the real estate of the debtor may be sold on execution, either at law or in chancery, in default of goods and chattels, on six weeks' notice, and in separate parcels, if required by the owner. A certificate of the sale is to be delivered by the officer to the purchaser, and another certificate filed in the clerk's office of the county within ten days.

10. *Is a sale so made conditional or absolute?*—431, 432.

Conditional; redemption of the lands sold may be made by the debtor, or his representative, within one year, on paying the amount of the bid, with ten per cent. interest. Any joint tenant, or tenant in common, may redeem his ratable share of the land by paying a due proportion of the purchase money. On default of the debtor, any creditor, by judgment at law, or decree in equity, and in his own right, or as a trustee, within three months after the expiration of the year, may redeem the land, on paying the purchase money, with seven per cent. interest. So, any other judgment creditor may redeem from such prior creditor. The redemption is allowed to be carried further, and is given to any other creditor, who may redeem from the creditor standing prior to him. But all these subsequent redemptions must be made within fifteen months from the time of the sale; for the officer is then to execute a deed to the person entitled, and the title then acquired becomes absolute in law.

LECTURE LXVII.

OF TITLE BY DEED.

1. *What is a purchase, in the ordinary and popular acceptation of the term?*—440.

It is the transmission of property from one person to another, by their voluntary act and agreement founded on a valuable consideration.

2. *What is it in judgment of law?*—440.

It is the acquisition of land by any lawful act of the party,

in contradistinction to acquisition by operation of law; and it includes title by deed, title by matter of record, and title by devise.

3. *Were lands alienable in the time of the Anglo-Saxons?*—441.

They were; either by deed or by will, according to some authorities.

4. *How were they called when conveyed by charter or deed?*—441, 442.

Boc, or bookland, and the other kind of land, called folcland, was held and conveyed without writing. But this notion of the free disposition of land among the Saxons must be understood in a very qualified sense; and the *jus disponendi*, even at that day, was subject, as it is and ought to be in every country and in every stage of society, to the restraints and modifications suggested by convenience, and dictated by civil institutions. It was reserved, however, to the feudal policy, to impose restraints upon the enjoyment and circulation of landed property to an extent then unprecedented in the annals of Europe.

5. *In whose favor did these restraints arise?*—442.

They arose partly in favor of the heir of the tenant; but principally from favor to the lord of the fee. It was repugnant to the genius of the feudal system to allow the land which the chieftain had given to one family, to pass without his consent into the possession of another, and perhaps to an enemy. The restrictions accorded with the doctrine of feuds; but were proper for that system only. As a part of the feudal fabric, they fell before the influence of freedom, commerce, and the arts.

6. *When were the earliest innovations upon feudal restraints made?*—443.

In the reign of Henry I.; the first step taken in mitigation of the rigor of the law of feuds, and in favor of voluntary alienations, was the countenance given to the practice of subinfeudations.

7. *Did not a law of Henry I. relax the restraints as to purchased lands?*—444, 445.

Yes, but retained them as to those which were ancestral.

Under the statute *de donis* of 13 Edward I., fees conditional were changed into estates tail; and by construction of the courts, these were eluded, and the policy of the statute defeated by the fiction of a common recovery. The statute of *quia emptores*, 18 Edward I., permanently established the free right of alienation by the sub-vassal, without the lord's consent. The power of involuntary alienation, by rendering the land answerable by attachment for debt, was created by the statute of Westm. 2, 13 Edward I., chapter 18, which granted the *elegit;* and by the statutes merchant or staple, of 13 Edward I., and 27 Edward III., which gave the *extent.*

8. *Who is capable of holding land by descent, devise, or purchase?*—446.

Every citizen of the United States; and every person capable of holding lands (except idiots, persons of unsound minds, and infants),and seised of, or entitled to, any estate, or interest in land, may alien the same at his pleasure, under the regulations prescribed by law.

9. *Has not the statute of* 32 *Henry VIII., respecting pretended titles, which imposed a forfeiture upon the seller of the whole value of lands sold, and the same penalty upon the buyer also, if he purchased knowingly, been reënacted in the State of New York?*—447.

Yes. This severe statute was reënacted literally in New York, in 1788, but the penal provisions are altered by the New York Revised Statutes, which have abolished the forfeiture, and made it a misdemeanor for any person to buy or sell, or make or take a promise or covenant to convey, unless the grantor, or those by whom he claims, shall have been in possession of the land, or of the reversion or remainder thereof, or of the rents and profits, for the space of a year preceding.

10. *Does this provision apply to a mortgage of the lands?*—447.

No: nor to a release of the same to the person in lawful possession.

11. *Was not a feoffment void, without livery of seisin?*—448.

Yes: and without possession a man could not make livery of seisin.

12. *Is this principle peculiar to the common law?*—448.

No. It was a fundamental doctrine of the law of feuds, on the continent of Europe.

13. *Does the principle prevail generally in the United States?*—448, 449.

The doctrine, that a conveyance by a party out of possession and with an adverse possession against him, is void, prevails equally in Connecticut, Massachusetts, Vermont, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Mississippi, Alabama, Indiana, and probably in most of the other States. In some States, such as New Hampshire, Pennsylvania, Ohio, Illinois, Missouri, and Louisiana, the doctrine does not exist; and a conveyance by a disseisee would seem to be good, and pass to the third person all his right of possession, and of property, whatever it might be.

14. *What is required, in the due execution of a deed?*—450.

It must be written on paper or parchment and signed, sealed and delivered.

15. *Does not the law require more form and solemnity, in the conveyance of land, than in that of chattels?*—450.

It does; and this arises from the greater dignity of the freehold in the eye of the ancient law, and from the light and transitory nature of personal property, which enters much more deeply into commerce, and requires the utmost facility in its incessant circulation.

16. *How were lands conveyed in the early periods of English history?*—450.

Usually without writing, but it was accompanied with overt acts, equivalent, in point of formality and certainty, to deeds. As knowledge increased, conveyance by writing became more prevalent; and finally, by the statute of frauds and perjuries, of 29 Charles II., all estates and interests in lands (except leases not exceeding three years), created, granted, or assigned, by livery and seisin only, or by parol, and not in writing, and signed by the party, were declared to have no greater force or effect than estates at will only.

17. *How has this statute provision been received in the United States?*—450.

It has been either expressly adopted, or assumed as law, throughout the United States. In New York, it has been enacted, in every successive revision of the statutes; and in the last revision it is made to apply, not only to every estate and interest in lands, but to every power, or trust, concerning the same; and the exception as to leases is confined to leases for a term not exceeding one year.

18. *Does this provision apply to trusts by implication, or operation of law, under the New York Revised Statutes?*—450, 451, *n.* (*c.*)

No: nor is a parol promise to pay for the improvements made upon land within the statute of frauds. They are not an interest in land, but only another name for work and labor bestowed upon it. So a crop of growing potatoes, corn, or other annual production, raised by the industry of man, is a personal chattel, and not within the statute.

19. *How must a conveyance be executed in England?*—451.

It is deemed essential in the English law to a conveyance of land, that it should be by writing, sealed and delivered; this rule of the common law is adopted and followed with us, except in Louisiana, and is in some States made a statute provision. Part performance of an agreement by parol to sell land will, in certain cases, take the agreement out of the statute of frauds, and authorize a court of equity to decree a specific performance of the contract.

20. *What is a deed?*—452.

A deed is an instrument in writing, upon paper or parchment, between parties able to contract, and duly sealed and delivered.

21. *What did the common law intend by a seal?*—452.

An impression upon wax, or wafer, or some other tenacious substance capable of being impressed.

22. *Is sealing, in the common law sense of the term, requisite in every State of the Union?*—452, 453, *and notes.*

Not in all of them. In Connecticut, by statute of 1838, a

seal is not necessary to the conveyances of real estate, or bonds. In many of the southern and western States, a scroll is a valid substitute for a seal. In New England generally, and in New York, the seal retains its original definition and character.

23. *Is delivery of a deed essential?*—454.

It is, for it takes effect only from the delivery.

24. *To whom may the deed be delivered?*—454.

It may be delivered to the party himself to whom it is made, or to any other person authorized by him to receive it.

25. *May it be delivered to a stranger as an* escrow?—451.

It may; and this means a conditional delivery to the stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the *grantee.*

26. *When generally does an* escrow *take effect?*—454.

Generally from the second delivery, and it is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery.

27. *What is the general principle of law on this subject?*—454.

That in all cases where it becomes necessary, for the purposes of justice, that the true time when any legal proceeding took place should be ascertained, the fiction of law introduced for the sake of justice, is not to prevail against the fact. It has been further held that if the grantor deliver a deed as his deed, to a third person, to be delivered over to the grantee on some future event, as on the arrival of the grantee at York, it is a valid deed from the beginning, and the third person is but a trustee of it for the grantee.

28. *What is required to make a deed valid against* bona fide *purchasers?*—456.

By the statute law of every State in the Union, all deeds

and conveyances of land, except certain chattel interests, are required to be recorded, upon previous acknowledgment or proof.

29. *Against whom only will a deed be good if not recorded?*—456.

Only as against the grantor and his heirs. It is void as against subsequent *bona fide* purchasers for a valuable consideration, whose deeds shall be first recorded.

30. *What effect has* notice *of a prior unrecorded deed?*—456.

The English law prevails generally in this country, that notice of the deed by a subsequent purchaser, previous to his purchase, will countervail the effect of the registry, and destroy his pretensions as a *bona fide* purchaser.

31. *Do not the New York Revised Statutes contain specific directions on the subject of the proof of execution of deeds?*—458.

They do; and also of the manner of recording conveyances of real estate.

32. *Do the New York Revised Statutes make any provision as to the number of witnesses requisite to a deed?*—458.

None whatever; and consequently the common law rule applies, that one witness is sufficient, or the acknowledgment before the officer without any witness.

33. *Is the practice of recording deeds in England limited, or general?*—459.

It is of local and very limited application. It applies to the Bedford level tract, to the ridings of Yorkshire, and to the county of Middlesex.

34. *Was there not, during the period of the English commonwealth, an effort to establish county registers for recording deeds throughout England?*—459.

There was.

35. *Was not the ancient policy in favor of the entire publicity of transfers of land, by the fine of record, the livery under the feoffment, the enrolment of a bargain and sale, and the attornment under the grant?*—459.

Yes; but the ingenuity of conveyancers, and the general and

natural dispositions to withdraw settlements, and the domestic arrangements, from the idle curiosity of the public, have defeated that policy.

36. *How is it now in Scotland?*—459.

The old feudal forms, and the *sasine*, or symbolical tradition of the land, are retained.

37. *Of what does a deed consist?*—460.

It consists of the names of the parties, the consideration for which the land was sold, the description of the subject granted, the quantity of interest conveyed, and, lastly, the conditions, reservations, and covenants, if any there be.

38. *What said Sir Henry Spelman of the deeds of the Saxons?*—460.

He says that they "observed no set form, but used honest and perspicuous words to express the thing intended with all brevity, yet not wanting the essential parts of a deed, as the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservation, and the names of the witnesses." This brevity and perspicuity, so much commended by Spelman, have become quite lost, or are but dimly perceived, in the cumbersome forms and precedents of the English system of conveyancing.

39. *Do not the forms in New York, and in those parts of the United States which adhere the most to the English practice, still retain the language of a mutual contract, executed by both parties?*—460, 461.

Yes. And each of them is supposed by the fiction implied in the more formal parts of the *indenture*, to retain a copy. But the essential parts of a conveyance of land in fee are brief, and require but few words. If a deed of feoffment, according to Lord Coke, be without *premises*, *habendum*, *tenendum*, *reddendum*, clause of warranty, etc., it is still a good deed, if it gives lands to another, and to his heirs, without saying more, provided it be sealed and delivered, and be accompanied with livery.

40. *What is the usual form of conveyance in the United States?*—461.

It is usually by bargain and sale, and possession passes *ex vi facti.*

41. *What is requisite as to the parties?*—462.

The parties must be competent to contract, and truly and sufficiently described.

42. *How has a grant to the people of a county been held?*—462.

To be void; because the statute, enabling supervisors of counties to take conveyances of land, applied only to conveyances made to them by their official name.

43. *Is a grant to the inhabitants of a town not incorporated, valid?*—462.

It is not.

44. *Are not conveyances good in many cases when made to a grantee by a certain designation, without the mention of either the Christian or surname?*—462.

Yes. As to the wife of I S, or to his eldest son, for *id est certum, quod potest reddi certum.*

45. *Is a consideration essential to a good and absolute deed?*—462.

It is generally so held; but a gift, or voluntary conveyance will be effectual as between the parties, and is only liable to be questioned in certain cases, when the rights of creditors and subsequent purchasers are concerned.

46. *Must the consideration be either good or valuable?*—464.

Yes. And not partaking of any thing immoral or illegal, or fraudulent.

47. *Is it not a universal rule that it is unlawful to contract to do that which it is unlawful to do?*—464.

Yes. And every deed and every contract are equally void, whether they be made in violation of a law which is *malum in se*, or only *malum prohibitum.*

48. *What is a good consideration founded upon?*—464.

Upon natural love and affection between near relations by blood; but a valuable one is founded on something deemed valuable, as money, goods, services, or marriage.

49. *What is the rule respecting the description of the land conveyed?*—466.

The rule is, that known and fixed monuments control courses and distances. So, the certainty of metes and bounds will include and pass all the lands within them, though they vary from the given quantity expressed in the deed. The least certain and material parts of the description must yield to those which are the most certain and material.

50. *Does the mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specification, amount to any covenant?*—466.

It does not; it is but matter of description—nor does it afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount.

51. *Whenever it appears by the definite boundaries, or by words of qualification, as, "more or less," or as, "containing by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, how does the buyer take it?*—467.

He takes it at the risk of the quantity, if there be no intermixture of fraud in the case.

52. *What is the difference between a* reservation *and an* exception?—468.

A reservation is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not in *esse* before; but an exception is always part of the thing granted, or out of the general words and description in the grant.

53. *How was the* habendum *originally used?*—468.

To determine the interest granted, or to lessen, enlarge, ex-

plain, or qualify the premises. It is now generally considered but a mere form. If, however, the premises should be merely descriptive, and no estate be mentioned, then the *habendum* becomes efficient to declare the intention; and it will rebut any implication arising from the silence of the premises.

54. *What five covenants are usually inserted in a conveyance of the fee?*—471.

1. That the grantor is lawfully seised.
2. That he has good right to convey.
3. That the land is free from incumbrances.
4. That the grantee shall quietly enjoy.
5. That the grantor will warrant and defend the title against all lawful claims.

55. *Which three are personal covenants?*—471.

The first three of the five above named. Those three do not run with the land, nor pass to the assignee.

56. *Are the covenant of warranty, and the covenant for quiet enjoyment, in the nature of real covenants?*—471.

Yes; and they run with the land conveyed, and descend to heirs, and vest in assignees, or the purchaser.

57. *Are there not implied as well as express covenants?*—473, 474.

Yes; any disturbance in the enjoyment of property, contrary to the grant of the party creating the disturbance, is a breach of covenant. In Pennsylvania, Delaware, Illinois, Indiana, Missouri, and Mississippi, it is declared by statute that the words *grant, bargain and sell*, in conveyances in fee, shall, unless specially restrained, amount to a covenant that the grantor was seised of an estate in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment. But these words do not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance, whereby the estate might be defeated. The New York Revised Statutes enact that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. In North Carolina and Alabama,

the words "give, grant, bargain, sell," etc., do not imply any warranty of title; and this is the conclusion which sound policy would dictate.

58. *How many kinds of conveyances are there?*—480.

There are two kinds; first, conveyances at common law; second, conveyances under the statute of uses.

59. *How is the first class subdivided?*—480.

Into original and derivative conveyances.

60. *What was a feoffment?*—480.

It was the mode of conveyance in the earliest periods of the common law.

61. *With what was the feoffment accompanied?*—480.

With actual delivery of possession of the land, termed livery of seisin.

62. *How was livery of seisin performed?*—480, 481.

It was performed by the entry of the feoffor upon the land, with the charter of feoffment, and delivering a clod, turf, or twig, or the latch of the door, in the name of seisin of all the lands contained in the deed. The ceremony was performed in the presence of the peers or freeholders of the neighborhood, who were the vassals of the feudal lord, and who might afterwards be called on to attest the certainty of the livery of seisin.

63. *Did the feoffment operate upon the possession?*—481.

Yes; without any regard to the estate or interest of the feoffor.

64. *Has not the conveyance by feoffment, with livery of seisin, long since been obsolete in England?*—489, 490, *n.* (*c.*)

Yes; and though it has been, in this country, a lawful mode of conveyance, it has not been used in practice. Our conveyances have been either under the statute of uses, or short deeds of conveyance, in the nature of the ancient feoffment, and made effectual, on being duly recorded, without the ceremony of livery. The New York Revised Statutes have expressly abolished the

mode of conveying lands by feoffment, with livery of seisin, and in Illinois and Missouri, a feoffment, deed, or conveyance in writing, passes the estate without livery of seisin. In South Carolina, feoffment, with livery of seisin, is still a valid and subsisting mode of conveyance. So, in Connecticut, feoffment, without livery.

65. *What was a grant?*—490.

It was a common law conveyance, and applied to incorporeal hereditaments, such as reversions, rents, and services; which, not being of a tangible nature, and existing only in contemplation of law, could not be conveyed by livery of seisin. Such rights were said to lie in grant, and not in livery, and they were conveyed simply by deed.

66. *What was the difference between a feoffment and a grant?*—490.

There was this essential difference between a feoffment and a grant: while the former carried destruction in its course, by operating upon the possession, without any regard to the estate or interest of the feoffor, the latter benignly operated only upon the estate or interest which the grantor had in the thing granted, and could lawfully convey.

67. *What did the common law require, to render the grant effectual?*—490, 491.

It required the consent of the tenant of the land out of which the rent, or other incorporeal interest, proceeded; and this consent was called attornment; but this is now abolished in the United States.

68. *Have not the New York Revised Statutes rendered the attornment of the tenant unnecessary to the validity of a conveyance by his landlord?*—491.

Yes. But to render him responsible to the grantee, for rent or otherwise, he must have notice of the grant. Nor will the attornment of a tenant to a stranger be valid, unless made with his landlord's consent, or in consequence of a judgment or decree, or to a mortgagee, after forfeiture of the mortgage.

69. *Have not the New York Revised Statutes given to deeds of conveyance of the inheritance or freehold, the name of grants?*—491.

Yes. And though deeds of bargain and sale, and of lease or release, may continue to be used, they are to be deemed grants.

70. *What is the nature and effect of a covenant to stand seised to uses?*—492.

By this conveyance, a person seised of lands covenants that he will stand seised of them to the use of another. On executing the covenant, the other party becomes seised of the use of the land, according to the terms of the use; and the statute of uses immediately operates, and annexes the possession to the use.

71. *Can any use be raised for any purpose by this conveyance, in favor of a person not within the influence of a domestic consideration?*—493.

No. And it makes no difference whether the grantee, if he be a stranger to the consideration, is to take on his own account, or as a mere trustee for some of the family connections. He is equally incompetent to take.

72. *Does this mode of conveyance exist in England?*—493.

It is said to be no longer in use there. It owes its efficacy to the statute of uses; and in New York the statute of uses is abolished, and no mention is made of this conveyance.

73. *What is a general rule as regards the form of conveyances?*—493.

It is a principle of law, that if the form of the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character so as to give it effect. *Cum quod ago non valet ut ago, valeat quantum valere potest.*

74. *Is there not a qualification to this rule?*—493, 496.

Yes; the instrument must partake of the essential qualities of the deed assumed. And, therefore, no instrument can operate as a feoffment without livery, either shown or presumed; nor

as a grant, unless the subject lies in grant (as it now does in New York in all cases of the freehold); nor as a covenant to stand seised, without the consideration of blood or marriage; nor as a bargain and sale, without a valuable consideration.

75. *What is the usual mode of conveyance in England?*—494.

That of lease and release; because it does not require the trouble of enrolment. It was contrived by Sergeant Moore, at the request of Lord Norris, for a particular case, and to avoid the unpleasant notoriety of livery, or attornment. It was the mode universally in practice in New York until the year 1788.

76. *What mode of conveyance is most prevalent in the United States?*—495.

That of bargain and sale; and it was in universal use in New York prior to the introduction of the grant by the Revised Statutes, in January, 1830.

77. *What, originally, was a bargain and sale?*—495, 496.

It was originally a contract for the conveyance of land for a valuable consideration; and though the land itself would not pass without livery, the contract was sufficient to raise a use, which the bargainor was bound in equity to perform. Nothing can be more liberal than the rules of law, as to the words requisite to create a bargain and sale. There must be a valuable consideration, and then any words that will raise a use will amount to a bargain and sale. After the statute of uses was passed, the use which was raised and vested in the bargainee, by means of the bargain, was annexed to the possession; and by that operation the bargain became at once a sale, and complete transfer of the title.

LECTURE LXVIII.

OF TITLE BY WILL OR DEVISE

1. *What is a will?*—501.

A will is a disposition of real and personal property, to take effect after the death of the testator. When the will operates upon personal property, it is sometimes called a testament; and when upon real estate a devise; but the more general and the more popular denomination of the instrument, embracing equally real and personal estates, is that of last will and testament.

2. *Were lands devisable with the Anglo-Saxons?*—503.

It seems that they were, to a qualified extent. But upon the establishment of the feudal system, at the Norman conquest, lands held in tenure ceased to be devisable.

3. *What exceptions were there to this restraint?*—504.

Burgage tenures, and lands in gavelkind.

4. *When did the disposition of real property by will become absolute?*—504.

In the beginning of the reign of Charles II.

5. *Was not the English law of devise imported into this country by our ancestors?*—504, 505.

Yes; and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient. Lands may be devised by will in all the United States; and the statute regulations on the subject are substantially the same, and they have been taken from the English statutes of 32 Henry VIII., and 29 Charles II.

6. *What is the general rule as to the parties to a devise?*—505, 506.

That all persons of sound mind are competent to devise real estate, with the exception of infants and married women. A *feme covert* may devise, by way of the execution of a power; but