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

the will that she makes in such a case, must be executed with the same solemnities as if she had executed the will while sole; and the statute of New York excludes the exercise of such power by her during infancy.

**7.** *May testaments of chattels be made by infants?*—506.

They might at common law be made by infants of the age of fourteen, if males, and twelve, if females.

**8.** *Are the laws in the several States uniform on this point?*—506.

They are not; and by the New York Revised Statutes, the age to make a will of personal estate is raised up to eighteen in males, and sixteen in females; nor can a married woman make a testament of chattels, any more than of lands, except under a power or marriage contract.

**9.** *May infants,* femes covert, *and persons of nonsane memory, and aliens be devisees?*—506.

Yes; for the devise is without consideration. A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent, if the particular devise to him was omitted out of the will.

**10.** *Which, in this case, has the precedence, title by descent, or by devise?*—506.

Title by descent.

**11.** *If the land be devised to the heir, charged with debts, by what will he take, and why?*—507.

By descent; for the charge does not operate as an alteration of the estate.

**12.** *Are not corporations excepted out of the English statute of wills?*—507.

Yes; corporations are excepted out of the English statute of wills, and the object of the law was to prevent property from being locked up in perpetuity, and also to prevent languishing and dying persons from being imposed upon by false notions of merit or duty, to give away their estates from their families.



**13.** *What do the New York Revised Statutes provide on this subject?*—507.

That no devise to a corporation shall be valid, unless the corporation be expressly authorized to take by devise.

**14.** *Are witnesses to a will rendered incapable of taking any beneficial interest under it?*—508.

Yes, except they be creditors, whose debts by the will are made a charge on the real estate.

**15.** *What is the settled rule of the English law respecting things devisable?*—510.

That the testator must be seised of the lands devised at the time of making the will. He must have a legal or equitable title in the land devised. The devise is in the nature of a conveyance, or an appointment of a particular estate; and therefore lands purchased after the execution of the will do not pass by it; the testator must likewise continue seised at the time of his death.

**16.** *Have not the New York Revised Statutes made devises prospective?*—512.

Yes, by declaring that every estate and interest descendible to heirs may be devised; and that every will made in express terms, of all the real estate, or in any other terms denoting the testator's intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. The law in Massachusetts, Vermont, Pennsylvania and Virginia is the same as that now in New York. In Virginia seisin is not requisite to a devise, and a right of entry is devisable. Rights of entry are devisable even though there be an adverse possession or disseisin; and the last will will extend prospectively, and carry all the testator's lands existing at his death, if so evidently intended. This is also understood to be the law in Maine, Alabama, Connecticut, North Carolina, Illinois and Ohio; and in the latter State the statute declares that every description of property may be devised.

**17.** *Has a joint tenant an interest which is devisable?*—513.

He has not; the reason given by Lord Coke is, that the

surviving joint tenant has an interest, which first attaches at the death of the joint tenant making the will; and he insists that there is a priority of time in an instant; and Mr. Butler refers to another case in which that subtlety was applied. A better reason is that the old law favored joint tenancy; and the survivor claims under the feoffor, which is a title paramount to that of the devisee; and a devisee is not permitted to sever the joint tenancy.

**18.** *What, in general, are the formalities required in the execution of a will of real estate?*—513.

The general provision on this subject is, that the will of real estate must be in writing, and subscribed by the testator, or acknowleded by him in the presence of at least two witnesses, who are to subscribe their names as witnesses. The regulations in the several States differ in some unessential points; but generally they have adopted the directions given by the English statute of frauds, of 29 Charles II.

**19.** *What is the general doctrine of international law regarding the execution of wills?*—513.

That wills concerning land must be executed according to the prescribed formalities of the State in which the land is situated; but wills of chattels, executed according to the laws of the place of the testator's domicil, will pass personal property in all other countries, though not executed according to their laws. The *status*, or capacity of the testator to dispose of his personal estate by will, depends upon the law of his domicil. *Mobilia personam sequuntur, immobilia situm.*

**20.** *How are wills to be executed in New York?*—514.

By the New York Revised Statutes, the testator is to subscribe the will at the end of it, in the presence of at least two witnesses, who are to write their places of residence opposite their names, under the penalty of fifty dollars; but the omission of their residence will not affect the validity and efficiency of their attestation. Three witnesses, as in the statute of frauds, are required in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South



Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are requisite in New York, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, and Kentucky. In some of the States, the provision as to attestation is more special. In Pennsylvania, a devise of lands in writing will be good without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses; and if the will be subscribed by witnesses, proof of it may be made by others.

**21.** *Does not the English statute of frauds require the will to be signed by the devisor, and to be attested and subscribed by the witnesses, in his presence?*—514.

Yes; and this direction has been extensively followed in the statute laws of this country.

**22.** *To what extent have the Revised Statutes altered the former law of New York?*—515.

So far as to require the signature of the testator, and of the witnesses, to be at the end of the will; and the testator, when he signs or acknowledges the will, is to declare the instrument to be his last will, and he is to subscribe or acknowledge the will in the presence of each witness; and the witnesses are to subscribe their names at the request of the testator.

**23.** *Have not the English courts, from a disposition to favor wills, departed from the strict construction and obvious meaning of the statute of frauds?*—515.

They have, and thereby opened a door to very extensive litigation. It was held to be sufficient, that the testator wrote his name at the top of the will, by way of recital; and his name, so inserted, was deemed signing the will within the purview of the statute.

**24.** *Has not the doctrine of a constructive presence of the testator been carried very far?*—515.

Yes: and it has been decided that if the witnesses were within view, and where the testator might, or had the capacity to see them, with some little effort, if he had the desire, though in reality he did not, they were to be deemed subscribing witnesses in his presence.

**25.** *Has it not been further held, that if the testator produced to the witnesses a will already signed, and acknowledged the signature in their presence, it was a sufficient compliance with the statute?*—515.

Yes.

**26.** *Is it held necessary that the witnesses should attest in the presence of each other?*—516.

It is not, nor is it necessary they should attest every page or sheet, or that they should know the contents.

**27.** *Must the subscribing witnesses all attest at one time?*—516.

It is not requisite.

**28.** *Was a will of chattels good without writing, at common law?*—516, 517.

It appears it was. In ignorant ages, there was no other way of making a will but by words or signs. But, by the time of Henry VIII., and especially in the ages of Elizabeth and James, letters had become so generally cultivated, and reading and writing so widely diffused, that verbal, unwritten, or nuncupative wills, were confined to extreme cases, and held to be justified only upon the plea of necessity.

**29.** *What have the New York Revised Statutes declared respecting nuncupative or unwritten wills?*—517.

They have declared that no nuncupative or unwritten will shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea; and every will of real or personal property must be equally subscribed by the testator, or acknowledged by him in the presence of at least two attesting witnesses.

**30.** *What is required in the English ecclesiastical courts, respecting a nuncupative will?*—518.

That it be proved by evidence more strict and stringent than that applicable to a written will, even in addition to all the requisites prescribed by the statute of frauds.

**31.** *How are the laws of Louisiana in respect to last wills?*—519

Wills, under the code of that State, are of three kinds;



nuncupative or open, mystic or sealed, and olographic. They are all to be in writing. The first, or nuncupative testament, is to be made by a public act before a notary, in the presence of three, or five witnesses, according to circumstances; and to be read to the testator, and signed by the testator and witnesses; or it may be executed by his private signature, in the presence of three, or five, or seven witnesses, according to circumstances, and they are to subscribe it. The second, or mystic testament, is to be signed by the testator, and sealed up, and presented to a notary and seven witnesses, with a declaration that it is his will; and the notary and witnesses are to subscribe the superscription. The third, or olographic testament, is one entirely written, and signed by the testator, and subject to no other form, and may be made out of the State.

**32.** *Is not a will, duly made according to law, in its nature ambulatory during the testator's life, and revocable at his pleasure?*—520.

Yes. But to prevent the admission of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument executed in the same manner; or else by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions.

**33.** *May not a will be revoked by implication, or inference of law?*—521.

Yes. And these revocations are not within the purview of the statute; and they have given rise to some of the most difficult and interesting discussions existing on the subject of wills. They are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. The case stated by Cicero is often alluded to, in which the father, on the report of the death of his son, who was then abroad, altered his testament, and appointed another person to be his heir. The son returned after the father's death, and the *centumviri* restored the inheritance to him. There is a case mentioned in the Pandects to the same effect; and it was the general doctrine of the Roman law, that the subsequent birth of a child, unnoticed in the will, annulled it. This is the

rule in those countries which have generally adopted the civil law, *Testamenta rumpiuntur agnatione posthumi;* and there is not perhaps, any code of civilized jurisprudence, in which this doctrine of implied revocation does not exist and apply, when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator.

**34.** *What is the English rule on this question?*—521, 522.

It is a settled rule of the English law, that marriage and the birth of a child, subsequent to the execution of the will, are a revocation in law of a will of real as well as of personal estate, provided the wife and child were wholly unprovided for, and there was an entire disposition of the whole estate to their exclusion.

**35.** *Can the implied revocation be rebutted by parol evidence?*—523.

The question was considered in New York, and it was adjudged* that such presumptive revocation might be rebutted by circumstances. The better opinion is, that under the English law there must be a concurrence of a subsequent marriage and a subsequent child, to work a revocation of the will; and that the mere subsequent birth of children, unaccompanied by other circumstances, would not amount to a presumed revocation.

**36.** *Can a testator devise all his estate to strangers, and disinherit his children?*—524, 525.

There is no doubt of it. This is the English law, and the law in all the States, with the exception of Louisiana. Children are deemed to have sufficient security in the affection of parents, that this unlimited power of disposition will not be abused. If, however, the testator has not given the estate to a competent devisee, the heir may take it, notwithstanding the testator may have clearly declared his intention to disinherit him.

**37.** *How is a will affected by the birth of a posthumous child?*—525, 526, *and notes.*

By the statute law of the States of Maine, Vermont, New

* *Brush* v. *Wilkins*, 4 Johns. Ch. Rep., 506.



Hampshire, Massachusetts, Connecticut, New York, New Jersey, Ohio and Alabama, a posthumous child, and, in all those States except Alabama, children born after the making of the will and in the lifetime of the father, inherit as if he had died intestate, unless some provision be made for them in the will, or otherwise, or they be particularly noticed in the will. In Pennsylvania and Delaware, marriage, or an after-child not provided for, is a revocation *pro tanto* only. In Indiana, Illinois and Connecticut, the birth of a child avoids the will *in toto*. The law in Maine, New Hampshire, Massachusetts and Rhode Island, implies the same relief to all children, and their representatives, who have no provision made for them by will, and who have not had their advancement in their parents' lifetime, unless the omission in the will should appear to have been intentional. In South Carolina, the interference with the will applies to post humous children; and marriage and a child revoke the will. In Virginia and Kentucky, a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried or an infant; if he had children before, after-born children, unprovided for, work a revocation *pro tanto;* and in Virginia, marriage revokes a will, unless made under certain powers of appointment.

**38.** *What, if a devisee or legatee dies in the lifetime of the testator?*—526.

In Maine, Massachusetts, Rhode Island, Connecticut, New York, Maryland, and probably in other States, the lineal descendants of a devisee or legatee so dying are entitled to his share, unless the will provides otherwise. This is confined in Connecticut to a child or grandchild; in Massachusetts, Rhode Island and Maine, to them, or their relatives, and in New York, to children or other descendants. In Maryland, the will takes effect as if the deceased devisee or legatee had survived the testator.

**39.** *What is provided by the New York Revised Statutes regarding presumptive revocation of wills?*—527.

If the will disposes of the whole estate, and the testator afterward marries and has issue born in his lifetime or after his death, and the wife or issue be living at his death, the will is deemed to

be revoked; unless the issue be provided for by the will or by a settlement, or unless the will shows an intention not to make any provision.

**40.** *Is any other evidence to be received rebutting the presumption of revocation?*—527.

No; none other.

**41.** *Is the will of a* feme sole *revoked by her marriage?*—527.

It is; and this is an old and settled rule of law; and the reason of it is, that the marriage destroys the ambulatory nature of the will, and leaves it no longer subject to the wife's control.

**42.** *Is a will deemed to be revoked by a second will?*—528.

Yes; provided it contains words of revocation, or makes a different disposition of the property, but not otherwise.

**43.** *Will a sale of the estate devised operate as a revocation?*—528.

It will; for the testator must die while owner of the land, or the will can not have effect upon it.

**44.** *Will a valid agreement or covenant to convey lands, which equity will specifically enforce, also operate in equity as a revocation of a previous devise of the same?*—528.

It will. It is as much a revocation of the will in equity, as a legal conveyance of the land would be in law; for the estate, from the time of the contract, is considered as the real estate of the vendee.

**45.** *What is a codicil?*—531.

A codicil is an addition, or supplement to a will, and must be executed with the same solemnity.

**46.** *What is the effect of canceling a will?*—531, 532.

If the first will be not actually canceled or expressly revoked on making a second, and the second will be afterward canceled, the first will is said to be revived. The mere act of canceling a will does not amount to any thing, unless it be done *animo revocandi*. The intention to revoke is an inference to be



drawn from circumstances; cancelation is *prima facie* evidence of the intention; and the inference stands good until rebutted.

**47.** *What say the New York Revised Statutes respecting the destruction or revocation of a second will reviving the first?*—532, 533.

They have dispensed with all refinements on this point. In no case does the destruction or revocation of a second will revive the first, unless the intention to revive it be declared. They have also declared that no bond, agreement or covenant to convey property previously devised, nor any charge or incumbrance upon the same, nor any conveyance altering but not wholly divesting the estate, shall be deemed a revocation of the will. But the property passes by the will, subject to any such agreement, charge, or alteration, unless, in the instrument making the alteration, an intention thereby to revoke shall be declared. If, however, the provisions of the instrument making the alteration be wholly inconsistent with the previous will, the instrument operates as a revocation, unless its provisions depend on a condition which has failed.

**48.** *What is the first and great object of inquiry in the construction of a will?*—534.

The intention of the testator; and to this object technical rules are, to a certain extent, made subservient.

**49.** *Is the word* heirs *requisite to convey a fee?*—535.

It is not; but other words denoting an intention to pass the whole interest of the testator, as a devise of *all my estate, all my interest, all my property, my whole remainder, all I am worth or own, all my right and my title*, or, *all I shall die possessed of*, and many other expressions of the like import, will carry an inheritance, if there be nothing in the other parts of the will to limit or control the operation of the words.

**50.** *What is the effect of a devise without any words of limitation, or any thing more than a description of the land devised, and if there be nothing in the will from which a fee by implication may be inferred?*—537.

The devisee takes only an estate for life. This rule has

been recognized both in England and with us, though it has been set aside in South Carolina, and probably other States, in favor of the intention, and in Massachusetts, in the case of a devise of wild lands.

**51.** *What is the present law in New York on this point?*—538.

The Revised Statutes have declared that every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied.

**52.** *What is the tendency of this provision?*—538.

Its tendency is to give increased certainty to the operation of a devise.

**53.** *What is the rule in most of the other States?*—539.

In most of the other States, the rules of the English law continue to govern.

**54.** *What is the general doctrine with respect to the expressions used by the devisor?*—540.

If his expressions denote only a *description of the estate*, as a devise of the house A, or the farm B, and no words of limitation be employed, then only an estate for life passes; but if the words denote the *quantity of interest* which the testator possesses, as all his estate in his house A, then a fee passes.

**55.** *What is another general rule on this point?*—540.

If the testator creates a charge upon the *devisee* personally, in respect of the estate devised, as if he devise lands to B, on condition of his paying such a legacy, the devisee takes the estate on that condition; and he will take a fee by implication, though there be no words of limitation, on the principle that he might otherwise be a loser.

**56.** *Is there not a distinction if the charge be* upon the estate?—540.

Yes: if the charge is on the estate, and there are no words of limitation, or other words denoting an intention to pass the fee,



but only a devise to A of the testator's lands, after the debts and legacies are paid, the devisee takes only an estate for life.

**57.** *Does this distinction prevail in New York?*—540.

It does not, since the enactment of the Revised Statutes.

**58.** *Does it not become necessary, in certain cases, that the devise be enlarged to a fee?*—540.

Yes: in every case in which the land is charged with a trust which can not be performed, or in which the will directs an act to be done which can not be accomplished, unless a greater estate than one for life be taken.

**59.** *Can introductory words to a will vary the construction, so as to enlarge the estate to a fee?*—541.

No: unless there be words in the will sufficient to carry such an interest. Introductory words to a will are like a preamble to a statute, to be used only as a key to disclose the testator's meaning.

**60.** *When are devises deemed lapsed?*—541.

As a general rule, all devises are deemed lapsed, if the devisee dies in the lifetime of the testator.

**61.** *Do not the English books take a distinction between a lapsed legacy of personal estate, and a lapsed devise of real estate?*—541.

Yes; the former falls into the residuary estate, and passes by the residuary clause, if any there be, and if not, passes to the next of kin; while the latter does not pass to the residuary devisee, but, the devise becoming void, the estate descends to the heir at law.

**62.** *Is there not a distinction between a lapsed, and a void, devise?*—542.

Yes; the former case is where the devisee dies in the intermediate time between the making of the will and the death of the testator; but, in the latter case, the devise is void from the beginning, as if the devisee were dead when the will was made.

**63.** *Who takes the estate in such cases?*—542, *n.* (*b.*)

It is said that the heir takes in the case of a lapsed devise,

but that the residuary devisee may take in the case of a void devise, if the terms of the residuary clause be sufficiently clear and comprehensive. In a recent New York case,* however, Chancellor Walworth concluded, that a residuary devise of all the testator's real estate not before disposed of by his will, did not embrace real estate which was in terms absolutely devised to others, although such real estate was not legally and effectually devised, either from the incapacity of the devisee to take real estate by devise, or by reason of his death in the lifetime of the testator. The weight of English and American authority would appear to be in favor of this conclusion, and that the heir at law takes in such a case, and not the residuary devisee. This decree was affirmed on appeal to the Court of Errors.

**64.** *What is the effect of the alteration of the law in New York?* —542.

The alteration of the law in New York, Virginia, and other States, making the devise operate upon all the real estate owned by the testator at his death, may produce the effect of destroying the application of some of the foregoing distinctions, and give greater consistency and harmony to the testamentary disposition of real and personal estates.

* See *Van Kleeck* v. *The Reformed Dutch Church*, 6 Paige, 600, and 29 Wendell, 457.

# INDEX.

[*The figures in parentheses refer to the questions.*]