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1st Session, 6th Parliament, 21 Victoria, 1858.

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B I L L .

An Act for the amendment of the Laws
with respect to Wills.

Received and read 1st time, Tuesday, 20th
April, 1858.

Second reading, Friday, 30th April, 1858.

(500 Copies.)

HON. MR. VANKOUGHNET.

S. Derbshire & G. Desbarats, Queen's Printer.

B I L L .

An Act for the Amendment of the Laws with respect to Wills.

SUMMARY.

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HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

- Interpretation of certain words in this Act. I. The words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows, that is to say: the word "Will" shall extend to a Testament, and to a Codicil, and to an appointment by Will, or by writing in the nature of a Will in exercise of a Power, and also to a disposition by Will and Testament or Devise of the Custody and Tutition of any Child, by virtue of an Act passed in the twelfth year of the Reign of King Charles the Second, intituled, *An Act for taking away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof*—sections eight and nine—and to any other testamentary disposition; and the words "real estate" shall extend to messuages, lands, rents and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels-real, and also to moneys, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the Executor or Administrator, and to any share or interest therein.
- 12 Car. 2, c. 24. 5
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20
25
- Real estate. 20
- Personal estate. 25
- Certain English Acts and parts of Acts repealed, viz.: II. An Act passed in the thirty-second year of the Reign of King Henry the Eighth, intituled, *The Act of Wills, Wards and Primer Seizins, whereby a man may devise two parts of his Land*; and also, an Act passed in the Session held in the thirty-fourth and thirty-fifth years of the Reign of the said King Henry the Eighth, intituled, *The Bill concerning the Explanation of Wills*; and also, so much of an Act passed in the twenty-ninth year of the Reign of King Charles the Second, intituled, *An Act for Prevention of Frauds and Perjuries*—as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative Wills, or to the repeal, altering or changing of any Will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein; and also, so much of an Act passed in the Session held in the fourth and fifth years of the Reign of Queen Anne, intituled, *An Act for the Amendment of the Law and the better Advancement of Justice*—as relates to witnesses to nuncupative Wills; and also, so much of an Act passed in the fourteenth year of the Reign of King George the Second, intituled, *An Act to amend* 30
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40
45
50
- 32 Henry 8, c. 1.—
34, 35 Henry 8, c. 5.
Part of 29 Car. 2, c. 3. (Frauds.)
Part of 4, 5 Anne, c. 16.
Part of 14 G. 2, c. 20.—

- the law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the Reign of King Charles the Second, intituled, 'An Act for Prevention of Frauds and Perjuries' "*---as relates to estates *pur autre vie* ; and also
- 25 G. 2, c. 6.
- 5 an Act passed in the twenty-fifth year of the Reign of King George the Second, intituled, *An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies*
- 10 *and Plantations in America*---shall be and the same are hereby repealed so far as the same may relate to Upper Canada ; and also, the seventh, eighth and ninth sections of the Act of the Provincial Parliament of Upper Canada, passed in the thirty-third year of the Reign of King George the Third, intituled,
- 15 *An Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof* ; and the forty-ninth, fiftieth and fifty-first sections of the Act of the said Parliament, passed in the fourth year of the Reign of King William the Fourth, intituled, *An Act to amend the Law respecting Real*
- 20 *Property, and to render the proceedings for recovering possession thereof in certain cases less difficult and expensive*, shall be and the same are hereby repealed, except so far as the aforesaid Acts or any of them respectively relate to any Wills or Estates *pur autre vie*, to which this Act does not extend, or to Wills
- 25 made before this Act comes into operation.
- As regards Upper Canada.
Also sects. 7, 8, 9 of Act of U. C., 33 G 8, c. 8.
And sects. 49, 50, 51 of 4 W. 4, c. 1.
- Exceptions.

- III. Every person may devise, bequeath or dispose of, by his Will executed in manner hereinafter required, all real estate, and all personal estate which he is entitled to, either at law or in equity, at the time of his death, and which, if not so
- 30 devised, bequeathed or disposed of, would devolve upon his heir-at-law, or, if he became entitled by descent, upon the heir-at-law of his ancestor, or upon his executor or administrator ; and the power hereby given shall extend to all real estate as hereinbefore defined ; and also to estates *pur autre vie*, whether
- 35 there be or be not a special occupant thereof, and whether the same be freehold or of any other tenure, and whether the same be a corporeal or incorporeal hereditament ; and also to all contingent, executory or other future interests in any real or personal estate, whether the testator be or be not ascertained
- 40 as the person, or one of the persons in whom the same respectively may become vested, and whether he be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by Deed or Will ; and also to all rights of entry for conditions broken, and other
- 45 rights of entry ; and also to such and the same estates, interests and rights respectively, and other real and personal estate, as the testator is entitled to at the time of his death, notwithstanding he has become entitled to the same subsequently to the execution of his Will.
- What property may be disposed of by Will.
Estate *pur autre vie*.
Contingent executory or future interests.
Rights of entry.
Estates acquired after the Will is executed.

Real estate to be assets for satisfaction of debts under 5 G. 2, c. 7.

IV. If no disposition by will has been made of an estate *pur autre vie* of a freehold nature where there is a special occupant, and notwithstanding any disposition by will that may be made of any real estate, including an estate *pur autre vie* of a freehold nature where there is a special occupant, the liability of the same as assets for the satisfaction of debts within the Statute passed in the fifth year of the Reign of King George the Second, chapter seven, intituled, *An Act for the more easy recovery of Debts in His Majesty's Plantations and Colonies in America* shall not be affected by the provisions of this Act; and in case there is no special occupant of any estate *pur autre vie*, whether freehold or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same comes to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

As to estates *pur autre vie*, where there is no special occupant.

If they come to the executor, &c., by any means, they shall be assets.

Wills of minors void.

V. No Will made by any person under the age of twenty-one years shall be valid.

In what case and manner only a Will may be validly made by a married woman.

VI. No Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act, or a Will made according to the provisions of the Statute (or of any Statute in that behalf), securing to married women certain separate rights of property, witnessed as by this Act is required, and made and acknowledged by such married woman and certified according to the provisions of the Statute enabling married women to part with their real estate by act *inter vivos*, and such Will being so made with the assent of her husband, testified by his signing the same in presence of the same witnesses who witness the execution thereof by such married woman, and executed by both of them at least days before the death of such married woman; but no such Will shall affect the rights of the husband as tenant by the curtesy, or be made in his favor unless she dies without leaving any issue behind her, living at the time of her death.

Wills must be in writing, and how attested.

VII. No Will shall be valid unless it is in writing and executed in manner hereinafter mentioned, that is to say: it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary.

No form of attestation required.

- VIII. Every Will shall, so far only as regards the position of the signature of the testator or of the person signing for him as aforesaid, be deemed to be valid within this Act, if the signature be so placed at, or after, or following, or under, or beside, or opposite to the end of the Will, that it is apparent on the face of the Will that the testator intended to give effect by his signature to the writing signed as his Will; and no such Will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the Will, or by the circumstance that a blank space intervenes between the concluding word of the Will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause or of the clause of attestation, or follows, or is after or under the clause of attestation either with or without a blank space intervening, or follows or is after, or under or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature is on a side or page or other portion of the paper or papers containing the Will whereon no clause or paragraph or disposing part of the Will has been written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the Will is written, to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature is made.
- Certain circumstances as to the position of the testator's signature not to invalidate the Will.
- Signature must be after the clause it is to affect.
- IX. No appointment made by Will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every Will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by Will, notwithstanding it has been expressly required that a Will made in exercise of such power should be executed with some additional or other form of execution or solemnity.
- Wills executed as required by this Act, and none other, to be valid in execution of a power of appointment by Will.
- X. Every Will executed in manner hereinbefore required shall be valid without any other publication thereof.
- No further publication required.
- XI. Any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the making of this Act.
- Wills of mariners or soldiers on service.
- XII. If any person who attests the execution of a Will is at the time of the execution thereof, or at any time afterwards becomes, incompetent to be admitted a witness to prove the execution thereof, such Will shall not on that account be invalid.
- Will not invalidated by incompetency of a witness.

- Legacy or devise to an attesting witness to be void; and he may prove the validity or invalidity of the Will. XIII. If any person attests the execution of a Will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), is thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns the person attesting the execution of the Will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void, and the person so attesting shall be admitted as a witness to prove the execution of the Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such Will. 5
- Creditor may be a witness, tho' property be charged for his debt. XIV. In case by any Will any real or personal estate is charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, attests the execution of the Will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such Will, or to prove the validity or invalidity thereof. 15
- Executor may be a witness. XV. No person shall, on account of his being an executor of a Will, be incompetent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof. 20
- Wills to be revoked by marriage. Exception as to certain appointments. XVI. Every Will made by a man or woman shall be revoked by his or her marriage, except a Will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, executor or administrator, or to the person entitled as his or her next of kin under the Statute of Distributions. 25
- Alteration of circumstances not to revoke. XVII. No Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. 30
- How only Wills may be revoked. XVIII. No Will or Codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. 35
- Alterations must be executed in the same manner as the Will. XIX. No obliteration, interlineation or other alteration made in any Will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the Will before such alteration were not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as 45

part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witness be made in the margin, or on some other part of the Will opposite or near to such alteration, or at the foot, or end of, or opposite to
 5 a memorandum referring to such alteration, and written at the end or some other part of the Will.

How alterations must be attested.

XX. No Will or Codicil, or any part thereof, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a Codicil executed in manner herein-
 10 before required, and shewing an intention to revive the same; and when any Will or Codicil which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the con-
 15 trary is shewn.

How only Wills shall be revived.

As to wills partly revoked and afterwards revived

XXI. No conveyance or other act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will may be revoked as aforesaid, shall prevent the operation
 20 of the Will with respect to any estate or interest in such real or personal estate as the testator has power to dispose of by Will at the time of his death.

Conveyance, &c., subsequent to Will, not to revoke it, as regards what the testator can still dispose of.

XXII. Every Will, with reference to the real estate and personal estate comprised in it, shall be construed to speak and
 25 take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the Will.

Will considered to speak from death of testator.

XXIII. Unless a contrary intention appears by the Will, any real estate or interest therein comprised or intended to be com-
 30 prised, in any devise in such Will contained, which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the Will.

Estates included in lapsed or failing devises, to make part of residuary devise.

XXIV. A devise of the land of the testator in any place, or in the occupation of any person, mentioned in his Will, or otherwise described in a general manner, and any other general
 35 devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it, shall be
 40 construed to include the leasehold estates of the testator, or any of them, to which such description extends (as the case may be), as well as freehold estates, unless a contrary intention appears by the Will.

Devise of any land described generally to include any leasehold as well as any freehold estate therein.

XXV. A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occu-
 45 pation of any person, mentioned in his Will, or otherwise

Devise of real estate described generally, to include es-

tates over
which testator
has a general
power of ap-
pointment:
And so as to
personal es-
tate.

described in a general manner, shall be construed to include any real estate, or any real estate to which such description extends (as the case may be) which he has power to appoint in any manner he thinks proper, and shall operate as an execution of such power, unless a contrary intention appears by the Will; and, in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description extends (as the case may be) which he has power to appoint in any manner he thinks proper, and shall operate as an execution of such power, unless a contrary intention appears by the Will.

Devise with-
out limitation
to pass to
whole estate
of testator.

XXVI. When any real estate is devised to any person without words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a contrary intention appears by the Will.

Words "*die
without issue,*"
&c., how to be
understood in
any Will.

XXVII. In any devise or bequest of real or personal estate, the words "*die without issue,*" or "*die without leaving issue,*" or "*have no issue,*" or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death, of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the Will, by reason of such person having a prior estate-tail, or of a preceding gift, being without any implication arising from such words, a limitation of an estate-tail to such person or issue, or otherwise: But this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift is born, or if there be no issue who lives to attain the age, or otherwise answers the description required for obtaining a vested estate by a preceding gift to such issue.

Proviso: such
construction
not to apply to
certain cases.

XXVIII. Where any real estate is devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, is thereby given to him expressly or by implication.

Devise to
trustee or ex-
ecutor to pass
the whole es-
tate of the
testator.

Devise to
trustee with-
out limitation,
or where the
trust may con-
tinue beyond
the limitation
to pass the
whole estate
of the testator.

XXIX. Where any real estate is devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by Will in such real estate, and

not an estate determinable when the purposes of the trust have been satisfied.

XXX. Where any person to whom any real estate is devised for an estate-tail, or an estate in quasi entail, dies in the life-time of the testator leaving issue who would be inheritable under such entail, and any such issue is living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the Will.

Devise of estate-tail, not to lapse, if there be inheritable issue living at death of testator.

XXXI. Where any person being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for an estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any such issue is living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the Will.

Gifts to testator's child, &c, for life or greater estate, not to lapse, if the child leave issue living at death of testator.

XXXII. This Act shall not extend to any Will made before the day of one thousand eight hundred and fifty- and every Will re-executed or republished, or revived by any Codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same is so re-executed, republished or revived; and this Act shall not extend to any estate *pur autre vie* of any person who dies before the said of , one thousand eight hundred and fifty-

Application of Act postponed.

XXXIII. Nothing herein contained shall affect the operation of the Statute passed in the fifth year of the Reign of King George the Second, intituled, *An Act for the more easy recovery of Debts in His Majesty's Plantations and Colonies in America.*

English Act, 5 G. 2, c. 7, not to be affected.

XXXIV. This Act shall extend and apply only to Upper Canada.

Act limited to U. C.