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No. 31.

3rd Session, 5th Parliament, 20 Victoriae, 1857.

B I L L .

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

Received and read first time, Tuesday, 3rd
March, 1857.

Second reading, Friday, 6th March, 1857.

Hon. Atty. Genl. MACDONALD.

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

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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 Tuition 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.
- Real estate. 20
- Personal estate. 25
- Certain English Acts and parts of Acts repealed, viz: 32 Henry 8. 34, 35 Henry 8. Part of 29 Car. 2. (Frauds).
- 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 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 the 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 *par 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 fourth and fifth years of the Reign of Queen Ann, 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*
- Part of 4, 5 Anne. 45
- Part of 14 G 2. 25 G. 2. 50

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 *par autre vie*; and also, 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, that 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 an Surrogate Court in every District thereof*; and the forty-ninth, fiftieth and fifty-first sections of 4 W. 4, c. 1—*To amend the law of Real Property*—shall be and the same are hereby repealed, except so far as the aforesaid Acts or any of them 20 respectively relate to any Wills or Estates *pur autre vie*, to which this Act does not extend, or to Wills made before this Act shall come into operation.

III. It shall be lawful for every person to devise, bequeath or dispose of, by his Will executed in manner hereinafter 25 required, all real estate, and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; 30 and that the power hereby given shall extend to all real estate as hereinbefore defined; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold or of any other tenure, and whether the same shall be a corporeal or incorporeal here- 35 ditament; and also to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the 40 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 rights of entry; and also to such and the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at 45 the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his Will.

IV. Notwithstanding any disposition by Will that may be made of real estate, including an estate *pur autre vie* of a freehold nature where there shall be a special occupant, the 5 same shall be assets for the satisfaction of debts within the

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.

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Estates *pur
autre vie*.

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Estates ac-
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the Will is
executed.

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

notwithstanding disposition thereof by Will.

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.

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*; and in case there shall be 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 shall come 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.

Wills of minors void.

V. That 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 duly 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 shall 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.

Wills must be in writing, and how attested.

No form of attestation required.

Certain circumstances as to the position of the testator's signature, not to invalidate the Will.

VII. No Will shall be valid unless it shall be 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: Provided always, that 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 shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the Will, that it shall be apparent on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will; and no such Will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the Will, or by the circumstance that a blank space shall intervene between the concluding word of the Will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause or of the clause of attestation, or shall

follow, or be after or under the clause of attestation either with or without a blank space intervening, or shall follow, or be after, or under or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be 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 shall be written above the signature, or by the circumstance that there shall appear 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 shall be made.

Signature must be after the clause it is to affect.

VIII. 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 shall have 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.

Will executed as required by this Act, and none other, to be valid in execution of a power of appointment by Will.

IX. 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.

X. Every Will executed in manner hereinbefore required shall be valid without any other publication thereof.

No further publication required.

XI. If any person who shall attest the execution of a Will shall, at the time of the execution thereof, or at any time afterwards, be 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.

XII. If any person shall attest the execution of any 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), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such 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 such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding

Legacy or devise to an attesting witness to be void; and he may prove the validity or invalidity of the Will.

ing such devise, legacy, estate, interest, gift or appointment mentioned in such Will.

Creditor may be a witness, tho' property be charged for his debt. XIII. In case by any Will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged, shall attest the execution of such 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: Provided always, that nothing herein contained shall affect or be construed to 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.*

Executer may be a witness. XIV. No person shall, on account of his being an executer 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.

Wills to be revoked by marriage. XV. 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, executer or administrator, or the person entitled as his or her next of kin under the Statute of Distributions.

Alteration of circumstances not to revoke. XVI. No Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

How only Wills may be revoked. XVII. 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.

Alterations must be executed in the same manner as the Will. XVIII. 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 shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as 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 a memorandum referring to such alteration, and written at the end or some other part of the Will.

How alterations must be attested.

- XIX.** No Will or Codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a Codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn.
- XX.** 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 shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death.
- XXI.** Every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by Will.
- XXII.** Unless a contrary intention shall appear by the Will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such Will contained, which shall fail or be 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 such Will.
- XXIII.** 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 devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates of the testator, or any of them, to which such description shall extend (as the case may be), as well as freehold estates, unless a contrary intention shall appear by the Will.
- XXIV.** A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his Will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by Will; and, in like manner, a bequest of the personal
- How only Wills shall be revived.
- As to Wills partly revoked and afterwards revived.
- Conveyance, &c., subsequent to Will, not to revoke it, as regards what the testator can still dispose of.
- Will considered to speak from death of testator.
- Estates included in lapsed or failing devises, to make part of residuary devise.
- Devise of any land described generally to include any leasehold as well as any freehold estate therein.
- Devise of real estate described generally, to include estates over which testator has a general power of appointment: And so as to personal estate.

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 shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by Will. 5

Devise without limitation to pass to whole estate of testator.

XXV. When any real estate shall be 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 shall appear by the Will. 10

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

XXVI. 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 shall appear 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: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. 15 20 25

Proviso: such construction not to apply to certain cases.

Devise to trustee or executor to pass the whole estate of the testator.

XXVII. Where any real estate shall be 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, shall thereby be given to him expressly or by implication. 30 35

Devise to trustee without limitation, or where the trust may continue beyond the limitation, to pass the whole estate of the testator.

XXVIII. Where any real estate shall be 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, shall not be given to any person for life, or such beneficial interest shall be 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 shall be satisfied. 40 45

XXIX. Where any person to whom any real estate shall be devised for an estate-tail, or an estate in quasi entail, shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be 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 shall appear by the Will.

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

XXX. Where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be 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 shall appear 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.

XXXI. This Act shall not extend to any Will made before the first day of July, one thousand eight hundred and fifty-seven; and every Will re-executed or re-published, 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 shall be so re-executed, re-published or revived; and this Act shall not extend to any estate *pur autre vie* of any person who shall die before the said first of July, one thousand eight hundred and fifty-seven.

Act not to apply to Wills made before 1st July, 1857,

As to Wills re-executed, &c.

XXXII. That this Act shall extend and apply only to Upper Canada.

Act limited to U. C.