Exoneration of the Specific Devise at the Expense of the Residue

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DEVELOPMENT OF THE DOCTRINE OF EXONERATION

The right of the devisee of a specific piece of real estate to have the mortgage on the devised property paid at the expense of the residue of the estate is a heritage of the common law, which, until the recent decision of the Wisconsin Supreme Court in Estate of Budd, had received little attention in this jurisdiction.

The rule that such a mortgage must be paid was forcefully laid down in early English cases. In King v. King, it was stated:

... the court was of opinion, that every mortgage implies a loan, and every loan implies a debt; and that though there was no covenant nor bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage. ...

Likewise, in Bartholomew v. May, it was held:

... wherever there is a mortgage made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security, and therefore the personal estate shall be applied in discharge of the £1300, although there may be younger children of the mortgagor who may be no otherwise provided for. ...

In Cope v. Cope, the Court declared:

If a Man mortgages Lands, and covenants to pay the Money, and dies, the Personal Estate of the Mortgagor shall, in Favor of the Heir, be applied to exonerate the Mortgage.

The reasoning behind the doctrine in English law is sometimes said to be that the personal estate has been increased by the proceeds of the mortgage loan at the expense of the realty and that the personal estate should, therefore, reimburse the devisee of the realty.

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1 11 Wis. 2d 248, 105 N.W. 2d 358 (1960).
3 1 Atk. 487, 26 Eng. Rep. 309 (Ch. 1737).
5 In re Fogarty's Estate, 165 Misc. 78, 300 N.Y.S. 231 (1937); In re Staiger's Estate, 104 N.J. Eq. 149, 144 Atl. 619 (1929); Mahoney v. Stewart, 123 N.C.
EXONERATION

explanation is not applicable to all cases, however; notably that of the purchase-money mortgage.

Another thesis concerning the development of the exoneration rule is the "consistency" explanation. This line of reasoning proceeds as follows: (1) The mortgagee may either file a claim against the estate and force it to pay the mortgage or may forego filing of a claim and rely solely upon his security; thereby putting the burden of payment upon the devisee. (2) The choice of a stranger should not affect the distribution of the estate, and to accomplish consistent distribution regardless of the mortgagee's choice of procedures, a definite rule had to be established. (3) It is more likely that the average testator intends that the devisee take real property free of the mortgage than that he receive it subject to an existing encumbrance. (4) Therefore, the specific devise should be exonerated at the expense of the personal estate.

This explanation of the development of the doctrine of exoneration is even more artificial than the "justice" explanation, since the basic question originally before the courts was whether the personal estate was ultimately liable at all for the debt represented by the mortgage. The "consistency" explanation is also the least satisfactory to the modern mind because it rests on a second assumption that the average testator prefers that the real property be relieved of the mortgage rather than that it pass subject to it. In a predominantly pastoral society in which real estate was the asset of main importance and its ownership was a mark of social distinction, this may have been true. Today, however, financial status and stability are determined in terms of total net worth in which real and personal assets play an equally important part, and the assumption that the average testator prefers to exonerate the specifically devised real estate at the expense of the personalty is not as convincing.

It would seem that the real foundation of the rule in English Jurisprudence is that stated in the early English cases: The "mortgage is looked upon as a general debt"; A "Man . . . covenants to pay the Money." In other words the doctrine actually stems from the broader

106, 31 S.E. 384 (1898); But see Sutherland v. Harrison, 86 Ill. 363 (1877) in which the Court dismissed this theory with the statement, "There is no such principle of general application."
40 H.R. L. Rev. 630, 631 (1927); However, election of the mortgagee to foreclose his mortgage was held to prevent application of the common-law rule although its existence was recognized in Marshall v. Middleton, 100 Ore. 247, 191 Pac. 886 (1921).
7 This argument was advanced in Galton v. Hancock, 2 Atk. 424, at 430, 26 Eng. Rep. 656 (Ch. 1742), but was dismissed by Lord Hardwicke on page 435 with the statement, "The mortgagee may take his remedy, indeed, against the executor, or against the heir at his election; but it must likewise be admitted, this election of the mortgagee will not determine which fund ought properly to be charged, nor vary the right as to those funds."
8 Bartholomew v. May, supra note 3.
9 Cope v. Cope, supra note 4.
rule of law that the debts of the deceased must be paid from his personal estate.10 The forces of justice and consistency may have helped to entrench the doctrine among the principles of the common law, but they cannot be said to have accounted for its beginnings.

Like every other common-law rule, this one had from the first its limitations and its exceptions. Originally there were three limitations of prime importance. First, the rule applied unless the will showed a contrary intent.11 This resulted in making the doctrine of exoneration applicable to the majority of cases in which the will was silent as to intent. It relieved the specific devisee of the burden of proving positive intent on the part of the testator to exonerate and placed upon those opposing exoneration the rather difficult burden of proving, in the face of the silence of the will, that the testator did not intend to exonerate the property. Secondly, the rule applied only if the mortgage was a personal obligation of the decedent.12 This requirement flowed logically from the broader source, the rule that the estate of a deceased person was liable only for his personal debts in any event. If the owner of the property had no personal liability during his lifetime to repay the principal sum secured by the mortgage, his estate could have none after his death. Thirdly, the mortgage on specifically devised real estate was payable only out of certain funds; chiefly, the personal property contained in the residuary estate to the extent that the same was sufficient therefor.13 This limitation, too, derives from the origin of the exoneration rule, i.e., that the debts of the deceased must be paid from his personal estate. As the law developed, of course, each of these principal limitations was interpreted and applied in a variety of situations, a process which has left many subrules in its wake.

England abrogated the common-law rule in 1854 by Locke King's Act, and since the passage of that law and its amendments, any devisee

10 Bromhall v. Wilbraham, Cas. t. Tal. 274, 25 Eng. Rep. 774 (Ch. 1734); Galton v. Hancock, supra note 7; Lanoy v. Athol, 2 Atk. 444, 26 Eng. Rep. 668 (Ch. 1742); Cumberland v. Codrington, 3 Johns Ch., 8 Am. Dec. 492 (N.Y. 1817), and cases cited supra note 4; 57 AM. JuR. Wills §1477 (1948); 26A C.J.S. Descent & Distribution §125(b) (1956); 4 PAGE, WILLS §1486 (3rd ed. 1941).
11 "If it appears that it was the testator's intention that the devisee should take it encumbered, there is an end of the question." Galton v. Hancock, supra note 7, at 428; see THOMPSON, WILLS §127; Annot., 5 A.L.R. 488 (1920), 72 A.L.R. 709 (1951); 4 PAGE, WILLS §1486, supra note 10; 3 AMERICAN LAW OF PROPERTY §14.25 (Casner ed. 1952); 3 JARMAN, WILLS 471 (1881).
12 "... where there is an encumbrance on real estate, the duty by which encumbrances are created being a personal demand on the owner himself, the heir at law shall have the benefit of the personal estate to exonerate the reality ... but if the ancestor has done no act to charge himself personally, the heir at law must take the estate cum onere." Parsons v. Freeman, 1 Ambl. 115, 27 Eng. Rep. 75 (Ch. 1751); Forrester v. Leigh, 1 Ambl. 171, 27 Eng. Rep. 114 (Ch. 1753); see 4 PAGE, WILLS §1486, supra note 10; Annot., 5 A.L.R. 488, 499 (1920). Whether assumption by the testator of a prior lien, placed on the property by another, satisfies this requirement is a matter on which there is much conflict of opinion, 57 AM. JUR. WILLS §1476, supra note 10.
13 Authorities cited, supra note 10.
of real estate in England has taken the same subject to the encumbrances 
eexisting thereon at the time of the testator's death, unless a contrary 
tention is clearly evident from the face of the will. However, the 
statutory change in England came too late to affect the situation in the 
United States. The common law which became a part of the body of 
law in the various states of the Union was the common law 
as represented by English court decisions, customs, and legislation 
shortly prior to the American Revolution, and once adopted, this body 
of law remained the common law of each of the several states until 
changed by the state itself.

Since land, during the early days of the American Republic, was 
plentiful, cheap, and largely unimproved, real estate mortgages were 
probably not extensively used as a means of financing. As a result, the 
factual situations which would bring the common-law rule of exonera-
tion into play and thus cause its desirability to be debated did not fre-
quently arise. By the middle of the nineteenth century, however, East-
er and Southern states were beginning to pass corrective legislation on 
the subject. However, by that time most central and Western states 

had already been organized and had adopted, at an earlier date, basic 
legislation similar to that then in force in one or more of the older 
sister states of the East. In this part of the country, also, low-priced 
land probably kept the problem from arising frequently for some time, 
but eventually, the economic situation changed, and the feasibility of 
the common-law rule of exoneration then became a matter of practical 
importance. As a result some of the states in these areas also began to 

enact legislation on the subject. Most of the state statutes followed the 
English pattern and provided that the specifically devised real property 
should not be exonerated from the mortgage unless the will so provided.

As a result of this legislation, there are now three types of court 
decisions involving the right of a devisee to have his mortgage paid by 
the estate. First, there are the cases in which no statutory enactment is 
applicable, and the testator, by a specific provision of his will, has at-
ttempted to provide for the payment of the mortgage for the benefit of 
the specific devisee. The second group of cases is that in which the 

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14 Real Estate Charges Act, 1854, 17 & 18 Vict., c. 113; 1867, 30 & 31 Vict., c. 69; 1877, 40 & 41 Vict., c. 340.
15 See 11 Am. Jur. Common Law §3 (1937); Coburn v. Harvey, 18 Wis. 156 (1864); Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903); City of Chippewa Falls v. Hopkins, 109 Wis. 611, 85 N.W. 553 (1901); Menne v. Fond du Lac, 273 Wis. 341, 77 N.W. 2d 703 (1956); Page, Statutes in Derogation of 
16 Authorities cited, supra note 15.
17 A construction that a gift of a sum sufficient to discharge the mortgage is not 
effected by particular language of the will does not necessarily foreclose the 
device from obtaining exoneration of the property on common law principles, 
since he is in many cases entitled to the latter, even in the absence of a show-
ing of intent.
testator has made no reference at all in his will, either directly or indirectly, to the mortgage on the specifically devised property, and there is no statutory provision covering the situation. In the third category are the cases arising under a particular state statute.\textsuperscript{18} Strictly speaking, the term “exoneration” refers to a result achieved by force of law rather than because of the express desire of the testator and, therefore, applies only to the second classification of cases. Cases in the first category are actually true will-construction cases, since the testator has attempted, although perhaps not very effectively, to express his desires on the subject, and, in view of ambiguities in the language chosen, the court is called upon to construe its meaning. The situation may be quite similar in the third category of cases, but the decision must be made within the framework of the applicable statute.

**INTENT OF THE TESTATOR**

In any instance, however, the first and most important matter is a determination of the category into which the case falls, the intent of the testator, and the effect of his intent in that particular type of case. If the testator has directed expressly that the mortgage be paid, he is, in effect, making an additional specific bequest to the devisee of the mortgaged property, and the mortgage is payable out of the estate generally in the same manner as are other specific bequests.\textsuperscript{19} In this type of case a positive intent on the part of the testator is inherent in the provision for the payment of the mortgage.

In the second category of cases, the initial and ultimate burden of proving that the testator did not intend to exonerate the property falls upon those interested in protecting the residue. However, the devisee, in order to defeat these efforts, will often bring out circumstances warranting a positive finding by the court of an implied intent to exonerate the property.\textsuperscript{20}

\textsuperscript{18} Cases decided on common law principles of exoneration in states having statutes relating to exoneration are numerous, however, since it is often held that the statute is limited in scope and does not change the common law rule with regard to a particular type of situation, kind of property, or species of lien.

\textsuperscript{19} Will of Man, 179 Wis. 66, 190 N.W. 830 (1922), discussed at length at a later point herein, is a case of this type, and the Court held that the mortgage was a charge upon the general estate. See 40 Harv. L. Rev. 631, supra note 6.

\textsuperscript{20} This tendency has led some authorities to conclude that there is a minority view of some weight that under the common law, exoneration is not permissible unless a positive intent to exonerate can be implied from the will. See 4 Page, Wills §1490, supra note 10. The increase in the number of cases decided under statutes requiring a positive finding of intent to exonerate has also lent apparent weight to this theory. In annotations on the subject to exoneration at 5 A.L.R. 488 (1920) and 72 A.L.R. 709 (1931), the introductory statement is made that the devisee is entitled to have a lien upon the property devised to him paid out of the personal estate, “unless the testator has indicated an intention to the contrary.” In a later annotation on the subject at 120 A.L.R. 577 (1939) it is stated that whether the property is to be exonerated “depends primarily upon the intention of the testator.” A majority of
A court may find intent to exonerate or not to exonerate implied in language of the will which does not expressly relate to the mortgage as such. It has been held in various cases that a devise of all of one's "right, title, and interest" in a piece of property indicates an intent not to exonerate.\textsuperscript{21} The majority rule appears to be that a general direction addressed to the executors to pay the debts of the decedent does not, of itself, indicate a positive intent to exonerate the real property,\textsuperscript{22} although in some jurisdictions, it has been held that such a direction does have this effect.\textsuperscript{23} The devise of real property "subject to" a mortgage has been interpreted in some instances to indicate an intent not to exonerate the parcel in question,\textsuperscript{24} and in other cases has been held not to have that effect, being only descriptive of the condition of the property at the time the will was made.\textsuperscript{25} Likewise, the grant of the property "absolutely" or "outright" has in some cases been held not to indicate an intent to exonerate, but was said, instead, to be only descriptive language used to distinguish a devise in fee from a life estate.\textsuperscript{26}

The general rule of construction of wills is that a will is to be construed as a whole, in the light of surrounding circumstances. Consequently, such "surrounding circumstances" may be considered when an effort to determine whether or not the testator intended to exonerate property is being made. In determining whether a mortgage should be paid off by the executor at the expense of the legacies, "the instrument must be considered as a whole according to its own terms and in the light of the circumstances of the testator . . ." and the nature and character of the property devised.\textsuperscript{27} The general rule of construction limits

\textsuperscript{21} Howell v. Ott, 182 Miss. 252, 180 So. 52 (1938); Savings Trust Co. v. Beck, Mo. App., 73 S.W. 2d 282 (1934); Taylor v. Broadway Methodist Church, 269 Ky. 108, 106 S.W. 2d 69 (1937); 4 PAGE, WILLS §1490, supra note 10. But see contra, Tobaison v. Machen, 217 Md. 207, 142 A. 2d 145 (1958).

\textsuperscript{22} In re McNulta, 168 Wash. 397, 12 P. 2d 389 (1932); Savings Trust Co. v. Beck, supra note 21; Estate of Budd, supra note 1; see Annot., 5 A.L.R. 488 (1920) at 505 and cases cited therein; 97 C.J.S. Wills §1316(2) and §1322(2) (1957).

\textsuperscript{23} In re Estate of Johnson, 66 S.D. 331, 283 N.W. 151 (1938), where this provision was held to require exoneration even though the will provided that the property should pass "subject to the mortgage."; Bridgeport Trust Co. v. Fowler, 102 Conn. 318, 128 Atl. 719 (1925); United States Bd. of Tax Appeals v. U.S., 26 F. 2d 1000 (D.C. 1928), cert. denied. 278 U.S. 621; 4 PAGE, WILLS §1490 and cases cited therein, supra note 10.

\textsuperscript{24} I P-H Wills, Estates and Trust Service §432.25 and cases cited therein; 4 PAGE, WILLS §1490, supra note 10; Martin v. Martin, 310 Ill. 622, 35 N.E. 2d 560 (1941); contra, Tobaison v. Machen, supra note 21.

\textsuperscript{25} In re Estate of Johnson, supra note 23; In re Blocknay, 166 Ia. 109, 147 N.W. 188 (1914); In re Woodworth, 31 Cal. 595 (1867); Johnson v. Child, 4 Hare. 87, 67 Eng. Rep. 572 (1844) (although exoneration denied on other grounds); 4 PAGE, WILLS §1490, supra note 10; Tobaison v. Machen, supra note 21.

\textsuperscript{26} In re Reynolds, 94 Vt. 149, 109 Atl. 60 (1920); 4 PAGE, WILLS §1490, supra note 10.

\textsuperscript{27} Taylor v. Broadway Methodist Church, supra note 21.
the consideration of surrounding circumstances to those existing at the
time of execution of the will, but in matters relating to exoneration there has been a strong tendency to disregard this time limitation, and one court has stated that in determining the question of the intention of the testator with reference to the exoneraion of his real estate from liens thereon, the court will apply the rule that a will speaks as of the date of the death of the testator, and hence it will take into consideration any change in conditions which has occurred between the date of the execution of the will and the date of the testator's death, in order to determine the question whether the will, viewed from its four corners, clearly and unmistakably requires, or manifests the intent of the testator, that a mortgage debt upon land devised shall be paid or discharged out of the testator's residuary estate.

"Surrounding circumstances" which will throw light on whether or not exoneration was intended are, of course, as varied as the pattern of life itself. However, some of the frequently recurring circumstances tending to indicate an intention to exonerate the property are: execution of a mortgage after execution of the will, and, especially, a purchase-money mortgage; sufficiency of the personal estate; the fact that the mortgage is large in proportion to the value of the burdened real estate; and a closeness of relationship between the testator and the devisee.

The situation which most often compels the courts to find that there was no intention to exonerate is the case in which the mortgage is of such size in relation to the personal property that application of the exoneration principle would deprive the residuary legatees of most of their bequest and thus defeat, to a large measure, the testator's plan of

28 Annot., 94 A.L.R. 26 (1935) at 222 and cases cited therein; 2 CALLAGHAN'S, WISCONSIN PROBATE LAW §15.55 and §15.58 (6th ed. 1959) and cases cited therein; Estate of Budd, supra note 1, citing Estate of Breese, 7 Wis. 2d 422, 96 N.W. 2d 422 (1959).


30 Brown v. James, 22 S.C. Eq. 24 (1848); 4 PAGE, WILLS §1490, supra note 10 and cases cited therein.


32 Johnson v. Child, supra note 25; Ruston v. Ruston, 2 Dall. 243, 1 L. Ed. 365 (1796); Union Trust Co. v. Brindlinger, 40 F. 2d 806 (1930).


34 Hapke v. Schafer-Doolin Mort. Co., 100 Okla. 70, 229 Pac. 621 (1924) (daughter); Cadoo v. Cadoo, 95 N.J. Eq. 430, 123 Atl. 712 (1924) (son); Tipping v. Tipping, 1 P. Wms. 730, 24 Eng. Rep. 589 (Ch. 1721) (widow); Byrne v. Hume, 84 Mich. 185, 47 N.W. 679 (1890) (aged parents); In re Towle v. Swasey, 106 Mass. 100 (1870) (widow); Fulfenwider v. Birmingham Trust & Savings Co., 222 Ala. 95, 130 So. 801 (1930) (a favorite nephew). See also In re Tunison's Estate, 75 F. Supp. 573 (D.C. 1948) where exoneration was denied when the specific devisee was a stranger.
disposition.\textsuperscript{35} Other facts which have been held to show an intent not to exonerate include ownership of only a partial interest in the property, the whole of which is mortgaged,\textsuperscript{36} and the existence of a blanket mortgage which covers both the specifically devised parcel and other residuary property.\textsuperscript{37}

The matter of the intention of the testator is also important in cases governed by statute. However, since these statutes generally provide that the devisee must bear the burden of the mortgage unless the will otherwise provides, both the burden of proof and the burden of going forward with the proof as to intent are removed from those interested in protecting the residue of the estate, on whom they rest when the question of exoneration under the common-law is at issue, and are placed upon the specific devisee. In addition, some of these statutes provide for a "clear" expression of intent on the part of the testator or intent expressed on the "face" of the will, with the result that the amount of proof of intent and the factors comprising it may also be changed.

\textbf{Wisconsin Case Law}

Wisconsin has never had a statute pertaining to the exoneration of real property from liens existing thereon at the time of the death of the decedent. And more interestingly, prior to the decision in \textit{Estate of Budd},\textsuperscript{38} the question of exoneration of a specific devise had never been directly considered by the Wisconsin Supreme Court, although there are several earlier cases which either indirectly touched upon the subject or have been thought to do so.

The first Wisconsin case sometimes cited as bearing upon the question of exoneration is that of \textit{Edgerton v. Schneider},\textsuperscript{39} which was decided in 1870. In that case one Cooper had died testate, leaving real property subject to a mortgage. No claim for the payment thereof had been filed in the probate proceedings. After the time for filing claims had expired, the executor obtained an order from the court directing him to sell the mortgaged real estate in order to pay other debts. An executor's deed was given to the purchaser which made no mention of the pre-existing mortgage. Upon action brought by the mortgagee to foreclose his mortgage, the argument made by the then owner of the


\textsuperscript{36} Draper v. Brown, \textit{supra} note 33, 4 PAGE, WILLS §1490, \textit{supra} note 10. This reasoning has also been applied to jointly owned property. See Fulenwiderness Trust & Savings Co., \textit{supra} note 34.

\textsuperscript{37} See annot., 168 A.L.R. 701 (1947); 57 AM. JUR. Wills §1474, \textit{supra} note 10. In such cases the mortgage is payable pro rata by those who succeed to the realty.

\textsuperscript{38} \textit{Supra} note 1.

\textsuperscript{39} 26 Wis. 385 (1870).
real estate, but rejected by the courts, both on trial and upon appeal, was that the failure of the mortgagee to present his claim for allowance in the Cooper probate proceeding had barred his right to pursue the remedy of foreclosure.

Obviously, this case is not actually concerned with the right of exonerating because the mortgaged property was not specifically devised nor did it pass by descent, and it is only in such cases that the doctrine would apply. It is never applicable to realty which is a part of the residue of a testator's estate. The case has been cited in that connection, however; probably because it does pertain to the closely related question of whether an executor is bound to pay the mortgage in the absence of the filing of a claim therefor.

The one case cited by most text authorities as the Wisconsin case on exonerating is Will of Mann, which was decided in 1922. In that case decedent and his sister owned a piece of real property which was subject to a mortgage in amount of $20,000.00. By his last will Mann specifically devised his interest in the property to his sister, and, after describing the mortgage thereon, stated:

... if any part of the principal of said mortgage shall remain unpaid at the time of my death, I direct my executor hereinafter named to pay the entire balance of such unpaid principal (whether owing by me or by my said sister), it being my intention that my said sister shall receive title to said property free and clear of said mortgage. If I shall have disposed of my interest in said property prior to the time of my death, then and in that event such devise of my interest in said property shall lapse and this paragraph of my will shall be of no further effect.

Sometime after the will was executed and before his death, the testator conveyed his interest in the property to his sister by warranty deed, which deed recited that said premises were free and clear of encumbrances, "except that certain mortgages of $20,000 ... which said mortgage said second party, Frances Mann Wolff, hereby assumes and agrees to pay when due as a part of the consideration hereof." During the course of probate of the estate the executor petitioned for a construction of the will, and the County Court of Milwaukee County construed the above-quoted provision as a valid direction which created a charge upon the general assets of the estate. This decision was upheld upon appeal, the reasoning thereon being that: The testator in his will had expressly declared it to be his intention that his sister should receive title to the property free and clear of the mortgage; The fact that he saw fit to vest title in her by deed prior to his death was not in contravention of the devise, but in furtherance of it; This act did not wholly carry out his purpose, however, since he also intended, as a part

40 179 Wis. 66, 190 N.W. 830 (1922).
41 Id. at 67.
of his testamentary plan, that the entire balance of the mortgage principal should be paid at the time of his death, whether owing by him or by his sister, and that his sister should then have title to the property free and clear of the mortgage. It was also decided that the last sentence of the paragraph in which the devise was made provided for its lapse only in the event of a disposition of the property to a third person and that, since this had not occurred, the paragraph was still effective, and the mortgage principal must be paid from the general estate.

This case, obviously, is one falling behind the first category of cases above mentioned. It is a case involving construction of actual words of bequest for the purpose of determining whether the testator by a positive direction on his part ordered the mortgage paid, thereby making an additional gift to his sister. It in no way involves the common-law theory of exoneration and could not, since the mortgaged property was not a part of the testator's testamentary estate and did not, in fact, pass to the sister as a specific devise under her brother's will.

In Will of Hurley, decided in 1927, an executor, who had continued to administer an estate for twelve years without making a final settlement, was allowed credit for interest paid on mortgages on the real property during that time. In its opinion the Supreme Court distinguished its ruling from the holding in certain New York cases cited, stating:

The New York cases holding that an executor is not entitled to credit for interest paid upon mortgages against real estate in his possession were decided under a statute which makes it the duty of the heir or devisee to 'satisfy and discharge the mortgage out of his own property without resorting to the executor or administrator.'

The inference here is that the state of Wisconsin, not having a similar statute, follows the common-law rule of exoneration, and that, since the executor must ultimately pay the mortgage, he must, in the meantime, pay the interest thereon. The fault in the reasoning of this case is that it stops at this point without examination of the facts to determine whether the doctrine of exoneration is actually applicable, even in the absence of statute. Since the mortgaged real property was actually a part of the residue of the estate, the doctrine could not, in fact, have applied, and any inference drawn from the language of this opinion is, at the most, based on dicta.

Ironically, the only Wisconsin case which, prior to the present time, would have put the question of the right of a specific devisee to have the mortgage on the real property paid at the expense of the personal

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42 Supra p. 293.
43 193 Wis. 20, 213 N.W. 639 (1927).
44 Id. at 24.
45 See page 8, appellant's appendix, Will of Hurley, supra note 43.
residue before the state Supreme Court was *Estate of Pitcher*, which, because of a defect in the notice of appeal, was not decided on its merits. Also ironically, in that case the devisee was appealing from a lower court decision which had held that the real property should be exonerated from the testator's mortgage. This peculiarity arose from the fact that the personal residue remaining after payment of claims and costs of administration amounted to only $600.00. The lower court ordered that the real property should go to the specific devisee subject to the mortgage; that the remaining personal estate should first be used to pay the specific money bequests and that:

\[
\ldots \text{in the event there is anything left in the way of a residue,}
\]
\[
\text{this amount of money shall be charged with the payment of the}
\]
\[
\text{mortgage on the homestead, and the same may be applied by}
\]
\[
\text{paying the same on the mortgage or paying it direct to Charles}
\]
\[
\text{O'Deal. (The devisee)}
\]

The priorities of payment established by this order followed the rule that a specific legatee is not required under the exoneration rule to contribute to the payment of a mortgage on property specifically devised. In this particular case, however, very little money would have been available to the devisee after payment of the specific bequests, a fact which, no doubt, prompted him to claim that his was the position of an ordinary creditor entitled to share pro-rata with all other creditors in the available funds before payment of the specific bequests. Unfortunately, this interesting theory, which, if tested, probably would have resulted both in a decision on the applicability of the common-law rule of exoneration in this state, and also in a ruling on the priorities of payment connected therewith never reached the Supreme Court on its merits.

The fact situation in *Estate of Budd* was as follows: The deceased, Mabel Ruth Budd, owned a home, one piece of business property, and some personalty. An $18,000 mortgage had been placed upon the homestead in 1953. In 1957 Mrs. Budd made a will in which she devised the home to her husband, made some specific and pecuniary bequests, and left the residue of her estate to certain nieces and nephews. In 1958 she executed a codicil to the will in which she changed some of the specific

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46 240 Wis. 356, 2 N.W. 2d 729 (1942).
47 *Id.* at 359.
48 The same result could have been achieved in this case with the more logical argument that the Court should adopt the view that pecuniary bequests abate in favor of the necessity of exonerating the specific devise. See discussion on priorities of payment at page 303 hereof.
49 Although the basic question of the right of a specific devisee to have the real estate given to him exonerated at the expense of the personal estate is determined by the decision in the recent case of *Estate of Budd*, *supra* note 1, the Court expressly reserved its opinion on the question of priorities of payment in view of the fact that there was sufficient personal property on hand to pay all creditors, specific legatees, and the mortgagee.
50 *Supra* note 1.
bequests and increased their total amount. Two months after the execution of the codicil, Mrs. Budd died. At the time of her death the unpaid balance on the mortgage was $4,500. The debts, administration expenses, and the specific bequests exceeded the total personal estate and the executors, therefore, sold the business property, pursuant to a power of sale contained in the will. No claim for the payment of the mortgage was filed within the time allowed, but thereafter the widower, by petition to the court, requested payment of the mortgage on the property devised to him. After a hearing on the matter, the Milwaukee County Court made a finding that:

The will of the testatrix contains no express direction as to whether the real estate . . . should pass to the devisee named, free and clear of the mortgage to which it was subject at the time of her death, and from a study of the entire will it appears that testatrix did not express an intent as to whether or not said real estate should so pass and therefore did not intend that said real estate should pass free and clear of the mortgage to which it was subject at the time of her death.\(^5\)

On appeal, it was argued that the Wisconsin Constitution provides that the common law shall be the law of this state until changed or abrogated by the Legislature;\(^52\) that the common-law rule, which in this state has not been abrogated by legislation, is that the specific devisee is entitled to have the real property exonerated from the mortgage unless the will shows a contrary intent; and, that since the lower court had found that the testatrix did not express an intent as to whether or not the property should pass free and clear of the mortgage, then it should have concluded under the law that it did so pass. The Wisconsin Supreme Court concurred in this reasoning:

It is, therefore, clear that the common-law rule, as adopted by constitutional provision, is that the devisee of mortgaged property is entitled to have the mortgage discharged from other assets, in situations where the will does not disclose a contrary intent. This common-law concept has not been altered or suspended by legislation in this state. . . .\(^53\)

The additional question then presented was whether the widower in this particular situation was entitled to exoneration of the mortgage in view of the fact that the personal property of the decedent was less than the amount needed to pay the administration expenses and claims and to satisfy the specific bequests. On this issue it was argued by appellant that the doctrine of equitable conversion was applicable, since

\(^51\) Paragraph 3 of Court's findings of fact in Estate of Budd, Milwaukee County Court File #367-738.

\(^52\) Article XIV, Sec. 13 of the Wisconsin Constitution provides: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

\(^53\) Estate of Budd, supra note 1, at 258.
the will contained a power of sale and the plan of disposition of the
testatrix made sale of the piece of business property necessary in order
to carry out that plan; and, that as a result, the proceeds from the sale
of this realty were to be treated as personalty for all purposes from the
date of death.\textsuperscript{54} The Court apparently adopted this view, but without
comment, merely remarking that there was "sufficient personal property
in the hands of the executors, including the fund derived from the sale
of the real estate,"\textsuperscript{55} (italics added) for the payment of the mortgage
and ordered the same discharged.

As a result of this decision, several points of law in the area under
discussion are clarified: First, the common-law rule of exoneration is
in effect in Wisconsin. Second, the devisee is not required to file a
claim in order to perfect his right to have the property exonerated from
the mortgage, the Court having stated that it found no merit in that
contention.\textsuperscript{56} Third, a direction in the will that all debts be paid will
not be construed to show an intent either to exonerate or not to exon-
erate the property.\textsuperscript{57}

The questions of law not decided by this case are pointed up by the
Court's statement that the devisee is entitled to have the mortgage dis-
charged "from other assets,"\textsuperscript{58} and also by the following paragraph
near the end of its opinion:

We have no problem of priorities presented in the instant case
as a result of granting the exoneration of the mortgage on the
Center street property, there being sufficient personal property
in the hands of the executors, including the fund derived from
the sale of the real estate. . . . Therefore, we refrain at this time
from discussing the priority issue, reserving our opinion with
respect thereto until a case arises which calls for disposition of
such issue.\textsuperscript{59}

In other words, although it is clear from this decision that the com-
mon-law doctrine of exoneration of a specific devise is applicable in
Wisconsin, the highly practical matters of the source from which the
funds are to be drawn and the order in which the obligations are to be
satisfied are left unanswered. Of course, in these matters, one must look
to the common law for the answers, but it is in these areas that there
is some conflict of opinion as to just what the common law really is.

\textsuperscript{54} Estate of Budd, Appellant's Brief, pages 13 and 14, incl.
\textsuperscript{55} Estate of Budd, supra note 1, at 258.
\textsuperscript{56} Id. at 258. The position of this statement at the beginning of the paragraph
in which it is stated that no question of priorities is involved in the case might
seem to suggest that a claim should be filed if priorities were at issue. How-
ever, no decisions have been noted in which, after the right to exoneration
was determined, the presence or absence of a claim affected the source of
funds available to accomplish payment.
\textsuperscript{57} At p. 256 of its opinion, in Estate of Budd. supra note 1, the Court referred
to this provision of the will as "a general direction to pay debts and nothing
more."
\textsuperscript{58} Estate of Budd, supra note 1, at 258.
\textsuperscript{59} Ibid.
EXONERATION

Sources of Payment and Priorities

The general rule is that exoneration of lands specifically devised is to be accomplished out of the personalty. The order of payment then usually recognized is resort to lands devised expressly for the payment of debts; lands descended to the heir; and lands specifically devised which are charged with the payment of debts, successively. In Wisconsin, however, the marshalling of funds for the payment of debts is controlled by statute, and possibly, in view of this statute, lands charged with the payment of debts would be marshalled ahead of intestate realty, although neither would be available until the residuary personalty had been exhausted. By virtue of modern custom and practice, however, the last three categories have become relatively unimportant. It has been held in a few cases that, where personalty and realty are blended as one by the will, both become available to discharge the mortgage on specifically devised property. However, this rule is not applicable merely because the personalty and the real estate are disposed of together in the residuary clause of the will.

In Wisconsin, at least, a method of enlarging the fund to which the specific devisee may look for the payment of the mortgage is by invoking the doctrine of equitable conversion, which, when applied in a proper case, will cause the court to look upon the realty contained in the residue as personalty, in its entirety and for all purposes, as of the date of death. This doctrine is applicable in cases in which the will contains a power of sale and factors are present which make exercise of the power "mandatory by implication." However, if the circumstances are such that equitable conversion is deemed to take place at a time later than the death of the testator, the theory would not logically inure to the benefit of the specific devisee.

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60 Supra notes 4 and 10.
61 97 C.J.S. §1316, supra note 22; 3 Jarman, Wills 471, supra note 11; 1 Underhill, Law of Wills 352 (1900).
62 Wis. Stats. §312.04 (1959), §313.26 (1959), and §313.27 (1959).
64 Pyott's Case, 160 Pa. 441, 28 Atl. 915 (1894); 97 C.J.S. §1322, supra note 22 and cases cited therein. Although not so identified, this is actually a type of equitable conversion. 5A Thompson, Real Property 935 §2631 (1957). See 4 Page, Wills §1479, supra note 10, for a discussion on the effect of "blending" on payment of debts generally.
65 97 C.J.S. §1322, supra note 22.
66 See discussion of application of this theory in Estate of Budd, supra note 1, at 301 hereof. For a discussion of the combined use of the theories of exoneration and equitable conversion also see 1955 U. Ill. L. Rev. 743, 752 (1955).
67 Estate of Dusterhoft, 270 Wis. 5, 70 N.W. 2d 239 (1955); Becker v. Chester, 115 Wis. 90, 91 N.W. 37 (1902); Will of Schilling, 205 Wis. 259, 237 N.W. 122 (1931); Webster v. Morris, 66 Wis. 365, 23 N.W. 353 (1886); Benner v. Mauer, 133 Wis. 325, 113 N.W. 663 (1907); Harrington v. Pier, 105 Wis. 485, 82 N.W. 345 (1900); Will of Bitton, 218 Wis. 63, 259 N.W. 718 (1935).
68 See 19 Am. Jur. Equitable Conversion §26 (1939) for general discussion of the time of conversion of real estate passing by will.
With regard to the order in which the various persons claiming from an estate are to be paid, the general rule is that debts and administration expenses shall first be paid, followed by payment of specific legacies, and that, thereafter, the specifically devised realty shall be exonerated. 69

The one big area of disagreement is whether pecuniary bequests are to be paid prior to exoneration of the devised real estate or thereafter. One view is that the mortgage is to be discharged from the personalty contained in the "residue," and that the residue is that which remains after all bequests have been paid, which reasoning protects the pecuniary bequest from diminution. 70 The other theory is that debts are to be paid from the personal estate, and that the specific devisee should not be deprived of his right of exoneration out of such assets by a bequest which differs slightly and only in form from a residuary bequest. 71 The view of the English courts was that the pecuniary bequest took precedence over the payment of the mortgage; 72 the court explaining in the case of Johnson v. Child 73 that this rule had developed through the courts' reading into wills an intention not to exonerate in those cases in which the pecuniary bequests would be diminished by payment of the mortgage.

In its efforts to settle the question of the priority of the pecuniary bequest in terms of an intention imputed to the testator, at least one court concluded that if the mortgage was given subsequent to the execution of the will, then pecuniary bequests must abate in its favor, but otherwise not. 74 This reasoning was based on the assumption that a testator was aware of the size of his estate and the existence of any mortgage at the time he executed his will and that, if he had intended the mortgage to be paid for the benefit of the specific devisee, he would not have made pecuniary bequests in excess of the amount of personalty which would be available after the mortgage payment. It would seem, however, that the more logical approach would be to determine whether or not the testator intended exoneration in the first instance, and if it is to be had, then the order of payment should follow definite rules and not, of itself, be dependent upon intent.

The pecuniary bequest serves a definite purpose, and the English theory that it should be favored over the right of exoneration is prob-

69 57 Am. Jur. §1474, supra note 10; 34 C.J.S. Executors and Administrators §484 (1942); 4 Page, Wills §1486, supra note 10.
70 Ruston v. Ruston, supra note 32; Harris v. Dodge, 72 Md. 186, 19 Atl. 597 (1890); Glass v. Dunn, 17 O.S. 413 (Ohio 1867); Wheeler v. Hatheway, 54 Mich. 547, 20 N.W. 579 (1884).
73 Supra note 25.
74 Lapp v. Lapp, 16 Grant Ch. (U.C.) 159 (1869).
ably preferable. Such authors as have ventured an opinion on the matter lean toward the theory that the majority rule is that the pecuniary legatee does not contribute toward the payment of the mortgage, even though the courts of a number of states have held otherwise. The Wisconsin Supreme Court has not, of course, been presented with this question. In the Pitcher case, however, a Wisconsin county court had directed payment of pecuniary bequests prior to the payment of the mortgage.

At one time the same question was debated with regard to the general bequest, i.e.—the bequest of all of the testator's personalty to a particular person. However, the consensus of opinion seems to be that such a bequest differs in no substantial way from a bequest of the residue and should, therefore, be available to exonerate the mortgage on specifically devised property.

**Other Encumbrances Required to Be Paid for the Benefit of the Specific Devisee**

In addition to the strict mortgage, the common-law principle of exoneration applies to other liens on the specifically devised property; the basic requirement being that the lien be a primary personal obligation of the devisor. Under this theory real estate taxes have been ordered paid for the devisee in those jurisdictions in which they are considered a personal obligation. Presumably, this would formerly

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76 Cases cited, supra note 71.
77 Estate of Pitcher, supra note 46. Wis. Stat. §313.28 (1959). This statute provides: "The estate, real and personal, given by will, when required for that purpose, shall be held liable for the payment of debts, expenses of administration and family expenses in proportion to the several devises and legacies; except that specific devises and legacies, and the persons to whom made, shall be exempted if there is other sufficient estate and it shall appear necessary in order to effect the intention of the testator." But there has been no construction of this statute which would throw light on the problem discussed above.
78 4 Page, Wills §1486, supra note 10.
79 "Obligation" is a term which has been broadened in meaning to such a point that it defies definition. In its original and most technical common law sense, it was limited to written instruments under seal whereby a man bound himself, under penalty, to do a certain thing. At a later point, it became any writing containing a promise to pay money or to do a certain thing, and it may have been in this sense that the term was used in the early English cases relating to exoneration of specifically devised property. See cases cited supra notes 4 and 10. In later English cases and in cases involving exoneration in the United States, the term has been used in its broader sense to include any duty, whether imposed by law, promise, or contract. See Bouvier's, Law Dictionary (Baldwin's ed. 1934); Black's, Law Dictionary (3rd ed. 1933); 29 Words and Phrases 30 (1940); and 67 C.J.S. p. 12 (1950). For a discussion of meaning of "personal" obligation see 40 Harv. L. Rev. 630, 632, supra note 6 and annot., 120 A.L.R. 577, 579 (1939).
80 In re Gill, 199 N.Y. 155, 92 N.E. 390 (1910); Braden v. Coale, 165 Md. 150, 166 Atl. 730 (1933). But see Barlow v. Cain, 146 Ark. 160, 225 S.W. 228 (1920), where the taxes were held not to be a personal obligation.
have been true in Wisconsin. However, the common-law doctrine is no longer applicable to current real estate taxes in this state in view of Sec. 74.62(2) of the Wisconsin Statutes, which provides that real estate taxes imposed in the year of the devisor’s death are to be pro-rated between the estate and the specific devisee, in the absence of any specific direction in the will. Mechanic’s liens, judgment liens, and vendors’ equitable liens for the purchase price are also encumbrances which the executor has been called upon to discharge for the benefit of the specific devisee.

**Exoneration of Intestate Realty and Specific Legacies**

The doctrine of exoneration is also applicable for the benefit of persons other than the specific devisee. It may be invoked by an heir of real property in the case of intestacy. However, under modern statutes the same persons generally take both the personality and the realty, with the result that no economic benefit may derive from its application. A beneficiary is also entitled to call upon the executor to exonerate his specific legacy upon the same principles which apply in the case of the specific devise. The doctrine has been effectively applied to the benefit of the specific legatee in cases involving chattel mortgages and debts secured by a pledge of the personality devised.

Historically, the right of exoneration has applied only to probate property; the right being available only to a specific legatee or devisee or to an heir. There have been a few cases in which a surviving joint tenant has demanded exoneration of the property jointly owned with the deceased, but in such cases the rule was protected from extension by a finding that an intent not to exonerate was inferrable from the circumstance of joint ownership. It also seems probable that an intent not to exonerate would be imputed to a decedent who had, during his lifetime, pledged life insurance policies on his own life as security for

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81 See Mariner v. Milwaukee, 146 Wis. 605, 609, 131 N.W. 442 (1911) in which it is stated, “Taxes are debts due to the government which a property owner has no more right to withhold than the most sacred debt of a private nature.” Also Warden v. Board of Supervisors of Fond du Lac County, 14 Wis. 672 (1861).

82 Bethel v. Magness . . . Okla. . . ., 296 P. 2d 792 (1956); 26A C.J.S. §125e, supra note 10 and cases cited therein at note 99. See Wis. Stat. §289.06 (1959) for provision regarding perfecting of mechanic’s lien after death of property owner, “. . . with like effect as if he were then living.” Query, however, whether the lien of a subcontractor would be a “personal obligation?”

83 Fenstermacher’s Appeal, 174 Pa. 476, 34 Atl. 120 (1896); Todd v. McFall, supra note 71.

84 26A C.J.S. §125c, supra note 10.

85 ATKINSON, WILLS §137 (2d ed. 1953); 4 PAGE, WILLS §1486, supra note 10; 35 Texas L. Rev. 289 (1956); annot., 5 A.L.R. 488 (1920); 72 A.L.R. 709 (1931); and 120 A.L.R. 577 (1939)

86 ATKINSON, WILLS §137, supra note 85; 3 JARMAN, WILLS 471, supra note 11; 3 AMERICAN LAW OF PROPERTY §14.25, supra note 11; 4 PAGE, WILLS §1486, supra note 10.

87 See authorities cited, supra note 87 and cases cited therein.

88 Fulenwider v. Birmingham Trust & Savings Co., supra note 34.
monies borrowed, even though the policies were payable upon his death to named beneficiaries.

PROCEDURE TO DETERMINE RIGHT TO EXONERATION

The mortgagee may either file a claim for the payment of the mortgage or may forego the presentation of a claim against the estate and rely solely on his security.99 The majority rule appears to be that the failure of the mortgagee to file a claim against the estate within the time allowed does not bar the specific devisee's right to have the property exonerated from the mortgage.90

In an informal manner, the filing of a claim for the payment of the mortgage by its holder may call attention to the exoneration issue, but the mere existence of the claim does not put the various classes of beneficiaries on notice as to all of the ramifications of the exoneration question, nor does the allowance of the claim in the usual manner constitute an order which will properly protect the rights of a devisee. The devisee seeking to have his devise exonerated should at least make a written demand therefor upon the executor, and the better and more efficient practice would be to petition the probate court for an order directing the executor to exonerate the real property. While authorities are generally in agreement that the devisee need not take action within the time limited for the filing of claims by creditors,91 any attempt to proceed against the residuary legatees after settlement of the estate should fail as a collateral attack on the judgment of the probate court.92

An executor has been held personally liable to the specific devisee for refusing to exonerate real property in a proper case.93 On the other hand, since it is the duty of the executor to protect the residue of the estate,94 if he acts without authorization, he does so at his own peril. The only prudent course, therefore, is for the executor to obtain an order of the court either directing that the specific devise be exonerated or not be exonerated in each instance in which the question arises.95 This obligation on his part raises the question as to how much investiga-

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90 Edgerton v. Schneider, supra note 39; 2 CALLAGHAN'S, WISCONSIN PROBATE LAW §9.36, supra note 28; ATKINSON, WILLS §127, supra note 85; 4 PAGE. WILLS §1486, supra note 10.
91 Authorities cited, supra note 90.
92 49 C.J.S. Judgments §402 (1947); 1 CALLAGHAN'S, WISCONSIN PROBATE LAW §1.155, supra note 28.
94 1 CALLAGHAN'S, WISCONSIN PROBATE LAW §7.280, supra note 28.
95 If the mortgagee has filed a claim, the executor should, of course, object thereto in any case in which there is any likelihood that the property passes cum onere. This procedure does not, of itself, however, bring before the Court all of the questions related to the ultimate burden of the debt if the claim is allowed.
tion the executor is required to make of the circumstances surrounding
the testator at the time of the execution of the will, since those circum-
stances might be indicative of an intent not to exonerate the property,96
which finding would save the personal estate from depletion.

**Will Provisions Relating to Payment of Liens**

In view of the many problems posed by the exoneration principle,
the only reasonable course for those drafting wills, especially in those
states following the common-law rule, is to include therein a provision
with regard to the payment of encumbrances. In view of the differences
in the law in the various jurisdictions, no one form is suitable in all
cases. However, the draftsman would be well advised to avoid the
phrase, "subject to the mortgage."97 He should state whether the pro-
vision is intended to apply to probate property, or non-probate property,
or both; to real property, personal property, or both; to mortgages only
or to all liens; and to encumbrances existing prior to the execution of
the will or those arising thereafter, or both.98 In addition, he should
state whether the payment of the encumbrance is to be a charge upon
the estate generally or upon the personal residue only,99 and if the
latter, whether pecuniary legacies are to abate in its favor.

**Statutory Modification of the Exoneration Doctrine**

It has been held that the Wills Act100 does not affect the common-law
rule of exoneration.101 England and a number of the states of the
United States have, however, passed special statutes which either
modify the doctrine or abrogate it entirely. Since these statutes are in
derogation of the common law, they must be strictly construed,102 and,
consequently, some of them have not fully accomplished the result which
their proponents intended.

In some jurisdictions the placing of a mortgage upon real property
devised by a will previously executed was at one time considered an
act in revocation of the will,103 and statutes were passed providing that

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96 See p. 295 hereof.
97 See p. 295 hereof.
98 Authorities cited, supra note 30.
99 As discussed herein at p. 294, when an express direction for payment of liens
is included in the will, the matter may no longer be one of common law exon-
eration, but, instead, the testator may be held to have made an additional
bequest which is a charge upon the residue of his estate. See Will of Mann,
supra note 19, and also related text discussion. Also Brener v. Raasch, 239
Wis. 300, 1 N.W. 2d 181 (1941) where a direction to cancel a mortgage held by
the testator on property previously sold to his brother was held to create a
specific legacy in the brother's favor. It would seem that this same reasoning
would be applied in a case containing all the elements necessary for the com-
mon law exoneration.

100 This act corresponds generally to Wis. Stats, Chapter 238, entitled "Wills."
102 In re Cloninger's Estate, 8 Wash. 2d 348, 112 P. 2d 139 (1941); See also,
Page, Statutes in Derogation of the Common Law, The Canon as an Analytical
Tool, 1956 Wis. L. Rev. 78, supra note 15.
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the execution of a subsequent mortgage should not have this effect. There has been a sharp difference of opinion as to whether these statutes abrogate the common-law rule of exoneration; the majority rule being that they have not changed the doctrine, although there is a strong minority holding that they have done so with regard to mortgages executed subsequent to the execution of the will. Statutes of this type generally apply by their terms to both real and personal property, but only in those cases where they pass by will. Because of their limited scope and the difficulties in interpretation, some states have broadened these statutes by adding provisions of the type next discussed.

The second type of statute changing the common-law rule of exoneration follows the English pattern and contains an outright statement that the devisee shall not be entitled to look to the executor for payment of the mortgage, but shall pay the same from his own funds; or that he shall take the property "subject to the mortgage"; or that he shall


105 34 Ore. L. Rev. 211 (1954). For cases holding that this type of statute as enacted in Washington does not abrogate the common law, see re Cloning's Estate, supra note 102. In Hannibal Trust Co v. Elzea, supra note 29 and Rice v. Gates, 320 Mo. 580, 8 S.W. 2d 614 (1928) a similar Missouri statute (since changed) was held to prevent exoneration of property from a mortgage executed subsequent to the will.

106 Supra note 104.


108 N.Y. Stat. Ann. §250, Real Property Law (1951): "Where real property, subject to a mortgage executed by any ancestor or testator, or subject to any other charge including a lien for unpaid purchase money, descends to a distributee, or passes to a devisee, such distributee or devisee must satisfy and discharge the mortgage or other charge out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there will be in the will of such testator a direction, expressly or by necessary implication, that such mortgage or other charge be otherwise paid. Where such real property is distributed or devised to two or more persons, the interest in the real property so distributed or devised to each of these persons shall, as between such distributees or devisees, bear its proportionate share of the total mortgage or other charge."; Okla. Stat. Ann. §5, Title 46 (1954): "When real property, subject to a mortgage, passes by succession or will, the successor or devisee must satisfy the mortgage out of his own property, without resorting to the executor or administrator of the mortgagor, unless there is an express direction in the will of the mortgagor that the mortgage shall be otherwise paid." S. D. Stat. Ann. §56.0227 (1960, Supp.): "When real estate subject to mortgage passes by will, the devisee must satisfy the mortgage out of his own property without resorting to the estate of the decedent unless there is an express direction in the will that the mortgage shall be otherwise paid."

109 Pa. Stat. Ann. §242, Title 20 (1950): "Unless the testator shall otherwise direct by his will, the devisee of real estate which is subject to mortgage shall take subject thereto, and shall not be entitled to exoneration out of the other estate of the testator, real or personal; and this whether the mortgage was created by the testator or by a previous owner or owners, and notwithstanding any general direction by the testator that his debts be paid."; N. J. Stat. Ann. §3A:26-1 (1953): "When real estate subject to a mortgage descends to an
take only the interest which the decedent had in the property at the time of his death.\textsuperscript{110} Statutes of this type do abrogate the common-law rule, but the wording first mentioned, although more cumbersome, seems preferable as the most precise. Matters to be considered in connection with such a statute is: whether it operates only to deprive the specific devisee of the right of exoneration or is equally applicable to the specific legatee and the heir; whether it prevents exoneration only in the case of a strict mortgage or relates to all types of charges and liens; and whether it applies to liens existing or wills executed prior to its adoption; All of these statutes, of course, contain a proviso that the statute shall apply unless the testator shall in some way indicate a contrary intention, but there is considerable variation in the manner in which this may be done. The New York statute\textsuperscript{111} provides that a "direction, expressly or by necessary implication," will defeat the statute, and the New Jersey provision\textsuperscript{112} is similar in that the will must "expressly or impliedly" direct that the mortgage be paid. The Pennsylvania statute\textsuperscript{113} provides that the testator must "otherwise direct," but further states that the statute shall be applicable "notwithstanding any general direction by the testator that his debts be paid." The Oklahoma\textsuperscript{114} and the South Dakota\textsuperscript{115} statutes provide for an "express direction." In Massachusetts\textsuperscript{116} the statute is invoked in distributing the testator's estate "unless the contrary shall plainly appear by his will." The second section of the present Missouri statute\textsuperscript{117} (which implements a section providing that a subsequent mortgage shall not revoke a will) provides that property mortgaged after the execution of the will shall be exonerated unless "it appears from the terms of the loan agreement or from the circumstances surrounding the loan transaction that the testator intended that

heir or passes to a devisee, such heir or devisee shall not be entitled to have such mortgage discharged out of the personalty or any other real estate of the ancestor or testator, but such real estate so descending or passing to him shall be primarily liable for the mortgage debt, unless the will of the testator shall expressly or impliedly direct that the mortgage be otherwise paid."\textsuperscript{118}

\textsuperscript{110} Mass. Stat. Ann. §23, Chapter 191 (1955) : "In all wills made subsequent to January first, nineteen hundred and ten, a specific devise of real estate subject to a mortgage given by the testator, unless the contrary shall plainly appear by his will, shall be deemed to be the devise of the interest only which the testator had at the time of his decease in such real estate over and above such mortgage, and if the note or obligation of the testator secured by such mortgage be paid out of his other property, after his decease, the executor of his will or the administrator with the will annexed of his estate shall, at the request of any person interested and by leave of the probate court, sell such real estate specifically devised for the purpose of satisfying the estate of the testator for the amount so paid, together with the costs and expenses thereof."

\textsuperscript{111} Supra note 108.

\textsuperscript{112} Supra note 109.

\textsuperscript{113} Ibid.

\textsuperscript{114} Supra note 108.

\textsuperscript{115} Ibid.

\textsuperscript{116} Supra note 110.

the encumbrances should be paid out of the encumbered property rather
than from his general estate."

The many problems posed by the existence of the common-law doc-
trine of exoneration plus the fact that it is doubtful that it effectuates
the testator's true intent in most instances are strong arguments for its
repeal. It would seem that any statute for this purpose should completely
eliminate the possibility of exoneration, except where the testator ex-
pressly directs otherwise by his will in terms other than by a general
direction to pay debts. In fairness, the law should apply to all classes
of persons and property and to all types of charges. In view of the
holding in certain Wisconsin cases that an express direction to pay an
obligation is a charge upon the general estate whereas common-law
exoneration normally thrusts the burden only on personal property, this
matter, too, should be spelled out in any statute enacted in this state.
The better provision would seem to be one in accord with present case
law and providing that in those instances in which the testator does
direct the payment of the lien, the same shall be a charge on the general
estate.

CONCLUSION

The decision in Estate of Budd has made clear that the common-
law rule of exoneration of a specific devise from a mortgage existing
thereon at the time of the testator's death is recognized in the state of
Wisconsin, from which it follows that the doctrine should also be recog-
nized by Wisconsin courts in any proper case involving an heir or a
specific legatee. That the problems involved are difficult of solution was
first recorded by the reporter for Lord Hardwicke, the chancellor who
rendered the decision in Galton v. Hancock, one of the earliest cases
involving exoneration. The reporter prefaced his Lordship's opinion
therein with the statement:

"His Lordship having taken a twelfth month to consider this
day gave his opinion on the matter as follows:"

118 This is contrary to recommendation found in MODEL PROBATE CODE §189
(1946) which states, "... either expressly or by necessary implication."
119 Will of Mann, supra note 19; Brener v. Raasch, supra note 99.
120 Supra note 1.
121 Supra note 7.