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Student Notebook: George Lake

Date: 1861-62

Professor: John B. Minor

Collection: [Law School Notebooks, RG 32/400](#)

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George Lake (Class of 1862)

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Notes on Mercantile Law & Law of Contracts Lectures by Prof J. B. Minor University of Virginia
Session of 1861 & 2 [Property] of [George Lake]

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Lecture 1st. Text Smiths [Jr] Law

(p281) Parties to a Bill or Note. As to banks in England see text p 281 there are three classes of banks existing in England. 1st. The bank of England 2nd. Banks of six or fewer than six persons 3rd. Banking Corporations & companies of more than six persons and these must be authorized by Law, so it is with us every bank must have its charter or [is its] illegal. We will notice some of the action specifically punishable in Va. under the head of unchartered banks and illegal circulation. As to banks see c198 S16. 1st. To issue without authority of law with intent to create or circulating medium any note or other security, shall be confined in jail not more than 6 months and fined not less than \$100 and no more than \$500. VC 745. c198 S12. 2nd. To pass or receive in payment any note or security, issued in violation of either of the two preceding sections he shall be fined not less than \$20 nor more than \$100. 3rd. To bring into the state with intent to circulate, any bank note less than \$5, issued in another state, or shall pass or receive such note in payment, he shall be fined not less than \$20 nor more than \$100. But this does not apply to travellers. VC 745. c198 S19. (p286) Author says the making of a note

beginning with "I promise to pay witness my hand &c" and signed by several persons singular has been held joint and several. 4 Rand 59

(p289) Transfer of Bills & Notes. Author says a bill or note endorsed in blank is as has been said, transferable by merely delivering it to the intended transferee but one indorsed in full must be indorsed again by the person to whom it was so indorsed in full, in order to render it transferable to every intent, for he who indorses to a particular person, declared his intention not to be made liable except by that persons indorsement over. Indeed where a bill was indorsed [in] blank by payee, and after other indorsements specially indorsed

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to Jackson who delivered it to [Muir] and Atkinson without indorsement who [discounted] it with the pltf, Lord Kinyon allowed the Pltf to strike out all the indorsements except that of the payee, and recover in an action on it against the acceptor. It has long been the settled doctrine of the English & American courts that the bonafide holder of a bill of Exch. may at any time before or after the institution of a suit against an indorser, by writing over a blank indorsement, direct that the money should be paid to a particular person: and that the holder does not thereby become an indorser. See on Lord Kinyons opinion Bayley on Bills 68. Contrary 1 Rand 12. (p 293) The Editors say the Modern English doctrine is &c. You cant (n *) take an overdue note with the same impunity as you can one that is not, which is not subject to collateral affects. 14 Grat I. (p 295) The endorsers of an accommodation bill are not joint sureties, (n *) but are but are liable to each other in the order of their becoming parties &c. The rights & duties of the several parties to an accommodation note or bill of Exchange are the same as upon those which are denominated business notes unless otherwise agreed by parties. 4 Rand 513: 1 Grat 234. (p 295. next note *) The American authorities recognize the doctrine that the transfer of a bank note by delivery is a warranty of its genuineness. A great diff of opinion however prevails upon the question whether there is an implied warranty of value. In Va. there is an implied warranty of bank notes also other negotiable paper provided returned in reasonable time. 7 Leigh [blank space] 1 Grattan 362. Every transferor of bankable paper is expected to warrant its genuineness but not its value or solvency. (p 301&2) Acceptance for Honor. Statute of 6 & 2 Wm. 4. Cap 58. reciting that bills are occasionally accepted supra protest for honor or have a reference thereon in case of need. We have enacted this stat c144 S5.6 but doubts have arisen when

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such bills, as to the day, should be presented for payment to the acceptor for honor & it has been decided that the day following that on which they became due and if that day happen on Sunday—Christmas day, 1st. Jany or 4th July then the day after (p 305.) these times. Presentment. Place where presentment is to be made. The English doctrine was settled in the great case of [Row] vs Young and the decision was that in order to change the ind—

order or acceptor presentment must be made at the place designated. The American authorities however with great unanimity establish the opposite doctrine and need not be presented at all in order to charge unless some loss should result. 5 Leigh 522. 10 Leigh 512 & it is now conformed by statute that it shall not be necessary to aver or prove presentment for payment at the time or place specified in the note, bill or acceptance. Such maker or acceptor cannot set up any defence except in loss sustained by him by reason of the failure to present. (p 306) VC 580 c144 S1. As to time when presentment must be made which is decided to be the last day of grace in Engd. & America there are 3 days grace while in some in countries 6 and even 10 are allowed—if the last day of grace is on holy days the day previous must be made for the payment as if Sunday last day of grace, Saturday. VC 581 c144 S3 and if not paid on the day preceding protest may be made. (p 306) When protest is necessary—Our stats. while they do not require a protest; but when made shall be prima facie evidence of what is stated therein in relation to presentment, dishonors & notice thereof, you need not have a nego. note or Inland bill protested but as to a Foreign Bill {as} a protest is evidence of the facts it is wise for this to be protested. VC [582] C144 S8. (p 308) How the notice must be given—When the party entitled to notice (note) has in the same city or town a dwelling house or place of business within the compact part of such city or town it may be served at either

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place. But where the parties reside in the same place notice cannot in general be given through the post office. So when the indorser lives in a different town from the holder it is sufficient to send the notice through the mail. If the town is not a post town, the latter should ordinarily be directed to the post office nearest to his residence. Where the party is in the habit of receiving his letters at various post offices to suit his own convenience or business, it may be sufficient to send it to either. Story on Bills 312. 6 Howard 256; 2 Peters 101. (p 311) Due diligence in giving notice may by holder be proved in two ways. (note) 1st. By showing a sufficient protest (whenever it was necessary) for non acceptance or non payment and timely notice of the dishonor given or forwarded to the parties on the bill. In this case there arises a legal presumption of its receipt in time. 2nd. By proof that the notice actually came to hand in time, though the letter was not properly directed, not sent by the most direct or expeditious route of the time &c where the protest occurs on Saturday notice of the dishonor will on Monday be early enough. VC 581 C144 S4. (p315) With respect to the place of presentment By stat 1 & 2 Geo 4 c[78] S1 "If any person shall accept a bill payable at the house of a banker, or other place without further expression in his acceptance, such acceptance shall be deemed to all interests and purposes a general acceptance of such bill; not if the acceptor shall in his acceptance express that he accepts the bill payable at a bankers house, or other place only, and not otherwise or else where, such shall be deemed a qualified acceptance, and the acceptor shall not be liable to pay the said bill except in default of payment, when such payments shall have been duly demanded at such place, we have reenacted so far as relates to drawer but not acceptor. VC c 144 S1.

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(p316) The author says that it has been expressly held a [NP] that a presentment at the place named in such acceptance is sufficient to charge the drawer or indorser. In Va, if it be expressed that {that} it is to be payable in any place other than that mentioned therein to be the residence of the drawee, if not accepted on presentment, may without further presentment to the drawee be protested for non payment in the place in which it shall have been expressed to be payable, unless it be paid to the holder on the day on which it would have become payable had it been duly accepted. c144 S2 (p 320) Days of grace their number differs in different countries. In France, Genoa, Leghorn, Palermo, Amsterdam, Antwerp & Rotterdam there are none. In England & America as has been said they are three and in computing the time a bill has to run, the day of its date must always be excluded, so must the day on which it purports to fall due, in computing the commencement of the days of grace, upon the last of which it must be presented thus if dated 2d. Nov 1832 & payable two months from after date Jan 3d. 1833 will be the first day of grace, and on Jan 5th. must be presented. As to style. When a bill is drawn in a place using one style and it is payable in another place using another, the rule as stated in Bayley on bills, is that "If the time to be reckoned from the date, it shall be computed according to the style of the place where drawn otherwise according to the style where it is payable, and in the former case, the date must be reduced or carried forward to the style of the place where it is payable, and the time reckoned from thence notice the manner of computing time." O.S. & NS. (p 321) Notice. When notice of a bill or note must be given, if man dies before that time it must be presented to Representative of deceased. Case in Lynchburg (...) I question whether any notice is required to be given, as we have seen if holder cant find house he would be excused. [Byles] on Bills 221, but if a notice is requisite it would suffice to put it in post office addressed to the legal representative of the deceased

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however if not taken out of office by representative it would in 3 months be sent to dead letter office and we think the safest way would be to give it to some of the family of the deceased. 15 Grat 501. (p 323) What is a sufficient notice, there is no particular form of notice yet it must impart in express term or by necessary implication that the bill or note has been dishonored; and it was long thought that it must likewise impart that the party receiving the notice is considered liable and expected to discharge it. (p 328) The place of protest. In ordinary cases the bill is protested for non acceptance or non payment, in the place where {it} acceptance or payment was refused. Stat 2 & 3 Wm. 4. This has been reenacted in Va. c144 S2. (p 330) A party's time forgiving notice will not be enlarged by the circumstance of his having recd. his own sooner than he had a right to it, or of his having given it within the time in which it might have been transmitted from himself to the defendant, through all the intervening parties, his time of giving notice is one day & one day only. 4 Leigh 37. The notice need not be in writing it may be sent to counting house if a merchant or dwelling house if a private person. If

dispatch by the post it is sufficient though it be not recorded. Story on Bills 312 & 6. (p 334.) Payment as to a forged note or bill. Though the drawers signature (Lecture) —nature be forged, the drawee if he accepts it he is bound to pay (2nd) it, provided it be in the hands of a bonafide holder and for value for the drawee's acceptance admits the drawers handwriting to be genuine. If he have not accepted it yet if he pay it he can not recover his money back from such a holder; at all events not unless he discover the forgery and give notice of it that very day nor will he who pays a forgery have any remedy again— —st the person whose signature has been forged unless that person have, by his gross negligence, facilitated the commission of the forgery; in which case he will have to bear the loss thereby occasioned

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2 (Chitty on Contracts 630) transferor of bank notes & any negotiable (7 Leigh 716 1 Grat 362) paper undertakes for its genuineness but not its solvency (6 Grat 327) How Payment may be enforced—Payment of a bill or note may be enforced by action against the drawee if he have accepted; against drawer & indorsers, if the bill have been dishonored either by nonaccept. or nonpaymt.: all these parties may be sued at the same time, the Court will & (...) proceed— ings on the payment of the bill & costs. At Com Law an action of debt or assumpsit lay against the acceptor of a bill or maker of a note {of a bill} because their liability is direct (8 Leigh 50)(1 Chitty Pleading 123) 3 (...) & Ryland (3 Hen & Munf 374) But assumpsit alone lay against {acceptor} drawer & & endoresees* Va. has enacted that all negotiable paper {unless prot— ected} payable at a particular bank, or at a brokes office or savings bank & upon any bill of Exchd—whether such [not?] be payable in or out of the state if the same be protested, an action of a debt may be main— tained & judgement given jointly all laible whether drawers, [indors?] or acceptors or against one or any

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allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the said interest shall commence. If a verdict be rendered hereafter which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose heretofore or shall arise hereafter & judgt. shall be (...) accordingly (VC 673 c177 S14, 18). In negotiable paper the principal sum & charges of protest with interest thereon from the date of such {charges} protest & in case of such bill you get damages also if bill is protested out of Va. but in US 3 per cent damages are allow but if in Va. nothing; if of a foreign bill out of U.S. then 10 per cent. A foreign reexchange is allowed our statutes now in place of passage & reexchange allow damages. C144 S9. (p 344) Resistance to Payment—case of illegality. Where the consid— —eration of a bill or note is partly illegal, the security, being [entiro], becomes void in toto though the plaintiff may still, with— —out using the note or bill, recover that part of the consideration which is good. If a bill or note given for an illegal consider— —ation be reserved, the new instrument is also void though not if it be so reformed as to exclude that part of the consideration which was objectionable. Formerly in some cases of illegality, the bill was void even in the hands of a bona fide holder and for value: these were where the consideration was, either wholly or in part, for signing a bank— —rupts certificate; for money lost or applied

in any of the modes of gaming; for ransom, or money lent in order to ransom. Money lent on a usurious contract was at first within this class; but by stat 58 Geo 3 c93, no bill or note given on a usurious condition is to be void in the hands of an indorsee for valuable consideration, if he were ignorant of the usury at the time he took the bill or gave the consideration. You can see the policy for this

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We have never enacted these statutes and such bills are void in Va. as before the enactment of these stats. hence if the making or endorsement of a bill or note be tainted with them it is to a greater or less extent void. It is not illegal to sell either a Com Law or statute security above 6 per cent provided not sold to raise money and stat only applies to money, hence a device to sell a horse &c was usurious. In order to prevent the usury you must make a bond & then buy it when it is not a loan & is not usurious. 2 Munf 36 Gilman 42 5 Rand 333 but if made for the purpose of selling & the purchaser knew it then it is a loan and more than 6 per cent is usurious. A mercantile security was not made to sell, but you may discount it so as to make usury an assignee cant be liable for usury in Com Law because the assignor is liable only for the amt recd. Mercantile Secty may be usurious in its transfer because the transferor is liable for the whole if he indorses it if he does not indorse it he is not liable while in C Law [paper] it is different—if made to sell & sold for more than 6 per cent it is usurious, but if not made to sell it is different. (p 346) When the illegality was such as to waste the instrument void in the hands even of a bona fide indorsee, yet if it were not orig— —inally made on that consideration, such illegality in the consi— —deration on which it was afterwards transferred, was no defence against such indorsee, if he was not, in making out his title bound to state or prove the signature of the person who made the illegal transfer; the authorities were contradictory upon the ques— —tion whether such illegality was a defence, when he was bound to state the signature & prove. If legal in inception though aft— —erwards transfer is illegal same law as just cited above. If plaintiff bound to claim through usurious parties he must show the legal consideration of the transferor.

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(p 349) Any material alteration of a bill or note, after it has been issued unless satisfactorily accounted for acts as a satisfa— —ction thereof; and even though the parties consent to such an alt— —eration, the instrument, though unimpeachable by them, is a new contract, and the old stamp will not suffice, unless such alt— —eration were made to correct a mistake, and render the bill what it was originally meant to have been—hence for this reason no banks like's to discount any paper that is [interleased] or interlaced because they must account satisfactorily for it and this they may not be able to do. 1 Greenleaf Evid. 600. The Rule is applicable to writings of all kinds. The Modern Rule is this if the alteration has been made by stranger it does not effect except in this, that it may be difficult to show what the writing formerly was and this is the only way in which it may effect [it] that injury made by a Stranger is

called spoliation. If the injury made to paper by party be material it is to be presumed fraudulent and this invalidates the paper. If immaterial & innocent it does not affect the validity and is called an alteration—thus in order to destroy its effect the injury must be material & otherwise than innocent. The difficulty is to know whether the injury took place before or after issue. The Old Law presumption was that it was made [blank space] Greenleaf says there is no presumption about it but must show it in its face as by different ink, handwriting &c. I think the law remains as it was (p 350 & 52) at first notwithstanding Greenleaf. Alteration in the date, sum, or time for payment, or the insertion of words authorizing transfer expressing the value recd. to be on a particular account, or an unwarranted place for payment, or adding a new maker or drawer are material. But the insertion of a mere memorandum, giving the right place for payment, or the correction of the drawee's name to make it correspond with his acceptance are not so. An alteration perfectly immaterial to the rights of the parties

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will have no effect, as, for instance the addition of a new name after the note had already become due, and was dishonored. Nor will the alteration affect its validity, if made with the consent of parties before it has issued—thus a note in blank may be altered before issue to a holder for value but not afterwards (8 Leigh 43). A bill or note is issued when it is in the hands of some person entitled to make a claim upon it, not before; and this is prima facie evidence &c soon as it is passed away by the drawer or maker, or (when the alteration is in the acceptance) accepted by the drawer. If a bill or note exhibit the appearance of alteration, it is for the holder to account for it. But the mere cancellation, by mistake, of an acceptance or indorsement, is not satisfaction of the bill, or discharge to the parties whose signatures are so [cancelled]. (p 354.) Discharge is when the right of action is not merely suspended, but destroyed, without any satisfaction, as by a release, or the provision of a Bankrupt or Insolvent act. It was once thought says author that the acceptor of an accommodation bill, or maker of our accommodation note, stood in the light of a surety, and that the holder would discharge him by discharging or giving time to the person for whose accommodation he accepted. The principle of giving time appears to be the same in an accommodation paper as in Com Law & mercantile secty— (Gilmore 307) the creditor binding himself not to sue the principle even for [blank space] while any binding delay will discharge surety (2 Rand 323) 4 Rand 104. Hunter v [Gett]: 4 Rand 533 and the same hold good in accommodation paper 3 Gratt 356 but if only delay dont. This depends on the principle that security always has a right to pay the debt & subrogate himself himself to rights of principal & by delay diminish sureties security. (p 358) In case of losing a bill &c according to 6 Munf 166. 4 Rand 186. cant generally sue on a lost bill in court of law & certainly not

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without making indemnity for justice requires this, but in the loss of a bill, the loser may enforce payment in equity on giving a proper indemnity and such a suit ought always to be in

equity. And by Stat 9 & 10 Wm. 3 C 17 S3 enacts "that if any inland bill be lost or miscarry within the time limited for its payment, the drawer shall, on {request} security given upon request to indemnify him if such bill be found again, give another bill of the same tenor with the first. We once had the same statute. I dont find it now however.

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Lecture's on Contracts. Text. Chitty Delivered in the Law School of the University of Virginia By Prof J B Minor. (Lecture I) Chitty's book treats alone on the law of contracts not under seal. In England we know a revenue is raised by the government for stamps sold {and} under the "Stamp Act" which requires one to be affix— ed to every insturment in writing in order that it may be receivable in evidence we know nothing of this in America but doubt not will have to resort to every me— ans in the U.S. to raise a revenue. Chap I Treats in I Section. Of the different kinds of contracts, and of the general [requisites] of contracts not under seal. II Section. Of the form and constr— uction of contracts not under seal. III Of stamping agreem— (Definition of Terms) —ents. The term obligation is used by the Roman jurists as denoting in its proper and confined sense every legal tie which imposes the necessity of doing or abstaining from do— ing any act; and as distinguished from imperfect obligations, such as charity and gratitude, which impose a general duty, but do not confer any particular right; as well as from natural obligations which although they have a definite object, and are binding in conscience can— not be enforced by legal remedy. English lawyers gen— erally use the word obligation in a more strict and tec— hnical sense, namely as importing only one particular species of contracts, that is Bonds; and they adopt the term "Contract" when they wish to convey the more extensive idea of the responsibility which results from the voluntary engagement of one individual to another as distinguished from that class of liabilities which originate in torts or wrongs unconnected

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with agreement. Therefore the term Contract comprises in its full and more liberal signification every desc— —ription of agreement, obligation, or legal tie whereby one party binds himself, or becomes bound, expressly or implic— —dly to another, to pay a sum of money or to do or omit to do a certain act; but in its more familiar sense, it is most frequently applied to agreements not under seal. Agreement seldom applied to specialties, implies mutuality of stipulation. Promise denotes engage— —ment without regard to consideration which induced (Kinds of Contract) it. Three kinds of contract in most general use viz 1 Of Record 2 Specialties 3 Simple Contracts. II Contracts of Record include Recognizance Judg— —ments & Statute staple. One then superior force from the sanction derived from authority of Courts &c—bind lands. Triable only by record. No consideration required. Impeached only by writ of Error by parties and not by pleading. In general precludes enq— uiry into illegality or fraud in transaction out of which it grew. But third persons may impeach it for fraud &c. Remedy for parties in case of fraud or illegality is generally in Chancery. III Contracts under Seal. Include deeds &c. Must be

sealed & delivered. Neither date nor sig— nature (At Com Law) essential. Seal is by a scroll in Va. acknowledged in the instrument. Delivery by word only, is sufficient and to third persons for use of Covenantee on condition escrow. III Simple contracts. All promises verbal or written which are not sealed. Distinction is not between parol & written contracts but contracts sealed and not sealed. Statute of Frauds requires certain

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contracts to be evidenced in writing, but essentials of contracts remain unchanged—thus there must be a consideration which in sealed contracts is implied but a deed not affected by want of consideration but only by illegality. Estoppel results from deeds but not from simple contracts. Deeds merge simple contracts and extinguish them, as store acct &c. Deed cannot be released or [blank space] save by deed. Remedies on deeds often more favorable. Deeds at Com Law (if they bound him) charged decedents lands as well as his Executors &c. Simple contracts charged against Exors.# only. But by Statute in Va all debts charged on lands. Deeds have at Com Law priority in admn. of decedents estate in Virginia. Deeds not liable formerly to act of Limita. At present subject to limitation of 20 years and in case of fiduciary bond 10 years. Deeds must be pleaded with profert, not so with simple contracts. No profert necessary in Va. now and deft. may have oyer as if profert had been made. Limit— —ation on Scire Facias on Judgments 10 years if no execution issued or no return. 20 years if there is a ret— —urn. VC 710 Ch 181, S12 &c. Recognizances (except bail in civil cases) to be prosecuted within 10 years Code 592 Ch 149 S10. Contracts not under seal depend on Mutual assent of two or more persons competent to contract, founded on valuable consideration to do or omit something not contrary to law. I Assent of parties must be req— —uest on one side and assent on the other. Mere ex parte affirmation in discourse on overture not agreed to, is insufficient because nudum pactum. In case of

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offer by letter if acceptance written before offer retracted it is binding because offer ex necessitate considered as repeated constantly until replied to. Obligation in general must be mutual or neither bound but to this there are several exceptions as in case of I Infancy II Fraud of one party III Statute of Frauds &c. Where sole consideration of promise is engagement of other party and probably in all cases latter must in general be bound at time of promise II But exception in case of professed agent without authority if his act be afterwards ratified. After if he did not profess to contract for principal. Assent may be either express or implied. Express when given in terms. Implied from demand of reason & justice, as taking benefit of act &c in other side, invariable & certain usage of trade or place. Commission of tort no one being allowed to take advantage of his [own] wrong. Legal interest as penalties and even judgments of foreign courts on which assumption— —sit [brot] though not in decrees of chancery because not of record & equitable only. Alike in Virginia. Express promise supersedes implied, as away going tenant in Va, whose lease is to expire at a certain time. II The Consideration. All contracts

require valuable consideration actual or implied. In simple contracts generally must be actual. In deeds & mercantile securities consideration implied from the nature of the transaction. General policy of mercantile securities as between original parties consideration presumed prima facie in the hands of subsequent holder for value &c. Valuable Consideration is a benefit to promisor, or to a third person at his request or loss or inconvenience or risk thereof {at}

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to promisee at instance of promisor. Marriage is valuable consideration. Distinction between good & valuable consideration relates to deed. So legal and illegal consideration. with view to impeach deed but not to sustain it. Adequacy of consideration of no importance except with regard to fraud. Mere indulgence without any other circumstances not sufficient proof of fraud. So mere folly or weakness short of entire imbecility not sufficient to defeat interest even in Equity if no advantage taken of it. If agreement unconscionable such damages will be given if violated as will be just, as if in agreement to pay double on every nail in horse shoe &c. Waiver of legal right, or tort valuable consideration. endeavor to perform act valuable consideration. So forbearance of legal or equitable remedy. For well founded or doubtful damages tho' only for limited period and though promisor not benefited by delay. But if claim wholly unfounded its waiver no consideration. So entrusting promisor with property is valuable consideration. as with money to buy stock, with property to take care of as in *Coggs. v Bernard*, so with materials to build with, so assign. of debt or right is valuable consideration. although transferor or assignor of choses in action transfers or confers only on equitable title. So release of Equity of Redemption for courts of law take notice that courts of Equity recognize such rights, so prevention of litigation, by mutual compromise of conflicting claims or in case of submission to arbitration, so promise for promise, as to contribute to common object. Moral Obligation when no legal liability, sufficient

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consideration only when original obligation was legal but some positive rule of law or statute of Limitation has precluded remedy. Yet sometimes moral obligation as case of past seduction, maintenance of child by step father. When express promise &c not so. Gratuitous Promises. An imperfect or vague duty does not support a promise. Hence moral obligation not sufficient except as above because uncertain wld often take preference of real debts, suits would be multiplied and temptations of [blank space] be increased and difficulty in discharging these duties. Smith in *Contracts* 117 (na) Thus natural love and affection insufficient, same indeed of conveyance. And so friendship, so seduction of child without parents request no consideration. Doing what one is already bound to do no consideration for additional promise of additional reward. As master of vessel in storm promising crew extra allowance, so witness promised extra allowance for attendance. Promise after consideration executed without precedent request is gratuitous and nudum

pactum. As to pay a debt already ensured by a third person. Precedent request implied promise when no loss to promisee and no gain to promisor or third person at his request not binding as to accept less than a debt or give time unless there is a new consideration. as for example additional or different security, or mode of payment differing in time, place or manner from first stipulation or mutuality in composition deed so to pay amount of negotiable security when no liability existed or by reason of its loss while negotiable &c.

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So by Exor# individually to pay testator's debt without new consideration but giving up former consideration or security to Exor# is sufficient. So by husband to pay wife's debt. Plaintiff a stranger to consideration relates rather to who shall be plaintiff than to validity of contract. If promisee be mere agent, promise is for benefit of principal but in general he must be plaintiff from whom consideration moved. Hence if A promise B for value— —able consideration. to pay a debt to C. B should regu— —larly sue rather than C. But in simple contract it seems a stranger to the consideration. for whose benefit a contract is made may sue. 1 Ch Pl 56. Must often be a question whether consideration does not move from plaintiff really when it does not appear so at first view. If stranger to consideration. might sue it would deprive him from whom consideration moved of privilege of with— —drawing his intended bounty, the same was gratuitous. In deed at Com Law if inter parties action must be in name of party to instrument and not of beneficiary who is a stranger as in *Ross v Miln & son*. 12 Leigh 204. But by Va statute (VC 500 C111. S2) both in deed & simple contract a stranger to consideration. if beneficiary in contract may sue. Impossible Consideration. Natural or legal impossi— —bility no consideration. because no benefit, as to go to Rome in three hours or to discharge a debt due to mother, or by assignees of Bankrupt (under Engl Bank Laws) to as to have bankrupt answer. But impos. probability or difficulty in thing promised does not affect promise and so such promise may be consideration., nor can impossibility if it affect promisor as individual and be not intrinsic, or

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contrary to law or moral duty. Hence a stipulation that another shall do an act is binding if founded on suffici— —ent consideration, so such promise is a consideration. for ano— —ther promise. Consideration void in part If consideration. [blank space] and part illegal, by Com Law or Statute contract void. EG. Agreement to pay \$1000 in consideration of the lease of a house and gaming apparatus. But if consid— —era. separable and part that is legal is sufficient to sust— —ain promise contract is good. EG. A deed of trust to secure a Sheriff for omitting to return execution either in the past and in the future. So if consideration is part frivolous or insufficient and rest of consideration. adequate to sustain promise it is valid and frivolous part may be omitted in pleading. Consideration in regard to Time. ¹Executed, not in general sufficient unless moved by preceding request express or implied. As promise by obligor after assignmt. to pay bond nudum pactum unless obligor had reques— —ted assignee to take assignment. Bailing servant unas— —ked and subseqt. promise by master to save harmless. Precedent request implied

from parties taking benefit of plaintiff act as when A furnishes clothes for B's child— —ren unasked and B afterwards promises to pay for them or A buys goods for B unasked and B afterwards promises payment such request implied ²from act being such as promisee was obliged to or would be coerced to do as if surety pay debt and prin— —cipal promise to indemnify. Such request implied ³from legal (but not moral) obligation by promisor to do what promisee has done for him, as if A pays B's debt unasked and B afterward promise payt. If executory considera. omitted with executed former

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may support promise. Moral obligation when it avails at all is executed. Executed considera. need not be stated in pleading with so much particula— —rity as executory ²Executory. Generally condition precedent to be performed by plaintiff (and purp— —ose averred in declaration and proved at trial) bef— —ore action will accrue . ³Concurrent as in case of mutual promises where thing promised need not be performed to make good considera. the promise is the consideration. Only required that promise shou— —ld be binding. Hence performance need not be aver— —red or proved as condition precedent unless such ap— —pear to be the intent. ⁴Continuing as that deft. had become and was plaintiff. tenant and promised to repair &c. But promise by tenant from year to year after tenan— —cy commenced to repair or do any other act to which law dont oblige him is executed and not binding without pre— —ceding request. Executed marriage is a continuing considera. And payment of money for deft. and having obtained release for him. Section II Of the Form and Construction of Contracts and of parol evidence to explain such as are written I. Of the form of a contract and how affected in general by stat of Frauds. What constitutes an Agreement ¹Mutual & definitive assent and obligation ²a legal subject matter and ³a valuable consideration. Also in some cases by Stat of Frauds writing signed by parties to be charged. In England writing when it is required must contain consid— —eration as well as promise, assent as well as proposal in short whole agreement. Alike in Va. Nature or effect of all contracts not altered by statute

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In all cases if there is a writing which although not required it should contain whole agreement for in genl. parol evidence not admissible to add to written. When writing necessary Engl. Stat Frauds 29 Ch. II 1, 2, & 3 Sections. 1st Relates to creation of title for lords. 4th. To various contracts. 17th. To contracts for sale of goods. Virginia Statute leaves to Stat conveyances to provide for creation of title to lands. Applies to var— —ious contracts viz 1st. Of Pers. Repr. to pay debts of decdt. out of their own estate 2nd. To answer for debt &c of another. 3rd. Upon consideration of marriage. 4th. For sale of Real Estate or lease thereof for more than one year. 5th. Not to be performed within a year which contem— —plates non performance within the year, that it may not be so performed is not within that. Nor is it if com— —pletely executed by consideration. 6th. Representations concerning character credit &c of another. 7th. To pay debts &c contracted in Infancy 8th. To repel bar of Stat Limitations. Form No particular form

required. Terms should be clearly set out. May be done by letter. Whole bargain must appear. May be on different papers if that signed refer to the others. EG [Shakespeare] subscribers in *Boydell v Drummond*. 11 East 142. Signature of party to be charged or his agent, other party need not sign it. "JAB agree &c" would be sufficient signature. Printing name would suffice, so would mark. One party can't be agent to sign for

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other case of Depty shuff selling land officially may be agent for High Shff and purchaser Auctioneer agent for both parties. May be made in pencil writing required by statute in several other cases as transfer of ships, of Copy & Patent Rights &c. And by custom of merchants Bills of Exchge & Promissory Notes required to be in writing. Certainty Agreemt. parol or written must be certain ie not so vague and indefinite as that the full intention of parties can't be collected. This agreement to become a partner with A is void for uncertainty. Alike if partnership between A & B on known terms and agreement had reference to that. Words of recital or promise will make a contract if appear so intended.

2 Of the Construction of Contracts— Rules of construction same at law and in Equity— whether contract sealed or not and a simple and consistent arriving to ascertain & enforce agreement as mutually understood at time. Contract when ambiguous to be taken in sense which promisor knew promisee understood it. Construction shall be reasonable With reference to subject matter, situation of parties and motives which led to contract, as near intent of parties as rules of law will permit. Promise of payment, not saying to whom means him from whom consideration proceeded. Promise to spare debtor means that he will not sue him. Bond with condition "to pay \$100 by instalments until whole sum of one dollars is paid" hundred supplied, so omission of word pound in Bill of Exchge supplied by superscription

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of sum as "£50" or even without it. Agreement to negotiate sale for commission on sum obtained means price actually received. Govt. for rent before re entry. Lease provided for re entry and that lessor should have premises "as if lease had never been made" means should have them after reentry but not so as to defeat recovery of previous arrears of rent. Agreement to work colliery as long as "fairly workable" means as long as working would pay but not to hold tent. to work at loss. Demise of old house with covt. to keep & leave in repair means keep it in state in which it was at demise. Word & language must bear the sense sought to be put on them, must be reasonable moral certainty of intent. Construction shall be liberal. Terms understood in most comprehensive popular sense unless contrary intent appear. Indefinite expression understood universally unless restrained, eg Masculine includes both genders Men, Woman &c. Construction shall be favorable. Hence if words bear two senses one against and the other leans most to law, latter shall prevail thus words "to assign all offices" means all

offices by law assignable. Agreement to make no lease in reversion; lease for 21 years from date includes date.

Popular meaning of words adopted. Technical words technical meaning. Unless subject matter or contract otherwise require. Thus bankruptcy need not mean technical proper bankruptcy, but if context require it then inability to pay debts, so insolvency. Mercantile contracts to be construed according to custom

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of Merchants. Usage must be general so as to prove acquaintance of parties with it. General dictionary not allowed to interpret such words. Hence evidence of meaning attached to the word "(...)" to the phrase "cotton in bales &c." Ordinary meaning departed from when involves absurdity or disproportionate responsibility. Whole of Agreement to be Considered. Whole content every part of instrument if possible made to take effect. Even recital looked to to as certain meaning—so a proviso or condition may make a promise. Exceptions limited to their words & letters. Particular phrase may be explained or qualified by some other, but phrase must have its proper meaning unless its force controlled by other part of instrument. Contracts usually construed by their own provisions and not by matter dehors; but acts of parties and even other instrument may be considered. A fortiori will several deeds made at same time for one object, and yet so as that each shall help main design. Lex loci. Regard had to laws of place with regard to which contract executed ie when to be carried into effect as interest [innuing] &c. But remedy has relation to lex fori—as Stat of Limitations. Redress sometimes refused to contract made abroad in consequence of agreement not to bring suit in own country as agreement by sailors. Words taken most strongly against grantor Grant of Estate for life generally, it shall be construed an estate for the life of the grantee. Grant of rent of 10 shillings by 2 tenants in common this is several and the grantee

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shall have 10 S from each; but if they make a lease & reserve ten shillings, they shall only have ten shillings between them. If a carrier give two different notices limiting his responsibility in cases of loss of goods he is bound by that which is least beneficial to himself as to which quaere. Applies in case of ambiguity only and in last resort. Implied attributes of agreements Bind Exors# and Admors.# of course. Heirs when named at Common Law. Alike in Va. by statute. Several persons promising creates joint liability and if several liability created only by special words. (3) Parol evidence to contradict or vary a written contract In general when agreement reduced to writing, the parties cannot add to, take from, contradict or in any wise alter it by parol evidence having reference to the same or a previous time. Agreement for policy's sake understood to be final depository of parties intent. But third persons may explain &c. by parol. And parties may prove by parol subsequent [indebtedness]. Rule prevails in Equity as well as at law. Fraud and gross mistake may be proved in Equity. Situation of parties & nature of

subject matter of contract provable Agreement by attorney to receive partner not an attorney (wh in Engl. is illegal) cant prove by parol that was not to be received until admitted as attorney. Even in mercantile contract if meaning of ordinary expre— —ssions clear, cant prove by parol, custom or particular int— —ention at variance with such meaning. Custom of country as to outgoing tenants allowance excluded by express stipulations in lease. Expressum facit cessare tacitum—custom may be admissible to explain what is doubtful; but not to contradict what is plain.

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custom proved as part of contract when not contrary to stipulation express or implied. Rule excluding parol evidence applied to Bills of Exchge &c. But may show no considera. (as between original parties) and that one party surety for the other. Written instrument not referring to each other cant be connected by parol. Ambiguity patent not explain— —able by parol. Ambiguity latent disclosed by parol & [blank space] by some as application to one of sevl. things to all of which writing applicable, as gift to JS when there are two of that name &c. Apparent principal may be shown by parol to be only agt. General rect & all ackmnts. of facts, as distringd. from contracts, explained or contradicted by parol. Blank supplied by parol except in contracts under Stat Frauds. In all execd. contracts for purchase & sale of goods price if not named presumed reasonable. And so as to time for law leans agst. destruction of instrumt. by reason of uncertainty. When statute requires writing no parol evidence can be introduced. In cases where no writing required if mem— —orandum does not profess to contain all the terms of contract adt. terms it is said proved by parol. So collateral terms grafted when contract silent as in case of away going crop. Writing when intro— duced to prove collate. fact contradicted by parol. Writing required by stat, fraud wholly but not part— —ially waived by parol as by changing time of perform. &c. Contract if not under seal may be released by parol provided there is a valuable consideration therefor. If sealed release must be sealed.

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Section III Of Stamping Agreements. No Stamp laws in Virginia (Chap II) Of Contracts with Particular Person's. (Section I) With persons incompetent, or protected from liability on their agreements. I In General To constitute binding agreemt. must be mu— tual consent of parties to do or omit an act. Such consent must proceed from exercise of reason and judgment on the subject. Hence those devoid of a sufficient degree of understanding to deliberate on the subject and weigh the consequences of their acts cant contr— —act. But the law (most adult persons being competent) presumes a capacity so that he who claims on exemption must establish the mutual inability. Protection is given only in the prescribed instances. Anything short of those (in the absence of fraud) is not regarded. The incapacity to contract is absolute & general in some cases as with married women, limited in others as with infants &c. sometimes the contract is void as to both parties sometimes as to the incompetent only as infants &c. but in general reciprocity of obligation is required. 2. Contracts with persons non sane. An idiot is a natural

fool from his birth. A lunatic or non compos is one who having once had understanding, has lost it by casualty. Both may be called non sane. "Insane person" in Va. statutes included all VC 100 Ch 16 S17 (Cl 5). A non sane is not liable on specialties nor on an account stated, nor probably on contract executory but he is liable on implied contracts for necessaries furnished & perhaps for

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other goods suitable to his station. Insanity subsequent to contract is immaterial, except as tending to show it at the time of contract. 3. Contracts with drunkards Drunkenness invalidate contracts I When brought about by other party. II When advantage taken of it by other party. III When it deprives man of sense. 4. Contracts with Infants. Infancy terminates at 21. The contracts of infants divisible into 3 classes. 1 Contracts which it is beneficial to infant to allow him to make, as for necessaries, marriage settlement particularly feme, touching personalty, apprenticeship & what is bound to do &c binding on infant not requiring confirmation. 2 Contracts which it is hurtful to infant to allow him to make, as bond with penalties, contracts involving forfeitures &c, void wholly & incapable of confirmation. 3 Contracts of doubtful tendency, as most of those which are made, which are voidable or not at pleasure of infant, not of adult. (First) What are necessaries? Such as relate to infants person meat, drink, lodging, medicine, clothing & such jewelry as may be useful but not mere ornament &c. having regard to his station in society. Also teaching but if parent placed him at school, credit presumed to be given him. Such as relates to his wife or children, of same sort. If infant already provided, nothing a necessary and no matter how he was supplied. Not liable for money lent though to buy necessaries, but Equity will put lender in place of person who furnished necessar.

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and was paid with lenders money. Not liable for repairs to his house, nor for rent of a house except as a residence, nor for goods & furnished to carry on trade. Not liable on any special promise even for necessaries, as account states, bond or promissory note. Infant is liable for a tort, but matter ex contractu cant be turned into tort in order to make him liable as by bringing trover for goods sold, case for negligent using property bailed as a horse case for deceit on a warranty falsified. Jury to judge whether necessary or not. (Second.) Infants confirmation of contract after age. Only third class of contracts above subjects of confirma. At Com Law confirmation might be express or implied by parol or in writing. Must however have always been deliberate & voluntary & in view of his rights. And to other party it is said, but quare if [blank space] to stranger would not be evidence of confirmation. By stat promise after age to pay debt contracted in infancy, or upon notification of promise or simple contract made in infancy must be in writing signed by party or agent. So far as stat dont apply as seem to deed infants confirma. proved by acts & devm. after age as before. So as to continuing contracts, as partnerships & leases infant bound if he dont repudiate. Infants incapacity a shield not a

sword for defence not aggression. Hence can't take benefit of contract after age and yet disaffirm it. If disaffirm part must restore what he has recd. under it if yet existing, so if enjoys contract can't recover back consideration. Confirmation may be conditional & then condn. must be complied with. No new consideration required. Action brot on old prom— —ise

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and new promise replied to plea of infancy. (Third) Liability of persons contracting with infants. Complete notwithstanding want of reciprocity unless when contract belongs to 2nd. class and is wholly void. If one of two joint contractors an infant, must sue both & if infant plead nonage, may enter nol pros as to him & proceed against adult. If jury find for infant on plea of infancy judgment still against adult because matter goes only to infant personal discharge. (Fourth) Liability of father for contracts of infant child. 1 On score duty—father liable to whoever supplies necessaries which not supplied from some other grantor to his infant child. 2 On score of agency which is applicable to child— —ren of all ages but especially implied in case of infants may be express or implied from usage, acquiescence after knowledge &c. 5 Contracts with Married Women (First) Effect of a marriage on contract of feme sole. Benefit of unexecuted contract vests in husband on condition that he reduce it to possession during coverture. Reduction may be actual or constructive. Suit must usually be in names of both. If wife survive husband unreduced choses in action survive to her. If husband survives wife they may be recovd. by him as her admor# and after payt. of her debts, he is her sole distributee. If feme plttf marry pending suit or sue alone on con— —tract made before marriage deft. must plead coverture in abatement. Husband liable on wife's ante implied contracts during coverture, but not afterwords (unless

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judgt. has been obtained, except as her admor#. Must be sued jointly with wife unless has promised to pay on a new consideration. If wife survives her liability on her ante implied contra. [revives]. (Second) Contracts of married women during coverture. 1 Of the husbands rights thereon. Generally she acquires nothing during coverture. Even wages for her personal labor are her husbands, and so a bill or note made payable to her. If woman sells property of husbd. without his authority he may reclaim it though other party thought woman a feme sole. If woman make contract with one who knows her to be married husbd. may ratify it if he pleases and other party will be bound. [Aliter] if she was not known to be married & did not profess to act for husbd. 2. Of husbands liability for wife's contracts during cover— —ture 1. In Genl. Married woman has no necessary perm to bind her husband by her contracts. 2. During Cohabitation He is bound only on ground 1s Of Agency which may be express or implied & is terminated by his death or denial thereof. 2nd Of Duty in respect of necessaries which last continues as long as duty lasts & is superseded by wife's abandoning husband or living in adultery apart from him, but not (during continuance of duty) by any prohibition of credit on his part. Principle embraces necessaries only and not money to buy them. Marriage in either

case proved by cohabitation. 3 After separation by mutual consent, but husbands act or misconduct.

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Deed providing for immediate separation valid. Aliter as to future separation. Wife notwithstanding separation cannot contract as feme sole. Husband still liable for necessaries unless he actually provides them or means to procure them. Mere contract to provide not sufficient. If wife have funds of her own though not supplied by husband. be not liable for necessaries. But quare! When cruelty of husband obliges wife to leave him he is still liable. Aliter if she goes without his consent for any other cause even though it be his bringing a mistress into the house. But quare! Law expenses of divorce & articles of peace included amongst necessaries. 4. After separation by act of misconduct of wife. Husband not liable even for necessaries except on ground of implied agency of wife as if he cohabits with her after adultery, or leaves her in his house without warning to tradesmen. When wife may be considered feme sole as to contracts In general not capable of any contract, even when divorce a mensa &c. Aliter in case of divorce a vinculo. Exception to Genl. Rule 1/ When legal existence of husband suspended or extinguished, as by transportation for life or limited term or perhaps confinement in penitentiary with [us]. 2/ When husband has abjured the realm. 3/ When he is an alien enemy. 4 /When he is alien friend but has never been here, doubtful. But not if he has been here. Intention to return presumed. 5/ When he has been absent 7 years without having been heard of.

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6 When wife trader in London. Wife joined with husband in action when she is the meretricious cause and promise made to her, as for wages &c. Wife may be an Executrix &c. 6. Contracts with aliens. Alien friend may lawfully contract but if war intervenes right suspended until peace. Alien enemy cannot contract—void. 7. Contracts with Outlaw and Persons Attainted Void at Common Law. Outlawry in civil cases abolished. Exists in criminal cases judgement of outlawry pronounced in Circuit court equivalent to conviction, occasions no inability to contract. 8 Contracts with Bankrupts.} Of little importance at present. 9 With Insolvents. Our law don't contemplate a release of debtor from discharge of the debt; but only from imprisonment on account of it by giving up all his property but remains bound for the balance which remains unliquidated. Ch 188 S2 Note* S8 to 16 5 tog. Imprisonment on Ca [Sa] abolished now in Virginia. Ch 188 S1, 2, & note except as to judgments rendered prior to the act. 10 Contracts with persons under Duress. Duress of two sorts, either in actual violence or in a threat thereof, to person not good's, proceeding from promisee or his agent. Actual violence, imprisonment any where if unlawful is duress to avoid contract extorted by it. Imprisonment lawful also duress if unlawful force or privations used & party thereby constrained to assent to contract. Imprisonment under regular process of Court of

compet. jurisdiction in proper custody, not unlawful & so not duress, by English cases. American doctrine appears to

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be different, makes any imprisonment without just cause or for unlawful purpose duress. Duress per minas. 1st. Of life 2nd. Of Member 3rd. Of Mayhem 4th. Of Imprisonment. Injury threatened must be such as damages cant be an adequate compensation. Hence of mere battery, or trespass on land or goods insufficient. Thus of burning house held formerly insufficient but comes within principle for endangers personal safety of party and family. By whom suffered. Usually by promisor, his wife or child. Pleading Duress. Must be specially pleaded or not available by new rules in Engl. In Va avail— —able under general issue in assumpsit or debt on sim— —ple contract. To specialties must be pleaded specially. Money extorted by duress, as illegal toll may be reco— —vered back. Section II Of contracts with persons competent to contr— —act. I Principal & Agent or master and servant. 1 Of the different description of agents. Mercantile ag— —ents or domestic servants. Merct Agents, factors who have apparent ownership of goods, brokers who are only empowered (without possession) to affect sale and Del Credere agents who for higher commissions guaranty sale. 2 Appointment of agt. & revocation. Appointment may be generally by parol except to execute deed or make livery of seisin when authority must be under seal. Parol acknowledgmt. of authority under seal by principal sufficient but if no authority existed parol proof of parol ratification not to be sufficient. Authority as agent sometimes implied when none is first given, as when goods sent to auction room, power of sale implied, club bound for acts of committee of managem —ent

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on doctrine of principal & agent ie so far as Comm— —issn. has authority subsequent ratification equivalent to previous authority. And if fact is not disowned as soon as known it is a ratification. Bringing action not sufficient for contract must be consummated by action brought Control of agt. as servt. is control of principal. Agent is only medium of assent, contract desc— —ribed & treated as that of principal. Hence agent need not be sui juris but may be infant, wife &c. Agency determined whenever principal pleases unless when an interest is coupled with authority, as when in nature of a contract by 1 Express revocation of authority 2 Death of principal 3 Efflux of time 4 Execution of commission But authority continues as to those who had before acted on faith of it until they have had or may be presumed to have had notice of the revocation. Extent of authority & liability of principal. Principal liable only civiliter not criminaliter for acts of agent so not liable for wilful but only negligent acts, unless indeed he directed the wilful act. But principal liable for agents fraud in course of his agency. Master not liable for medicines &c furnished servant unless he employed physician &c. Master liable only for acts of agent in scope of authority. Agts. general or special. Principles same in each case, only authority wider in one than other EG Livery Keepers servt. sent to sell horse with directions

not to warrant, servt. sent to buy goods on credit without order. All agents authorized to do subord. acts nec— —essary to effectuate principals act, unless expressly denied on

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face of authority, thus to sell implies power to warrant chattel &c. Extent of authority in case of doubt sometimes determined by usage. Thus sale on credit if customary in such cases is within power to sell generally. Agents for sale of goods had at Common Law no power to pled— —ge them [through] the apparent owner. Remedied in Engl. by 6 Geo IV C 94, and in Va. by act declaring property in possession of agent who does trading business without disclosing principals name liable for all agents debts. If name of principal not known at time and credit given to agent, upon discovery of principal he may be debited; but if principal is known and credit still given to agent principal cant be charged. Citizen merchant buying for foreign seems always liable without express contrary stipulation. Agent cant delegate his authority. 4 Right of action of Principal. In general principal and not agent may and must sue on contracts made by agent which are indeed contracts of principal. Only exceptions when agent has contracted in his own name without disclosing principal. Even then principal may come forward and ass— —ert his claims except when he has permitted agent to cont— —ract in his own name under seal or to have possession of goods or money by which (...) of property he has deceived some one when principals rights are subordinate to those of other party. 5. When agent is personally liable. In general agent not personally liable on contracts as such because they are con— —sidered contracts of principal. Exceptions First. When he omits to diclose his principal or contracts in his own name, or otherwise fails to bind a principal.

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Second. When he exceeds his authority or acts without any as by executing a specialty without authority under seal. Mode of executing instrument if agent dont bind himself immaterial, may be signed "P by A" or "A for P" what is essential is that it should be the P not the A who speaks. 6 When agent may sue. In general agent cant sue. Must have some special property to do so as in case of carr— —ier, factor, broken &c. So when agent has so contracted as to be liable he may sue on that interest. But deft may set up any defense he has against principal. ——2 Partners— —— I Formation of partnership 1 As between the parties themselves Partnership may exist as to public it does not bet— —ween the parties themselves. May be created by parol or in writing, but if to last over a year or relates to lands should be written according to Stat Frauds. No action for breach of agreement to become partner unless terms clearly appear, either expressly or by reference to those of existing concern. Agreement to be partner not generally decreed specifically in Equity at least when partnership dis— —solvable immediately. Partnership generally constitu— —ted between parties by agreement to share profits & losses equally or unequally whoever may supply capital. Presumption is that profits shared equally. But must be intention to be partners else sharing profits & losses does not as between parties create partnership as when merely mode of compensation eg agreement between captain and

seamen of whale ship. Agreement to [run] coach & find horses each for diff. parts of road and share profits propor— tionably to distance, a partnership.

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No partnership if projected concern never carried into effect agreeably to prospectus, as in case of distilling co. One partner cant sue another at law in respect of part— nership accounts, or transactions which require settlement of accounts, because court of law cant settle accounts which belongs to Equity. Hence one cant sue co—partner for money received for use of farm or debts paid &c. But may sue on express covt. not involving adjustmt. of partnership accounts, as for not advancing money stipulated for &c. When the same person is a member of two firms, one firm cant sue the other at Law, must sue in Equity. 2 What will constitute a partnership with respect to third persons. An agreement to share in equal or unequal proportions the profits. For ce qui sentit commodum, sentire debet et onus. And he lessens the [fund] to pay debts. No matter tho' party were not known as partner. Exor# who continues business of decdt. personally liable as partner in the firm, although of no personal advantage to him. Communion of losses unnecessary, that of profits enough eg ship agts. who agreed to share portion of prof its but ea— ch to bear his own losses. A & B agreeing to allow B \$300 out of profits with lien on profits of concern. Dormant partner liable when discord. on implied & and it would seem on express contracts too if not sealed. But not liable if not shown as partner on contracts after he has actually ceased to be partner. Dormant partner is one whose name dont appear at large or in general terms in concern. Retiring partner liable still if he continues to receive part of profits or allows his name to be used in concern. Liable in all cases for engagements. whilst partner. Nominal partner is one who without actual interest allows his name to be used. Founded on general policy to prevent

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fraud on creditors. If such nominal partner does not share in profits, not a partner as to such creditors as know of that. Mere admissions subsequent to contract that party was partner of firm does not conclude him. Aliter if admission be made before contract, for credit of his name may have induced it. Subscription to contemplated asso— ciation does not make one liable as a partner unless terms complied with and association complete or unless he has authorized by language or conduct the particular contract as by attending meetings acting as director &c. Publication of name as member of intended association by society, without authority is not such holding out as part— ner so as to subject partner, because not his act. Members of club houses with comml. of management not generally considered as partners & therefore not bound by contracts of comml relation is rather of principal & agent. Sevl. persons dining together at tavern jointly liable for whole expense. Aliter officers of regimental mess which seems like club. If no participation in profits, nor any use made of party's name to obtain credit, no partnership, though there be com— munity of interest eg a purchase by one of several parties with agreement between them that each shall have distinct share of whole. So when

agreement to share is subsequent to purchase. But agreement for joint purchase for adventure makes partnership from time of goods bought, tho' one partner only known and credit given to him. Sev. proprietors of stage coach on long road provide each for distinct parts of road & share profits in prop— —ortion to distance, no partnership yet quaere! [Remuners.] as to clerk or traveller out of profits in lieu

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of fixed compensa. no partnership, so in case of lighter master and crew of whaling ship. II What contracts by one partner bind the firm. General Rule is that act agreemt. of one partner about business of firm binds it. This the rule throughout Europe & America, founded on desire to favor commerce and give partnership credit, and on the principal of agency. Dormant partners liable on implied and it seems on ex— —press contracts of firm. Private agreements between partners dont affect acts of either as to third persons, if within business of concern, as in warranty of horse by one of two dealers. One partner may bind fellows by bill Exchange or Promi— —ssory note, selling or insuring effect, receiving, releasing or suing for debts, borrowing money for firm &c. If in name of firm & within its sphere of business liability exists though firm got no benefit, no matter if partners are secret partners, still bound. If other contractor collude with one partner to injury of another, latter not bound. Doubtful if partner can guaranty for third person, seems not incidental to general authority conferred by partnership. But authority express or implied may be shown. Cant submit to arbitration for like reason. So cant bind firm by instrument under seal without spe— —cial authortiy under seal or perso. assent & preserver. Yet general assignmt. of personalty & purchase of lands to pay debts though under seal valid, even it seems though cred— —itors arranged in classes ie act which would be good but for seal, is not vitiated by it. Bond in name of partn— —ership executed by one partner is his bond only. At Law extinguished simple contract which is merged in it

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In equity if bond not recd. in satisfaction simple contract enforceable against now signing partner although perh— —aps not until insolvency of him who signed at least if former be dead. Subsequent approval or silence with knowledge, evidence of authority. So subsequent approval or silence evidence of partnership existing at time of contract but if it clearly appear that it commenced afterwards no acknowledgements of liability will make him liable as partner. Firm not bound if collusion between partner and third partner, or latter had reason to suspect good faith of par— —tner as transaction to bind firm for private debt of ptnr &c. Firm not bound tho' transaction relates to partnership & free from fraud if express warning not to trust be given for implied authority revoked by express countermand yet quaere for it amounts to dissolution of partnership. If money advanced to and on credit of partner does not become partnership debt by being applied to purposes of partnership, even with knowledge of other partners— —quare. After contract made change of members of firm does not justify action by new firm though the interests of old firm in subject be transferred to new, as contract with

coach makes to hire carriage for a certain term and change of members of concern meanwhile. Liability on guaranty by firm ceases by retiremt. of one ptnr. III Of the Dissolution of a partnership and of contracts subsequently made.

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Of the subject matter of Contracts. May be any subject, so it involve no illegal object, tho' trifling unimportant or ridiculous. Section I Of contracts not under seal respecting seal pr— roperty. I Of contracts relating to purchase of real property I In general. Capacity to purchase. Incapacities 3 kinds. 1st. Absolute as unincorporated associations &c. corporations forbidden to purchase &c. 2nd. To hold but not to purchase, as aliens except in cases prescribed by statute &c. 3rd. To purchase except sub modo—as infant, married women, lunatics, fiduciaries as to subject of trust &c. which latter prevails in Equity. Circumstances which affect purchase. Inadequacy of consideration, only so far as tends to prove fraud. Imbecility of mind short of idiocy, only so far as tends to prove fraud. But imbecility & inadequa— cy of consideration together will prove fraud. Fraud always avoids contract at instance of him defrauded whether consists in misrepresentation, concealment or any thing else. Misrepresentation though innocent if material or though immaterial if with fraudulent design avoids contract. Question generally is has party got substan— tially what he contracted for, if so he is bound if no fraud. When misrepresentation neither material nor fraudulent, compensation made for it. If material or fraudt. effect not obviated by stipulation that no error of description shall affect it. Contract wherein material mistake or fraud not execd. by Court of Law rescinded by court of Equity.

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Several lots bought at auction sale seperately deemed seperate contracts, unless afterwards aggregated into one written agreement. Employment of puffers at auction fraudulent and avoids sale. Vendor may by previous notice reserve a bid to prevent property being sacrificed. 2 Of Statute of Frauds touching agreements for Sale of Real Property For provisions of English Statute 29 Car II see text. Va. Statute declares that no action shall be brought to charge one on any contract for sale of lands or lease thereof for more than a year unless it be in writing &c. Applies only to contracts of sale & lease of lands not any interest therein. Parol contract for sale or lease not made availeth at law by part performance. Aliter in Equity. But can at law sum pd. when adversary refuses to comply recoverable back. Statute applies not to executed but only to executory contracts. Hence if deed made or lessee put in possession purchase money may be recovered or rent although no writing on part of purch— aser or lessee. So acknowledgment or purchase money in deed of conveyance dont repel proof of non payment for deemed only formal. Parol contracts for lands not void and so vendee himself cant refuse to comply & so entitle him— self to recover money paid on contract. No third person can take advantage of contracts being by parol. 3 Of action by vendor against vendee of land for breach of contract of sale. Vendor must have performed or offered to perform as by showing or offering to show good title if so required and tend— ering deed of conveyance contract on his part, unless

ven— —dee agree to do it or it be dispensed with by vendee, or pres —ented by vendee's act. Duty of vendee if nothing said to prepare conveyance. Yet Quaere!

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4 Of action by vendee against vendor. Vendee may sue vendor if he fails to fulfil his contract and recover his deposit or whatever he has paid, but in gen— —eral not damages for loss of bargain. Such damages recoverable only where vendor guilty of fraud or wanton trifling, as when he knows he has not the title he agrees to convey. If vendee dies persl. repl. may for breach of contract in vendee's life time. If breach secured after vendee's death heir to sue. Vendee must have done punctually or offered to do all on his part to be done, unless in case of independt. covts. or covts. not precedent or unless discharged from performance by vendor. Any objection which in Equity would excuse vendee from perf— —orming, will in general entitle him to sue for breach of con— —tract. If neither party ready at appointed time contra— —ct at law ipso facto dissolved. If no time fixed for completion of contract, enough if vendor can make title at time of trial unless title demanded by ven— —dee in vain before. 2 Of contracts between landlord and tenant. 1 To take assign and surrender premises. (1) When instrumt. [ammounts] to immediate demise, or to lease in futuro. Depends on whole of instrument showing intent of parties, no form at large necessary. Bonds of present demise not counteracted by stipul— —ation for formal lease in futuro if present demise seem designed. (2) When demise must be in writing under Stat Frauds. When contract executory. Executed lease when ten— —ant put in possession need not be in writing unless ex— —ceed 5 yrs and then (by stat conveyances) must be by deed

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(3) Tenancy from year to year. Until Hen VIII general letting or lease at will since their tenancy from year to year, but still lease at will may be created by express terms. Principle of imp— —lying tenancy from year to year from a general occupation not applicable to make lodgings. Tenancy from year to year impliedly created by remaind— —ermans continuing to receive rent from lessee of previous tenant for life & or lessee's continuing to receive rent from lessee holding over after end of term and impliedly the terms are the same as far as applicable. But if several persons concerned all must concur. One let into possession a contract of sale before payment of rent is tenant at will afterwards tenant from year to year Payt. or rect. of rent prima facie evidence of contract of lease tho' not of precise terms. Mortgagee bound by tenan— —cies created before mortgage, and after default of mortg— —agor may be considered as assignee of reversion. Not bound by subsequent tenancies & may treat tenants as trespassers; but cant sue or distrain them as his tenants. If tenant take possession under written demise which he dont sign, presumed to hold under its terms, but if land— —lord fails to perform contract on his side in action for use & occupation jury may allow quant. valebat without ref— —erence to to writing. If tenant evicted by landlord may treat tenancy as void but if he retain rest of premises must pay quantum valebat Quaere? 4. Of the Stat of Frauds relative to

assignment & surrenders — —ender of terms & of surrender by operation of law. 3rd. Section 29 Car II requires all assignments, grants & surrenders of freehold or terms for years or any uncertain

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interest except copy hold &c. to be in writing. In Va. only parallel is in Stat Conveyances applicable to estates exceeding 5 years which requires deed. Cancellation of deed does not reconvey title. (5) Of the tenant being estopped from disputing landlords title. General rule that tenant cant dispute landlords title tho' he may have none, unless the tenant has been evicted. But maybe show that landlords title has expired since lease. Same principle applies between mortgagor & mortgagee trustee & cestui que trust, and generally wherever one obtains possession of land from another by recognizing his title. Tenant cant dispute title of landlords assignee, nor of reversioner whose title same as that of tenant for life who let the land. Payment of rent impliedly admits tenancy & so prima facie landlords title; but may prove mistake or misrepresentation. 2 Of tenants liability to repair. If there is an express agreement conform to that. If no express agreement law implies that tenant will use well and return in same state as when demised save ordinary wear and tear considering purposes for which leased. But not bound (in absence of express covts.) to do heavy repairs, as new roofing &c. Extent of obligation depends on condition of structure and duration of lease greater repairs required as lease is longer. Tenant from year to year liable only for slight repairs to prevent serious damage & for voluntary negligence. Express covt. to repair at Com Law bound tenant to rebuild though premises destroyed without his default. But promise should be unequivocal. Hence to return property does not bind tenant for accidents but only in opposition to holding over.

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In Va. by statute to repair does not oblige to rebuild if buildings destroyed without tenants fault. Promise to treat farm in husband like manner and according to custom of country implied by law. Custom not resorted to if express stipulations as to cultivation. Damages for not repairing, expense of repairs at discretion of jury, compensation for loss of use of premises whilst repairing and also I presume injury resulting directly from want of repairs. Landlord not liable to action for not repairing if not agree to do so, but tenant may quit after notice, if house become uninhabitable, or there is no beneficial occupation quaere. 3 Of Taxes as between landlord & tenant. Landlord liable ultimately in Va. for taxes and if tenant pay them (& he is primarily responsible) to be allowed out of rent. By contract tenant may oblige himself to pay taxes as by express terms, or by agreeing to pay rent free from all manner of impositions, or net rent &c. 4 Of Notices to Quit. 1 When necessary. In tenancy from year to year by Va. stat 6 months notice in country & 3 mos in town required to be given in writing. In case of tenant at will not notice or time required [or] allowed except to enable tenant to remove his effects. 5 Of Fixtures. 1 In general. A fixture is a thing in its nature a chattel so annexed to the freehold as to be removable at the pleasure of tenant during tenancy called

fixture yet may be removed! First mode of annexion & purpose. It must be 1 not a part of freehold nor necessary to its complete enjoyment, as mill stone window blind &c. eg

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agricultural fixtures generally which not removable & fixtures for trade ornament &c which are. 2 Not so fixed as that removal will injure freehold, as mirrors &c by screws, barns on blocks, marble mantles &c. Second. Principles regulating or limiting power of removal in respect of relative situations of parties &c. Genl. rule, that no occupier of land can take away what he has once annexed to freehold, but in many cases relaxed and exceptions allowed. Questions touching fixtures principally arise between persons of three classes. 1 Between heir & exor# of him who put up the fixtures. 2 Between Exors# of tenant for life and remainderman or reversioner. 3 Between landlord & tenant. Character of fixture more easily attached in 2nd. case than in 1st. and in 3rd. than in 2nd. Hence if removability est— —ablished as to 1st. or 2nd, it is inferred a fortiori as to 3rd. Transfer of Fixtures. Upon conveyance [or] of mortgage in general terms all chattels annexed to freehold pass though they would be removable under law of fixtures. Thus steam engine to drive bark will pass by sale of freehold, so a stove fixed to break work of chimney passes, and a kettle in a falling mill if set in brick work, and crops growing. But not a stove with a funnel running into chimney, nor with a pipe, nor machinery in a woolen factory not fastened to building, nor moveable scenery in a theatre. An expression of some things in the conveyance will limit its effect to those. When conveyance contains stipulation "fixtures taken at valuation." What are fixtures depends on relations of par— —ties

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as already explained ie if sale in fee consider fixtures as between heir & exor# if lease as between Landlord & tenant. Statute of Frauds. Contracts for sale of fixtures alone not within 4th Sec of Stat, but if interest in land however slight intended to pass it is in England & perhaps in Va. Price of fixtures not recovered as "goods" but as "fixtures chattels & effects" bargained & sold. But when tenant has sold to landlord fixtures which he might have removed should be a special count setting out facts. 2ndly As between Landlord & Tenant. Consider how general principles above stated modified by usual contract & also independently of contract. 1 Independently of contract Leading distinction is between things annexed by tenant for purposes of trade ornament & domestic use; which are commonly fixtures and removable, if removal would not injure freehold, and things annexed for purposes of agriculture. Ground of distinction is that former are mere appliances to enjoyment of freehold & not constituent parts of it whilst latter are necessary elements to perfection of freehold. Hence a marble mantle or a mirror if part of the finish of the house not removable however fastened, for they are part of house. No distinction as to right of removal whether tenant be for life or from year to year by deed or parol. Tenant must remove fixtures during tenancy or else will lose them. 2 By Contract General principles above stated may be varied by contract—thus covt. to keep in repair all erections there— —after to be built would forbid removal of fixtures.

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So covenant to leave all improvements &c. Time of removal may be extended or restricted. Tenant on reviving lease should reserve right to remove his fixtures put up during first lease. Else [cant] do it. When express or tacit demise of fixtures as part of land must be enjoyed as such and cant be detached. And if detached they become landlords property. 3 As between ingoing & outcoming tenants. In general governed by same principles as between land— —lord & tenant. Usually agreement to take fixtures at val— —uation & then those valued which outcoming tenant might remove on principles above explained. Landlord should be party to such agreement lest he sho— —uld claim fixtures valued as belonging to outcoming tenant as his by law of fixtures. 6 Of Awaygoing Crops, tillage &c. General rule that tenant who knows not end of his term entitled to emblements, if terminated without his fault. Away—going crops taken by tenant on different principles viz by virtue either of express agreement or of custom. Custom does not alter or contradict lease only super —adds terms! Can be no custom in Va. allowed in Pa. In like manner by custom grain left in barn on premises to be threshed. Remuneration for tillage claimed by out—going tenant may be allowed by custom. Tenant in absence of custom or agreement may remove straw & hay from premises. But not manure unless agreemt or custom permit. Land sold passes manure scattered, but not in heaps. These customs may prevail between tenancy created by deed or parol.

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7 Of the common count for use & occupation— Debt for use & occupation lay at Com Law & was not defeated by proof of a demise, not under seal reserving a certain rent, by stat 11 Geo 2 c 19 which was ena— —cted in order to avoid the inconvenience which was held "that wherever then had been an actual lease debt wo— —uld not lie" the stat provided that "it should be lawful for a landlord, where the agreement was not by deed to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the deft. in an action on the case, for the use & occupation of what was so held or enjoyed; & if in evidence on the trial of such action, any parol demise or any agreement (not being by deed) whereon a certain rent was reserved should app— —ear the plaintiff in such action should not therefor be now non suited but might make use thereof as an evidence of the quantum of damages to be recovered" this stat reenacted in Virginia Code Ch 138 sq. 4 Leigh 485. Maintainable for the actual use & occupation ever of an incor— —poreal hereditament. Where written agreemt. of demise must genl. be produced & proved by plttf at trial to show term of tenancy. And would seem this action will lie even altho there has been no demise. But one who has never been in actual possession of premises altho' estate be in him cant maintain this an action against an occupier unless there has been a demise. Is maintainable tho' deft. to whom premises let did not himself occupy them, but let them to another person or altho' only occupied by servts. of deft. action will lie although premises destroyed or unfit for habitation, action will not lie against a mere trespasser. The action for use & occupation, is not a proper form of action for the discussion of a doubtful title.

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Section II Respecting Personal Property 1 Of contracts for the sale and exchange of goods. 1 In general A sale or exchange is a transfer of personal property for a recompense. In sale money: In Exchange other property, same rules apply. To make contract sale must be mutual assent & obligation when entered into, as in other cases of contract. When property altered by sale. May be done merely by bargain. Distinguished between right of property and right of possession. As soon as contract made and nothing material remains to be done by vendor, as weighing, selecting &c. property vested in vendee, unless otherwise agreed, but right of possession is with vendor until purchase money paid unless a future day or payment fixed. If no future of payment or delivery of the chattel be named, presumption is that transaction meant to be on the instant, hence if parties separate without tendering money or property respectively bargain cancelled generally. Bargain concluded and property altered. 1 When no time of payment or delivery specified & tender made of money or chattel before parties separate 2 When future time of payment or delivery is named 3 When whole or part of money is paid 4 When earnest is paid 5 When chattel delivered to vendee When goods to be manufactured are ordered property usually vests not until {actual} articles furnished. But if to be paid for at particular stages & work done under superintendence of purchaser or agent, become his as fast

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as those stages attained. As to when article is finished that is a question of evidence. May sometimes be determined by admissions of parties if they treat it as finished. or not finished. So question of acceptance depends on evidence. If article to be manufactured. vendee's acceptance must be proved, shown by assent to its fitness unless negated by other circumstances. But not by his employing persons to work on it merely. In sale of goods at auction several lots separately knocked down make several contracts, although afterwards [contained] in one memorandum. unless aggregate price for all agreed on. But when sale is private all articles bought absolutely at same time constitute one contract and though purchaser assist in cutting off some & marking others yet valid delivery of whole must be proved. Aliter if one article bought absolutely and another only conditionally. Sale of goods by him who has wrongfully obtained them. General rule is that man can only sell what he has a right to sell. Aliter when innocent person has been betrayed to buy of one having possession prima facie legal, thus fraudulent vendee may sell validity to one without notice; so factor perhaps: So sales in market overt, in England not so in Virginia. 2 Of the Statute of Frauds as it affects contracts for sale of goods. 1 In general. At Common Law parol contract for sale of goods was valid. By 17th. section of 29 Car II required to be in writing if price exceed 10£ unless buyer 1st. Accept part and actually receive same or 2nd. Give something in earnest

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to bind bargain or in part payment. No corresponding provision in Va. except that no gift of any chattel valid, unless by deed or will or possess— —ion has come to and remained with donee or some one claiming under him. Yet so much of text as relates to acceptance & delivery of essential use here. Engl. Stat confined to contracts for sale of goods embr— —aces chattels of all sorts as horses, promissory notes &c. Applies to executory as well as Execd. contracts, even though article is unmanfactd. provided contract is for completed chattel & not for work, or for materials yet Qu— —aere! Contract by shipowner to convey corn to a place and then bring a cargo of coals at a price named, not within statute, contract to do work not of sale. If price amt to £10 contract within statute though uncertain at time of bargain whether it would amt to that sale by public auction within statute—and so in ma— —rket overt. If sevl. lots knocked out to one bidder contr— —act for each generally seperate. 2 As to the delivery & acceptance of part of the Goods. Delivery must (in order to satisfy statute) be with int— —ent to vest right of possession of whole in vendee. And so Acceptance must be with like intent & unequivocal. Delivery to satisfy stat. required here in Va. in order to enable vendor to sue for goods sold & delivered. Written order from seller to warehouseman &c. to deliver goods accepted by vendee and recognized by warehouseman suff— —icient delivery. If goods ponderous or not present as ships at sea symbolical delivery sufficient, as key of warehouse or other indicia of property. Hence sale by vendee of hay & removal by purchaser though without consent of vendor evidence sufficient of delivery to vendee

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Various signs of acceptance held suffi. in [diffc] cases thus after bargain complete, removal of horse from sale to livery stable by vendor, proof of delivery and acceptance. But when horse was to remain with vendor 20 days at his expense & was sent to pasture in vendors name, no delivery. So if sale be for cash & property is to remain with vendor for a time, notwithstanding ven— —dee gives directions as if it were his, yet no deli— —very for paymt. of price was by agreemt. to be concu— —rrent with delivery. So if price to be paid at future time, but by agreemt. title to remain in seller until money paid paymt. tender pre— —cednt. to vesting title. When paymt. & delivery meant to be concurrent if ven— —dee gets possession without paymt. dont change property and vendor may reclaim goods. So if [seek] for paymt. at future day to be given as condn. precd. if vendee gets possession seller may re— —claim goods, unless he meant to waive security. And such waiver implied if goods delivd. by seller without any manifestation of intent to insist on secty, as if he demands it not for 2 mos or even for 8 days. Presumption of such waiver especially strong & very soon in favour of those who in good faith have relied on vendee's ownership as evidenced by possession. Delivery to carrier not acceptance of vendee disaffirms as soon as he sees goods. As to articles to be manuf— —actured vendee employing one to do work on it before com— —pleted, no acceptance. But if price to be paid in ins— —talments at particular stages of work the property may be vested as the article advances. Verbal agreemt. to buy 12 bushels of [tares] in bulk to remain in vendors

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possession until called for, vender measures them & sets them apart, no acceptance. Vendee selects, cuts, measures & marks goods & orders them & bill to be sent him no acceptance. Packing goods on vendee's boxes, which yet remain in vendors possession, no delivery. Delivery of sample not intended as part of thing sold takes not case out of statute. Section V Respecting Monies I Money Lent. Subject must be money [mdze] or even stock not suff— —icient. Money must have been lent to deft. or rather advanced on his sole credit & not to another he being only guarrantor of paymt. Hence lies against pr— —incipal, but not surety, so that whilst prima facie it lies agst endorser of negotiable note yet if it appear an accomodn. endorst. not so. Right to sue not affected by deposit of goods or pledges unless there be special agreemt. stand to it only. Mort— —gage or pledge always implies debt & obligatn. to pay money advanced by parent to child prima facie presum— —ed given, not lent. Money lent to borrower for illegal purpose & so applied not recoverable, as for gaming &c. or in Engd. for consuming captured ship. Person advancing money should sue although another were its owner, unless loan on latters account. If executor [bond] assets, may sue for its as executor. Ordinary bill of Exchge or Promis. note evidence of money lent by payee {by} to drawer &c. But not a check, apparently from usage in both cases. II Money Paid 1 Money must have been paid.

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Money must have been paid by plttf for deft at defts. request express or implied, and for a debt for which deft. was liable. Hence if plttfs goods taken for defts. debt action lies not. Aliter perhaps if goods so— —ld (though text contra). Nor if bond only given for debt unless accepted as paymt. and in discharge of principal. 2 Request required express or implied. 3 Primary liability of defendant. Request implied when plttf compelled to pay defts. legal debt, as if plttf paid rent of deft. to loose his goods from distress. So when necessary duty (as burying one's wife) dischgd. by plttf on defts. absence or when carrier deld. Cs goods to B by mistake & had to pay for them to C. So law implies request to surety on part of principal, or to bail. But costs incurred by surety in defendn. action recovd. only on implied pro— —mise of indemnity special count. So contribution be— —tween co—sureties rests on same ground. Money paid lies. But must show insolvency of principal. And at law recover only single aliquot part tho' some insolv., but in Equity otherwise & in Va. at law. Against principal & against co—sureties when money paid on judgmt. summ— —ary proceeding by motion in Va. in 10 days notice. Contribution not recoverable at suit of one who requested co—surety to join. Request negatives promise or request implied otherwise. Contribution extends not to costs expended by plttf in defendns [st] of common credr. no contribution between partners at law, proceedgs. must be in Equity bec— —ause of acct. but there is between co contractors not partners. No contribution between tort feasons unless the tort was only inferential as in case of two coach pro— —rietors or plttf knew not that act was unlawful or it was doubtful. Request by deft. to pay money binds

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him though transaction were originally illegal—as to pay money which had been lost at gaming. III Money Had & Received. 1 In general. Equitable action to recover money which ex aequo et bono deft. ought to refund. Lies not for money paid which in sincerity ought to have been paid but which law would not enforce as infancy debt, debt barred by stat Limita. &c. Lies for money paid by mistake or imposition or for considera. which had failed &c. Form of Count. Must be priv— —ity of contract between plfff & deft in law or fact, and deft. or his agt. must have recd. money and not merely money & worth for use of plfff. Hence stock improperly transferred to deft. not recoverable as money had. Hence if money in dispute paid to stakeholder by mutual consent for party entitled, can be recovd. as money had &c. only of stakeholder & not of other party. So money had &c. lies not to recover value of bank or other stock transferred to deft. & standing in his name or forei— —gn securities, until converted into money. But sometimes if easily convertible conversion into money presumed. So if plfff give deft. bank bill not due to get endor— —sed and deft. put it into his bankers hands money had &c. lies not before till due. Essential for plfff to establish right to particular sum of money recd. to his use. Hence receiver of rents of est liable to elegit credr. for money had &c. only when no prior liability to absorb rents. But origl. receipt of money by deft. to use of plfff sometimes presumed or proved by defts. admission. Thus if deft. receives money as admor# wh— —ich all concerned agree shall be applied to pay funeral expenses of decdts. widow which plfff has dischg.

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money had &c. lies. So if trustee admits balance in his hands due cestui que trust. Money had &c. sometimes lies when no money ever recd. by deft. So when vendor & vendee of land ag— —ree that vendor should pay no part of expense of conveyance otherwise payable by both. Attorney who prepared conveyance may sue vendee for money had &c. So when agent of grantor & grantee of annuity renders account to grantee showing moneys recd. of grantor, lia— —ble for money had &c though none recd. unless can show that credit were made by mistake. Need not always be express privity of contract between plfff & deft. Thus husband gives wife money to dep— —osit in bank for him which she deposits accordingly but in another persons name husbd. may have money had &c. In many cases plfff may waive deft. x [blank space] tort by which he recd. the money & [sers] as for money had &c. Thus deft. tortiously takes plffs. goods & sells them plfff may waive tort & sue for mon— —ey had &c. So if deft. receives plffs. rents with out orders money had &c. lies, provided rents not claimed by virtue of adverse title—title cant be tried in this action. Generally money had &c. lies not if all privity of contract expressly negated by facts & deft. recd. money solely for another. Thus attys. clerk who receives money for client in behalf of his master, accountable to his master & action for money had &c. lies not against him. 2 Who may in general maintain the action. In genl. plfff must show that deft. recd. some specific sum for his use. Money or goods proceeds of which plfff claims, must have been his at comme—

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—ncement of suit. But mere possession of goods suf— —ficient to show title as against a wrong doer having no title, against when if he sells the goods this action lies. Action lies if plttf entitled to money the deft. recd. it indirectly & tho not the indential produce of the goods sold. When acts of trespass distinct plttf may waive tort in first & sue for money had &c. & sue in trespass for other. Trustee receives money for c.q. t. he is liable if no further trust himself be entitled to money. Thus if A sue for benef. of B & attorney receives money B shld. have title & not A. When mo— —ney recd. for sevl. jointly all must sue tho' shares of some paid, as in case of ship belonging to sevl sold. 3 Against whom it lies in General. Not in general maintainable against mere bearer of money. Should be genl. against principal & not ag— —ent especially if agent has paid it over. Not aga— —inst clerk or atty; who has recd it expressly on account of another though he has not paid it over. But money paid by mistake to agent & not paid over to principal may be recovd. as money had &c. And making rests in the acct without giving past credit not a paying over. To charge partners for money had &c. must show money recd by all or by one in behalf of all. Thus where after dissolutn. one partner recd. from insurance office on policy effected in his own name value of goods deposd. with firm for ma— —nufacture and destroyed by fire not recoverable as money had &c. as against firm.

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4 When money had & received lies to recover a debt tran— —sferred by creditors order on debtor to pay plaintiff. There must be an extinction of the intermediate debt. And for that purpose an express agreement between the creditor the plttf & the debtor, whereby the latter is accepted by the plttf as the sole debtor & the creditor (the intermed. debtor) is discharged. It has been said that the substituted debt must be of ascertained amount, but this seems unnecessary. An assignee of a chose in action, independently of statute can only sue in his own name at law when there is not only a transfer to him of the chose, but an express promise by debtor to pay assignee & a consequent extinguishment of assignors demand. If deft were not originally indebted for money had & recd., the common count for money had & received lies not against him. And deft. in order for this count to lie must be debtor specifically to the person for whom he undertakes. The count lies against one who receives mon— —ey on a claim after having assigned it. An authority to pay a debt to a third party cannot be revoked after a pledge has been given such third party. 5. Or money which a principal orders his agent to pay the Plaintiff. This order countermandable by principal and no action against agent maintainable until agent assents to the order or unless a third person be induced to advance on faith of it & it is appropriated to meet such advances. 6. Between Principal & Agent. Count for money had & recd. lies for principal against agt. to recover money collected by latter; but should be prece— —ded by demand. If no money recd. [its rect. sometimes presumed] action should be special for not selling or not collecting. Principal may revoke authority to agent to

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to apply money to illegal purpose, before it is applied. Agent cant resist principal's demand on ground that money was recd. on contract illegal as between principal & the third person. So agent cant dispute principals' title in general. 7 Against Stakeholders. If wager legal winner only can recover stakes. If illeg— —al either may recover his deposit before paid over. No notice of wager determined to stakeholder required. If deposit be made to be paid in a certain event holder must not pay until event determined. If he does action for money had & recd. lies against him. 8 To recover money paid on failure of consideration. When money deposd. or paid on contract and before any benefit derived by plttf or contract performed by deft. con— —sidera. wholly fails there having been some fraudulent misrepresentation, or concealment, or some warranty by deft. money had & recd. lies supposing plttf to have been guilty of no fraud, or other illegal conduct. And so if neither is ready to perform at stipulated time. And a fortiori if def— —ault of plttf was occasioned by that of the defendant. But money had & recd. lies not if contract has been recent— —ly performed & the plttf has derived some benefit, the con— —sideration in such cases not having wholly failed. Thus infant depositing money on agreement to become partner in trade and repudiating contract (as he may) before partner— —ship commenced may recover the deposit. Aliter if the business be actually entered on. So money had & recd. lies when contract rescinded (when contract may be rescinded see ps. 308, 458, 466, 741). Thus if sale of horse rescinded price recovd. as money had & recd. So it lies to recover money adv— —anced for a purpose never arising—as to support bastard

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who dies before expense, to indemnify for an apprehen— —ded injury never suffered &c. 9 To recover money paid by Mistake. Mistake to avail must be of material fact not of law unless of foreign law which regarded as a fact. Must be no laches in being ignorant of the fact although forgetfulness of it sometimes excusable. Payment volunta— —rily made on knowledge of facts tho' not requirable by not recoverable, as underwriter in insurance. Capt. of Ki— —ngs ship freight to admiral &c., tenant land tax without deducting for rent &c. Instances of paymt. by mistake & therefore recoverable as money had &c. Bill of Exchge not presented &c. by holder, pd. by endorser in ignorance of facts which discharged him. Father of bastard paying money when child not supported by parish. Discoun— —ting or receiving forged bills (provided prompt notice of forgery be given so as enable payer to trace them). Instances of laches which discharged. Bank receiving its own notes forged being paid bona fide. Banker paying forged acceptance &c. of customer to bona fide holder & not giving notice same day so as to enable holder to give notice of dishonor. But advance— —ing cash on over due check stolen subjects party who receives amt of check to refund it, mercantile paper over due being treated as common law paper. Paymt. voluntarily made which parties lost not law reqd. as debt barred by Stat Limitations, infancy &c.— —not recoverable nor is money voluntarily paid on an unjust demand with full knowledge of the facts. Nor is paymt. considered coerced which is made upon full knowledge of facts which exonerate, on threat of suit, unless a fraud be practiced.

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10 To recover money obtained by fraud. Maintainable tho' fraud were committed not by deft. but by his agent. And tho' deft. were really entitled in equity to money, if he were not entitled at law—Quaere. Or in case of fraudt. collusion with insolv't. to obtain pro— —ceeds of goods. Or money paid by debtor to creditor by way of fraudulent performance in contempl. of bank— —ruptcy which relclaimable by assignees. But if money paid on contract after fraud discovered cant be recovd. 11 To recover money paid by Oppression or Extortion. When parties are not in [blank space] As in case of usurious excess of interest paid. Tolls imp— —roperly exacted, unless paid voluntarily. Any payment wrongfully exacted by lien or possession of property or by legal process. But mere threat of action not compulsory. 12 To recover money paid on Illegal Contract. When contract is executory or parties not in pari delicto as illegal wager disavowed before result known, money deposited may be recovered. If contract executed & parties are in pari delicto action lies not, as money pd. for office. Action lies by statute to recover money lost by gaming if it be \$7 or made within 24 hours. VC 621, Ch 142 S3. But election to rescind must be notified in due time. 13 Money unjustly recovered at law. As where judgment, after payment, is reversed. Or mon— —ey paid to plaintiff attending credr. his judgment is reve— —rsed or money paid on execution issued on satisfied judgment. but not money paid under legal judgment with— —out fraud, as in case of payment not proved. 14 Fees of Office unjustly recd. by intruder. Pltff may recover as money had &c. fees of office recd. by intruder. But not mere gratuities paid to such intruder.

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15 Against Sheriffs &c. May be sustained by pltff in process of execution, when sale made on acct of his execution; but not until such sale. Hence if shff seizes under one execution & sells under another the first creditor cant sue for money had &c. but must sue on the official bond. Deft. may sue shff for money had &c. if surplus remains after paying debt. If shff wrongfully seize & sell goods under execution, owner may sue for money had &c. IV Interest. At Com Law. By Stat in Va V Account stated. Ch. IV p657. Of Illegal Contracts In General The law maxim is ex turpi contractu non inter actis. The test is whether pltff requires aid from illegal transaction to es— —tablish his case. The object of all law is to repress vice & promote the genl. welfare. Hence contracts violative of the principles of society cannot be enforced. If the consideration of a contract be illegal it may be investigated by parol evidence though in writing, or even under seal and if it arise ex turpi causa the contract cannot be enforced so aid would in like ma— —nner be refused the other party, for where both parties are equally in fault potior est conditio defendentis. But the presumption of law is in favour of a contract because the law never assumes one to be guilty. So if the means in view might be lawful or unlawful the former are supposed to have been in contemplation. In a will circumstances of fraud must be explained by him who propounds the will. In contracts, the reverse. Section I Of Contracts illegal at Common Law. I Of immoral contracts Future cohabitation is a vicious consideration which inva— —lidates a deed. Past cohabitation as a consideration

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does not. But neither cohabitation nor seduction past is a sufficient consideration to sustain a promise not under seal. Contracts otherwise supported by sufficient consideration are vitiated if perverted to immoral purposes, as lodgings let or suffered to be used for prostitution, clothes furnished a prostitute to be paid for from her gains pictures [libellous] or obscene &c. 2 Of contracts void as affecting public policy. Must expressly and unquestionably contravene public policy. Restraint of trade. A contract in partial restraint of trade (if founded on a legal consideration) good. Aliter if restraint be general. Not to set up as Apothecary in 3 miles of Taunton, nor as attorney in 150 miles of London, and not to run coaches on a certain road deemed partial restraints. Restraint is unlawful if not limited reasonably, in respect of space regulated by the nature of the trade &c. but may be indefinite in point of time. Monopolies. Contracts tending to create monopolies except patent and copy rights, are void. Injunctions to revenue. Contract void if impairs revenue of our own country, but not for injuring that of foreign country. In contravention of Bankrupt and Insolvent laws. Contracts to give one creditor more than his proportion &c. void. Restraint of Marriage. Contracts in general restraint of marriage void, but those restraining marriage to particular persons or for limited time valid. Marriage brokerage contracts. To procure a marriage for reward are void. Contracts providing for present separation of married parties good; but for future separation bad. Sale of Offices such contracts void, except (in Va.) the deputation of the office of sheriff.

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Affecting course of justice. To compound a prosecution for a felony or misdemeanor of a public nature, as perjury, maintenance, champerty. To fight, to induce a public officer to neglect his duty; but not to indemnify (for a legal consideration) for past neglect, to indemnify against a trespass, unless reasonable ground to believe it no trespass. Trading with an Enemy, illegal except as to ransom bills &c. 3 Of Contracts voidable on the ground of fraud. Effect of fraud. To avoid a contract ab initio at law & in Equity, whether the object be to deceive the public or third persons, or to cheat other party. Fraud of agent same effect as that of principal, but innocent (unconscious) misrepresentation of agent does not affect contract with fraud. Misrepresentation by third person if known by vendor to influence vendee is a fraud. Party guilty of fraud cannot elect to rescind. And if both guilty as to third person neither of them can found a claim on it. Election to rescind by party defrauded must be made as soon as fraud discovered. In that case can only recover for whatever he has done (if he elects to rescind) by action for deceit. Trespass on the case action ex delicto. Fraud may consist. Of misrepresentation, or of concealment of a material fact. Misrepresentation of value and in other vague assertions the truth of which may readily be ascertained, or the concealment of what a man of ordinary vigilance could discover for himself is no fraud. Fact misrepresented or concealed must be such as would be calculated to deceive a prudent man. Misrepresentation must in general be not only false, but fraudulent in design in order to vitiate

especially if contract were in writing and representation not included in it. In insurances there must be good faith—sufficient to communicate facts without opinions

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whether concealment were material a question for jury. Inadequacy of consideration alone does not justify the inference of fraud, nor does mere weakness of mind but both pregnant auxiliaries to other circumstances. Alteration in written instrument by party avoids it, when one of two parties innocent must suffer from fraud it is he whose conduct made it possible, untrue representations of party's pecuniary responsibility make representor liable, if in writing. Fraud on third persons, as creditor of insolvent debtor compounding with them, when some of them make private bargain for additional benefit or security, or debtor conceal part of his assets. On parties collaterally interested, as in case of surety and principal, where A wishing to advance B buys for him goods of C and C privately exacts a promise from B to pay him more, promise void. Puffers at an auction, vitiate sale unless employed bona fide to prevent sacrifice under given price and should be mentioned in conditions of sale. As to sales as respects third persons. If vendor remain in possession fraud prima facie presumed but may be repelled, conveyance fraudulent as to creditors & purchasers. Agreement for sale of office, thought it be not within the statute prohibiting sales, yet if without the knowledge and sanction of those having power of appointment is void. Section II Of Contracts void by Statute. In general. If part of entire consideration or entire promise be illegal at Common Law, or by statute the whole contract is void. Seems if illegal part be independent or severable, so in case of entire parol contract, if part be void by statute of frauds all is void.

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A contract on which statute imposes as penalty is impliedly prohibited, except marriages & conveys. of pre-empted titles, as to which Quaere! To apply this principle consider if policy of statute was to prohibit act, entirely, or sub modo, or only to raise revenue. In latter case penalty implies no prohibition. Observance of contract excused when statute requires things to be done which contract forbade, but not where it merely permits what contract forbids. 2d. Usury. Usury has 3 essential provisions. 1 Avoids all contracts founded on usurious consideration. 2 Punishes taking usury by forfeiture of double the thing lent. 3 Provides for discovery from creditor and then discharges him from penalties. To constitute usury there must be a loan. If a loan contract void however concealed. Hence no usury to anticipate one's own debt by an early payment before due for a discount or to guarantee a bill at over 6 per cent premium, or bona fide to purchase bill of exchange at discount exceeding 6 per cent. But no purchase if bill endorsed, for then it is a loan to endorser who is liable at any rate. Must be agreement for usurious interest. Hence no usury if accidental mistake occurs or if interest reserved in advance, or calculated for convenience at 360 days to the year by Rowletts tables. But if more than 6 per cent known to be taken it is usury though parties believed it lawful. Must be no risk of principal by contingency. Hence bona

fide purchase of annuity or rent though at any premium not usurious. So if lender is substantially partner with borrower. So if no interest is payable on a contingency, not usury, as if payment be made by a named day. It may however be a penalty. So a penalty which may be avoided is not usurious, but equity will

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relieve against it. The loan of stock, or its proceeds to be replaced at a subsequent day, by stock or the money with the profits of the stock meanwhile not usury, though the dividends happen to exceed 6 per ct, unless it be a shift. If election whether stock or money to be returned is in lender, must make it at time of loan but stock on loan above market value is usury if to be returned in money. Usury must be reserved at time of agreement. Hence valid debt not vitiated by being included in subsequent usurious security. A new agreement or security cleansed of the taint of usury is founded on sufficient consideration & is valid, but there must be an entire abandonment of the illegal interest by repayment or deduction. Bona fide holder of usurious bill—affected by force of the statute, with the invalidity of the instrument (altered in Engl. by 58 Geo III and 5 & 6 Wm. IV). Bill may be usurious in its inception or in its transfer only. In latter case bona fide holder may recover unless he claims through Separate instruments, one for the usury or a verbal contract at time of loan to pay usury within the statute and avoid the whole transaction. Charge for bona fide expenses beyond legal rate of {usury} interest no usury as of commd. by mcht. factor & expenses of collection &c. But it is if a shift to evade statute of which jury must judge. Property taken on proposition for loan prima facie repels usury without reference to value of property; but it is usury if borrower obliged to take it at extra value as condition of loan. Compound interest not usury, but oppressive with us & void. Reference to law of country where contract to be executed for amount of interest. (The rate of interest—having as (...) pleas as would go to statement to jury) Plea of usury must show special terms of contract, not so by late stat in Va. (Chap 141 S6 1 Chitty 572 577. 10 Grat 221.) Jury not court determines time

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character of suspicious contract. Offence of Usury—only completed by actual taking of usury. But contract avoided by agreement for usury. Usury paid recovd. back at law or in Equity as case may be. Measure of relief on usurious deed of trust. III Gaming & Horse Racing. All contracts growing out of gaming of any sort, horse racing, cock fighting &c. or any wager void. So money lent at time and place of gaming to person gaming &c. irrecoverable. If one loses \$7 in 24 hours may recover it in 3 mos. otherwise anyone else may recover—over treble amount half to Commonwealth. Bill of Exchge void for gaming, as for usury in hands of bona fide holder, so bond or note is unless assignee were induced to take it (ignorant of the taint) by assurances of obligor aliter if promise were not made until after transfer. IV Stock Jobbing.

V Illegal Associations. Unchartered banking companies prohibited in Va. and their contracts void.

VI Sale of Offices Such sales void by statute 5 & 6 Edwd. VI if they concern 1 Adminis. of Exec. Government.

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2 Administration or Execution of Justice 3 Rect. or paymt. of Public Revenue 4 Clerkship of any court of record. In Va. statute embraces all posts, of honor, trust or emolument. Legal, Executive or Judicial and the deputyation thereof except the sheriffalty. Not a sale if compensation paid deputy is in shape of a part of profits reserved, the residue being to be paid principal. Aliter if deputy is to pay over a specific sum to principal at all events. Sale of public office if not within the statute, yet is often void at Com Law, as contrary to public policy. VII Illegal sales of goods. Forestalling. Regrating & Ingrossing ante pp 417 to 424 all void if in violation of policy of law.

VIII Contracts made on Sunday In his own or any other calling, void as impliedly prohibited by penalty. IX Illegal charges on benefices.

Chapter V p 727. Of the usual defences to actions upon simple contracts. I Performance of contract and in excuse thereof by reason of plaintiffs non performance. 1 By whom contract to be performed. General Rule by person to be discharged from liability as insolvent stipulating for composition. must tender security to creditors. So debtor must tender money, not merely be ready to do it. 2 How performed. According to its legal construction thus contract to make good & sufficient deed to land only performed

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—formed by conveying good title. If agreement in alternative & one become impossible promise bound to perform the other. Exact terms to be observed neither more nor less. If specific articles to be delivered at given time & place, promiser must be present & must do such acts as vest the property in promisee, as settling articles apart whether promisee present or not. If contract to deliver in all the month of May promiser must be ready at last convenient hour of the month. After right of action for non delivery accrued, subsequent tender unavailing, unless promiser waives default, as by objecting not to time of offer but character of article. If no time or place specified promisor should apply to have both designated, but need not go out of state. If cant find promisee or he neglects to give answer, promisor may appoint place & time. Creditor cant sue until he makes demand or place & time fixed otherwise. If money debt be dischargeable in collateral articles. Aliter After the day. Tender and delivery of the articles on the day a performance, so as to bar subsequent action tho' not received. If promise be to deliver collateral articles, cant sue in debt. 3 When it is to be performed. If time fixed at that time precisely though non performance occasions as forfeited

iture. If no time fixed, in reasonable time to be judged by court from all circumstances. If time computed by month Com Law intends lunar month unless usage to contrary as in case of bills of Exchge. Aliter in Va where calendar month meant. Computation from act or date excludes day of act &c. Date generally means nominal date but if that involve absurdity, as if time be passed when agreemt. made then means delivery.

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time may be prolonged by parol if afterwards the substi— —tuted time observed, but stat frauds allows no partial (tho' it does total) waiver. 4 Notice and request to perform. No notice requi— —red if fact as much within knowledge of one party as of another, otherwise notice is required. So notice re— —quired by implication as if necessary to performa., as the resuming a part by an actor. But unless the nature of the case require request or it be expressly stipulated for none necessary. Promiser bound to do it without being required. No request need be averred unless required to be proved. But if required to be proved as above must be alleged unless other party dispenses with it acknowledging it to be fr— —uitless. 5 Excuses of performance in general. When law imposes obligation, impossibility by act of God excuses. Aliter if party himself undertakes absolutely with out providing for contingencies. But Quaere! In any case it must be impossibility not merely increased difficulty which excuses. Hence lessee covenanting to repair bound to rebuild though premises destroyed by tem— —pest &c. otherwise in Va by Revisal of 1849. If Legisla— —ture after contract declare act stipulated to be done illegal party excused from performance. Aliter in respect to Covt. to omit unlawful act which afterwards law allows. Misconduct of other party may justify refusal to perform, as misbehavior of passenger in ship &c. Entire contract not properly apportionable, yet if other party enjoy benefit of part perfor— —mance must pay quantum meruit. Condition precedent must be performed according to terms of agreemt. before can complain of adversary. Must aver in declara. and prove such performance or offer to perform. And prevention of performance

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by stranger no excuse, as in case of insurance & certificate by minister &c. Concurrent considrs require mutual perf— —ormance or offer to perform, as to deliver horse on being paid price &c. Independent promises require no previous performance or offer. Construed dependently or independ— —ently according to intention of parties & good sense of case and sometimes tho' in form of dependt. yet treated as indepe— —ndent to avoid injustice. 4 Leigh 21. 2 Grat 169. 6 Of rescinding contract on non performance by other party. To rescind contract by deed without mutual consent in no case is admissible. Sufferers remedy by action for dam— — (3 Leigh 81.)— —ages, or in Va. by special plea in nature of plea of set off. (Ch 172 S5.) But as to contracts not under seal non— —performance of cond— —ition precedent usually entitles other party to rescind, but not party in default. So disability to perform condition pre— —cedent induced by party himself enables others to rescind even before time of performance. Yet rescission, unless

both parties assent or [blank space] does not entitle party aggrieved to recover back what he may have paid. If contract continuing default at one time does not enable other party to dispense with contract on future occasions unless failure is at variance with whole spirit of contract. No rescission unless both parties placed in original situation, as in case where one had bad possession or recd. partial benefit from contract. The original rule of the Com Law was that deft. should perform his part, and seek in a cross action compensation in damages for plttfs. default. But in modern rule in order to avoid unnecessary litigation, in case of partial failure of consideration is (instead of bringing cross action) to reduce damages by showing such partial failure. This relaxation applies not in case of bill of Exchge espec—

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—ially in hands of holder for value. It is chiefly applic— —able in case of contract for goods, work & labor & mat— —erials, when deft. is sued for price and proposes to show insufficiency of goods &c. II Payment. I Payment by and to whom made. Rect. fraudulently & by collusion, by one of several plttfs. or by nominal plttff no money passing Court will disre— —gard. Payment in general to trustee good in law how— —ever it may be in Equity under particular circumstances. (in 5 Rand 645, must be in money, & no paymt if collateral but the atty is still atty, from the time atty collected paymt. 7 [Gratt] 48.) Payment of money to plttfs. attorney good 1 Call 143. 1 Wash 10. 5 Rand 645, but not to attor— —neys agent. Payment to creditors agent for that pur— —pose good. Auctioneer after sale is one & time past not such agent (as auctioneer). Debtor must prove agency at (7 Leigh 277) his peril. Agent can only receive money generally, not collateral things in payment. Payment to one of several par— —tners good even after dissolution unless notice to contrary. Payment to one of several executors good. Trustees must act jointly. 2 {Pay} Amount paid Payment [of] part in genl. no satisfaction of rest for want of consideration. But if time, place, or mode of payment dif— (*as in case of subscribers to build a church all bound mutually tho subscirption of one influences the other)—fer from stipulation it may be otherwise. *Hence validity of compositions with creditors &c. payment by stranger, delivery of chattel for money &c. eq a bill of Exchge 15 M&W 31. To try to compel payment of part operates (it is said) rel— —ease of rest. Quaere. 3 Payment when presumed. From uniform course of dealing, as in rent & servants wages. From lapse of time, as 20 yrs, independently of stat of Limitations, but delay may be explained, absence, insolvency or presumption repelled, part payment &c. From possession of security, if it be proved once to have been in circulation. Check no pay—

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—ment (unless so accepted) but only means of getting it. Hence must show that it was paid on presentation or was passed by creditor to another person. Holder of check must present it, not necessarily same day but in reasonable time. But if he had no fund in bank it is a fraud and neither presentment nor notice required. Payment pres— —umed from transmission by mail if directed so to trans— —mit, especially or by usage. May be in goods as well as in money.

Payment in forged bills a nullity. But in gen— —uine bills though worthless if without fraud good in Va. Aliter in New York. Payment may be made by order on debt— —or in favor of creditor, if latter be agreed to be taken & original debtor dischgd. If debtor commit himself to creditor no retracting after that by giving order. If debtor give order for cash & creditor take anything else it is at his peril. Payment sometimes to agent of credr. by giving him credit on account but that in pursuance of usage. 4 Appropriation of payments. If debts distinct— debtor may appropriate at time of payment if voluntary or if he does not creditor may, or if neither law will app— —ropriate it according to justice. If payment coerced it is apportioned among the debts*(as case of two executions levied must be apportioned). If debts treated as one entire account, payment genl. appropriated to earlier items. If one of the demands be illegal, a genl. payment will be app— —ropriated to the other, being legal. The creditor can only appropriate in those cases where the money has been recd. by him as creditor and where the debtor has had an opp— —ortunity himself to make the appropriation and has neg— —lected it. General voluntary payment to be appropriated to interest rather than to principal unless debtor at the time of paymt, direct otherwise.

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5 Receipt for money paid. Not conclusive only presumptive evidence even (it wld. seem) tho' sealed. May be disproved on ground of fraud or mist— —take of facts by parol evidence. Clause of acknowledged— —gement of rect. in deed of conveyance of land not concl— —usive, only estops from denying existence of any consid— —eration not from proof of different amt or of non paym— —ent because such clause merely formal. III Accord and Satisfaction Accord is a satisfaction agreed upon between the parties. Genl. principle that accord without satisfaction, no bar. No valid satisfaction unless a fresh right of action be aff— —orded, or the promise of satisfaction be executed and that for want of consideration. I What is a good accord & satisfaction In respect of the debt, duty, or demand, any may be dis— —charged by accord & satisfaction accepted as such pro— —vided it be certain and definite, as money or bond debt, ejectment or trespass &c. but not a seal action. Must be an existing right of action at time of accord. Hence accord & satisfaction no bar if it precede breach of covenant see Smiths Leady Case 327 (top). If there are several parties accord & satisfaction by one discharges all for there ought to be but one satisfaction and this applies in case of tort. In respect of the value & kind of compensation. Must not be executory agreement in general (such as agreeing to receive part in discharge of the whole) for such agr— —reement nudum pactum or as text says not advantageous; so that if the circumstances afford a consideration (as if debtor give up his property or other creditors discharge him in conse— —quence of the acceptance of part in satisfaction) it is good. So acceptance of part before the day of payment, or at a

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different place. Must not be cause of action of some sort. Thus a prom: note is no satisfaction of account not one promy note of another. But bond or negotiable note is. Nor in any case must

satisfaction be executory tho' the thing promised to be done may be. So where satisfaction differs from nature of debt, as horse for money &c. for horse may be equal in value & consideration may be sufficient. Hence paper negotiable, or Common Law assigned in satisfaction is good. But not if assigned as collateral security. In respect of the acceptance as a satisfaction this is necessary of course. Must be complete satisfaction for else it would only substitute one cause of action for another. Must go to whole demand. Before breach bond not discharged by accord & satisfaction without deed. After breach may be for it is a satisfaction of breach & not of bond. Sed Quare! Plea should show accord, satisfaction and acceptance. IV Bills of Exchange &c. taken for debt. Good defence pending the bill for it operates as a credit for which sufficient consideration in the new liabilities assumed by debtor. Action revives on dishonor of bill. But bill may be taken as absolute payment and then no right of action except on instrument. If bill void & debt due, action lies immediately. Sometimes creditors right of action not revived by non-payment of bill, as where he is guilty of laches as to it. So if creditor lose bill before or after due, so that he cannot produce it, if bill endorsed in blank, or negotiable by delivery. Taking bill prima facie satisfaction which plaintiff must rebut. If creditor take bill of 3rd. person & then sue on original debt, must show due diligence used with bill. Agent's bill does not pay debt so as to preclude

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recourse to principal unless the debtor is induced to treat demand as satisfied as between him and agent. Bill or note of one partner does not of course discharge his fellows. Must clearly appear to have been taken in discharge. If between immediate parties consideration of negotiable security may be enquired into and no more recovered than debt. But even as to them if instrument given or special contract which not entirely rescinded or void for fraud, a partial failure of consideration is no defence. Quare! If goods to be paid for by bill & debt refuse, special action for refusal before credit expired afterwards common count sufficient. As payment of part no satisfaction of whole a fortiori a bill is not such stipulation in like case. V Release by act of party or by operation of law. 1 Form & effect of express releases. General Rule is that release must be under seal, which appears to result from necessity for a consideration. Hence if there is a consideration (as in case of a composition arrangement with creditors.) release good though not under seal. So if third person pay part, release of residue is good without seal. Sealed contract cannot be waived or altered by parol or without seal. Written contract (not sealed) under Statute Frauds may be wholly, but not partially waived by parol. And after breach it can only be released under seal although it may be adjusted by accord & satisfaction by parol which seems effect of want of consideration. As to Form, no particular words required. Covenant not to sue, if between all parties on both sides & indefinite in time is a release to avoid circuits of action. Otherwise if covenant for a time only, or between some of the parties only. Release of principal discharges interest. Release construed accordingly

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(In order to be a release the covt. not to sue must amt to the same exactly of the thing discharged.) to its apparent intent, and by that intent its terms sometimes restrained & sometimes enlarged. Effect of release not not avoidable by parol. May extend to only part of debt. 2 By whom executed. Release by or two one of sevl. discharges all the debtors. But if releasor be nominal party merely, so that release fraudulent it is void. But application should be made to court to set release as— —ide before trial. Persons interested who is no party on record cannot release so as to defeat the remedy at law. 3 To whom executed. Release to one of sevl. joint or joint & sevl. contractors is a release of all, so to one of several tort feasors. And no term in the instrument to the contrary will restrain the effect. 4 Releases implied or by operation of law. As by making debtor exor# for cant sue himself. Not so in Va. Or by feme creditor marrying debtor for same reason. Hence no release if debt not payable until coverture deter— —mined. Nor in equity though payable during coverture if intended as advancement to wife in comtemplation of marr— —iage. By taking higher security, extinguishes inferior security unless it to be taken as collateral security. By altering written instrument. By party materially or fraudulently. Cancellation, destruction or loss of writing if by accident does not vitiate it unless it be negotiable by delivery. In that case relief had in Equity only when indemnity can be required. Erasure or alteration presu— —med to be made after execution. But that much controv— —erted, some hold that there is no general presumption, but that all depends upon evidence. VI Another action pending. Judgment before recovered. Mere pending of another suit does not extinguish but only suspends right of action. Suits must be substantially

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for same cause and by same parties. Judgment recov— —ered is a defence. It extinguishes original cause of action matters not that forms of former & present act— —ion are different if cause of action identical. If dec— —laration in first suit framed to admit proof of second ground of action & judgment by default, presumed that plfff recovered the claim secondly demanded. But he can show that he gives no evidence of the second demand. If he offer evidence & fail he is barred forever, if evidence & decision were on the merits. Former verdict & judgment an estoppel, if so pleaded. If relied on in evidence no (see Greenleaf Evidence) estoppel. But not so a non suit. *Sentence of foreign (*Case of (...) ship bound for the West Indies, owner stated he had no contraband goods on board, after [it was] captured & English court said had contraband goods aboard) court *of admiralty conclusive as to title to subject. So gen— —erally in judgments. [blank space] Not conclusive of facts involved unless the decree appear founded on law of nat— —ions instead of municipal law. Foreign judgment bet— —ween same parties for same cause absolute bar, if court had jurisdiction & parties personally before it. But if action be brought on such judgments to enforce them they are pri— —ma facie only. Foreign judgmt. if court have jurisdiction cant be incidentally questioned. As between these states mutual faith given to record. If judgmt. good in state when rendered, has same force in other states if founded on personal summons. But the jurisdiction may be que— —stioned whilst it is prima facie presumed. VII Arbitrament and Award. Good defence when the award changes the nature of demand as by ascertaining damages for tort, or monied compensation for nondelivery of chattel, or for other breach of collateral covt. But not if award has only fixed the amount to be

recovered, without changing the form of action to be employed. Party cant divide his case. Hence barred from suing on part of it

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which he ought by terms of submission to have produced to arbitrator. Clause in agreement to refer to arbit— —ration does not oust courts of their jurisdiction. Action lies in such case for breach of agreement to submit. VIII A tender of the debt 1 When a tender is available & the effect of it. Tender available when demd. pecuniary capable of being reduced to certainty, & debtor ready always to pay money. Court be made if damages unliquidated though is allow— —able on quantum meruit & by statute as amends for in— —voluntary trespass. Does not extinguish debt in genl. only bars interest & costs. Tender admits contract as stated. 2 By whom made. Must be by or on behalf of debtor. If debtor an idiot anybody may act for him. 3 To whom made. To creditor or his agent authorized to receive the money, as clerk who refuses it by direction domestic servant who brings message of refusal, to attorney. So to one of several creditors good and to Exor# before proof of will if he afterwards prove it. Quaere in Va. (...) VC 540 Ch 130 S1. 4 The amount to be tendered. Full amount of debt. Tender of part a nullity, unless sums distinct when tender of any good for that. Tender of more than debt due good, if he does not require change. Tender of aggregate sum without discrimin. in discharge of sevl. sums due from diff. persons of diff. amounts not good. If obligee is to have choice of money or calla. thing both must be tendered. 5 When made. Must be on day of paymt. and not before or afterwards. Because was only to save forfeiture & damas. which could not be if contract were once broken. The Com Law having no fixed standard of damages, such as interest. Hence English practice arose of paying money into court upon

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a rule of court. 6 Mode of making tender. Money must be actually pro— —duced or production express by dispensed with. Must be unconditional, that is not "in full" of the like nor so as that if credr. accepts he will compromise himself. In current coin of country. But if bank notes not obj— —ected to on that account, tender not vitiated by being in notes. 7 Of prior or subsequent demand to defeat tender. Debtor must always have been ready from time money was due, toujours prist. Demand & refusal must be made by & of some one authorized on either side. By or of one of sevl. joint credrs. or a joint debtor good. 8 Of the pleadings on a tender. In England tender cant be pleaded with any other plea, quoad the sum tendered because of incongruity. Here no leave of court required & could not be prevented. Plea must say tout temps prist. Should set out sum tendered truly. Should say it was tendered when due and before comm— —encement of suit. It is an issuable plea. In debt conclude by prayer if any damages. In assumpsit, if greater damages than have tendered. Pltff in replication may deny tender, or admit tender and pro— —ceed under genl. issue if that be pleaded for greater sums, or allege prior or subsequent refusal of money. If tender and another plea pleaded & either found for pltff he is entitled to genl costs of action. But deft. is entitled to costs of whatever

plea he may succeed on. 9 Payment of money into Court. A substitute for tender when money not offered precisely at the day, introduced in England by usage of the courts. In Virginia not resorted to heretofore. But sanctioned & practice prescribed

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by Revised Statutes. May be resorted to in any personal action for tort or contract. IX Statute of Limitations I In General Founded on presumption of payment but chiefly on the policy of preventing litigation in res— —pect to state matters which cannot be adequately inv— —estigated after such a lapse of time. At Common Law no peremptory bar existed, but only repellable pre— —sumption after 20 years. Statute does not extinguish debt, it only bars the remedy by action. Hence alien is good still, and hence a subsequent promise revives the obligation, the subsisting debt being good consideration not on specialties severable against a personal representative. Stat prescribes 5 years in Va. for actions (except retail store accoun— —ts for which 2 yrs prescribed) and on actions not revivable ag— —ainst personal representatives one year, on specialties generally 20 years, and on bonds of Exors# and other fiduciaries 10 years. For exceptions & qualifications by revd. stat see abstract in lecture. Exceptions, infancy, coverture, lunacy, imprisonment same time severally allowed, and in case of retail store accounts one year allowed further if either party dies. Also excepting such accounts as concern trade of merchandize between merchant & merchant. Also excepting when judgt. given for plttf & reversed or judgt. arrested, further time of one year afterwards allowed. Also excepting where defendants abscond or conceal themselves or by removal from country if residence when action accrued or otherwise defeat or obstruct action. Exception of merchants accounts applies not to stated but current accounts. But it does apply if current & mutual between anybody mercht. or not provided any item be within 5 years. If between merchant & merchant exception prevails though no item be within 5 years. Beyond seas no disability now in Va. All disabilities [relied]

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on must exist action accrued. Action does not accrue if no one [in] being to sue or be sued as if no admor# or exor# or deft. absent from country. Statute having begin to sum disregard (...) disabilities. No limitation in Va. on seal— —ed instruments except in case of fiduciaries. Aliter by revisal of 1849. 2 From what period limitation dated. Limitation dated from time when cause of action accrued. Cause of action accrues, when the act or omissin occurs & not when damage ensues, much less when damage is discovered. But if fraud undiscovered until within 5 years to answer to the statute, it must be specially rep— —lied at all events. 3 Revival of remedy by new acknowledgment &c. I In general. Previous to Lord Tenterdens act (9 Geo 4) a verbal admission of debt sufficient. That stat provides for written proof of admission by word. Saving former effect of payments in part, and making one of sevl. joint contractors liable only for his own promises, statute applies only to action of debt & case on simple contract. Va. stat similar to Ld. Tenterdens act except says nothing of effect of paymts., nor proof thereof by endorsements

and provides that promise shall draw down original promise to date of written one. Ch. 149 s 1. 2 Of form & nature of fresh acknowledgment &c. Stat of limitations does not extinguish liability, it only affects the remedy. Hence subsequent promise revives remedy being on sufficient consideration. It does not seem (under Va. stat) to create a new debt. Promise must be express or can be implied only from distinct & unqualified acknowledgment. If promise conditional condition must be complied with. Amount must be proved, to which promise referred.

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A trust charging land with payment of debts generally no bar of the statute of Limitations. especially since our statute English & Va. stats. refer only to admissions by word. Don't preclude effect of admissions by acts, as by part payments whereby debts are revived. Part payment must appear to have been in part payment of debt and to have been so appropriated by debtor. Debtors verbal admission of payment since statute not sufficient, although his admission of appropriation to debt sufficient after payment proved. Payment by one co-contractor removed bar of statute as to all, as verbal promise of one did before statute altered probably in Va. If money paid by bill payment considered as made at time of delivery of bill. Payment may be in goods as well as money. Writing to be signed by party chargeable thereby. If writing lost oral evidence of contents allowed. Absolute admission after suit brought sufficient, not so if promise conditional for condition must be performed before suit. If contract collateral and barred no acknowledgment restores it. 3 By whom acknowledgment must be made. Statute requires signature of party chargeable thereby. Hence agent's signature not sufficient (it is said) although agent's verbal promise sufficed before statute. Creditor can't retain debt barred. Non-promising contractor not bound judgment then against party punishing only. Quære how if party promises to pay his share? Part payment without debtor consent express or implied (as agent against his orders) has no effect. Payment by one affects all because of community of interest. Hence if no community of interest rules hold not as in Engl. where on joint contractor dies, or where payment by assignees of one co-contractor being bankrupt.

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4 To whom acknowledgment must be made Acknowledgment to stranger it seems enough for it is evidence of a promise. Text however contra. 5 Of issuing & continuing a writ to save Statute. No provision of this sort in Va. now suit suffered, or informality defeating action don't avail. In Va. only judgment reversed or arrested, one year afterwards but see Revd. Stat. 6 Pleading & Evidence in respect of Statute. Va. Stat declares written promise a [blank space] decree of original promise to that date. Provs. of Revd. Stat diffc. It would seem therefore never necessary to declare save on original promise. Revd. Stat allows either. But apart from Stat rule was that if subsequent promise were not adequately described by the description of original promise must make a description duly applicable to it. Statute of Limitations must be pleaded no defence on genl. issue. Deft. may rely on lapse of time 20 years. Should say "cause

of action did not accrue within 5 years." Exor# &c. ought to plead it, must do it by revd. stat. Plea may be associated with genl. issue or other plea, concludes with verification. Exception in statutes should be specially replied. P806. The statute of 21 Jac I. Enacts &c. In the revised statutes the act of limitations presents its policy in a more compact and better adjusted form than ever before. Prov— —isions referred to following heads. 1 Cases to which Limn. applies. VC 590 to 93 Ch 149 S1 to 14. 2 Periods of Limn. Page 590 to 93 S1, 3, 4 to 6, 11 to 14. 3 How Limn. repelled or qualified P593 &c. S15, 18, 3&4, 7 to 9. 4 Application to existing rights P594 S19. 1 Cases to which Limitation applies. 1 Entries on land and actiond therefor. 2 Personal actions of all kinds, including scire facias.

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4 Bills in Equity to repeal Comths. Grants 2 Periods of Limitation 1 For entries on land and actions therefor 15 years after right accrued S1 & 2. 2 For Personal Actions, including Si. fas. 1 For action to recover money on award or contract other than judgment or recognizance. 1 On indemnifying or fiduciary bond 10 years from right accrued. S5&6. Time when action deemed to have accrued stated in S6. Does not apply to fiduciary himself or his repre. so far as not chgd. on bond 2 On other contracts under seal 20 yrs from right accrued S5. 3 On any other contract or award, except for articles charged in store account. 5 yrs from right accrued. And in actions by partner vs co partner, for settlement of accounts, and in actions on accounts concerning the trade of merchandize between mcht. and mcht. their factors & servants, where the action of account would lie, the time is to be reckoned from a cessation of the dealings in which the parties are interes— —ted together S5. 4 On articles charged in a store account, 2 years S5. 2 Sci fas. or actions on judgments or recognizances 10 years after right accrued S10 VC 710 C186 S12, 13 In case of foreign judgments see S12. 3 Any other personal action not otherwise limited 1 supposing it to be revivable agst. defendts. represent., if he should die. Five years from right accrued. S11 2 Supposing it not so revivable(Va Code 544 C130 S19 to 21 for when revivable and when not). One year from right accrued.

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[sketch of hand pointing right to the text] Except agst. master of vessel carrying away slave which not limited at all. S11 Lex loci contractus governs contracts made & to be performed in another country by one then resident therein. P 594 S17. 3 For Creditors impeachment of voluntary conveyances. By suit, distress or execution within 5 years after conveyance made by S 13. 4 For Bill in Equity to repeal Commonwealths grants 10 years from the date of the grant S 14. 3 How limitaiton is repelled or qualified. 1 By subsequent acknowledgement or promise. If defendant in a personal action on award or contract by writing, signed by him or his agent promise to pay, or make an acknowledgment whence a promise may be implied plttf may sue in same time as on original promise. And he may sue on the old promise & if statute be pleaded reply the new promise and that suit was instituted in proper time thereafter or he may process on the new promise S7. But no promise, except one in writing as aforesaid shall repel the

operation of the statute S7. No acknowledgement by a pers. repre. or by one of sevl. joint contractors shall repel the bar of the Statute as to the estate of the decdt. or another contractor S8. No provision in a will devising real estate subject to or charging it with debts shall prevent stat applying to such debts unless such plainly appear testators intent S9. 2 By disabilities on plaintiff If plttf in infant, feme covert, or insane, when action accr— —ued, allow like time after disability removed but in no case to exceed 20 years from action accrued S15. In case of lands allowed 10 years additional after disab— —ility removed, but in no case to exceed 30 years from right accrued S3&4. If person entitled to action

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die before action accrued and more than 5 years elapse betw— —een his death and the qualification of a representative, he shall be deemed to have qualified on the last day of the 5 years S16. Clark v Hardman 2 Leigh 347 & Hansford v Elliott 9 Leigh 79 in conformity with many English authorities had ascertained that if the cause of action accrues not until after the claimants death the stat does not begin to run until the repl. has qualified. The same doctrine confirmed by Lyons Admr. v Maganos. Admr. 7 Grat 377. This provisions seems intended to limit that principle. 3. By attempt to evade the action. If deft. had before resided in Va. & by departing from some or by absconding, or concealing himself, or by any other indirect means shoul abstract the prosecution of the right, that time is to be deducted but only as to the person obstructing & not as to another jointly liable with him S17. 4 By Commencement of suit which fails. If action commenced in due time and abate by dead or marr— —iage or return of no inhabitance, or judgment for plttf be arrested or reversed without precluding new aciton, or if occas— —ion arises for new suit from loss, or destruction of papers in former suit plttf may commence a new action within [the year] S18. 4 Application of Statute to existing rights. If limitation has heretofore existed, that is to govern. If no limitation has heretofore existed right of action to be consid— —ered as accruing 2d. July 1850. S19. X A Set Off 1 In General. Set off not allowed at Com Law, only permitted to embrace claims belonging to same transaction in settlement founded on Stat 2 Geo II. Debts must be mutual. In Va. stat applicable in case of debt due by bond till judgmt. or otherwise RS says in st. for any

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debt deft. may be allowed set off &c. Unliquidated dama— —ges cant be setoff. Deft. may avail himself of his right of cross action if he prefer it. Must file account of Set off in Va. Equity allows set off when law could not. 2 When a set off is available in reference to plttfs cause of action. Claim must be in nature of debt reducible to specific amount & recoverable in action ex contractu. Stat applies not when plttf goes for unliquidated dama— —ges. Hence no set off to assumpsit for nor indemnifying plttf according to engagement, or for not accepting goods, or breach of collatera. agreement under seal or otherwise. Vender has lien a goods sold for cash until he delivers them & then no set off. But if once he deliver lien gone & then setoff allowed. If money claimed under special count in decla., be recov— —erable on Common Count set off

may be pleaded for plaintiff cannot so defeat defendant's rights. Yet if defendant appropriate till given him for specific purpose plaintiff may evade set off by suit— —ing for breach of promise to deliver bill. 3 What demands may be set off. Demand must be liquidated. Hence damages for negligence cannot be set off against demand for wages of servant at least without special agreement. Money due on judgment may be set off, provided defendant be bona fide owner of it. But not if it was assigned merely to be gained by set off and agreed to be taken back if not allowed. Contra in Virginia no set off in respect of debt barred by statute Limitation. Defendant deemed to have brought action at time of plea pleaded by plaintiff. Debt to be pleaded as set off must be actually done save in Chancery. Debts need not be of same degree but must be mutual or in same right. Hence after— —ter death of one Co—contractor, liability surviving may be

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setoff against the survivor's private demand. Debt in one's own right not set off against demand as Executor &c. Cannot set off debt due from plaintiff's testator against demand by (because mutuality) plaintiff as Executor made after testator's death. Husband cannot set off debt to his wife against debt due from himself. Demand to be set off must be legal not equitable. Hence in England assigned debt not subject of set off. Aliter in Virginia. special plea plea of set off in Virginia. in consequence of statute. 4 Set Off in case of Bankruptcy. 5 Pleading set off & evidence thereof. May be plea (on) or notice in Virginia. Plea should aver plaintiff indebted at commencement of suit & that he still is indebted. May be answer to whole or part of plaintiff's demands; but should not profess to answer more than it does answer. If special agreement for set off otherwise not admissible must be specially pleaded. Replication denying simple contract set off is that "plaintiff was not, nor is indebted to defendant as alleged". May reply statute Limitations. payment. Plea of set off cannot be relied on by plaintiff to prove admission of debt when the general issue is pleaded. Defendant must prove set off in general as if he were suing for it. Verdict— —ict against plaintiff on set off estops him from suing on it as a separate demand. If not prepared to prove it he should waive it. It is said set off bond must be specially pleaded— —ded and plea must aver amount due for principal and interest seems to arise out of English Statute. Plaintiff may deny bond by replication of non est factum or release, or may traverse amount due. If set off equal amount of debt & acquired before suit brought judgment for defendant with costs aliter as to costs if set off acquired after suit brought. If balance— —ance proved due defendant he may have judgment therefore by plaintiff contra at Common Law.

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XII Infancy Infant must always appear and defend by guardian and not by attorney, else ground of writ of error, coram vobis or motion. Guardian admitted before plea which should always state admission. But if he attains his age before plea may appear by attorney. May be given in evidence under general issue in assumpsit & debt on simple contract. Plaintiff may reply deny— —ing infancy, alleging ratification (which now by statute must be in writing &c.) or averring necessities. If infancy denied non— —age proved by defendant. So if ratification alleged non— —age at contract proved by defendant because most in his knowledge & others subsequent ratification at full age by plaintiff.

If necessities averred no proof of infancy required onus on plfff. Non— age shown by evidence of witnesses who know, or contemporaneous entry in bible &c. But not by subseqt. entry stating birth tho' in public register. XII. Coverture May be given in evidence under genl. issue in Va. in assump— (This rule of 3 & 4 Wm. IV)—sit & debt on simple contract if existed at time of contract. If entered into since should be pleaded in abatement. Womans declaratns. & acts however solemn as feme sole dont estop her from pleading coverture. If married at time of plea must ple— —ad in person not by attorney because she cant create a power of attorney. Deft. must prove her coverture if denied. Done by marriage register. Evidence of witnesses present at it & by general reputation quoad this purpose. If husband absent 7 years must repel presumption of his death. XIII Bankruptcy & Certificate. Plea filed of bankruptcy & certificate should conclude to country. Cant be given in evidence under genl. issue nor can plfff bankruptcy before action. Plea supported by office copy of certificate. When one of sevl. discharged by bankr— —uptcy

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need not sue him; but if non—joinder pleaded may reply certificate &c. XIV. Discharge under Insolv. Act— (Chap VI) Of damages or sum recoverable assumpst. & herein of a (p 863) penalty & liquidated damages. Penalty & Liquidated damages. In case of penalty party (The penalty in a simple contract is wholly void & it is only in a contract that is under seal that it will at all avail. & in simple contract you sue for damages alone in contract under seal may sue either for damages or penalty.) can recover only such damages as jury may assess. But par— —ties may themselves liquidate & ascertain the damages for a breach of contract in advance. If in good faith they do so not as a cover to secure penalty, then ascertainment will stand & jury bound to give that sum. The declaration that the sum named is to be stipulated damages & not a penalty is not con— —clusive must appear that parties bona fide estimated the real loss likely to result from breach. If sum annexed to a single act & be not unreasonable, it may be considered. a stip— —ulation of damages especially if so called in agreemt. But if sevl. acts are to be done and a single gross sum be named as stipuld. damages for the omission of any or all, parties cant really have intended to estimate loss. It is no nature of a pen— —alty. If sum might otherwise be considered liquidated damages if called penalty it is usually to be so taken. Proceedings for a penalty or more. Two remedies on contract guarded by penalty. 1st To sue on contract as often as broken and recover damages without regard to penalty. 2nd. Or to bring debt for penalty (contr— —act being always supposed under seal). In latter case contract res— —cinded & penalty becomes debt subject to modifications in Equity &c. Stat. respecting breaches 8 & 9 Wm. III penalty for collateral object penalty is supposed to limit recovery always. But in money bond not so recoverable beyond am— —ount of penalty in damages.

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Of amount recoverable in other cases. In assumpsit [blank space] of action is damages for breach of contract. If breach [consists] in non—paymt. of money measure of damages is sum

promised & interest in Va. unless must reduced by proof of partial failure of consideration. If breach consists in non-performance of collateral engagement measure of damages is injury sustained by plaintiff directly & also consequentially if the fair natural result of default. violation of agreement. But not merely speculative injuries dependent on contingencies, uncertain & having no immediate connection with the breach of contract complained of. Thus buyer of horse with warranty may recover not only what he has been obliged to pay, but also costs of suit against him if he gave notice to vendor & offered defence to him. But can't recover for loss of goods bargained unless he has acted by his care to value. So if anchor lost by breaking of cable warranted may recover value of anchor. For not delivering goods or replacing stock measure of damages is value at day of delivery. In assumpsit for use & occupation jury shall give value of premises which defendant did or might have occupied. If evicted by third person of part, rent apportioned. If by landlord entire rent suspended. Damages allowable for future injury from breach but not for anticipated future breach. Interest allowable on damages ex contractu; but no ex delicto by that name must be allowed in damages. But aliter by Revd. Code 1850. Damages how assessed. Jury ascertain damages either upon issue or on writ of Enquiry Court may now do it in Va. in certain cases where amount pretty certain & writ of enquiry only pro forma. If neither party recognizes jury. And by Revd. Stat court may assess damages in any case when parties neither require jury

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Excessive or too small damages. Court may grant trial for damages excessive & by stat in Va. if too small. Must be so out of way as to shock moral sense & to show prejudice, partiality or corruption in jury. At C Law damages too small on action ex delicto no ground for new trial because (...) to criminal prosecution. Statement of damages in declaration. Special damages must be explicitly stated else not recoverable. Damages necessary or in legal implication resulting from non-performance need not be explicitly stated. Recoverable under common conclusion of declaration. Damages can't exceed those laid in declaration. But if jury discharged before noticed may correct by writ. If exceeds those in writ also may release in Court afterwards, or may amend declaration and have new trial. If aggregate damages in several counts and some defective in arrest of judgment. whole judgment arrested. Aliter if separate damages assessed on each count and some defective. Courts should inquire into grounds of verdict with great caution especially of persons themselves. End