3. The will in this instance is a manifest absurdity, as it purports to give all the property of the wife to herself, and the real and personal estate of S. A. Alter vested on his death in his heirs-at-law and distributees under the intestate acts, and no special legislation could divest their rights; as against them it was unconstitutional.

[*Philadelphia Legal Gazette*, June 12, 1870.]

Sur petition to reform will.

Opinion by Ludlow, J., delivered June 18th, 1870.

George A. Alter and Catharine, his wife, each determined to make a will, and each intended to give to the survivor the property he or she possessed. Two wills were prepared for execution, and, as was supposed, were duly executed, and then placed in separate envelopes. The husband died, and, on an examination of the envelope containing, as was thought, his will, it was discovered that the husband had signed his wife's will, and the wife had signed the husband's will.

In this dilemma the wife obtained legislation, and an act of Assembly was passed authorizing her to file a petition stating the facts, and upon proof of "the alleged mistake" to the satisfaction of the Register's Court, that tribunal is clothed with "the powers of a Court of Chancery," and is authorized "to reform said paper-writing," and "to have entered in the office for the Register of Wills in and for the city and county, the said paper-writing, which he (George A. Alter) intended to execute as his last will and testament, as if the said writing had been signed by him, with his own hand and seal, and not by his said wife Catharine."

The petition contemplated by the act of Assembly has been filed, notice was duly given to the heirs-at-law of the decedent, and they resist this application. It ought further to be added that the wife of George A. Alter not only survived her husband, but is now alive; and we have no doubt, as a matter of fact, that a clear mistake was made in the execution of these papers.

We will be best able to perform our duty if we first determine what, exactly, we are asked to do in this case. Clearly we are, in general terms, to reform a last will and testament; but which will is to be reformed? Undoubtedly the will which has been executed by the wife in due form of law, and which is upon its face a testamentary disposition of property, by a woman who is now alive, and whose will is therefore ambulatory until her death. Nor is this all. We must go further, and by virtue of a legislative edict strike out, in fact and in law, the name of the wife, and thus execute a will for a dead man.

Such legislation as this was, we think, never before heard of, and if it can stand the test of judicial criticism will work a revolution in our law.

For the following reasons we think the act is fatally defective:

1. If a Court of Chancery ever had jurisdiction in matters of probate, that power is now considered to be obsolete. Spencer's Eq. Juris., ch. vi., p. 701; Adams' Eq., ch. iv., p 248-9; Ib. 178. Nor can jurisdiction attach until after probate: *Allen* v. *McRierson*, 1 H. L. Cases, 191; Story's Eq. Juris., sec. 140; see also Ib. ch. xxxix., sec. 1445-7.

And a court of equity cannot in any event dispense with the regulations prescribed by the legislature as it regards formalities necessary in the execution of wills: 1 Fremm. ch. 130. Adams in his work, commenting upon this point, declares that "a will cannot be corrected by evidence of mistake so as to supply a clause or word inadvertently omitted by the drawer or copier, for there can be no will without the statutory forms." And this principle is correctly stated if we regard it as applying to the formalities required by statute. Story, in his work upon equity, remarks: "It will be found, we think, upon examination, that American courts of equity have not interfered to correct alleged mistakes in the execution of wills, either as to statutory requisites or the manner of writing, as by inserting the name of another legatee," and adds: "The extent to which the English equity courts have sometimes carried this branch of their remedial powers, has more the appearance of making wills as they (testators) probably would do if now alive, than carrying them into effect as they were in fact made:" 1 Story Eq., sec. 180 (*a*). It is well settled that Chancery never relieves against a statute: Comyn's Dig., tit. Chancery, 3 F., 6, 7, 8; Sedgwick's Stat. and Const. Law, 104.

In the further investigation of the subject it is to be remarked, that among the host of cases cited by counsel for the wife, not one of them is at all like this cause, and for the reason, that while deeds, contracts, and wills have been reformed, the effort has invariably been made to find out an intention in an instrument having a legal existence, and not to execute a paper. Hence it has been wisely said, "In the construction of wills indulgence has been shown to the ignorance, unskilfulness, and even negligence of testators, and no degree of technical informality, or of grammatical or orthographical error, will deter the court from giving effect to an intention;" but it is to be observed that in every case which has come to our knowledge, a will, duly executed, has been before a court of law or of equity. A diligent search has failed to produce a single instance in which a court of law or of equity has ever executed a will, while in a case reported in 14 Jurist, 402, the Prerogative Court in England refused probate in a cause precisely similar to this one, except that the parties executing the supposed wills were sisters, and not husband and wife. It is thus reported:—

"Harding applied for probate of the will of the deceased to be granted, the signatures of the two wills being respectively restored to their original state, on a suggestion that a court of equity might put a construction on the contents of the will now before the court.

"Sir H. Jenner Fust—Two ladies lived together, and they determined to make what I may call mutual wills. The wills are the same *mutatis mutandis;* they were drawn up and executed, that is, if executed they are, at one and the same time, but unfortunately each signed the other's will. After the death of one of them the solicitor alters them, so as to make of one of them appear as that of the other, and I need scarcely say that he has erred in so doing. But what is to be done with this paper? It is not the will of the deceased, and it purports to give