Real Property
Real Property

We have previously entered particularly into the

details of the doctrine of real property, propose to give an historic

delineation of its rise and progress to the present time.

It is difficult to define real or contrast it distinguished

from personal property. Real property is said to be fixed per-

sonal and immovable; personal to be movable and such as

may attend a man's person wherever he goes, and such as is in

cluded under the comprehensive term Chattels.

It is not true however that all personal proper-

try is movable, for the property enjoyed under a lease is an immo-

vable as any other at this personal.

The in real property always possessed of the qual-

ities of personality and tangibility, for an Equity of 

Salutation is real property.

But again real property is defined to be such as

descends to the heir; personal such as go to the 

death. A life estate in real property it is a freehold not of inheritance

but still cannot descend to the heir.

Hence the enquiry naturally occurs, can an es-

tate to A. for the life of B. descend to the heir of A. B.

being alive? It cannot. Because it is an estate to A only.
and not to his heirs — It cannot go to the Exe because it is an estate of fee simple. It cannot go to the donee, for he granted for the life of the person in whose hand it is, and is still living. It was then open to the donor to sell it, for the benefit of the heirs.

There are but three estates known to the English law which have certain unalterable qualities and incidents thereto; viz. I. Estate in fee simple. II. Estate for life, and III. Estate for life under which one includes estates for the life of the donor, for another, and most commonly estates distinguished as

Real estate includes hereditaments, corporeal and incorporeal.

Corporeal hereditaments include only lands according to Sir Ed. Coke; for in legal signification land embraces all the buildings and erections of every kind upon it, such as columns and all mines and productions below it ad infinitum.

Incorporeal hereditaments are neither visible nor tangible, are not the objects of perception, although their effects may be so. An incorporeal hereditament issuing out of any thing corporate or intangible, whether real or personal; or an

meed to; or exercisable within, the same, as an annuity, right
of Common, right of Office, and the like.

But there is another species of estate distinct from the already mentioned which (it would seem) are neither real nor personal, nor annexed to or exercisable within the same. This is an estate, which does not and cannot go to the heir or heirs, and on the death of either of the parties must be at an end.

To make a real estate of inheritance words of inheritance are necessary which in English we call "heirs." This is not only necessary to render personal property inheritable and aise entirely from the peculiar idea attached to real property by the feudal system.

Originally estates owned by the feudalchieftains were never granted for a longer time than the will of the donor. The next step was the granting of estates for years, and at last or a great stretch of faver estates for life were granted, which seemed to be the nex plus ultra of feudal liberality. Hence an estate given to I. S. not mentioned to be for a determinate time, was construed to be for life. At last or tenants became anxious that their estates should be descendent to their posterity; it became necessary to use some word which should import their descendent qualetities and distinguish their estates for life. The term "heirs" was adopted and has continued.
by the lives taken at this time was meant only the lives of the body of Christ; his defendible part could not go; any person for life only to the issue of the soul. In the conclusion of the present was filially resting in any nation. For the magnitude was that the redeeming price of the blood of the first person given of the blood which was made by it for the entrance of every individual person who was meant by it. It was a mere and every article here; man knew that God was a person might be known by us.
to be used to this time.

Under the Eng. law their Real Property is governed by laws altogether different from those which regulated it with the Greek and Roman governments—The gothic chiefs who governed conquered the folk, southern and western empires, first granted out estates in land on the condition of the fidelity of the grantee. These grantees or their heirs, must have been reckoned first, held the estate at will for years, next forty, and eventually descendent to their Heirs.

The word "heirs" included every direct descendant of the grantee. who of course must be of the blood of the first purchaser or acquiree, for at that time no collateral relation could be the heir of the grantee.

When there were lineal descendants the eldest son took the estate or heir; and at his decease the next brother inherited as heir to the father, provided the lineal succession failed.

During all this time there was no such thing as alienation of land; that is buying and selling it at a price. But when the moniker tendered money necessary, a small portion of the real estate of the proprietor was permitted to be sold: Afterwards one half was customarily disposed of, and eventually by the Statute Mala Antiqua.
By a fiction of land estate became definite to any lesser relations.

This was vouch by the great Roman as declared in one of the

great men of the party to prevent it being sold for the 2d or the 3d
pawn it would go on from generation to generation and sold and

sold and sold in the land until the diminished-ness of

the court, that was a sees and ample and clear and wie that you pleased with

it if not it quite back again to quiet. The


keep in the land

and that house as the court, they then attempted to purchase

and they purchased and by force of the law the

the court could to be sold. The state by sale as your

the followed by statute of 32. 33.
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18 Dec. I. persons holding real property were empowered to divide the estate of the whole of it—

Still lands could not be divided by will until the Statute of Wills in 27 Hen. VIII. made all lands devisable. Previously to that statute however, the use of lands could be divided, which was a practice favored and enforced by courts of Chancery.

The consequence of this division was the statute of uses by which the land was divided into several equal parts and appropriate uses created, which declared that the land should revert to the land for complex—there can be no defeasance of the use.

When by the statute Titus V. lands became alienable, the devise was confined to the blood of the first purchaser—

There are several incidents or qualities attached to and inseparable from an estate in fee simple—

I. It is necessary from its nature alienable. It is descendable to the heirs general of the purchaser, which includes collateral as well as lineal heirs, and excludes only those in the ascending line for the eighth removal (perhaps) assigned by an ancient author “sui poendo non accidit.” The “heirs general” does not mean every child alike, but has a reference to the laws of descent.
III. The wife of a man seized in fee simple is entitled to

IV. And if the wife is seized of land, land the husband shall

V. have country.

VI. The owner of lands in fee simple may commit Waste.

Formerly in Eng. words both of perpetuity and descent were necessary to create an estate in fee simple. Now a grant to A and his heirs will create such an estate. What particulars with these are necessary is regulated by the laws of descent, and the word Heirs is only descriptive of the quantity and duration of the estate and not the mode in which it shall descend.

The best definition that can be given of an estate in fee simple is "an estate to a man and his heirs."

In common estates are held in allodium and Mx.

supposes would not escheat unless by special provisions in statute.

A fee simple may be created by will without the necessary words to convey such an estate by grant, if it be the obvious intention of the testator to create such an estate. Deeds must be construed literally strictly and technically. Wills according to the intention of the testator. This difference is attributable to the more enlarged and
As where an estate is given to the male heirs or to A.
His female heirs

The following states have been made by the

in Rhode Island, the same may convey such estate

In Massachusetts the same may convey such estate

In Connecticut the first quarter had at the

in life and then at death; a fee simple absolute

In New York, the same may convey such estate

in New Jersey all entailments absolute

been made previous to August 17th of the

had passed any estate were in the hands of

the same of a fee simple, and all made after

that time must pass in estate and be made

be fee simple, estate in the hands of the

In Maryland the law and statute may convey

into estate as a fee simple estate

For very time after by a statute of 1792

all estates held as fee simple estates due

due to be fee simple estates and

all estates hereafter made by words that

words an entailed estates to be fee simple estates

in all the states except Vermont and South Carolina

death the state enable the owner to dispose of

the words are all proper heavy lands to

may pay the for the other those all persons

having fee simple
liberal mode of thinking which prevailed at the time of enact

ing the stat. of Wills, when the human mind began about
the shackles of technical strictness by which it had been un
chained.

In a devise "all my estate," the words "all my estate"
"all my effects," and even "all I have worth" will convey an es-
state in fee simple — But there is in Eng. one curious
exception for where a man devises an estate (describing it
jure se) to A., it will be only an estate for life. This would
not be so in Co., and this says McRae, is the only dif-
ference in the construction of wills between the Eng. and
Co., law.

The intention of the devisee is that by which
all difficulties and obscurities are elucidated, or must be
regarded when against law, as where there is a devise to Sis.

riters or Brothers exclusively: this is such an estate as the
law knows nothing of, neither fee simple fee tail, for life,
contingent, or conditional.

II. The next estate known to the Eng. law is an E
state Tail: But before I treat particularly of this, some ob-
servations shall be made on a species of estate not now in
existence, but which in the parent of estates tail — This we
called a fee conditional at common law — This had its
rise from the proud autocratic spirit of the Feudal chiefs, who could not endure the idea of seeing their estates alienated from their families. Hence they introduced grants to their children and the heirs of their bodies. This or it restrained alienation could not be a fee simple. The judge who was not at that time well affected to the Scribes continued

This or an estate necessarily descending in the family of
in which it was limited: but as notwithstanding, depar-
d on the condition or contingency of their being chil-
dren and when the condition did not happen: that is
when there were children, the estate was spent and a fee
simply vested in the donor. This construction was just
as the scheme of those who introduced the practice, and
that their favorite project should not eventually defeat
they introduced. The statute "De donis conditionales.

Viii. which restrained the estate to descend in the
family of the grantee in perpetuum." This could not be
explained or construed away. It was a sore grievance
and altogether a remedy for it was discovered which
is termed docking an entailment. This is accom-
plished by a friendly suit. John Stites wished to
sell his estate in tail to Tom Poker. John tells Tom to see him
for the land and he will make no defense. Tom acce=
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Singly commenced suit; John in court vouches the case, who know nothing of the matter, a nominal sum is recover'd against the case; a judgment goes out against the defendant and gives the Pett a regular and complete title to the land. This is a common recovery.

Estate tail are within the tail-gentle or special—The estate in tail-gentle is to D. and the heirs of his body begotten, and is so called because however often the donee in tail be married, his issue in general by all and every such marriage is in successional order capable of inheriting the estate tail for posterity done. The succession of heirs is regulated by the laws of descent, collateral relations are entirely excluded.

An estate in tail special is an estate restrained to certain particular heirs of the donee's body and not in the estate generally as an estate to John D. and his heirs on his present wife Mary to be lawfully begotten.

Estate tail are further diversified by several distinctions, in such estates for they may be in tail male or in tail female as if lands be given to D. S. and the heirs male of his body, this is an estate tail male general. But if to D. S. and the heirs male of his body on his present wife Mary to be begotten, this would be an estate
intail male special and so by substituting the word “female” it would in the above cases be an estate in tail female general or special.

If there be no such heirs and the entailed interest is not divided by a common recovery; the estate being spent the feu will revert to the donor.

In case of an intail male, the heirs female cannot inherit, nor any descended from them; and “e covert” of an estate to intail female—Co. Litt. 20.

Thus if the donor in intail male had a daughter, who died leaving a son, such grandson not being able to deduce his descent from the donor by heir male cannot inherit no man of his descendents; and vice versa.

The principal incidents to an estate tail under the state of West. 2° are as follow:

I. The tenant in tail may commit waste.

II. The wife of a tenant in tail shall have the dower.

III. The husband of a tenant in tail may have curtesy.

IV. An estate tail may be had by fine and recovery; and by a general warranty descending with rests to the skin.

V. Estates tail may be destroyed by docking the entailed interest. In the 12 year of Edw. IV. Common recoveries were first helden to be a sufficient bon to an estate tail.
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In law, there is a statute creating entailments; it has not entered the Eng. doctrine only in limitation or duration of the estate. It remains an estate in the dower, but becomes a fee simple in the children. It is used in many instances to a fee conditional at common law. It was enacted here to provide for families, and restrict spendthrifts from wasting the subsistence of their children.

It has been said that the Eng. statute vests a fee simple in the children of the grantee as soon as they are born. The words of the statute are that "the estate tait shall vest in fee simple in the children of the grantee." And it has been contended that the grantee by the words taken only an estate for life. Mr. Burke contended that for the words of the statute give an "estate tait" having reference to entitle estates in Eng. For a proper construction then we must refer to the Eng. books. If this is not done, we should be entirely "out at sea" in our legal proceedings. The fact is that the grantee takes an estate "per fe ferum donum" that is an estate tait which entailed the dower cannot go for that would destroy the effect which the legislature intended the statute to produce. It has been decided that the wife shall have down in the estate which is decisive of the question.
Estate in fee simple, and fee tail are the only estates which can descend, the former "per forma done" is limited to a particular mode, but both are governed by the laws of descent.

As the word heirs is descriptive of the quantity or duration of the estate, and not of the mode of descent, the eldest son regularly inherits.

All estates of inheritance are also freehold estates, but all estates of freehold are not of inheritance. An estate for life of any kind or estates depending on a contingency which may terminate for life—here we see that one may have the freehold and the an other the fee simple.

As to the operations of Deeds. The words land, house, barn, orchards, lands, waters, ponds, lakes, heaths, heres, moors, &c. are very often the very unnecessarily used in deeds. They were probably first introduced into the vocabulary of the clerks who were handsomely paid for writing.

By the term "land" passes every thing, and the word "farm" means the land is properly described will convey as well as "land".

A man may convey land and except a fee simple in it, any any other estate in the wood, timber, buildings &c. In fact he may except any thing on the land and convey
it to another, or retain it himself. If a house is excepted it will be a
lease of the land whereon it stands as long as it stands. "Coit. 244.

There is one species of property of an incorporeal nature
which appears to be personal in every other respect than that
it descends to the heir, and not to the Gov., I mean an annity,
which is a claim upon the person of another — "Co. tit. 244.

Supposing be given to b. and his male heirs forever,
a fee simple passes — For tis there was only an intention to limit
to male descendents only, yet if the male issue fail the female shall
take — for the law knows no such estate as that intended to be
limited, the intention of the grantor is an illegal one, and of
course void; and the words of perpetuity and inheritance in
the grant render it a fee simple.

Any words in a devise which make clear the inten-
tion of the devisee, will convey just such an estate as was inten-
ded: In devises no words of perpetuity or inheritance are
necessary to vest a fee simple.

Suppose an estate were given by deed to A. B. and
heirs, but for want of certainty as to what heirs were meant
this was continued to be an estate for life. It would have
been otherwise in a will — "Co. tit. 244.

If a grant is made to A. and his successors this
will be only an estate for life —
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But in corporations, the word successors, serves the same purpose as the word heirs in grants to individuals, and if it be a sole corporation either successors or heirs are absolutely necessary to be inserted: But after or to aggregate corporations, for a grant to a corporation aggregate will convey a fee simple without words of succession.

There are some exceptions to the general rule that the word "heir" is necessary to convey a fee.

1. Persons holding estates in corporative where one will to convey her portion to an other no words of inheritance are necessary requisite. 2. In case of corporations, as has been mentioned. 3. So also in devises at ante.

Before devisees were necessary, it was a maxim that a fee simple for the first grant conveyed to the grantor could not be limited upon a fee simple; for the first grant conveyed to the grantee all the estate which the grantor owned. This Mr. Hume thinks censure savours too much of technical reasoning.

By will, however, a new estate was created, which was termed an "executory devise" of which more will be said hereafter, by which a fee simple may be limited upon a fee simple.

By an executory devise a fee simple might be given to commence in future on the performance of some con-
A fee simple Conditional nearly answers the same for a
estate in fee limited on a fee. This is called a lease
qualified fee, having some condition annexed to it, on the
determination of which the estate must end — Co. Lit. 407 a, 127.

A conditional fee is one whose terms are so confined
in some particular heirs in exclusion of others or to the heirs
of a man's body; the male heirs of a man's body are

This was termed a conditional fee, by reason of the
condition expressed or implied in it, that if the donee die
without such particular issue or heirs, it should revert to the
donee, but if he should have such heirs it would remain
to the donee.

An entail may be created by devise without the par-
sicular words necessary in Deeds.

A tenant in tail may sell his interest in the estate
but cannot affect the heirs, for if he dispose of the
estate for his own life it will be good against him; but
the estate tail must descend unimpaired to the heirs.

If a tenant in tail conveys an estate in fee simple
such conveyance is voidable by the heirs. Because of such
conveyance to be a status quo.

Suppose in this country a tenant in fee simple
die without being, and there is no statute what not shall become of the estate. Mr. Freeman supposes it would go to the first occupant as lands here are strictly allodial, and even the word "fee" as used to designate our estates is improper.

**Tenant in tail after possibility of issue extinct.**

This estate seems to form a middle link between estate tail and for life. The entitlement must be specified as "to the heirs of A. B. on his present wife Mary to be begotten and the possibility of such heirs must be extinct that is in the case part Mary must die without issue or leaving no issue—

In every event except that he is not liable for waste the tenant in tail is as tenant for life, but the revision on cannot sue him for waste—460.50.

**Estates for Life.**

There are of two kinds: 1st. Conventional, such as are created by the act of the parties themselves, and 2nd. Legal, such as are created by construction and operation of law.

The former species compasses cases made to
one for his own life, or for the life of any other person or for
more lives than one, and all estates depending on conditions
or contingencies which may by possibility endure for life.
Any lease for a determinate time, the for 1000 lbs.
is only an estate for years.
The estates for life created by operation of law are
I.  Tenant in tail after possibility of issue extinct.
II.  Tenant in dower; and
III.  Tenant by the curtesy.
The incidents to a conventional estate, and one created
by operation of law are the same. The tenant may unless
restained by special agreement, take reasonable tenants,
or bate; but cannot commit waste.

The tenant shall not be prejudiced by any sudden
determination of the estate: for if a tenant for life owns the
land and die, the emblements belong to his ex., "res ac tis
De minimis facit injuriam."

If a man be tenant, "per antem viam" and estate
qui viv, or he for whose life the estate is held, die after com-
somm and before harvest; the tenant shall have the em-
blements. The same rule is the same if the estate be
the same, determined by the act of the law.

But aliter, if determined by the act of the two
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34. Under tenants, or lessors of tenants for life, have all the
privileges of their lessors, and this additional one, that when
the estate is determined by the act of the tenant for life, the
under tenant shall have the remainder.

Of Estates for life created by operation of Law

First of all. The intention of dower is to provide a
suitable maintenance for the wife of a deceased husband—and in
some respects it differs from any other estate.

By the English law, the wife at the death of the husband, has an estate for the life of the wife of all the
lands of which the husband was seized in fee simple or fee
tail, during the coverture.

On law, the wife is entitled to dower only in the
lands only of which the husband died seized.

To entitle the wife to dower, the estate must
be such an one as that if the husband had issue by the
wife it might have inherited.

Therefore an estate in special part might not in
some cases be subject to dower. Of this it can only be
said "In hir scripturist."
The rights of the wife to devise created great embarrassments in the alienation of estates, being an encumbrance of which a sale could not divert them. To remedy this, in England, alienations by fine and common recovery were used which was a judicial conveyance by the wife and husband jointly.

This dower estate has some peculiar privileges which are not incident to other estates, as

1. An exemption from paying the debt of the husband for if a man be insolvent, having in his possession a large real estate, the wife will be endowed and the creditors cannot deprive her of it.

2. Dower cannot be devised away from the wife by will; nor taken from her by the act of law.

But in personal property the husband can at any time by disposing of it have the wife of any part of it.

A woman can be a lawful wife and yet can not be endowed; as an alien wife, Eccles 131, 161. In the affair, an alien may hold estate if it is not taken from him, which it is always to be, yet it can never descend from him.

A woman divorced from a husband cannot be endowed; and this proceeds upon the ground that she never was a lawful wife.

If a wife is under a year of age, she cannot be endowed.
A wife may bar her dower by an act of her own, which is an
elopement with an adultery and the husband not reconciled to her.

Elopement itself according to our ideas with the word of the word will not
be a bar. But it is supposed that the true original meaning
of the word "elopement" itself originally indicated the going off of an
wife with an adultery.

Where our statutes have not varied there we have
almost uniformly adopted the English rule of estates in fee
simple, fee tail, dower, &c.

A reizen in law of the husband is the same for
suing the wife's dower, as where he is reized in fact, the wife can
not defend.

In case of joint tenancy the wife cannot be intro
duced because of the "jure quercyandi" or right of survivorship to
one joint tenant in case of the death of the other.

Estates in joint tenancy cannot be devised because
the title is an absolute one and firm expressed it, the equity
of the title or right of survivorship is so great that it acts
before the devisee can have a title.

A wife is disqualified to dower in an incorporeal estate
as a right of common, a piscery, or hunt. This is real property.
The basis cannot be incumbent of an office.
Wife may be housed of her dower by a jointure, which is a provision made by the husband for the wife in lieu of her dower. It must be good be done before marriage; for then the woman is "mijorie" capable of judging of the competency of the jointure, and is not under the coercion of her husband; for if it was not thus made before marriage she might be hindered of her dower by an insufficient jointure.

2. It must be a competent livelihood by which is meant a livelihood proportionate to the husband's estate.

3. It must be taken immediantly on the death of the husband.

4. It must be of real estate, because real estate is more permanent and cannot be easily spent.

5. This conveyance must be made to her not to trustee for her.

If all these requisits are complied with, it will be a complete house to dower. If jointure at common law was called but is made so by statute.

To make a marriage settlement it must not be of real estate therefore marriage settlements cannot be dower.

Jointures are frequently made after marriage. There if accepted by the wife will have then dower at common law a jointure by device but it is still at together at the restitution.
at her election to accept a part for she in many cases a obligation but may take her dowry at law, but cannot have both.

It is held in the Ingros reports that if a husband devises his personal property (which consists of personal property) however large or important, they may not be taken as dower unless it be expressed to be in lieu of dower and received as such.

In every New York, people have gotten an idea that they must express in their wills these words: "I devise to my property to my wife Mary to hold during her life" not realising that (or rather not knowing) the wife will have the dower at all once. This thing is not expressed to be as dower or in lieu of dower but the thinks it would be improper and unjust to give her as more as dower when the testator intended what he devised in their as her dower; this is certainly a question, but it is supposed that when the matter is brought before court by some more lawyer like woman it will be decided that she shall have but the 1/3 devised to her.

Dower in land by attainder of treason; a jointure is not because it is vested before marriage and cannot be afterwards affected by any act of the husband.

As to the wife's remedy for her dower, she may remain 40 days after the husband's death in her house during which time (which is called her quarantine) it is the heir's duty.
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to set out her duty down. If he does not do it from want of a will, or if he is too young to do it, or if he does set it out, and the wife is not pleased with it, she may make her application to the court for her event of dower.

But in the case of the jointure proves not to be her husband's and she is only of part of it, she may relinquish it, and take her dower at law.

Wherein the doctrine of dower differs in Con. from that in Eng.

In Con. the widow can be endowed of only one third of what her husband actually died seized of—A man striving then to deprive his wife of her dower may convey away her property before his death; but to remedy this as much as possible, it has been determined that if the property conveyed away in contemplation of death the wife shall have her dower—But these conveyances have not been considered as deeds, but as wills, because made in contemplation of death, for an instrument of writing thereto made is not the less a will because it does not begin in common form. This is not a new idea introduced by Con. courts, vide 2 Eliz. 43, 44. In Con. a woman is entitled to dower even in
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case of a divorce a vinculo matrimonii if she is not the party in
fault. In Law you will recollect that divorces are for super-
venient causes.

In Law a woman cannot forefeit by the Reason of
her husband.

It has been made a question whether from one
state we had not here a jointure different from that in
Eng. No: because determined in the negative.

A much may suffer to the said concerning tow
sea and we will proceed to the consideration of

Estates held by the curtesy of Eng.

A curtesy estate is that where a man marries a woman
ripped of lands of inheritance, and has by her a child or children but
alive which issue could have inherited; now upon her death
the
husband shall hold her lands during life in tenant by the curtes-
y of Eng.

The regulations concerning tenants by the curtesy
are positive regulations, for which there is no apparent reason.
The difference between dower and curtesy is as fol-
down. In dower the wife is entitled to 1/3 of all the husband's
property, in curtesy the husband has all the property of which the
wife was married.
In order to take down there is no necessity for issue in
country there must be issue born alive —

The wife may have dower of lands of which the husband
was seized in law — to entitle the husband to customary the wife
must have been seized in fact —

Where they agree — They agree in this that each is a provision
made, the one for the wife and the other for the husband. If in both
there must be death. In dower of the wife, in customary of the hus-
band — If in both, the estate held must have been such as to
that the issue could have inherited — but cannot issue always
inherit when the estate is an estate of inheritance? No. It has been
therefore that an estate in tail special may be made, or to prevent
the inheritance of issue; in such estate therefore the wife can
have dower on the husband customary —

There has been an opinion entertained in law that


the Eng. doctrine of country would not be adopted altogether the
and the dower belong to land, to be held in heart which is good
because we had no statute adopting it. But this notion was


Concerning that we have a statute in law, made in op-


fensiveness of the Eng. doctrine with the variations before ante.


There have in Eng. a great variety of customs growing up
among which the two principal principal now are Gavel Kind
and (I presume) Grosop English, both of which cover our south
of Eng. Gavel Kind prevails in the county of Kent and is where
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all the same inherit together; and here the husband or is entitled to
country without issue. In this account, tenant by the cou-
yr. has been said to be the same as country or country in Geo-
rel Kind. In this particular they may be alike, but in every
other respect they in law adapted. Common law country-

It has been a great question whether a husband and
have a country in a trust estate of his wife? There are many
trust estates — the equity of redemption in one and the husband
can have country in it. The wife cannot in Eng. be endowed
of any trust estate, but in Con. she may. Both in Eng. and Con.
the husband may have country in such an estate

But can the husband be tenant by in country of a sole
and separate estate to the use of the wife and her heirs? It is clear
he can have no such right to such an estate during coverture; for
it is completely within her power to sell it, or do as she pleased with
it. It has been determined that as he could not be seized of
such an estate, he can have no country in it.

An other estate for life which grows out of the wife
estate and not granted to her sole and separate use in the estate
which the husband has in such property during coverture. They are
in this a joint estate, but the husband has exclusively the usufruct,
which is anything produced on the land by they labor, his labor, and
which does not appertain to the freehold or inheritance. It is
Jane W.

[Handwritten text not legible]
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in fact the crop, the annual produce. It being entailed to the unprofitable rate, he may have an action in his own name for any injury done to it. The wife is often joined. But if an injury is done to the inheritance or feehold, which is the gear, land, or tree, she must join her husband in an action, because the injury in this case is done to her.

The foregoing estates are all created by operation of law.

Of Conventional Estates

Conventional estates, or estates created by the act of law, the parties, or such as are given to a man by some instrument expressly for life. They are sometimes for the life of another person, and sometimes for more lives than one.

It should be recollected that the incidents inseparable from a prize are: 1. Alienation; 2. Being descendentable to the heir general; 3. Dower of the wife; 4. County of the husband; 5. Being dispensable for waste.

For fare last, 6. Being dispensable for waste; 7. Dower of the wife; 8. County of the husband; 9. That they can be divided; 10. That they cannot divide; 11. That the tenant may take upon himself the land reasonable extent or better. 12. That he...
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shall not be prejudiced by any sudden determination of the estate of

A third incident relates to under tenants or lessees, for they

have greater indulgence than their lessors -

A tenant for life has a right to commit waste -

except there is an express right granted in the lease to commit

waste -

The statute of Lan. (which has been made the subject

of much ridicule) declares that the tenant in dower must

the estate in good repair be, as if any satisfaction could be

of the wife where dead, if she did not then leave it, but the

the liability of having the estate taken from her and given to the

then it must be supposed

of the statute appears clearly to subject her to damages

also she kept it in good repair during life -

These tenants all have a right to take off the land

what is necessary for food, or for carrying on the farm, which

in the old Saxon language is sufficient: plough, bolt, haybolt,

and firebolt.

It has been observed that any estate resting

on a contingency which may last for life, will be esteemed

an estate for life, and have its qualities; but no estate for

a determinate period can be a life estate, nor possess its qual -

ities -

It is a maxim of the English law, that no estate

of freehold can be made to commence in future. This one
is broken in upon by no other conveyance than that of will — but why cannot this be done? All conveyances were formerly by instrument of writing, because they did not then know how to write. A rule could not then be perpetuated except by this matter of notice — since writing has become customary the delivery of a deed would as completely convey a title as turf and turf.

At the reason of this rule has reared yet the rule itself remains, that an estate of freehold if it pass at all must pass so instantly that the deed is delivered — but by a statute in 1698 it is declared that no estate in fee simple, fee tail, for life, for years, for less estate, can be passed by deed or will unless given to a person in being or to the immediate descendants of a person in being.

Of course an estate can be made to commence in future, for it can be given to the child of one who is in being.

In equity devises the longest time in which it can be given is for life or lives in being and 21 years & 10 months afterwards — in Eng an estate granted to A. for life, remainder to B. since the estate does not commence in future, but passes out of the grantor both to A. & B. at the time of the grant to A.; to show the truth of this if there is any waste committed during the time of A. & B. the remainderman on evidence must sue, as the case may be —
This doctrine applies to incorporeal interests, in which a real estate can be had.

The operation of the state of feudal and jurisdiction authorizes a sale without injustice.

Estate "per antie vie" or for the life of another, stands upon the same footing, only in the case of the death of the tenant per antie vie. In this case, who could take the estate, for the grantor could not take it, because the grant had not expired? Could not escheat because it is a rule that part of an estate cannot escheat. The heir could not take it, because there are no words of descent. Neither could the estate take for it was real estate. It was then hereditas jacens, open as in a state of nature to the first occupant, until by statute it was limited as personal property, and made arrear in the hands of the grantor. It was also desirable by will.

There is one principle, in Eng. in cases for estate for life, which we have not adopted, which is that the alienation by a tenant of a greater estate than his own, was a forfeiture of this estate. But here, the feudal idea does not govern, and such a sale will convey all the estate that the tenant had. Therefore it was no forfeiture.

In Eng., if the reversioner joined with the tenant, it would be considered as a reversionary and a complete
conveyance of all their estate.

Something of the word heir. It is a rule in Shelley's
case 12 Co. Rep. 104. about which there is no difference of opinion
that if an estate is given to a man for life, and in the
same instrument the estate to his heirs here not understanding
the intention of the grantor, it will be a fee simple.

or the devisee, if it is given or devised to the heirs of his
body, it will be an estate tail. The words for his life are
continued as nothing and this according to the feudal
idea. The word heir, heir in this case will be a word
of limitation (i.e. it will mean the heir in general) and
not a word of purchase or descriptive person. A word of de
scription. In all this there is no disagreement. Mr. B.
it will be recollected has spoken of agreements executed
and not executory.

Let us proceed one step further and we will
find the great point, which has exercised the skill
called for by the ingenuity of the greatest legal character
in Europe.

The construction given to a will or deed couched
in the words preceding, being manifestly contrary to the
intention of the grantor or devisee, it has been concluded
in the modern literature, that other terms must be construed.
in a legal way; yet if there are other words besides merely the words
of a fee life and to the heirs of his body indicating, of an evident
meaning, that it should not only an estate for life in the grantee,
be, that it should be considered as a word of description or a
share, and not as a word of limitation.

This is evidently in favor of the intention of the testa-

tor or grantor. But on the contrary, it is said, that there can be no
construction different from the known principles of law, and that it is
an acknowledged principle, that wherever the word 'heir' is used,
irresistibly must vest a fee simple, if anything because heirs in
the word by which a fee simple must be made. That this pres-
eives legal word must and will control the intention of the party
conveying the estate.

Mr. Brewer is of opinion with those who are for lay-
ing hold of all the words and construing them according to the
intention of the testator. We all know that where there are no
technics used— the construction must be according to the
intention of the devisee or grantor and that any estate could
be given if not contrary to the principles of law. Could the
grantor, then, give an estate for life? He could

So what was legal, because the
word 'heir,' so was used, happened to be used? It is to concede
that all depends upon the nature of the estate given, and not
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upon the words made use of

The care of Bagshaw and Sherwin was of this nature. An estate was given to Thomas Bagshaw for life, and for the purpose of preventing a forfeiture, it was then given to trustees to preserve for his heir. Here these were other words used to show the intention of the grantor; and according to such intention it was determined that Bagshaw had an estate only for life. Here the heir took as described in the instrument; this it is conceive to have been a very important case. There is also much important doctrine disclosed in the case of Peers and Blake (1651, 24 P. 266) and many many cases in point cited. Mansfield, Hardwick & Butler were for observing the intention of the devisee in the intention to be thrown out of the question, and certain text were to be observed. The intention whenever it is a legal one, ought certainty to be regarded. A man may so explain his intention as to control others. Powell, T. Dyer are for observing text in the case of Bradshaw. They were in the Court of Colburn & Colman; they were opposed to Mansfield. And Hardwick & Butler. The present question has been agitated inasmuch the reasons of the judges were in favor of the intention but the point was not settled.

Enrolled

This is a species of amphibious property (sometimes, vol. 3).
A view of Mortgages, the estate chargeable to the debts of condition performed as described depend on several proofs. It may be in fee or for a term of years, etc., or forever. The rights may be voided, the equity or real estate depends on the nature of the mortgage, if personal or for debt.
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sometimes personal, called emoluments, which may be defined to be the
thing which is annual production of labor. Such things as are
raised by the industry of the legal tenant. In short, the emoluments
are the crops raised on the lands held. These emoluments
adhere to the freehold as well as trees or grass, but yet they are
not always real property.

They will pass by a grant of the freehold; therefore in
that point of view, they will be considered as real property. They
cannot be committed on them (except resided from the freehold)
in that point of view they are also considered as real property.

But in case of the death of the tenant, they will not descend to
the heir but go to the Ex't and in this point of view they are con-
considered as personal property.

It is a general rule that the emoluments will
not pass by a devise. If therefore a devise is made of the free-
hold sometime before the death of the tenant, say for 50 years,
the emoluments clearly will not pass, because they were not
had in view at the time of making the devise. But suppose
the devise of the freehold is made to day to pass instantaneously, the
question is, will the emoluments pass? This is omitted.

When a tenant in seisin dies, or a tenant in
 Fee tail dies, the emoluments go to the
But what will become of them in case that the
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tenant for life dies, they will go to the ESTATE or assets in his hands, otherwise if the tenant for life determines his estate by his own act—

Where a man surrenders whether he be tenant for life, tenant for years, tenant at will or tenant for years, having known no knowledge of the time, at which his estate will determine, he shall in case of a determination have the emoluments, and free ingress, egress, and regress, to get them off the estate. If he dies, the emoluments will go to the ESTATE as personal property. But it will be remarked, that it will be invariably the case, that where the tenant puts an end to the estate by his own act, he will have no right to the emoluments, and of course they cannot go to the ESTATE.

Mr. Blacke having finished his remarks on freehold estates, he will now consider estates less than freehold, which are estates of lease.

Leases for years—Estates at Will & Estates at Sufficient

I. "An estate or lease for years is a contract for the possession of lands and tenements for some determinate period." This estate at the death of the landlord is not real property, but a chattel interest. It goes to the ESTATE upon the tenant's death of the lease, as other chattels and is applied to the same uses as, although it may be in time of value, as a life estate, which is a freehold. If an estate—
But in one state, there is no exception, and all leases must be in writing, these have supposed, that a lease for one year only might be the same, because our state requires leases to be recorded. Says that all leases for a longer time than a year must be in writing and recorded, which seems to imply that for a less time, they need not be in writing, but it must be remembered that the state of New York had declared that all leases must be in writing, and that the other state was not made to repeat that, but only to require the recording of leases that were for a longer period than one year, it was the same as if the state had said, all leases must be in writing and all for a longer period than one year must be in writing recorded.
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is leased only for one month and is an estate for years; it is an estate for years as much as if 1000 years.

Every estate which may continue for life, as an estate during coverture, during widowhood, or until married, are estates for life. But what distinguishes leases for years from these estates is that the former begins at a determinate time and ends at a determinate time. Upon principles of some laws, an estate of freehold cannot be made to commence in future; estates for years may be made to commence at any time. In making a lease for years, if no time is mentioned, it will commence on the delivery of the lease.

The words generally used to create this estate are "Demise" "lease" "let to possess." But these terms are by no means necessary, any word which will show a certain and intention of the lessee will convey just such an estate for years as is expected expressed, as was intended.

At common law it is said, that leases for years might be made by parole; but by the statute of frauds and unjustifi, there can be no interest created by any parole agreement, except with the exceptions there made. But by the construction given to the statute, by some, a lease by parole would be good, but the former thinks that even before the statute of Frauds.
leases, to have been good, should have been in writing; and he thinks that the true construction of the statute is this, that all leases whether for a long or a short time term should have been in writing, but that if a lease is made for less than a year it is unnecessary to record it.

If, however, a man does make a lease by word and in consequence thereof a tenant enters, it will not be void as to all purposes, for it will be a license to have him from an action of trespass; for his entry will be lawful.

Again if a parcel lease is made with reservation of rent, and entry in consequence thereof, the rent shall be paid, but not on the ground of the lease being a good one, and the tenant thereby acquired an interest in the land; but on the ground of the tenant receiving profit, or advantage, for which he ought to pay.

WHO ARE MADE LESSORS? A tenant in fee simple can make a lease for any time he pleases, because the whole property resides in him.

But a tenant in tail can make no lease that will be binding on his heir, except by the statute 30 Geo. 3. which enables the tenant in tail to lease for 3 lives in fee, which might last longer than his life, and so long as it did last the heir would be bound thereby.
Can a tenant for years make a lease? We shall suppose upon principle the may, but the knowing of the law determining the point.

Deprive of years is liable for waste, either actual or for

purposes, if it is such as the law seems to be waste. But this

lives cannot be made in this way because he came lawfully

into possession.

With respect to the manner in which long leases in common
acted upon, many rules cannot be laid down. But
Mr. Black says that the judges have for 20 years, or have for 999 years, in
induced such leases as freeholds are real estate. One of such a lease the wife
has been endowed and the husband entitled to country. A man
being lease under one of those long leases has been deemed a free
holder; one of which things could have been done unless the prop-
erty had been considered as real.

A lessee may for years may under lease, or assign his
whole term.

II. What is called an estate at will, we have consid-
ered as no estate at all, yet something must be said about it. It
is not real property because it cannot descend. It is not an estate
for life because the tenant may be turned off at pleasure. It is not
an estate for years, because it is for no determinate period
and depends upon the will and caprice of both parties.

It is in fact only a licence from the owner permitting
eman to enter and then it is held at the will of each party. What right then
does he acquire by entering? He acquires the right (if it can be cal-
elled one) of not being a trespasser. Whatever is the product of his
labour he is entitled to. He is in fact entitled to the emblyments as if
the owner wishes to determine the estate before the emblyments en-
right he may do so but he must allow the tenant free ingress, egres,
and require to cut and carry away the profits. But if after the deter-
mination by the lessor, the tenant enters on the purpose
of tilling the land he, he will be a trespasser. The lessor shall never
so far take advantage of his own wrong as to rend off the tenant,
and keep the emblyments to himself, for it was his own act to sup-
for the tenant to enter.

A tenancy at will may be determined for
by any act of the lessor inconsistent with
the occupancy of the tenant at will. You have before seen what will be
the consequence of a determination of this estate. This tenant at will is not
liable for trespass but if he does any injury to the estate which would have been
considered waste in an other tenant, it will be a trespass in lessor.

This licence is personal on the part, therefore a trespass means spent it. If he mis-
uses it, it will be a determination of his estate.

III. Tenant by Sufferance is where one lives an estate for years after
the time has expired. The lessor continues on the ground the lessor knowing it. It says that
this estate is allied in every particular to a tenancy at will.
Estate upon Condition.

An estate upon condition is one which depends upon some uncertain event, by which it may be created, enlarged or defeated — Co. Lit. 204, 215, 152.

Estate upon condition are of two sorts: I. Estate upon condition expressed, implied; and II. Estate upon condition expressed. Under the last of these are included estate upon pledge.

I. Estate upon condition implied are such as have some condition annexed to them from the very essence and nature of the thing itself — be the grant to a man of an office be — the it is implied on his part that the office shall be faithfully performed, and implied on the part of the grantee also that he shall do what is incompatible with the nature of the estate granted, or the exercise of a stranger in — Co. Lit. 215, 222, 152.

II. Estate upon condition expressed are such as have express qualifications annexed to them, by the estates are to commence, be enlarged or defeated — Co. Lit. 215.

Express conditions are divided into estate upon condition precedent, and subsequent — the former is where the event on condition must actually happen before the estate can vest or be enlarged, or an estate granted to be upon his managing to it, provided he goes to work —
An estate upon condition subsequent is where the estate is vested, but upon the happening of some event or condition may be defeated. As where an estate is granted to A. upon the condition of a payment of rent be annually; here the estate is vested. But when the estate is granted upon the condition of a payment of rent, unless the grantor actually makes a demand of it at the due time, he cannot afterwards recover it. The condition is here construed strictly against the grantor.

There is a distinction to be observed between an express condition in a deed, and a limitation or condition in law.

Where an estate from the nature of it cannot possibly remain or continue after the event takes place, the qualification is called a limitation. That is where it is not necessary for the grantor to do any act in order to revert the estate.

The words "so long," "while," "until" are words of limitation.

But if the qualification annexed is a condition in deed, the estate does not cease immediately or of course after the happening of the condition. Entry or claim is necessary by the grantor, or his heirs, to vest the estate and this is called a condition in deed.
2 Pet. 1:5
1 Pet. 4:10
1 Pet. 3:14.15.
3:24.25.
2:16.18,19.
3:10,14.17.
2:18.
4:25-.
The words "provided" and "upon condition" are terms of condition.

The distinction between a condition and a limitation, although it would seem merely verbal, yet it is very important.

It is not universally true that these words of condition as "provided" or "upon condition" are words of condition, for it is a rule, that where an estate is granted over to a third person or persons, these words will be construed as words of limitation.

The reason is because the grantor or his heirs may neglect to take advantage of the non-performance of the condition, and therefore it appears shall not be prejudiced by the negligence of others.

It has lately been settled that an express condition that the lessee of a term shall not assign it to others.

If, therefore, he should make an assignment of it, it will be a forfeiture of the term.

But if a lease is made to A. and his E.F. with a condition that his E.F. shall not assign it, it is a question whether they may not assign, without a forfeiture of the estate.

The latter, however, seems to be that they may not assign, such condition notwithstanding.
Estates upon Condition.

If one holding an estate for life or years under a deed which is void, and he attempts to assign under such ineffectual instrument, this attempt to assign will not destroy his estate.

It has been settled that if there is a lease made with provision that the term shall not be subject to bankruptcy, it will be good.

It seems also that it may not be taken under any execution by the creditor of the lessee.

If an express condition subsequent annulled the estate, be impossible at the time of its creation, it exists the estate intended to be given upon condition in the lessor or grantor, for such a condition is void.

So also if the condition becomes impossible by the act of God, or by the act of the grantor, the estate becomes absolute, for the party to whom the estate is granted, shall not suffer by the statute barker of another, when he has done what he can.

So also if the condition be against law or unreasonable to the nature of the estate granted it will be ill estate unkept and void, and therefore an absolute will vest.

Here the dictates of sound policy are followed, for those men should be a limitation laid to commit an illegal act.
Estates upon Condition.

The preceding cases refer to conditions subsequent but do not refer to conditions precedent. There is a material difference. In conditions precedent, no title can possibly vest at all whether the condition be unlawful or impossible. If it is impossible, it clearly cannot, because the creation of the estate in its condition happening primarily depends upon the impossibility. If it is unlawful, the estate can never vest, because the law can never recognize a title which is repugnant to itself.

The performance of a condition either precedent or subsequent is matter in pais, and of course provable by parol evidence.

Under the head of conditions subsequent are included estates held in Pledge or Mortgage and Living Pledges, which will now be considered.
Mortgages.

Estate held in pledge are of two kinds, the first of which is called "VIVUS PLEDGE," or living pledge, which is an estate granted by a debtor to his creditor, to hold until the debt is paid or satisfied. This species of pledge is called a living pledge, because the thing pledged survives the debt, and when it is discharged the property reverted to the grantor—Brow. 5 T. 246. 2 D. 261. 2 A. 157.

The second kind of pledge is called "MORTGAGE," or dead pledge, and is an estate granted by a debtor to his creditor, upon condition that if the grantor pays the debt on a certain day, the estate shall become void, in one of the ways—1. That the Mortgagee shall receive or pay or 2. That the Mortgagee shall demise all interest in the premises—Brow. 5 T. 246. 2 D. 261. 2 A. 157.

It has been observed that conditions either sub segment or precedent being matter in pairs may be proved by past evidence. So in Mortgage the extinguishment of the debt for which the estate is given is provable by past testimony. And the estate therefore reverts, therefore a clause of provision for reconveyance is merely a cautionary stipulation.

It is called a mortgage, because if the Mortgagee fails to make the payment, the estate as to him is gone for
Mr. Gould remarks, that when the question is asked, how many kinds of mortgages there are, it is generally assumed that there are two viz. real and personal. This is he says, incorrect, for to say that a living pledge is a mortgage is as absurd as to say that a living man is a dead man. Recurrence to the derivation of the word will show this.
Mortgages

Rev. at Law a 3d. 153, B. 4, 12. 1856. 12 15. 736.

A mortgage then is substantially an estate pledged by a creditor debtor to a creditor as a security for a debt - The word "mortgage" then refers to the estate pledged and not to the deed, as is often understood - The deed then should be called a mortgage deed instead of a mortgage -

The debtor or grantor is called the mortgagee - The creditor or grantor is called the Mortgagor -

Every mortgage then is an estate pledged upon condition, and this condition is usually called a Declarance because its office is to defeat the estate granted to the mortgagee -

There is no precise technical form indispensable in making a mortgage deed - The declarance may be a technical instrument, it may be in the body of the deed, or it may be annexed to it, or indorsed upon it, or it is a rule that two instruments executed at the same time, and referring to the same cause, make but one contract -

As soon as the estate is created, the Mortgagor may take possession 108 he is liable to be depromised - The usual and almost universal practice is for the Mortgagor to remain in possession until the condition is broken -

There is a distinction at Common law between a grant made to secure a gift and one made to secure an antecedent
In the former a tender made not only discharges the
lives a debt, but the whole obligation. The promise of a gratuity or
gift does not in fact create a legal debt. In the latter a
tender at the day fixed of the money does not discharge the debt,
it still remains a legal debt, being already created.

The condition in a mortgage deed is always a condi-
tion subsequent, although formerly it was considered as a condition
precedent.

Formerly after the condition was forfeited, the wife
of the mortgagor was entitled to dower in the estate, and it was
subsequent subject to all the covenants be of the husband. And
for this reason, it is customary in England to grant very long time
by way of mortgage. And this continues to be the practice in
Eng. although the reason which gave rise to it has ceased for the
wife is not at this day entitled to dower there in such estate.

Mortgages in Con. are almost always in fee
simple.

If a bond is given by a mortgagee, conditioned for
the performance of the covenants be contained in the mort-
gage deed — non-payment at the day is a forfeiture of the con-
dition of the bond — this was formerly decided contrary as in
Mortgages

How Mortgages are Considered in Courts of Equity

It has been remarked, that at Law, if the condition is not strictly performed, the land or property vested absolutely in the Mortgagor a grantee. A very serious hardship was the consequence of this, for a large and valuable estate would not infrequently be lost for a trifling sum. Concerning this there was a great controversy between the courts of Law and Chancery. The former contending that upon a breach of the condition the thing mortgaged was gone from the Mortgagor and vested absolutely in the Mortgagor, without the possibility of a redemption like a life estate (Courts of Chancery) contending that the transaction wholly was a mere personal contract, and the land or property only a security for the performance of the condition. By that the Mortgagor was actual owner of the land notwithstanding the non-performance of the condition.

In this contest (as with all others between courts of Law and Chancery) the courts of Chancery prevailed, and in consequence thereof, Chancery has cognizance principally of all matters concerning Mortgages. These courts consider that whenever the debt is paid, the interest of the Mortgagor determining, and if it is not paid, and there is a forfeiture of the condition,
the mortgage becomes trustee of the legal estate, for the mortgagee.

As in cases of equity, the whole transaction is considered as a personal contract, and the land a security for the performance of the condition, the debt is the principal principal and the land or estate is the incident. As a corollary to the doctrine of reciprocal mortgages, it was held that this equitable right, which resides in the mortgagee after a breach of the condition, is called the equity of redemption; so we see that it is purely a creature of the courts of equity.

But although the land is considered as the mortgagee's until the redemption, the mortgagee's interest continues in equity to entitle him to the profits, and of course the possession.

From this view of the subject, it may be inferred that such a mortgage is not such an alienation of the property as to affect any previous disposition of the same. Any previous disposition is necessarily affected by it.

It is an alienation pro tanto, i.e., to the amount of the debt, for which the property is mortgaged to secure itself in cases of default. Mortgages will only affect them pro tanto and will not be considered as a total revocation. It is, however, a rule in law, that any subsequent disposition of property desired will be at law an entire revocation, but in equity it is clearly settled to be a revocation pro tanto only.
Mortgages

But still if the owner of land devises it to A, and afterwards mortgages it to A, it is a total revocation of the devise even in equity, for it is said that A cannot stand in two characters, i.e. as Mortgagor to himself. But it does not believe the rule to be founded upon this reasoning technical absurdity; it proceeds upon the presumption of an intention in the party to revoke, and the presumption of such intention cannot be rebutted.

Every contract for the loan of money or payment of a debt secured by the conveyance of real property, and not intended to be conveyed in fee, is a mortgage and so considered.

It is also a rule that all private agreements between the parties made at the time of the mortgage against claiming the equity of redemption are void. For were they implied, they would enable mortgagors to take unreasonable advantage of Mortgagors for Mortgages are considered very much at the mercy of the Mortgagors. The maxim "once a mortgage, always a mortgage" applies here, and it is really true that when a condition is added to a mortgage deed, that "if payment not made at the time limited, the land should be considered or sold" such condition would be void.

As to this point it makes no difference whether the provision is in a mortgage deed, or in a separate instrument.
Mortgages.

The rule proceeds further still, for if there is an agreement at the time of making the mortgage deed that the conveyance shall become absolute, provided the mortgagee advance an additional sum of money it will be void. Such agreements are considered as radically void.

But still an agreement that the case of the sale of the equity of redemption, the right of pre-emption shall be reversed, reserved to the mortgagee will be good. Such an one cannot be open to criticism.

So also a subsequent agreement for an absolute estate created by the parties, is good—that is, it is not void subject to be avoided where there are any badges of fraud.

So also if the mortgagee makes a subsequent release of his equity of redemption and agrees for a reconveyance, this agreement will be good.

Conditions precedent are construed strictly, but conditions subsequent are construed literally.

There are also other exceptions to this general rule that "once a mortgage always a mortgage" as in cases of family settlements. Any settlements thus made as charitable or protective will be good, or where the estate is settled that
the equity of redemption shall not be claimed except during the life of the mortgagor.

There being praetorium acts of the mortgagor proving to be in such a situation as that the mortgagor cannot take advantage of him, and renders them good, and exceptions to the general rule above.

According to rules observed in the book Eng. courts of Chancery an absolute deed without any discharge, may be considered and treated as a mortgage, where there are no circumstances which induce a belief that the equity of redemption should be claimed. As where the grantor or mortgagor is required to remain in possession to pay no rent, but pay taxes.

The superior courts have in two instances acted upon this ground. And W. C. think upon principles of the highest justice, for the statute of frauds and priorities is but a rule of evidence and not a rule of property. The court of error have as often reversed their decisi determinations. This is therefore a doubt.

But parol evidence is clearly admissible to prove a payment, and is therefore sufficient to defeat the interest of the mortgagor.

Therefore, if the mortgagor by volition forgives the debt, parol evidence will be admitted to prove it.
Mortgages

But a parol agreement between two or more that the whole shall rest upon one of them will be within the state of frauds and prejuice therefore parol evidence cannot be admitted to substantiate. If lands are devised to retain the tenant to hold until the rents and profits shall discharge certain debts specified debts, and no power is given them by the instrument of devise expressly to mortgage the lands yet if a sufficient sum cannot be raised within a reasonable time to pay the debt from the rents and profits, the estate may be mortgaged, or even sold for the payment of them, unless it clearly appears from the instrument of devise that the intention of the devisee is otherwise. 


Of the interest of the Mortgagor in the premises mortgaged.

As soon as the estate is created the Mortgagor may have immediate possession but if there is an agreement that the mortgagor shall remain in possession for a certain fixed time he is tenant for years to the Mortgagor. But if the Mortgagor is left in possession without any agreement as to the time, he shall remain in possession so far as it
The rents and profits are suffered to be taken by the mortgagor in lieu of interest paid to the mortgagee. Not so with a common tenant.
Mortgages

respects the rights of the Mortgagor; he is tenant at will or quasi tenant at will to the Mortgagor; he is not tenant at will in every particular case. For, he may be sued in ejectment by the Mortgagor without notice, which is not the case with a common tenant at will.

But on the other hand a Mortgagor thus in possession is not liable for rent to the Mortgagor, or other tenants at will are.

and the reason is that the rents and profits are to be applied to the payments of the debt and interest.

On the other hand such tenant is not entitled himself upon ejectment to the satisfaction for all the profits he is to go towards paying the debt. So upon the whole the Mortgagor loses nothing by not being able to claim rent.

Again a common tenant at will cannot lease or sublet the land, but it is otherwise otherwise, with the Mortgagor in possession, for such lease will not determine his possession but the Mortgagor may if he pleases defeat the lease against the Lese, for the Lese stands in the same situation as the Mortgagor.

Such a lease will be good against the Mortgagor and all strangers, and will entitle the Lese to the equity of redemption.

As the Mortgagor has it at his election to treat the Lese as a wrongdoer or not, it follows that by giving him notice he may treat him as tenant and compel him to pay rent.
Mortgages

more; but he cannot be compelled to pay rent which he had paid

The Mortgagor, for he would be then paying it twice.

It is now settled that the Mortgagor, when sued in eject

ment by the mortgagee cannot set up the title of another as a
defence, for he is stopped to do this by his own act deo

So on the other hand the Mortgagor is stopped to deny

the title of his own lessee, while the lease continues, for his title
is good against the Mortgagor and against all strangers. From
this it follows, that their possession will answer the lessee of the Mortga
gor to sue any stranger in ejectment, for this being a lawful possession,
it is alone sufficient for this.

The Mortgagor being denied in E J, the true owner
of the land and the interest of the Mortgagor a mere chattel in
surable or security for the payment of a debt, it follows that if a
freehold is mortgage, the right remaining remains in the Mort-
gagor, and his interest will descend to his heirs. or it will

issue by devise and whoever possesses this right, or interest

a settlement thereby. The only difference between

this interest and a real freehold, is that in this, the title,
after forfeiture a breach of the condition cannot be enforced
at law. On a devise of it will pass under the same denomination

of land as land.

But this the Mortgagor is considered as real owner
Mortgages

... yet if he commits waste an injunction will issue from Chancery to stay it — even tho' the mortgage is for a term of years, which cannot be done in cases of common tenants for years — 

All the foregoing rules were devised and adopted for the purpose of conveying conveyance, what may be called substantial and moral right.

Of the interest of the Mortgage.

The interest of the Mortgage in the premises mortgaged may be considered at four distinct periods: 1. The interest of the Mortgagor from the time of executing the mortgage and before forfeiture of the condition while possession (as we usually the care) is in the Mortgagor.

2. After the mortgage is perfected by non-payment of the money at the day and before the Mortgagor enter into possession.

3. After the Mortgage enters into possession and before foreclosure, and

4. Of foreclosure, of which I will treat hereafter.

1. Of the interest of the Mortgagor between the execution of the deed and the forfeiture of the condition.

Before forfeiture the Mortgagor's estate continues...
Mortgages

what it was at Law Suits before Chancery interfered. The legal title is in the Mortgagor, not in the Mortgage, so it is defeasible on performance of the condition. It is the equitable right which results to the Mortgagor after breach of the condition which gives Chancery coercive of Mortgagors. This court then has no sort of concern with them [breach of the condition].

Hence any conveyance or any lease made by the Mortgagor, during this period, is void as against the Mortgagor. Hence the Mortgagor may on notice compel the Mortgagor’s lessee to pay him the rent, even before forfeiture of the condition.

And this rule holds as well when the lease is prior to the mortgage as when it is subsequent to it. But suppose that rent could not be compelled to be paid by the Mortgagor, which had accrued before the mortgage made.

When a term for years is mortgaged by the lessee, the Mortgagor is in the nature of apigence of the term, provided the whole of the term is mortgaged; and if the whole is not mortgaged he is liable as derivative lessor in the character of apigence.

But such Mortgage is not liable for covenants which run with the land, unless he takes actual possession if the premises and the reason is that the mortgagor
regarded only as a security.

This rule holds as well after forfeiture as before. But if the mortgagee does take possession, he is liable, for all the improvements he makes on the land, as other easiers, for he takes it upon his own account, and enjoying the profits he must submit to the losses of others. The two next periods of time will be considered together; the difference being remarked when any occurs. That is the interest which the mortgagee has after forfeiture and before possession and after possession and before foreclosure. The interest between these periods is considered by courts of Equity as a chattel interest.

After the interest of the mortgagee will pass under a devise of lands, before forfeiture.

If then the mortgagee dies at any time between forfeiture and foreclosure, his interest will go to his personal representatives; and on the same principle of considering it a chattel interest, it follows that the assignment of the debt does not convey this interest.

Hence also the mortgagee before foreclosure, must not do or exercise any act of ownership which will injure or impair his mortgagee's interest.
Mortgages.

In such a case as this, however, the Lord Chancellor objected that a lease would be good, if made to avoid a levy. Mr. J. thinks this doctrine of his Lordship vague if not bad.

As the mortgagee before foreclosure cannot do anything which will injure or encumber the mortgagee's interest, regularly therefore he cannot before foreclosure commit waste, for if he does Chancery will issue an injunction to stop it. This will hold as to mortgagee in fee.

But if the mortgagee's security is defective a mortgagee in fee will not be restrained from committing waste even before foreclosure. But in all cases where he does commit such waste he must account for it with the mortgagee for it, that is, for the value of it, for it must be applied to pay the estate, and not to the mortgagee's benefit.

But this the mortgagee cannot encumber the estate, yet he will be allowed expenses for making necessary repairs. These expenses are to be added to the principal of the debt against the mortgagee and it will bear interest.

If a mortgage is made of an estate to which the mortgagee has no title and afterwards the true owner conveys it to him, the mortgagee shall have the benefit of this, and it is called a graft upon the old title.
Mortgages.

The Mortgagor is not bound to expend money upon the estate except for necessary repairs; but however if he does expend money in defending the Mortgagor's title he may add it to the principal for it is to be remarked that if the title is attacked it is at the risk of the Mortgagor.

The Mortgagor takes the estate mortgaged subject to the same incidents to which it is subject in the hands of the Mortgagor. If the Mortgagor therefore has done any act that amounts to a forfeiture, the Mortgagor will lose his security. It would appear however that the following distinction will hold, that when the Mortgagor has done any act which is inconsistent with the nature of the estate it will be a forfeiture contemplated by the rule; but when the forfeiture is the commission of any offence it is not such an one as will effect the Mortgagor's interest. In the last case the forfeiture does not arise on account of any injustice done by the remainderman or any
thing can take only what interest the Mortgagor had.

Of the Equity of Redemption—who may claim it.

The equitable interest which accrues to the mortgagee after breach of the condition, by non-payment at the day appointed, is called the Equity of Redemption.
Mortgages.

The equitable interest in a mortgage is properly speaking a trust.

The legal estate in case of foreclosure is in the hands of the mortgagee until the mortgage is 

A mortgage is really, in effect, a mortgagor's conveyance, the trust is in the mortgagor to hold

A mortgage of the same premises to another; this, though it was

As the mortgagor may redeem at any reasonable time

by paying the debt and interest, every one claiming under him,

A second mortgage may redeem a first mortgage

So a deed of a 3rd party is the rule in that any person having

An assignee of a bankrupt mortgagee may redeem

In equity of redemption

So also the lessor of the mortgagor may redeem.

So also, after the death of the mortgagor, his heir may redeem.

If this interest, mortgagee was a freehold and descend.
Mortgages.

...The equity depending will be real assets.

An equity of redemption of a mortgage in fee, is governed by the same rules of descent, by which the legal estate is governed.

And as an equity of redemption is devisable, a devise of the mortgagee may redeem, for he has the same intestate which the mortgagor had.

At law, as also a judgment creditor of the mortgagor may redeem, because a judgment obtained is a lien upon all the debtor's estate, but before the bill is brought to redeem, a writ of execution must be sued out, for there is no lien until that is done.

Altho' a judgment creditor in law, cannot redeem as such, yet if he has actually levied the execution he may redeem, for the levy gives him an interest in the equity.

It has been a matter of much doubt in law, whether to the way in which an equity of redemption shall be levied upon. Two different practices have obtained. The first is if the execution debt is large enough to swallow up the whole of the equity of redemption, the whole is to be levied upon and appraised off to the creditor, and this entire extinguishes the mortgagor's interest, but when the debt is not equal to the equity, execution may be levied upon a part, and that appraised off to the creditor. Secondly, the whole...
The second method is to appropriate off the whole equity of redemption to the creditor, whether the demand is great or small, without entering into any inquiry what the value of that equity is, and in this case the debt from the mortgagee to the creditor is not extinguished. 108. 2. 

ed, nor the right of redemption taken from the mortgagor, but such levy places the creditor in the same situation as if he had been a second mortgagee, and thereby he gets a security for his debt to the extent of the value of the equity which may be redeemed by the mortgagor if he chooses, but the levy does not operate as an absolute sale of the equity by the mortgagor, but as if the mortgagor had given to the creditor a second mortgage.
Mortgages

May in the first instance he lawful upon and their officers will cut off such a proportion of the mortgagee's interest, as is adequate to the debt compared with the whole equity. Where the right of the mortgagee is not entirely extinguished, the former method of in the suit approved by the supreme court of errors.

In Eq. the king may always redeem when the mortgagee has committed any offense which works a forfeiture.

Tenant by eject slight, statute merchant or statute

Tenant may redeem

If a mortgaged estate or equity of redemption descends to an infant, his guardian may without the direction of a court of equity apply the profits to the discharge of the debt.

After the death of the mortgagee his widow may redeem, if she has a jointure in the land, and at the jointure she received in part of the estate only, yet she may redeem the whole. If she pays more than a third part of the principal money, she shall hold the land until re-invested. It appears that if the mortgagee requires it she must redeem the whole.

The husband of a mortgagee may redeem after the death of the wife or tenant. By the council of the equity of redemption.
Mortgages

But in order to entitle the husband to this remedy, there must have been a seisin of the wife during coverture, i.e., not a corporeal seisin but an equitativa seisin, and it would seem that the prescription of the rents and profits would have been a sufficient seisin.

A subsequent incumbrance may render a former one.
If a subsequent mortgagee redeems of a first, the mortgageor or his heir or devisee may redeem of him. It is in fact a rule that property in this situation may be redeemed, until it is redeemed by the one who is entitled to the whole interest, legal and equitativa. For if the heir of the mortgagee redeem at the mortgagee may redeem of him, but when the mortgagee or his heir or aprique redeem he will receive the whole interest, therefore there will be an end of redemption.

A mortgagee may redeem even after a release of the equity of redemption if it appears by circumspect proof that it was made upon a strict trust and for his benefit.

If there be lease a tenant for life with interest in remainderman, in fee of an equity of redemption, the shall contribute proportionably what is due on mortgage.

So a devisee of an estate for life in an equity of redemption may redeem and hold over, until those in remainder also contribute.
Mortgages.

And if the remainder man or reversioner will neither of them contribute, the tenant for life may hold the land until they pay 4/9 of what is due for principal and interest.

In precedent in Chan. 44 it is advanced that a tenant for life is to pay 4/9. I would think this incorrect, but that 1/9 to be the exact proportion.

The general rule is that the estate for of the tenant for life in the premises shall be rated at 4/9 and that of the remainder man or reversioner in fee at 1/9 of what is due for principal and interest.

If the mortgage money is payable on a contingency not arrived, he in remainder or reversion may exhibit a bill in Chancery called a quiet tenancy against the tenant for life and compel him to contribute.

That is, that he shall pay 4/9 being his interest in the premises or else relinquish the proposition. The object appears to be to constrain the tenant for life to keep the interest down if the land be charged; for he cannot be compelled directly to redeem it, for he may indirectly by purchasing in the mortgage.

If the tenant for life of the equity of redemption pay off the whole debt, and takes a conveyance of the estate, makes improvements thereon and dies— Afterwards the remainder man or reversioner comes to redeem they must pay 4/9 of the tainting improvements to his representatives but not
Mortgages

...thing for the the other third because he received the benefit than
of during his life, and no interest shall be allowed during the life
of the tenant for life for the money he paid, for he is bound

to keep the interest down the during his estate.

But as to the proportion of money to be paid between
the tenant for life and the remainder man this distinction
is to be taken. As has been said if after redemption by the tenant
for life, the remainder man applies to redeem during the life
of the tenant, the tenant is to pay only 10.

But if application is made after the death of the
tenant to his representatives they must allow only for the
time that the tenant for life enjoyed the estate, and the
remainder man would consequently be subject to a great
lesser diminution than in the former case.

An equity of redemption on a mortgage in fee
is not a right at law, for then the estate of the Mortgagor
is gone entirely, the very moment that the equity of
redemption commences. Still however if such equity
of redemption is a right in Chae, and if an heir alien or
release his equity of redemption to prevent creditors
from having satisfaction for debts their debts Chae will
follow the money in the hands of the heir or Etc.

As however an equity of redemption is only
In the former case the insurance is real 2 Bk. 411. and therefore would be assets in the hands of the receiver and not of the Exrs.

10 Hen. 410.
2 Bk. 354

10 Hen. 124,
Proc. 136

Hardw. 469.
1 Hen. 41.
2 Phill. 412.
2 Atk. 10.
Mortgages

Equitable estates cannot be touched by the intervention of the creditors, and must be paid pro rata, without respect to the degree or quantity of their debts.

In law, all equities of redemption are real estates. An equity may therefore be attached by execution, or by levy of execution, precisely in the same manner as real property is levied upon. When the mortgagor makes out an inventory, he must include the equity of redemption. Even inIng, the mortgagor's reversions or expectancies, or a mortgaged term, for years will be arrested at law, liable to debt, and will affect the redemption.

So also the reversions of a chattel interest except in the determination of a mortgage of part of the estate, is estates, but it is a personal interest in the hands of the devisees and not of the estate.

The judgment in these cases will be of ejectment, "quando acciderint," i.e., when they fall, and the creditor cannot pay a bill in Chancery compel the devisee to sell the reversions, but must expect until it falls.

An equity of redemption is desirable for the payment of debts and it is in case of its being decreed that it becomes equitable and not legal estates.

It was once supposed that if a devise was made
Mortgages.

to any Eq. the estate which he had would be legal as to
But it is now settled that such a devise, either to the
Eq. or any third person shall be considered as equitable as to
shall be paid to the creditors “pari passu.”
But the regularly creditors as such have no priority
when the fund consists of equitable assets—yet a second
mortgage shall be preferred to any creditor; other creditors
he has priority as not an creditor, but as an incumbrance
having a specific lien on the land.

An equity of redemption has never been held to
belong to a bond creditor during the life of the creditor—Mort
gages.

It has been a great dispute in Eng. whether there can
be “poppy firatis” of an equity of redemption. The better opin
ion seems to be in the affirmative.

If a man has a son and a daughter by one wife
and afterward has an other son by an a second wife.
and the elder son dies: raised, the estate goe to the daugh
ter in exclusion of the half brother—this is called “poppy firatis”; but if the elder son had never been raised the
younger brother would have taken, because all descents are
from the person last raised.
A mortgagee dies in the last estate. Does his heir or she, if the last son died in possession, would the daughter take? Sir Joseph Fyke, Esq., was strongly inclined to think he could not trust the current of authorities one against the other.

For a definition of praecessio, see vide 8 B. 16. 213.

In general no person is allowed in equity to redeem unless he is entitled to the legal estate, according to Powell, but Mr. Gould considers this to be absurd, for he that has the legal estate needs no redemption; what Powell means must be this, that no person shall be permitted to redeem unless he has an interest in the equity of redemption, which ought to have been the rule.

But if he in whom the equity of redemption is refused to redeem any person either directly or consequentially interested, will be permitted to redeem.

Where a mortgagee becomes a bankrupt and a majority of the creditors would not suffer the assignee to redeem, the other creditors were permitted to file a bill for redemption under suit of costs.

If the mortgagee's heir in whom the equity of redemption is, will not redeem, the creditors may lose, but if the heir does will redeem the creditors have no right to intervene.

It is a leading maxim of the laws of Eng., that an
the right of redemption is a creature of equity, a court of Chancery will always make it subordinate to its own rules.

It is also a leading maxim that he who seeks equity must do equity. Hence it follows that a court of Chancery will deem a redemption, either absolutely or conditionally as the justice of the case may require.

The right of redemption is not then absolutely absolute.

If therefore the Mortgagor should apply to redeem, provided he is able to on payment of the debt, and he could not set aside the mortgage at law, the court will not indulge him, for he must relinquish his suit at law, on his application to a court of Chancery.

So if having applied previously to a court of law, and failed, the Mortgagor applied to equity, the court of equity will compel the appeal applicant to pay the costs and charges of the suit at law.

Again although the Mortgagor cannot compel the Mortgagor to redeem before the day of payment, yet in case of a bad bargain against the Mortgagor, he will be permitted to redeem before that time.

Again if the Mortgagor should obtain possession against the Mortgagor by fraud, pending a suit, on petition for redemption he must restore the premises before he can redeem.
A mortgage to 15 for $1000 which is to be for 800
return to order from the 1st of May 1000
A mortgage to 15 & John to £ 655.75 for £ 800 £ 800
and return to order from the property £ 800
So of £ 250 of which 15 gave to order he pays £ 800
A mortgage to 15 for £ 800 of which to £ 800
they have been £ 250 of which to £ 800 £ 800
and return to order he pays the herein £ 800
Jenny murray to E. Cunderton with Agreement.
Mortgages

In pursuance of this, it is a rule that if a mortgage
Black sue for one debt, and White sue for an other, and one is
more than sufficient to secure the debt, and the other securing
than the debt sufficient, he cannot redeem the sufficient one
without redeeming the other at the same time.

So if the heir of such mortgagor wishes to redeem—

So where the heir of such mortgagor endeavours to defeat
the mortgage of one of the estates by setting up an entailment
and afterwards applies he shall redeem both or neither—

If a purchase under the mortgage shall hold the land
against the mortgagor and his heirs, for the sum due on the
mortgage at the rate he may have bought it for less money, or given
than it was worth, for he stands in the shoes of the the mortgagor
who espigned, and whom might have given it to him gratis.

But as against subsequent incumbrances a vendee
after the purchase shall hold for no greater sum than he actu-
ally paid—

So also if the heir of the mortgagor purchases the first
mortgage at a discount, this incumbrance shall not stand as
against a subsequent one for more than the sum paid—

So it is a general rule that if an heir at law, trustee,
executor, assignee, &c. of the mortgagor purchase in this mortgage
at a discount, the creditors and legatees shall have the amount
advantage of it, and for want of them the benefit shall go to the assigns to the surrenders.

This rule applies as well to equities generally as to mortgages.

These rules are all founded upon the general principle first laid down viz., that the right of redemption is a creature of the law equity and the courts of law, will always make it subordinate to its own rules.

But if the mortgager’s heir or trustee buy in execution or be held under the rights or the out of which he himself is entitled, the whole money due shall be allowed in account, or this it was purchased for life.

Mr. Gould thinks that in this case, the general principle has not been rightly followed. Why might not the doctrine of tacking security, and the application here, and why should the heir or trustee be allowed to hold, not having paid a just equitable consideration against bonafide creditors? What distinction is there between in principle between this and the case of an ordinary purchaser, except so far as it goes to protect his own incumbrance?

If the mortgagor becomes indigent to the mortgagor, otherwise than on the mortgage, the former debt as well as the latter must be paid paid or discharged before the mortgagor will be permitted to redeem on his own applic
Mortgages

section for the condition being broken the estate of the Mortgagor becomes absolute at law, and he must do equity for the same reason.

But if the Mortgagor in the case supposed sole his title to the property, the Mortgagor is not bound before redemption to pay the other debts.

The principle of the change between

the party at

the

equity

instance.

If the Mortgagor's heir would redeem the debt he must pay every debt due to the Mortgagor by bond, as well as by mortgage if he would make the application himself, but the debt must be by bond, or of such a nature as a bond debt, otherwise the heir is not liable. For simple contracts will not bind real estate, in the hands of the

heir, ubi idem ratio idem jus, how different is the Mort.

In coincidence with the same rule, if a lease for years is mortgaged, and then a new debt contracted by the Mortgagor on bond, the lessor must pay both, indeed the lessor must pay other than bond debts, for a lease being personal is certainly liable. For debts on simple contract.

But if there be several encumbrances upon it,
Mortgages.

estate, and the first incumbrancer has a bond debt; it will be proper to enforce all real incumbrances on the land, whether by mortgage judgment, or statute, for the bond is in charge on the estate, and the first incumbrancer has not the same equity against a future incumbrancer, or against an heir at law, who is liable to the bond in respect of apetition.

Since the state of a tenant devisee, the devisee of the equity of redemption cannot redeem without payment of the debt on bond and upon mortgage, because the statute makes such device work as against creditors, and that the devisee stands in the same place as the heir would have stood if no devise had been made.

Before the statute, however such a creditor devisee would not have been liable to a bond creditor.

Further if the apetee of the Mortgagor has a bond debt, he has the same equity against the Mortgagor and his representatives as the mortgagor himself had, and no other.

If the money due the Mortgagor on bond was prior to the mortgage, the rule is the same as when it is on estate subsequent to it.

When the Mortgagor in Equity in a bill in equity to redeem, the court will extend will extend the debt beyond the Juncture of the bond, if the principal and interest are
Mortgages.

The rule is the same when the mortgagee's representative petition for a redemption. The courts do not attempt to alter the contract, but they impose terms on him who applies i.e., the mortgagee.

But this can never be done in an application of the mortgagee to foreclose, for it would alter the contract.

There are many cases in which the mortgagee and his representatives on a petition to redeem are bound to pay the debt not due on the mortgage as well as those that are.

Where the mortgagee has practiced fraud upon a third person by the concealment of a debt due on bond the mortgagee shall be permitted to redeem on payment of the bond debt proceeds, principle money only.

And if part of an original mortgage be paid and then a further sum be borrowed on a defective title, the first sum must be paid as well as the first on redemption by the mortgagee.

But the purchaser of an equity of redemption for a valuable consideration may redeem without paying the debt not secured by the mortgage for he is not the debtor— he purchases the land encumbered and the land
Mortgages.

in the hands of the alienor can be charged to greater amount
than the incumbrance itself. For the reminder of it

Indeed, the Mortgagor's claim to have his conditio
paid, as well as those secured by mortgage, is good alone
against the Mortgagor and his assigns.

Length of possession by the Mortgagor after forci
ture is not of itself absolutely a bar to the Mortgagor's right
of redemption, yet courts of equity have so far followed the
statute of limitations for mortgages are not within the sta.
of limitations.

But at the length of possession after forfeiture is
not considered a bar to the Mortgagor's right of redemption,
yet courts of equity have so far followed the stat. of limi
tations in Eng. as to say that twenty year possession after
forfeiture is prima facie evidence of the Mortgagor's hav
ning abandoned his right of redemption. And indeed
it is generally conclusive evidence unless there be
incompetencies or disabilities on the part of the Mortgagor, which
hindered him from redeeming.

This equitability bars to the Mortgagor's right. It

seems principally upon the presumption that the Mort-
gagor has abandoned his rights; if this presumption can
be removed or rebutted, the Mortgagor's right will in the
This presumption may also be rebutted by facts showing that the setation of the Mortgagor and Mortgagee has been recognized within 20 years in Eng. and 10 Cons. Indeed any act of the Mortgagee by which he has recognized the Mortgagor’s right of redemption within 20 years will prevent a bar of the redemption.

If the Mortgagor has within 20 years exhibited a bill to foreclose it will preserve the equity for it is a recognition of the Mortgagor’s right within the time limited.

If the Mortgagor has received part payment within the time limited, the Mortgagor’s right is not be void.

The time allowed for redemption after the removal of any of these disabilities, is the same as that presented in the statute of limitations in real estate—ten years in Eng. and five in this State—
As for instance, A. gets into possession of B.'s land, and remains in 5 years or there is without taking any notice of it goes off to sea, and it gone so long that the 20 years in Aug. it is in law in passed over his going to sea will not stop the statute of limitations from running upon the land. This rule is not much adhered to in law, as in many cases it might work great injustice.
But if any fraud has been practiced upon the Mortgagor to prevent him redeeming, no length of time whatever will bar his right of redemption, for it is a maxim of equity as well as of law, that no length of time will be construed so as to suffer a man to take upon stage of a fraud.

As to these disabilities, the rule is the same in equity as at law - for if the statute of limitations has begun to run, the intervention of any of the legal disabilities does not prevent it, i.e., does not prevent a bar against the person before having a right to redeem.

These disabilities have any operation or effect must exist at the time when the right accrues - i.e., when the equity of redemption commences, which is at the forfeiture by the breach of the condition.

When it is agreed between the parties that the Mortgagor may take possession of the premises and hold until he is satisfied from the issue and profits of the land, no length of time shall bar the Mortgagor's right of redemption - even tho' it appears by the tenant's own showing that 60 years had elapsed.

In case of a mortgage in Wales as a Welsh mortgage, the possession of the Mortgagor for any length of time is no bar.

A Welsh mortgage is one by which money is destined to be paid required to be paid on a given day in a certain place.
(2) By an Eng. Stat. 48 & 50 W. 4 & Mary the Mortgagee is deprived of his equity of redemption if he is guilty of fraud on the Mortgage, by concealing any prior incumbrances. 2 Bos. 574, 1829, 60, 520.
on the same day in any subsequent year. Here there is no need of the
inference of a court of Chancery. For it may always be deemed at
law, for there is an everlasting undisturbed right of redemption descen-
dible to the heir of the Mortgagor which cannot be forfeited in
like other mortgagees—therefore there can be no equity of redep-

Again, the length of the Mortgagor's possession can in
no case be a bar to a decree of redemption, if the Mortgagor will
submit to a redemption, but if the Mortgagor does not avail
himself of this right he will be deemed to have waived it—

Further, if the Mortgagor remain in possession no
scope of time will bar a redemption, if he is guilty of fraud
on the Mortgagor, by concealing any prior incumbrance—(c)

We have no such statute in Law. But Mg suggests
that our courts of equity would adopt a similar rule that
is, if we can suppose a case in which a second mortgagee
will be injured—our record one considered as constructive
notice of the situation of the land, therefore the rule cannot
well apply.

If any person who shall once mortgage lands for
a valuable consideration, shall again mortgage the same
lands, or any part thereof, to any person, the former mort-
gagee, and shall not disclose the same in writing to the second

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Mortgagee such Mortgagee shall have no relief, a equity of redemption against the second Mortgagee, but such second or third Mortgagee, may redeem any former one.

It is incumbent on the Mortgagee under the statute of 18. Geo. 3. to make provision to a second mortgage of his lands, to give the Mortgagee notice in writing under his hand of all future circumstances.

A second mortgage of the same subject is a mortgage of the land itself and not of the equity of redemption. If this is all that preserves the right of the Mortgagee after a second mortgage; for were it not so he could not redeem the first mortgage until he redeemed the latter. This may appear to be a mere nominal distinction but it is highly important.

Of a devise of lands mortgaged by the Mortgagee

The interest of the Mortgagor like that of the Mortgagor is devisable and the devise so that it stands in the place of the Mortgagor may have foreclosure.

It was formerly the case that the whole of the Mortgagee's interest in a mortgage in fee would not pass in a devise under the general words "all my mortgages" but the devise would have had an estate for life only, and the nee
mortgages.

But now the mortgagor's interest being deemed a chattel interest, the whole will certainly pass under the general words "all my mortgaged" etc.

On the other hand, the interest of the mortgagor will not regularly pass under the words "land, tenements, hereditaments," as they are used to denote real property; therefore they will not regularly carry the interest of the mortgagor.

But this is the general rule; it is not universally true, for if the mortgagor had no other property at the time of making the devise, which would answer the description of the words, such property or did answer the description will pass under the general words.

When therefore the mortgagor, that is the devisee has no property other property answering the description, the mortgaged premises will pass.

A foreclosure obtained by the devisee of the mortgagee is not bad against the mortgagee but against the mortgagor and his heirs. The devisee of the devisee is no party, because he has no interest in the lands.

It is laid down that a devise by the mortgagee of money due on a mortgage does not carry the interest due on the debt at the time of the mortgagor's death, but the principal only. It cannot however be said this rule is too broad for he has no doubt but
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that the interest may pass in certain cases.

The question has incidentally arisen whether the mortgage's interest will pass under a devise, not attested under the state of

seals and signatures. It seems that it will, for this statute refer

to real estate, the interest of the mortgagee is a mere chattel interest and therefore not embraced by the statute.

Of the priority of Incumbrances, and of taking

of prior and subsequent Incumbrances as such.

The general rule is, if there are several mortgages or other incumbrances upon the same estate, priority takes place among the incumbrances according to the dates of the respective securitis. The first incumbrance who has the legal estate shall be preferred to the second and so on.

Incumbrances in Law stand upon the same footing in order of time, as statutes, judgments, and recognizances.

In Law, neither statutes, judgments, nor recognizances are a security, for we have no statute which interferes, but the Latin maxim governs "prior in tempore, potior est in jure."

But this priority under some circumstances is for

speared or rather lost, i.e., when prior incumbrances are postponed.
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...ed to subsequent ones. 255. 570. 1869. 240.

This loss of priority may happen 7 when the prior incumbrance has been quitly by fraud or neglect affecting a subsequent incumbrance.

2. As to the first class of cases. If the first mortgagee by fraud or antiprise conceals his mortgage to induce another person to lend money upon the security of the same land, and this person does actually lend his money the first mortgagee shall be proceeded against the subsequent incumbrance.

2. So also if a first mortgagee be a witness to mortgage deed made to a subsequent mortgagee of the same premises and shall not inform the second mortgagee he shall be proceeded to the latter and it is to be remarked that the law always presumes that the witness knew the contents of the instrument which he has attested. And this throws the onus probandi of not knowing the contents upon the first mortgagee.

In all these cases the first mortgagee is deemed to be guilty of fraud.

But further it has been said that if the first mortgagee has been guilty of any neglect whereby another person is induced to advance money upon the security of the same land the first mortgagee shall lose his priority because he permits the mortgagee to retain in his hands the evidence of a complete title; for the
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Mortgagee should have taken the title into his possession in good faith and then
by have avoided this danger. The maxim of equity which applies here is
that where one of two innocent purchasers have been guilty of
fraud, and one of them must be a sufferer, the law shall right on
and from whom one of the mischief arise.

Again, if one who is about to lend money upon a mort-
gage, to know if he has a mortgage of it, and he desires that he
has any, he loses his priority if he informs the first mortgagee
by application that he is actually about to lend money on the
same security to the mortgagee. If he does not so informing
the first mortgagee, will not lose priority by such denial: for
the first mortgagee is not bound to answer unless he knows
the intention of the applicant.

Again, a prior incumbrancer may lose his view of
his chance, by the second incumbrancer's purchasing in the prior
incumbrance to protect his own.

Where a subsequent incumbrancer obtains the
legal estate, he may make all the advantage of it, which the
law will admit of, and thereby protect his title. Where
the equitable interests are equal, and it is a rule that
where two equities are equal, that which has the law on
its side shall prevail.

But in order to satisfy the subsequent incumbran-
(a) without knowledge of any intermediate incum-

benees, for then he will have law on equity

on his side.

(b) But whereas a subsequent incumbrance gave no
credit to the mortgagee knowing of the precedent
incumbrance he will not be admitted to take
on his equity i.e. he shall gain no priority.

2 Dec. 574, 2 Vent. 839, 1 Vern. 148, 3 Vent. 337, R. Ch. 866

Vern. 182, 8.

2 Vern. 297.

Vern. 49.

Pur. 60.

c Cit. 186.

c Vern. 308.
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To secure to a priority he must have given his credit to the mortgagee. Knowing of the present incumbrance, he will not be admitted to back on his equity in the debt given in pari

To exclude the subsequent mortgagee from the privilege of taking he must have had notice of the intervening incumbrance at the time of lending his money or giving credit to the mortgagee; for such knowledge after the money lent will not exclude the taking of priority.

This privilege of taking is called by Sle. Hale "substitia in manu aggressa."

A subsequent incumbrance may take in this way his equity not only to the first mortgage but to any other incumbrance or mortgage that carries the legal estate.

In all of the above cases, the subsequent incumbrance gains a priority over all the intermediate incumbrances until his own debt together with the interest on both are satisfied.

To the general rule that equitable interests have priority according to the dates of their respective securities, there are certain exceptions. Where any one of the parties has more equity to claim the legal estate than the others, for he that hath more equity shall be preferred. It being a maxim
(a) It will therefore be understood that it in this case will have a right to redeem the 40 acres of the 50 if he pleases but if without redeeming the 20, but if he wishes to redeem the 20 he cannot do it without redeeming the 40 acres.

2 Vent. 387.
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in equity that what ought to be done, have been done as it always to be considered as done.

But if the prior incumbrance which carries the title attaches on a part only of the subsequent mortgage, it will protect that part only and no more. And therefore if a man being seized of 60 acres of land, mortgage 20 to A. & then the whole to B. and afterwards the whole to C. Then if C. purchases in the first incumbrance, that shall not protect more than 20 acres but it shall so protect the other 40 acres that B. shall never recover them until he pays all the money due on the first and last Mortgage. (c)

But if the prior incumbrance bought in its entirety upon other estates, as well as that affected by the subsequent mortgage, the subsequent mortgages shall hold all the estates comprised in the incumbrance bought in until he is satisfied as well for his own debt, as for the money paid by him in purchasing in the first mortgage.

If there are three mortgagees or more of the same property, the first of which covers the two others, more than these others, the two others, the subsequent purchasers in every incumbrance may by purchasing in the first which covers the two others, hold the whole until both debts are paid.

A satisfied incumbrance or mortgage is one
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paid after the day of payment has expired. This payment it seems does not determine the legal title, but the mortgagee has his own

In all cases a subsequent incumbrance may take effect by purchasing in the prior incumbrances. It is presumed however by 62 that there may be cases so circumstanced as to prevent this taking a gaining priority.

A prior incumbrance may always make use of his
satisfied incumbrance at law, except when there is a good legal defence to it. This rule however appears to go a great length. It is difficult to discover the equity in it, for the right purchased in, is merely nominal and excluders by the supersession in this case, an actual, and legal and equitable interest.

The rule goes further; it seems to be settled, that the subsequent incumbrance by purchasing in the nominal satisfied estate, without paying a valuable consideration, holds against intervening incumbrances—this is certain by extremely inequitable—

And in pursuance of the last rule, courts of Chancery have gone so far as to say that the naked possession of such incumbrances, shall gain him priority, and protect his estate against all intermediate incumbrances, subsequent.
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But where the prior incumbrance is defective in, is deficient in any of its legal requisite, it will give no priority to such prior incumbrance.

As if a recognizance bought in, hath not been mete in proper time, or in case of a judgment, if it has not been dook.

Indeed subsequent incumbrance can gain no priority except by purchasing in the legal estate; for there is no such thing as taking an equity to any incumbrance, but that which carries the legal estate along with it.

So other incumbrances than the Mortgages is obliged to take. A judgment or statute creditor in suing cannot obtain a priority by purchasing in the legal estate, so as to take his own equity— for he has only a general, and so specific lien upon the land—the is not deemed therefore to have equal equity with an intermediate mortgage incumbrance.

The law of taking is founded upon the general maxim that where equities are equal, that which is on the side of law shall prevail.

The purchase of the first mortgage will give no priority to the purchasing subsequent incumbrance, unless the first mortgage be forfeited at the time of purchase— for before that time, the estate is defeasible of
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Compensation by paying the money or performing the condition fulfilling the condition, and is not a subject of equitable jurisdiction, for the court of equity has nothing to do with mortgages until the condition is perfected.

A prior incumbrance having a legal estate may tack a subsequent sum advanced by him on a former security to his prior mortgage, and thereby protect him against supposances to this subsequent incumbrance, now he stands in the place of a subsequent mortgagee who has purchased in the prior mortgage i.e., the legal estate. In order Mr. Gould supposes to give him this privilege of tacking the sum must have had no notice of any prior incumbrances at the time of advancing the subsequent sum. This, Mr. Gould conceives, to be the equity statute qualification, et hoc omnium est laid down in the books.

So also if there are two or more mortgagees and the first make a subsequent loan to the Mortgagor, after the subsequent mortgage, and takes a judgment for security, he may tack this judgment to his original mortgage, to protect himself against the intermediate incumbrances - the issue here the legal estate, and the judgment, which latter the first party no interest in the land, operates as a lien thereon.

This rule with respect to notice has an except
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ion; for it is a rule, that where the intervening incumbrance is defect in the subsequent incumbrance may lack, and hold to the extinction of the same incumbrance, at the time of lending the money of the intermediate incumbrance.

So also if the mortgage is defective in legal requirements, the last shall be good against the first incumbrance, at the time of giving credit to the mortgagor of this first incumbrance. The reason is plain; the first mortgage being defective in form, does not carry the legal estate.

But a defective mortgage will be enforced in a court of Equity against creditors, who have only a general and not a specific lien upon the land; for they did not originally take the land for their security, but will be postponed until such defective security shall be satisfied.

If the mortgage deed contains the clause waiving the land a security for subsequent loans, such loans will have relation to, and be taken as a part of the original mortgage.

This rule holds, if the first mortgagee had notice of the intervening incumbrances at the time.
of making subsequent loans—that is, if the second Mortgagee at the time of giving credit knew of this restrictive clause, for if he did not, and the first Mortgagee had notice of this clause at the time giving credit, i.e., the time of making the second loan, it will not hold against the subsequent Mortgagee.

Where notice under the preceding rules varies the rule of priority, if notice is charged by one party, it must be substantiated and positively denied by the other, so he will be deemed to confess that he had notice.

If notice is denied by the subsequent incumbrance, who has purchased in the legal estate, and the fact is attempted to be proved by the testimony of one witness only, the bill will be dismissed; for this testimony alone is not sufficient proof according to the rules of evidence in Chancery.

It is a rule of the court of Chancery, when the Plaintiff charges not only notice in general, but special facts and circumstances, that they must be denied as well as notice in general.

But if there are circumstances corroborating the testimony of the witnesses advanced, when the Defendant denies an issue will be directed in a court of law, whether the Defendant had notice or not, but if the circumstances are not satisfactory to the Chancellor, he will dispense with such issue.
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and find the fact himself—

Of Notice express and Implied.

Notice is of two kinds—actual or express and constructive or implied—

I. Actual Notice. One is said to have actual notice, when he is party to a deed, and which shows the fact, or has notice regularly served upon him or

But a flying report is not considered as actual notice. Ex. gra. A. being about to lend money to a stranger, to some one the contract, on mortgage pays to him, "B. has a mortgage of the same land." This caveat is not deemed actual notice.

III. Constructive notice. is a conclusion of law that one has notice of the fact, the thing is no proof of actual notice, as where one cannot make out a title but by a deed, he which

discovers a material fact, by which the person to whom notice should be given is necessarily or may be necessarily lead to a knowledge of the fact. Ex where B. conveys to D. revoking a power of

Ss. convey to B. it is deemed to have notice of the power of B. to revoke.

So if B. devise lands to A. subject to legacies, and A. mortgage the lands to B. it is presumed to have notice—
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that the land is charged with legacies, wherein he is guilty of gross neglect, for he divests the title, the title under the devise.

So if a deed creating a prior charge upon an estate is delivered among other papers to a purchaser, he is presumed to have notice of the prior charge. As where a mortgage is made by instrument, the mortgagee’s duplicate is delivered to a subsequent mortgagee, before he lends his money, this is deemed sufficient notice.

The general proceeding admits of one exception. In case of an assignment of a testator’s property by an executor, the assignee is not deemed to have notice of the contents of the will in favor of creditors and legatees. It would be dangerous, besides the purchaser cannot know the amount of debts he and the assignee.

A recital of one deed stating or necessarily implying that there is an incumbrance on the land, by a prior deed, is deemed sufficient notice to a person professing notice the deed.

It is laid down as a rule that whatever is sufficient to put the party charged with notice upon an inquiry is in equity deemed sufficient notice.

Upon the same principle it would seem that notorious profession by a prior mortgagee would be sufficient.
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Scientific notice of the insufficiency to a subsequent Mortgagor,

Notice to one's attorney, agent, or counsel when acting for
the principal principal in constructive notice to the principal himself

This rule holds anywhere one is agent for both parties, as is frequently the case in manage settlements.

Further if one person takes upon himself to act for another without authority, and makes a mortgage or pawn
share and the principal afterwards ratifies the act, or agrees to it, he makes the former his agent absintos

But notice of an act of bankruptcy will not be presumed against a subsequent Mortgagor, to prevent him
from availing himself of the right of backing.

So also a subsequent Mortgagor may tack his equity to the legal estate notwithstanding an intervening judgment.

Intervene judgment obtained against the Mortgagor in a court of law, is matter of record for judgments de
stained by intermediate incumbrance are deemed to be unknown as to third persons, and cannot affect third per
sons unless they are proved to have had express notice thereof before they lent their money.

A question has arisen in law, whether a subse-
quent Mortgagor can tack his equity to the legal estate.
by purchasing in the first mortgage or legal estate, one the utter
liability concerning incumbrances whose deeds are recorded? On principle
such records ought to be esteemed as notice, for certainly their
object is to give notice to third persons merely and not to the in-
mediate parties — but in this the registering intermediate incum-
brances has not been considered constructive notice —

But a subsequent mortgage having notice of a prior mortgage not registered, cannot gain a priority by regis-
tering his own deed, and purchasing in the legal estate. The
court in assigning their reasons for the rule, consider the sub-
sequent mortgage as having that notice which the statute
was intended to require —

A subsequent mortgage registering registered is
preferred to a prior one, not registered, if the subsequent mort-
gage had not actual notice. This is indubitably agreeable to
principle; for the statute regularly gives priority to incumbr-
ances according to the dates of their respective deeds.

But a purchase for a valuable consideration
shall hold against a prior voluntary conveyance that he
had notice of the voluntary conveyance at the time of last
taking his deed; for a conveyance fraudulently made to that
creditor, and bona fide purchasers in good faith void, and
the making a voluntary conveyance always raises a pres-
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Assumption of fraud. This rule holds as well to incumbrancers as to common purchasers.

It is a rule, if one purchaser of a prior incumbrance sells with notice, and then sells to another who has no notice, the notice given to the grantor or vendor shall not affect the grantee.

If A. mortgaged an estate to B. and then mortgaged the same to C. who has notice, and then C. sells it to D. without notice, D. who had no notice at the time of purchasing is not affected by the notice which C. had.

If a person purchases for a valuable consideration with notice of a prior incumbrancer who had no notice, the last purchaser is not affected thereby for in so doing, he in no manner injures the prior incumbrancer, subjecting him to no inconvenience than what he would have experienced under the grantor himself, he standing in the place of the grantor.

This principle has been extended one step farther, if A. purchases with notice of a prior incumbrance, and afterwards sells to B. who has no notice, and B. sells to C. who has notice, the last purchaser is in no degree affected thereby.
The relation of which it stands to be falls under the first rule, and that of B to C. under the second.

To whom the interest of Mortgagor on a forfeited mortgage shall belong after his death.

Formerly it was much doubted whether the money due on the mortgage should on the death of the Mortgagor go to his real or personal representatives.

This distinction was taken, that if a bond was given conditioned to be paid to the Mortgagor or his heirs it went to his heirs. But if there were no bond, or one was given conditioned payable to the Mortgagor, his heirs, executors, or assigns, payment was to be made to his heirs.

But more recently the court of Chancery has considered the interest of the Mortgagor as merely personal and consequently the money in all instances goes to the Cts.; unless the Mortgagor himself has manifested a contrary intention.

Such contrary intention may be manifested in a variety of ways — Any act however which indicates an intention to convert this chattel interest into a realty will cause this interest to be considered and treated...
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As if the purchaser is the equity of redemption, or obtain a foreclosure and takes possession.

Another reason for this money going to the personal representatives is, that the loan or debt for the security of which the mortgage was taken came from the personal estate of the Mortgagor, and the payment of the debt ought therefore to accrue to the same fund.

If the money is made payable to the Mortgagor, his heir, or Ee., the Mortgagor may on the day of payment pay to either of them at his election, for here he prevents the jurisdiction of Equity by fulfilling his condition at law.

If he pay it to the Ee. the heir must recover the land, for he is a mere trustee, and the trust is satisfied but in Equity as between the heir and Ee. the money belongs to the latter, and the heir if it is paid to him is compellable in Chancery to pay it over to the Ee.

If there are two or more Ee. payment may be made to either, and a discharge from the Ee. to whom it is paid is a full and complete discharge.

A bequest of a specific legacy to the Ee. does not bar his right to the money, for he holds merely as trustee in entire debt.
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When there is no devise appointed, the money belongs to the devisee, and the heir must come to such devisee when there are no debts due from the estate, for the claimants under the estate of distributions have more right to it than the heir.

So when the mortgagor releases the mortgagee's redemption to the heir of the mortgagor, the personal representatives of the mortgagor have still a right to the mortgagor's interest, but not to the whole estate as Powell incorrectly states it expresses it.

So also tho' the mortgagor was foreclosed, the personal representatives will have the mortgagor's estate, if the mortgagor had not taken possession of the premises.

But whereas the owner of the mortgagee himself considers it as real property, it will be so considered after his death, and the money of the estate redeemed will go to the heir. Or when the owner of the estate purchased it under an absolute deed.

So also if the mortgagor desired his mortgage as real estate, the heir of the devisee and not his devisee will be entitled to it after his death.

But the mortgagor's intention of considering it as real estate, does not operate upon the mortgagor.
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on any claimant in him, but merely upon the Mortgagee's representatives.

Again; if money received by mortgagee is allotted to be paid out in lands and settled in any certain manner, it is bound by the actio, and goes or land would have

gone, if purchased with the money, for equity that is done

which ought to be done.

If two persons make a loan of different and

distinct sums, and take a joint mortgage for the security of both debts, they are not joint tenants, but tenants

in common, and the "in aequo rebus" consequently does not take place.

And so is the rule even if they foreclose the mort

=gage
Of the interest of the Mortgagee's wife in the

premises.

As the wife may have her right of dower by join

ing her husband in a fine or common recovery in

the same way she may rescind it with a mortgage.

The right of dower is thus preserved to the

mortgagee; but the right of dower is paramount to
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that of the Mortgagor when the mortgage is made by the husband
and alone.

A jointure of lands mortgaged by the husband
may redeem, and she and the representatives shall retain
possession until they are repaid the whole of the principal
and interest, which she has paid for the redemption. This
supposes a case in which she has not joined to incumbrance,
for in that case she must bear her proportion of the burden
i.e. 1/3. This rule holds only (says Mr. Gould) when a mortgage
is made by the husband after the land is mortgaged, i.e.
the mortgage is prior to the jointure.

This rule holds when the jointure is in acti
sole, executory, and is not executed by a deed of settle-
ment.

And if after such executory jointure the hus-
band mortgage to one without notice she has only
the right of redemption.

If after marriage she join in a prior to a mort-
gage she must on redeeming pay her proportion i.e. 1/3,
if she does not redeem she must if during her own estate keep down the interest.

If the Mortgagee gives back further credit
on the same security to the Mortgagee, not having no
notice of an intervening jointure, he may take his last
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sum and hold for the whole against the jointure.

But a jointure in mortgaged hands, settled after marriage and merely voluntary, i.e., without consideration, is void without against the subsequent mortgage, even if he be nosci.

If a husband before marriage gives his wife anything conditioned to leave her a certain sum at his death, and she marries him, she may redeem his mortgage in the character of a creditor.

If a husband takes a mortgage in the joint names of himself and wife, and he dies first, she is entitled to the whole of it, if there are assets to pay debts, without it; if not, if the assets are insufficient to discharge the debts.

On a mortgage in fee, the mortgagee's wife is not entitled to dower in an equity of redemption; therefore, unless the court can review, redeem for the husband's equity, is considered in the nature of a pure trust, of which there can be no dower.

But a husband may have a mortgage in his wife's mortgaged land in law. It has been determined that a wife may have dower in the husband's equity.

In Eng. the wife is entitled to dower in the married
expectant on the determination of the estate or term mortgage
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for the termination of the term reverts the estate at law.

Of Mortgages by husband and wife of keepers
hold and his to the mortgage-money due to him.

A husband by marriage obtains no other interest in his
wife's estate of inheritance than a freehold, during their joint lives
unless they have issue in which case he obtains an estate for his
own life by the court, he cannot therefore make a mortgage of his
freehold, for any longer period than that for which he holds. If this
should he should mortgage the estate for 500 years it would up
on his death.

At Law. Law the rule is the same even if the wife
joins her husband in a deed of her own inheritance, unless the
joiner were in a free and recovery of recovery.

In Law, the husband and wife may by their joint act
i.e. by deed, alien their inheritance and of course they may
mortgage it.

And in Law, if the wife joins her husband in buying
a free, either for the purpose of leasing or mortgaging the
inheritance it will be binding upon her and her heirs, for
coverture notwithstanding.

But acts of the wife after coverture amounting to
a new grant a reexecution will give validity to a mortgage made by
her husband and herself or by herself alone during couartime
the said mortgage be by deed and this is not on the ground of
her deeds being voidable, for the covenants are statute, void with no
exception (where the maker a lease for years) but on the ground of it
being a new execution or redelivery

If the wife joins in a fine to lease or mortgage new a
mortgage of her estate, and the mortgage is perfected, the estate
will be held by the mortgagor not only for the original sum
borrowed but if a further sum be borrowed it will also be
held for that

The principle on which the courts have decided
is, that the Mortgagor has by the Mortgage the legal title, and
in addition to that as much equity as the wife or heir has to be
restored to be restored to possession, and where the equity is equal
the legal title shall prevail

But on the other hand if the wife's hand is mort-
gaged to secure the husband's debt, her personal estate shall
first be applied to the discharge thereof and the debt buried a fine;
even in exclusion of the claims of his legates for the mortgage
Debt of the husband the
being originally the wife. By consenting to change her lands with
it; she does not make it less so, than it was before.

From the foregoing it will follow that the wife joins
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in incumbering...jointure to secure her husband's estate, but she does not absolutely part with it, but will repossess it upon discharge of the incumbrance.

If the wife joins in incumbering her own estate to discharge her husband's, and she dies first, she will be to the devisee considered in chancery as standing in the place of the mortgagee, and entitled to the benefit of his estate; for she is virtually considered as a purchaser of her husband's estate, and her estate is liable to the mortgagee.

If a devisee being a mortgagee marries and her husband upon the marriage makes a settlement of his own estate upon her, in consideration of her fortune; this settlement will be considered as a purchase of the mortgage. If she dies first it will go to him; but if she dies he dies the thing will go to his representatives and not survive to her.

But this rule does not hold in case of a voluntary settlement after marriage, for, obiter, if $d$ had the husband does not in this case become a purchaser of that accession of fortune and the ground which he went upon, whether there was no contract or the part of the wife, for after marriage she was incapable of contracting.

If a settlement be made upon the wife before marriage, but in consideration of the whole and in such
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part of the fortune only, it will do away the general presumption that it was in consideration of the whole, and in such case it is apprehended, that what is not specially conveyed to the husband will survive to the wife.

And when according to the above rule an actual settlement made by the husband would amount to a purchase of the wife's fortune, an executory agreement will amount to a purchase even tho' the wife should die before an actual settlement had taken place. If in this case the husband had been guilty of defaulting that the portion will go to the husband or his representatives.

But it is to be observed that this executory agreement would be enforced against him in favor of the heirs in a Court of Chancery. P. Bk. 212. 1 Esp. 1. 46. 146.

If a settlement made by the husband in consideration of the wife's fortune falls short or does not amount to what was agreed upon, it will in no wise be considered as a purchase, but she will hold the whole against her husband's creditors.

Further, where the wife is mortgagee, the husband is entitled to the mortgage as he is to her property in action if he reduces them into possession during coverture.

And an alienation or an assignment of the wife's mortgage by the husband (she being mortgagee) will be binding if
made for a valuable consideration so this act is considered or equivalent to reducing the mortgage into possession. But if the alienation of or assignment is merely voluntary, i.e., without consideration, the spouse has no higher claim to the estate of the wife than the husband or his heir would have had, had there been no assignment made.

If the husband’s creditor gets possession of the wife’s mortgage, so that she is obliged to apply to a court of Chancery for relief. Such court will not interfere so as to take from them any legal advantage which they may have acquired. Or in case of an assignment by commissioners of bankruptcy, they have the evidence of a legal title in themselves, and as high an equity as she has, for the husband might have disposed of it to his creditor.

On the other hand, if the wife herself or her trustees have possession of the title deed, equity will not interfere in favor of his creditor when there is nothing at law against her.

But if the husband will make some reasonable provision in her favor, the court will interfere, and Mr. Gould thinks that the bankrupt’s creditors have the same right.
Mortgages

But the the court of equity will not interfere against the wife in favor of the husband's assignees, yet it will interfere in favor of a specific assignee of the mortgage by the husband for a valuable consideration. It will not interfere in favor of creditors who have only a general lien on the husband's property, but in favor of those who have a specific lien.

A mere executory agreement by the husband to assign for a valuable consideration his wife's mortgage, as a security for a debt, without a delivery of the deeds will bind the mortgagee pro tanto i.e. to the amount of the debt for which the assignment was made.

Out of what funds Mortgages are to be returned

There are some general rules on this subject which are important, and which if thoroughly understood will greatly elucidate the particular cases which have been determined.

It is a general rule in equity that the fund which has been increased by contracting a debt, is in the first instance to be charged with the payment of such debt. Thus, the mortgagor's personal property, having been benefited by the debt, is first to be applied to its reduction.
Sal. 449
Tab. 54
Pa. 61
P. W. 84%
1 Aug. 6
2 69
Pa. Ch. 277
1 Att. 48%

[Handwritten text and notation]

175 51

[Further handwritten text and notation]
Mortgages

If there are personal ejectors, the estate is compellable in Ch. to advance the redemption money for the benefit of the heir. If there are ejectors, the heir does not take them cum onere. This proceeds on the above rule laid down.

This rule is general and not universal, for it may be qualified and attired by the intention of the mortgagor.

Further if the mortgagor should sue the mortgagor upon the bond (which in Eng is usually given) the party in Chancery cannot compel the executors to advance the arrears and satisfy the demand in suit.

The devisee of the mortgagor who is quasi an heir is entitled to the same privilege; he is not indeed a mere grantee, but a mere devisee. Thus a devisee.

If then the mortgagor bequeathes his personal estate among his relations, it must still, according to the general rule be applied to the benefit of the heir for the mortgagor's claim is a debt and the claims of creditors are prior to those of legateses, they being more immediate.

But if the testator directs otherwise, the precedent rules do not hold, and the heir or devisee takes the land some cum onere.

So far is the principle of the prior liability of personal property pursued, that even if the real estate is charged generally with the payment of debts, such charge
Mortgages.

under it liable only in case of a deficiency of assets.

If however the real estate be so charged or to make it manifest that the mortgagor's intention was that it should be applied in the first instance, it will be so applied i.e. the land desired to A. be sold for the payment of debts. +

To apply this rule - The mortgagor devises his real estate to B & his personal to C & if he dies leaving debt unpaid, now all the personal estate is first to be applied, to the redemption of the mortgage debt if contrary interest is undeveloped.

In con. these rules are not so important as it is for here the real property in general descends to the same person who enjoys the personal property and here all the property of the testator or intestate is liable for all his debts, whether due on specialty or simple contract. It is understood however that personal is first liable.

This general rule is never supposed to operate in favor of the heir, to the prejudice of any creditor, tho the debt is by simple contract, nor can against general legacies.

The rule last laid down seems to clash with one laid down before, respecting the liability of personal property bequested among the relations of the testator. Indeed it is plainly contradictory to it, tho this "opposition" is not
...
Mortgages

Taken notice of by any law-writer. It might be reconciled on the hypothesis that the bequest referred to, among the relations of the testator, was entirely void on the ground of uncertainty, and of course as if there was no bequest at all. But Mr. Gould does not positively lay it down that this is the proper explanation, because nothing in the reported case expressly warrants it, and if it was void on the ground of uncertainty, the report of the case would probably have noticed it particularly.

Mr. Gould observes that Mr. Powell uses the word generally in contradistinction to the residuary legatee—and not or distinguished from specific legatees.

To return to the main subject. If the personal fund is to be exhausted by specialty creditors, the simple contract creditors and general legatees may come upon the real estate, pro tanto, for so much as the specialty creditors have taken from the personal fund. So that in equity, simple contract and general legatees are preferred to the heir.

This rule holds also in favor of simple contract creditors and legatees against the mortgagee's devisee; when the devise is specific in which case it does not hold as to legatees but merely as to creditors by simple contract for a specific devise is preferred to a simple contract of a creditor but not to a general legatee.

Where the devise is broken, and the heir of the.
...
Mortgages

Mortgage is made to take by purchase under a devise. He stands in the same situation as a common devisee - specific or general as the case may be.

By the descent being broken in most cases: a disposition of the estate that the heir cannot take it as heir; for if the estate be so disposed of, the heir might take the same heir, he must take it as heir, for he must be under the better title. A case of a descent being broken, is when a tenant in fee in ding device to his eldest son (who is heir) intitulate.

But notwithstanding the general rule, the heir of the mortgagor is not entitled to the aid of his ancestor's personal property as is specifically bequeathed; and even money if contrasted that it can be identified may be specifically bequest.

To render a bequest of personal property specific, it must be clearly, certainly, and exactly, identified or defined.

In pursuance of the general principle, it is a rule that the mortgagor devised his estate to me "with the income, because therein" yet the personal fund is (under the preceding qualifications) liable to discern, unless the same other words, which clearly an intention that the devisee shall take the estate under the words "with the income, because therein" being decisive of the particular estate bequeathed and not limited.
Mortgages

...of interest desired.

And if it clearly appears from the instrument of devise that it was the intention of the devisee that his devise should hold the estate he therein bequeathed in the heir must pay the incumbrances out of the real property after the personal estate is exhausted.

If the mortgage sells the equity of redemption, the heir of the assignee, or purchaser has no claim upon his (the purchaser's) fund to dismember it, for the personal fund of the purchase has not been benefited any it has been diminished and the real estate enlarged.

The rule is the same as to the devise of such fund.

So also if the money due on mortgage is not the debt of the owner of the equity of redemption, the estate is mortgaged shall itself on the death of the owner bear the burden; and the heir or devisee of this owner shall not have the aid of his personal fund but if he will have the land, shall dismember it himself. In this case it is evident that the arrears of the owner of the equity have not been benefited and of course they are not liable

Of the payment of the interest due on Mortgage.

In Eng the legal rate of interest is fixed by a Statute.
Mortgages

It is a general rule in all contracts, mortgage as well as others, that the receiving more than lawful interest makes the contract void. The receiving more incurs the penalties of the statute.

But the the receiving more makes the contract void it does not of itself incur the penalty, nor does the receiving of course under the contract void.

Ed. Hardwicke has said that if a mortgage he made for 5 per cent. and the mortgagee received 6 per cent, the mortgage is void. In this he must intend a reception of more at pure instance of a private original agreement between the parties or a receiving at the time of the loan, which is a reservation.

The same chancellor has also holden that a deed given in Eng, mortgaging an estate in the next censir (when 5 1/2 per cent is allowed) is wrong, if more than 5 per cent is reserved. Here he must allude to a case in which the payment was to be made in Eng.

In Chancery arbitrary distinction has been adopt
ed between an agreement to pay 4 1/2 per cent interest with a clause of enlargement to 5 if the mortgagee does not make punctual payment, and an agreement that 5 shall be paid with a clause of reduction to 4 in the event of punctual payment.
Mortgages

The latter agreement is enforced in Chancery, the former is not, for repayment it is in the nature of a penalty; this distinction says Mr. Gould in previous cases, without a difference, a real difference and subject to perpetual succession.

It is agreed that the covenant to pay the additional one per cent in good in equity and it is not expressed to be necessary that the covenant be in a separate deed from the mortgage.

An agreement to raise the interest from one sum to another (not exceeding lawful interest) in case of non-payment is good in Chancery, if an indulgence be given to the Mortgagee to the Mortgagor, and such indulgence is the consideration to the contract; for in this case the agreement is considered as a liquidated satisfaction for such forbearance and not as a penalty.

Compound interest is not regularly allowed either in Chancery at law—P. Ch. 116. 2 Atk. 331. 1 Ch. 652.

But if the Mortgagee assigne the interest with the concurrence of the Mortgagor all the money paid by the assignee (including interest as well as principal) shall be accounted principal and drawn interest. This is in the nature of a contract between the Mortgagor and assignee that the latter shall pay the debt of the former.

But if such assignment be made without the
Mortgages

Inconvenience of the mortgagee, the assignee has no claim for more interest than the mortgagee had for this is not such a contract between the mortgagee and assignee as in the last case.

The assignee will not draw compound interest upon the assignment for bona fide and the money actually paid, for a mere collateral assignment to obtain compound interest is of no avail.

When one the assignment by the mortgagee was not in truth between the mortgagee and assignee of the money due from the mortgagee this account is not binding upon the mortgagee.

It was once held that the mortgagee should have compound interest when the estate was forfeited. This is now exploded. The report of a master in Chancery computing interest on the suit pending between the parties, converts that interest into principal, from the time the report is confirmed by the Chancellor, for such report is confirmed in the nature of a judgment at law.

But a master's report when made against an infant, does not in all cases convert the interest into principal. It never does when the infant is defendant in a suit for an act that done the infant is never guilty of any neglect in not having previously satisfied the claim of the mortgagee.
2. Feb. ca. 56.
4. Feb. 44.

1. Mar. ca. 66.
2. July.

1. July 656.

Salta. 449.
2. Oct. 381.
Mortgages.

According to the master's report—

If, however, the infant is in debt in favor of the mortgagee, the account made up against him by the master does not turn the interest into principal, for in that case the debt is driven into court by the infant, the decree passes as to him in invitam, and he may take what advantage he is able of the situation in which he is placed by the debt.

Again, if an infant entitled to the equity of redemption agrees to pay compound interest, for the sake of procuring some substantial benefit to himself, and does actually procure it, he shall be bound by such agreement.

A mere signing or acknowledgement by the mortgagee that sum is due or interest, does not convert that interest into principal, for interest is not to be computed on interest except after a report of a master confirmed.

And an express agreement at the time of making the mortgage to pay compound interest is not binding, for it is treated as prima facie oppressive. But after interest has actually accrued such agreement would be good.

A tenant for life of the equity of redemption...
Mortgages.

Action is compellable by the remainderman or successor, to keep down the interest during his own possession: Indeed, the remainderman may indirectly compel him to redeem by purchasing in the incumbrance himself, and then if the tenant will not redeem, he must abandon the possession.

On redeeming the tenant must pay ¼ of the original debt, the remainderman must pay the remaining ¾.

But the tenant in fact of the equity of redemption this incumbrance is not at all compellable to keep down the interest during his own possession neither by the successor, remainderman or by his own representatives; for he has all those in expectancy in his power and may forever conclude them by leasing a fine or suffering a common recovery: Indeed his estate may by perpetuity last forever and certainly must endure while he has heirs of his body.

That if such tenant in fact be an infant his guardian must keep down the interest during his minority, for the infant while such cannot have the remainder, unless it be under the King’s privy seal which will never be used for such a purpose.
Mortgages

If the rent is paid in full, the tenant in fact does keep down the interest, the remainderman or remainder shall have the benefit of it. The reason of this probably is that there can be no proportion established between the value of a tenancy for life and an absolute fee.

If the first mortgagee takes possession and allows the mortgagee to receive the profits without applying them to the payment of the interest, still in favor of a second mortgagee, the profits thus taken shall be applied to the interest payment of the interest on the debt due the first mortgagee.

When a bond is given to the mortgagee, the holder of the bond has a right to receive the whole debt, principal and interest, and the giving up the bond extinguishes the debt. But the holder of the mortgagee deed has no right to receive more than the interest, and his giving up the deed will not extinguish the debt, but the mortgagee is still liable for it, to the holder of the bond. Indeed it is difficult to assign the reason why the same holder of the mortgagee deed should be entitled to receive the interest, but it probably arises from the fact that he has the power to obtain the possession of the premises.

A tender of the money by the mortgagee after the
Mortgages

day of payment has elapsed, is of no avail at law. But in equity if after forfeiture the Mortgagee makes a tender to the Mortgagor, who refuses to accept it, and if the Mortgagee has given in notice of his intention to pay, 6 months previous to the time of his making the tender, the Mortgagee loses his right to the interest from the time the tender is made.

Such tender will also bar the right to recover interest of the devisee of the Mortgagor; and probably also of the common grantee.

But in this case the Mortgagor must make oath that he has retained the money, from the time of making the tender, ready to be paid to the Mortgagor, and that in this interval he has derived no advantage from the money. This is in analogy to the rule of law respecting tender.

It is a general rule that tender thus made must be strictly legal or it will not bar the Mortgagor's right to interest.

But the tender of a bank bill has been decided to be sufficient, when the Mortgagor had no objections to receiving on the ground of it's not being a legal tender. Once the Mortgagor offered to exchange it if the Mortgagor wished—this decision is questioned by Powell.
The debt due being a sum in gross, must regularly be tendered to the person of the Mortgagee. The rule contains a case in which there is no place appointed for the payment to be made at.

On the other hand, if place and time are appointed, the Mortgagor cannot make a tender at any other time or any different place; but a tender at the time and place appointed is good even if the Mortgagee is not present.

In equity, if no place is appointed, and the Mortgagor gives notice where he will make payment - a tender at that place is good, if the appointment be a reasonable one and no objection is made to it at the time of giving notice.

And it has in one case been decided that when no place is appointed, a tender at the house of the Mortgagee is sufficient. This indeed was a case when the Mortgagee kept out of the way, to avoid a tender from the Mortgagor.

Yet if the Mortgagee has doubts as to any legal question arising from tender, he shall be allowed a reasonable time to satisfy himself by counsel.

So also where a tender is made by a person claiming the equity of redemption he shall be allowed time to investigate the fact whether such claimant is the
Mortgages

real owner of the equity.

Powell says generally that interest on a mortgage (presumably) may be attained by a personal agreement prior to agreement subsequent. But the case which he quotes does not support the position; that was merely a case of rebutting an equity, which may always be done by fraud.

If however the mortgagee had been Pst. Wig says the rule would undoubtedly be otherwise.

The method of Accounting

A mortgage being a pledge and not an alienation of the subject, the mortgagee has no right to the profits until he takes possession. Of course the mortgagee remaining in possession is not bound to account with the mortgagee for the profits, and an additional reason is that the debt due on mortgage draws interest.

But the mortgagee must account for profits received during possession. His possession i.e., they are to be applied first to the payment of the interest, and secondly to the reduction of the debt due from the mortgagee.

The mortgagee in this case is in the nature
Mortgages

If the Mortgagor in possession makes the estate himself, he has no allowance for his care and trouble; and all that is meant by this is, that as bailiff he is to have no compensation for his pains; for he is certainly entitled to the clear annual value of the rents and profits, deducting the labor and expense employed in producing them.

Even tho' the Mortgagor contract with the Mortgagor, to allow him a compensation or bailiff, such agreement will not be enforced in chancery.

But it is laid down that if the Mortgagor employs a skillful bailiff he shall be allowed for the compensation made to such bailiff. In this, their words not apply tho' in the Northern states, it might. Why?

If a mortgagor in possession apigns his mortgage to a person insolvent, he shall be liable for the profits which accrue after, as well as those which he accrued before the assignment.

The Mortgagor is to account with the Mortgagor only for those profits which he has actually received unless it appears that he might have received more, but for some fraud, or willful neglect or default in himself.
Mortgages.

But if the Mortgagor having taken possession keeps
other creditors out of possession— he will be charged in favor
of those other creditors, with all the profits he might have made

It is to be understood that he is not bound only
he has notice of the subsequent incumbrances—

If the Mortgagor in possession permit the Mort
gagor to make use of his (the Mortgagor’s) legal title to keep
incumbrances.
other creditors out of possession— he will in their favor be cha-
eged with the profits from the time at which they might have
had possession without his interference— this is called "Pen
ite = cing," and is a having the legal estate in the hands of the
Mortgagor, by which he is enabled to fence his interest from
the attacks of subsequent incumbrances—

But if the incumbrances subsequent were
voluntary on the part of the Mortgagor i.e. by his own act,
and not by operation of law, he cannot fence against such
subsequent incumbrances—

After the Mortgagor has assigned his interest,
a bill brought for redemption against the assignee must
join the Mortgagor as a party, for he must account for the
profits which he himself has received—

If there are several mortgagees the account
stated between the mortgagor and the first mortgagor will
1st of Jan'y 1772, in order to 1530 on the 25th
of Jan'y 1772 41 regd. 41t. 35 cts. of the cts.
of 200 cts. then for 5 years on 300 cts. instead
having added to the 40 regd. 41t. 35 cts. then the
25th of Jan'y 1772. And on
that day there was a payment of 25 cts.
of 25 cts. which reduced 25 cents.
the debt.

10 5' line.

on the 25th of Jan'y 1772 there was a payment of 30 cts. and
the debt at this time was 13 5'
was 13 5'.

30 cts. was the payment of 10 5'.

and 10 5'.

on the 25th of Jan'y 1772 as payment
of 5 5' cts. was ordered and added to the
the debt was 13 5'.

and was the payment of 5 5' or 8 5'.

on the 1st of Jan'y 1793 after
for two years there was a payment of
5 5' cts. which added to 5 5'
and was the payment 13 6'.

on the 1st of Jan'y 1803 after
5 5' cts. which added to 5 5'
and was the payment 16 7'.

on the 1st of Jan'y 1864 after
were a payment of 5 5' cts.
and was the payment 2 1 5'.

and was the payment 2 1 5'.
Mortgages

will be conclusive on the rest unless there be some fraud proved.
This contemplates merely the Mortgagor and the first Mortgagee, and not an account between between the Mortgagor and any subsequent Mortgagees.

But an account made up between the Mortgagor and his assignee of the debt due from the Mortgagor to the Mortgagees will not conclude the Mortgagor.

After a great lapse of time, and several assignments, the last assignee is not bound to account for the profits before his own time, and they shall be set off against the interest that had previously accrued.

If the Mortgagor after having endeavored to possess the title of the Mortgagee at law, exhibit a bill to redeem, the expenditures of the Mortgagee in defending his title shall be allowed in accounting.

There are two modes of accounting I. By annual rents there are an application of the surplus of the annual rents and profits over the interest to redeem the principal: these are never made except when the profits considerably exceed the interest and when allowed it is very advantageous to the mortgagor operating in a manner exactly the reverse of compound interest.

II. By bringing all the profits into one aggregate
Mortgages

sum and all the interest into another, and substracting the life from the

greater.

Of Foreclosure

As Cher after a forfeiture will decree a redemption for
the benefit of the Mortgagee; so also it will decree a Foreclosure
in favor of the Mortgagee, for the great object is to distribute jur-
itees in equal portions to each party.

A decree of Foreclosure is a decree that the Mortgage
does not pay the debt within a time limited by the court, he shall
be forever barred of his equity of redemption—This decree is invr-
seable except under special circumstances; it is not permanent but
conditional.

Where a reversion is mortgaged, the usual practice is
not to decree a foreclosure but a sale of the premises—This rule
is in favor of the Mortgagee and perfectly equitable for the
reversion may fall in at a very distant period. The if no great
advantage to the Mortgagee unless it be sold—Besides it is com-
monly more valuable to the owner of the particular estate than
to any other person.

If there are several grantees of the Mortgagee or
if there are several Mortgagees, they must all be parties to
Mortgages

the bill.

A foreclosure will not run in descent till after judgment. It is laid down in the books, that on a bill for foreclosure, the title of the mortgagee cannot be investigated, but must be settled at law. This is very incorrectly expressed, for on such application the fact whether the applicant has the title to the interest of a mortgage may be inquired into. The meaning of it is, on a bill brought to foreclose, the court will not aid the legal title of the mortgagee. The bill is brought for the purpose of hav[ing] the equity of redemption, and for that purpose only, and on this bill the court can do no more than to order a foreclosure, or deny a decree for that purpose.

A mortgagee may pursue all his remedies at the same time. The pendency of one is not pleadable in bar or statement to the others.

In case, after judgment is obtained on the bond or personal security of the mortgagee, the mortgagee may bring his execution upon the equity of redemption and have it appraised to him—not in [ sic ], for then the equity of redemption is not legal ejectment.

Under such circumstances, the court will grant an injunction against an action of ejectment brought by the mortgagor.
Mortgages

Chancery may refuse a decree for a predecease, when injustice would evidently be the consequence of decreeing it.

If upon reference to a master, the mortgagee does not redeem by the time appointed when he himself has made an application to redeem; and afterwards on the application of the mortgagee the court on that ground dismisses the bill such dismissal is equivalent to a decree for foreclosure.

If the mortgagee's heir brings a bill to foreclose it will be cause of demurrer, that the personal representative of the mortgagee is not made a party to the bill for he is entitled to the money.

So without any money demurrer if it appears upon the hearing that the personal representative is not made a party, the heir cannot proceed.

But unless the mortgagee is of a chattel interest the personal representative of the mortgagee need not be made a party to the bill for redemption; he has no interest in the equity of redemption of a personal estate.

But if the heir of the mortgagee has obtained a foreclosure it will bind the mortgagee, the personal representatives were not a party and the heir may redeem the land on paying the Estate or Ad 11th the debt.

If the heir does not pay debt to the personal...
Mortgages.

representative, he may be compelled to convey the land to him; for
the principal is the debt due on the mortgage, goes to the per-
sonal representative of the mortgagor, and the incident, that
is the mortgage or security to the heir.

In a decree for foreclosure the time allowed the mort-
gagor to redeem is computed by calendar months.

A decree to foreclose a tenant in tail, is binding on
his issue in tail, and all in expectancy.

But if there be tenant for life of the equity of reduc-
tion with remainder over, the remainderman is not bound
unless he be made a party to the bill. The reason of this
distinction is probably, that the tenant in tail has all those in
expectancy completely in his power, which the tenant for
life has not.

If there are several incumbrances, who are
not made parties to the bill for foreclosure, still the
first mortgagor may foreclose such as are made parties,
but those not made parties to the bill are foreclosed and
may afterwards redeem.

When all the interest of the mortgagor is de-}

away the devisee may bring a bill to foreclose without mes-
thing the heir of the mortgagor a party; for the latter has
no interest in the mortgage.
Mortgages

A foreclosure may be decreed against an infant, but he has a day given in court, after he arrives at full age, to remove against the decree—This is day in court as it is termed consists of 6 months after he shall have arrived at full age and proceed to appear to appear and show cause, shall have been recorded upon him.

Such a decree then is not in the usual form, for it contains a clause allowing the infant his day in court.

If within 6 months after having arrived at full age, and having process served upon him, he does not show cause against the decree it is binding upon him, but if he does show cause, he may on such showing put in a new answer and make a new defense.

In this case however the infant is not allowed to go into the account owed or of course to redeem on payment of the money. This privilege extends no farther than to enable him to show that the decree was erroneous or unjust and to enable him to take advantage of that which is known at the time of making the decree would have prevented it being made—Indeed it is said that the proper remedy of the Mortgage when an infant is owner of the equity of redemption is to have a sale and not a foreclosure of the hands decreed. This binds the infant definitively and is perfectly equitable.
for the supplier after payment of the debt belongs to the infant.

If a cause suits on the ancestor mortgager hands and
the equity of redemption suits in her after coverture, a decree
for foreclosure obtained against her is peremptory and of course
she has no day in court to show cause against it; for her
incapacity is optional and not a necessary cause. She
has given her authority to her husband; if however it appears
that any injustice had been done her, she may avoid the
decease after coverture.

If the Mortgagor has been guilty of any fraud or
an unfairness in obtaining a foreclosure the court will open
the foreclosure which is a revival of the equity of redemption.

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Thus if the Mortgagor obtains a foreclosure of
his judgment creditor has given him notice of his demand
and tender him the money due on the mortgage, the court
will open the foreclosure. If however no notice is given
the foreclosure will not be opened. Due to her.

When a foreclosure is opened in favor of a sub-
sequent incumbrancer, the first Mortgagee is allowed
all his expenses in obtaining it. This rule is laid down
without qualification, never unreasonable when the
first Mortgagee knew of the subsequent incumbrancer.
Mortgages.

Under special circumstances, the time limited to the mortgagee for payment may be enlarged; or when the mortgagee, without any default or willful neglect, must be greatly a sufferer by a foreclosure.

Indeed one foreclosure has been opened several successive times, and even when the mortgagee had entered into a rule not to apply again.

A foreclosure is never opened in favor of a mere potential volunteer, that is, the one who has the equity of redemption without having paid any good or valuable consideration. As a devisee of the mortgagee.

If the first mortgagee obtains a decree against all the parties concerned, and afterwards divests the land to the mortgagee, the foreclosure is ipso facto opened.

The reason of this rule obviously is, that the interest of the mortgagee in the land is vested, and the mortgage due to the subsequent mortgagee is in the nature of an inquitatia estoppel.

So also if a mortgagee, having obtained a foreclosure, runs on this covenant security, or his bond or note with interest is a waiver of the foreclosure. Or, can a foreclosure with possession taken in a satisfaction of the debt? This according to principle.
Mortgages

Regularly a foreclosure is not to be entered when the
Mortgage has remained for several years in possession of
the Mortgagor under the foreclosure.

In Eng. it is the practice when the Mortgagor does
not pay within the time limited in the deed; and to make
of it absolute if it be by a proper order. In law, it becomes absolute.

In Eng. a Mortgagor may obtain a foreclosure how
ever small his debt compared with the estate. In law, the debt
must amount nearly to the value of the estate; and it will be granted. There is no principle ground of foreclosure
does not exist in law. Abraham and Mordecai, Convertid
of God. A foreclosure is seldom granted. We never
recollect only one instance and that when the Mortgagor
on his way to pay the Mortgagee within the time limi
ted fell sick upon the road.
Of estates in joint tenancy, coparcenary and common.
Joint Tenancy

When an estate is held by one individual only, it is termed an estate in solemnity, in contradistinction to estates held by a plurality of persons.

There are three kinds of joint estates, of which we propose to treat in their order: And

1. Of an estate held in Joint Tenancy. This species of estate may arise by mere act of law or by descent, but always by the purchase. It is distinguishable from other joint estate estates by this criterion. An estate given to more than one grantee is of course a joint-tenancy, unless the deed contains words expressive of the intention of the parties that it should be an estate in common.

COMMON

It is observable that in the state of York, this rule is attested by statute, since every statute holder jointly is construed to be an equity estate in common, unless explained to be in joint tenancy or

The properties of an estate joint tenancy are derived from its unities, which are four: Unity of Interest, of Title, of Time, and of Possession.

1. Unity of interest is meant that it be one and the same quantity in the grantee, all the grantees.

2. By unity of title is intended that the estate must be created by one and the same act of the parties in all the grantees.
Joint Tenancy

§ 3rd. That it must vest at one and the same period in all the grantees.

§ 4th. By unity of possession it must be that each owner shall have possession of the whole estate, as well as every part and parcel thereof, as of being mixed according to the ancient Norman phrase "pur sang et per tant" by the moiety and by all. Each must have an undivided moiety of the whole and not the whole of an undivided moiety.

From these several must many consequences and incidents to the estate. First reserved on a lease to be paid to one joint tenant shall come to both. So a surrender or release of one made to one, shall come to both. Indeed of any act respecting the joint estate the act of one is the act of all.

Thus also by the English law in all actions relating to a joint estate, neither joint tenant can sue or be sued without joining the other. But so in law for here a custom has grown up, which has been sanctioned by the courts, that one alone may sue or a stranger - this arises from the vast inconvenience of compelling all to sue, when the owner might be repeated from each distance in this widely extended country.

One joint tenant cannot sue another in trespass for each has a several right of entry. But neither has a right
Joint Tenancy

by himself to do that which may injure and destroy the right of his co-tenant. On this principle by the Stat. W. 2. c. 22. it is enacted that one joint tenant may give an order in mortis causa to the other. If an action of account is given which would not be at common law, unless one joint tenant had made the other his bailee or receiver. This account will be fairly taken and the tenant in possession is compellable to account for the surplus over and above his share of the rent proceeds which he has received, and he is accountable for that only.

By the English law there is incident to all estates held in joint tenancy a right of survivorship "jure accrescendi."

This doctrine is rejected in the commercial law, and in cases of joint ownership of stocks or farm in Eng. and in law, it is entirely exploded.

One joint tenant may at any time convey his estate to a third person (which works a release). In Eng. however he can never devise it. But in law, a joint tenant may devise his estate.

At common law no estate was devisable and in the State, which rendered them so in Eng. estates held in joint tenancy were expressly excluded. This was done on the ground that from the very nature of an estate in joint tenancy a statute rendering it devisable by one joint tenant would be inequitable.
Joint Tenancy

For say the copy books the title of the surviving joint tenant to take effect instantaneously upon the death of the other; and thus having an agility than any other title can have would exclude the idea of a title being given to the devisee.

By the state of wills in law, and most other states, all estates are made desirable. In these states which recognize the joint secrend; it would be a curious question under such a state, whether an estate held in joint tenancy could vest in the devisee. If the testator intended it, it would (S. 186. c. 6. 185.)

An estate in joint tenancy may be severed in various ways or modes. If by agreement of the owners. Before the state of fault and injury, this was done by making a practical division merely but since the enacting of that statute (the state of S. & 6.) all agreements of this kind must be in writing. It is then necessary after the partition is made practically, that mutual deeds of quit claim pass between the joint tenants.

Or by law so one joint tenant could compel the other to make partition of the lands—but by S. 31. 32. 18. 31. and 32. 31. 32. a remonstrance may be compelled by one joint tenant. This is done by bringing a suit of partition. The mode of accomplishing it is as follows; a joint tenant wishing to compel a partition states to the court (either of law or ch.) that the state is held in joint tenancy and that he wishes a remonstrance
Joint Tenancy

On this the court issues a writ to the sheriff commanding him to take a jury of 12 men, to make partition. Then if done fairly, consent if you not objected, to is final.

In son, the sheriff takes three men only, and his return when one made in of course recorded, and at all events conclusive. This is equit deficient in the Common law and needs correction.

If an estate in joint tenancy may be severed by an alienation of one of the joint tenants which destroys the unity of title: So by destroying any one of the constituent units the estate in joint tenancy is itself destroyed — 2 Blae 185.

II. Of Estates in Coparcenary.

This estate is always created by descent, and happens when an estate of inheritance descends from an ancestor to more than one person. At Common Law it includes females only and their legal representatives, to whom the estate descends, and all their successors in interest are termed Co-parcenary or more briefly, co-parceners.

By the custom of England girls descend to all the male alike who of course later as co-parceners.

By the laws of common all the children inherit as co-parceners, female as well as male, without distinction.

Estates in Co-parcenary must have the unity of interest of
Coparcenary

The unity of time however is not required. For if A dies leaving A and B, his heirs tenants in coparcenary and C. dies leaving C. his heirs B. and C. are still tenants in coparcenary, tho' the estate vested at different times yet the descent must have been cast at the same time.

The coparcenary can maintain no action of waste against each other. Partition might be compelled at law: law; and there is no jus accrescendi in coparcenary—there are the most material respects in which it differs from joint tenancy.

III.

Of Tancy in Common

The only unity necessary to constitute a tenancy in Common is that of possession—there need be no unity of time, title, or interest; but the interest of tenants in common is joint as to its possession only every estate held by a joint possession, not being a joint tenancy, tenancy and not coming by descent is of course a tenancy in common.

Whenever an estate of joint tenancy or coparcenary is divided, so that there be no partition made but the unity of possession continues, it is converted into a tenancy in common.
Tenancy in Common.

It may also be created by an express limitation in a deed, when the
conveyance is explicit of a tenancy in common.

Each tenant has the whole of an undivided half or moiety
of a tenancy in common and not an undivided moiety of the whole
as in joint tenancy; but no one knows of his own secur.
They all then

are occupying promiscuously.

Tenants in common are compellable to make partition by
stat. of land. There is no "jure accursendi" in a tenancy in common
and the tenants in common may sue separately in Eng. as well
as here. In other respects it agrees with other estates held
jointly.

lands to be given to A. & B. to be equally divided between
them" have been held to be given them in joint tenancy
when the expression used in a deed, & in common when used
in a will. Mr. Coke supposes the words ought to be construed
alike in both cases instruments.

It is laid down that when one tenant in common is forcibly
turned out of possession he may bring an action of ejectment as
against his cotenant. It is to be remarked that, he can do this
merely for the purpose of getting into possession himself, not for that
of ejecting his cotenant.

One joint owner of an estate may hold for so long a
time as to gain an exclusive title to the estate against the
If a enters on land at 15 must come less it and keeps perch from 20 years Suppose they were permanent and enters for boat in the price Suggestion shall it that he remain by alter al justice or how is the perception of the people only know of the case other
Tenancy in Common.

The joint owners, the in common cases, the statute of limitations does not run upon this species of estate. This can happen only when the estate tenant in possession holds it by a possession adverse to that of his cotenant.

See N.C. Conn. from §179 to 194 inclusively & the author cites referred to 182.
The term "Devises" when properly used signifies an testamentary disposition of real property. "Wills" are the instruments by which a man conveys personal property.

Devises were in use with our Saxon ancestors. Before the Roman conquest introduced the feudal system in its full rigor, the manner of devising at that time is however involved in uncertainty. By the feudal system all alienations without the consent of the Lord were restrained. Devises as well as other alienations indeed the restraint upon alienation by devise, continued long after that upon alienation by deed had ceased.

The introduction of the ideal estate of use, distinct from the legal interest, gave rise to the practice of devising the use; and in a court of chancery the certainty gave way, could compel the trustee to execute the devise and even to convey for his benefit. Stat. 27 Hen. 3. But when the state of uses had annexed the possession to the use, there was now being the yard land itself because no longer desirable. This consequently extinguished the kind of devising, and brought on the state of wills 32 Hen. 8 & 1 explained by 34 Hen. 8 & 9, which gave to all persons possessed of lands in fee simple (except it were in joint tenancy) a right to devise with certain restrictions as to the quantity desirable (which were afterwards taken away by statute, Ch. 2) and as to the persons to whom it might be devised. The explanatory stat.
Devises.

The statute, in con. does not extend to devises.

There is a remarkable difference between the construction of words in deeds and wills. In a will, certain words which if used in a deed will convey no interest, will convey an estate.

In a deed, the words "heirs" is necessary to create an estate of inheritance; but in wills, any words expressive of the intention of the testator to create such an estate will have that effect. The general rule is that the intention of the testator is to govern.

But this may be understood too broadly, for no estate can be conveyed by deed. The statute of wills confines no power upon a testator to create a new estate; but merely to dispose of his real estate under the previous restrictions which existed upon the alienation of lands by deed. This rule understood with the preceding qualifications is very important in devises and will solve a great number of cases which have been decided.

The rule there is merely this, that in the construction of wills, technical expressions yield to the intention of the maker of the instrument; in that of deeds they prevail.

This rule, however, says that does not warrant conveying devise which were unknown at law and they may be considered as an exception to the general rule.

It is not Mr. Keene's intention to explain existing devise.
in this place, but he will just mention the manner in which they originated. At Law, saw no estate of freehold could be made to commence in future, and if a remainder was limited, it was necessary that there should be some intervening estate to support it. Courten however took upon them to determine that by devise such an estate might be created without any intervening estate to support and there they termed an executory devise.

The operation of a will may be very different upon real and personal property. Suppose A makes a will giving all his real estate to B. If he afterwards purchase real property it will not pass by this devise, but if he gives all his personal property to B all that he dies possessed of will pass. It will then operate upon real property from its date upon personal property from the time of the testator's death.

The effect of a republication of a will is to give it operation from the time of its republication and is in effect giving it a new date. A devise there of all real property made before the purchase of the other estate of the same description by republication after such purchase, will operate as well upon the property immediately bought as upon that originally devised.

Wills are revocable until the death of the testator. They are therefore revocable, liable to revocation express and in
Devises.

Indeed, before the Stat. Charles 2, they might be revoked by gift, when such revocation was made intestate, the reversion being a "advincus revertendi".

A particular form of expression is necessary in wills under the Eng. Stat. It has been questioned whether a possibility, i.e., an estate depending upon a contingency, could be devised. Formerly, it was held that it could not, but must go to the heir; but it is now settled that they are desirable under the contingency happens.

If an estate were granted to A, and his heir pass vicariously, his heir would take it during the life of the certain person. Now, as the word "heirs" in this case is merely a word of description, it would seem clear that the owner might dispose of the estate by devise. But by the English Stat., estates for life are not rendered desirable, and it therefore remains as at Law.


In Law, all estate is desirable, and hence such an estate would consequently pass by devise. Even in Eng., in those places where all lands were desirable by custom, that mind of estate might be devised.
Devises.

Subsequent to the original stat. of devise made in the reign of Hen. 8., the stat. a. la. 2. renders other solemnities requisite to the validity of a devise. This last stat. has been almost uni-

formly copied by every state in the union with very few variations.

There were a number of cases under the stat. of Hen. 8. before the stat. of la.

1. It was contended between those parties that the whole of a will should be made and executed at the same time, but it is now settled not to be necessary, for part may be written at one time and part at another, and the will or devise will be good good-

2. In case a man has three or four or more wills which contemplate distinct pieces of property and are all three perfectly consistent with each other, they will all be good; but if the last differs or is inconsistent with a former one, it of course revokes it-

3. There is, however, where the latter will runs to be in some measure inconsistent with a former one, and yet both shall stand, as where B. makes a will by which he gives Black acres to C. this being all his property he afterwards marries, and with

intends to give some estate to his wife, instead of making anew will entirely, he makes another giving Black acres to his wife
for life upon the condition of her paying to A. 50l. per annum. This test "Will," will operate as a revocation of the estate given to the wife.

4th. Another point settled during that period is that a will may be made to take effect referring to another writing and dispossessing of an estate according to that writing without inverting in the will what that writing contained contains. As a will conveying to such person such property as is mentioned in a certain instrument of writing to.

We hence just remark in this place that a codicil to a will is nothing more than an addition to a will which will become a part of it and will add, explain, or subtract from the will to which it is an addition.

5th. Another point settled at that period is that whenever mentions in a letter to a friend the way in which he shall dispose of his property, this letter shall be his will.

6th. Where the devisee may be in such a situation as to render the writing of his will at the time impossible, present impracticable, but gives the manner in which he wishes his property to be disposed of to an attorney, who having written it brings it for approval to the testator who at that time is incapacitated to approve. This was (on the presumption that the attorney has obeyed his instructions) determined to be a good
will. These questions and difficulties however occurred in the second state of wills in Eq. Cor. 2.

This state declares, that all devises of lands, desirable either under the state of Eq. 8, or by custom should be in writing.

That they shall be signed by the devisee himself or by some person in his presence and by his express direction.

They must be attested and subscribed (i.e. witnesses) in the presence of the devisee and

This must be done by 3 credible witnesses. This is all the state. She requires 2, other requisites appear to be so very plain yet almost every word and every syllable have been subjects of litigation. This state has made no attention in the form of draughting Wills. As techniques are necessary, the intention of the testator must be perfunctorily expressed.

A will, when made in a foreign country, the devisee omitting the state requisites from ignorance of them, will be good. But where this ignorance cannot prevail, all the devisees in a foreign country devise must be made according to the country laws of the country where the land lies.

This is common for men making devises to give power to others persons to dispose of certain property.

The property here passes by the first will, and in case this will made by the trustee a confidential person
Devises

should want any of the legal requisites it will not be good. The will to the appointees must have the legal requisites.

We have now consider these requisites in this order, and

I. That the "Deviser" should be in writing needs no comment. But-

II. That it shall be signed by the deviser or by some person in his presence and by his express direction made some consideration. With respect to signing what is it? Here the deviser ought to write his name at the beginning of the devise i.e. it is sufficient. In this case three of the judges determined that sealing was signing within the state. The name must be in the deviser's hand writing.

The next question was supposing an other man had written the whole devise and the deviser had himself sealed it would this sealing be a signing within the state? It has been determined that it would not.

An other question has been made suppose a deviser attempts to sign and cannot that incapacity it will not be good. The rule is that whenever you have complete evidence that the deviser intended to sign and did not, it will not be signing, but when he writes his name at the top and there is no evidence to sign
of an intention to sign at the bottom, it will be a sufficient signing.

III. A third requisite to the validity of a devise is that it should
be attested and subscribed in the presence of the Devisee. What
then do they attest? To the corporeal act of signing by the devisee.

24r. It is said that witnesses attest to the sanity of the devisee.
the Aut. Locke supposes they do not.

But what is attestation to signing? It is settled that an acc
nowledgement by the devisee to the witnesses, that he him-
self did sign the will is sufficient to enable the witnesses to
prove the will although they themselves did not see it signed.

Anything short of this acknowledgement in this way
will not validate a devise.

But the witnesses, in the presence of the testator.

What then is to be construed "in the presence of the testator."
It has been settled that, if the subscribing was done in the
possible view of the testator, it will be sufficient i.e., if
the testator could have seen the witnesses sign it, it will be

do.

But if the testator could not have seen it, it will be in
sufficient for it has been said and it is probably true, that al-
most the witnesses were in view but recited themselves at
the time of signing lest the testator should utter his mind,
this greatly vitiated the devise.
It has also been determined that where the testator was surrounded by witnesses, it might have seen the witnesses sign it would be a sufficient signing in his presence; he might have had a view of the witnesses to subscribe in the corporal presence of the testator; yet if he was deprived of his mental faculty, so as to incapacitate him to exercise, it will not be subscribing in his presence as contemplated by the statute. There must be a capacity of the subscribing to be proved when the question comes up at law.

The fact is, the witnesses may not only serve to the testator's signing but also to their own subscription.

There is a great convenience in all the witnesses being present at the time of their subscribing, for if this is the case one may prove the whole, i.e., the signing of the testator and the witnesses.

There is an inconvenience which sometimes occurs and which is sometimes inconceivable. Indeed many wills are thereby defeated, and it is when the witnesses are all dead; it is true that in this case you may prove the handwriting of the testator and also of the witnesses, but this does not prove that they subscribed in the presence.
Devises

In case of the testator's death, the court in such cases may hold of all the circumstances of the case and from these may infer the subscribing in the presence of the testator. But where there are no such circumstances from which such inference may be drawn, the court will presume the instrument to have been regularly executed.

But suppose that there is one witness alive and he did not see the others subscribe? In this case, the handwriting of the other witnesses must be proved. However, the witness does not see why this proof should not be admitted, that it has been "quinque voces" in Eng. Proof will clearly be admitted.

But suppose one witness comes into court and swears to all the requisite to the validity of the will; that the will is that the testator signed and that himself and the other witnesses subscribed in his presence, and another witness swears directly the contrary? In this case, the court will judge of the fact in dispute. But courts are so much inclined to favor due execution, that one witness swearing to it, when supported by circumstances, has been believed in preference to two witnesses directly the contrary.

But it is held that those witnesses attest not only
Devises

to the fact that the testator did sign but off to his rarity at the time of signing and yet strange today these same witnesses will be also sworn to prove his insanity to contradict themselves. The fact is their testimony may be rebutted by that of others and the matter will be left with the tries. 1 St. 1096. 1 Jux. 6. 365. Strong case.

There is a case which seems to contradict the doctrine that witnesses may contradict themselves. 2 Bern. 1224.

As to the number of witnesses.

The stat. declares that there must be three or more witnesses. Cases. A will made having two witnesses and a codicil thereto annexed with two witnesses.

Now such a will as this has been held not to be good upon the ground that those who witnessed the will knew nothing of the codicil it being on a separate piece of paper. There were therefore but two witnesses to the will.

A will to which there were no witnesses to the will a codicil thereto annexed, executed by three witnesses. The codicil recognized the will and yet this was held not to be a good devise, upon the ground that the will was not proved at the time of executing the codicil. If the will had been.
Devises

present. The issue supposes that the execution would be good.

A well and codicil on the same piece of paper, and a sufficient number of witnesses to the latter — hence the will must necessarily have been present at the execution of the codicil, and therefore was held to be good.

A will containing 8 or 9 separate sheets signed at the bottom by the testator — if the last sheet is subscribed by three witnesses, it will recognize the whole as one will and of course make it valid.

There has been a distinction drawn between a "will" and a "codicil" but it is now confused he cannot see it.

An illiterate man made a will and being ignorant of the legal requisite omitted to have a competent number of witnesses — afterwards finding it out he drew up an other will altogether consistent with the power to which he had the legal number of witnesses. All constituted one will and was good — that all the witnesses must be present — see — Pro 22.13, 14.

IV. A fourth requisite is that it must be witnessed by 3 or more credible witnesses in the presence of the testator.

For what purpose is the word credible added? some contend that any credible persons would be admitted to prove
a will, and therefore devisees themselves if credible would be admitted. Others say they must be "competent" witnesses. But upon the whole we may conclude that the word credible was in meaning nothing more than legal witnesses. In fact Mr. Steers supposes it to be superfluous.

Can a devisee expunge himself of interest by the matter post facto as to be suffered to prove a will which made him devisee? In answering this an other question involves itself, which is whether witnesses to a will must be competent or disqualified at the time of subscribing the will? The fact is that if at the time of proving the will they have no bias on their minds they will be competent witnesses notwithstanding their interest at the time of subscribing. This is Mr. Steers opinion.

A witness being a devisee has only a contingent interest, i.e., it is contingent at the time of attesting, for the will may or may not be affected, and is not an heir at law whose father protracted an action of ejectment more interested than a devisee? and yet he can be a witness in such a case. Mr. Steers then favors the idea of the admissibility of a devisee as a witness.

In the spiritual courts it was always practiced that a laytee on releasing his interest might become a witness to a will; for to will strictly speaking no witnesses are necessary.
It was contended by the advocates for excluding the devise that a new system of evidence was intended to be introduced by the statute from this hypothesis it became entirely different for statute did not materially affect the pleadings or evidence collateral to—and besides the adoption of this idea would lead to great difficulties and absurdities. Suppose that the devise at the time of subscribing did not know of the devise to himself at the time of uttering he would have no basis which could on any principle exclude him.

The decision strange was a very alarming one and brought on a statute (25 Geo. III c. 3) by which it was enacted that all evidence given to witnesses should be void. From this statute no inference can be derived which will militate against the doctrine contended for by Mr. Breeze, for the statute might as well be made in affiance of the Common Law as in alteration of its. In England judges have decided in the affirmative of the Common Law and 6 in the negative so that this is now a great question.

On how this question has been twice decided in the affirmative in the Superior Court and their last court of determination has been reversed by the Superior Court of errors. It also here this in quarto inde terminates.

V. It is not mentioned in the Stat. by or necessary that the devise be published. This was held necessary under
Devises.

the Stat. of H. B. and was introduced from analogy to a deed which must be delivered. Indeed a devise may be delivered as a deed of

Under the Stat. of N. B. it is not strictly required that a devise be published, but Mr. Brown thinks the subscription and attestation required by the Stat. of H. B. to be equivalent equivalent to a publication.

VII. It is required that the entire will be present at the time of attestation. Whether it was present or not is a question of fact to be left to the determination of the judge.

As has been hinted, the inextricability of every thing human often renders it necessary that the great fact of the devise, signing the will in the presence of the subscribing witnesses, be proved by sight evidence.

Of the Revocation of Wills.

Revocations are either express or implied. In Eng. there is a stat. respecting the solemnity requisite to an express revocation of the section which has been adopted by some states, tho' not by all. It is not adopted in N. B.

The greater part of Revocations being implied are not operated upon by the statutes before the statute an express revocation, the legal form.
an implied revocation would annul a will.

No expression of an intention to revoke an executory
an implied revocation may arise from some coterminous
act of the testator which absolutely implies it, or by some
act of this, furnishing grounds to presume a change of inten-
tion, or from the mere operation of law.

A second will inconsistent with a former one is an
implied revocation, and if it be inconsistent with the for-
mer one in any material point it entirely revokes the for-
mer. On principle however it ought to revoke it pro-
tante only i.e. to the extent of the inconsistency.

A codicil may be a revocation of a former will but
not unless there be an express clause which operates as a
revocation and no further than such clause extends, for the co-
dicil recognises the former will.

When a second will is made under a false impression, as to a
matter of fact, without which false impression it would not have
been made, it is no revocation of a former will, however inconsis-
tent with it, it may be.

But when such will is made under a false impression
as to the law it is a revocation. Hence the intention to revoke,
but in this case the rule tends to reasons of policy, for a con-
trary made of procedure would produce much confusion.
Suppose a will impliedly revoked by a subsequent inconsistent one, and that such second one in afterwards expressly revoked in the first will revoked? Resort to the intention of the testator of the testator. By this Mt. Reeves thinks it will generally be found the safer way to revive the first will and so it is decided.

But if the first will be cancelled and destroyed, it is not revived by the distinction of the second.

Suppose the second will expressly revokes the first, is afterwards destroyed while the first is not revoked. Mt. Reeves thinks this distinction not founded on principle.

In the case cited from Louper both the first and second wills were cancelled but there was found in the testator's house a duplicate of the first uncancelled, but it was held to be nonrevival of the first.

Such a great alteration or taking place in the circumstances of the devisee by marriage and the birth of a child is an implied revocation of a devise previously made as well as of a will.

So also marriage and the birth of a posthumous child work a revocation. There seems proceed upon the ground of an implied change of intention in the devisee arising from the alteration of his circumstances. It has been said indeed that unless the devisee works a total dis-
(a) There is a statement here expressed in Con.

but in Sec. it has been indirectly repeated 20th. 502.

by or a state of Express meaning will as will

be seen further on in the lectures.

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Moon 899.
Pep. 103.
1 Pn. Ro. 941.
1 Roll 615.
10th. 146.
1st. 93.
9 Mod. 190.
10 D. 23.
5 at. 92.
Devises.

...division of the issue, the circumstances above mentioned do not amount to a revocation, but Mr. B. thinks this by no means certain, but that the intention of the testator is to govern the issue, exclusively.

It was formerly contended that subsequent insanity of the devisee, which rendered him incapable of altering his will, when he would probably have done it, had he prepared the power amounting to a revocation — but it was always determined otherwise.

...An other species of implied revocation arises from an intended revocation; when the instrument designed to revoke the first will is deficient in some essential requisite to its validity as a will, yet it shall operate as a revocation, this is also on the ground of the intention of the devisee. Mr. Newber says that the principle seems hardly to warrant the decisions; for certainly in such cases the law cannot pass to the devisee, in the second devise because it is insufficient and incomplete as a devise, but it will go to the heir at law who may be by a very different person from him who is the object of the devisee's bounty and thus his intention will be as effectually frustrated if the first will had been permitted to stand — but the law settled and so we must be bound...
Devises

The rule last mentioned applies to all devises where they are
made to devises incapable of taking. As a corollary to-

At that we have treated of revocations implied by the inten-
ation of the testator. We will now treat of revocations implied
from an attestation of the estate and which therefore are an
exception to the general rule that the intention of the test-
ator is to govern.

Case 1st. Where a testator devises an estate, then sells it,
and afterwards renews it—This will be such and
alteration as will revoke the devise—

2nd. A devises to B, in fee. Afterwards marries and wishes
to make some provision to his wife, makes a trust estate
for his own life remainder to intestate for the life of his
wife—Here the intention was entirely not to defeat the
deviser's estate in fee, and yet this was held a revocation
upon the ground of an attestation—In this Mr. Serjeon
reasons—

3rd. But the courts have gone even farther. A being pos-
seessd of an estate in tact devises it, and to give validi-
sity to the devise suffers a recovery, this was esteemed to
hold to be a revocation upon the same ground—

4th. But to ridiculous a length have the courts car-
ried this principle, that an intention to attor has been
Devises.

held to be a revocation upon the same ground as where a wife to the in socket, device to B. afterwards, thinking the estate was in tail, suffered a recovery to dock the entailment and therefore to give validity to the devise. This was held a revocation on the ground of an intention to alter. Now, doubt the precedent establishing this principle, was made by an intuited judge. Judge at first, and other subsequent have followed the same. This want of adherence to the intention of the devisee has destroyed the symmetry of the law upon this subject.

It is an established rule that where there is an equitable estate, chancery will not consider such alterations, a revocation but in legal estates, chancery will be governed by legal rules. Be in other words, whenever legal estates are made equitable, once an alteration will not be a revocation, but if when equitable estates are made legal over, legal rules govern. Partitions of estates after devices will not amount to revocations.

Again, the alteration brought about by a mortgage is no revocation i.e., it is a revocation for want only, for the devisee may at any time pay the mortgage money and take the estate. But there is a distinction between the mortgage.
of a lease for years or for a term for years, and the mortgage of a fee. As where A. owning a lease for forty years devises it to B. Afterwards A. mortgages to C. a part of the term say 20 years. In this case it will be a revocation pro tanto only at law, in equity, the devisee may redeem it at any time.

A devise of a farm of land to B. and afterwards mortgagor to B. asserting ignorance of the will. This will be a revocation upon the ground of an intention to alter.

In all cases in which there has equitancy or situations will only revoke pro tanto. For such alterations, or in mortgagor to one almost uniformly made for the purpose of paying a single debt, or answering some other specific purpose, which when done the devisee's intention is answered and the devisee will take the estate — or in the first instance the devisee may be said to take it even once.

Thus far as to alterations known for other causes of revocations, which indeed may be called alterations of the estate.

The act of a stranger may cause a revocation and to quodigist the following it is necessary to remember that no man can devise an estate of which he is not seized at his death.

A devisees an estate to B. C. dipes B. and holds him
Devises.

out at the time of his death, B. the deviser cannot take — But

Again when a deviser makes use of any grand couin B to
alter the disposition it will not be a revocation. As where A de-
vises a part of his real and part of his personal estate to B and
also a part of each to C. both being his children, now C. not in-
stantly the disposition differs this father and holds him out both
after his death — the court in this case would interfere and not
suffer this trick to vitiate the will.

So also where a stranger or other person tears up or destro-
ys a will, now if the contents of the will can be substantiated in
any way it will not be a revocation.

One thing further as to the alteration of an estate. Not
withstanding what has been said, yet if there has been
a will made, and a subsequent conveyance operating me-
ly as an abridgment, it will be a revocation pro tanto —

A. devises an estate to B. afterwards leaves it to C. for
the life of C. now this is a revocation pro tanto i.e. for the
life of C. Their much for implied revocations.

In the same stat. 39 Car. 2 in which there is a devising
clause (which has been considered) there is also inserted clau-


Express Revoking Wills

Which will now be considered — This will by no means
only interfere with implied revocations — It has relation to such
Devises

are themselves expressly mentioned only.

Proof of a devise may be admitted to prove the facts out of which revocations may be implied, but in express revocations there are three specific clauses pointing out what must be done in order to a revocation—

1. In the first place, no devise shall be revoked unless by some other will or codicil in writing declaring the same (that is, containing a clause of revocation) or,

2. It must be revoked by tearing, burning, cancelling, or obliterating the same some other writing of the devisee, signed by himself in the presence of or more witnesses—

3. It may be revoked by some other writing of the devisee signed tearing, burning, cancelling or obliterating the same.

If a second will is made without a clause of revocation, it will imply one; but this revoking part of the statute was made to prevent partial revocations by the testator—Before the making of this part of the statute, any partial declaration significant of the testator's intention, or any instrument of writing whatever was a revocation. This was at Common Law.

The first and second requisites are only restrictive and do not introduce any new law; they only exclude anything or any partial declarations being revocations except such writing is ignored with the requisite.
Devises

I. But as to revocations by will or codicil and

II. As to revocations by some other writing signed by the testator in the presence of three or more witnesses, which will both be ordered together.

When you judge of a revocation by will (i.e.) a second will the first question to be determined in, whether this will be a good one—Whether it is duly made and is a good disposing will, having in it a clause of revocation, as well as all the stat. requisite, for if it is not, it will by no means be a revocation—If it is not a good disposing will that will come under the 2nd class of "a writing by the testator in the presence of witnesses" it will not be a revocation. The rule is this that if a man attempts to dispose of property and at the same time and by the same instrument attempts to revoke a former will it will not be a revocation unless this will is a good disposing will—but if the object or intention of the testator is not to make a disposing will, the instrument being signed by three witnesses will be sufficient to revoke the former will—

Cases—A devises to B. by a good title, then makes a disposition of the same property to C. Now the jury in their special verdict found that there was a first, and also that there was a second will, containing a clause of
Devises

retraction, but because the witnesses to the second will did not subscribe in the presence of the testator, the will was not good and therefore not a revocation.

You have already inferred, that a will may always be revoked by a will or codicil duly made and executed according to the revoking clause of this state, and that you may devise all one devise a devise by an instrument, which for distinction sake is called a revoking will, which need not have the requisite of a deviser will.

In Con. there is no revoking clause adopted; there fore the devisee may revoke by any writing signed by himself, and significant of an intention to revoke—But it does not know but there may be a parole revocation in Con.

III. A devise may be revoked by the act of the devisee in burning, tearing, cancelling or obliterating such devise. These acts or anyone of them to these would revoke a devise at Con. Law before this state, but this does not under consideration of this part of the subject the less necessary.

But let it be remarked, that these acts themselves do not constitute a revocation. To do this, there must be animus revocandi—The intention must be expressed to; for if anyone of these acts be done by accident
Devises.

it will by no means be a revocation.

But in general if a man attempts to destroy the devise and it is manifest that he aims at the distinction its destruction it will be a revocation.

To prove the "meaning" i.e. the intention which in influenced the testator in meddling with the will, proof must be admitted as the best evidence the nature of the case admits of.

There are cases where a man commences the distinction of his will, and for some cause stops, and yet this will will not be void, but will stand, as where a man having a will and wishing to revoke it, makes a second will but before the second is finished he commences tearing up the old one, thinking the new one perfectly executed, but finding it not to be so he the old one up carefully and puts it away until the new one he properly properly authenticated; in the meantime however he sends sickness and dies now the new one never having been witnessed it has been determined that the old one stand and this (I presume) upon the ground of intention of the testator.

No matter in how slight a manner the testator bureaus, cancels, or substitutes his will, yet if it be done
Devises

Animo destinandi it will be a revocation.

The will is merely annulled and not torn at all or not burnt or not at all obliterated or cancelled, it will probably not be a revocation express within the state, although it might have been annulled "animo destinandi".

One doctrine further. It has been held that when a testator has made some obliteration, so as not materially to affect his first design in disposing, it was no revocation. But in a case where the devisees attorned 40 to 450: the word "daughter" to "daughter-in-law" be, and this without materially affecting his first disposition.

Of the Reproduction of Devises.

A will or devise may be impriously (and the devise may seem to think expressly) revoked, and a reproduction of the same will, will revoke it.

It is a rule which must not be lost sight of, that real property purchased after the making of a will, will not pass by the same will, but personal property purchased subsequently will pass by it.

Real property will not pass because it is capable of being clearly asserted, defined, and identified.
Devises

If not mentioned in the first will, is supposed not to be intended, but personal property is separate, unsettled, and often very often opus of the testator, therefore it is supposed to be contained in the testator.

Some hold estates subsequently purchased will not pass, at the account of personal property and this is because the estate of the identity and certainty of real property.

The republication of a will causes lands purchased subsequently to the making of the will to pass, in all the land purchased previously to the republication of the will, republished operates from the time of the republication. It speaks the same language as if it was actually made at that time.

But please to observe, that a republication will not pass what was not mentioned in or intended in the first instance. For instance, to all my lands lying in Ditchfield—this will pass all lands lying in Ditchfield, and purchased subsequently to the making the devise and previously to its republication. But land subsequently purchased and lying in Ditchfield will not pass, and not mentioned will not pass.

Mr. Ruse having pointed out the effect and operation of a republication will now consider what is necessary what
Devises.

to constitute one—

Before the Stat. of Pa. & Pa., any words spoken in an
"executed" repute, would be a good repute; but since the Stat. & Pa.,
no express repute will be good. Yet there is no provision
clause in this Stat. which says that an express declaration will
not be a repute. There is no clause requiring a written
instrument to make a repute, as there is in case of
repeal. The determinations, which require a writing
signed by the testator, proceed upon the ground that the re-
reputation of a will is making a new one, but this reason does
not see why this reasoning would not as well operate before
the Stat., as since—

A repute to be good must be in writing and signed
according to the Stat. of frauds and ferriages, because
were this not the case, such proof must necessarily be
have been put in to prove a repute. If a disposition
by the creditor, which was the very evil the Stat.
intended to remedy—

If you are about to make an express repute, it is not
necessary that you write the same will over again, and at that it need not be subscribed by the witnesses;
yet the testator must sign and acknowledge it in their
A partial republication will however pass personal property purchased subsequently to the making of the will and prior to the publication.

A codicil to a will made and executed according to the statute, i.e., the devising clause will republish the will, to which it is a codicil. But there it was a doubt whether there should be a clause in the codicil, showing the testator's intention to republish.

It has been "questio vexata" whether a codicil to a will executed according to the statute, without a clause of republication, will republish that will. It is the opinion of Dr. Black, that a codicil to a will so made did republish it, upon the ground that whoever makes a codicil must contemplate the will, for its very greatness is to alter or substitute a contradiction from a will.

Another "questio vexata" has arisen, whether it will make any difference whether a codicil was of personal or real property. It has been held that if the codicil is annexed to the will it will have a repulsation if its subject matter be personal property only.

But what difference does it make whether the codicil be annexed or not to the will or not.
Devises

Altho' these Stat. 621. & 1557. 434, are contra, yet Mr. Howse says, that the consent of authorities make the codicil a good re-publication of a will disposing of real property, even tho' it be not annexed to the will.

The doctrine relative to a will being a will speaks from the time of its re-publication in certain cases, and objected in all the cases. But to it be remarked, that if a codicil re-published a will, yet it does not give it new properties it will only give it operation as the same will from that time.

Suppose a will and a codicil are both made the same day, or same time, can the operating or signing the codicil be applied to, or validate the will? it may be at the time one two authorities which seem to be contra. However Mr. Howse supposes they were not intended to contradict the principle. Stat. 599. Stat. 176.

One thing further, a will made by a minor will be good if re-published by him after he comes of age.

Of the admission of Probal evidence to explain both latent and patent ambiguities arising from Devises.

With regard to the admission of probal evidence to explain
Devises.

In both wills and deeds, there is not so much real difference as it first be conceived; that is nearly the same evidence may be admitted as to each.

It may be laid down as a general, if not an universal rule, that no prior declarations of a testator of what he intended are admissible to explain, enlarge, diminish or rescind his will or to give it any import, or make it any way different from the will itself.

Notwithstanding this rule, there are very cases where the declarations of the testator previous and subsequent to making the will, have been admitted to be proved. But there were declarations not made with specific reference to the will, they have been merely the testator's story indicative of the manner in which he intended to dispose or had disposed.

There is no testimony so vague, uncertain, and precarious as that which refers to what a man has said—men understand the same language very differently. Indeed what they said at one time, they may conceive of, and speak quite differently a few years after. Hence, the propriety of the general rule above, which goes to cut off testimony of the declarations of a man in his lifetime.

It will probably be asked what there may be proved by partial concerning wills or deeds? The answer is that you
Devises.

...may prove matters of fact by parol from which conclusive and
satisfactory inferences may be drawn. As in case of mortgages where
a man sells land and keeps the deed himself or remains in posses-
sion—now parol proof of these facts is satisfactory evidence
very often that it was not an absolute sale—these facts are such
as may be proved without danger of misrepresenting the under-
standing, for let it be remarked that this statute (of 1618) was enacted
not only to prevent frauds and injuries, but the innumerable mistakes
which were introduced previ-
ously to its enactment from the admission of parol testimony.

It is to be observed that no averment will be suffered
to be made unless it stands well with the deed, with i.e. in
deed does not in any degree contradict the will. Any fact
which stands well with the will, and from which the in-
ation of the testator can be collected may be excepted.

There are sometimes doubts which arise concerning
the will, and which may be explained by facts besides the will,
and there are called latent ambiguities. Parol proof will
here be admitted to explain the testator's meaning or inten-
tion— I mean parol proof of these extraneous facts.

As when a man devises property to his son James
and he has two sons of that name. Also devise of black
Devises

...and the devise had two farms called Black acre. In this case parole testimony will be admitted to explain the testator's intention.

...He where a man made a devise to his children naming them but left the youngest and favorite child unprovided for. Evidence was admitted of this fact.

In all these cases of latent ambiguity, or ambiguity either dehors the will, parole proof of some extraneous fact may be admitted to explain the testator's intention, but no evidence of any of his declarations.

But if this ambiguity appears upon the face of the will, upon reading it is not dehors the will and is therefore an ambiguity arises upon the face of the will upon reading dehors the will. Ambiguity patent. Now if the ambiguity is patent so great that it is impossible to form any opinion of what is intended and no sense can be made of it, no parole proof can be admitted and the will must therefore fail; but if the testator's intention can possibly be collected by taking the whole together the will is good. Into the first, where lands were devised to one of his children and no one could profitably tell which was intended this destroyed the will for no parole proof could be admitted to explain the intention entirely.
Devises.

Also desire to use of deacereums funeral etc. The native was here so corrupt as to give no data from which to form any opinion of who was intended and of course the will was sought.

But desire to use them being two or that name but living in different places. Now parol proof was admitted to the fact that he knew nothing of one name and of course the other was intended.

Where the ambiguity arises from the sentences of a will, a construction must be given to them if possible, therefore no parol testimony can be admitted to explain. As a devise to the right heirs on my mother's side, how to know what heirs a construction must be given.

Ambiguity defeats the will—It has been observed and is necessary to be remembered, that no averment can be admitted unless it stands well with the will.

Desire of £300 to the 4 children of cousin E.B. Now E.B. had 6 children; shall parol evidence be admitted to explain which four was intended? Yes; for it will stand well with the will—This is one of the cases where parol testimony was admitted as to what the devisee had said (which was a story of what she had done) and having no particular reference to the will in question.

Desire of £300 to the children of E.B. then testimony will not be admitted to prove that 4 children were intended, because
it would not stand well with the will.

Legacy of £300 to a charity, school in Kent; there were two charity schools in Kent—these were proof of the devisor's particular love for and attachment to me, was admitted, and deemed satisfactory.

Cases of false descriptions or to be more correct Exer. of wrong manner but of proper description.

There are cases in which parol evidence is admitted to explain wills but would not be admitted to deeds—If the devisee is named by a wrong name, yet if it was evident from my discription given that he was intended, he may claim.

As where a man had a niece and called her by a nick name—Devise to her by this nick name, but a discription of her, for the devisee had other nieces. Here the court let in evidence to prove the circumstances from which it was inferred that she was meant.

So also where there were two some devise to, by nick names. So also where the devisee forgot the name of the devisee, but devise to him, describing him as being in the service of the duke of Savoy.

No proof like this would be admitted in cases of deeds. The rule only extends to admit evidence that such an one
Devises

was described:

Where it is a devise giving £500 to Mr. leaving the
name blank it will be void, for no evidence will be offered
to explain who was intended.

Ambiguity - Patent arising from equivocal words.

Such proof is sometimes admitted to explain equivocal words, but
not equivocal sentences in a will i.e. parol proof of facts from
which it may be inferred who was meant.

As where two women were contemplated and mentioned
and in a devise, and at last in a sweeping clause, it is mentioned
and "I give and bequeath all to her" now parol proof would
be admitted to ascertain who was meant by her.

Again in case of a devise of undivided "senior and junior" all
proof was admitted to show whether son or daughter was intended
as devisee.

Again the circumstances of a man's family may in
introduce ambiguity, as where there is a devise to D. and
his children - how the word children in its legal sense
of signification has a different meaning according to the state
of the person to whom lands are thus devised. If lands are
designed to a man and his children it will go to himself
jointly in equal shares as tenant in common; and in this
case the word "children" will be a word of purchase.
But if he has none the word children in the same light as if the devise had been to him and the heirs of his body, it would be an estate tail, and in this case the word children would have been a word of purchase limitation. Now proof testimony or to the fact of his having or not having children is admissible.

The following case depended upon the words I devise to A. the whole of my estate: It is thought proper to observe that previous to the stat. of wills nothing but a life estate could pass by the word estate. In a deed there must have been the word heirs to make it a fee simple or a fee tail. But after the practice of making wills was introduced the intention of the testator began to be attended to. If it was clear that a larger estate than one for life was intended to be given it would be construed as an estate absolute. But where a man devises all his estate to A. for the payment of debts and it so happens that his personal estate will not pay all, does his real estate pass? This was long a question but it is now settled that proof evidence may be laid hold of to prove the circumstances by which it may be collected what the testator intended. In this case, that the personal property would by no means satisfy the demands, and
that, therefore, the devise must have intended to the real estate.

It is now also clearly settled that a devise of all one estate will be invalid, grant an estate in fea simple, at tho' it is not the case intended in devises.

In all these cases of "equivocal terms," parol proof will be admitted of circumstances which may make clear the intention of the testator.

But this doctrine of parol testimony being admitted is carried still further. For words not equivocal nor attended with apparent ambiguity may, when applied to testator's property, throw light upon these words, by arguments respecting the state of that property, and by this means receive such a construction as will suit the state of that property, contrary to what they technically import.

Case—"I give to T. the house called the black Bell tavern." So far there is no doubt, for in Eng, when a thing is named there, it only passes a life estate, tho' in Con. it passes a fee simple. The words "estate in" transform not equivocal—It has a certain definite meaning. The facts, however were that T. was already tenant in tail of the Bell tavern, and the devise for himself had only the revision after the estate tail was spent. Upon the death of the tenant in
Devises.

Till, without issue of his body, the tenant was claimed by the heir of the demesne. Now the question was, did the reversion pass by the demesne of the Bell tavern? Parchment proof was set in to prove the circumstances, while when taken altogether were conclusive proof that the demesne intended to part the remainder, notwithstanding that the words were unambiguous. It was determined to give that to give that he meant to give a different estate from what the words took technically in point. An estate in fee simple. Judge Holt being contra, a writ of error was taken but judgment was affirmed.

Another case turning upon the same ground. A woman devised £100 stock in long annuities to B. 100 £ stock in long annuities to C. 100 £ stock in long annuities to D. and the rest and residue of her estate to the tenants. But it turned out that the woman had in all but 120 £ stock in long annuities for annuities. She must then have intended to 300 £ by an equitable sale of the annuities which could be done and each devisee would have his bequest, and there would have been a remainder for the tenants. Then parched evidence was admitted to show the state of the property notwithstanding the property made use of tenants made use of were unequivocal. This was affirmed in the House of Lords.

The general rule which ought to be here laid down
is that no parol testimony shall be admitted unless it stands well with the will, and neither will any evidence be admitted to contra dict the legal operation of words in the will.

The case reported in 1732 before referred to of a devise to cousin E.B. and her 4 children—she having 6 children parol proof was admitted to show what 4 children the testator might—But in the same will there was a gift to 16 children; an attempt was made to introduce parol proof to show that by this the same 4 children were intended, but not admitted for it did not stand well with the will.

It has been said where a devisee appoints his debtor to release the debt will thereby be released, but A. appointed B. & C. his debtors, one to wit B owed him £8000, and C. his debtors, and parol proof could be admitted to show that the testator intended to release it: After his debts were paid and legatees were satisfied he gave the residuary to B. and C. his debtors. The parol proof was admitted to show that the debt was not released but was of & for to pay the residuary legatees, that is B. owed the £8000, and C. his debtors proof could be admitted to show that the testator intended to release it—It would not have stood well with the will.

It has been said where there is a devise of lands directing them to be sold for the payment of debts, it is construed according to
the English rule, that they are not to be sold for this purpose, until the personal property is first applied, and fails. As when a man made a will directing his lands to be sold to pay his debts, when in fact he was possessed of a personal estate at a larger amount. In this case it was contended by the heir that the real property could not be sold until the personal was first applied; on the other hand it was contended that it would contradict the legal operation of the writing which can never be done.  

Again, it has already been stated that whenever there is a will giving no legacy to the Esq., yet if there is any property remaining after the payment of debts and legacies the residuum in Eng. will go to the Esq. It is however different here where the Esq. is paid for his trouble. FOolish testimony was here not admissible to show that the testator intended that residuum should not go to the Esq.  

Impress this rule well on your memory that whenever the legal construction is, no parol testimony can be introduced to contradict it.  

A further branch of this doctrine is where parol evidence may (and sometimes the declaration of the testator himself) be admitted for the purpose of Rebutting an Equity.  

(Notes)
Devises.

Casting an Implication of Law.

On one side lie it down "part declarations even of a testator are likewise received in all cases to rebut the construction declarations, constructive declarations of a trust, put on words contrary to the legal sense of them by which is rebutting an equity; for in such cases the estate is in the devisee and the avowment is in effect part of the letter of the will."

Judge B., definition may be a little more perspicuous. The observer that Row and Clark have given different constructions to the same will is, the words in the same will; and where there is an equitative construction and a legal one, proof may be admitted to rebut an equitative one, and thereby make way for, and sit in the legal one. An example will illustrate this definition. As where A. devises lands to B., whom he appointed his E. for the payment of debts and legacies. Now B. having paid all the debts and legacies there was "residuum" the legal construction is that the E. should take this residuum, but the equitative one is that it is a rebutting trust in the hands of the E. for the heir at law. Now the question is can proof be introduced to rebut this equity that is, to show that it was the testator's intention that this residuum should go to the E.? It certainly can, for the resi...
estate is vested in the devisee.

Again, A makes a will and appoints B, his Ex. to direct him to give a legacy to C, then one to himself. Now if there had been no legacy to the Ex., the legal construction was clearly that the Ex. should have taken the residuum, and the equitable one that it was in trust for the heir. But even in this case where the legacy independent given these terms, yet proof was admitted to show the equity and not the implication of law, i.e., to show that there was the testator's intention that the Ex. should have the residuum a simpler.

It is a rule of equity that whenever a man mortgages an estate and dies, the heir of the mortgagee has a right to redeem; he may call upon the Ex. to furnish him with money out of the personal property. But notwithstanding this rule where a man made a personal mortgage, and on his death made his executors personal proof of war admitted to show that it was the devisee's intention that his executor should have his personal estate exempt from debts, and in consequence of this the heir could not have aid of the personal estate to pay off the debt mortgage estate debts; notwithstanding that by the rules of court the same was liable to be so applied.

But there are cases which are decided upon grounds not perfectly understood by the courts, and these
Devises

cases where partial proof is admitted to explain the testator's intention in

Repeated Legacies

Mr. B. conceive it to be settled that where there are two or more
legacies given in one instrument "in totum vel bis, et ejusdem genera" to
the same person, they will not be accumulative, but if in a
different instruments from the will there are two legacies given
to the same person in the same words, and of the same kind, as
in a codicil to the will they will be distinct and separate legacies, i.e.
they will be accumulative, this being the case Mr. B. asks of
where in the necessity of partial proof being introduced to
explain the testator's intention in repeated legacies?

It is also settled that where there is a devise of £500 to Mr. A. and afterwards at a future day the devisee made a
note giving the same sum to Mr. B. This note was deemed a codicil and therefore was an addition to the will £500
more. Partial proof was here admitted showing that the testator had declared that he would make up £500 to Mr. B.

Vide cases in Cow. on Dec. 526.

It should be particularly mentioned that in all the above
mentioned cases partial testimony is admitted on the
ground of standing well with the will.
Devises

Upon the same principle of the evidence not being contradictory to the will it has been held that parol proof may be brought to show that a devise is meant as a performance of a preceding agreement; for in such case the evidence is not made use of to construe the will, but to explain whether the one thing is in strict interpretation of the other.

As where a man before marriage, covenant with his intended wife to settle an estate on her— but neglects until near dying and then gives her in his devise what he had covenanted to settle upon her. Now the question is can parol proof be admitted to show that the testator gave it in satisfaction of a duty, yes, for this will in no way contravene or impeach the devise.

Parol evidence may be admitted in all cases to contradict parol, because to decide otherwise would be to make the rule instrumental in encouraging that which it is its object to prevent.

Of admitting parol evidence to explain devises

Mr. More has taken the pains to write a synopsis of the foregoing

lecture upon permitting parol testimony to be given in explain wills

for the use of his students of which the following is a copious

abridgment. He has given the greater different cases of
of general rules.

I. Part alters of the testator's declarations of his intention at the time of making the will are not admissible, for if those declarations are in conformity to the will they are useless; and if it is against the principles of the Law, and opposed to the state of frauds, to admit them to explain, enlarge, diminish, or rescind the language of the will, or give the words therein used a meaning different from what they obviously import—

II. When there appears an ambiguity on the face of the will, not arising from the use of equivocal words, but from the construction of sentences contained in the will, no partial proof of any kind is admissible to explain what the testator intended—

III. If an ambiguity arises, dehors the will, as in the case of two devisees of the same name, or of two persons known by the same name and one only is devised, in that case partial proof of the testator's intention not arising from his declarations, but to be inferred from the proof of certain facts, is admissible.

IV. When there is no ambiguity respecting the person who is intended as devisee, he being sufficiently described but called by a wrong name, evidence may be made of the true name.

V. When an equivocal word is used, relating to a person an
When a word is used, that is equivocal, because under some circumstances, it is a word of purchase and other circumstances, of a word of limitation, a partial avowment of the circumstances may be introduced.

When an equivocal word is used as to the quantity of the property devised and thereby it becomes uncertain from the words of the will what quantity of property is devised, partial avowment of the circumstances and state of property of the testator may be made to enable us thereby to discern what quantity of property the testator meant to devise.

The words are not equivocal, yet if their technical meaning will under the devise ridiculous and the conduct of the devisee unreasonable such meaning not working the state of property of the devisee, then the state of property may be avowed, for the purpose of producing such a conclusion of the words of the will, as will comport with the state of property not contrary to their technical meaning.

Probative evidence and even partial declarations of a testator are admissible to rebut an equity. It frequently happens that the construction of the words of a will in a court of Law is different from the equitable construction in Chancery. To restore the legal construction and thus to rebut the equitable construction,
parched testimony of the testator's intention is admissible, may be explained by the following case. A makes a will giving
many legacies, and amongst others a legacy to his son, and constitutes
his Ef. After all the debts and legacies are paid there being a
remainder and no residuary legatee - the legal construction as-
specting this residuum is that it belongs absolutely to E. The Ef,
the equitable construction is that he holds this residuum as trustee for the testator, next of kin and will be compelled
to distribute it among them. Now to rebut this equity or
equitable construction, parched evidence may be admitted to
prove that it was the intent of the testator, that the Ef
should have the residuum absolutely and thus restore the
legal construction.

X. In no case can parched proof be admitted, the legal con-
struction and place in its room the equitable one.

XI. Parched testimony is never admissible unless the constructive
intended to be produced by it stands well with the will.
This may be explained by the case in B. where the testator gave
a legacy to the 4 children of E. The fact B. had 6 children
2 by her first husband and 4 by the last; parched evidence
was admitted that the testator intended that the 4 children
by the last husband should have the legacy, for this does
not contradict the will but stands well with it.
some will there was an other legacy not to the 4 children but to the
children of the. - Proof testimony was offered to show the testator's
intended the 4 children by the first husband, but this was reject
ed, for the word children includes all the children and to retain
the construction to the four children would not stand well
with the will. &

XII. Proof testimony is admissible to prove that a legacy was
intended in satisfaction of preceding agreement.

Of Executory Devises and Remainders.

In the first place let it be observed, it necessary to make some
observations on the difference between Wills and Deeds, by way of
which introducing the subject of the intende to treat.

In the beginning of the lectures on Devises it was observed that the pole star in constructing wills was the intention of the testator. It is a rule of prime importance that the intention is always to govern in devises, provided it be con-
istent with the rules of law. Now if the latter part is to be understood in a certain sense, there would be no distinction
between wills and deeds. But this is not the case. In
deeds technical terms are adhered to in wills, the inten-
tion of the testator, provided such intention can be ascertai
Devises.

and in wills the words "per stirpes" "all my estate" "to one forever" do not convey a fee simple, but not so in deeds, the word "rent" must be inserted.

The rule that the intention is to govern in wills provides that the devisee is consistent with the order of law, does not refer to technical terms used to convey property, but to the nature of the estate given.

Now if the estate is of such a nature as can be given, no matter what terms are used it will pass, if it is fairly the intention of the testator that it should pass. If a man wishes to extend his wishes to split his dominion after his death, and therefore devise to one, and after him to another to be from generation to generation it will not be good, for the testator's intention of the testator is plain and indisputable, yet it is an illegality.

This seems to be a deviation from this rule in the case of estates.

Executory Devises, for in these an estate can be given inconsistent with the order of law, which is in direct opposition of the rule of law. An executory devise differs from an estate — in fee, an estate in tail, an estate for life and an estate for years. It is in fact a new kind of estate, it was anomalous.

Remainders and executory devises agree in this that they are estates to be enjoyed at some future period. The right in one case is vested by deed. In the other by will. But it is remarked, that a remainder can be as well created by will as
Devises.

by deed - As where a man by deed gives to A, an estate for years, remainder to B, and his heirs forever - So may he do it by will - 

A man cannot give an estate by deed to commence 20 years hence because it would be no remainder, but he could by devise - If it is an estate which would not be good by deed, it will be an executory devise - Where an estate is subject to termination in remainder, it will be a remainder otherwise an executory devise.

No estate made to commence "in future" will be good unless supported by a particular estate - It is the very principle which remains, which remainders rest - An estate is given to A for years, remainder to B, for years in fee - Here the interest passes entirely out of the grantor to a devisee to the particular estate man, and the remainder man, and the latter will have all the privileges and government of the estate, while in fee, possession of tenant for years, or the grantor would have had, the remainder remained in him - This is a vested remainder.

Because the estate is already in the hands of the remainder man, and cannot be defeated, but where the estate of the remainder man rests on some uncertain event, a person so that it may or may not vest, it is a contingent remainder. As where B gives an estate to A, for life, remainder to B's son unless

son the remainder is contingent. Because B's may never have a son but the moment he has one the remainder is
no longer contingent but vested. If you must be born during A's life otherwise the remainder can never vest for it is a rule that it must vest during the continuance of the particular estate or is instant that it determines. If A merely conveys an estate to B for life, the reversion in fee as a matter of course, still remains in A. To make either a contingent or vested remainder, there must always be a precedent estate.

It is a rule that a contingent remainder cannot be created upon any estate less than a life estate, because the freehold must pop out of the grantor and vest in some one at the time of granting and when it rests upon a contingency there is no one in whom it can vest, for a freehold estate cannot vest in one for years.

Another maxim is of so much importance as to demand attention. It is that in a deed a fee simple cannot be limited upon a fee simple, which may be done in a devise — As where B gives by a deed an estate to A, and his heirs, but provided A dies before he arrives to the age of 21 years, then to B and his heirs — it will be void, but in a will it will be good.

One thing further as to the difference between deeds & wills — By deed no man can create a remainder in a hope for years i.e. in personal property, because in law a life estate is greater than an estate for years, but in a will this can be done.
Devises.

Mr. Coke has thought it unnecessary to refer to any authority for what he has laid down, but recommends C.M. 166, and Wood's various lectures as containing all the important matter.

Of Remainders.

"A remainder is an estate intended to take effect, and be enjoyed after another estate is ended." As where J.S. grants an estate to A for your remainder to B and his heirs forever. Now J.S. has parted with all his estate and interest, and has vested a remainder in B, the remainder is in fact a present estate, but to be enjoyed in future.

When an estate is greater than for years, it is necessary to pass it. To become there is no actual delivery of its delivery of seisin at this day in Eng. but the delivery of the deed is symbolic of it.

A remainder can never be vested upon an estate which passes out of the grantor at the time of creating the particular estate, but it is not essentially necessary that this estate, vested in the remainder man, for it may be a contingent remainder, but it must vest in the remainder man during the continuance of the particular estate or "in instantibus" that it determines, if it does not it can never vest.
Devises.

A remainder may be limited to take effect upon an uncertain person or upon an uncertain event. The uncertain person or event must be "potentia propeingua" or probable contingency & not "potentia remota" or a remote possibility.

1. As to an uncertain person - An estate to A, for life remainder to B's eldest son, now the event of B's having a son is "potentia propeingua." But an estate to A, for life remainder to B's eldest grandson B. having neither son nor grandson is "potentia remota." An estate to A, for life and to the heirs of B, if B being not in his, there is also "potentia remota." B's eldest son named John is remote all. If this estate is void in its creation it can never have effect although all the contingencies happen.

2. As to the uncertainty of the event - An estate to A, for life remainder over to B provided B. survives them both. If B. dies before A, the remainder is gone and can never vest. These remainders are contingent.

If this particular estate, which is said to support the remainder, is destroyed before the remainder vests it can never after vest, for when the foundation stones are swept away the fabric itself must fall.

In case of contingent remainders, the tenant for life may destroy the remainder by perfecting or surrendering up his own estate as well as by his death before the remainder
Devises.

man is in a way. This has introduced the practical practice of constituting trustees to support contingent remainders as where there is an estate to A. for life remainder to B. if he survives A. Now if A. does any act by which he forfeits it will destroy the remainder, but B. to prevent this forfeiture, has a clause inserted in the grant that if "D shall be a trustee to preserve the contingent remainder during the natural life of A. this is in fact throwing an other prop under the building and was first known in the reign of Earl I.

No more appears that the doctrine of remainders has been called difficult. But it is difficult only as learning to a shoemaker is difficult it is merely mechanical and requires only attention.

Of Acquity Devises.

An acquity devise properly so called is an estate created by will to be enjoyed at some future period, and it must be such an estate as cannot fall under the denomination of remainder.

The first difference between an acquity devise and a remainder, is that no particular estate is necessary to make it, the former. As an estate to commence on the marriage of a person, or an estate to A. and his heirs on the day after
Devises

2. marriage — This is a fee hold made to commence in future and upon a contingency too. An estate unknown at common law, for then every fee hold must commence in present if even it is to be enjoyed in future. This practice of creating estates to commence in future was made entirely by the courts. The example above stated is not an executory devise because created by will, but because it is made to commence in future without any estate to support it. 2 Bl. c. 176.

2. A second difference between an ex. deo. and a rent is that in the former, a fee simple or any other estate of estate may be limited after a fee simple upon some contingency. As if a man devise lands to B. and his heirs, but if he die before the age of 21, then to B and his heirs. This remainder then void by death in good by your way of ex. deo. But in both of these kind of ex. deo. the contingency ought to be such as to happen within a reasonable time, because otherwise perpetuities are created which the abores. An estate to B. and his heirs, but if no heirs 100 years hence then to C. and his heirs. This would be ill.

The length of time which was first determined that the contingency should happen in, was during a life or lives in being. Afterwards the time was extended: as in case of a devise of to the eldest son of B. how in the first instance the eldest
son must have been born before the death of B. in the second in a
estate it was extended to the time at which B. should arrive at
the age of 21. which might be 21 years after the death of B. in the
third place, and finally the period was extended to a life in
being which was to last the life of the mother and the subsequent
injury of her son—making in the whole a life in being 21 year
and 9 months afterwards. The reason of this gnaw the 3° advance
of 9 months was when the father might die and leave the mother
eruption with the son to whom the property was devised on the arrival
of the age of 21. This time was usually allowed in the usual course
of gestation. 24th. 1797.

3. By executory devise a remainder may be created in a term
of years or a life for years may be given to one man for his life
afterwards limited over in remainder to another, which, could not be
done by deed, because in law a life estate is esteemed a greater estate
than one even one for 1000 years. As e.g. A. may give a life to B. in
a term of years, with remainder over to C. but in order to avoid
perpetuity which the law abhors with its concomitant inconve
nience to society, it settled that the remainder man must be
in use at the time of the limitation—otherwise a man might
extend his dominion from one generation to another for 1000 which
would be creating perpetuities. But all the remainder men
must be in use in use so that all the candler may be titled

Deavors.

 Burning at once. Such remainders may not be limited to take effect unless upon such such contingency as must happen (if at all) during the life of the first devisee. &c. 1725.

Statute of Connecticut.

The statute of can. places remainders and executory devises upon one and the same footing. Such a statute, however, has not been adopted in the states generally.

This statute, declares that all kinds of estates may be given by deed or will to any person or purpose in trust to the immediate descendants of those in error. Which completely does away the major part of laws that an estate cannot be made to commence in futuro. By this statute, an estate may be given to A, and descend to the youngest child of B, not born. It can go no farther; he cannot have dominion beyond the second generation.

It shall first be observed in this place, that there has been a great deal of foolishness in the books about the legal construction given to the words "dying without issue" by an estate. And if he should die without issue, then to C. If there were not been a lawyer every body would have known how to have construed these words. For the
Devises

meaning of these would naturally have been without issue of

hundred... without extending to great grandchildren; future not-

generations i.e., without extending to great grandchildren

grandchildren. But according to the legal construc-

construction a man may die without issue an hundred or

a thousand years after his death natural death. This

law however remains unmetred in Eng. but appears to be

ridiculed and sneered at in some of our courts.

Cases exemplifying the nature of Remainders

and Executory Devises.

1st. devise an estate to to his wife for life, remainder over

to C. This is a good remainder vested.

2nd. A devise to B. his wife for life, remainder to the heirs of

his eldest son his son then having no heirs. Now this is a good

contingent remaindered: one executory devise for it has the

properties of a remainder.

3rd. A devise an estate to B. for life, remainder over to C. &

his heirs forever, but if my son A. pays to my son C. £500 with

in 3 months after his mother's death then to A. and his heirs.

This will be a good executory devise for a fee is limited after

a year. - 10 mod. 420. 2 per
This distinction is necessary where the person in question is uncertain.
Devises

4. This case is a leading one. It devolves to B. and his heirs forever. But if A dies without issue living, then to B. and his heirs forever, Ex. 21. 6. This was an ex. dem.


One word in this place with respect to the distinction between a contingent and vested remainder. A remainder is not contingent because it may never vest, for a remainder vested in interest may never vest in possession. A distinction may be drawn in this way. If there is a capacity in the remainder man (that is if he is in eye) to take at the time of the creation of the remainder, it will be a vested remainder, but if he is not in eye, he will not have capacity to take and therefore it will be a contingent remainder. (2)

Of devises conferring Power to executors and other persons to sell the Testament's property.

A man not only has power to devise his estate himself, but he may confer or give away that power either by deed or will.

This power is generally most commonly to executors, but yet it may as well be transferred to others.
Devises

Sometimes a mere naked authority to dispose of the property is given, at another an interest is coupled with such an authority.

As to the first. Where there is a devise that his Executor shall sell, that they may sell, or that they have power to sell, if it confers but a naked authority and any conveyance made by such authority executor will be valid. Some see that the law from indulgence to testament permits them to have some sort of dominion over their property even after their death.

As to the second. When I devise to my son to sell my property, they have not only a power but an interest in the legal title is in them. This distinction Mr. Keane considers as unfounded, for he supposes that the object in each would be the same, and so he thinks it would be determined in law when the question comes fairly up.

If there is a mere naked authority devise to a man to sell, it can be considered in no other light than as a power of attorney and of course if this power is given to two men a conveyance cannot be made by one alone, because powers of attorney are construed strictly always; the conveyance must be executed jointly except it is otherwise provided in the will. The devise do not take as devise but as appointee. But it has
been determined, that in case that in case there are three parties if one die the other two may convey or sell.

Also that where a man has given power to his spouse in law to sell a joint conveyance i.e., a conveyance of them all only will be good. But where such power was given to his son in law, a conveyance by any two will be good. And if the power is given to any of them then the act of one will be sufficient.

It is a principle established in ch. that whoever has such a power to sell or dispose of property may be compelled to do by the Registar or Auditor filing a bill in equity for that purpose. But the appointee acts by someone competent to act, the case above suppose them to have accepted which if they once do they are competent to act.

It is frequently the case that men devise their lands to be sold without mentioning mentioning by whom. In such cases it has been determined that the donee may sell and the sale will be valid, will be valid. But how if they do not sell and the courts have no authority to compel them to do it? The court will it frequently happens appoint a truster for the purpose. 1 Decr. 304.

All the difference between a naked power and one
Devises.

with an interest, i.e., that in the lifetime of the devisee or appointee, have in them the legal title, until they do sell, and then they may enjoy the estate until that time, but they will be compelled to sell.

Where an estate is given to B to be distrained, or to maintain children or both of these cases, they have an interest as well as a power.

Anciently there was a practice for the testator to devise his property to his B to dispose for the good of his soul. In this case it seems the heir had a right to claim, which if he did not, the B would be sure to sell, for it was pleasing for him to have the money to use as he pleased.

Observations applicable to the states wherein the
statute of Uses regulates Wills and Devises.

Before the statute of Uses, 24 Geo. 3. Where A. gave an estate to B. for the use of C. C. the cestui que usa would compel B. the

estate to pay over to him the rents, profits &c. The practice of granting these trust estates (as has been already been observed in a locality on considerations) arose from the frequent for

suspension of estates during the civil wars between which con

curred B. The owners of lands would convey them to others.
purposes to the use of themselves or their friends to save them from
perilous — This practice brought along with it great confusion, and immense inconvenience, which induced the
enactment of the Stat. of 1824, declaring the man to whose use
lands were given should not only have the use but the
proposition, not only the beneficial but the legal interest of
the simple was vested in the extinct use.

But suppose an estate devised to B. for the use of C. would
then stat. operate upon it? If certainly would. operate to vest both the
latter and possession in C. the "use man." In these states, however
when the statute of use has no force, this would not be the
case. If then this stat. cut up by the roots all such estates as
there, given in trust, how happens it that in these countries
where this very stat. appears greater, that there are so many of
trust estates? How is this stat. evaded for certainly it must
be if trust estates are allowed. That statute was defeated by
connecting 4 practices in the will or conveyance. Where A.
given an estate to B. for the use of C. in trust for D. the latter
of whom was to be profited by the grant; and this practice
has introduced the whole doctrine of trust estates.

Should a man then attempt to create a trust
estate by a devise to be B. for the use of C. the statute would
not eat it up quicker or lightning" In Conn. where the statute of
Devises.

user is understood by an other state this would create constitute a good trust estate.

There has been a most useful statute inadvertently but it is justice to observe that courts of Chancery have so safely regulated trust estates, that little danger need can be apperceived from them.


It is apparent from the Eng. Statute that no property is devisable in Eng. except property held in free simple. But to enable a man to devise it is not necessary that he should be in actual possession, for a man may devise his remainder interest on occasion as may devise his reversion, but a man in order to devise his must be seized. The fact is that in case of a reversion the seizure of the successor's tenant or lessor is his reversion, so of the remainder man.

But if a man is actually dispossessed that is turned out of possession he cannot devise the premises of which he is so seized disposed.

A man may devise all deviseable possible contingent interest in the nature of a free simple.

An estate in jointure cannot be devised—neither
Devises

ran an estate tait; nor an estate for the life of the testator, or to be enjoyed by the testator for the life of another.

Difference in Law. All persons here may devise any estate of which they are possessed, except estates tail - A joint tenancy may be devised here - A man need not be seized here to enable him to devise.

How a devise may become Inoperative.

One way in which a devise may become inoperative has already been largely treated of and which will not be taken up again. We now refer to sequestrations.

I. But then a will may become inoperative by being new revokèd.

II. A will may likewise become inoperative by reason of uncertainty. As where a devise is in these words, "to the right heir of my son, name and fruitfully set part and for life." Also "all my freehold to my wife for 5 years" and in a codicil made afterwards, "my estate is out of freehold before the 5 years are expired there to." He also devise "to the two best men at White Hall." So also to the poorest man at Town."

In all these cases, the will is unintelligible upon the face of it, is inoperative when taken altogether, moral and interpretation
can be given to it.

But a will may become inoperative by uncertainty which may arise either from the will, or where a man gives such an estate to his son John he having two sons of that name. Now we have already seen that proof proof may be admitted to identify the person and thereby explain the testator's intention. Then will in some cases become inoperative but if no such proof can be had the devise becomes ineffective.

III. A devise may also become inoperative where the manifest intention of the testator is contrary to or opposed to the policy of the law. Cases of this kind have occurred very frequently. As a devise by A. to B. and his heirs forever. That B. shall not have power to alienate the estate. It is a principle ingredient in a fee simple that the owner have power to alienate; the intention of the testator is there of fore contrary to law. It will be recollected however that this will however by no means render the will void. It will only vest the estate, the leg correct upon the estate which is contrary to law. The devisee will consequently take a fee simple.

So also a devise of an estate to A. and his heirs male in attempt forever, will be construed to create such an estate as the law knows nothing of. To have devised to the heirs male of the body of B. would have been a legal intention, for then an estate tail male would have been created. As the case is stated a fee simple would vest in the devisee.
Devises.

It would also be the same if a man should devise an estate tail to A, the heirs of his body be prohibiting him from docking such an estate by fine or common recovery.

So also in case of a devise from one generation to another, so also where there is a devise of an estate free from Down.

The cases are opposed to legal policy.

IV. Another set of cases which formerly occurred, and which will be mentioned now for the sake of regularity, which are opposed to legal policy are, Where testators having several children devised all their estate to their eldest son, who would have taken all.

It formerly made a great difference whether in such a case a son would take as devisee or heir, for in the former case the property would have been liable for debts; in the former it would not. But now in either case or in all cases, the property will be liable for the testator's debts.

V. A devise may become irrevocable by the devisee's waiving of it which he may always do. This will very frequently be the case where the legacies or debts will amount to more than the property devised. In such cases devises will not burden them unless for nothing.

VI. A devisee may have done the very thing in his lifetime, which he devised to have done, at the expense of his property after his death, which will always satisfy the will, and under it as to
that, insomuch as, where a man makes a will and gives $400 out of his personal property to his eldest son for the purpose of building him an house, the remainder of his estate to his other children; the testator does not die so soon as expected, but builds the house for his son during his lifetime, and then dies; this is a satisfactory provision to the

VII. devisees may be defeated or become inoperative by statute, which subjects the lands devised to the payment of debts.

Who may Devise.

All persons were incapable of devise real property before the state of malls 32 Hen. 8, except those who lived in parts where there were special customs. Before this statute, every person could devise personal property. The statutes of Hen. 8 Charles gave a power of devining to all persons to devise real property except infants, idiots, and persons of unsound mind; these it seems were incapable of devising real personal property at term. Since, before the statute—

True devinors had also a positive disqualification to devine by the statute Hen. 8.

18. Minor or infant are now prohibited on the ground of a want of discretion.
Devises.

II. The title, and persons of some, are memory, are also disqualified.

opposed on the ground of incapacity, or want of discretion to direct the course in which their property ought to go. Whether persons have sufficient capacity is to be investigated by the production of evidence and to be left to the determination of the trial. A man is not to be excluded on the ground of idiocy merely; upon the belief or suggestion of one man, the court or jury being the triers must judge for themselves.

If a man has capacity to take due and proper care of his property and affairs, and to manage them with ordinary discretion, he is not a subject of disqualification within the statute. Hence a man is enabled him to devise must not only be capable of answering familiar questions, but he must be of a sound disposing mind.

IV. As to the power of testators to devise.

Testators are disqualified positively to devise by the statute of 1834, notwithstanding some contend that there is no disqualification arising from an incapacity to devise at law. Laws.

But can some persons devise in those states where this statute is not adopted in the great question? In some states it has been determined that they can devise property which they have to their sole and separate use, that they may devise any real property which they may bring into marriage as well as all other kinds.
of property which they had to their sole and separate use, without the consent of the husband, and Mr. B. considers this a covert de

It was first determined in the court of probate in the affirmative. It was then taken to the superior court and there determined in the negative, and from thence to the supreme court of errors where it was determined in the affirmative & upon application to the Legislature to have an other trial it was refused to be granted. In the council there was that one di

This to be sure was a novel question and the principle determined was condemned by lawyers generally upon the ground that from courts are under the coercion and con

Now the determination if it is correct in Con. it is cor

In Con. there is nothing in the law which Mr. B. supposes in incapacity from courts. By the words of the law: "Infants, idiots, and persons of unsane memory and all others legally incapacitated" are disqualified - Does this split then include a covert upon some courts? In covert ine legal disqualification?
Of they were intended by the stat. by legislation why were
they not mentioned or named? Nothing could have been
more and nothing more natural than to have done this. If so
other persons except those mentioned are legally incapacitated, and there words "all others legally incapac-
itated" are merely words of abundant caution. These are per-
sions have been under deers, or the absolute control of others, or
persons under overfurs who could not devise but some coverts
or certainly not intende under this claus.

Having attempted to show that the stat. of law do not
either literally or virtually exclude or disqualify married women,
the question remaining is could some covert devise their per-
sonal property at law, law for these no one could devise real
property. If in Eng. law, the law, they could devise their person-
al property, it is agreed on all hands that they can devise real
property here for one state regulate both.

If there can be a case so circumstanced that a maid-
woman can devise her personal property (I mean property in
her own right entirely independent of her husband) without vi-
olation of the least with the nail to or with the husband's
legal rights, then we can see no objections to prevent her from
devising her such property. If in devising she would in such
a case effect her husband's manatit rights or legal rights
Devises

it is agreed that she cannot devise

But let me ask if she has property to her sole and separate use, where neither the <omitted> or it. Why should the husband have control over it, where it can never possibly go to him? Why are her wishes not to be gratified as well as his, wherein it will not injure him or affect his marital rights, in some possible degree?

But there are only arguments which if against lawyer-<omitted> yields, however forcible or convincing? But is this the case?

To the opponents of this determination say (in loc.) that the wife cannot contract or devise alone because she and her husband are one; this is truly ridiculous; for if they are one how comes it to pass that the husband can contract, and she cannot without the concurrence of the wife?

It is also said, that the wife has no will of her own this is not true in any sense. If she has no will what is it necessary that she should join her husband to convey a fee simple? The estate must be had to by pass his life estate.

So the agent is wanting to pass his fee simple. Besides when the wife is guilty of an offence is she not for an subject to be punish-<omitted> as his? most certainly.

The opposers of this principle refer to the cases in the books, wherein it is said the will of a married woman is good, with
Devises.

the will or assent of the husband—therefore say they, it would not not be good without this assent—The answer is ready to this is ready. All these cases, without a solitary exception, are where the wife sold away the property of the husband, which do not at all, reach the case of a will of her own p".

4th. In Reeve's history, there is a note signed by Bracton saying generally that once courts can devise. The meaning of Bracton is obvious—they cannot generally devise, because they cannot have not generally property to their sole and separate use.

Both Linwood and Arch-bishop Stafford, think it very strange that there should be a question with respect to a fine court's having power to devise her separate property.

5th. It was anciently the case practice to endow ad fitem societas with personal personal property. Linwood maintains that, the wife could devise this property—these cases striking into antiquity, were beyond a doubt what was then considered as law by men of business.

6th. Before the Stat. Car. 2, which statute makes the testator administrator of the wife and therefore gives him the power in action for the payment of debts, her debts. Before this statute, if the wife had chosen in action never meddled with collected or reduced to papas
Devises

...cession by the husband during coverture, she could dispose them. The incapacity to do this now arises from an incapacity introduced by the statute above quoted.

If this is correct, she may dispose of ecclesiastical property which she holds in her own right or separate, distinct from her husband. It has been so determined.

The number of cases of separate property which continually arise in Theke's opinion unequivocally decide this question.

In every book it is found that a wife cannot do what she chooses with her separate property. Why then may she not dispose of it? She cannot in Eng. on account of the prospective disqualification by the statute, nor, and not because an incapacity arises from coverture.

If coverture disqualified her, then she would not be at liberty to sell or convey her property, which we find she continually does under the protection of the law, and without affecting the husband's manumit rights. The property, we know must be subject to the husband's coverture, and so vice versa his to her.

Why then is asked) may a wife covert not dispose in these states, where no disqualification is imposed by statute? The only reason against the position is that pure coverture are under the coercion and control of their husbands and women this upon a slight examination vanishes. For if this argument proves...
Devises.

anything it prove too much were this reason to have its full to
side, the same course would be incapable to convey their real
estate property, which they in fact do every day for surely the
confin would operate in sales, and conveyances as well as devi
cen if it wavered one it would waver the other.

If it is said that when women devise they are generally weak
in body and mind and therefore more unfit subject to coercion,
the answer is at hand this does not apply to their power to
devise but stirs alone at the policy and validity of permitting

deterred difficulties. The question is can a female devise when
well in health have they the power then? W T, is in affirmative.

This is indeed analogous to the law respecting to the power
of some coverts to contract. If a husband is spirited or banished
he, the wife can certainly contract.

The ground on which the husband can join his wife
in the disposal of her property is uniformly to give up his own
right, and not hers.

But say the opposite of this principle of female coverts may devise
against the will of their husbands why may they not convey against
their wills? There is no statute disqualifying them from convey
sing. The fact is that by then conveying she would by their deprive
him of the usefulness of their property during life, which he has an
Indispensable right to, and a privation of which would affect his
marital rights.

Besides, there would contradict a settled maxim that
a freedman cannot be made to commence in futuro, which would
be the case if such conveyance should have validity without his
agent. She could not then be permitted to create a remainder
because it would contradict an other maxim of the Eng. Law that
a remainder must commence at the time of creating a partizan
an estate which is said to support it.

The Eng. Law then does not itself disqualify some estates
to devise—they have power therefore so to do in all the states where
one they have not disqualified them by statute.

There is a principle in Eng. that the person devising must
have power to devise at the time of making the will, or it will
never afterwards be valid. As when a married woman devises
afterwards being disinherited republishes the devise now she
being incapacitated at the inception of her will her devise
there will not make it good or valid.

There was anciently a practice in Eng. that when men
had good house wifes, they would set apart for them a certain
portion of personal property called their reasonable part, which
they were permitted to devise and such will was good now
this was not because there was a disqualification for if
it had been the consequence or design of the husband, could not have
made a will good, when in its reception was lead and void.

The following are some of the principal authorities connect-
red with the foregoing principle — 1 Stew's 5th. Eng. Laws 217. 1101, 476
22. 34. 15. 4. 29. 37. 170. 1 Bro. Ch. 10. 10. 15. 17. 18. 23. 28. 3 30. 11. 1709.
R. 14. 20. 1. 11. 126. 2. 36. 41. 6. 6. 2. 11. 17. 23. 8. 11. 217.

Surely, Impairment, and the are disqualifica-
tions to a man's deceiving. Where a devisee has been under any
of these, the courts will go greater lengths to set aside wills than
they will deeds.

Whenever a man is sick or dying, death, or in sup-
posed, procures respite from suffering, has made a will ac-
cording to the design of those who have imparted his wish will
be set aside — As where a woman charged her husband to fa-
sion to a particular child.

All the disqualifications of devisees have been no men-
tioned. It remains to say that all persons who are siezed of
property legally may devise, and so may all persons who have an
equitas to claim a seisin for it is all the seisin which such
a claimant can have.
Of Devisees.

It is almost impossible to find a man who cannot be a devisee. It is clear that all persons may unless they are under some state of civil disability or disqualification.

A devisee may be made to a person in ventre sa mere; thereupon a grant to a devisee has nothing to do with a devisee. A devisee cannot therefore be compelled to take the property devised to him. In grant to the property granted was vested immediately; therefore the noise made about the agent of the grantee is naught.

Property devised vests instantly upon the death of the devisee.

Contemn is no disqualification of a devisee; it is said the husband may agree a grant to her taking as devisee. It is acknowledged he may do so during his life, but as an estate he will may be made to commence intestate, he cannot hinder her taking as devisee after his death.

It was once a question whether a husband could devise to his wife. It was said he could not because he and she were one to have devised to her would have been devising to himself which would be absurd.
Devises.

But when it was considered, that the estate devised was only to commence after his death, it put an end to this "due wife" 사양 talked about.

A man may also grant lands to his wife that any medium be to convey to an other person and be immediately to convey to another her. This is now the practice in Co.

But in Eng, the statute of Uses has given to husbands a more direct way of conveying to their widows. As a man conveys to Tenants for the use of his wife this is by the deed an immediate conveyance to his wife.

It may be seen then that there is no such difference between devises and devises where is pretended.

ALIENS. - It has been said that aliens cannot be devises. It is true that aliens cannot legally hold property devised; but yet in case of a devise the interest does pass out of the devisee to the alien. He certainly can take as devisee, tho' the property would be forfeited upon his found i.e. at soon as he was legally proved to be an alien.

Illegitimate CHILDREN. It has been said that the illegitimate being "filiu muller" or "filiu perpetu" cannot take as devisee. By the same manner of reasoning we may know they were never born.

The fact is that they may always take by grant or
Dissises.

due, after they have obtained a name by reputation after the year and before——

Suppose a man devises to his eldest son, and his eldest son is illegitimate, would he take? No, the law presumes no illegitimacy but that he intended his eldest son born in lawful wed locks.

But suppose a man makes an estate in remainder to his eldest son known whether illegitimate or not, the first if illegimate could not take having no name by reputation. But a devise to his illegitimate children would be good. If however he had 3 illegitimate children born and three unborn, the former five sons only would take. If he should not say to his sons' yet if to them by name, and they had obtained names by reputation then the devise would be good.

An estate cannot either be devised or granted to illegitimate children unborn.

In a devise where an estate is made to commence "in futuro" it is not necessary so particularly to describe a devisee but in deeds which must vest an estate "in presenti" the grantee must be particularly described.

Thus a devise to A on his marrying a woman of a certain name, so this devise will vest the property on such marriage.

In devise uncertainly as to the person who is to take
in his man's uncommon. - Of a devise to one of a certain man's children who shall first get married -

Corresponding persons not in esse - A joint deal has been said as to persons in esse not in esse taking by deeds and wills.

Deeds and devises do vary in this particular; for an estate may be devised generally to persons unborn, if not too far extended. An estate can be created by deed to vest in future except in the case of contingent remainders.

The ventre sa mère - An estate conveyed to one in the ventre sa mère, will not be valid unless by way of remainder. In case of death the civil law distributed the estate alike alike to one in ventre sa mère as with others.

Formerly a devise to a child when born (futura de present) would be good; but to an unborn (futura de futuro) child, not so - but now in both cases valid. - A disgraceful question.

It is a rule if you can collect from the will that the testator intended a future disposition to take effect at the birth of the child, it will be a good devise. As devise of the child should he be born.

Civil deserter - An estate may not only be given to another to the same persons as Ept. to the heir of and any words in the will which will direct as to the person intended, will be sufficient at the no name be mentioned. It depends.