the property against strangers; and the tenant is on the spot, and presumed to be able to protect it.

79. *What were the ancient remedies for waste?*—77, 78.

The ancient remedies were writs of *estrepement*, and waste; but they are now essentially obsolete. And the modern practice is to resort to an injunction bill, when the injury would be irreparable, or to an action on the case in the nature of waste, to recover damages.

80. *Was not the provision in the statute of Gloucester giving, by way of penalty, the forfeiture of the place wasted, and treble damages, reënacted in New York and Virginia?*—80, 81.

It was; and it is the acknowledged rule of recovery, in some of the other States, in the action of waste. But the writ of waste is gone out of use, and a special action on the case, in the nature of waste, is the substitute.

LECTURE LVI.

OF ESTATES FOR YEARS, AT WILL, AND AT SUFFERANCE.

1. *What is a lease for years?*—85.

It is a contract for the possession and profits of land, for a determinate period, with the recompense of rent; and it is deemed an estate for years, though the number of years should exceed the ordinary limit of human life.

2. *Is an estate for life a higher and greater estate than an estate for years?*—85.

It is; notwithstanding the lease, according to Sir Edward Coke, should be for a thousand years or more; and if the lease be made for a less time than a single year, the lessee is still ranked among tenants for years.

3. *Have we any instances of long leases in this country?*—93, 94, *n.*

Yes; some of terms of nearly one thousand years. But the revised Constitution of New York, of 1846, declared that no leases or grants of agricultural lands, to be thereafter made, for longer than twelve years, and reserving rent or service of any kind, should be valid. There is a similar provision in Wisconsin, the longest term there allowed being fifteen years, and in Alabama no leasehold estates can be created for more than twenty years. In Massachusetts, since 1836, lessees and assignees of lessees of real estate, for terms of one hundred years or more, of which at least fifty are unexpired, are regarded as freeholders, and the estate subject, like freehold estates, to descent, devise, dower and execution. In Ohio, since 1821, lands held under permanent leases are considered real estate in regard to judgments and executions. And in the purview of the Ohio statutes, leasehold estates, for the most essential purposes, as judgments, executions, descent and distribution, are regarded as freeholds or real estate.

4. *May leases for years be made to commence* in futuro?—95.

Yes; for, being chattel interests, they never were required to be created by feoffment and livery of seisin.

5. *How may leases for years be created?*—95.

The statute of frauds (which has been very generally adopted in this country) declared that all leases for years not put in writing should have the force of estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the time shall amount to two third parts of the full improved value of the thing demised. In New York, the statute declares that no estate or interest in lands, other than leases for a term not exceeding one year, shall be created unless by deed in writing, signed by the party; and every contract for leasing longer than one year, or for the sale of lands or any interest therein, is declared void unless in writing and subscribed by the party.

6. *If land be let upon shares, for a single crop only, does that amount to a lease?*—95.

No; the possession remains in the owner.

7. *May a lessee for years assign his interest?*—96.

Yes; he may assign or grant over his whole interest, unless restrained by covenant not to assign without leave of the lessor. He may underlet and encumber the land with rent and other charges. If the deed passes all the estate, or time, of the termor, it is an assignment; but if it be for less than the whole term, it is an under-lease and leaves a reversion in the termor.

8. *May leases operate by way of estoppel?*—98.

Yes; when they are not supplied from the ownership of the lessor, but are made by persons who have no vested interest at the time.

9. *How may a term for years be defeated?*—99, 100.

By way of merger, when it meets another term immediately expectant thereon. The elder term merges in the term in reversion or remainder. A merger also takes place, when there is a union of the freehold or fee and the term, in one person, in the same right, and at the same time.

As a general rule, equal estates will not drown in each other. The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person.

10. *What is a surrender?*—103, 104.

Surrender is the yielding up of an estate for life or years to him that hath the next immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement. It may be made expressly, or be implied in law. The latter is when an estate, incompatible with the existing estate, is accepted; or the lessee takes a new lease of the same lands.

11. *Is a tenant for years entitled to emblements?*—109.

Not if the lease be for a certain period, and does not depend upon any contingency.

12. *What is an estate at will?*—110–115.

An estate at will is where one man lets land to another, to

hold at the will of the lessor. But estates at will have become almost extinguished, under the operation of judicial decisions converting them into tenancies from year to year, when the tenant is suffered by the landlord to enter on the possession of a new year. The New York Revised Statutes authorize a summary proceeding to regain possession where the tenant for one or more years, or for a part of a year, or at will, or at sufferance, holds wrongfully against his landlord; but one month's notice to remove must be given to a tenant at will, or sufferance, before application be made for process under the act. Summary proceedings have also been provided in such cases by statute in Pennsylvania, Maine and other States.

13. *Who is a tenant at sufferance?*—116.

A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong, after the determination of his interest.

LECTURE LVII.

OF ESTATES UPON CONDITION.

1. *What are estates upon condition, and how are they divided by Littleton?*—121.

Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed. They are divided by Littleton into estates upon condition implied or in law, and estates upon condition express or in deed.

2. *What are estates upon condition in law?*—121.

They are such as have a condition impliedly annexed to them, without any condition specified in the deed or will.

3. *Of what extraction is the doctrine of estates upon condition, and from what did it result?*—122.

It is of feudal extraction, and resulted from the obligations arising out of the feudal relation.

4. *What are conditions in a deed?*—123.

The conditions are expressly mentioned in the contract between the parties, and the object of them is either to avoid, or defeat an estate; as if a man (to use the case put by Littleton) enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an express condition annexed, that if the rent be unpaid, the feoffor and his heirs may enter, and hold the lands free of the feoffment. So, if a grant be to A in fee, with a proviso, that if he did not pay twenty pounds by such a day, the estate should be void. It is usual, in the grant, to reserve in express terms, to the grantor and his heirs, a right of entry for the breach of the condition; but the grantor and his heirs may enter, and take advantage of the breach, by ejectment, though there be no clause of entry.

5. *How are conditions in a deed divided?*—124.

Into general and special. The former puts an end altogether to the tenancy, on entry for the breach of the condition; but the latter only authorizes the reversioner to enter on the land, and take the profits to his own use, and hold the land by way of pledge until the condition be fulfilled.

6. *When are conditions precedent, and when subsequent?*—124, 125.

That is a matter of construction, and depends upon the intention of the party creating the estate. A precedent condition is one which must take place before the estate can vest, or be enlarged; as if a lease be made to B, for a year, to commence from the first day of May thereafter, upon condition that B pay a certain sum of money within the time; or if an estate be limited to A upon his marriage with B; here the payment of the money in one case, and the marriage in the other, are precedent conditions, and until the condition be performed, the estate can not be claimed or vest. Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated; as, on failure of payment of rent, or performance of other services annexed to the estate.

7. *What is a conditional limitation?*—126.

If a condition subsequent be followed by a limitation over

to a third person in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation.

8. *What is a collateral limitation?*—129.

It is another refinement belonging to this abstruse subject of limited and conditional estates. It gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral events, as a limitation of an estate to a man and his heirs, tenants of the manor of Dale, or to a woman during widowhood, or to C till the return of B from Rome, or until B shall have paid him twenty pounds. The event marked for the determination of the estate is *collateral* to the time of continuance.

9. *How are conditions subsequent regarded by courts of justice?* 129–132.

They are not favored in law, and are construed strictly, because they tend to destroy estates. And if it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; for a covenant is preferable for the tenant.

LECTURE LVIII.

OF THE LAW OF MORTGAGE.

1. *What is a mortgage?*—135.

It is the conveyance of an estate, by way of pledge, for the security of debt, and to become void on payment of it. The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner, until he is debarred by his own default, or by judicial decree.

2. *From what does the English law of mortgages appear to have been borrowed?*—136.

From the civil law; and the Roman *hypotheca* corresponded very closely with the description of a mortgage in our law.

3. *Is there not a material distinction to be noticed between a pledge and a mortgage?*—138.

Yes: a pledge or pawn is a deposit of goods, redeemable on certain terms, and either with or without a fixed period for redemption. Delivery accompanies a pledge and is essential to its validity. The general property does not pass, as in the case of a mortgage, and the pawnee has only a special property.

4. *Where is the condition of a mortgage usually to be found?*—141.

It is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument, and if it be executed subsequently, it will relate back to the date of the deed. But the deed and defeasance should be recorded together. An omission to have the defeasance registered would make the estate, which was conditional between the parties, absolute against every person but the original parties and their heirs.

5. *What effect has the intention of the parties on this point?*—142.

It determines the character of the conveyance in equity; and any agreement in the deed, or in a separate instrument, showing that the parties intended that the conveyance should operate as a security for the repayment of money, will make it such, and give to the mortgagor the right of redemption.

6. *Is parol evidence admissible to show that a deed, absolute on its face, was intended as a mortgage?*—142, 143, *n.* (*b.*)

It is in equity, but the Court of Errors in New York has held such evidence not admissible in a court of law.

7. *What is a conditional sale?*—144.

It is a sale, with an agreement for a repurchase within a given time; and this is entirely distinct from a mortgage.

8. *What may be mortgaged?*—144.

Property of every kind, real and personal, which is capable of sale.

9. *Does the mortgage raise an implied covenant to pay the money borrowed?*—145.

No; there must be an express covenant to pay, or the remedy of the mortgagee will be confined to the land. But the absence of any bond or covenant to pay the money will not make the instrument less effectual as a mortgage.

10. *To what class of powers does the power to sell contained in a mortgage belong?*—147.

It is a power appendant or annexed to the estate; is coupled with an interest; is irrevocable and deemed part of the mortgage security; and it vests in any person who, by assignment or otherwise, becomes entitled to the money secured to be paid. And a power to mortgage includes in it a power to execute a mortgage, with a power to sell.

11. *May a mortgage arise in equity, out of the transaction of the parties, without any deed or express contract for that special purpose?*—150.

Yes.

12. *What is now well settled in the English law on this subject?*—150.

It is settled that if the debtor deposits his title deeds with a creditor, it is evidence of a valid agreement for a mortgage, and amounts to an equitable mortgage, which is not within the operation of the statute of frauds.

13. *In what case, and when, was the earliest decision in support of the doctrine of equitable mortgages, by the deposit of muniments of title?*—151.

In the case of *Russell* v. *Russell*, in 1783, which decision is now deemed an established principle in English law.

14. *Has not the vendor of real estate a lien for the purchase money?*—151, 152, *n.* (*d.*)

He has, under certain circumstances; and the Court of Chancery will appoint a receiver in behalf of the vendor, if the vendee has obtained the property and refuses to pay. This doctrine, however, has not been received in all the States, and in some of them only to a limited extent.

15. *Upon the execution of a mortgage, in whom does the estate vest?*—154.

It vests in the mortgagee, subject to be defeated upon performance of the condition.

16. *Can the mortgagor be treated by the mortgagee as a trespasser?*—155.

No, he can not; neither shall his assignee, until the mortgagee has regularly recovered possession, by writ of entry or ejectment. The mortgagor in possession is considered to be so with the mortgagee's assent, and is not liable to be treated as a trespasser.

17. *Is not the mortgagor allowed, in New York, even to sustain an action of trespass against the mortgagee, or those claiming under him, if he undertakes an entry while the mortgagor is in possession?*—155.

He is.

18. *How was it anciently held?*—155, 156, *n.* (*e.*)

It was anciently held that so long as the mortgagor remained in possession, with the consent of the mortgagee, and without any convenant for the purpose, he was a tenant at will. Now, by the New York Revised Statutes, the mortgagee is driven to rely upon a special contract for the possession, if he wishes it, or to the remedy by foreclosure and sale, upon a default.

19. *What is the equity doctrine in regard to mortgages?*—159, 160.

It is, that the mortgage is a mere security for the debt, and only a chattel interest; and that, until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law; and it is, accordingly, held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law.

20. *Have not the courts of law also, in modern times, adopted the equity view of the subject?*—160.

Yes; except as against the mortgagee, the mortgagor,

while in possession, and before foreclosure, is regarded as the real owner, and a freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding the form of the conveyance, has only a chattel interest, and his mortgage is a mere security for the debt.

21. *Will an action at law, by the mortgagee, lie for the commission of waste?*—161, 162.

No; because he has only a contingent interest; and yet actions of trespass, *quare clausum fregit*, by the mortgagee, for the commission of waste, by destroying timber, or removing fixtures, have been sustained against the mortgagor in possession, in those States where they have no separate equity courts with the plenary powers of a Court of Chancery.

22. *Who is entitled to redeem?*—162.

The right of redemption exists not only in the mortgagor himself, but in his heirs, and personal representatives, and assignee, and in every other person who has an interest in or a legal or equitable lien upon the lands.

23. *If the mortgagee obtains possession of the mortgaged premises before foreclosure, for what will he be accountable?*—166.

For the actual receipts of rents and profits, and nothing more, unless they were reduced, or lost by his willful default, or gross negligence. He imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would, with reasonable diligence, have received.

24 *How about registering the mortgage?*—168.

By the statute law of New York every conveyance of real estate, whether absolute or by way of mortgage, must be recorded in the county in which the land is situated; if not, it is void as against any subsequent purchaser or mortgagee, in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded. And this may be said, generally, to be the substance of the statute law on the subject in every State of the Union, though in some of them the recording is still more severely enforced.

25. *What follows if the subsequent purchaser had notice of a prior deed?*—169–171.

It is a settled rule that if a subsequent purchaser or mortgagee, whose deed is registered, had notice, at the time of making his contract, of the prior unregistered deed, he shall not avail himself of the priority of his registry to defeat it; and the prior unregistered deed is the same to him as if it had been registered. The whole of the English equity doctrine of notice prevails in New York, and, probably, in all the other States of the Union.

26. *Has a mortgage not registered a preference over a subsequent docketed judgment?*—173.

Yes; a mortgage unregistered is still a valid conveyance, and binds the estate.

27. *Suppose the purchaser at the sale on execution, under the judgment, has his deed first recorded, who then will have the preference, and on what will the question of right turn?*—173.

The purchaser will gain a preference by means of the record over the mortgage, and the question of right turns upon the fact of priority of the record, in cases free from fraud.

28. *How is the rule in Pennsylvania on this subject?*—173.

In Pennsylvania the docketed judgment is preferred, and not unreasonably; for there is much good sense, as well as simplicity and certainty, in the proposition that every incumbrance, whether it be a registered deed or docketed judgment, should, in cases free from fraud, be satisfied according to the priority of the lien upon record, which is open for public inspection.

29. *Can future advances be secured by mortgage?*—175.

A mortgage or judgment may be taken as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement. But subsequent advances can not be tacked to a prior mortgage to the prejudice of a *bona fide* junior incumbrancer, or where there is an intervening equity.

30. *Does the English doctrine of tacking junior to senior mortgages prevail in this country?*—176–179.

No.

31. *What is the practice with us in proceeding to foreclose a mortgage?*—181.

In New York, Maryland, Virginia, South Carolina, Tennessee, Kentucky, Indiana, and, probably, several other States, the practice is to obtain a decree for the sale of the mortgaged premises, under the direction of an officer of the court, who applies the proceeds of the sale toward the discharge of incumbrances according to priority.

32. *May the right of equity of redemption be barred by the length of time?*—186–189.

It may. And the mortgagee may equally, on his part, be barred by lapse of time.

33. *If the mortgagee omits to give proper notice, whether directed by the power or not, may not the sale be impeached in chancery?*—190.

It may.

34. *Is not the sale under a power, if regularly and fairly made, according to the directions of the statute, a final and conclusive bar to the equity of redemption?*—190.

It is.

35. *How long has this been the policy and language of the law of New York?*—191.

From the time of the first introduction of the statute regulation on the subject, in March, 1774.

36. *Will a sale under a power, as well as under a decree, bind the infant heirs?*—191.

It will; for the infant has no day, after he comes of age, to show cause, as he has where there is the strict technical foreclosure, and as he generally has in the case of decrees.

37. *Has a court of equity a competent power to require, by injunction, and enforce by process of execution, delivery of possession?*—192.

It has; and the power is founded upon the simple elementary principle, that the power of the court to apply the remedy is co-extensive with its jurisdiction over the subject-matter.

38. *Does the English practice of opening biddings on a sale of mortgaged premises, under a decree, prevail to any great extent in this country?*—192.

No.

LECTURE LIX.

OF ESTATES IN REMAINDER.

1. *Of what two kinds are estates in expectancy?*—197.

The first is created by the act of the parties, and called a *remainder;* the second by the act of law, and is called a *reversion.*

2. *Under how many heads are remainders treated?*—197.

Under nine, viz.,

1. Of the general nature of remainders.
2. Of vested remainders.
3. Of contingent remainders.
4. Of the rule in Shelley's case.
5. Of the particular estate.
6. Of remainders limited by way of use.
7. Of the time within which a contingent remainder must vest.
8. Of the destruction of contingent remainders.
9. Of some remaining properties of contingent remainders.

3. *What is a remainder?*—197.

It is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it.

4. *How, by the New York Revised Statutes, is a remainder defined?*—198, *n.* (*a.*)

It is defined to be an estate limited to commence in possession at a future day, on the determination, by lapse of time, or otherwise, of a precedent estate, created at the same time; and

where a future estate is dependent on a precedent estate, it is a remainder, and may be created and transferred as such.

5. *Of what may a remainder consist?*—198.

It may consist of the whole remnant of the estate; as in the case of a lease to A for years, remainder to B in fee; or it may consist of a part only of the residuary estate, and there may be a reversion beyond it left vested in the grantor, as in the case of a grant to A for years, remainder to B for life; or there may be divers remainders over, exhausting the whole *residuum* of the estate, as in the case of a grant to A for years, remainder to B for life, remainder to C in tail, remainder to D in fee.

6. *Can a remainder be created after a grant of the fee?*—199, *n.* (*a.*)

Not at common law; but, by the New York Revised Statutes, a contingent remainder in fee may be created on a prior remainder in fee, and to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age. So, by the same statutes, a fee may be limited on a fee, upon a contingency which, if it should occur, must happen within two lives in being at the creation of the estate.

7. *What are cross-remainders?*—201.

They are another qualification of these expectant estates, and they may be raised expressly by deed, and by implication in a devise. If a devise be of one lot of land to A, and of another lot to B, in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C in fee, A and B have cross-remainders over by express terms; and on the failure of either, the other, or his issue, takes, and the remainder to C is postponed; but if the devise had been to A and B of lots to each, and remainder over on the death of both of them, the cross-remainders to them would be implied.

8. *Of how many sorts are remainders?*—202.

Two; vested and contingent.