POPULAR PAPERS ON ENGLISH LAW.

BY A SOLICITOR.

"I GIVE AND BEQUEATH."

IN every civilised community there must be laws, and, as we all know, laws have to be obeyed. Montesquieu put the same general proposition in a more definite form:—"The liberty of man in a social state, different from that in a state of nature, consists not in a power of acting in all things according to his own judgment, but in acting according thereto in subservience to the will of the public—in being free to do all things the law does not prohibit, and to omit all things the law does not enjoin."

Our English system of jurisprudence has been gradually built up by a process which want of space forbids me to describe—an enormous accumulation of statute upon statute, and precedent upon precedent. It would be a Herculean, almost Augean, task; but this so-called system of ours sadly needs simplifying into a code, so as to reduce chaos into order, pruning away the useless, and defining the doubtful. "Our laws," said Hallam, "like those of Rome, must be cast into the crucible. It would be a disgrace to the nineteenth century if England could not find her Tribonian."

It does seem hard that all should be obliged to obey laws with which only a very few have any real acquaintance, and which fewer still are capable of knowing perfectly. Beyond this, there is a well-recognised principle of our courts of justice that ignorance of (at least) statute law cannot be pleaded. As each nation advances in civilisation its laws increase in number and intricacy—it is one of the penalties of that civilisation. The progress, also, of the arts on the one hand, and of commerce on the other, demands frequent changes in the law. But, even in the face of these difficulties, I think it is the duty of every Englishman to strive to acquire such a clear and intelligent view of the laws which most nearly concern him, as shall enable him to act with independence in simple matters, or to rely with confidence on the practitioner who may advise him in difficulties.

To afford this view is the aim of the following papers.

In attempting a simple sketch of English testamentary law, I must not be understood to encourage the making of their own wills by "laymen," as solicitors call unprofessional people. It is no easy task for any but a lawyer to prepare even the commonest form of will, and the formalities with which its "execution," or making, has been hedged round, are quite serious, and demand the strictest care. *Verbum sapientibus satis.*

Our fathers under William IV. had many difficulties to contend with when they made their wills; of the law at that period it was truly said, "its general characteristics were complication, diversity, uncertainty." But one of the very first things our gracious Queen did was to pass an Act (7 Will. IV. & 1 Vict., c. 26) "for the amendment of the laws with respect to wills," which became law in the session of 1837, and affects all wills made on and after the 1st of January, 1838. This enactment cleared away a mass of old statute law, and provided a fresh starting-point upon which our testamentary law now wholly depends. One or two technicalities may here be explained.

The key to the word "will" is found in its synonym "testament," from the Latin *testatio mentis*—the witness of a man's mind; and to give by testament is to speak by a man's will what his mind is to have done after his death. He who makes the testament is called the testator, and when a man dies without a will he is said to die intestate. The term "real property" includes such as passes to the *heir* on the owner's intestacy—that is, land, with the houses and fixtures upon it, and some other property (such as tithes), which is called "incorporeal" and "savours of the realty." All other property is called "personal," because it is supposed to accompany its owner's movements, and in old times did so. The next-of-kin take this on his dying intestate. It comprises goods and chattels (the *boni et catalli* of legal dog-Latin); money, and its securities, such as stocks and shares; and, by a curious legal fiction, leasehold interests in land of even 1,000 years or more. To the disposal of real *estate* (another word for property), the term "devise" seems to have been appropriated; while "bequeath" is the technical expression in the case of personalty.

Now we have to consider:—1. Who may make wills; 2. What may be "willed;" 3. How it is to be done; 4. What is necessary to alter, and—5. What revokes a will; 6. What is necessary to prove it.

1. The Statute of Wills of 1837 requires that every testator shall be of the age of twenty-one years at least; but the disqualifications are practically few, and are either imposed by physical causes or justified by moral reasons. Among those incapable of making a will are:—minors, without any exception; married women, unless enabled by a *power* (which some previous settlement or will not unfrequently confers), or possessed of property settled to their "separate use;" persons of unsound mind, or born deaf-mutes; traitors and felons. Aliens, or foreigners, until the passing of the Naturalisation Act, 1870, were also disqualified.

2. Every kind of property may now be disposed of by will, and the formalities of execution are the same with both real and personal estate. It is most important to remember that a will "*speaks from the death of the testator*," and will embrace all that at that period may justly be called his own, whether acquired before or after the date of signing it. So that in framing a

will it is necessary to foresee and provide for all contingencies which may happen subsequently to its date and before the death of its testator.

3. A will must be *in writing*, but it may be written upon any substance and with any material. For instance, a carpenter's will written in pencil upon a piece of board will be valid, if properly signed and witnessed. The testator must place his usual signature immediately below the last line of the will; but, if he is unable to write, the statute allows some other person, by his direction and in his presence, to sign his name for him. And this is much preferable to the barbarous alternative of "making his mark."

There must be *two or more* witnesses, and they must all be present when the testator makes his signing; and then, while he is still present, they must "attest" the will by writing under the attestation clause their full names, descriptions, and addresses, in order that they may be more easily identified thereafter. No particular form of attestation is required, but for the purpose of "proving" the will without any question being raised as to its due execution, it is decidedly better to have a formal memorandum in this (the usual) shape:—"Signed and declared by the said testator, A B, as and to be his last will, in the joint presence of us, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses." Especial care must be taken not to choose for a witness any person who, or whose wife or husband, is intended to derive any benefit whatever under the will, otherwise the gift to such witness will be void; the will itself, however, excepting only that particular clause, will be valid, and the witness in question is even allowed to prove its execution. A creditor of the testator can act as a witness, and so may any person whom he has appointed executor.

An exception, as regards the formalities required by the Statute of Wills, is made in favour of soldiers in actual military service—that is, on an expedition—and of mariners and seamen at sea, who may dispose of their *personal* estate as they might have done before the passing of the Act—*i.e.*, by an unattested writing, or by a mere "nuncupative" testament by word of mouth, before witnesses.

4. The original will, when once made, must not be altered. The best means of altering its effect, without wholly revoking it, is by making a *codicil* to it. This has to be considered as part of the original will, and it must refer to it distinctly, thus: "This is a codicil to the will of me, A B, of, &c., which will bears date the 1st day of January, 1877." It requires exactly the same formalities, when being signed by the testator, as the will required. Of course the dispositions already made by the will are not disturbed further than is absolutely necessary to give effect to the codicil. If any obliterations, interlineations, or other alterations in the original will should be made through ignorance—I do not suppose any educated person would adopt so troublesome and clumsy a process of alteration—the defect can only be cured by the testator signing the will again, the witnesses attesting his execution of it as before. The most ready means of "altering" a will, I need scarcely say, is for the testator to sell, give away, or in some other way part with, any of the property comprised in his will after he has signed it. As the document speaks from his death, he is at perfect liberty to do this, and the will immediately loses its control over the property which has passed out of the testator's possession.

5. There are several means of *revoking* a will—that is, of making it wholly void:—(i.) A very common means is matrimony. It is not universally known that a man or woman who marries after making a will, by the very act of matrimony revokes that document, and a new one must be made, unless such newly-married person wishes to die intestate. It may be well to bear in mind that, under the Wills Act, marriage is now the only *extrinsic* circumstance capable of revoking a will; for the statute expressly declares that "no will shall be revoked"—as formerly it might have been—"by any presumption of an intention on the ground of alteration in circumstances." (ii.) A will may be revoked either by another will of subsequent date, or by some writing declaring an intention to revoke it, and executed with the same formalities as are required for a will. The second will stands in the place of, and in fact becomes, the original will, unless it is expressly stated to be intended as part and parcel of the first, and read with it. In the latter case, the two documents may be "admitted to probate," or proved, as one will. But a will complete in itself, and having no reference to any preceding testament, impliedly revokes all former testamentary dispositions. (iii.) Burning a will, tearing it, or in any other way destroying the substance of it, will be sufficient to revoke it, if such acts are done *animo revocandi*—with the intention of revoking; but, of course, they must be done either by the testator himself, or by some person in his presence and by his direction.

A curious case in point, *Cheese* v. *Lovejoy*, has just been decided. The question arose whether a testator had revoked a will which he had executed, under the following circumstances:—The will was dated in 1849 (*i.e.*, since the Wills Act). The testator died in 1876. Some years before his death he had struck through parts of the will with a pen, but the writing remained legible. After this he had thrown the will into a waste-paper basket, and had often kicked it about the house. It was found sometimes in one place, sometimes in another, and was rescued by a servant from destruction, and placed on the top of a wardrobe. After this, until the testator's death, it was never in his own custody, but was moved about from one place to another by his servants. It was decided that, as a matter of law, there had been no revocation, and the Court of Appeal held that this ruling was right. There must be an act of revocation as well as an intention to revoke. All the destroying in the world without intention will not revoke a will, nor all the intention without destruction. The two things must concur.

6. Previously to the year 1857, wills were under ecclesiastical jurisdiction—that is to say, they were

"proved" in, and executors obtained their authority from, the several archbishops or bishops, who held what were called "Consistory Courts" (the Archbishop of Canterbury had his "Prerogative Court") for the purpose. This dominion of the Church over testamentary matters sprang from very early times, when the monks were, generally speaking, the only *literates* in the rural districts, and would-be testators naturally resorted to "the religious" to get their last wishes committed to writing in an intelligible form; and the ecclesiastical courts also undertook to grant probates. Hence the Church dignitaries by degrees obtained almost exclusive jurisdiction over testamentary affairs, and so things went on until the Probate Act of 1857 (20 & 21 Vict., c. 77) was passed. By this statute a new court was created, to which was given the sole jurisdiction over the proving of wills, and the title of "Her Majesty's Court of Probate." The authority of the Church was thus entirely removed. The new court was invested with full authority to grant or revoke probates of wills and "letters of administration," and to hear and determine all questions relating to matters and causes testamentary. District registries of the Court of Probate were established all over the country, and to many of these registries were assigned limits roughly corresponding with the several dioceses over which the old Consistory Courts had authority.

By the recent Judicature Act the style of the Court of Probate was changed; it has now been, in a measure, merged with other courts into one great authority, and is called "The Probate Division of Her Majesty's High Court of Justice."

Now the first step to be taken in "proving" is to ascertain who is the executor. There may be two or even more executors; they will probably be expressly named by the document itself, but not necessarily so, for there is sometimes an "executor according to the tenor" of the will. Let us suppose that two executors *have* been so appointed, and that both are willing to undertake the duties. The title of the executors is founded upon their testator's written will, and the latter also contains the specific rules and limits of their conduct in administering the estate; so that some act obviously requires to be done to give the will a legal stamp and currency, and to afford evidence of the authority of the executors. This act is called "proving a will." The executors have to be sworn to a document called an *oath*, which identifies the "paper writing" annexed to it as the original will of the testator, and which declares that the deponents (or the persons taking the oath) are the executors named in such will, that they will well and faithfully administer the estate, that the testator died at such a place on such a day, and that the personal estate does not exceed so much. They also make an affidavit for the purposes of the Inland Revenue Office as to the amount of the testator's gross personal estate, so that the proper *ad valorem* stamp duty may be paid. The original will is then deposited in the Court of Probate, and a compared copy of it written on parchment, with the official seal attached, called the probate copy, is given to the executors as their title-deed, so to speak. Before probate, however, the executors may perform all the ordinary acts of administering a will, such as receiving and giving receipts for debts due to the testator, paying his debts, and selling and assigning any part of his personal estate.

There is a very striking difference between a will disposing only of real estate and one dealing with any personal estate whatever. The first will does not require to be proved at all; it operates as a conveyance without any sanction from the Court of Probate or any one else. But a will of personal estate has always required to be proved.

Should the testator have omitted to appoint any executor, the Court of Probate will grant what are called "letters of administration" *cum testamento annexo* (with the will annexed) to some person, usually one of the next-of-kin, who is then called the "administrator." When any person dies intestate, the court will grant (simply) letters of administration in a similar manner.

We have placed our two executors in their legally constituted authority, and as their chief duties are generally performed by their solicitor, or under his guidance, there seems no need to accompany them further.