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REVOCATION OF WILLS.

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1889.
Of all the benefits derived from cultivated social life and advanced civilization one of the most important and far-reaching in its effect is the right of testamentary disposition. When a man after long years of diligence has accumulated property the acquisition of which has perhaps been the end and aim of his life, arrives at the point of death his natural inquiry will be, "and what shall become of my worldly possessions, is the labor of years in vain, is my property to revert again to the common stock, to be owned by him who may acquire the same by force of chance or might?" A natural sense of justice, common to all men however degenerate will revolt against such a principal. Where men are bound together by the ties of family or of friendship there is the admitted right of one to confer upon another his property, when and in what manner he will. If during his life a man can bestow upon another the products of his labor why at his death should he be denied the same privilege. It is difficult to conceive of a society so barbaric as would favor the reversion of a
man's property to the common stock. The strife and confusion which would result from a mad scramble for the spoils of the death bed, would cause revulsion in the most degenerate mind. To satisfy a common sense of justice to sustain the peace and harmony of society, the right of the possessor upon his death to direct the disposition of his property has been evolved from the almost absolute necessity of things. And with some restrictions society has given to the proprietor the right upon his own death to dispose of his property in what manner he chooses, and to vest his goods in certain persons to the exclusion of all others. Society has provided for the disposition of a man's property in case he fails to avail himself of this privilege, but a discussion of what Mr. Schouler calls, "the will of the state" as distinguished from the will of the testator, is not pertinent to this discussion.

The abuse of the testamentary power, possessed by a sane man, is guarded against by the natural and instinctive affection existing between him and those to whom he is bound
by ties of blood or marriage.

Disposition of property to take effect at one's death is called a will or testament which terms we may now use synonymously. Wills have kept pace with civilization. To the most degenerate society perhaps they were unknown. When society was nomadic, a man's only possession being movable, of course, wills were confined to that species of property. As society progressed and as real property became a subject of private and individual ownership provision was made for wills to embrace it. And thus has the law slowly broadened down the centuries.

The earliest according to some authorities was "Noah's Testament made in writing and witnessed under his seal, whereby he disposed of the whole world. Among the ancient Hebrews we find Abraham complaining that he unless he had children of his body at his death his steward Eliezer of Damascus would be his heir. Many writers think this is quite conclusive to show he had made him so by will.
Isaac gives his deathbed blessing to his younger son by an error which he refuses upon his discovery to retract. Blackstone thought that the earliest authentic instance of testamentary disposition was Jacob's bequest whereby he gave his son Joseph a portion of his estate double that given to his brethren. All these seem to afford instances of deathbed dispositions at patriarchal discretion.

It appears altogether likely that verbal testaments preceded written ones. In the primitive ages of many nations formal wills were unknown. This was the case with the ancient Germans and also with the Athenians before the age of Solon. The sanctity of the family relation and the right to the absolute possession of property in a more advanced civilization changed this and introduced the use of testaments. Within the introduction of the Twelve Tables at Rome came an unlimited right of the Roman citizen to dispose of his property. This was afterwards qualified and the observance of certain formalities was required, such as the presence of five witnesses and the
will was in the form of a purchase. Afterwards the number of the requisite witnesses was increased to seven. Under Justinian the testator’s right of disposition was restricted by a provision that he should in no case totally disinherit his children. It appears that the right of making a formal will and disposing of property after death is merely a creature of the civil state, which was expressly granted in some states, while in others it was permitted by the acquiescence of society. Where it is permitted by law it is subjected to different formalities and restrictions in almost every nation, but the end is the same — To permit a man to do what he will with his own. The right of disposing of one’s property after death is a reasonable and natural right, so we may conclude that existed to a certain extent everywhere and at all times.

The reason for laws and legislation on this subject, the requiring of certain formalities and the imposing of limitations, is to prevent a testator from unjust discrimination against those who ought to be the object of his bounty, and for the further purpose of securing uniformity in
order that the courts may be able to interpret the will and carry out the intention of the testator.

It is impossible to discover when testamentary disposition was first made in England. It appears to have existed in the earliest times but not without serious restrictions which were not altogether removed until recent years. The church always favored the restriction on the disposition of personal property. During the reign of Henry II only one third of the personal property could be willed away. The feudal tenure which existed after the Norman Conquest made the disposition of real property impossible save with the consent of the Lord. Three statutes during the reign of Henry VIII did much towards relieving this disability and during Charles II all traces of feudal tenure were abolished and by the statute of Wills passed in 1827 during the reign of the present queen of England all restrictions were removed from the disposition of property whether real or personal. The law as it existed in England was introduced into this country by our ancestors with such restrictions and modifications as were deemed expedient.
As new circumstances presented themselves it has been found necessary to make various changes and now we have a complete set of statutory rules the requirements of which seem plain and simple but have however been the source of constant controversy.

Man's property is his own until he disposes of it. One can only alienate property by delivery, by virtue of a contract or in the execution of a gift. A contract and an executed gift each presuppose two parties, a grantor and a grantee. A will cannot be an executed gift during the life of the testator for it is only made to take effect at his death, nor is it a contract for it lacks mutuality of mind since these are the only methods of placing property beyond the owner's control, he cannot bind his subsequent actions by conveying that property by will as that would presuppose the control to have passed out of his hands. Therefore a will irrevocable in terms is none the less revocable during the testator's life.

In speaking of the subject Lord Bacon said, "It would be for a man to deprive himself of that which by all things is most incident to human condition and that is alienation
or repentance." Hence when a testator states this to be his last will and testament it must necessarily be a counter mand or revokation of all or so much of the former will as is in conflict with or contrary to the last declaration of the testator's mind.

This is clearly stated in the case of Timon vs. Claffy 45 Barb. 438, "A testator has the right when in a full possession when in the full possession of his faculties to destroy his own will at any time or in any manner he pleases, and no fraud can be committed by any person in destroying or assisting to destroy a will by the express direction and in the presence of the testator, though it is not done in the presence of two witnesses so as to revoke it."

What amounts to a Revocation.

At first almost any act that showed an intention to revoke a will would have that effect. The result has been the same as with the formalities required in making the will which as civilization advanced has been stricter, and to-day there is a general and uniform system,
In primitive times a parol revocation would be effectual as it was regarded as the declaration of the testator's mind. However it must have been a present revocation in the presence of three witnesses. A parol revocation to take effect in the future has never had such result as it is only a declaration of what the testator intends to do.

If the laxity and uncertainty of the early formalities which were allowed to affect the will were recognized to-day wills would be practically useless and there would be no settled doctrine, and to avoid this evil the English statute of Frauds provided the following: "That no devise, in writing, of lands, tenements, and hereditaments, or any clause thereof shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same or some burning, cancellation, tearing or obliterating the same by the testator himself, or in his presence or by his directions and consent. But it continues unless altered by some other will or codicil in writing, or other writing of deviseor signed in the presence of three or more creditable witnesses declaring the same." And by the same act,"No will
in writing concerning personal estate shall be repealed, or any clause or bequest therein altered by words or will by words of mouth only except the same be, in the life of the testator, committed to writing and read to and allowed by him, and proved to be done by three witnesses."

The legislation of most of our states on this subject is based upon this provision. According to the wording of the statute the instrument revoking the will must be signed in the presence of witness. This is the same requirement as in executing a will has been held to be sufficient if the testator acknowledges the signature to be his in their presence.

A will devising real estate cannot be revoked by an instrument not executed with the same formalities. (Rio vs. Borland 14 Mass. 208.) The judge says, "Our statutes on this point are a literal copy from the English statute of Wills and has been repeatedly decided and is perfectly in England that a will whereby alands or a disposition of, as the case here, to amount to a revocation a former one must be such a one as would be effectual to pass lands with the devising clause of this statute and must be witnessed
and otherwise qualified as that clause requires."

The statutes in all the states seem to agree that a will, (demise in a will) or codicil can be revoked by burning, cancellation, destroying or obliterating it by the testator. The destruction of the instrument then by a third person without the testator's consent or knowledge whether before or after his death would not be a revocation.

In Early vs. Early 5 Red. 5, The court said, "A testator cannot delegate his power of revocation by inserting in the will a clause which confers on another an authority to destroy it after death."

The statutes in most states provide, that this burning, cancellation, etc., can be done by some other person in his presence. (45 Barb. 438 Timon vs. Claffy)

In this case the jury found that a will was destroyed by the testator's wife at his request and that it was so destroyed in his life time and in his presence and not fraudulently. The court held, "A testator has the right, while in the full possession of his faculties, to destroy his own will or any time or in any manner he pleases, and no fraud can be committed by a person in destroying or in assisting to destroy
a will by the express direction and in the presence of the

testator, though it be not done in the presence of two wit-
nesses, so as to revoke it."

The statutes in Delaware have gone so far as to pro-
vide that this can be done even in the absence of the

testator if by his direction but when the will is thus de-
stroyed the fact of the destruction and the intent, consent

and direction of the testator must be shown by two witnesses.

Whatever the means used in the destruction of the
will, it must be done with a clear and defined intention of
the testator to revoke the same. Thus to use Lord Mans-
field's illustration: "If a man were to throw ink upon his
instead of sand will, there would be no revokation of the will although the
writing was irrecoverably gone unless it was done with the
intention of revoking the will." A good example is where
a will is torn up under a mistaken impression that it is
invalid and then the parts gathered up and preserved. This
was held to be a valid will and to remain in full force in
the case of Burns vs. Burns 4 S & R. 47. So it would
follow that the accidental destruction of a will would lack
the animus revocandi of the testator and in no case amount to
a revocation.
The question of the revocation is not so easily disposed of where the burning, cancellation, or tearing is incomplete, where the full intention of the testator was not carried out. One of the first cases upon this subject was Bibb vs. Thomas, 2 Bl. 1043; in this case a testator ordered his will to be brought to him. He opened and threw it contemptuously upon the fire. But falling off it lay where it must soon have been burned had not a woman in the room picked it up and put it in her pocket. The writing was still legible, the will having been but slightly injured. Held to be within the statute and the revocation was complete. There is another early English case which seems to be inconsistent with that of Bibb vs. Thomas, (Dee vs. Harris) 6 Ad. & El. 209; in this case a testator, who also intended to destroy his will threw it on to the fire from which some one rescued it in a similar manner, but with only a corner of the envelope which contained the will burned. The revocation was held incomplete. The court in reconciling these decisions seems to have given great weight to the fact that one will was partly burned,
while the other was only scorched, the envelope protecting it. This seems to be very poor reasoning. The better ground and the one upon which the cases are now decided would be to adopt the intention of the testator as a criterion. If it was his intention to destroy, this should govern even though the destruction was not complete. This should be sufficient to satisfy the law. In both cases there was an intention to destroy, but in the first case the testator threw the will in the fire and supposed it was destroyed; while in the second case he intending apparently to destroy the will threw it on the fire but knew of its subsequent rescue and that the party rescuing had the will in his possession. The testator did not carry out his intention. He knew the will was not destroyed and hence there was completed intention for the testator relied upon the promise of the rescuing party to subsequently destroy the same. In White vs. Costen I Jones L. 187 the testator threw the will on the fire intending to destroy and revoke it. The will was burned through in three places without interfering with the writing. The will was rescued
and preserved without his knowledge but the court held it to be a sufficient revocation.

The general rule in nearly all of the states is, that a will may be revoked by some other writing signed attested and acknowledged in like manner as a will. In some of the states a subsequent will or codicil must expressly revoke the former will while in others the mere making of the subsequent will is a sufficient revocation.

In New York the rule is that a subsequent will or codicil duly executed will revoke all former wills made by the testator. Thus in the case of Ludlum vs. Otis 15 Hun 410, a testator executed a will whereby he devised his interest in a house and lot in New York city to his cousin. Afterwards in Switzerland, he executed, in accordance with the laws of the state of New York a second will whereby after giving certain legacies to his servants, he devised the remainder of his property, all situated or invested in America, to his natural heirs. The second will did not in any express terms revoke the first but it was held that the first will being inconsistent therewith, was revoked by the second.
No man can die with two testaments. If he die leaving two in existence the one last in point of time contains the true expression of his intentions and therefore is his only will. Williams on Exec. But even in New York the later will though well executed only revokes the earlier will in so far as it is inconsistent therewith unless of course the revocation be expressed.

By the statutes of most of the states the birth of posthumous child or the birth of children after the making of the will and during the life of the father, will inherit as if he had died intestate unless the will contains some provision for them or they are particularly referred to in it. The will is thus revoked pro tanto. The statutes in several of the states go further and give the same relief to all children who have not been provided for in the will or to whom advancements have not been previously made unless the omission in the will appears to have been intentional. In Virginia and Kentucky the birth of a child after the making of a will if there were no former children revokes the will unless the child dies unmarried or an infant. If the testator had children previously the birth
operates as a revocation pro tantum.

In some of the states the will is revoked by marriage alone.

By the New York Revised statutes a will which disposes of the whole estate is revoked by the subsequent marriage of the testator and the birth of issue, where the wife or the issue shall be living at the testator's death and is unprovided for, unless so mentioned in the will as to show an intention to make no provision. Whether the order of the events of marriage and birth is important, the cases do not clearly decide. Under a similar statute in England it was held in 4 Vesey 48 that the rule is satisfied by the birth of a child subsequent to the will, by a first wife followed by the testator's re-marriage. It has been held that a will making no provision for the future birth of a child although it did for a future wife was revoked neverthe less by the birth of a child.

In short, statute expressions vary so greatly in America, that it seems impossible to extract from our cases a uniform doctrine.
The legal presumption is when a will has been properly executed, with all the formalities required by the statute that it continues to exist until the death of the testator. However this proof may always be rebutted by actual proof of its revocation. Greenleaf on Evidence page 680. But it appears that it has been held in Vermont that if a will which was duly executed and properly published cannot be found after the death of its maker, its absence will amount, prima facie to proof of revocation. But the presumption being one of fact, may be rebutted and the will established by proof of its contents. 14 Vermont 125. So too in absence of all proof as to who destroyed the will this presumption will prevail. I Grattan 286.

Revocation is a question of intention and the acts, conduct and declarations of the maker of the will are admissible for the purpose of ascertaining whether it was revoked. The fact of revocation may be established by circumstantial evidence as well as by positive proof. What amounts to revocation is a question of law. 2 Head I64.

Where the animus revocandi is doubtful, the onus
of proving it is upon the party who alleges it. 6 Met. 282.

The revocation of a will by mere inference of law or presumption is limited to few instances. In general the will can only be revoked by express intention of the testator or by such acts as clearly and conclusively evince such an intention. If from the facts we are unable to spell out an intention the will remains in full force and effect liable only to modification in those particulars wherein the testator has transgressed the will of the state, which in certain instances restrains him from neglecting those who are the natural objects of his bounty.