

Jefferson County Circuit Court
Case Files - Civil
June 1859 - #27

Box No. 11 Folder #38

Couch, John

Couch, Leonard

Parnell, Hynes

Parnell, Reese et al

vs

McKeon, James B.

Partition

40 Acres S12-T40N-R3E
Other Heirs: Henry Couch,
Elizabeth Britton,

Know all men by these presents that Leonard Couch
of the County of Jefferson and State of Missouri
for and in consideration of the sum of one dollar
to me in hand paid by Julius Higgins of the
County and State aforesaid, the receipt whereof is
hereby acknowledged and the said Julius Higgins
thereof never acquits, have granted bargained, sold
transferred and quit claimed, and by these presents
do grant bargain sell transfer and quit claim to
the said Julius Higgins to and for the uses and
purposes hereinafter mentioned, all that certain piece
parcel or tract of land situate in the County of Jeff-
erson and State of Missouri known and described as
follows to wit: "The North West quarter of the South West
quarter of Section Twelve in Township Forty North of
Range Three East in the District of Lands subject to entry
at Saint Louis Missouri, containing Forty acres, together
with all and singular the buildings and improvements thereon,
as also, all the household furniture, and horses, cattle, sheep
hogs farming utensils, grain provender, and all and every
kind or description of personal property that is now or may
be hereafter on the above mentioned premises, to have
and to hold the said real estate ~~to~~ also all the above
mentioned personal property to him the said Julius
Higgins his heirs and assigns forever. Nevertheless
for the following uses and purposes, that is to say,
the said Leonard Couch is during his natural life
to have hold and enjoy the above mentioned real
estate as also all the personal property above mentioned
to his whole and sole proper use benefit and behoof
and after his death the said Real Estate as well
as the personal property above mentioned as also all
that may be acquired by the said Leonard Couch
hereafter and not otherwise be disposed of by him

or which shall be and remain on the said premises at the decease of the said Leonard Couch shall be considered in trust of the said Valius Higgins to and for the whole and sole use benefit and behoof of Martha Couch the wife of the said Leonard Couch in case she should survive him the said Leonard to have hold and enjoy the said real Estate as well as the said personal property for and during her natural life, and at her death to dispose of the same by will in any manner she may think proper. This deed of gift to the said Valius Higgins to and for the use of the said Martha Couch to be considered in lieu of her dower in any or all of my Estate.

In Testimony whereof I the said Leonard Couch have hereunto set my hand and affixed my seal this fourth day of September in the year of our Lord One thousand eight hundred and forty.

Leonard Couch 
Mark

State of Missouri }
County of Jefferson } I Be it remembered that on this first day of September in the year of our Lord One thousand eight hundred and forty before me John S. Matthews Clerk of the County Court within and for the County aforesaid personally came Leonard Couch who is personally known to me to be the person whose name is subscribed to the foregoing instrument of writing as having executed the same and acknowledged the same to be his act and deed hand and seal for the purposes therein mentioned.

In testimony whereof I hereunto set my hand and affix the seal of said Court at Office in Hillsboro the date above mentioned

Jno. S. Matthews Clerk

State of Missouri }
County of Jefferson } John S. Weather, Clerk of the
Circuit Court, and Ex Officio Recorder within and for
the County aforesaid do hereby certify that the foregoing
deed was filed for Record on the fourth day of September
1840. and is truly Recorded in Book #, pages 318 & 319.

In testimony whereof I hereunto set my hand
and affix the seal of said Court at office
in Williboro September the 8th A.D. 1840

John S. Weather, Recorder


Leonard Beach
Deed to
Julius Higgins in
trust for
Near the Beach

filed Sept 4th 1840

Wm Mathews
clerk

fees & charges	112
Recording	1.00
Drawing deed	75
icking sheet & seal	<u>\$2.87 1/2</u>
10 on above	<u>2.00</u>
10 in full	<u>1.87 1/2</u>

Know all men by these presents that I Martha
Couch Widdow of Lencemaw Couch Sed tote of
the County of Jefferson and State of Missouri
have this day for and in consideration of the sum
of One Hundred Dollars to the said Martha Couch
in hand paid by the James B McLean of the County
and State aforesaid Granted bargain and sold
and by these presents do grant bargain and sell
unto the said James B McLean the following
described tract or parcel of Land and personal
property (to wit) The ^{NE} East qr of the South East qr of Sec
No 11 Town No 40 R 3 East and the South West qr of
North West qr of Sec No ~~11~~ 12 Town No 40 R 3 East containing ^{Acres} ~~1/4~~ ^{1/2}
and the following personal property (to wit) One Black
Girl named Fure and all Moneys and have and by
said Martha Couch and three head of horse beasts
and also all other property or Effects that the said
Martha Couch is Interested in or in possession of
to have and to hold the premises and property hereby
conveyed with all the rights privileges and appurtenances
thereunto belonging or in anywise appertaining
unto the said James B McLean his heirs and
assignes forever I the said Martha Couch hereby
covenanting to and with the said James B McLean
his heirs and Assignes for himself his Executors
Administrators to warrant and defend the title
to the premises hereby conveyed against the claim
of every person whomsoever
In Witness whereof I have hereto Subscribed
my name and Affixed my Seal this 23rd day
of Sept A D 1858
at St Michael McLean Martha Couch
Mark

State of Missouri
County of Jefferson

Be it Remembered that
Martha Couch who is personally known to the
undersigned a Justice of the peace in and for said
County to be the person whose name is subscribed
to the within deed as a party thereto this day
appeared before me and acknowledged that she
Executed and delivered the same as her Voluntary
act and deed for the use and purposes therein
contained Given under my hand this 23rd
day of Sept A D 1858

Newman Sanders
Justice of the peace

State of Missouri

County of Jefferson

The undersigned Clerk of the
Circuit Court and Ex officio recorder in and for
said County hereby certify that the foregoing instru-
ment in writing was filed for record in my office
October 13th A D 1858 and is truly recorded in
Book C. page 21

Witness my hand and the Seal
of said Court date last aforesaid
Elias D. Horey
Recorder

Conveyance
from Martha
Couch to

Wm. B. Allen

dated Oct. 13th 1858

Geo. J. Henry

Paid

John Couch Lin Couch
 Agnus Pamela Russ Pamela
 Henry Couch & Britton
 Agst
 James B. McKear

In the circuit
 Court of Jefferson
 County
 Missouri

Plaintiff states that their father Leonard Couch on the 2nd day of September 1840 conveyed by deed to Julius Higgins the following described real Estate situated & being in Jefferson County Missouri, to wit; the North West quarter of the South West quarter of Section Twelve in Township Forty North of Range three east containing forty acres. The said deed conveyed to said Higgins was not absolute but in trust of the said Leonard for & during his natural life & after his death in trust for Martha Couch the wife of the said Leonard for and during her natural life, provided she survived her husband and the said Leonard, with power vested in the said Martha Couch to dispose of said Real Estate at her death by will in any manner she might see proper. Said deed of trust also conveyed to said Higgins all the personal property the said Leonard then owned & all he might die possessed of in trust for the said Martha to be disposed off in the same way as said Real Estate.

Plaintiff further states that the said Leonard died in the year 1837 leaving the said Martha surviving him together with the plaintiffs and

James Couch who is not made a party
to this suit, as his children were at law;
that the said Martha soon eight or ten
months after her husband's death, died also,
without having executed the power given her
by said and of Trust to dispose of said Real
estate by will, whereupon the said and is of
no further force or effect & the real estate
results to the heirs or legal representatives of
the said Leonard.

Plaintiff further avers that James Couch one
of the sons of the said Leonard has relinquish-
ed his interest in said land to Defendant
that the plaintiffs & defendant are the only
parties that have any interest in said
land. Plaintiff further states that they
and defendant are each entitled to one
six part of said Real Estate.

Plaintiffs in consideration of the fact
pray the court to order & decree that division
& partition of said Land be made among
them & Defendant according to their respective
shares or if the same cannot be made in
kind without great prejudice to them
intended to order & decree that the same be
sold.

Hagan Pipkin & Thomas
attys for plffs.

Francis Hagan atty for plffs make
oath & says that the above petition & the
motions as therein stated he believes to be true
Sworn to and Subscribed } Francis Hagan
Before me, July 21st 1859 }
Elias J. Hooley Clerk }

Couch et al

Sept-

13 McKeen

Receipt for
particular

All business from

Sept. 20 1859

Geo. A. Hovey
clerk

copy of A	75
100	50
and stop	120
off base	30
	<u>275</u>

COUNTY OF JEFFERSON, SS.

The State of Missouri.

To the Sheriff of the County of Jefferson--Greeting:

We command you, that you summon James B McKeon

if he be found in your County, that he be and appear before the Hon. Judge of our Circuit Court, on the first day of the next term thereof, to be begun and held at the town of Hillsboro, within and for the County of Jefferson, on the second Monday after the fourth Monday of May next, then and there to answer unto John Couch Len Couch Agnes Parnell Ress Parnell Henry Couch & Brettton

upon their original petition, a copy whereof is herunto annexed and accompanies this writ—and have you then there this writ.

Elias J Honey
Witness, ~~Wm C Fletcher~~, Clerk of our said Circuit Court, with the seal thereof hereto affixed, at office, in Hillsboro, this twenty third day of February A. D. 1859

Elias J Honey
CLERK CIRCUIT COURT.

I executed the within writ in the County
of Jefferson State of Missouri on James B
Mcain by reading said writ & petition to him
also by delivering a true copy of this writ &
petition on the 30th day of April 1859

Asd. David Sheriff

No 27/628
Jefferson Co. Court
June Term 1859

John Leach. and
Geo. Leach et al

v. J. Leachman

James B. Mcain

David Sheriff. fee \$1.00

Subd April 30th 1859
E. H. Honey, Clerk
Paid for partition

John Couch & others Plaintiffs

^{vs}
James B McKean Defendant.

In the Circuit Court

Jefferson County Mo

The defendant for answer to the plaintiffs petition states. That it is True that Leonard Couch on the 4th day of September 1840, conveyed by deed to Julius Higgins, the land in the petition of plaintiffs described and that said conveyance was in Trust for the said Leonard for and during his natural life, and after his death, to his wife Martha, if she survived him, to dispose of by will "in any manner she might see proper", that said Leonard died in 1857. and that said Martha survived him,

Defendant states, that at the death of said Leonard the said Martha became the owner in fee simple of said land and, in the exercise of a perfect legal right did on the 23^d day of September 1858, for a good and sufficient consideration, convey the same by deed to the defendant,

Defendant states that he is the legal owner of the whole of said land and is in actual and full possession thereof, and denies that plaintiffs have any right or interest whatever in said land or any portion thereof.

Green & Fletcher for Deft

James B McKean the defendant, on oath states that the foregoing answer and the matters therein as stated he believes to be True,

Signed & sworn to before me

June 1st 1859.

Elias F Honey, Clerk

James B McKean

John Leach Esq
or.
James B McLean.

Answer

Filed June 6th 1859
Oliver J Hoovey
Clerk

John Couch et al vs In the Circuit Court.
James B. McKeon June Term for 1857.

Now at this day come the
Plaintiffs move the Court to strike out
the second Count in Sept's answer for
the following reasons:-

1. Because it constitutes no defense to the
action.

2.

Because a power to dispose of land by
will cannot be executed by an absolute
deed.

Hagon, Ripkin & Thomas.

John Leach et al
vs

J. B. McLean.

Motion to strike
out parts of & to
amend.

Made June 1859

Edw. Moberly etc

John Couch, Lem Couch,
Agness Parnell, Ress Parnell,
Henry Couch, and - Britton, - Plaintiffs }
Against
James B. McKean, - Defendant }
In the Circuit Court
Jefferson County.

Amended Answer filed by leave of Court,
The Defendant in Answer to Plaintiffs
Petition, admits that Leonard Couch on the 14th
of September 1840, conveyed by deed the Land
described in Plaintiffs petition to Julius Wiggins.
But he denies the legal effect of said Deed, as
set forth in said petition. He therefore denies
that said deed to Wiggins conveyed merely
a life estate in said Land, for the use of Mar-
tha Couch in case she survived her husband,
with power in her of disposing of the same by
will only. But, on the contrary, he avers that said
Deed conveyed the absolute fee simple estate of
said Land, to Julius Wiggins, to hold in Trust
for the sole use and benefit of Martha Couch,
in case she survived her husband, the said Leon-
ard, with unlimited power in her of dispos-
ing of the same by will or in any manner
she might think proper, - reserving to said
Leonard Couch the use of the Land during
his life; and containing no limitation over,
beyond the estate of Martha Couch, - Defend-
ant therefore avers that, as she had the un-
limited power of disposing of said Land,
by will in any manner she might think prop-
er, the fee simple title in said Land vested
in her immediately upon the death of her
husband, and that the manner of disposing

of the same was immaterial.

Defendant admits that Leonard Couch died some time in the year 1837, and that Martha Couch survived him some eight or ten months. But, he denies that the said Martha Couch died without executing the power given her by said Deed of Trust, and denies, that said Deed of Trust with the powers therein contained, became void and ineffectual at her death, and denies that a resulting trust exists in favor of the heirs or legal representatives of Leonard Couch to said real estate.

The Defendant states that, on the death of Leonard Couch, the said Martha Couch became invested with the unlimited power of disposing of the fee simple title to said Land, by virtue of said Deed of Trust, and that she executed this power, by a deed of Conveyance of said Land, made and executed to the Defendant, on the 23^d day of September 1858, for a good & valuable Consideration.

The Defendant therefore avers that he is the legal owner of the whole of the Land aforesaid, that he is in the actual and exclusive possession of the same, and that the Plaintiffs have no right to any portion of said Land, or any interest in the same whatever. And Defendant denies the right of plaintiffs to have & maintain their action of partition for said Land, against this Defendant, who holds the same adversely and exclusively against the plaintiffs, under a valid claim of title.

} Green & Fletcher
Attorneys for Defendant

James B. McKean, defendant, makes
oath and says the above Answer, and the
matter therein as stated, he believes to be true,

Sworn to and Subscribed
before me Nov. 3^d 1859
Elias D. Hooley clerk

James B. McKean

In the Circuit Court
of Jefferson County

John Couch
vs.
John P. McKeen

Answer

Answer

Filed Nov. 30 1859

Chas. J. Honey
Clerk

James B. McKean, defendant, makes
oath and says the above Answer, and the
matter therein as stated, he believes to be true,

Sworn to and Subscribed
before me Nov. 3^d 1859
Elias D. Honey clerk

James B. McKean

COUNTY OF JEFFERSON.

THE STATE OF MISSOURI,

To

Charles J Foster

GREETING:

You are hereby commanded, that setting aside all manner of excuse and delay, you

appear before our

Concurs

Court for the County aforesaid, on the

fourteenth

at Hillsboro, then and there

to testify, and the truth to say in a certain matter of controversy, now pending in our said

Court, wherein

John Steen

Concurs

Plaintiff and

Sam B Steen

Defendant on the

part of

deft

and herein you are in no wise to fail.

WITNESS, ELIAS F. HONEY, Clerk of our said Court

with the Seal thereof hereto affixed, at office this

15th day of

June A. D. 18*80*

Elias F. Honey

Clerk.

I Executed the within writ of Reading
the same in the Presence and
hearing of C. F. Gaster on the
15th day of June 1866

L. C. Gaster
J. C. Gaster

Couch

W. O. Olan

Ed. Jones

Shuriff fees

25
50

Elizabeth Britton et al }
vs } Position.
James B. McKeon }

To the Honorable the Circuit Court
of Jefferson County Missouri:

Your petitioner James Couch
would respectfully state that he is a
son & heir at law of Leonard Couch dec'd
& that he once was entitled to one sixt
part of the real estate mentioned in Plaintiff's
petition but that at the October Term of this
Court for 1858 he relinquished his interest
in said real estate in controversy to defend-
ant by compromise in a suit then
pending wherein Martha Couch was

Plaintiff & your petitioner was defendant.
which will fully appear by reference
to the papers in said cause now on file
in the office of the Clerk of the Circuit Court.

Your petitioner respectfully states he has
now no interest in said land & that he
believes defendant is entitled by reason
of said compromise to his share therein.
Your petitioner would therefore pray
the Court to make him a party to the
above entitled cause & decree that
his interest in said land be vested in
defendant according to compromise.
James Couch

James Couch makes oath & says he believes the
above petition & the matters as therein stated are
true - Sworn to & subscribed } James Couch
before me this 16th day of June 1860 }
Elias D. Hordley Clerk

Printed at
J. J. M. M. M.

Printed at
J. J. M. M. M.

Printed June 16th 1860
J. J. M. M. M.

Leouch et al

vs.

McLean Leouch

Petition

Now at this time comes James Leouch one of said dependents & in answer to Plaintiff's petition, states that the allegations set forth in said petition are true & correctly averred; that he does not claim any interest in the land mentioned in said petition & says that he did in Oct. 1888 relinquish his interest, ^{it being one sixth} in said real estate to defendant, by compromise in a certain suit then pending in the Jefferson Circuit Court wherein Martha Leouch was Plaintiff & James Leouch was Defendant, which will more fully & at large appear by reference to the papers in said suit last mentioned now on file in the office of the Circuit Clerk of said County - James Leouch

James Leouch makes oath & says that he believes the above answer & the matter as therein stated are true James Leouch
sworn to & subscribed ~~~~~ James Leouch
before me this 16th day
of June 1866
Chas. F. Honey Clerk ~~~~~

Can Chetol

W¹

McNeen et al

Answer of James
Havel.

Dated June 18th 1860

Chas & Hoarey

Debt

State of Missouri } p In the Circuit Court.
County of Jefferson } June 18th A D 1860

John Couch, Leonard Couch
Agnes Parnell, Reese Parnell,
Henry Couch, & Elizabeth Britton Plaintiffs
against
James B. McKear and James Couch Defendants

"Order of Sale"

And now again at this day, come the parties afore
said by their respective attorneys, and the answer
of the said James Couch, being filed, disclaiming
any interest in the land in plaintiffs petition men-
tioned, and this cause, coming on to be heard, with-
out party requiring a jury, the cause aforesaid is sub-
mitted to the Court, and after hearing the allegations
of the parties respectively, the evidence offered by each
and the argument of counsel: The Court doth
find that the said Plaintiffs and the defendant
James B. McKear, are the owners of, and tenants
in common of the following described tract of
land, in the petition of Plaintiffs mentioned. Viz
The North West quarter of the South West quarter
of Section number Twelve, in Township number
forty of range number three east, containing
forty acres. And it appearing to the satisfaction
of the Court, that partition and division of said
premises, cannot be made without great preju

edice to the owners thereof. It is ordered adjudged, and decreed by the court, that the same be sold for the purpose of partition and division among said owners; and the court proceeding to ascertain and settle the rights and interests of said parties in and to said land, doth declare the same to be as follows. The said Plaintiffs, John Couch, Leonard Couch, Henry Couch, Agnes Parnell and Elizabeth Britton, are entitled to one Sixth thereof each, and the defendant James B McKeon to the remaining one Sixth part thereof. And it is further ordered by the court, that the Sheriff of Jefferson County do proceed to sell said land at Public Vendue to the highest bidder for ten per cent of the purchase money in cash at the time of sale, and the residue in twelve months, and that for the deferred payment, that he take from the purchaser a bond or note with good security, bearing six per cent interest from the day of sale, that said sale take place on some day during the Session of the Circuit Court, and be governed in all things by the same regulations provided by law, for sales of real estate under Execution. Notice thereof being given by the Sheriff in the manner prescribed by law for such sales and pay over the proceeds to the said parties according to their respective rights and interests as herein set forth, and report his proceedings herein to the court, and this cause is continued.

State of Missouri }
 County of Jefferson } I, the undersigned Clerk
 of the Circuit Court in and for said County do here
 by certify that the foregoing is a true and complete
 copy of the order of Sale made by said Court
 in the above entitled cause in partition as fully
 as the same remains on record in my office

In Testimony whereof I hereto set
 my hand and affix the seal of
 said Court, this twenty fifth day of
 August Eighteen hundred and Sixty
 Elias S. Hooney Clerk

Sheriff sale in partition.

JOHN COUCH, LEONARD
 COUCH, AGNESS PAR-
 NELL, REESE PARNELL,
 HENRY COUCH, and E-
 LIZABETH BRITTON,
 Plaintiffs,

In the Circuit Court.

vs.
 JAMES B. McKEEN and
 JAMES COUCH, Def'ts.

BY VIRTUE AND AUTHORITY OF AN ORDER
 made by the Circuit Court of the County of Jef-
 ferson, State of Missouri, at its June term, 1860, and
 I will, on Friday, the 14th day of December, 1860, at
 the Court House door in the town of Hillsboro, be-
 tween the hours of nine o'clock in the forenoon and
 five o'clock in the afternoon of that day, offer for
 sale at public auction, to the highest bidder the fol-
 lowing described real estate and property, to wit:

The north-west quarter of south west quarter of
 section twelve in Township forty, range three east,
 containing forty acres, for which the purchaser will
 be required to pay ten per cent. of the purchase mon-
 ey in hand at the time of sale, the balance in twelve
 months, the purchaser giving his bond with approved
 security bearing interest at the rate of six per cent.
 per annum from date, this October 20th, 1860.

OSCAR DOVLE, Sheriff.

20 Jefferson County Court
December Term 1860

John Couch et al
vs { Order of Sale
James W. McKeon

Printers fee

\$ 5.00

Filed Dec 20 th 1860

Chas J Mooney clerk

James Couch & 75-5000
- Sheriff 14 -

John Couch, Elizabeth Button
Leonard Couch, Agnes and
Reese Parnell, and Ben. and
Sarah McKee, Plaintiffs
Against
James B. McKee, Deft

Now at this day come Ben.
McKee and Sarah his wife, who state
that there was a mistake made in bringing
this suit by inserting the name of Henry
Couch as one of the plaintiffs: that Lem.
Couch Dec'd had no such child or heir
but that the name of him in the original
petition is properly set forth, and that the
said Sarah McKee formerly Sarah
Couch is one of the heirs of said Leonard
Couch Dec'd and was intended in the
place of Henry. They ask to be ^{Plaintiffs} ~~Defendants~~
Ben McKee & S. McKee
By Thomas, Atty

John L. Thomas makes oath & says
that he believes the above petition and
the matters therein stated are true.

Sown to and Subscribed
before me Jan'y 19th
1863 } John L. Thomas
Elias H. Hovey

J. Leonard et al

vs

J. B. McKee.

Partition of Real & Personal
Estate, to the Master
of the Court,
Superior Court

Filed Jan'y 20th 1863
Chas & Henry Alt

John, Henry and Leonard
Burch, Rees & Agnes Small
and Ben. and Sarah McKee,
Plainfield.

[illegible]

Good even of your husband and
children; to Rose and Agnes Samuel
and their; to Ben. and Sarah McTea
and their and to James B. McTea
and their.

Hagon, Pub. Admr.
vs
James B. McKeon

The Plaintiff asks the Court to declare
the law in this cause as follows.

1. That a deed of trust to Mrs. Leach in 1840, by her husband conveying to her all the personal property that he then owned & all that he might hereafter possess of is too indefinite to be valid & is therefore as to the personal ^{property} void.
2. That a deed of trust to the grantor for the life of the grantor with power in her to dispose of the ~~property~~ ^{property} both real & personal then contained at her death by will gives to the grantor a life estate only.
3. That where a power in a will or deed is to be executed by will & cannot be done by an absolute & irrevocable deed.
4. That the words "hers of her body" are necessary to create an estate tail, in a woman.

John & Leonard Couch et al } In Partition
 James B. McKean. } In the Jefferson Cir Court
 Fee Bill

Honey clerk. 1 copy pet. 75¢ 1 Cert Seal 50¢
 writ copy 1. 20. aff'd. 25¢. Dockets 20¢. Leave 50¢
 petition of Jas Couch 25¢ Submision 25¢. aff'd 25¢
 ans 25¢ ans of J. Couch 25¢. Note on 25¢. Amended ans 25¢
 aff'd. 25¢. 1 Spa 50¢. trial 50¢. Judgt. 50¢ decree 1.50
 2 oaths 10¢. copy order sale 50¢ Cert Seal 50¢. jms 33¢
 Report 50¢. Index. 10¢. make up costs 25¢ atty fee
 25¢. paid \$111.95

Oscar Dover Sheriff

Seize writ 1 defendant	\$1.00	
" Spa 1 writ	.50	
" Leas. 20¢ Cornuption 530 Note 1¢	6.70	
" Advertising -	6.00	14.20
atty fee -		
" cont-50¢, petitioner of McKee wife & 25		25.15
aff'd writ 25. order 10¢. Order to distr		
clude proceeds 10¢ files 5¢		1.25
		\$26.40

no than?ouchat

m

June 13 Melton

see Bill

Conch it ad
McKean } means of authorities

Where the terms of a devise clearly indicate
the purpose of the testator to disprove of his whole interest
in the property devised, the devise will take an estate
in fee though there be no words of limitation but as
Phelps 17 Wend 393 &c see memo 437.

a devise of land to the wife to disprove of as she may
think best, at her death, conveys the fee. Moore v Webb
213 Masses 282,

It has become

Leach

^{vs}
McCann.

The defendant asks the court to declare the law to be that the defendant being in possession of the land in the partition described asserting an exclusive title thereto, the plaintiffs being out of possession and claiming a common title to said land, cannot maintain this action for partition,