not rightful ly convey. Tate 179. At the common law, both lineal & collateral warranty barred the heir, with or without assets. The Stat of Gloucester altered the law in respect to tenants by the curtesy— & by analogy to this stat the judges constru ed the stat de donis as making lineal

90 warranty a bar only when assets descend— ed, because the stat said that the estate shld go absolutely to the issue per formam dom: notwithstanding any act of the ancestor but collateral warranty was left as at com— mon law, until the 4 & 5 Ann wh provided that all warranties by tenant for life should be void. & that all collateral war— ranties of any lands tenements or herid itaments by any ancestor who has not an estate of inheritance in possession of the same shall be void against his heir. In a warranty an action of covenant lies not. 9 Leigh 448. In order to make an ancient convenant real, the terms used must be the same as required in war— ranty. ∴ I & my heirs will warrant; not I & my heirs will covenant to warrant. In all these covenants binding the per son, the heirs are bound only when named, but executors or administrators are bound whether named or not, ex cept in some personal covenants to be performed during the life of the deceased, & there has been no breach during his life— time. [blank space] The

covenant of seizin is vio lated, if atall, at the time of making the conveyance, & therefore no assignee of such covenant can have an action upon such covenant, as the land is

91 a mere chose in action, & no chose in action can be transferred. 2 Johnson 1 14 Johnson 253. [blank space] Tortious eviction is not included in the covenant for quit pos— session & enjoyment, but a legal eviction only. 2 Johnson 4. All that the covenant means is the mere quiet enjoyment, there is no warrant of the title. 5 Johnson 121. The covenant that the lands are free from incumbrances, is violated by outstanding judgements, or unsatisfied mortgages. If the grantee has paid these, he is entitled to recover the amount from the grantor in an action of covenant, but if he has not paid them, he is only entitled to recover nominal damages. Otherwise, he might re— cover against the grantor & shall have the judgement & mortgage outstanding against him, which wld be inconvenient. Lecture 32 Dec It is not now usual in Va to insert a covt in deeds. One sometimes used is "[to] warrant & forever defend the title against all persons" but its precise import is not determi— ned. It means anything or nothing, as the parties may agree. The value of the property is to be estimated by its value at the time of purchase, & the best criterion is the purchase money.

92 The interest, so long as the covenantee is liable for rents & profits, & his costs. This view of the estimate of value is jus— tified by several considerations. 1st because it was this wh obtained in the old covenant real or warrant. Bracton bk 5 Viner's abrdgmt. 1 Rive's hist of the Eng law. 448. 2 Because the introduction of personal covts is nowhere hinted at as abro— gating the rule of the common law as to covenants real, but we have several cases to prove that it still exists the same. 3 Because sanctioned by public conveni ence. The value of land is liable to fluc— tuation & especially in our country. 4 Because confirmed by decisions in all the states in which the question has arisen. 2 Rand 152 2 Leigh 451. 11 Leigh 89. 2 Robinson 374. Feoffment. For form of ancient deed of feoffment see appendix to 2 Blackstone no 1. Feoffment was originally made on the land in the presence of the other tenants of the lord who were the peers of the lords court, tried all excuses arising between the lord & his tenants, & hence attested the facts. Afterwards strangers were al lowed to attend as witnesses, though it was still necessary for the peers to be present, as they had to try the cause

93 afterwards, & in those days of simplicity the only evidence was that of the senses. Thence it was that livery in one county could not include land lying in another because the peers of the county were not supposed to be cognizant of facts in other counties. The presence of the peers was required for the benefit of, the lord, the tenant & themselves. For the benefit of the lord because they might inform the lord if the proposed tenant were a secret enemy of the lord. For the tenant that they might be witnesses that the land was granted. & for themselves, that they might determine who were to set as peers of the court, & entitled to its privi— leges. It is prudent to endorse on the back of the deed, the fact of a feoffment the time, the place, & the names of the persons present. A statute passed in Va in 1705 provides that where any deed or conveyance shall be acknowledged or proved in order to their being recorded, the livery of seizin there— upon made, in such cases where the law requires the same, shall in like manner be acknowledged or proved & shall be recorded together with the deed or conveyance whereupon it shall

94 be made. The effect of this statute according to Jdge Lomax, is, to substitute this evidence of livery, for the livery itself. But it seems there is no ground for this, as the stat might will mean it only [as] an evidence that such livery has taken place. A freehold can't commence in futuro, for in the 1st place, the very object of livery would be defeated, as this cld be no evidence or notoriety for which this ceremony was intended, & 2ndly the free— hold wd be in abeyance, wh the law wd never permit if it can be avoided. The first of these reasons was of some weight anciently, but since register acts have been introduced it is of no importance. The second reason is now the opera— tive one, since, if the freehold were in abeyance, there wd be no one against whom actions cld lie &c. But this rea— son extended only to those cases in wh a dispute might arise. In the case of a rent de novo, wh there is no possi— ble cause of actions, this reason wd fail. A stat of Va provides that a freehold es— tate may be made to commence in futuruo by deed as well as by will. By conveyance operating under the stat of uses a freehold might always be made to [commence] in futuro, not only because no livery

95 was necessary, but because also the estate remains in the hands of the grantor or feoffer to uses until the conveyance takes effect. 2 Leigh 662. Lecture 33. Dec 1846— In Va it is usual for the vendor to cove— nant for the acts of every body. 6 Leigh 269. What effect our statute, permitting freehold to commence in futuro, may have in dis pensing with livery of seizin admits

of question. The stat must be understood as applying to those cases in which livery of seizin was necessary. Feoffment being the only conveyance in wh this ceremo— ny was necessary, it must apply to this class of conveyances. But as a feoffment for valuable consideration will operate as bargain & sale, & for natural love & af— fections as a covenant to stand seized to uses, the statute must be understood to apply to feoffment merely voluntary without any consideration, since this was the only estate which could not be made to commence in futuro. Livery of seizin is therefore wholly abolish ed by our statute. When a man has two ways of convey ing an estate by the common law, & his conveyance is defected one way, it may pass by the other, provided it be ap—

96 plicable. But if one method be by common law & the other by stat of uses it shall not pass by {one} the latter if the {other} be [defeeted]. This doctrine of Lord Coke is now over— ruled {by Lord Coke} in Eng & Va. 2 Leigh 662. Jdge Tucker thinks that our statute {forbids} disqualifying any one from passing a greater estate than he has by any con— veyance whatsoever applies only to particular tenants, & not to one having a wrongful estate in fee, in which case, by the common law, the person so possessed, could pass his estate to any one, subject to be defeeted by the rightful owner. The statutes of 495 Ann & 11 Geog 2 have been reenacted in Va. The statute provides that no attornment shall be necessary, but that if the tenant pay rent to the former landlord he shall not suffer by it. For the benefit of the landlord it is enact ed, that if the tenant attorn to a stranger it shall in no wise affect his interest as to the land or rent. Tate 175. Lease. No set form of words is necessary to make a lease, but the intention of the par— ties will be pursued. 5 Rand 572. Though personal property be passed with the land & form some part of the consid eration, yet the whole rent issues out

97 of the land, & distress must be made on the land for the whole. By Va stat of frauds no action can be maintained on a contract or agreement for the lease of lands for longer term than one yr unless such contract be in writing & sign ed by the party. By the statute of con— veyances all conveyances of land for a longer term than 5 yrs must be by deed & in order to be valid agst creditors, & sub— sequent purchasors for valuable consid eration without notice, must be left with the clk for recordation. A covenant to repair lands binds the tenant to rebuild should the buildings be destroyed. Whenever the contract passes an interest, the day on which it is made is included by the words "from the date", because an instrument is to be construed most strongly against the grantor. 4 Kent 95. If the tenant has enjoyed the land unin teruptedly, he cannot plead "no title" wh the landlord applies for the rent. 1 Washington 90. But if the

interest passes first, & should afterwards determine, he is not estoped to plead "nil habuit" 2 Leigh.

98 Lecture 34. Dec 1846. Before the stat of 11 Geo 2 it was a dispute in Eng whether an action for use & occupation wd lie where the contract was without deed. In Va it has been decided that the action lies independent of the statute whether the contract be express or implied. 4 H & Mu 168. 1 Munf 407. 1 Term Reports 407. We have a stat allowing testamentary guardians to lease the wards lands during infancy. Guardians appointed by the court can make leases to continue un— til the infant is 14 yrs of age, at which time he is entitled to choose a guardian under the approval of the court. There seems to be no doubt notwithstanding the English case mentioned & our stat that any guardian may lease during the wards infancy, provided the guardianship continues so long. In the case of guardian appointed by the court, this period extends to the age of 14 yrs. The rent may be reserved to the guardian or infant, but to whomever reserved, if paid to the guardian it is sufficient. We have a statute declaring that if a creditor appoints his debtor executor, it is no release of the debt. Tate 405.

99 Lecture 35 Dec 1846. [stylized writing in box] RELEASE Where a party is in by wrong, a release to him operates by way of entry & feoffment. But when he is in by title it operates simply as a release of all right to the land: Def of release by way of extinguish— ment, with examples. Lecture 36 Dec 1846. [large stylized writing] STATUTES of frauds & conveyances. These statutes involve two branches in Va embraced in two statutes in Eng in one that of Char 2. 1st relates to contracts for the possession of lands. 2 to actual conveyances. The 1st known, together with the stat of fraudulent conveyances, as the stat of frauds. The second as the statute of conveyances. Its purpose was, to pre— vent supposititious sales & purchases from being acknowledged & proved save by a certain method prescribed by the statute. The statute applies both to personalty & realty but with the latter we are now concern ed. Before considering our stat, we will take a view of the Eng Stat. It provides that—

100 1 Section. All leases, estates, interests of free— hold, or terms for years, or any uncertain interest in lands, by parol & not in writing signed by the parties, shall have the effect of tenancy at will only. 2 Section. Except all leases not exceeding three years, upon which full 2/3 of the annual value of the thing demised shall have been reserved to the landlord during the term. 3 Section. No lease estate or interest in lands of freehold or term of years, or any uncertain interest (except copyhold interest) shall be assigned granted or surrendered unless by deed or note in writing, signed by the party so assigning, or by some person legally authorized by him, by writing, or by act or operation of law. 4 Section—No action shall be brought upon any contract or sale of lands, or any in— terest in lands, unless the agreement be in writing & signed by the party so charged therewith, or some person by him legal— ly authorised. The 1 & 2 sections have no parrallel in our statute. The 3 is analogous to our statute of conveyances. The 4 is similar to our statute wh provides that "No action shall be brought to charge any person upon

101 a contract for the sale of lands tenement or hereditaments, or the making a lease thereof for a longer term than one yr, unless the promise or agree ment be in writing signed by the party to be charged therewith, or by some other person by him there un to by him legally authorised." The differences between our statute and the English are, 1 The English statute allows no action to be brought upon any contract for the sale of lands or any inter— est in lands. Our statute provides that no action shall be brought upon a con— tract for the sale of lands &c. or the making a lease for more than 1 yr, not extending to all interests in lands, as the English statute. 2 Our statute speaks only of the promise or agreement which dispenses with the consideration. & In England the whole agreement must be written. Construction of the Statute The writing must be signed, but it need only be signed by the party charged therewith. 14 Johnson 486. There is however one very excellent authority to the contrary. Lord Reedsdale held that a contract ought to be mutual, other— wise a person might procure another sig— nature to a contract & have it observed

102 or not as best suited him. But it is now settled that the signature of the party charged is sufficient. 3 John— son's Cases 60. [blank space] The part of the instru ment on which the party's name must be signed is not material so that the signature be applicable to the whole instrument. 3 Atkins 303. 3 Hen & Munf 187. The signature may be affixed by a le— gally authorised agent, but what au— thority shall be deemed sufficient is not laid down by the statute. The courts of law have decided that parol authority is sufficient. An auctioneer is the

agent of both parties & the parties' names written by him in his book is sufficient to bind both. 2 Taunton 13. 6 Leigh 23. If the auction— eer's clk. write them in the presence of the auctioneer it is sufficient. It is hardly necessary to add that the agent must be a third disinterested person. It has been decided that a deputy sheriff selling the estate of an insolvent debtor is such a third person. 6 Leigh 23. Sales made under the authority of a court of chancery are not within the statute because sufficiently evidenced by the rec— ord of the court. 6 Leigh 24. The paper upon which the auctioneer

103 enters the names must contain the terms of the sale. 7 Leigh 170. The signature is entirely sufficient though it be in pencil mark. 14 Johnson 491. Form of Contract No particular form of words is necessa ry to make a good contract. But the terms must be clearly set forth either in the agreement or in some other paper referred to, & unless referred to the connection between the papers cannot be proved by parol evidence. 2 Lomax Digest 86 1 Johnsons Reports 281. When the terms are uncertain parol evidence will not be received to prove the agreement. Because this would open the door to all the [coils] which the statute was made to remedy. Upon these principles a valid sale of land may be made by letter provided the terms be set forth in an instru ment referred to by the letter. 3 Browns Reports 67. 4 Munf 77. 6 Munf 83. Consideration The contract must be made upon valuable consideration, or it is void as a nudum pactum. If the contract does not meet with the requisitions of the act it is wholly void in law. But equity will sometimes relieve in

104 cases of the kind. There are two classes of cases: 1 Where fraud has been practiced by the party. 2 In case of part performance by one of the parties. When one of the parties has received a part of the consideration on his part, it would be unjust that he should then take the benefit of the statute. This would be allowing fraud to pre— vent perjury. But when a specific performance of a parol contract has been demanded, the terms of the contract must be clearly & strictly proved. Requisites of a specific performance— 1st The contract must have been partly performed by the person claiming the performance & no other. 3 Randolphs reports. 2. The performance must have been in con— sequence & in view of the agreement, & such as [without] the agreement would not have been performed. 3. It must be such an act as cannot be compensated in damages, & would ope— rate as fraud upon the person so {conveying} performing. 1 H & M 92. 1 Shaw 41. 1 Story's equity 67. Trusts are not embraced within the terms of our statute, it referring only to sales & leases; but the English statute speaks of all manner of interests, & therefore trusts would be [embaced] within its

105 provisions, but in Va it must be a very clear case of trust, & not a contract, or it would come within the statute. 1 Munf 513. Payment of purchase money is not such a specific part performance as will induce the courts to decree a performance by the other party. 5 Munf 318. 5 Rand 355. In Eng & in Va the cts have somewhat receded from the strict provisions of these statutes. Which is to be regretted, as they are eminently useful. 5 Munf 317. 1 Munf 517. The courts ought to exercise in all cases a sound discretion, & ought not to grant a specific performance when unreasonable. As if the contract be iniquitous, or not of sufficient consideration, or there be unnecessary delay on the part of the plaintiff &c. Newland on Contracts. 6 Johnson 317. Lecture 37 Jan 1 1847. For effect of cancellation see 10 Leigh 61. (366 page n S of Coke) In considering this note observe that bonds are no charge upon the real or personal estate before judgment in the lifetime of the obligor, but binding im— mediately upon the heirs, after death, if named, & since our late statutes whether named or not. Sessions acts of 41 & 2. The statute of Wm. & Mary on fraudulent devises has been reenacted in Va. in substance. Tate 283.

106 The stat of 4 & 5 Ann provided that, though the conditions of a bond be forfeited, yet the penalty shall be discharged by the ten— der of the sum due with interest. Tate 122. Statute of Conveyances. The Statute of Conveyances contains six dis— tinct provisions, & may be compre— hended under six different heads, viz 1st. No estate of inheritance or for a longer term than 5 yrs can be conveyed except by deed, that is by an instrument in writing, sealed & delivered. 2nd. The instrument must be acknowled or proved according to the statute, & to be val— id as against creditors & subsequent purcha— sors for valuable consideration, it must be lodged with the clerk for recordation. 3rd. Marriage settlements, deeds of trust, & mort— gages are void as {against} to creditors & subse— quent purchasors unless recorded, or lodged with the clerk of the county for recordation. 4th. All others conveyances & agreements respecting lands, if recorded within 8 months from the date thereof will take effect from the time of delivery, but if not recorded within this time, they take effect from the recordation, as marriage settlements, deeds of trust, & mortgages allways do.

107 5th. The place of recordation is the clerks office of the county where the lands or part of them lie, or if it be personalty it shall be recorded in the county where it remains, & if such property be removed to another county, & the said deed be not certified to the court of that county, & lodged with the clerk to be rec— orded within 12 mts it shall be void as to all creditors & purchasors without notice. 6th. It must be acknowledged or proved by three witnesses before the court of the county, or in the clerk's office where it is recorded, or before two justices, or by the statute before commissioners appoint ed by the court. If the person be not resident within the U. States, before any court of law, before the mayor or chief magistrate of any town corporation &c. where he may reside. The seal shall be a scroll which must be acknowledged in the body of the instru ment as a seal 2 Leigh 195. 7 L. 301. 9 L 511. A deed once delivered is valid forever & hence a grantor cannot take back a deed & redeliver it upon condition. 1 Johnson's Chanc rep 251. The deed is good if the parties sign it, seal it, & leave it at the place without any express delivery.

108 A deed may also be made to a third person without words if he be willing to receive it. 13 Viner's Abridgement. 23 K 12. 3 Coke 26. The delivery may be made on condition if the condition be expressed at the time of delivery. 1 Johnston's cases 114. If a deed of bargain & sale be admitted to record on the acknowledgement of the grantor & afterwards the grantor prove the acknowledgement & take the deed, it is valid. 4 Leigh 566. But unless such acknow— ledgement be notified by the grantee in the clerk's office, a subsequent deed will have the preference over this. Lecture 38 Jany. 4 1847. Our courts seem inclined to allow inte— rest in shape of damages, though it amount to more than the penalty on the bond which has been forfeited. This is the only case in an action of debt in which the amount of dama— ges claimed is material. In other cases it is merely nominal. Statute of conveyances continued Second clause. If the deed be deposited with the clerk it will be sufficient & he will be responsible for any injury that may result from a failure in duty on his part. 1 Randolph 102.

109 But it has been decided that it must be lodged with the clerk not merely left at his office. 2 Grattan 471. Admitting a deed to record is a mere min isterial act & gives it no additional force. 2 Henning & Munford 132. 7 Leigh 705. If the court refuses to admit a deed to record the proper remedy is a mandamus obtained from a superior court, which is a mandate to the lower court to proceed with the business. 7 Leigh 705. If it be improperly admitted to record, as for instance recorded in a wrong county or in an improper manner, it is void as a recorded deed. 2

Washington 64. 2 Grattan 16. But if a deed be found recorded, it is prima facie valid until otherwise proved. The certificate of the clerk is prima facie & conclusive evidence of the fact of recordation, but as to the time of recordation it seems not to be conclusive. 1 Douglas 67. A nonrecorded deed is void as to all creditors but only void as to subsequent purchasors without notice. If he has notice of the first conveyance, it is his own fault if he ac— cepts a second. 4 Randolph 211. Purchasors at a creditors sale will not come under the description of those having notice, for they stand in the

110 shoes of the creditor. A purchase for valuable consideration is considered as complete in good faith when all the purchase money is paid & the deed accepted. If the party has paid the purchase money & then has notice before the delivery of the deed, it is sufficient notice, & he must recover his money as he can. Atkins 384. 1 Washington 41. 1 Munf 38. 3 Munf 196. But notice must always be clearly proved, there can be no presumption of notice. 6 Munf 44. Marriage Settlements &c. This provision in regard to marriage settle— ments has been construed to intend the creditors of the grantor. In a settlement on a husband by a wife, the creditors of the [blank space] 5 Cranch 154. 5 Rand 311. The contrary was decided in Va in a case reported in 1 Grattan 357. Also all deeds of trust & mortgages must be recorded, & this whether of personal or real property, & until such recordation are of no validity as to creditors & subsequent purchasors. 3 Cranch 157. If slaves are mortgaged & the deed recorded & then they are removed to another country & the deed be not recorded in that country within 12 mts a subsequent conveyance or charge will

111 have the preference. But though 12 mts have elapsed yet if the deed be recorded before there is a specific lien upon the slaves, the preference will not be given to this subsequent lien, nor will such preference be given if an action has been brought within 12 mts to set aside such lien, because this is equivalent to recordation. In general the date of a deed is that which it bears upon its face, but a different date may be proved. 2 Coke 43. If it has no date or an impossible date, its delivery will be its date. If date be impossible or there be no date & reference is made to to the date, it will apply to the time of delivery. But if reference be made to the date, & there be a date, this is the true date of the deed. If a deed be reacknowledged & recorded within 8 months it will be good to date from the reacknowledgement. 2 Call 125. But if the party wishes to take advantage of this he must strictly prove the date of the reacknowledgement or the deed will have its usual date. The 5 & 6 branches need no remarks, ex— cept that, when a parcel of land is divided by a navigable river which is at the same time

the boundary of the county, it will be considered as two separate parcels, & the deed must be recorded in each county.

112 Lecture 39 Jany. 6 1847. Conveyances under the statute of uses. The English statute of uses is strangely misrepresented by the anno— tator when he confined it to lands, because it extends to all manner of real estate. It provides that, henceforth when any person shall be seized of any manor honors rents remainders reversions or any other hereditaments to the use confidence or trust of another, by feoffment bargain & sale, fine, recovery, or any means whatever, such person, so entitled to the use, shall be deemed to be seized of the legal estate in possession of the land in like manner as he was seized of the use. We have in Va a stat somewhat similar but some more limited in its terms: including only land, & embracing only a few specified conveyances. Our stat enacts that. By deed of bargain & sale, lease & release, or covenant to stand seized to the use; such person entitled to the use shall have the possession of the land just as firmly as if he had been enfeoffed with livery. Now for the Eng Stat: Among the several conveyances operating under the stat some operate by transmutation of the possession. Others without such transmutation. To the 1st class belong feoffments, fine & recovery. To the second, Bargain & sale, covenant to stand seized, Lease & release. Declara— tion of use, & appointment to use by virtue

113 of a power. The differences between these may be made plain by examples. At common law if A bargained with C to sell him lands without livery C had no legal estate, but merely a use. A right to the profits. The statute transferred this possession to the use & gave C a legal estate. This is the effect of the statute in the simple case of a use. Now as to the first class of conveyan ces by which a transmutation of the possession is effected. Requiring in the first place all the forms of a com— mon law conveyance to make a grantee to uses they would not be likely to be much employed. The latter opera— ting without any transfer of the posses— sion, being capable of being accomplish ed without going out of the room are now almost exclusively used, & the former lost sight of. To illustrate A wishes to convey to B. He has to ways by which to do it. He may enfeoff C to the use of B. & the statute executes the posses— sion to the use; or he may use any other common law conveyance: in which some ceremony is required. But it would be absurd for him to go through this troublesome process when he has a

114 method of direct conveyance without any transfer of the possession atall. Thus A bargains with B for valuable consideration that he will stand seized to the use of B & immediately the statute executes the possession to the use without any transfer. In all cases where there is transmutation of the possession some third person is intro duced to complete the conveyance. But when there is a variety of uses to be served, it is best to have such a feoffer to (...). Now with regard to the English conveyances under the statute of the second class. 1 Bargain & sale. The English requisition of enrollment will strike the student as similar to our statute of recordation. Some differences will however be observed. Thus.. The Eng provision relates only to freehold estate, & these conveyed by bargain & sale & for want of enrollment makes the conveyance void as between the parties. Our statute relates to all estates in land of a longer duration than 5 yrs & extends to all manner of con veyances, & is valid between the parties whether recorded or not. A valuable consideration is indispensa ble to bargain & sale, & some have thought that it must be a money conside

115 ration, among whom is chief baron Gilbert. 2 Covenant to stand seized. This conveyance is founded entirely on natural love & affection. There must be some near relation or a prospective marriage. It must be natural love & not mere friendship. Gilbert 425 n 6—100—145. 3 Lease & release. This is sufficiently explained in the note to the text. [4] Declaration of uses. Scarcely ever used. It is applicable chiefly to [a] common law conveyance to use, & is an after means of directing the execution of the use. This is its technical sense, though in fact all these conveyances are declarations of use. [blank space] 5 Appointment of uses by virtue of a power. The power must be executed by the instrument mentioned in the deed conferring the power. 8 Leigh 23. When a power of execution was given in writing of the nature of a will, it was held that it must be executed with the forms required for a will, or it was not a good execution. When there is a power of ap— pointment to children, & mere nominal ap— pointment to one by which he is excluded from his share is not a valid appointment. 6 Munf 30. Gilmer 31. An appointment cannot be made to a person not mentioned in the deed con— ferring the power if it be a special power— 2 Call 326. 6 Munf 350. Nor can a [power] of appointment be delegated from one to an— other. 4 J.C.R. 369.

116 Execution of powers If the power be created by will, the renuncia —tion by the executor of the power, as [legated] under the will, does not prevent him from executing the power. If the party fail to make an appointment, the estate will be equally divided among the beneficiaries. The execution of a power has the same ef— fect generally, as though it had taken ef fect under the original deed. But that this is not universally true, see Butter's note at the end of the volume. 20 Johnson 551. 7 Johnson's Chancery reports 48. Before the statute of uses, Uses & Trusts were not synonymous terms. In Uses— The legal title was in the feoffee but the actual control & beneficial use of the estate were in the cestuy que use. In Trusts, the control of the estate was vested entirely in the trustee, & the ces— tuy que trust had no control over the estate — the trustee held the estate sub— ject only to the performance of the trust. 1 Preston 44 1 Stephen's Commentaries 343. Trusts are not within the statute of uses, and are still cognisable only in courts of equity. The entire number of exceptions [under] the statute of uses is three. 1st. Those equitable states which before the statute were known as trusts.

117 2nd. Uses limited upon uses. 3rd. Uses declared upon estates less than free— hold. 1st. Trusts. The same reason which before the statute, caused Chancery to forbear inter ference to defeat the intention of the parties has prevented the statute from executing the trust. The very object of the trust is to keep the control of the estate from the cestuy que trust, and this object would have been entirely defeated if these estates had been construed to be within the statute. 2ndly Uses upon uses. With regard to these it has been said that a use could not be raised out of a use. That the statute executed immediately the first use, & could not execute the second. And that of the same estate, a man could not be seized to the use of two. And that the second use was repugnant to the first. This was a very contracted view of the judges. For there is no reason why the statute should not execute the second use as well as the first. As the first cestuy que use might be considered as seized to the use of the second. The reasoning of the judges has fail ed to satisfy the minds of men—but it is now settled that these are not within the statute, and as Lord Hardwicke says in 1 Atkins 591, "The whole effect of a stat—

118 ute, made upon the most solemn con— sideration, & in the most pompous manner to abolish uses, has been, to add three words to a conveyance." 3 Uses declared on estates less than freehold. The statute does not execute these uses because it used the word seized, which is applicable at least to a freehold estate. Lecture 40 Jan 8 1847. Statute of Uses in Va. Our statute includes lands only, & relates to the conveyance of these by three modes, viz. Bargain & sale,—Lease & release,—&Covenant to stand seized to uses. Very few adjudications, if any,

have dec— lared its precise import. There is no doubt that the 1st & 2nd excep— tions to the English statute prevail here. With regard to the third, there may be three constructions. 1st that the person conveying to use must be seized in fee. 2 That he must have a freehold at least. 3 That he may declare a use of a term of years. As to the first it may be said that at common law, a feesimple was required & that a freehold arose after the statute & that our statute does not use the word seized as the English statute does & that the common law interpretation

119 would exist here. But our statute uses language similar to the English statute. It declares that the cestuy que use shall be as firmly seized as if enfeoffed with livery. 2. Freehold required. The expression of the stat ute just refered to has been considered as requiring the same construction as the English statute. 3. It may be said that the statute does not mean any particular estate, but will transfer the posses sion to any estate which may be conveyed to uses by any of the conveyances mentioned by the statute. Of this last opinion is Jdge Tucker. 1 Tucker 361. Jdge Lomax thinks the second is the right construc tion, & in this opinion Proff: Minor concurs. There is a large additional class of exceptions in Va, arising from the limited terms of our statute. Thus—Our law, as before remarked, refers to lands only—& these conveyed in three manner of ways. Hence the statute would not execute a rent, nor lands conveyed by feoffment or by will. 2 Leigh 359. This is doubted by Mr. Leigh. For, he says, a feoffment or will is within the spirit of the act, & it should be construed liberally. To this it may be answered, that this would be a liberal construction indeed, since it has never been determined whether wills come under the English statute with all its extension. See Butler's note.

120 All uses which the statute does not execute are trusts & recognised in Chancery only. Chancery is a powerful agent in controlling trust estates. Unless the intervention of the trustee is necessary to carry out the intention of the trust a court of equity upon application will compel the trustee to execute the estate {to to estate} to the cestuy que trust— and a trustee may at any time ask assistance of the court in the execution of the trust. Resulting trusts are those which arise to a person in consequence of his furnishing the consideration of the conveyance. As if one furnishes another with money to make a purchase, as soon as the purchase is made, a trust results to the person so furnishing the consideration. 134. 164. 197. 2 Johnson's Ch Reports 411. 6 Wheaton 401. And this, though the bargain be merely by parol. And not only is parol evidence suffic— ient to raise a trust, but it is sufficient to rebut the presumption which the law makes of a trust. If it be a son to whom the mon— ey is given,

prima facie it will be an ad— vancement & not a trust: but the contrary may be proved. 11 Johnson 96. If a trustee buys land with the profits of the trust, the benefit will result to the cestuy que trust. Further confirmed in 4 Munf 222 & 6 Cranch 101. All persons coming into possession of a trust

121 estate with notice of the trust, are trustees to the cestuy que trust— and this need not be actual notice— but it is only necessary that he shld be in possession of such facts as wd prompt a further inquiry. 1 Johnson's Cases 51 5 Randolph 195. 1 Leigh 152. 8 Wheaton 449. A purchasor without notice is not affected by notice to his vendor. Lugden's vendors 531 Fonblanques equity 138. As the lien is merely implied, it will be de— feated by a subsequent express lien, as a mort— gage. 2 Leigh 348 1 Robinson 101. 12 Leigh 332. Rules for trust estates. By English statute of frauds, trusts are assets for payment of bond debts. We have a statute declaring that trusts are liable for payment of debts as though they were legal estates. Tate 171. Terms to Maintain the inheritance. These were used where a man purchased an estate & afterwards found that there was an outstanding judgement to which the estate was liable—and also found that there was an outsanding term—perhaps for a thousand years—and procured the assign— ment of this to himself, & it is said to attend the inheritance. The purchasor took the estate subject to the judgment, but as the term was created before the judgement the inheritance is shielded by this, & no lien can be obtained before the expiration

122 360—5 of the lease. 1 Tenn Reports 763. 1 Story's Equity. In Va a cestuy que trust may maintain an ejectment & so many trustees. Statute of 7 Ann relating to infant trus— tees has been reenacted in Va. Tate 479 Guard. Also 29 G 2 relating to lunatic trustees Tate 495. In England a trustee receives nothing for his services. In Va 5 percent on all disbursements. 4 Hening & Munford 415. Alienation by matter of record. (604 N A) He mentions in this note two apea— rances of this kind—King's grants & private acts of parliament. Private acts of assembly in Va have become almost obsolete since the abolition of estates tail. & the courts of Chancery exercise the power of decreeing sales of the estates of infants &c. 2 Lomax. A private act of assembly may be relieved against, if obtained by fraudulent representations. 4 Call 514.

123 Lecture 41 January 13 1847. It was the opinion of the elder Jdge Tucker that the commonwealth succeeded to all the rights of the crown at the revolution. 2 H & Munf 333. All grants in Va must be by the authority of the legisla ture. The construction of the king's grants was very peculiar, being taken most strongly agst the grantee. The reason of this was, that they pro ceeded only from the benevolence of the king. It has been thought that the same rule would apply to grants by the commonwealth, but this does not seem to follow. All grants from the king made for valuable consideration were construed as ordi— nary grants. All grants by the commonwealth are for valuable consideration. Therefore accord— ing to the English rule, they should be [countered] as common grants, i.e. most strongly against the grantor. 1 Tucker book 2 181. 2 Lomax 377. The most usual grants of the commonwealth are of waste & unappropriated lands in the western part of our state. Tate 675 land law. To obtain a complete title to these lands, four steps were necessary viz. Warrant—Entry— Survey &—Grant. Warrant. Is obtained by paying to the treasurer of the state $2 for every 100 acres & taking his receipt. This receipt is taken to the auditor, who gives a certificate stating the quantity of land paid for. Which, being carried to the register of the land office, he issues a warrant under seal

124 of the land office—by which the individual is au— thorized to survey the quantity of land mentioned in the warrant—but leaves him to find the land, and to select it where it best suits him. But the state does not undertake to find it for him. In most of the other states the land is surveyed & sold in lots, so that each buys with certainty of location. 5 Cranch 234. By this warrant the person acquires the power to appropriate the land, but can actually appropriate only by the further steps required. 2 Call 45. 3 Call 267. 4 Randolph 365. This warrant, before entry, is considered as personal estate—but after entry is real estate, & will so [pass] unless the warrant be withdrawn, or there be a failure in completing the contract. 2 Randolph 217. This warrant is also assignable—but such assign— ment must be by endorsement in writing & signed attested by two or more witnesses. Entry. Is effected by the delivery of the warrant to the chief surveyor of the county where the lands or most of them lie, & he must enter upon the book which the surveyor keeps, such a certain descrip tion of the boundary of the lands, that others may with certainty appropriate adjacent lands. The en— tries are to bear the true date, & are to follow each other in the book without blank leaves or spaces. This is to prevent mistake or fraud. When this entry is made, the surveyor gives notice to the party, when he will proceed to survey the land, & at the ap— pointed time the party must be present with

125 men & suitable apparatus. If he fail so to do, his en try shall become void, & the land subject to the entry of another. The surveyor shall return him the war— rant, which may be located anew or again upon the same piece of land if not appropriated—but he shall not reenter such land more than once. What is sufficient certainty in making an entry has not been determined—but depends upon the circumstances of the case. Thus wh an individual entered land "400 acres lying on the south branch of the Potomac river adjoining the lands of another"—and it was found that the two tracts lay on different sides of the river, it was held to be uncertain & void. 1 Call 206. 6 Call 28. 1 Leigh 353. 3 Call 28. 1 Munf 293. 4 Wheaton 485. There are certain lands in the commonwealth though unappropriated—yet are expressly excepted by the statute. These are lands which have become vested in the commonwealth for non judgment of taxes thereon, lands on the shores of the bay of Chesapeake, of the sea, of rivers naviga ble, & of the beds of rivers, these being for the free enjoyment of the good people of the common— wealth. Also the statute protects lands which have been settled thirty years prior to such entry or location. Or upon which taxes or quitrent can have been proved to have been paid within thirty years. Where a location has been made upon a warrant in one county, another location cannot be made upon the same warrant in another

126 county. But if part of such a warrant be un— appropriated, he may obtain an exchange warrant for such unappropriated part. Tate 629. All entries are void unless made within two years from the time of entry & lands shall be subject to another location. Tate 630. Survey. This must be made by the coun— ty surveyor, who shall give notice to the party personally or by publication at the court house door of the county when such survey will take place. In making the survey no open lines {will} are to be left, but they must be marked by chapping or a watercourse &c. The breadth must be at least 1/3 of the length, unless it be re— strained by a watercourse or other land. The surveyor shall deliver to his employer within 3 mts a plat and certificate of such survey, the quantity contained, the courses & descriptions of the several boundaries, & the names of all persons whose lands con stitute boundaries. All persons shall, within one year from this survey of such lands, return the plot & certif— icate to the land office & may demand of the register or receipt for the same. On failure to make such a return, or if the breadth be not equal to the required, any other person may enter a caveat in the land office against the issuing a grant to him, expressing therein for what cause

127 it should not be granted. Also if any person shall ob— tain a survey of land to which another has a better right, such person may enter a caveat expressing the right upon which he

founds his claim. But failure in this latter case to enter a caveat, shall not prevent him from asserting his right in any court of law or equity. The survey may be assigned to another in like manner as the warrant. 2 Randolph 217. If a person carries his warrant to a surveyor he cannot then withdraw it & locate elsewhere. 7 Wheaton 24. Grant. By this the complete legal estate is acquired before, it was only equitable. If the proceedings be reg— ular, the grant issues of course. But if irregular, or a bet ter right be set up, the party is liable to be arrested in his proceedings by a caveat—the effect of which is to arrest the grant until the matter can be tried, but not to set it aside. The caveat must contain the cause thereof, & also an affidavit that he desires bona fide to appropriate the land. This ca— veat, together with a plot, must be certified to the register. The person entering the caveat, shall take from the land office a certified copy of the caveat & enter it in the clerk's office of the superior court of the county where the land lies within sixty days, and clerks office of the county court within 30 days. The clerk shall enter this in a book kept for the pur— pose—shall thereupon issue a summons requiring the defendant to appear at the next term if it be in the superior [term] or at the next quarterly sessions if it be in the county court. & the cause is there tried in a summary manner without pleadings in writing, & if there be facts involved a jury is sum—

128 moned to try them. If the judgement befor the defendant, being delivered in the land office within three months shall destroy the caveat. If not delivered within 3 mts a new caveat for that cause may be {delivered} entered against the grant. If judgement befor the plaintiff—upon delivering the same in the land office with a certif icate & plot of the survey & a legal certificate of his new rights—he shall be entitled to a grant of the land to himself. If these be not returned {to him self} within 6 mts, it shall be lawful for any person to enter a caveat against such person bearing a grant. If a person has equitable grounds which entitle him to a patent in preference to another he must pursue his right by caveat. & if a patent is obtained, he will be barred from prosecuting his right, unless he can prove that he was prevented by fraud or accident from prosecuting a caveat—or that the grounds on which he claims relief are such as he cld (4 Munf 155 1 Rand [493] 5 R 509) not use on the trial of a caveat. If he has a legal title, of course he will not be barred of his right by a patent obtained {of} by another. If the defendant loses on a caveat, he shall have another warrant for so much land as he has thus lost. The object of a caveat is to pre vent a grant, & if, [pending] a caveat, a grant issues, it will be vacated at once. 6 Munford 160. For revisal of [these] laws in 1819 see Tate 633.

129 But supposing there is no impediment to the issuing of the grant. Then the patent will issue & must be according to act of legislature & have the seal of the commonwealth affixed. & thus is the complete legal estate passed, taking effect from the date of the grant. 7 Wheaton 212. 8 Cranch 229. A court of law cannot look behind the patent to discover any irregularity of proceeding—as—to compare the dates &c. Though it appear on the very face of the grant that the survey preceded the warrant. 7 Wheaton 248. 1 Hen & Munf 306. 5 Munf 220. If however the patent appear to be void on its face, it may be im peached collaterally in a ct of law 11 Wheaton 308. Courts of equity consider entry as the date of the title, & will consider him to have the best title who entered first. 5 Cranch 234. 5 Randolph 475. An entry in the surveyor's book will be consid ed as record, & as notice to the other party. 5 Cranch 191. 5 Leigh 679. Patents issued contrary to law or contrary to anoth er's right may be set aside by a scire facias, but are valid until so set aside. 5 Cranch 381. DEVISES.

130 DEVISES !Devises! By the common law lands were not divisable, but were by special cus tom in certain parts of the realms of England. Personal property being very in considerable at that time & therefore very insignificant, could always have been devised. The statutes 32 & 34 Henry VIII made lands devisable, but did not prescribe rules to govern such devises, and this was determined by the famous statute of 29 Chas 2, called the statute of frauds. We have a statute analogous to that of 32 & 34 Henry VIII, the provisions of which are as follows. Every person aged 21 yrs, of sound mind, & not a married woman, may, by last will & testament, devise all the es— tate, right, title, or interest, in possession remainder or reversion, which he has at the time of his death, or shall have in or to, lands, tenements, or hereditaments, or rents or annuities charged upon or issuing out of the same, so as such last will be signed by the testator, or by some other person in his presence directed by him, & if not wholly written by himself—attested by two or more credible witnesses. Saving to the widow her dower in such lands &c. Tate 888. The terms of our statute being more

131 extended than the English statute would embrace states per auter vie, but we have a separate provision rendering such estates devisable. & if not devised, they will be subject to debts charged upon the lands, & will be assets in the hands of execu— tors & administrators. In England the statute of wills only requi— red that the will should be in writing. The statute of frauds made other provis— ions regulating the making of them. There are two leading differences between the English statute & ours. 1st In England three or more credible witnesses are required. In Va only two. 2nd In England, attesting witnesses are requi— red in all cases. In

Va none are required wh the will is written wholly by the tes— tator. The rule in England seems to be universal, that if the testator sign, or di— rect the signing of the will, it matters not in what part of the will the sig— nature may be placed. If there be several sheets of paper, it is best to sign all. But if the last be signed, it seems to be sufficient. But if any other than the last be signed, then all must be signed, for it would seem that the testator signed only those which he wished to sign & excluded the others.

132 The reason that it is sufficient that the last be signed is, that this is an evidence of fi— nality, which is one object of signature. In Va, the doctrine of signing in any part of the will does not hold as to those wills written wholly by the testator. The object of attestation is twofold. 1st To establish its identity, & its connection with the testator. 2nd To evince that the testator completed what he intended to do—as it is supposed he would not call witnesses to attest the will unless completed. The first object is attained though the testator's name be not at the end of the will. But the second is not sufficiently attained by a signing on any other part than the end—because the testa— tor may, for aught we know, intend to write more. But it must not be understood that a literal signing at the bottom is required—but if it appear that he intended to place his sig— nature at the end of his will—as where, for want of room a testator placed his signa— ture at the top of the next page, it was held to be a signing at the end of the will. In autograph wills the proof of hand— writing may be made by any uncontra— dicted & unimpeached witness as in any other fact—which was formerly a (...). 6 Randolph 316. 2 Leigh 248.

133 How this knowledge is to be acquired seems not to be certain. It is said to be sufficient if the person was the administrator of the testator & had access to his papers—or held cor— respondence with him in life as in the case of 6 Rand 316, which was the first case on the subject. But the court of probate is not permitted to take speci— mens of the testator's writing & compare them with the will, & then exercise their judge— ments. When the testator acknowledges the signature & it is then attested, it is sufficient though the witnesses did not see him sign. This doctine is confirmed in numerous cases. It is even sufficient though some one else signed for the testator. 3 Leigh 436. 3 [Mar] 144. Bacon's Abridgt. Wills. D17. 1 Rand 331. This last case was one of the first on the subject, and the doctrine in this case was overruled by 3 Leigh 436. It is now settled in England & Va that the witnesses need not sign at the same time with the testator. It is not required that the witnesses should know the contents of the will, or even that it is a will. It is sufficient that they saw the testator sign an instrument, which they

recognize in the said will. A testator's acknowledgement of a will is evidence that he knows its contents, though he be illiterate.

134 If he be blind, or it be proved that the will was prepared by another, then proof is requi— red that he knows its contents. 6 Call 90. 3 Leigh 50. Codicils are in all respects distinct from wills, & may modify them. But either one or the other may be revoked without affecting the one not mentioned, & attestation of one does not affect the other. 3 Hen & Munf 538 & 502. The object in requiring the witnesses to be in the presence of the testator was to prevent fraud by substitution &c. Hence if they be within scope of his vision it is sufficient. Presence does not necessarily imply being in the room—but if in the room, it is prima facie evidence of presence but may be rebutt— ed by testimony showing that the testator's po— sition was such that he could not see them & that he was unable to change his position with— out help, so as to observe the witnesses. If out of the room, it is prima facie ev— idence of a want of presence, but this may be rebutted by showing that the testator was so placed as to see them, or might, without help change to such a position. Thus when a person was very ill, was raised up, signed his will & was laid down, very much exhausted, in such a position that he could not see the witnesses, who signed at his bedside it was held not to be a sufficient sign— ing & attestation. 1 Leigh 6. Bacon's Ab Wills D 23—24.

135 All the material circumstances must be proved by two credible witnesses attesting the fact. Some have said also that the sanity of the testator must be proved, but this has been doubted. If the wit nesses throw out any doubt as to the sanity of the testator, they may be contradicted by other testimony. 1 Randolph 132. 6 Call 93. Unless the witnesses sign with a view to attes— tation it will not be good. All witnesses for other purposes may also be witnesses to a will, including devisees & lega— tees. Eng & Va Stat require witnesses to be credible. This unfortunate phrase has caused a great deal of dispute, & raised a warm controversy between Lords Mans— field & Camden. Lord Mansfield contended that the phrase was superfluous or absurd. If it meant only competence, this was implied. If it meant more, then it was absurd, in requiring the testator to look forward years to come & de— termine the character of the witness. He considered that it implied only competence & that this competence might be acquired after attestations. 4 Barrows 417. Lord Camden also held that it meant only competence, but contended that this competence must exist at the time of attestation. At first Ld. Man's opinion pervaded, but now Ld C's is the settled doctrine.

136 We have a statute providing that when a legatee is a witness to a will, such legacy shall be void, & he shall be compelled to testify — but saving to him any right accruing to him independently of the will. Creditors, not being mentioned by our stat ute remain as at common law. Lecture 42 Jan 15 1847 The doctrine is clearly established that wills of realty must be according to the forms of the country where the property is situ— ated. 14 Vesey 537. 7 Cranch 115. 4 Johnson 460. 10 Wheaton 192. Sotry's Conflict of laws 398. 307. Wills of personal property are governed by the lex domicilii. Story's C of So 391—5. 4 Johnsons C.R. 460—9. 1 Wheaton 169. 9 Peters 483. Our statute makes provision for wills previ— ously proved in a foreign country, or in one of the other states of the Union. It provides that "Authenticated copies of such wills made in foreign countries may be offered for probate in the general court, & if in one of the other states, it may be proved in any superior or inferior court of the county where the lands or most of them lie." Tate 900. What it is which the witnesses must at— test in this case, has been doubted. Some have said that the copy must be attested, but this has been doubted. 1 Rand 108. The statute requires the proof to be

137 according to the nature of the case & seems to have intended further proof than that the papers have been admitted to [record] abroad. The will is liable to be contested as though the original were offered for probate. But it has been said, that if the attesta— tion be sufficient according to the law of Va, no additional proof will be required here, but the will will be admited here as a will of lands or chattels as the nature of the proof discloses. 3 Leigh 816. If it be proved in a country whose laws require 3 witnesses, & it appear to have been proved there generally, without any particulars of proof being stated, it is doubtful whether or not further proof will be dispensed with. 3 Leigh 819. A will devising lands in Va will be proved here, though declared void in the state where it is made. Personalty. Wills of personalty are of two kinds. Written—&—Verbal or nun cupative. Written testaments are those which are com— mitted to writing under the direction of the testator nun cupative are those directives as to the dispo— sition of his chattels which a person in ex— tremis gives in the presence of witnesses. In England a testament might be made by a female at the age of 12 & by a male at the age of 14. In Va both males and

138 females must be 18 yrs of age. The common law always allowed testaments of chattels to be made, so that these derive their origin & force from the commmon law. Devises were introduced by the statutes 32 & 34 Henry VIII. The statute of frauds in England required all wills to be in wri— ting except wills made in extrae mis. But in case of testaments nothing more was required than writing, which opened the door to many frauds. Thus a testa— ment might be drawn by a stranger, proved by him, & was considered good. And so far was this carried, that the courts allowed a mere memorandum that the testator intended to make a disposition of certain chattels, to be a valid testament. 1 Chitty's gen practice 111. 2 Blackstone 501. 2 Henning & Munf 467. 5 Leigh 589. No particular form for a testament is re— quired. The intention of the testator is the object to be attained, in whatever form that intention be expressed, but the testa— ment must appear to be completed. 2 Leigh 249. A memorandum made with a pencil if with the approbation of the testator has been held to be a good testament. 1 Chitty's practice 111. And part of such testament may be good & part void on account of fraud. Also a will of personal & real property, might, by the

139 Law of England, pass to the former, though not only executed to pass the latter. In consequence of no witness being requi— red to a will of personal property, a legacy to one who shall chance to be a witness is not void, but it will only be necessary to re sort to some one else to prove the will. When speaking of no witness, no attesting writing is meant. One witness is always necessary to prove the testament. 5 Leigh 589. Thus stood the common law as to testa ments, & our law also until 1835, when a statute was passed upon the subject. Improved by another in 1840. This statute provides "that all wills of personalty except nun cupative wills, shall stand upon the same footing as wills of realty." The leading differences between wills of realty & personalty are. 1st Testaments were always allowed at the common law, Wills of realty owe their origin to statute. 2nd Testaments speak from the death of the testator, & relate to property as it is at the time of such death. Devises are looked upon as conveyances, & pass only such land as the testator had when the will was made. But by a statute of Va after acquired lands may be passed by a will, though it must appear that the will contemplated such subsequent possessions. 4 Munf 191.

140 It appears from the language of the statute that wills of personalty must in all respects have the same requisites as devises. 4 Kent 578. 3rd difference. Nuncupative testaments are in no case allowed. With these differences, & with the exception in case of nuncupative

testaments, the same construction prevails in Va with regard to testaments as in de— vises. 4 Henning & Munford 283. The only way in which a person can disinherit his heirs or distributees is, by divising away the property they would oth— erwise take. It is in vain that he by express words excludes them—it will have no effect. Nuncupative wills opening the door to fraud, are not favoured, & are conse— quently confined to very few cases. From the nature of their occupation, soldiers & seamen are excepted from the rules of our laws relating to testaments. 1. Our statute provides that no nuncupative testament shall be valid unless made in the testator's last illness, at home, or where he has resided 10 days previously, unless he be on a journey & die before reaching home nor where this value or the chattels

141 exceeded $30, unless he calls two witnesses to the fact. 2. No nuncupative testament shall be proved by the witness {unless put in} after six months, unless put in writing within six days. 3. It cannot be proved within 14 days nor even then, unless the widow & next of kin have had notice thereof. Thus we see the precautions of our statute. To prevent impositions from strangers, he must be at home among his friends, unless he be suddenly ill from home. He must be sud— denly & violently ill. & if the amount of proper ty exceed $30, witnesses must prove the transaction. So little is trusted to the memory of man, that if not committed to writing within 6 days, it cannot be penned after 6 mts. & to prevent fraud upon the family of the deceased, the will cannot be proved until they have notice. & finally, where witnesses are required, they both must be present at the same time. It has been decided that when the indi vidual is taken suddenly ill abroad, though he be unwell when he left home, this does not vitiate the will. 4 Henning & Munf 91. 2 Robinson 424. Any testamentary disposition in extremis not propery proved & executed will op—

142 erate as a nuncupative will. If, in committing it to writing, a distinct part be omitted, this does not vitiate the residue. Nor does it affect the verbal disposition, that a part has been disposed of by a written will. For the effect of nuncupative wills as to property embraced see 2 Rob 424. For what is considered "in extremis" & "committment to writing" see 2 Rob 424. Slaves may be emancipated by a nun— cupative will. 4 Kent 518. Revocation of Wills. There are two ways of revoking a will. Expressly, & 2 by implication. The express methods are dictated by the statute & are, by the testators destroying, cancelling, tearing, or by causing it to be done in his pres— ence, or by a subsequent will, codicil, or declaration in writing, made in the same manner as the will itself. But it must be observed that the cancelling must be done animo cancellan di, & the tearing must be accompanied with an intention to revoke, which may be

proved by parol testimony. 2 Johnson 394. But a mere direction of a testator that a will shall be canceled, & his belief that it is done, is not sufficient. 3 Leigh 32. 1 Rob 346.

143 But the slightest cancelling, tearing &c. if with an intention to revoke, accom— plishes the purpose. 3 Wheaton 32. 1 Rob 346. Even though the testator be prevented by force or fraud from cancelling, it is a good will. But in such case the devisee may be a trustee for him who would have been entitled, had the will been destroyed. Proof of a subsequent will stolen from the testator without proof of its contents accompanied by declarations that he will die intestate, will not revoke the former will. If a will be proved to have been in the testator's possession & at his death cannot be found, it is presumed to have been destroyed. 1 Grattan 286. A will is impliedly revoked, when there is such a change in the testators situation as to produce a change in his obligations & duties, as, by marriage, & the birth of issue, or in the case of a female, by marriage alone. But in this case, the death of the husband will revive the will. 4 Kent 527. Implied revocation also results from a change in the manner of holding the subject devised. As, when it is conveyed away, or a change of his estate or of his interest therein.

144 As if the testator convey or contract to convey, & the contract be rescinded, & he die seized, this will be a revo— cation in equity. That a mortgage does not always revoke a will see 3 Lomax digest 89. 6 Cruse 99. For lectures 43 & 44 which com— plete the subjects treated of in Coke See Volume 3 of C's notes on Minor. End of Vol I

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