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Edited by

E. B. LOVELL, Esq.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

Each Number contains the Cases, Orders and Statutes issued from the first to the last day of the Month; is analytically arranged, and therefore adapted both for perusal and reference.

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THE ACT

FOR

THE AMENDMENT OF THE LAWS

WITH RESPECT TO

WILLS,

7 WILL. IV. & 1 VICT. c. 26;

With Notes,

AND

REFERENCES TO DECISIONS UPON THE SEVERAL SECTIONS.

BY

JAMES PARKER DEANE, D.C.L.,

ADVOCATE IN DOCTORS' COMMONS, AND OF THE INNER TEMPLE, BARRISTER AT LAW.

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1852.

TABLE OF CASES.

T.

U.

V.

W.

ERRATA.

Page 10, l. 21, for "pay" read "pass."
23, l. 21, for "deceased" read "testatrix."
26, l. 20, for "ix" read "xi."
41, l. 6, between "if" and "had" insert "it."
79, l. 5, for "Devenzy" read "Derenzey."

INTRODUCTION.

The Act for the Amendment of the Laws with respect to Wills received the Royal Assent on the 3rd of July, 1837; and by section 34 it is enacted, that the act shall not extend to any will made before the 1st of January, 1838, unless such will shall have been re-executed, or republished, or revived by any codicil subsequent to that time; in which case the will shall be deemed to have been made at the time when it has been so re-executed, or republished, or revived.

It may, therefore, be worth while even practically, with respect to wills which do not come within the operation of the act by reason either of their date, or it may be of their subject-matter (see Cloves *v.* Awdry, 12 Beav. 604; 1 Sugd. Pow. 369), and also with the view of better understanding the provisions of the new law, to consider briefly the state of the previous testamentary law, and so ascertain the nature and extent of the mischief and inconveniences which the legislature, in passing the existing law, intended to provide against.

Execution before 1st January, 1838.

There appear to have been, previous to the 1st of January, 1838, no less than ten different laws for regulating the execution of wills, as they were concerned with the disposition of several kinds of property.

1. Freehold Estates in Fee Simple.

First, to pass freehold estates in fee simple by direct devise, either at law or in equity, or to pass equitable estates in such customary freeholds as were not devisable

at law, the will must have been in writing, and signed and attested in the manner required by the Statute of Frauds.

History of the power of disposing of Land by Will.

Mr. Hargrave, in a learned note to Co. Litt. 111 b, n., has given an account of the power of disposition over lands in this country; he states that the testamentary power over land was certainly in use among our Anglo-Saxon and Danish ancestors, though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country; for as Tacitus, writing of the ancient Germans, says, § 20, "Hæredes tamen successoresque sui cuique liberi, et nullum testamentum. Si liberi non sunt, proximi gradus in possessione, fratres, patrui, avunculi."

It does not appear that the Saxons or Danes made any distinction between real and personal property; the whole property of a man was described by the general term *res,* and under that denomination was subject to the same succession ab intestato, and might be given or disposed of by will. But this power of disposing by will was not allowed without restriction, for there is every reason to conclude, from the prevailing custom of the realm afterwards, that a man was restrained from totally disinheriting his children, or leaving his widow without a provision. Consistently with this supposition we find the law, with regard to the estates of intestates, Leg. Can. c. 68: "Sive quis incuria, sive repentina morte fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem, præter eam quæ jure debetur herioti nomine sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis pro suo cuique jure distribuantur." (1 Reeves's Hist. E. L. 11.)

After the Norman Conquest the power of devising lands ceased, except as to socage lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to terms for years, or chattel interests

in land, which on account of their original imbecility and insignificance were deemed personalty, and as such were ever disposable by will. This limitation of the testamentary power proceeded partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will, partly from a jealousy of death-bed dispositions, but principally from the general restraint of alienation incident to the rigours of the feudal system as it was established, or at least perfected by the first William. (Wright's Ten. 172; Reeves's Hist. E. L. ch. 11.) In the reign of Edward the First the statute Quia emptores removed in great measure this latter bar to the exercise of the testamentary power, that is, in respect to all freeholders, except the king's tenants in capite. But the two former obstructions still continued to operate, though indeed this was in name and appearance only; for soon after the statute of Quia emptores, feoffments to uses came into fashion, and last wills were enforced in chancery as good declarations of the use; and thus, through the medium of uses, the power of devising was continually exercised in effect and in reality. But at length this practice was checked, not accidentally but designedly, by the 27 Hen. VIII., which, by transferring the possession or legal estate to the use, necessarily and compulsively consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction, to make its operation dependant upon the intention of parties, were invented. However, the bent of the times was so strong in favour of every kind of alienation, that the legislature in a few years after, having interposed to restrain an indirect mode of passing land by last wills, expressly made it devisable.

This great change in the common law was effected by

the statutes of 32 and 34 Hen. VIII., which, taken together, gave the power of devising to all having estates in fee simple, except in joint tenancy, over the whole of their socage lands, and over two-thirds of their lands holden by knight's service. The operation of these statutes was further extended by the conversion of knight's service into socage in the 12 Car. II. But still copyhold lands, and also, as the best opinion seems to have been, estates *pur autre vie* in freehold lands, remained undevisable. On the one hand they were not devisable at common law, because they came within the description of real estate. On the other hand they, or at least the former, are not within the statutes of Hen. VIII., these requiring that the tenure should be socage, which copyhold is not; and that the party should have an estate in fee simple, which is more than a tenant *pur autre vie* can be said to have. (See as to copyhold lands, Royden *v.* Malster, 2 Rolls Rep. 383; and as to estates *pur autre vie* in freehold lands, Gawen *v.* Ramtes, Cro. Eliz. 804; Moo. 625; 1 Wms. Saund. 261, 6th edit.; notes to Took *v.* Glascock; Oldham *v.* Pickering, 2 Salk. 464.)

This defect of provision in the Statutes of Wills was supplied, as to estates *pur autre vie*, by the 29 Car. II. c. 3, s. 12, which made them devisable in the same manner as estates in fee simple. But previous to the 55 Geo. III. c. 192, which made dispositions by will of copyhold estates effectual without previous surrender, no provision was made in respect of copyhold estates, and therefore the power of devising was indirectly exercised over these by an application of the doctrine of uses, similar to that which was anciently resorted to in respect to freehold lands; for the practice was to surrender to the use of the owner's last will; and on this surrender the will operated as a declaration of the use, and not as a devise of the land itself. (Att. Gen.

v. Andrews, 1 Ves. 225; 2 P. Wms. 258, n. 1; Tuffnell *v.* Page, 2 Atk. 37; Co. Litt. 111 b, n. 1.)

The only form necessary to the validity of a will, under the Statutes of Wills, was writing; a devise by custom, under the old law, might afterwards be made by parol. This distinction and others (Co. Litt. 111 b, n. 4) was abolished by 29 Car. II. c. 3, s. 5, which required that all wills of lands devisable by force of the statute, or by custom, shall be in writing. And the same section made three other formalities requisite to the validity of a will of freehold estates in fee simple. 1st. That it should be signed by the testator, or by some other person in his presence, and by his express direction; 2nd. That it should be attested by three or four credible witnesses; and 3rd. That it should be subscribed by the witnesses in the presence of the testator. Sometimes it was treated as necessary, though not required by the statute, that the will should be published by the testator. (Ross *v.* Ewer, 3 Atk. 161.)*

2. Leaseholds. Money secured on Land. Personal Property above 30*l.*

Secondly, to pass leasehold estates, money secured on land, or personal property, exceeding the value of 30*l.*, and belonging to any person other than a soldier in service, or a sailor at sea, any writing, however informal, was sufficient; or such property might pass by parol, in certain cases, with the evidence required by the Statute of Frauds.

Leaseholds.

Leases for terms of years were originally mere contracts for the cultivation or occupation of the soil, and were usually made in consideration of the render of part of the produce, or its value. They were in the power of the free-

* In the Appendix to the Fourth Report of the Real Property Commissioners, p. 6, there is a very learned "inquiry into the origin, the progress, the actual state and the attempted reformations of our testamentary jurisdictions, ecclesiastical and lay," which will well repay attentive perusal.

holder, who might destroy them, until they were protected against such destruction, in some cases by the Statute of Gloucester, 6 Edw. I. c. 11, and in others by the statute 21 Hen. VIII. c. 15. At a time when the greater part of the land was cultivated by villeins, who were incapable of possessing any property, it may be supposed that the few freemen, who occupied land upon contracts for terms of years, were a class but little superior to the villeins, and it is not probable that they held any freehold estates.

Leasehold interests were at first merely personal to the lessees, and determined with their deaths. When leases beyond the lives of the tenants began to be upheld, they were not considered to create estates in the land, because they were not at that time of sufficient value to sustain the burthens of feudal tenure; and on account of their insignificance were treated as personal property, and thereby became subject to the same power of testamentary disposition as the stock on the land and other chattels.

Mortgages.

Mortgages and other securities for money, unless where an estate of freehold is conveyed to the mortgagee, have been considered to be of the same nature as the money itself; and where a mortgage is made by the conveyance of an estate of freehold, the right to the money in equity was subject to the same power of testamentary disposition as other personal property.

Personal Property.

A testamentary power over some proportion of movable and other personal property existed in very early times (ante, p. 2). It seems that formerly the owner could not dispose of more than one-third if he left a wife and children, or of more than one-half if he left a wife and no child. These restrictions continued in the city of London, the principality of Wales and the province of York, till they were abolished by the statutes 2 Geo. I. c. 18; 7 & 8 Will. III. c. 38; 4 & 5 Will. & M. c. 2; 2 & 3 Anne, c. 5; since which

the owners of personal property in any part of England have been allowed to dispose of the whole of it.

Previous to the Statute of Frauds, a will of personal estate might be made by parol (2 Black. Com. 500); but the 19th section of that statute enacted, that no parol or nuncupative will should be good, when the estate thereby bequeathed exceeded the value of 30*l.*, unless the following requisites had been complied with—1st. That it be proved by three or more witnesses, who were present at the making; 2ndly. That it be proved that the testator at the time did bid the persons present to bear witness that such was his will; and 3rdly. That the will was made in the last sickness of the testator, and in the house in which he dwelt, or in which he had been resident ten days, or that he was surprised and taken sick when absent from home, and died before his return. And the 20th section required further, in addition to these provisions, that the substance of the testimony be committed to writing within six days, or otherwise it was not to be received after six months; and then by the 21st section it was provided, that the will should not be proved until fourteen days after the death of the testator, nor then until the widow or next of kin had been called upon to contest it, if they thought proper. (Lemann *v.* Bonsall, 1 Add. 389.)

Statute of Frauds, s. 19.

S. 20.

But wills of personal estate *in writing* might be made in any form, and without any solemnity. It was not necessary that even the name of the testator should appear; and any scrap of paper or memorandum, in ink or in pencil (Dickenson *v.* Dickenson, 2 Phillim. 173), mentioning an intended disposition of property, was admitted as a will, and would be valid, although written by another person, and not read over to the testator, or even seen by him, if proved to have been written in his lifetime and according to his instructions (Sikes *v.* Snaith, 2 Phillim. 351), and the

further completion of the instrument was prevented by the sudden death of the testator.

Even where the will was imperfect, and it appeared upon the face of it that something more was intended to be done before it was finished, yet it would have been valid, so far as it seemed to be complete, if it was proved that the testator's intention was arrested by sickness or death. (Musto *v.* Sutcliffe, 3 Phillim. 104.)

In Kidd *v.* North (2 Ph. 91; 10 Jur. 995), the testamentary paper before the court had neither date, signature, nor attestation; but it was held to be in substitution and to supersede the provisions contained in other complete instruments. "It is reasonable," Lord Cottenham said, in his judgment there, "to give effect to the incomplete instrument, if it contains within itself evidence of an intention to make an entirely new disposition, and for that purpose to undo all that had been done before; but if the new disposition applies only to part of the subject matter, the instrument being upon the face of it incomplete, and not applying to other parts, it is consistent with all principle to give effect to this intention, so far as it is expressed, but to consider the first disposition, as operative, so far as no substituted disposition is provided in its place."

In Montefiore *v.* Montefiore (2 Add. 357), and Masterman *v.* Maberly (2 Hagg. 247), Sir John Nicholl thus referred to the principles which guided the court of probate in respect to unexecuted and imperfect papers:—"The legal principles as to imperfect testamentary papers of every description vary very much according to the state of maturity at which those papers have arrived. The presumption of law, indeed, is against every paper not actually executed by the testator; and so executed, as it is to be inferred on the face of the paper, that the testator meant to execute it. But if the paper be complete in all other respects, that

presumption is slight and feeble, and one comparatively easily repelled. For intentions sub modo at least need not be proved in the case; that is, the court will presume the testator's intentions to be as expressed in such a paper, on its being satisfactorily shown that its not being executed may be justly ascribed to some other cause, and not to any abandonment of those intentions so expressed on his, the testator's, part. But where a paper is unfinished as well as unexecuted, especially where it is just begun, and contains only a few clauses or bequests, not only must its being unfinished and unexecuted be accounted for, as above, but it must also be proved, for the court will not presume it, to express the testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it as far as it goes; so that by establishing it, even in such its imperfect state, the court will give effect to and not thwart or defeat the testator's real wishes and intentions in respect to the property which it purports to bequeath in order to entitle such a paper to probate, in any case, in my judgment.

"In respect to personal property, where there is final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate the instrument. The disposition intended to be made has the same legal effect in regard to personal property, as if the instruments had been actually signed and attested. This non-execution does not, in law, affect the validity of these instruments as testamentary instruments applying to personal property."

3. Personal Property under 30*l.*, and Property of Soldier or Sailor.

Thirdly, personal property, when not exceeding the value of £30, and also any amount of personal property belonging to a soldier in service, or a sailor at sea, what-

ever might be its value, with the exception of the pay, prize money, &c., of a seaman in the navy, or marine, might pass by parol without any restriction as to evidence; for, by the 23rd section of the Statute of Frauds, the wills of soldiers in actual military service, and of mariners at sea, which includes marines, with respect to their personal estate, were exempted from the provisions of the act; and consequently these persons might make their wills by parol; but this privilege was limited to movables, wages, and personal estate, and did not include the disposition of realty.

4. Pay, &c.

Fourthly, to pass the pay, prize-money, &c., of a warrant officer or seaman in the navy, or non-commissioned officer of marines or marine, the forms required by the act 11 Geo. IV. & 1 Will. IV. c. 20, must have been complied with. (See section 12.)

5. Estates pur autre vie.

Fifthly, to pass freehold estates, *pur autre vie*, at law, the will must have been executed in the same manner as wills of estates in fee simple; but such estates appear to have been in many cases devisable in equity by a will in form sufficient for personal property. (See section 6.)

6. Money in the Funds.

Sixthly, to pay money in the funds by direct legal devise the will must have been attested by two witnesses: but this provision was almost nugatory; since upon a principle similar to that by which devises of estates *pur autre vie* were governed, it was settled that wills with respect to money in the public funds were subject to a different testamentary disposition at law and in equity. It is declared by 1 Geo. I. c. 19, s. 12, and other acts of parliament, that money in the funds may be devised by will in writing, attested by two or more witnesses; yet when it was bequeathed by an unattested will, it vested in the executor, and he was considered a trustee for the legatee. (Bank of England *v.* Moffatt, 3 Bro. C. C. 260; Bank of England *v.* Parsons, 5 Ves. 664.) Being personal property, the assent

of the executor was always necessary to give effect to the bequest. And so the only difference between a will executed in the manner required by the acts of parliament, and an unattested will, with respect to such property was, that in the former case the property vested in the legatee upon the assent of the executor; and in the latter, it vested in the executor, but the legatee could compel the executor to transfer it to him, or as he might direct. (Franklin *v.* The Bank of England, 1 Russ. 575; 9 B. & C. 156; Ripley *v.* Waterworth, 7 Ves. 440.)

7. Copyholds.

Seventhly, copyholds were not included in the Statute of Wills, those statutes being expressly confined to lands held in socage and knights' service. Nor were wills of copyholds required to be executed in the same manner as wills of freehold estates. The words of the 5th section of the Statute of Frauds, which section regulated devises of lands by force of any custom, appear indeed to be sufficiently comprehensive to include wills of copyholds, and they were clearly within the mischiefs which that statute intended to remove. However, it was held soon after the passing of this statute, that this provision did not extend to copyholds; and that decision was followed, although no good reason could be given in its favour, and many eminent judges expressed their disapprobation of it. (Lord Macclesfield, in Wagstaff *v.* Wagstaff, 2 P. Wms. 259; Lord Hardwicke, in Attorney-General *v.* Andrews, 1 Ves. 225; Lord Loughborough, and Buller, J., in Habergham *v.* Vincent, 2 Ves. jun. 237, 232.) Copyholds could not therefore be devised directly, except in a few places, where by special custom they were devisable; but an indirect power of devising them existed by surrender to the use of the will, and the lands were considered to pass, not by the will, but by force of the surrender.

Solemnities of any description might be required by the surrender to the use of the will, but where none were imposed, the will might be made by any unsigned, informal, and, in some cases, imperfect writing; and such wills being within neither the Statutes of Wills nor the Statute of Frauds, might be made by parol, when allowed by the custom of the manor; and it is perhaps doubtful whether a parol will of a copyhold estate, when the value of it exceeded 30*l.*, is within the 19th section of the Statute of Frauds relating to nuncupative wills, for that section is not in terms more applicable to wills of copyholds than the 5th section, which was held not to extend to them.

Equitable estates in copyholds are not properly the subject of surrender; and have been determined by courts of equity to be devisable in the same manner as the legal estate would be devisable if a surrender had been made to the use of the will.

Some persons, entitled to an imperfect legal interest as well as the beneficial interest in copyholds, as a devisee or voluntary surrenderee who has not been admitted, were incapable of devising them (Wainewright *v.* Elwell, 1 Madd. 627); but it was held, that a devise could be made by an heir before admission. (Right *v.* Banks, 3 B. & Ad. 664. See post, sect. 3.)

8. Customary Freeholds.

Eighthly, such customary freeholds as would pass by surrender to the use of the will could not, it was thought, be devised at law without a surrender; but equitable estates in customary freeholds so devisable might be devised, in the same manner as equitable interests in copyholds. And there were some customary freeholds which could not be surrendered or conveyed to the use of a will, and which were not devisable at law. (Hodgson *v.* Merest, 9 Price, 556.)

Ninthly, to appoint a guardian a will must have been attested by two witnesses. The statute for abolishing the military tenures, 12 Car. II. c. 24, which put an end to the Court of Wards, gave to a father by section 8, whether within the age of twenty-one years or of full age, the power of appointing a guardian by a will in writing to be executed in the presence of two credible witnesses (see post, sect. 7). 9. Appointment of Guardian.

And, lastly, to exercise a power of appointment by will it was necessary to comply with any forms which might be required by the terms of the power. 10. Will under a Power.

The legal estate in freehold or copyhold property, and the equitable interest in every kind of property, may be conveyed or settled for such purposes as the owner or any other person (to whom the power may be given) shall appoint by will; and such will might be required to be executed in the presence of any number of witnesses, or with any other solemnities, at the caprice of the person by whom the power was created. A power might be reserved to be executed by a simple note in writing or by will unattested, or attested by only one or two witnesses; and this although the subject over which it rode was real estate. (1 Sugd. Pow. 155.) Every combination of the solemnities which the law had made necessary for the due execution of wills of different descriptions, and, on the other hand, several solemnities not required by any law, are occasionally found to be prescribed by different powers of appointment, and these requirements could only be satisfied by a strictly literal and precise performance. They were incapable of admitting any substitution, because they had no spirit in them which could be otherwise satisfied; incapable of receiving any equivalent, because they were themselves of no value. (1 Sugd. Pow. 251.)

However if a will, or a writing purporting to be a will,

was required to be the instrument by which the power was to be exercised without saying more, a will to be a valid exercise of the power must have been executed as a proper will under the statute; although if the instrument creating the power was silent as to the instrument by which it was to be exercised, it might, as it seems, have been executed by a will not complying with the Statute of Frauds. (1 Sugd. Pow. 157.) But of course a man could not reserve such a power to himself by his own will (Habergham *v.* Vincent, 2 Ves. jun. 204), for that would be simply an evasion of the Statute of Frauds (1 Sugd. Pow. 157; see as to this point under the present Statute of Wills, Ferraris *v.* Lord Hertford, 3 Curt. 468); and yet the owner of freehold property might enable himself to dispose of the value of it by an unattested codicil; as if by his will duly attested he charged his estates with legacies generally, he might by an unattested codicil give legacies which would be payable by virtue of such charge.

This variety of rules led to serious inconveniences, and tended to create litigation on questions of mere form, and when there was no substantial question in dispute; and occasioned mistakes, which defeated lawful and proper intentions; thus often rendering a will void as to some property intended to be comprised in it, while the same will was valid as to other property. Nor did there appear to exist any good reason for making a distinction between the forms required for the execution of wills with respect to different descriptions of property, since it could not be urged that one description of property required greater protection than another, so far at least as the disposing of it by will was concerned, nor would the necessity for a guard vary with the nature of the interest in the same property.

It seemed therefore of great importance, that as a general rule wills of every description should be required to be exe-

cuted according to one simple form, which might be easily and generally understood. And the Commissioners on the Law of Real Property in their Fourth Report, April, 1833, from which this account has been chiefly taken, submitted several propositions which should, when adopted by the legislature, establish simple and definite rules for the execution of wills.

These propositions were:—

1. That the Statute of Frauds, so far as it relates to wills (being sections 5, 6, 12, 19, 20, 21, 22 and 23), shall be repealed.

2. That no will of any description, except such as are mentioned in the fourth proposition, shall be valid, unless it be in writing, and signed at the foot by the testator, or some other person in his presence and by his direction; and the signature be made or acknowledged by the testator in the presence of two or more credible witnesses, present at one time, who subscribe their names to the will.

3. That the statute 25 Geo. II. c. 6, shall be deemed to apply to such witnesses.

4. That any soldier, being in actual service, or seaman at sea, may dispose of personal estate as he may do under the present law.

5. That a will executed according to the second proposition shall not require any other publication.

6. That any will made in exercise of a power shall be executed in the same manner as is required for the validity of other wills, and shall be valid notwithstanding the terms of the power may require the will to be executed with additional or other solemnities, which have not been observed.

7. That no will made by any person under the age of twenty-one years, and no will made by a feme covert, except by virtue of a power, or, as to personal estate, with

the consent of her husband, or for appointing an executor of a will of which she shall be executrix, shall be valid.

8. That all freehold estates, and all copyhold and customary estates, including an estate pur autre vie, where there is no special occupant, and also every copyhold estate which would be devisable if the party entitled thereto had been duly admitted, and all leasehold estates and other personal property, and all estates, interests and rights therein capable of being conveyed or transferred by the testator by any act inter vivos (except estates tail and estates in quasi entail, and estates or shares of estates held by the testator in joint tenancy), and also all rights of entry, and of action or suit, to any such estates, may be devised or bequeathed by will.

9. That any freehold or other property acquired by a testator, subsequently to the execution of his will, may pass by it, and a will shall be considered with reference to the property comprised in it, as speaking at the testator's death, unless a contrary intention appears.

10. That no will shall be revoked otherwise than by another will or codicil, or by some writing executed and attested in the same manner as is required for the validity of a will, or by burning, cancelling, or tearing, with the intention of revoking it, by the testator, or in his presence and by his direction.

11. That obliterations made in a will shall have no effect unless duly attested as alterations, in the same manner as is required for the execution of a will.

12. That no act done by a testator, subsequently to the execution of his will, with respect to any property comprised in it, shall operate as a revocation of any disposition thereby made of such property, except so far as a beneficial interest is conferred by such act on another person.

13. That the will of a woman shall be revoked by her

marriage, and shall not be revived by the subsequent death of her husband.

14. That the will of a man shall not be revoked by his marriage, and the birth of a child or children.

47. That when any person to whom any real property shall be given by will for an estate tail or an estate in quasi tail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and such issue shall be living at the death of the testator; and also where any person being a child or other issue of the testator, to whom any real or personal property shall be given by will, for any estate or interest not determinable at or before his or her death, shall die in the lifetime of the testator, leaving issue who shall be living at the death of the testator, such gift shall not lapse, but shall take effect as if the death of the testator had happened before the deaths of such tenant in tail, or child, or grandchild.

48. That where the devise of any real property shall fail in consequence of the death of the devisee in the lifetime of the testator, or because it is contrary to any rule of law, or otherwise incapable of taking effect, and there shall be a residuary devise in such will, the property comprised in the devise which shall fail shall pass by the residuary devise, unless an intention to the contrary shall appear by the will.

49. That when any real property shall be devised to any person, who, at the time of the testator's death shall be his heir, or one of his co-heirs, such heir or co-heir shall be deemed to take as a devisee and not by descent.

The remaining propositions have reference to jurisdiction, registration, &c., and do not contain any suggestions as to the form, mode of execution, or construction of the will.

The present act was framed upon these propositions, but it will be observed, on reading the several provisions, that the propositions have not been all adopted by the legis-

lature, although it will be evident that the legislature had in view the same objects as the Commissioners; first, that property of every description should be subject to the testamentary power; secondly, that all wills, whatever might be the description of the property to be disposed of, and by whomsoever made, should be executed in one and the same manner, and with the same formalities; and, thirdly, that the manner and formalities of execution should be as few and as simple as possible, and such as might be complied with in every case with the least inconvenience compatible with security and authentication. So far the statute has been generally, if not universally, approved of; but the rules of construction introduced by the latter sections of the statute, and the expediency of any rule of construction being imposed by the legislature, have been the subject of much criticism and doubt.

THE ACT

FOR

THE AMENDMENT

OF

THE LAW OF WILLS.

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7 Will. IV. & 1 Vict. Cap. 26.

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

Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that 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

Meaning of certain Words in this Act:

"Will:"

12 Car. 2, c. 24.

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," or by virtue of an act
14 & 15 Car. 2, (I.) passed in the parliament of Ireland in the fourteenth and fifteenth years 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 to any other testa-
"Real Estate:" mentary disposition; and the words "Real Estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, 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:" "Personal Estate" shall extend to leasehold estates and other chattels real, and also to monies, 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;
Number: and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every
Gender. word importing the masculine gender only shall extend and be applied to a female as well as a male.

Effect of Section 1. The purport of this section is to bring every description of property within the power of disposition by will, either as real

or personal estate; and then, by giving the widest acceptation to the word will, make that word, as it is used in section 9, extend to all property over which the owner may have a power of disposition by testamentary instrument.

This section, by referring to statutes 12 Car. II. c. 24, and 14 & 15 Car. II. (I.), in connection with section 7, deprives an infant father of the power of naming a guardian to his children by will.

Definition of a Testament.

A testament Justinian (Inst. ii. 10) and Sir E. Coke (111 a) agree to be so called, because it is testatio mentis; a derivation which is said to savour too much of the conceit, it being plainly derived from the word testari, in like manner as juramentum, incrementum, and others from the verbs. (See Menag. Jur. Civil. Amœn. c. 39.) The definition of the old Roman lawyers is much better than their etymology; Voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit (Ff. 28, l. 1); that is, the legal declaration of a man's intentions, which he wills to be performed after his death. (Swinb. on Wills, p. 1, ss. 2, 3, 4.) It is called sententia to denote the circumspection and prudence with which it is supposed to be made; it is voluntatis nostræ sententia, because its efficacy depends on its declaring the testator's intention, whence it is in England emphatically called his will; it is justa sententia, that is, drawn, attested and published, with all due solemnities and forms of law; and it is de eo quod quis post mortem suam fieri velit, because a testament is of no force till after the death of the testator (2 Black. Com. 500); or as expressed (Co. Litt. 322b), testamentum est morte consummatum.

Joint or mutual Wills.

This necessity of death to consummate the will, in other words, the recognized ambulatory and revocatory character of a will (Forse and Hembling's case, 4 Rep. 61 b), seems to give a good foundation for the rule, which prevails in England, against joint or mutual wills as wills, whatever effect may be given to them as contracts. (Dufour *v.* Pereira, 1 Dick. 419; 2 Harg. Juris. Exerc. 101; Walpole *v.* Lord Orford, 3 Ves. 402.) As wills they have no place in the testamentary law of this country. (Hobson *v.* Blackburn, 1 Add. 277.)

But there is nothing to prevent two or more persons from making separate wills in favour of each other, and on the death of any one of them, his will, if otherwise unrevoked, will

take effect for the benefit of the survivor. Thus, in Hinckley *v.* Simmons (4 Ves. 160), two sisters made their wills, each giving all her fortune and everything she had power to leave to the other, and appointing the same person executrix; and it was held, that although the marriage of one of the sisters revoked her will, yet the will of the other, who died subsequent to the marriage and before the death of the married sister, was to take effect.

Distinction between Testaments, Wills and Codicils.

In strictness, and according to the older authorities upon ecclesiastical law, the appointment of an executor was essential to a testament, without that a will was not considered a proper testament, and by that alone the will was made a testament. (Godolp. p. i. c. i; Swinb. p. i. s. 3, pl. 19.) But this strictness has long ceased to exist (Wyrall *v.* Hall, 2 Chanc. Rep. 112); and even, according to the old authorities, an instrument which did not amount to a testament, because no executor was therein appointed, was obligatory on him who had the administration of the goods of the deceased. And although the Constitutions make use of both terms, *testamentum* and *ultima voluntas*, their regulations were applicable to both, without practical distinction. (Lynd. 173 h.)

A codicil, the diminutive of codex, a testament, is called by Swinb. (p. i. s. 5, pl. 4) and Godolp. (p. i. c. vi. s. 2) an unsolemn last will, and defined the just sentence of our will touching that which we would have done after our death, without the appointing of an executor. Now, however, the use and acceptation of the codicil is to add to, explain or alter the former disposition or will of the testator; and it is not unfrequent in practice to find executors named in the codicil, where there are none appointed in the will.

In this latter and modern sense of the word, codicils are a part of the will, all making but one testament. (Sherer *v.* Bishop, 4 Br. C. C. 55; Crosbie *v.* Macdouall, 4 Ves. 610; and see Fuller *v.* Hooper, 2 Ves. sen. 242; Belt's Supp. 333.) But the codicil may be so far independent of the will as to be entitled to probate, and take effect without the will. Where the testator, a solicitor, executed a codicil beginning with the words, "This is a codicil to the will of me R. H., and which I desire to be added to my will," and the will could not be found, probate was granted of the codicil, which was independent of and

Codicil, where the Will is not found.

capable of taking effect without the will. (In the goods of Halliwell, 9 Jurist, 1042.) And where a will and two codicils were made, and the testator then burnt the will, intending to make a new one, but not to affect the codicils, and died leaving the codicils, but without having made any further will, the codicils were held entitled to probate. (Clogstoun *v.* Walcott, 12 Jurist, 422; see Medlycott *v.* Assheton, 2 Add. 229; Tagart *v.* Hooper, 1 Curt. 289.) In this last case the codicil appointed no executor, and did not dispose of the residue; the Court of Exchequer allowed the next of kin to take the residue, upon giving recognizances to refund in case the will should be found. (Bakewell *v.* Tagart, 3 Y. & C. 173.)

What Instruments are testamentary.

In deciding whether an instrument is testamentary the courts look to the substance and not to the form of the instrument, to the intention of the writer and not to the denomination which he affixes to the writing; and the essential characteristics of a testamentary instrument derived from the definition given above are, that it should take effect at the death, and be revocable at the will of the maker, and duly executed as a will. Where the drawer of the instrument purposely avoided using the word will in consequence of the nervous state of the deceased, who thereby "gave, parted, transferred and set over to A. B. and C. D. all and singular the goods, chattels, monies, securities for money, and all other her personal estate and effects whatsoever, upon trust after her decease to collect and get in such parts thereof as should consist of monies or securities for money, and to sell such other parts thereof not consisting of monies or securities for money, and to stand possessed of the monies which should come to their hands upon trust in the first place, but subject always to her just debts to pay and apply, &c.;" and this instrument was not under seal, but executed as a will, probate was decreed to A. B. and C. D. as executors according to the tenor. (In the goods of Montgomery, 10 Jurist, 1063.) So a bill of exchange, drawn upon his agents and executed as a will by a man upon his death-bed, was considered a testamentary paper in Jones *v.* Nicholay. (14 Jurist, 675; see King's Proctor *v.* Daines, 3 Hagg. 218; Glynn *v.* Oglander, 2 Hagg. 428; and Shingler *v.* Pemberton, 4 Hagg. 356.)

In Doe *v.* Cross (8 Q. B. 714), P. executed the following instrument, attested by two witnesses, "Know all men, &c.,

that I make E. my lawful attorney, for me in my name and to my use, to ask, demand, &c., or receive the possession of or produce of the rent of the freehold, &c. And I do empower her the said E. to hold and retain all proceeds of the said property for her own use until I may return to England and claim possession in person; or in the event of my death I do hereby in my name assign and deliver to the said E. the sole claim to the before mentioned property, to be held by her during her life, and disposed of by her, as she may deem proper at the time of her death." This instrument was acted upon during the life of P., and the objection taken was, that as it was to take effect during the life of the party executing it, it could not be treated as a will. But it was held, that although part was to operate immediately as a power of attorney, the other part, which was to take effect in the event of the death, might operate as a will.

Effect of Power of Revocation being reserved.

A voluntary covenant to pay a sum of money to A. after the death of the covenantor, will not partake of a testamentary character, except there be in the deed a power of revocation or something equivalent thereto. (Fletcher *v.* Fletcher, 4 Hare, 67.)

In the case of the Attorney-General *v.* Jones (3 Price, 368) the Court of Exchequer, against the opinion of Wood, B., held that a settlement by which the grantor reserved to himself the dividends of a sum of stock for his life, with limitations to take effect upon his decease, and a power of revocation, and never parted with the deed or with any part of the property during his life, was substantially a testamentary instrument. This decision however, as to the effect of a power of revocation being reserved, in order to alter the character of an instrument and render it testamentary, is much shaken by the observations of Lord Cottenham, M. R., in Tompson *v.* Browne (3 My. & K. 32), which decided that the subsequent ratification of such a voluntary settlement by a will cannot give the settlement a testamentary operation.

The present act, by requiring a particular mode of execution for testamentary instruments, will probably very much diminish the number of this class of cases. Such a case as Masterman *v.* Maberly (2 Hagg. 235), where probate of three unexecuted drafts of bonds was granted, could not occur under

the present law. (See Thorold *v.* Thorold, 1 Phillim. 1, where most of the older cases are referred to.)

It may be proper, before closing the subject of the nature of a testamentary instrument, to notice briefly a mode of gift which differs from a disposition by will, and a gift inter vivos. It is derived, and has borrowed most, if not all, its properties from the Civil Law, as well as its name, Donatio mortis causâ. It is defined in Inst. ii. 7: "Mortis causâ donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is, qui accipit, sin autem supervixisset is, qui donavit, reciperet, vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit." The cases upon this subject have decided that the gift must be made by the donor in contemplation of the conceived approach of death, and the title is not complete till he is actually dead (Duffield *v.* Elwes, 1 Bl. N. S. 530); nor must it be a present absolute gift (Tate *v.* Hilbert, 2 Ves. jun. 118), for if the donor intends to make an immediate and irrevocable gift, it will not be good as a donation mortis causâ (Edwards *v.* Jones, 1 My. & C. 226); but the annexation of a trust or condition to the gift will not defeat it (Hills *v.* Hills, 8 M. & W. 401); and some species of delivery must accompany the gift (Ward *v.* Turner, 2 Ves. 441), which was said by Lord Eldon, in Duffield *v.* Elwes, to be a leading case.

Donations *Mortis Causâ.*

Definition.

Requisites.

These gifts resemble a legacy, inasmuch as they are subject to legacy duty (36 Geo. III. c. 52, s. 7); are liable to debts on a deficiency of assets (Smith *v.* Casen, 1 P. Wms. 406); and may be made to the wife of the donor. (Lawson *v.* Lawson, 1 P. Wms. 441.) But they should not be proved in the Ecclesiastical Court, as they take effect from delivery in the lifetime of the donor, and the title of the donee is not derived through or under, but is rather adverse to, the executors or administrators (Thomson *v.* Batty, 2 Str. 777; Tate *v.* Hilbert, 2 Ves. jun. 120); and they cannot be revoked by a subsequent will, for, on the death of the donor, they are held to take effect from the time of delivery (Jones *v.* Selby, Prec. Chan. 300; Hambrooke *v.* Simmons, 4 Russ. 25); though it follows, from the definition of this kind of gift, that it may be annulled by the donor's recovery from his disorder, and revoked by his resumption of the subject of the gift.

Law by which Wills are regulated.

In looking at a will for the purpose of seeing whether it be well executed or not, it is important to ascertain in the first instance, with respect to the real property disposed of, where such property is situated; and secondly, with respect to the personal property, what was the domicile of the deceased; for the lex loci rei sitæ will generally prevail as to real property, whilst the law of the domicile of the testator will give the rule which is to govern the instrument as to personal property.

The distinction between real and personal estate is peculiar to our own policy, and is not known to any foreign system of jurisprudence that is founded on the civil law, in which the only recognised distinction was between moveable and immoveable property. Leaseholds for years, therefore, which obviously belong to the latter denomination, though they are with us transmissible as personal estate, are there governed by the lex loci, and do not follow the person; hence it is said that if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law. (1 Jarm. on Wills, 4, n. (*i*).) But the property being in England, the learned editors of Jarm. Convey. vol. ix. 3rd edit. p. 15, contend, and it should seem with reason (see Price *v.* Dewhurst, 4 My. & C. 81, 82), that the law of England must determine what part of such property is real and what personal; and the owner of the property being abroad, the lex domicilii then comes in and rules the distribution of that part of the property which the lex loci has determined to be personal, and this, in the case suggested, will of course include leaseholds for years.

Distinction between Will of Real and Will of Personal Estate.

In Birtwhistle *v.* Vardill (7 Cl. & Finn. 915) Lord Brougham thus puts the distinction between the two kinds of property. "From the time of Huber downwards, from the time indeed when the distinction between real property and personal arose, the law governing the former has been generally the lex loci rei sitæ, that governing the other the lex loci contractûs, et domicilii." And to the same effect in Brodie *v.* Barry (2 Ves. & B. 131) Sir W. Grant said, "Where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine what portion of each law is to enter into the decision of the question. It is not easy to say how much is to be considered as depending on

the law of real property, which must be taken from the country where the land lies, and how much upon the law of personal property, which must be taken from the country of the domicile." Hence the place where a will disposing of lands happens to be made, and the language in which it is written, are wholly unimportant as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered. Thus a will made in Holland, and written in Dutch, must, in order to operate on lands in England, contain expressions which, being translated into our language, would comprise and designate the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England. (Bovey *v.* Smith, 1 Vern. 85; Drummond *v.* Drummond, 3 Br. P. C. Toml. edit. 601.) Upon a similar principle, lands in England belonging to a British subject domiciled abroad, who dies intestate, descend according to the English law. (Doe *v.* Vardill, 5 B. & C. 438.) Hence if an Englishman so domiciled has real estate in England, and wishes to make a testamentary disposition of his property, he ought to make two wills, one devising such estate duly executed and attested according to the English law, and the other bequeathing, if permitted, the personalty conformably to the foreign law. Wills made under such circumstances require more than ordinary care, in order to exclude some perplexing questions involving the application to an uncertain extent of the conflicting principles respectively governing real and personal property. (Jarm. Convey. vol. ix. 16; Lord Nelson *v.* Lord Bridport, 8 Beav. 547; 10 Jurist, 1043.)

Domicile.

To return to the question of domicile. This is primâ facie much more a question of fact than of law. The actual place where a person resides is primâ facie to a great many purposes his domicile. You encounter that, if you show that residence is either constrained, or from the necessity of his affairs, or transitory, that he is a sojourner, or you can take from it all character of permanency. So, on the other hand, if you show that the place of a man's residence is the seat of his fortune; or the place of his birth, upon which little stress is to be laid; or the place of his education, where he acquired all his early habits, friends and connections, and if all the links that attract him to society are found there; if you add to that, that he had

no other fixed residence upon an establishment of his own, his domicile will be where he so resides. (Bempde *v.* Johnson, 3 Ves. 198.)

Effect of Time in ascertaining Domicile.

It has been said by a very high authority upon the subject, that time is the grand ingredient in constituting domicile, that hardly enough is attributed to its effects, and that in most cases it is unavoidably conclusive; and that although if a person comes only for a special purpose, *that* shall not fix his domicile, yet if the purpose be of a nature that *may probably* or *does actually* detain the person for a great length of time, then a general residence might grow upon the special purpose. (The Harmony, 2 Rob. 322.)

It may be here observed that a person does not change his domicile by going to India in the queen's service; *secus*, if he enters into the service of the East India Company (Bruce *v.* Bruce, 6 Br. P. C. 566; 2 Bos. & P. 229), and the domicile of origin of the latter does not revive by a return to this country, unless the acquired domicile in India is finally abandoned.

Intention and Fact required to make a Change of Domicile.

To constitute a change of domicile there must be both the intention to change and the fact of a change; for domicile is not lost by mere abandonment; it is not to be defeated animo only, but animo et facto, and necessarily remains until a subsequent domicile has been acquired, unless the party die in itinere toward an intended domicile. (Munroe *v.* Douglas, 5 Madd. 379. See Denisart, tit. Domicile; Belfour *v.* Scott, 6 Br. P. C. 550; Hogg *v.* Lashley, 6 Br. P. C. 577; Drummond *v.* Drummond, ib. 601; Ommaney *v.* Bingham, 5 Ves. 757; Ryan *v.* Ryan, 2 Phillim. 332.)

Change in Fact without Intention.

Craigie *v.* Lewin (3 Curt. 435) and Stanley *v.* Bernes (3 Hagg. 373), reversed on appeal, but not reported, are two cases which rule, the first that a change de facto only, and the second that a change animo only, will not be sufficient to effect a change of domicile. The testator in Craigie *v.* Lewin was a Scotchman by birth, and he did not abandon that domicile till he became of age, when he acquired an Indian domicile by going to India in the service of the Company. In 1837 he came home on leave of absence, which would have lasted till 1841; but he had every expectation that in the course of the service during his absence he would have obtained that rank which would have precluded the necessity of his returning to India, to which

he had a decided aversion. In 1839 he contemplated the purchase of a house in Edinburgh, and he offered a person there 100*l.* to give up his bargain for the lease of a house for seven years in that city. However, he neither purchased the house, nor obtained the lease, and died in 1840, at which time the event had not happened, which would have prevented the necessity of his return to India. He left a will good according to the Scotch law, but invalid according to the law of India; and in giving judgment against this will, Sir Herbert Jenner Fust thus stated the facts:—"The question is whether a person having a fixed domicile, and having quitted it with the proposed intention of returning, although such intention may be annulled by the happening of a particular event, can in law be said to have abandoned that domicile; this is the important part of the case. Did the deceased, when in 1837, or in 1839, he went to Scotland, go there animo manendi, or did he merely go there to remain so long as the rules of the service in India would permit, and no longer? All the correspondence and evidence tend to show that he contemplated returning to India. He might have continued to live in Scotland during the whole of the time of his leave of absence; but would that have been a residence animo et facto? The animus would only be whilst his absence from India permitted; for if he did return to India, his Indian domicile would revert; perhaps I should not say revert, because it would never have been divested. When the deceased came to this country, he quitted India on a temporary absence, which might be converted into a permanent quitting, by a certain event happening in the interval between the time of the commencement of his absence and the time for his return. I cannot think that the fact that he was absent from India, when he was looking to a probable return, can be said to be quitting that country animo manendi in another; he was indeed in another place, but for a temporary purpose only. I think there is quite sufficient to enable the court to determine that the Indian domicile, which the deceased had acquired, did remain at the time of his death. When I look to the animus and the factum, I do not find sufficient to enable me to say that the deceased had dissolved his connection with India; and I think that, under all the circumstances, the Scotch law cannot determine on the validity or invalidity of this will."

Intention without the Fact of Change.

In Stanley *v.* Bernes (3 Hagg. 373) it was argued that there was no principle or authority for holding that a British subject could so far throw off his British character, as to deprive himself of the rights he possessed under it; still less that, under whatever circumstances a British subject might take up his residence in a foreign country, he became so domiciled there as to render it incompetent for him to dispose of his property according to the forms of the country of his birth; that the succession to personal property depended upon the intention of the possessor, whether expressed or only implied; and if in cases of intestacy an intention is implied that the property shall go according to the law of the place of residence, yet where a different intention is declared by will, that will, if validly made according to the English forms, is valid as to (*personal*) property situated in England. And it was thereupon contended that, although the testator had resided ever since his boyhood till his death within the Portuguese dominions, still as he had from time to time invested property in England, and intended returning to England, and made his will in an English form, that he might dispose of his personal property by a testamentary paper valid according to the English law, but invalid according to the Portuguese law. And Sir J. Nicholl inclined at least to that view of the law; for at p. 443 of the judgment he thus sums up the case:—"What then is the court called upon by the opposer of the codicil to decide? That the codicil is invalid, contrary to the manifest intention of the testator, that intention being expressed in an instrument duly executed according and with reference to the law of this country, in his own handwriting, and attested by three witnesses. The court is called upon to extend disqualification, and to deprive of privilege,—to disqualify a British subject, because he is resident in a foreign country, from giving effect to his wishes in the disposition of his property at his death, and to deprive him of his testamentary privilege, which is so highly favoured by the general law of this and of most other countries. Without some more direct authority than any which has been quoted, or with which this court is acquainted, I do not feel warranted to proceed to such a length." On appeal, this decision was reversed.

It is, however, right to add that Sir John Nicholl was fur-

ther induced to pronounce for probate of the codicil by the consideration that, if probate had been refused, the legatee under the codicil would not have resorted to any other jurisdiction; whereas by pronouncing for it he enabled the residuary legatee to take the decision of a court of equity upon the construction of the codicil.

Remarks upon Stanley *v.* Bernes.

It is important to consider this judgment of Sir John Nicholl's, because the decision of the Delegates reversing it is the first direct authority that the lex domicilii governs in cases of testacy, whatever may be the intention of the testator.

Sir J. Nicholl's judgment appears to have proceeded upon two grounds; first, that the residence of a British subject in a foreign country, notwithstanding his length of residence in that country, his naturalization, his marriage and change of religion there, and his never returning to England, was not sufficient to acquire for him a domicile in derogation of his British domicile; and secondly, that if he were domiciled there, it was not necessary, to give validity to a will of personal property, at least of such part as happened to be in England, that the will should be valid according to the law of the country where he was so domiciled. The only reasons which can be alleged in support of the first ground are, that a British subject cannot shift his allegiance; but this arises from a confusion between allegiance and domicile.

Allegiance distinct from Domicile.

Laying aside the question of domicile, the maxim nemo potest exuere patriam will generally apply. Assuming a man to have been born of parents who were British subjects, he would be, although born abroad, a British subject, and would owe allegiance to the crown of Great Britain, and this whatever might be the domicile of his parents or of himself. The only excepted cases are those of the peculiar instances of the children of persons whose domicile was in the United States prior to the acknowledgment of the independence of America, as in the cases Doe *v.* Acklam (2 B. & C. 779), Doe *v.* Mulcaster (5 B. & C. 771).

The Law of the Domicile applies to Testacy as well as to Intestacy.

A change of domicile is an admitted fact of every day occurrence; and that an intention to return to the domicile of origin, evidenced by remitting money, or any expressions of that intention, is sufficient to work an abandonment of the acquired domicile, is a proposition directly contradicted by Bruce

v. Bruce, (6 Br. P. C. 566; and 2 B. & P. 229, note to Marsh *v.* Hutchinson,) in which it was decided by the House of Lords, that the animus revertendi was not sufficient, though there was a clear intention of returning, and a remittance of money in furtherance of that intention. (See Dalhousie *v.* M'Douall, 7 Cl. & Finn. 817; and Munro *v.* Munro, 7 Cl. & Finn. 842.) Then as to the next ground it is conceded, that if he had died intestate, the distribution of his personal estate must have been made according to the law of the country where he was domiciled; but a disposition by will, it is said, stands on different grounds, and the object being to give effect to the intention of the testator, the forms required by the law of that country are not essential to give it effect here. Is this a sound distinction? As a general rule, personal property must be governed by the law of that country where the owner is domiciled; it has no locality, but follows the person of the owner, and is governed qy the law to which he is subject. Pipon *v.* Pipon (Ambl. 25), Bempde *v.* Johnson (3 Ves. 198), Somerville *v.* Somerville (5 Ves. 750), Pottinger *v.* Wightman (3 Mer. 67), Munroe *v.* Douglas (5 Madd. 379), were, it is true, all cases of intestacy; and in Curling *v.* Johnson (2 Add. 6, 21) doubts are suggested in the judgment whether the same rule is applicable where a will has been made. To a certain extent the circumstance of a will being in existence may make a difference, as the will may in a doubtful case itself furnish important evidence on the question of domicile, by showing to what country the testator considered himself to belong. But except to this extent the law of domicile appears equally applicable to cases of intestacy and testacy; and the principle that personal property has no locality, and follows the person of the owner, seems to apply equally to both cases. In fact it has been so considered in several cases, although not directly decided. Thus, in Pollen *v.* Browne (5 East, 131), Lord Ellenborough speaks of foreign laws being recognized in the "succession to personal property by will or intestacy of the subjects of foreign countries." In Sill *v.* Worswick (1 H. Black. 665), Lord Loughborough says, that "personal property is subject to that law which governs the person of the owner; with respect to the disposition of it, with respect to the transmission of it, either by succession or the *act* of the party, it follows the law

of the person." The fact of the testator's describing himself in his will as of a particular country, the country of his origin, was held immaterial with reference to the question of domicile, in Whicker *v.* Hume (15 Jur. 567), where see the observations of Lord Langdale on this point. And in the last edition of Ambler, p. 799, in the report of Pipon *v.* Pipon, from Serjt. Hill's M.S., Lord Hardwick lays down the rule in general terms, speaking both of *probates* and administrations, and explaining the necessity of recurring to the ecclesiastical courts of the country where the property lies, in order to obtain their authority to recover it, but without affecting the equitable right to the property, and forcibly pointing out the inconveniences which would arise from distributing part of the property according to one law, and part according to another. And indeed this principle seems to have been generally acted upon in the ecclesiastical courts, without any doubt being raised as to its soundness in cases of testacy, until Curling *v.* Thornton and Stanley *v.* Bernes, since these courts adopted the probate granted in the foreign country in which the testator was domiciled. (Hare *v.* Nasmyth, 2 Ad. 25; Larpent *v.* Sindry, 1 Hagg. 382; In the goods of Read, 1 Hagg. 476; In the goods of De Vera Maraver, 1 Hagg. 498; Moore *v.* Darell and Budd, 4 Hagg. 346.) For this practice would not have prevailed, except upon the principle that the law of the forum domicilii was to be the guide. The act of the foreign court is of course founded on the foreign law, and therefore in adopting the act of the foreign court, the English court adopted and followed the foreign law.

In the recent case of Whicker *v.* Hume (15 Jur. 567), it was held, that a new domicile might be acquired in a country where a man was only a lodger and not a housekeeper, and without repudiating his nationality, and that such acquired domicile was not changed by a subsequent residence in a third country, in a house taken upon lease for a term of years.

The Law of the Domicile at the Time of Death prevails.

Some difficulty has been felt with respect to the case of a will which may have been valid according to the law of the country where the deceased was domiciled when he made the will, but is invalid by the law of the country which has become his domicile at the time of his death. Which law is to operate in such a state of facts? Is the will revoked by the

change of domicile, entirely or in part, and with respect to the property only where the will is invalid, or not at all? Again, the will might have been originally invalid by the law of the country in which the deceased was domiciled when he made the will, and it may be valid by the law of the country in which he died domiciled. Will the change of domicile in this case have any and what effect upon the will or none? These questions are discussed by Judge Story and Mr. Burge. In sect. 473, ch. xi. of his work on the Conflict of Laws, the former thus argues and determines the question. "But it may be asked, what will be the effect of a change of domicile after a will is made of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicile at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle, that in such a case the will or testament is void; for it is the law of his actual domicile at the time of his death, and not the law of his domicile at the time of making his will or testament of personal property, which is to govern. If, however, he should afterwards return and resume his domicile, where his first will or testament was made, its original validity will revive also. And in support of this doctrine he refers to J. Voet. ad Pand.

And Mr. Burge, 4 Comm. on Col. and For. Law, relying upon the same passages of J. Voet, says, "If the person at the time he made his will had attained the age which rendered him competent, according to the laws of that place, to make it, but he afterwards acquired a domicile in another place, the laws of which required that he should attain a more advanced age before he could acquire the power of testing, and he should die in the latter place, the will previously made would become, by the change of domicile, invalid, because the testator must possess the capacity to test both at the time of making his will, and at the time of his death. Nor will the testament become valid, if he should survive the period, when by the laws of that place he was competent to test. If the party competent according to the law of the country where he made his will, although incompetent according to that of the country to which he had transferred his domicile, should return to the former country and there resume his domicile, and retain it at the time of his death

as his actual domicile, the will would be restored to the validity it possessed at the time it was made.

It is now settled that, in deciding upon the validity of a will and the distribution of personal property, the law of the country in which the deceased was domiciled at the time of his death is to prevail. (Price *v.* Dewhurst, 4 My. & C. 76.)

Sometimes the foreign law has different provisions applicable to native subjects, and to the subjects of other countries there domiciled. Thus, by the law of Belgium the validity of a will of an English-born subject, though domiciled in Belgium, will depend upon the law of England. (Collier *v.* Rivaz, 2 Curt. 855.) Or in conformity with existing treaties between the countries, although the law of domicile and the fact of domicile may exist, yet the succession to personal estate, whether under intestacy or by testamentary disposition, may be governed by the law of the domicile of origin, as in Maltass *v.* Maltass (1 Rob. 67). These, however, are instances of and not exceptions to the general rule, that the law of domicile regulates the succession, whether under intestacy or testacy.

And the law of domicile not only regulates what forms and solemnities shall be observed in making testaments, but the rights which the testament confers must also be determined, in respect of immovable by the lex loci rei sitæ, and of moveable by the law of the testator's domicile.

For instance, it has been decided that the question, whether a legacy bequeathed to a person who died in the lifetime of a testatrix, who was domiciled in England, had lapsed, was to be determined by the law of England, and not by that of Scotland, where the testament was made (Anstruther *v.* Chalmer, 2 Sim. 1); and in affixing the sense in which the testator has used certain words, terms or phrases, he is presumed to have adopted that which prevailed in the place of his domicile. (See 4 Burge, Comm. on Col. and For. Law, c. xii. and Story, Conflict of Laws, cc. xi. xii. and xiii.)

Repeal of the Stat. 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.

II. And be it further enacted, that an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, 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 an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" 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," and of an act passed in the parliament of Ireland, in the seventh year of the reign of King William the Third, 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 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," and of an act passed in the parliament of Ireland, in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law, and the better Advancement of Justice," as relates to wit-

10 Car. 1, sess. 2, c. 2. (I.)

29 Car. 2, c. 3, ss. 5, 6, 12, 19 to 22.

7 Will. 3, c. 12. (I.)

4 & 5 Anne, c. 16, s. 14.

6 Anne, c. 10. (I.)

nesses 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 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 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 and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any part of them respectively relate to any wills or estates *pur autre vie* to which this act does not extend.

14 Geo. 2, c. 20, s. 9.

25 Geo. 2, c. 6 (except as to Colonies).

25 Geo. 2, c. 11. (I.)

55 Geo. 3, c. 192.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath or dis-

All Property may be disposed of by Will.

pose of, by his will executed in manner hereinafter 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, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; 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, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; 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 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 of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

In considering the present section, the two leading points are, who may make a will, and what shall the will dispose of. As to the first, it is obvious that the words used, "It shall be lawful for every person to devise, &c." must receive some limitation, for the act was not intended to remove any legal disabilities, and consequently these words must be taken to mean every person having a legal power, or not under some disability.

Testamentary disabilities under the law of England, arise either from some want of understanding or infirmity of mind, real or implied, which may for practical purposes be termed mental incapacity, or from the state of the individual apart from all mental qualifications, and simply in relation to the law which renders him incompetent, and this may be called legal incapacity. Moral incapacity, as distinguished from that high degree of perversion or depravity of moral feeling which amounts to insanity, is not known to the testamentary laws of this country.

Testamentary Disabilities.

Mental Incapacity.

Legal Incapacity.

Moral Incapacity.

The first mental incapacity, which is want of age, is implied and founded on a presumption of law, and the period at which it ceases is entirely arbitrary, varying in different countries;

Nonage.

by the present act, section 7, it is enacted, that no will made by any person under twenty-one years of age shall be valid.

Insanity.

The next, which, under the general name of insanity, or unsoundness of mind, is susceptible of almost endless modifications, cannot be so easily dismissed. Non compos mentis, according to Lord Coke (Co. Litt. 247 a; see 246 b, n. 1), is of four sorts. 1. An idiot, which from his nativity, by a perpetual infirmity, is non compos mentis. 2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding. 3. A lunatic, that hath sometimes his understanding and sometimes not, aliquando gaudet lucidis intervallis, and therefore he is called non compos mentis so long as he hath not understanding. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken.

Idiots and Lunatics.

The second and third heads of this division are now comprised within the general term lunacy, for the English law names only two classes of persons who are judged to be of unsound mind, idiots and lunatics. The French code, with more minuteness, but arriving at the same conclusion practically, contains references to three kinds of mental disorder, by the names of *folie*, *démence* and *imbécilité*.

Unsoundness is either congenital or superinduced, but there is no partial Insanity.

Unsoundness of mind is either congenital, as in the case of idiotism and persons born blind, deaf and dumb, or superinduced by old age or disease. The notion of a partial insanity, quoad hoc vel illud insaniri, is no longer, if it ever was, admissible as distinct, in testamentary law at least, from general insanity. The whole reasoning of the judgment delivered in Waring *v.* Waring (6 Moo. P.C C. 341) is opposed to such a distinction.

"The question," Lord Brougham said in that case, "being, whether the will was duly made by a person of sound mind or not, our inquiry, of course, is whether or not the party possessed his faculties, and possessed them in a healthy state. His mental powers may be still subsisting; no disease may have taken them away, and yet they may have been affected with disease, and thus may not have entitled their possessor to the appellation of a person whose mind was sound.

"Again, the disease affecting them may have been more or less general; it may have extended over a greater or a less portion of the understanding, or rather, we ought to say, that it may have affected more, or it may have affected fewer, of the

mental faculties. For we must keep always in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible; that when we speak of its different powers or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if had members or compartments, whereas in all accuracy of speech, we mean to speak of the mind acting variously, that is, remembering, fancying, reflecting, the same mind in all these operations being the agent. We therefore cannot, in any correctness of language, speak of general or partial insanity; but we may most accurately speak of the mind exerting itself in consciousness, without cloud or imperfection, but being morbid when it fancies; and so its owner may have a diseased imagination, or the imagination may not be diseased, and yet the memory may be impaired and its owner be said to have lost his memory. In these cases we do not mean that the mind has one faculty, as consciousness, sound; while another, as memory or imagination, is diseased, but that the mind is sound when reflecting on its own operations, and diseased when exercising the combination termed imagining, or casting the retrospect, called recollecting.

"The view of the subject, though apparently simple, and almost too unquestionable to require or even to justify a formal statement, is of considerable importance, when we come to examine the cases of what are called incorrectly 'partial insanity,' which would be better described by the phrase 'insanity' or 'unsoundness' always existing, though only occasionally manifest. Nothing is more certain than the existence of mental disease of this description. Nay, by far the greater number of morbid cases belong to this class. They have acquired a name, the disease called familiarly, as well as by physicians, 'monomania,' on the supposition of its being confined, which it rarely is, to a single faculty or exercise of the mind. A person shall be of sound mind to all appearance upon all subjects save one or two, and on these he shall be subject to delusions, mistaking for realities the suggestions of his imagination. The disease here is said to be in the imagination; that is, the patient's mind is morbid, or unsound, when it imagines; healthy and sound when it remembers. Nay, he may be of unsound mind when his imagination is employed on

some subjects, in making some combinations; and sound when making others, or making one single kind of combination. Thus he may not believe all he fancies to be realities, but only some, or one; of such a person we usually predicate that he is of unsound mind only upon certain points. I have qualified the proposition thus on purpose, because if the being or essence, which we term the mind, is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness which is manifested, by believing in the suggestions of fancy as if they were realities, would break out; consequently, it is as absurd to speak of this as a really sound mind (a mind sound when the subject of the delusion is not presented), as it would be to say that a person had not the gout, because his attention being diverted from the pain by some more powerful sensation, by which the person was affected, he for the moment was unconscious of his visitation.

"It follows from hence that no confidence can be placed in the acts, or in any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be. The act in question may be exactly such as a person without mental infirmity might well do. But there is this difference between the two cases; the person uniformly and always of sound mind could not, at the moment of the act done, be the prey of morbid delusion, whatever subject was presented to his mind; whereas the person called partially insane,—that is to say, sometimes appearing to be of sound, sometimes of unsound, mind,—would inevitably show his subjection to the disease the instant its topic was suggested. Therefore we can with perfect confidence rely on the act done by the former, because we are sure that no lurking insanity, no particular or partial, or occasional delusion, does mingle itself with the person's act, and materially affect it. But we never can rely on the act, however rational in appearance, done by the latter, because we have no security that the lurking delusion, the real unsoundness, does not mingle itself with or occasion the act. We are wrong in speaking of partial unsoundness; we are less incorrect in speaking of occasional unsoundness; we should say that the unsoundness

always exists, but it requires a reference to the peculiar topic, else it lurks, and appears not. But the malady is there, and as the mind is one and the same, it is really diseased, while apparently sound; and really its acts, whatever appearance they may put on, are only the acts of a morbid or unsound mind. Unless this reasoning be well founded, we cannot account for the unanimity with which men have always agreed in regarding as the acts of an insane mind those acts to all appearance rational, which a person does who labours under delusions of a plainly extravagant nature, though there is nothing in the act done, and nothing in the conduct of the party while doing it, at all connected with the morbid fancies. If these fancies only affect the party now and then,—if for some months he is free from them, labouring under them at other times, then his acts apparently rational would not be regarded as those of a person mentally diseased. But if we were convinced that, at the time of doing the acts, the delusion continued, and was only latent by reason of the mind not having been pointed to its subject, and would have instantly shown itself had that subject been presented, then the act is at once regarded as that of a madman. Thus there have been many cases of persons labouring under the delusion that they were other than themselves; some have believed themselves deceased emperors or conquerors; others, supernatural beings. Suppose one who believed himself the Emperor of Germany, and on all other subjects was apparently of sound mind, did any act requiring mind, memory and understanding; suppose he made his will, and either did not sign it (before signing was required), or, if he did, signed with his own name; but suppose we were quite convinced that had any one spoken of the Germanic Diet, or proceeded to abuse the German Emperor, the testator's delusion would at once break forth, then we must at once pronounce the will void, be it as officious and as rational in every respect as any disposition of property could be. Of course, as no one could propound such a will with any hopes of probate, if it happened that, while making it, the delusion had broken out, even although the instrument bore no marks of its existence at the time of its concoction, it must always be a question of evidence, on the whole facts and circumstances of the case, whether or not the morbid delusion existed at the time of the

factum; that is, whether, had the subject of it been presented, the chord been struck, there would have arisen the insane discord, which is absent to all outward appearance, from the chord not having been struck."

See also, as to partial insanity, the observations of Lord Lyndhurst in refusing a commission of review in Dew *v.* Clerk (5 Russ. 163).

In common parlance then, and for the sake of describing the state of a particular person, it may be very well to speak of such person as deranged upon one subject only; and for the purposes of medical science, the terms monomania, pyromania, cleptomania and so forth, are probably of valuable use, but the testamentary law of this country recognizes but one form of insanity. Once affect the mind of the individual with derangement or unsoundness, be it but upon one subject, and though the will be entirely untouched by the derangement or unsoundness, still it must fail, as being the act of an incompetent person, unless it can be shown that, at the time when the will was prepared and executed, there was a lucid interval.

Lucid Interval, what it is.

But a lucid interval is not a mere remission of the complaint; the law requires a total cessation of it, and a complete restoration to the perfect enjoyment of reason upon every subject upon which the mind was previously cognizant. (Shelf. Lun., lxx., where D'Aguesseau's beautiful description of a lucid interval is cited.)

Difficult to prove.

Consequently, the existence of a lucid interval is very difficult to prove, for frequently the attention of the person, when brought to the particular subject upon which he is insane, will, even in what has been taken for a lucid interval, exhibit the insanity, and men often mistake for a lucid interval the mere absence of the subject of delusion from the mind; hence, no madman can be said to have recovered his reason unless he freely and voluntarily confesses his delusion, and without any design at the time of pretending sanity and freedom from delusion, according to the known or suspected view of the inquirer. (Per Lord Brougham in Waring *v.* Waring, 6 Moo. P. C. C. 354, referring to Hatfield's case, 27 St. Tr. 1316. See Hall *v.* Warren, 9 Ves. 610; Ex parte Holyland, 11 Ves. 11.)

What Proof required.

Cartwright *v.* Cartwright.

The leading case upon the subject of lucid intervals is that of Cartwright *v.* Cartwright (1 Phillim. 90). The testatrix there had been insane for several months before the date of the will,

and continued so after making the will. She was anxious to make the will, which she wrote herself without assistance, and the disposition therein made, and her whole conduct whilst engaged about the will, were rational. Sir W. Wynne, relying upon the passages, Inst. ii. 12, said, "If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved, is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for until proof of habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it. Now I think that the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you were able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Unquestionably there must be a complete and absolute proof that the party, who so formed it, did it without any assistance. If you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from disorder at the time, that is completely sufficient."

Remarks on Cartwright *v.* Cartwright.

Having the judgment in Waring *v.* Waring before one, there is great difficulty in agreeing with the decision in Cartwright *v.* Cartwright, so far as that was founded upon the act being rational in itself, and rationally done. No reliance, according to the former case, is to be put upon the fact, that the act is exactly such as a person without mental infirmity might well do; but something more is required,—some test applied to try whether the morbid fancy does not still, though secretly, exist; the chord must be struck, before it can be known or said to be in perfect tune; and it may admit of some doubt whether Cartwright *v.* Cartwright, or any similar case, would now be decided upon the principle, that the making the will was a

rational act, rationally done,—unless it was fully proved by further evidence of another kind, that the testatrix was free from the disorder at the time. In truth, though Waring *v.* Waring introduces no new principle (Wheeler *v.* Alderson, 3 Hagg. 599), it will very materially interfere with the advantages, which the propounders of testamentary papers derived from their containing no expressions "sounding to folly."

Delusion is the Criterion of Insanity.

Still the question remains, what is "unsoundness," and what the test or criterion of its existence? Lord Erskine said, "in all the cases which have filled Westminster Hall with the most complicated considerations, the lunatics, and other insane persons who have been the subjects of them, have not only had memory, have not only had the most perfect knowledge and recollection of all the relations in which they stood towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable, the disease consisting in the delusive sources of thought; all their deductions within the scope of the malady being founded upon the immoveable assumption of matters as realities, either without any foundation whatsoever, or so distorted and disfigured by fancy as to be almost the same thing as their creation. Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity. In civil cases the law voids every act of the lunatic during the period of lunacy, although the delusion may be extremely circumscribed, although the mind may be quite sound in all that is not within the shades of the very partial eclipse; and although the act to be voided can in no way be connected with the influence of the insanity." And Sir J. Nicholl, in Dew *v.* Clark, laid down the same principle (Haggard's Report, p. 7): "As far as my own observation and experience can direct me, aided by opinions and statements I have heard expressed in society,—guided also by what has occurred in these and in other courts of justice, or has been laid down by medical and legal writers,—the true criterion is, where there is delusion of mind there is insanity; that is, where persons believe things to exist which exist only, or, at least, in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind; it is only the belief of facts which no rational person would have believed that is

insane delusion. This delusion may sometimes exist on one or two particular subjects, though generally there are other concomitant circumstances, such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms, which may tend to confirm the existence of delusion, and to establish its insane character."

Quære, whether the Test of Unsoundness.

But although delusions may be a good test and very satisfactory proof of insanity, it may be doubted whether they are the only test of unsoundness of mind, and their existence the only evidence of incapacity. Delusions alone do not constitute insanity, if by that term general unsoundness is intended, though they may be symptoms of one form of the disease, which may be inferred from other circumstances, from general habits and conduct and conversation; to rest unsoundness of mind, as a cause of incapacity, upon the presence of delusion alone, and infer the absence of unsoundness from the absence of delusion, is to narrow too much the limits of mental incapacity, since want of memory, and other failings or diseases of the mind, will, as seems to be admitted in Waring *v.* Waring, constitute unsoundness; but see Freer *v.* Peacock (1 Roberts, 448). As to extreme old age, see Kinleside *v.* Harrison (2 Phillim. 461); eccentricity (Mudway *v.* Croft, 3 Curt. 671); weakness of mind (Constable *v.* Tufnell, 4 Hagg. 465; 3 Knapp. 122); in all of which the will was pronounced for. And generally Attorney-General *v.* Parnther (4 Br. C. C. 409); Ingram *v.* Wyatt (1 Hagg. 384). The judgment in Ingram *v.* Wyatt was reversed by the Delegates, but it appears from the observations of Knight Bruce, V. C., in Cockraft *v.* Rawles (7 Notes of Cases), that the sentence of the court of appeal proceeded upon the evidence in the case, and did not dissent from the law as laid down by the court below.

It is obvious that under the present statute the time of execution is the time at which the testator must be capable. Fulleck *v.* Allinson (3 Hagg. 527), and similar cases, cannot occur in the existing state of the law.

Drunkenness.

A man who is drunk is compared to a madman, and if he, in that state, make a will, it is void. (Swinb. p. 2, s. 6.) But the cases of madness and drunkenness, notwithstanding their apparent similarity, are subject to some different considerations, for the madness may exist, but be latent, whilst the effects of drunkenness only subsist whilst the cause, the excitement,

visibly lasts: there can scarcely be such a thing as latent ebriety; and the case of a person in a state of incapacity from mere drunkenness, and yet capable to all outward appearances, can hardly be supposed. Consequently, in this last case all that requires to be shown is the absence of the excitement at the time of the act done; at least the absence of the excitement in any such degree as would vitiate the act, for under a mere slight degree of excitement the memory and understanding may be as correct as in the total absence of any exciting cause. Whether the excitement prevailed in the requisite degree must necessarily depend upon the particular circumstances of each individual case, nor will the subject admit of any rule more definite than this. (See Wheeler *v.* Alderson, 3 Hagg. 602; Billinghurst *v.* Vickers, 1 Phillim. 191; Ayrey *v.* Hill, 2 Add. 206.) In fact, where a will has been executed by a man in a state of incapacitating drunkenness, it will almost invariably happen that the case is one of fraud, and to be classed rather under the head of an act vitiated by fraud than as the act of an incompetent person. (Cory *v.* Cory, 1 Ves. sen. 19; Cooke *v.* Clayworth, 18 Ves. 12; Say *v.* Barwick, 1 V. & B. 195; Rex *v.* Wright, 2 Burr. 1099.)

Undue Influence; Fraud; Force.

Closely connected with the subject of mental capacity, but depending upon somewhat different principles, is the necessity imposed by law that wills should be the act of a free agent, that there shall be in all cases the liber animus testandi. (2 Blackst. Com. 497.) Thus wills are liable to be set aside if they can be proved to have been procured by means of undue influence, fraud or force.

What Influence is undue.

It is obvious that all influence is not undue, and will not furnish ground for setting aside a will, or other instrument; but such a dominion or influence must be acquired over a mind of sufficient sanity and of sufficient soundness and discretion for general purposes, as to prevent the exercise of such discretion. (Mountain *v.* Bennett, 1 Cox, 353.) And this must be something more than the influence of affection and attachment, or the acting upon a desire of gratifying the wishes of another, and should amount to something like force and coercion destroying free agency, of unfair importunity to induce the act. (Williams *v.* Goude, 1 Hagg. 577.)

From this it is obvious that undue influence and fraud are

very similar; each case will depend upon its own circumstances; nor is it possible to lay down any rule more general than this, that the free agency must be shown to be destroyed before the act can be vitiated. These cases will frequently depend upon the relation in which the maker of the will or other instrument may be placed with reference to the person exercising the influence or practising the fraud. Thus as between husband and wife, although considerable latitude may be there allowed for confidence and affection (Marsh *v.* Harding, 2 Hagg. 84, appealed, but compromised; Mynn *v.* Robinson, 2 Hagg. 179; Baker *v.* Batt, 1 Curt. 125); in the two last cases the husbands, who failed in obtaining probate of the wife's will, were condemned in the costs. And see Walmesley *v.* Booth (2 Atk. 25); Saunderson *v.* Glass (2 Atk. 297); Gray *v.* Mansfield (1 Ves. 379); Oldham *v.* Hand (2 Ves. 259); Welles *v.* Middleton (1 Cox, 112); Montmorency *v.* Devereux (7 Cl. & Finn. 188); Paske *v.* Ollat (2 Phillim. 323), as to undue influence on the part of solicitors: Huguenin *v.* Baseley (14 Ves. 273), in which Sir S. Romilly made his celebrated reply; where a voluntary settlement by a widow upon a clergyman and his family was set aside: Dent *v.* Bennett (4 My. & C. 269), in which the parties were patient and surgeon: Maitland *v.* Irving (10 Jurist, 1025), guardian and ward being the parties concerned. And see Grindall *v.* Grindall (4 Hagg. 10); Godrich *v.* Jones (5 Moo. P. C. C. 16); Butlin *v.* Barry (1 Curt. 614; 2 Moo. P. C. C. 480); Browning *v.* Budd (6 Moo. P. C. C. 430). By the Code Civil, (tit. 2. chap. ii. s. 909), the medical and spiritual attendants of a person are prevented from taking any benefit by gift inter vivos or will made during the last illness of such person, if they have been in attendance upon him during such illness.

Husband and Wife.

Attorney and Client.

Spiritual Adviser.

Medical attendant and Patient.

Guardian and Ward.

In Allen *v.* M'Pherson (1 Phill. 133; 1 H. L. 191), the testator had bequeathed a considerable property to A. by his will and subsequent codicils, and afterwards, by a further codicil, revoked these bequests, and in lieu of them made a small pecuniary provision in A.'s favour. A. opposed this last codicil on the ground that it was procured by false and fraudulent representations made by an illegitimate son of the testator and by his daughter the residuary legatee, as to the character and conduct of A. The Court of Probate determined that the codicil was

Allen *v.* M'Pherson.

entitled to probate; and so far there was nothing peculiar in the case. But upon the decision of the Court of Probate, A., instead of appealing, filed a bill in chancery, alleging the same reasons against the codicil, and further, that he had not been permitted in the Court of Probate to take any objections to that codicil, except such as affected the validity of the whole instrument, and prayed that the executors or residuary legatee might be declared trustees or trustee for A. to the amount of the revoked bequests. On demurrer it was held in the House of Lords by Lords Lyndhurst, Brougham and Campbell, against the opinions of Lord Cottenham and Lord Langdale, that the Court of Chancery had no jurisdiction, and that the proper course for A. would have been by appeal. In the course of his judgment, Lord Lyndhurst referred to a case (Butterfield *v.* Scawen), furnished by Dr. Lushington, and also to a statement he had received from the judge of the Prerogative Court, as to the jurisdiction of the Court of Probate, to the effect that if it should appear that an old and infirm testator, who had bequeathed a legacy to A. B., had been induced by false and fraudulent representations with reference to the conduct of A. B., made to him for the purpose by C. D., to make a subsequent codicil revoking that legacy and substituting for it a much smaller one, the effect of which would be to give a larger share of the residue to C. D. than he would otherwise take, probate would not be granted of such revoking codicil, it being clearly established in evidence that the act and intention were produced by the false and fraudulent representations; and he also stated it to be perfectly clear that the Court of Probate might admit a part of an instrument to probate and refuse it as to the rest, relying upon Billinghurst *v.* Vickers (1 Phillim. 187); Barton *v.* Robins (3 Phillim. 455 n.). Allen *v.* M'Pherson is therefore a leading authority for the jurisdiction of the Court of Probate in cases of fraud, and that whether the fraud affect the whole or merely part of the instrument.

Effect of the Judgment in Allen *v.* M'Pherson.

Force.

Force is the only remaining ground for invalidating a will; and if it can be shown that actual force has been used to compel the party to make the will, there can be no doubt, that although the formalities required have been complied with, and the party were perfectly in his senses, such a will would never stand. (Mountain *v.* Bennett, 1 Cox, 355.)

Fear is but a mode in which force is employed, and provided it be a reasonable fear, such as the law intends, a will procured by means of fear will be set aside. Fear.

Traitors and felons from the time of their conviction are incapable of making a will, for then their goods and chattels are no longer at their disposal, but forfeited to the crown. Neither can a felo de se make a will of goods and chattels, for they are forfeited by the act and manner of his death, but he may make a devise of his lands, for they are not subjected to any forfeiture. (See 54 Geo. III. c. 145.) And it seems an outlaw for debt, as long as the outlawry subsists, is incapable of making a will of goods and chattels. (2 Black. Com. 499.) Legal Incapacity.

As to married women, see section 8.

Although the interpretation clause, sect. 1, enacts that the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, 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 monies, shares of government and other funds, securities for money not being real securities, debts, choses in action, right, credits, goods and all property whatsoever which by law devolves upon any executor or administrator, and to any share or interest therein, still there is some species of property which cannot be disposed of by will: for instance, a devise or bequest by a joint tenant of real or personal estate is necessarily void in the event of the testator dying in the lifetime of his coproprietor, for jus accrescendi præfertur ultimæ voluntati (Co. Litt. 185a); and the title of the survivor takes precedence of the claim of the devisee or legatee, so that no part of the property so held would, if undisposed of, devolve upon the real or personal representatives of the deceased. But under the old law there was an important distinction arising out of the nature of the property of which the testator was joint tenant; for if that property was personal, and the testator survived his companion in the tenancy, the bequest became good; but if the interest was freehold, then, notwithstanding the testator became entitled to it by survivorship, the estate did not 2. What may be disposed of by Will.

pass, the testator not having a devisable estate when he made his will; and upon the same principle any divided share which, after the making of the will, he acquired by partition, would not pass by the will. (Swift *v.* Roberts, 1 Wm. Blacks. 476.) But the present section enabling the testator to dispose of all such real and personal estate as he may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will (see also sect. 24), has abolished this distinction with respect to all wills coming under the statute, and it is sufficient that the testator have a devisable interest at the time of his death. Neither tenant in tail nor tenant for life can dispose of estates or property so held, since the estate or property undisposed of will not devolve upon their general, real or personal representative. The extent of testamentary power before and since the present act are fully discussed, Jarm. Wills, ch. 4.

It has been already observed that copyholds were not within the Statutes of Wills or the Statute of Frauds. A remarkable instance of the absurdity of this state of the law occurred in Doe *v.* Harris (6 A. & E. 209; 8 A. & E. 1), tried between the same parties with respect to the same will. In the former case the lands for which the ejectment was brought were freehold, in the latter they were copyhold. The facts proved in both cases were the same. That the testator was much under the influence of the devisee, but had frequent quarrels with her, often complained of her, and, on one occasion, when irritated, threw the will upon the fire; she rescued it without his knowledge, at which he expressed his displeasure when informed of it. The paper in which it was wrapped was partially burnt, but the will itself was not affected by the fire. The devisee kept it till after the testator's death. The question in both cases was, whether what was done by the testator was an actual revocation of the will, and so intended by him. In the former case, the Court, proceeding wholly on the express enactment of the Statute of Frauds, was of opinion that the will was not revoked. In the latter case the Court was of opinion that the will was revoked.

And as copyholds generally could pass only by surrender to the use of the will, the want of a surrender was fatal to the devise, except where a court of equity interfered, as it would do in favour of a wife, children or creditors (Chapman *v.* Gibson,

3 Br. C. C. 229; Hills *v.* Downton, 5 Ves. 557; Perry *v.* Whitehead, 6 Ves. 544), until the 55 Geo. III. c. 192, removed this difficulty.

That act however, in sect. 3, declared that nothing in the act should be construed to render valid a devise of copyholds, which would have been invalid if a surrender had been made to the use of a will: so that the act did not apply to cases where there was no custom to surrender to the use of the will, and, being expressly limited to copyholds, it did not extend to customary freeholds. This act is repealed by the second section of the present act, and its provisions enlarged by the present section, under which the power of disposition, by duly executed will, is extended to all customary freeholds and copyholds, though the devisor may not have surrendered the same to the use of his will, or being himself a surrenderee or devisee, he may not have been admitted at the time when he made his will, or could not have disposed of the same by will if this act had not been made, in consequence of some special custom, or in consequence of the want of a custom to devise or surrender to the use of a will or otherwise.

The provision in this section enabling the heir to devise before admittance was, in effect, anticipated by Right *v.* Banks (3 B. & Ad. 664).

As to estates *pur autre vie* generally, see post, section 6.

Contingent and executory interests and possibilities, accompanied with an interest, were descendible to the heir or transmissible to the representatives of a person dying, or might be granted, assigned or devised by him before the contingency upon which they depended took effect. (Purefoy *v.* Rogers, 2 Saund. 388, n.) Where, however, the contingency, upon which the interest depends, is the endurance of the life of the party entitled to it, till a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to his executors or administrators. A descendible interest was also devisable. (Roe *v.* Jones, 1 H. Bl. 30.)

But if the devisor was not at the date of his will ascertained to be the person in whom the estate would vest, it could not pass by the devise, though the event happened subsequently. So where an estate was limited to two sisters and the survivor

of them, and after the death of the survivor to such other person as the survivor might give it by will, while both were alive, as it could not be known which would survive, a will made by either would have failed, though the party making it afterwards became the survivor. (Lord Langdale's Speech in the House of Lords, February 23rd, 1837; cited, Lush on Wills, 11.) In such cases the will would now be operative by virtue of the power given by this section, if not by virtue of the 24th section.

Personal property acquired after the making of the will would pass thereby; and, although it was at one time doubted whether this extended to leases for years (Bunter *v.* Coke, 1 Salk. 237), it was determined that a leasehold estate for years, or the trust thereof, passed under a will made prior to the estate being acquired. (Stirling *v.* Lydiard, 3 Atk. 199; Carte *v.* Carte, Amb. 28; Marwood *v.* Turner, 3 P. Wms. 163.)

But a devise of lands was not good if the devisor had nothing in them at the time of making his will; for he could not give that which he had not, and the statute only empowered those having lands to devise them, so that if the testator had not the lands he was out of the statute. The only mitigation of this rule of law allowed by courts of equity was in certain cases to put the heir to his election. (Churchman *v.* Ireland, 1 Russ. & My. 250.)

Generally copyhold lands purchased after making the will did not pass (Harris *v.* Cutler, 1 T. R. 438, n.), unless the surrender referred to the will, and the after-purchased property fell within the description, when it was considered the same as if the will had been made at the date of the surrender; or where a copyhold manor was devised, in which case copyhold premises, parcel of the manor, purchased by and surrendered to the lord subsequent to the time of making his will, would pass. (Attorney-General *v.* Vigor, 8 Ves. 287; Duppa *v.* Mayo, 1 Saund. 277 e, notes.)

A right of entry was not devisable. (Goodright *v.* Forrester, 8 East, 552; Doe *v.* Hull, 2 Dow. & R. 38; Cave *v.* Holford, 3 Ves. 669; Attorney-General *v.* Vigor, 8 Ves. 282.) But these were rights of entry which arose from the freehold estate of the party being divested, either by fine or recovery or by disseisin, or some other tortious act, which ousted him of the

freehold, and where it was necessary to make an actual entry on the land to make his title or interest available and to restore his seisin. But if he were merely dispossessed, without his seisin of freehold being taken from him, and the possession only were withheld from him, there was no necessity to make an entry on the land. Thus, if a tenant in fee demised for twenty-one years, and, after the expiration of the term, the tenant retained possession without paying rent or acknowledging the title of the landlord, and after the expiration of the lease the owner devised the estate, it might be said, in common parlance, that the owner had a right of entry, and yet he might devise it, for there was no actual disseisin of the devisor, and a mere adverse possession would not suffice. (Culley *v.* Taylerson, 11 A. & E. 1008.)

The present section has removed the distinctions and most of the difficulties which previously existed in respect to the exercise of the testamentary power over the different kinds of property, according to the nature of such property, or the time when it may have been acquired by the testator, by extending the power of disposition to all contingent, executory, or other future interests, to all rights of entry, and to property, which the testator may be entitled to at the time of his death, notwithstanding he may have become entitled to the same subsequently to the execution of his will. (See post, section 33.)

As to the Fees and Fines payable by Devisees of customary and copyhold Estates.

IV. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real

estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills of customary Freeholds and Copyholds to be entered on the Court Rolls; and the Lord to be entitled to

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or

the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

the same Fine, &c., when such Estates are not now devisable as he would have been from the Heir.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor

Estates *pur autre vie.*

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.

This is the only section in the statute which provides for the case of intestacy; to understand the reason of this it may be useful to refer briefly to the legal history of tenancy *pur autre vie,* and general and special occupancy.

Statute of Frauds.

Freehold estates *pur autre vie* were not devisable at law before the passing of the Statute of Frauds. They were subject to the rules of tenure which prevented the devise of estates in fee-simple before the Statutes of Wills, and they were not comprised in those statutes which are confined to estates in fee-simple. By the 12th section of the Statute of Frauds an express power is given to devise estates *pur autre vie* in the same manner and with the same solemnities as are required by the 5th section with respect to estates in fee-simple.

Previously to the Statute of Frauds estates *pur autre vie* might be devised in equity, by vesting the legal estate in trustees, in like manner as estates in fee-simple might be devised before the Statute of Uses. And before the present act, though they could not be devised at law, except like fee-simple estates by a will attested by three witnesses, they were in many cases devisable in equity by an unattested will, in the same manner as personal property.

Of Occupancy.

When the owner of an estate *pur autre vie* died in the lifetime of the persons for whose lives the estate was created, and no persons were named to take the estate in the event of his death, it did not descend to the heir, because it was not inheritable; and the executors or administrators were not entitled to it, because it was a freehold, though the lowest or least estate of freehold which the law acknowledged. It was therefore without any legal owner. And in the case of a freehold corporeal hereditament the first person who entered and took possession was allowed by the law to retain it for his own benefit (2 Bl.

Comm. 259); he was called the occupant. In the case of a copyhold hereditament the lord became entitled to it, because, as owner of the freehold, he was considered to be in possession, and therefore no other person could gain a title by occupancy. (Per Holt, C. J., Smartle *v.* Penhallow, 2 Ld. Raym. 1000; 1 Salk. 188; 6 Mod. 68; and see Doe *v.* Martin, 2 W. Black. 1150; Zouch *v.* Forse, 7 East, 186.) In the case of a rent or other incorporeal hereditament, the estate determined on the death of the owner, because there could be no entry, and therefore no title by occupancy. (Co. Litt. 41b, 388a; Salter *v.* Boteler, Cro. Eliz. 901; Mo. 664; Crawley's case, Cro. Eliz. 721.)

Of Special Occupants.

When the heirs of the owner of an estate *pur autre vie* were specially named to take in the event of his death, the heir became entitled to the estate, and was called the special occupant, by analogy to the right of the person who became entitled when there was no special limitation, and which person, by way of distinction, was called the general occupant. There might be a special occupant of a copyhold estate (Co. Litt. 41b; Co. Cop. s. 56; Doe *v.* Martin, 2 W. Black. 1148), or an incorporeal hereditament. (Bowles *v.* Poor, 1 Bulst. 135; Cro. Jac. 282; Bac. Abr. tit. Estate for Life and Occupancy.)

Occupants.

An estate *pur autre vie* may be limited to executors or administrators, as special occupants of corporeal hereditaments; but whether incorporeal hereditaments can be so limited was doubted. (Duke of Devon *v.* Atkins, 2 P. Wms. 383; Duke of Marlborough *v.* Godolphin, 2 Ves. 80; Westfaling *v.* Westfaling, 3 Atk. 466; Atkinson *v.* Baker, 4 T. R. 229; Ripley *v.* Waterworth, 7 Ves. 442; Campbell *v.* Sandys, 1 Sch. & Lef. 281; 1 Sugd. Pow. 233, n.)

The section of the Statute of Frauds, sect. 12, which gives the power of devising estates *pur autre vie*, also provides, that if there shall be no devise of an estate *pur autre vie* it shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent; and in case there shall be no special occupant it shall go to the executors or administrators, and be assets in their hands. This clause in the statute is considered to have been passed to put an end to general occupancy, but it was doubted whether it was intended to continue estates which, when there was no special occupant, determined, because they were not liable to general occupancy.

It does not extend to Copyholds.

The statute does not mention copyholds or incorporeal hereditaments; it does not refer to executors or administrators as special occupants; and it makes no provision for the surplus remaining after payment of debts. Upon the construction of the statute it was held that it did not extend to copyholds, because it could not be intended to prejudice the right of the lord (Doe *v.* Martin, 2 W. Black. 1150; Zouch *v.* Forse, 7 East, 186; and see Doe *v.* Goddard, 1 B. & C. 528); on the contrary, with respect to rents and other incorporeal hereditaments, it has been determined that where there is no special occupant, or quasi occupant, the estate is continued during the lives for which it was granted, and may be devised; and if not devised, goes to the executors or administrators. (Bearpark *v.* Hutchinson, 7 Bing. 178.) With respect to the surplus it was decided (Oldham *v.* Pickering, 2 Salk. 464; Carth. 376) that the executor or administrator could not be compelled to distribute it as personal property: in consequence of that decision the stat. 14 Geo. II. c. 29, was passed, which provided that such estates shall be applied and distributed in the same manner as the personal estate. With respect to estates limited to executors or administrators as special occupants, a similar rule had been adopted where the owner had left a will, on the ground that the executor or administrator was a trustee for the person to whom the testator had given his personal estate, the will being a direction to whom and in what manner to apply it. Therefore, although an estate *pur autre vie*, in a freehold hereditament, whether corporeal or incorporeal, could not be devised at law unless by a will attested by three witnesses; yet if there were no special occupant, or the executor or administrator were the special occupant, it would pass in equity by a will, not executed according to the Statute of Frauds, to a residuary legatee, and even, according to the prevailing opinion, to a specific devisee; for it was considered that the executor ought not to claim against the will, and the residuary legatee ought not to be entitled as against an express bequest. Where the heir was the special occupant, the devise was void in equity as well as at law, unless the requisites of the Statute of Frauds had been complied with. (See generally Holden *v.* Smallbrooke, Vaugh. 187; 2 Black. Com. 258; Watk. Conv. 8th ed., 66.)

14 Geo. 2, c. 20.

Effect of the present Section.

But whatever difficulties or doubts (see Doe *v.* Lewis, 9 M. & W. 662) may have existed upon these points, they are now removed by the present act, sections 2, 3 and 6; the first of which repealed 29 Car. II. c. 3, s. 12, and 14 Geo. II. c. 20, s. 9; the next extends the power of devising to all estates pur autre vie, and the present section, which provides that where an estate pur autre vie, undisposed of by the will, comes to the heir by reason of special occupancy, the same shall be chargeable in his hands as assets by descent, and if there be no special occupant of an estate pur autre vie, of whatever nature, it shall go to the executor or administrator of the grantee, and shall be assets in his hands, whether it shall have come by reason of special occupancy or by virtue of the act, and be applied and distributed in the same manner as the personal estate of the testator or intestate.

A question often agitated, but never entirely settled in regard to the devising "power over estates of this description, was whether, where they were limited to the tenant *pur autre vie and the heirs of his body*, they could be devised without some act on his part to bar the entail. It was admitted, that if the property were undisposed of it would devolve to the heir special per formam doni; it was equally clear that an alienation by deed was an effectual bar to the entail; but the doubt was, whether the estate was devisable by will alone without any such previous alienation. The authorities on the point are few and contradictory. Lord Kenyon inclined to think the devise was good. (Doe *v.* Luxton, 6 Durnf. & East, 293.) Opposed to that are the opinions of Lord Redesdale, in Campbell *v.* Sandys (1 Sch. & Lef. 281), and of Lord Manners, in Dillon *v.* Dillon (1 Ball & Bea. 77), who held that a quasi tenant in tail of an estate *pur autre vie* could by devise exclude the remainder-man; and such was the impression of Sir T. Plumer, in Blake *v.* Luxton (Coop. 185). The present statute does not in terms dispose of this debateable point, but has, it should seem, done so in effect by the language of the third clause, which extends the devising power to all real estate and all personal estate which the testator 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, or customary heir of him, if he became entitled by descent of his ancestor,*

or upon his executor or adminstrator. The terms of this enactment evidently restrict it to cases in which property, in the absence of disposition, would devolve to the *general,* real or personal representative of the testator, as distinguished from the case now under consideration, in which the devolution would be to the heir *special.*" (1 Jarm. on Wills. 55.)

No Will of a Person under Age valid.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

With respect to a devise of lands, the Statutes of Wills, 34 & 35 Hen. VIII. c. 5, s. 14, made all infants under the age of twenty-one intestable, except under a custom; but with respect to personal estate, infants who had attained the age of fourteen, if males, and of twelve, if females, were considered capable of making wills, at least in the Ecclesiastical Courts, though there seems to have been an abundance of irreconcilable opinions elsewhere upon the point. (Co. Litt. 89b, n. 6; 2 Black. Com. 497.)

Mr. Reeves, in his History of English Law (p. 114), citing from Glanville, says, the son and heir of a sokeman was considered as of age when he had completed his fifteenth year; the son of a burgess, or one holding burgage tenure, was esteemed of age when he could count money, and measure cloth, and do all his father's business with skill and readiness.

The present section requires, in express terms, that every person shall have attained the age of twenty-one years, in order to make a valid will.

But as section 11 excepts from the operation of this act the wills of soldiers in actual service, and mariners at sea, it follows that the wills of persons coming within either of these descriptions, though they be within the age of twenty-one years, will be valid; and so it was held, In the goods of Farquhar (Waddilove's Digest, 327).

The disability of infancy was expressly taken away, in regard to the paternal appointment of guardians, by the statute 12 Car. II. c. 24, s. 8, which enabled any father, within the full age of twenty-one years, or of full age, who should have any child under twenty-one and unmarried, by deed or will, in the

presence of two witnesses, to dispose of the custody of such child or children, during such time as he or they should continue under twenty-one, or any less time; and it gave to such person the custody of the infant's estate, both real and personal, and the same actions as guardians in socage. This guardianship drew after it the custody of the land, which the infancy of the father would have prevented him from devising directly. (Bedell *v.* Constable, Vaugh. 178.)

In a case which came under 26 Geo. II. c. 33, a suit was brought by the woman acting by her guardian to declare her marriage void. It appeared that the licence was granted with the consent of the testamentary guardians of the woman, but as the father's will was not attested by, nor executed in the presence of two witnesses, according to the statute, the marriage was held void for want of consent. (Reddall *v.* Liddiard, 3 Phillim. 256.) The man was also a minor at the time of the marriage, though in the affidavit to lead the licence he described himself as of full age.

12 Car. II. c. 24 is not repealed by the present act (see sect. 2; therefore, although the present section, taken together with section 1, abolishes the power of infant fathers to appoint guardians by *will*, the power of nominating guardians by *deed* remains in force; and this will go far towards preventing any practical inconvenience, which might otherwise have resulted from the abolition of the power of infant fathers to appoint guardians by will.

For an account of the several kinds of guardianship see Co. Litt. s. 123, and Mr. Hargrave's notes, which exhaust the subject.

In computing the age of a person for testamentary or other purposes, the day of his birth is included, and the law makes no fraction of a day. A person born on the 15th of February is of full age the 14th of February, twenty-one years after. (Herbert *v.* Torball, Sid. 162; Raym. 480, 1096.)

Nor of a Feme Covert.

VIII. Provided also, and be it further enacted, that 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.

The case of coverture is widely different from that of infancy:

an infant is disabled from binding himself, except when it is for his benefit, for want of judgment and capacity; but a woman has not less judgment after marriage than she has before. (Hearle *v.* Greenbank, 1 Ves. 298; Sockett *v.* Wray, 4 Br. C. C. 486.)

A Married Woman cannot make a Will of Lands;

With respect to lands married women were expressly prohibited from disposing of them by will under 34 & 35 Hen. VIII.; but they are enabled to dispose of these and all other kinds of property by will operating as an appointment under a power.

nor a Will of Chattels;

A wife has, generally speaking, no disposing power over her chattels independent of her husband; for all her personal chattels are absolutely his, and he may dispose of her chattels real, or shall have them to himself if he survives her; it would be therefore extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to another. (2 Bl. Com. 497.) And consequently a married woman's will as such simply is not entitled to probate. (Temple *v.* Walker, 3 Phillim. 403; Steadman *v.* Powell, 1 Add. 58.)

unless it be of Property settled for her separate Use;

Fettiplace *v.* Gorges (1 Ves. jun. 46) established the principle, that personal property, settled upon a feme covert for her separate use, is to be enjoyed with all its incidents; and that as the jus disponendi is one of them, she may, although there is no express power of disposition given to her, dispose of such property, either by act inter vivos or by will. (Rich *v.* Cockell, 9 Ves. 369; Wagstaff *v.* Smith, 9 Ves. 520; see Parker *v.* Brooke, 9 Ves. 583; Newlands *v.* Paynter, 4 My. & C. 408.) And this power extends to interests in reversion as well as in possession. (Sturgis *v.* Corp, 13 Ves. 190.)

and its Produce and Accretions;

And when she has such a power over the principal, that power extends also to the produce and accretions, as the savings of her pin-money. (Herbert *v.* Herbert, Prec. Chan. 44.) And it will make no difference whether the property be given to trustees for her separate use, or to the wife herself, without the intervention of trustees, for her own separate use. (Tappenden *v.* Walsh, 1 Phillim. 352; Braham *v.* Burchell, 3 Add. 263.)

or by virtue of a Power;

Where the will of a married woman is made in pursuance of an agreement before marriage, or of an agreement after marriage for consideration, it falls under the same rules as a will made in pursuance of a power. (2 Rop. H. & W. c. 19, s. 3; See post, sect. 10.)

The husband, however, may waive the interest which the law gives him, and so empower his wife to make a will; and this licence or assent is sufficient to repel the husband from his general right of administering his wife's effects. (2 Bl. Com. 498.) But a general consent that the wife may make a will is not sufficient, it must be shown that he has assented to the particular will. (Rex *v.* Bettesworth, 2 Str. 891.)

or by the Assent of the Husband.

This assent the husband may revoke at any time during the life of the wife, or after death before probate, though whether he might do so where he once assented to the will after her death was not free from doubt. This point was considered in a late case. (Maas *v.* Sheffield, 10 Jur. 417; 1 Roberts, 364.) The facts were somewhat singular. The wife made her will, and the husband, in testimony of his consent, attested it; at her death it came into the possession of the sole legatee therein named, from whom, and before probate, the husband obtained it upon certain alleged purposes, but at the same time giving this memorandum :—"I hereby declare that the annexed will, dated, &c., was made at that period by my wife at my express recommendation in favour of, &c., and that I have not since that period done anything to revoke it; that it continues to have my sanction, and that I now in every respect adopt it." After this he obtained letters of administration of his wife's estate, as dead intestate. In support of his right so to act, it was argued, from Swinb. pt. 2, s. 9; 1 Rop. H. & W. 170; Brook *v.* Turner (1 Mod. 111), that till probate, the act of consent was not completed, and might be withdrawn. And Chiswell *v.* Blackwell (2 Frem. 70) was cited, but as a case of doubtful authority, which carried the doctrine contended for still further. But Sir H. Jenner Fust decided upon the modern authorities, that where the husband had consented to a particular will, after the death of the wife, he might not retract his consent, and accordingly he pronounced for the will.

Husband may revoke his Assent at any time before Probate, unless he has assented after Wife's Death.

When the will is made in pursuance of an express agreement or consent, it is said that a little proof will be sufficient to make out the continuance of the consent after her death. (Maas *v.* Sheffield, 10 Jur. 417; and see Forse and Hembling's case, 4 Rep. 61 b, notes, Fraser's edit.)

But if the wife survive the husband, the will made with his consent becomes inoperative, for this assent on his part is no

more than a waiver of his rights as her administrator, and can only give validity to the instrument in the event of his being the survivor; so that if he die before the wife, her will is void against her next of kin so far as it derived its effect from his consent. (Stevens *v.* Bagwell, 15 Ves. 156; 1 Rop. H. & W. 170, n. *e.*) Hence a will made by a married woman with the consent of her husband must, upon his death, be re-executed under the present statute; such will does not come within the operation of the 24th section, and speak and take effect as if it had been executed immediately before the death of the testatrix; for it is not in reality a will, but only something like a will, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. (2 Bl. Com. 498.) In this respect the will of a married woman, made with her husband's consent, is similar to the will of a person within age, which will not become valid though the maker subsequently attains full age, but must be re-executed in compliance with section 9; section 24 provides only for the case of a will valid per se at the time of execution.

But a will made under a settlement, or by virtue of a power, during coverture, does not require re-execution on the wife's surviving the husband. (Morwan *v.* Thompson, 3 Hagg. 239.)

The queen consort is by the common law of England an exempt person from the king, and is capable of lands or tenements of the gift of the king, as no other feme covert is, and may sue and be sued without the king; for, says Lord Coke, the wisdom of the common law would not have the king, whose continual care and study is for the public, et circa ardua regni, to be troubled and disquieted for such private and petty causes; so as the wife of the king of England is of ability and capacity to grant and to take, and to sue and be sued, as a feme sole at the common law. (Co. Litt. 133 a.) And she may devise and bequeath her property by last will and testament without the concurrence of the king. (Cruise, Dig. 6, 13; or tit. 38, c. 2, sect. 1, § 3.)

The will of a married woman, like the will of any other person, is subject to be set aside for incapacity, fraud or undue influence. (See March *v.* Tyrell and Harding, 2 Hagg. 84; and Mynn *v.* Robinson, ib. 179.)

The reasons, generally speaking, upon which a married woman's privileges or disabilities are founded, are her own interest, or the interest of her husband. In the latter case, the assent of the husband is required; in the former, she will be found generally to be protected from disposing of her own property without certain solemnities, which, in most cases, have been enjoined upon the supposition that she might be under the coercion of her husband. That idea, with respect to her testamentary capacity, has been said to have been carried full as far as reason or truth would warrant, when it was extended to all cases in which the wife lived with her husband, and was locally under his dominion. (Per Buller, J., in Compton *v.* Collinson, 2 Br. C. C. 387; and Sir J. Nicholl's observations in Braham *v.* Burchell, 3 Add. 262.)

Accordingly there are cases in which, though the tie of matrimony is not dissolved, the civil rights of the husband are nevertheless extinguished or suspended; as where the man was professed (Co. Litt. 132 a), or banished. (Belknap's case, Co. Litt. 132 b; Rutland *v.* Prodgers, 2 Vern. 104.) And where the husband is transported for life or for years, the wife will be entitled to the rights of a feme sole, and her will made during the term of his sentence, though he receive a conditional pardon, will be entitled to probate. (In the goods of Martin, 15 Jurist, 686.) Some difficulty was apprehended as to the effect of transportation for a term of years, not merely after the period had elapsed, and before the man's return to this country, but also during the term of transportation. (Marsh *v.* Hutchinson, 2 B. & P. 231.) But in Ex parte Franks (1 Moo. & S. 11), Tindal, L. C. J., said, that transportation of the husband, for a term of years, operated as a suspension merely of his marital and civil rights during that period; whilst in case of banishment for life, it amounted to a total extinguishment of such rights. (The cases are collected 2 Rop. H. & W. 121.)

Wife of Convict for Life or Term of Years.

And if the observations of Buller, J., and Sir J. Nicholl, already referred to, were well founded, it would seem that the husband, though the term for which he was transported had expired, would not be restored to his marital rights till he had done some act in his character of husband, or at least returned

to this country. Ex parte Franks (1 Moo. & S. 1) is an authority that the wife will be treated as a feme sole, though the husband has never left the country, but remained in the hulks, where she has been in the habit of visiting him. The true principle, on which the wife's right depends, seems to be, not merely that the husband is in such cases civilly dead, but that unless his rights are suspended, all the property acquired by the wife will become his by virtue of the marriage, and then fall to the crown as the property of a convict. (See Lord Mansfield's reasoning in Corbett *v.* Poelnitz, 1 T. R. 8.)

Practice of the Court of Probate.

Formerly it was the practice of the Court of Probate not to grant probate of a testamentary appointment of personal property by a feme covert, though made under a power given by the husband, without his concurrence. (2 Rop. H. & W. 188, note *d.*) But for many years that practice has been changed, and probate of the will, where made by virtue of a power, is granted to the extent of the power to the person appointed executor by the will without his consent (Tappenden *v.* Walsh, 1 Phillim. 352), and though the husband oppose the grant. (Boxley *v.* Stubbington, 2 Lee, 537; Rex *v.* Bettesworth, 2 Str. 1111.)

Where an Executor is appointed in the Wife's Will.

In these cases the husband is entitled to a grant cæterorum of the property not within the power; but if a doubt exists as to whether the property is within the power or not, the probate will be so limited as to leave that question to the Court of Construction. In Ledgard *v.* Garland (1 Curt. 286) the deceased had power to dispose by will of a certain principal sum, the interest of which she received for her separate use. At the time of her death there was at her bankers a fund, the produce of her savings out of this interest. The question was, were the executors of the wife, or the husband, entitled to this last fund. The grant was made to the executors, limited to the settled property, and all accumulations over which the deceased had a disposing power, and which she had disposed of; thus leaving the matter open.

Where an Executor is not appointed, or does not act.

Where a feme covert made a will in respect of property over which she had a disposing power, and did not appoint an executor, the practice, so late as 1833, seems to have been to grant administration with such will annexed to the husband, and not to the legatees. (Salmon *v.* Hays, 4 Hagg. 382.) But since that time a different course has been introduced, and

in accordance with the general rule, that the grant should follow the interest, these grants are now usually made to the persons having an interest under the will, and not to the husband. (In the goods of Dawson, 7 Notes of Cases, 317.) In which case, however, Sir H. J. Fust decreed the administration to the husband upon the particular circumstances of the case.

Remarks on the present Practice.

Again, In the goods of Dempsey (25 April, 1851), Sir H. J. Fust decreed administration with the will annexed of a married woman, made in virtue of a power, to the representatives of her husband, no objection being made by the legatees, who were cited by direction of the court. Unless there are other cases, which I am not aware of, the present practice in the office cannot be said to have received any direct judicial sanction. For In the goods of Dawson Sir H. J. Fust expressly avoided determining the question of practice; whilst the citing the legatees In the goods of Dempsey, and the decree being made upon their nonappearance, still leaves the point open to discussion.

The modern practice is said to be founded upon the principle, that the grant should follow the interest; but that principle does not seem to apply to the case of a married woman's will, for no interest whatever passes or is affected by the grant, which merely evidences that the instrument is a will; the administrator is not even the channel through whom the property disposed of flows; he need not receive, nor pay, a fraction of it, but the persons beneficially entitled look entirely to the trustees or other persons in possession of the fund or property. (Platt *v.* Routh, 7 M. & W. 756.) And consequently the fund can neither be benefited or damaged by the conduct of the person who holds the grant.

This also furnishes an answer to the argument, that although the husband has no interest in the fund, yet he may have an interest adverse to those who are benefited by the will, and consequently be an unfit person to take the grant, since the question of fitness or unfitness cannot arise where there is no trust, obligation, or duty to perform.

But it is said if the wife appoints an executor, you make the grant to him, even in opposition to the husband. Why should you, on the renunciation of that executor, or in the case of no executor being named, pass over the residuary and other

legatees? To this it may be answered, that the power of appointing an executor is implied in the power of making a will; and when the wife names an executor, she is in fact merely exercising a power given to her, which the Court of Probate has no right to control; but when there is no executor, the general right of the husband is entitled to a preference, and particularly as by making the grant to him, you prevent the necessity of two grants, one to the legatees with the will annexed, and the other cæterorum to him.

It is to be regretted that the goods of Dawson and the goods of Dempsey did not require a decision upon this point of practice; but it would seem, if the above reasoning be well founded, that the practice of making the grant to the husband proceeded upon sounder and better principles than the more modern practice, besides being supported by Salmon *v.* Hays; and it is to be hoped that an opportunity may soon occur, which will call for a decision, and a return to the older practice.

Formerly it was not the practice of the courts of equity to require probate of a will by which a married woman disposed of property under a power (Goldsworthy *v.* Crossley, 4 Hare, 140); but it has long been deemed necessary that those courts should be satisfied by the judgment of the Court of Probate that the instrument is in the nature of a will (Rich *v.* Cockell, 9 Ves. 369); and they will not act upon such a will if it has not been proved. (Stone *v.* Forsyth, Dougl. 707; Stevens *v.* Bagwell, 15 Ves. 153.)

And where several papers of different dates, purporting to be wills made in virtue of the power, were brought before the Court of Probate, which granted a general probate of the latter, and made a grant of administration with the earlier papers annexed, limited to proceedings in equity, disputing the execution of the power by such papers, the Delegates reversed the sentence and held that the court must decide whether the later instruments revoked the earlier, and so decree probate of the former alone, or of all the papers as together containing the will. (Hughes *v.* Turner, 4 Hagg. 30.)

The Husband may prove the Wife's Will generally,

Where a married woman had power to dispose of certain funds by will, and made a will disposing of those funds and also of other funds over which she had no power, and ap-

pointed her husband executor, who proved her will generally, and not merely as to the funds over which she had the power, it was held that her will operated, as to the funds over which she had no power, as a will made ex assensu viri. (Ex parte Fane, 16 Sim. 406.)

when, as to the Property not within the Power, the Will operates as made ex assensu viri.

In the case of a will made by a married woman, either with the assent of her husband, or under a power, probate or administration, limited to the subject-matter of the bequest contained in such will, is the usual and proper grant; but there is no objection to the husband's taking out a general administration, nor will the Court of Chancery on that account refuse to entertain a suit respecting any claim under the will, but that court requires, at the least, the limited administration. (Tucker *v.* Inman, 4 Mann. & G. 1049.)

The only remaining case is that of the will of a married woman executrix. Since the husband has no beneficial interest in the personal estate which the wife takes in the character of executrix, and as the law permits her to take upon herself that office, it enables her to make a will, in this instance, without the consent of her husband (Scamnell *v.* Wilkinson, 2 East, 552); restricted, however, to such articles to which she is entitled as executrix. The effect of such an instrument is merely to pass, by a pure right of representation to the testator or prior owner, such of his personal assets as remain outstanding, and no beneficial interest which the wife may have in any part of them. And with respect to the assets which may have been received by the feme executrix during the marriage and not disposed of, they immediately become the husband's property, and are not affected by the will. (Hodsden *v.* Lloyd, 2 Br. C. C. 534; 1 Rop. H. & W. 188.)

Will of a married Woman Executrix.

If the executor of a married woman's will make his will, and appoint an executor, the chain of representation is continued, and the executor of the executor will represent the original testatrix, and a grant of letters of administration of her unadministered estate will not be decreed to the residuary legatee, in opposition to such executor. (In the goods of Beer, 15 Jur. 160.)

Transmission of Executorship, of a married Woman's Will.

So a married woman being executrix continues the chain of representation by making her own executor. (Birkett *v.* Vandercom, 3 Hagg. 750; Barr *v.* Carter, 2 Cox, 429.)

Transmission of Executorship, by a married Woman Executrix.

Every Will to be in writing, and signed in the presence of Two Witnesses.

IX. And be it further enacted, that 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 the 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.

Effect of the Section. Four things required to the validity of a Will.

Four things are by this section required to the validity of every will. First, it must be in writing; secondly, the signature of the testator, made by himself or by some other person in his presence, and by his direction, must be at the foot or end of the will; thirdly, such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time; fourthly, such witnesses shall attest and subscribe the will in the presence of the testator. The wording and requirements of the enactment do not apparently present any great difficulty, and they seem simple and intelligible enough, and capable of being easily complied with; but such has not been the case practically, and lawyers as well as laymen have been found to fail in attempting to comply with the terms here employed, and the requirements imposed by the legislature.

The numerous decisions, which have consequently occurred upon this section, make it desirable to refer to the reasons which may be supposed to have led to the enactments, as they are stated in the Report of the Commissioners; and then examine the cases in the Reports, and extract such rules or principles as these two sources of interpretation may supply; the former conveying to us, in a degree, the intention of the legislature, the latter furnishing a judicial exposition of the law enacted.

And in studying the cases referred to there will frequently be reason to bear in mind, that it is a very useful rule in the

construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, which is to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further, per Parke, B. (2 M. & W. 195.)

1. Writing.

It has been already observed, that writing was a requisite under the Statute of Frauds, except in the case of nuncupative wills; with respect to these the Commissioners, p. 16, remark, that the power of making a nuncupative will is very rarely exercised, and in the present general state of education can scarcely ever be required. In fact the Statute of Frauds had provided so numerous a train of requisites in setting up a nuncupative will, that the thing itself had long fallen into disuse, and was hardly ever heard of in Sir W. Blackstone's time (2 Com. 501). The present section has provided against this description of will, unless it can be brought within the exception in the 11th section, by requiring that every will must be in writing. It is however unimportant on what substance, or with what material, or in what language, the will be written, or whether the words be written at length or contracted, or the sums be in figures or not, provided there be no doubt or ambiguity. (Masters *v.* Masters, 1 P. Wms. 425.) Formerly the presumption was that pencil writings, as distinguished from writings in ink, were deliberative and not final (Lavender *v.* Adams, 2 Add. 406; Ravenscroft *v.* Hunter, 2 Hagg. 65); but where the requirements of the present section have been complied with, all ground for and all the effect of such presumption is done away with. (See Bateman *v.* Pennington, 3 Moo. P. C. C. 223, and cases there cited, and the subsequent provisions in the act, with respect to revocation.)

2. Signing.

Some doubt existed whether under the Statute of Frauds sealing might not be held to amount to signing (Lemayne *v.* Stanley, 3 Lev. 1; Warnford *v.* Warnford, 2 Str. 764; Smith *v.* Evans, 1 Wils. 313; Grayson *v.* Atkinson, 2 Ves. 454; Ellis *v.* Smith, 1 Ves. jun. 11), where Willes, C. J., said, "I do not think sealing is to be considered as signing; and I declare so now, because if that question ever comes before me, I shall not think myself precluded from

weighing it thoroughly, and decreeing that it is not signing, notwithstanding the obiter dicta, which in many cases were nunquam dicta, but barely the words of the reporters." (Wright *v.* Wakeford, 17 Ves. 459; Morison *v.* Turnour, 18 Ves. 175.) Upon this point it is said (1 Sugd. Pow. 253, n.) without question, if the point should ever call for a decision, it would, in conformity to the express words of the statute and the general opinion of the profession, be holden that sealing is not signing.

But the signing may be by the testator's making his mark, as well as by writing his name (In the goods of Field, 3 Curt. 752), and it need not be proved that he was unable to write (Baker *v.* Dening, 8 Ad. & E. 94); and it is not necessary that the name of the testator should appear upon the face of the instrument, provided it is identified as being the will of the deceased. (In the goods of Bryce, 2 Curt. 325.) So the initials of the testator would probably be held a sufficient signing, but this point is now pending.

In the goods of Glover (11 Jurist, 1022), a married woman made her will by virtue of a power, in the lifetime of her second husband, and signed it, not by the name she then bore, but by the name she took from her first husband, the power being derived from the settlement made upon her second marriage, and this was held a good execution.

Whether the legislature intended the person signing for the testator to write his own name, or that of the testator, does not appear; nor whether the person so signing may or may not be one of the subscribing witnesses. In the goods of Bailey (1 Curt. 914) the name of the testator was written by W. B., one of the subscribing witnesses, by the testator's direction, and in his presence and in the presence of the other subscribing witness: it was held, that there was nothing in the act which prevented the person making the signature from being a witness to the will, and the execution was accordingly decided to be valid. In the goods of Clark (2 Curt. 329) the will was signed on behalf of the testator with the writer's name, and was held to be well executed, as the act did not direct that the will should be signed with the name of the testator. It would seem from these two cases that a will would be held to have been duly executed, if signed by one of the subscribing witnesses with his own name, provided such signing were made by the testator's direction, and in the testator's presence, and so made or acknow-

ledged in the presence of both subscribing witnesses. But the better course would nevertheless be to have three persons employed in such a case, one as the writer of the name, which should be that of the testator, and the others as attesting and subscribing witnesses A case is now pending, in which the person acting for the testator made his mark on the will.

In what manner the direction of the testator shall be expressed must necessarily depend upon the circumstances of each case, and be a matter of evidence. In Wilson *v.* Beddard (12 Sim. 33), on motion for a new trial of an issue devisavit vel non, Shadwell, V. C. E., in refusing the motion, said:— "It was contended, that what the learned judge said with reference to the testator's hand being guided when he made his mark to his will, was not law. The judge said that it was necessary that the will should be signed by the testator, not with his name, for his mark was sufficient if made by his hand, though that hand might be guided by another person; and, in my opinion, that proposition is correct in point of law. For the Statute of Frauds requires that a will should be signed by the testator, or by some other person in his presence and by his direction: and I wish to know if a dumb man, who could not write, were to hold out his hand for some person to guide it, and were then to make his mark, whether that would not be a sufficient signature of his will. In order to constitute a direction, it is not necessary that anything should be said. If a testator, in making his mark, is assisted by some other person, and acquiesces and adopts it, it is just the same as if he had made it without any assistance. It is observable, too, that before the mark was made, the testator made some faint strokes on each of the sheets. My opinion therefore is, that the observation made by the learned judge on this part of the case was quite correct in point of law; and therefore it affords no ground for granting a new trial."

At the Foot or End.

Whether a will or other writing be "signed at the foot or end" or not, would, à priori, seem a very simple question, and yet the construction put upon these words has been apparently so conflicting in different instances, that perhaps there is no class of cases upon which it has been more difficult to give a decisive opinion with satisfaction. It becomes therefore necessary to examine shortly the principles upon which this point has

been from time to time determined, and endeavour to ascertain whether there is at the present time any general and recognized governing principle as a guide for the future.

The learned judge of the Prerogative Court was at first disposed to construe these words "foot or end" with considerable liberality, and to act upon what was called the equity of the statute; however, a stricter construction was afterwards adopted, but the same learned person still inclining to favour the manifest intention of testators, thought himself at liberty to look at the contents of the will, and see whether the property was entirely disposed of, as by a bequest of the residue, or appointment of executors, for the purpose of ascertaining that the will was, in its dispositive character, a completed instrument. Upon this principle the case of Ayres *v.* Ayres (11 Jur. 417) was determined. But in Willis *v.* Lowe (11 Jur. 807), the will was complete in form as to its dispositive part, and there was a residuary clause and the appointment of an executor, (but the signature of the deceased was half way down the third side, though the will concluded about the middle of the second side,) probate was refused in both cases. See for some observations on these two cases, 11 Jur. part 2, p. 422. Soon after these cases came Smee *v.* Bryer (11 Jur. 103; 13 Jur. 289; 6 Moo. P. C. C. 404), which was taken up to the Judicial Committee of the Privy Council; and although the opinion of their Lordships, as delivered by Lord Brougham, has often been referred to as a leading case, it may fairly be doubted whether that case, even with reference to the words cited below, established any principle which can be made generally applicable. After Smee *v.* Bryer there were several decisions, many of which are reported in 1 Roberts (as, for example, In the goods of Howell, 1 Rob. 671), which seem to have turned on the greater or less space occurring between the conclusion of the will and the signature of the deceased; and at the beginning of last year, In the goods of Dawnay (14 Jur. 318) came before the Court, which may be taken to lay down, as the principle resulting from these cases, that the words "foot or end" may be satisfied by a common-sense construction being put upon them. Unfortunately this obvious and satisfactory construction has been very much weakened by a distinction taken between those cases, in which the signature of the deceased is beneath, and on the same side with the concluding words

of the will, and where it is not on the same side, but carried over, a distinction probably suggested by some words in Smee *v.* Bryer, where Lord Brougham, in describing the will in question, says, "no part of the will being immediately above it," that is, above the signature. This case (Smee *v.* Bryer) was of so special a kind that it cannot be made an authority for others not exactly resembling it, and this seems to have been the general opinion when the case was first decided in the Privy Council; for there was an impression that their Lordships would on some future occasion lay down a general rule as a guide for the Court below. This, however, has not yet been done. A careful perusal of Lord Brougham's judgment will satisfy the reader that the words "no part of the will being immediately above it" are merely descriptive of the instrument under his Lordship's attention, and were not intended to lay a ground for a general principle. Still if this rule, that some part of the will must be above the signature, or on the same side with the signature, were held to apply in all cases, there would be little reason, why those who have to advise upon the point should complain of any difficulty in forming an opinion upon the cases which may be laid before them. But a further distinction is drawn, and it is said you must look to the manner in which a will so questioned concludes, for all wills have not the same form of conclusion. There is the dispositive part, which of course will be found in every will; but some wills have thereto added a testimonium clause, and some an attestation clause; others have neither of, and others again have both, these clauses. Then do these clauses, or does either, form a part of the will below which the testator may write his signature? Sometimes it would seem that such clauses are embodied with and do form part of the will, and sometimes they do not. In the goods of White (7 N. C. 543) the learned judge of the Prerogative Court said, "In some cases the testimonium clause is the conclusion of the will; in other cases the attestation clause may conclude the will, though the signature of the testator ought to be at the end of the testimonium clause." And this is made more certain, since, In the goods of Batten (7 N. C. 289), the same learned judge expressed his opinion that, "generally speaking, the signature should be placed at the close of the testimonium clause."

So far then the testimonium clause may be considered as a part of the will. Next, as to the attestation clause. In the goods of Shadwell (7 N. C. 377), the dispositive part of the will ended near the bottom of the second page, space sufficient for the signature being left on that side, and on the top of the third side were the words "signed by me, in the presence of the undersigned," and the signature followed. Probate was refused on motion. Why? Was it because these words "signed by me," &c. which were read as an attestation clause, did not follow immediately and on the same side with the conclusion of the dispositive part of the will, but after a space ample enough for the signature was left on that side, and could not, therefore, be taken as a part of the will? If so, the attestation clause can then only be taken as part of the will where it is on the same side, or begins on the same side with, and follows immediately, and without intervening space, the conclusion of the dispositive part or the testimonium clause. And this view seems confirmed by the case of Batten, mentioned above, in which the learned judge described the attestation clause as following the testimonium clause, without a blank, and granted probate of the will, whilst In the goods of Pain (14 Jur. 1032), there was some little distance between the end of the will and the beginning of the attestation clause, and probate was refused. In the first of these cases, the page ended with the words, "Signed in the presence of us, who, at the request and in the presence of the said Amy Batten, testatrix, and"—the rest of the clause and the signature being on the next side. In the latter case the page ended with the words, "Signed, sealed and delivered by the above-named Mary Pain" —the rest of the clause and the signature being on the next side.

The result, therefore, would appear to be, that where the testator has placed his name below the dispositive part of the will, and on the same side, the signature will, generally speaking, be well placed. The same rule will apply where he has signed below, and on the same side with the testimonium clause. And lastly, that where the signature is below the attestation clause, but not on the same side with the conclusion of the dispositive part of the will, or testimonium clause, the will is not duly signed, unless the attestation clause follow the conclusion of the dispositive part or testimonium clause immediately, and without leaving a sufficient space for the signature of the testator.

These observations first appeared in a note to The goods of Anderson (15 Jur. 92), and as the decisions which have since occurred, at least in this country (for the Court of Delegates in Ireland have not taken so strict a view of this part of the section, Devengy *v.* Turner, referred to in Lemann *v.* Lemann, 15 Jur. 850), seem to support the view there taken of the point, they are repeated here.

It was held under the Statute of Frauds, that where it did not appear that a further signature was intended, the name of the testator written in the beginning, or any other part of a will, was a sufficient signature. (Grayson *v.* Atkinson, 2 Ves. 454.) But the Commissioners observed (p. 16), "It is almost the invariable practice to sign wills, deeds, receipts, and all other written instruments, at the foot; and we think it right to require this usual form, in order to prevent questions, whether the name of the testator appearing in any other part of the will is a sufficient signature, and in order to cause wills to be made in a formal manner and to render void imperfect papers.

"At present, if the testator is prevented by sickness or death from finishing the will, the gifts which appear to be perfect, so far as respects copyholds or personal estate, will be good. It appears to us that the rule which allows validity to such imperfect instruments, is attended with more mischief than benefit. It must be impossible to ascertain what were the intentions of a testator, unless he has given full expression to them. Where a leasehold is given to the heir, the testator may have intended to give a freehold estate to a younger child; and where a gift appears to be complete, there may have been an intention to impose some trust or condition in a subsequent part of the will. The injustice of carrying into effect part only of a general arrangement, and the danger of letting in parol evidence to prove the circumstances under which the paper was left imperfect, appear to us to be conclusive objections against the admission of such papers."

These observations seem to point out very clearly the place intended by the words "foot or end," and state the reasons why that place in particular was chosen for the signature of the testator. And, indeed, when one considers that most testators have probably been in the habit of signing letters, receipts and other papers, at the end of the writing, it is difficult to account for the ingenuity, which has been shown in case after case, in

missing the ordinary and proper sense of the simple words "foot or end." Perhaps the most perfect instance of compliance with the letter of the statute is In the goods of Raitt (14 Jur. 627), where the will ended and was signed as follows:

this 24th day of De
cember 1840, in the presence
of
Edwd. Woods, { Witnesses to the undersigned, } John Hart.
J. D. T. Raitt.

Sic.

In some cases the name of the testator has been written in the attestation clause itself, as In the goods of Woodington (2 Curt. 324), where the will ended in the following manner:—

Signed and Sealed as and for the will of me
Catherine Elizabeth Thicknesse Woodington
in the presence of us,
John Hughes,
Ellen Hughes.

The facts as deposed to were, that the deceased wrote her name as it appeared in the paper in the presence of one witness only, but afterwards, in the presence of that and the other subscribing witness, acknowledged the will to be her will, and to have been written by her. Sir H. Jenner Fust said, "The deceased, by placing her name where it stands, seems to have intended that it should answer the purpose of a description as well as a signature, and such signature being at the foot or end of the will, and the will being written by the deceased, and acknowledged by her to be her will in the presence of the two subscribing winesses, I think this is a sufficient acknowledgment of the signature to the will to satisfy the provisions of this statute." In the subsequent case (In the goods of Chaplyn, 10 Jur. 210), Sir H. J. Fust, commenting upon this case, remarked, that the words were in the first person, "the will of me," whereas in Chaplyn's case the words were, "signed by the within-named;" that the difference was material, and that he had gone as far as he could in admitting that as a good execution. Probate was refused in the latter case on other grounds also. See and compare In the goods of Gunning (1 Rob. 459).

Wills are frequently found written on alternate sheets, as

where they are written briefwise, the alternate sheets being left in blank, and sometimes blanks occur in the body of the writing; it has been decided that in these cases the wills are entitled to probate. In Corneby *v.* Gibbons (13 Jur. 264; 1 Rob. 705), there was a large space left in blank in the dispositive part. Dr. Lushington, sitting for Sir H. J. Fust, admitted the paper to probate, observing, that he should be very unwilling to throw any obstruction in the way of establishing a will, clearly carrying out the wishes of the testator, where the legislature has been silent. (In the goods of Kirby, 1 Rob. 739; In the goods of Corder, 12 Jur. 966; 1 Rob. 669.)

Blanks in the dispositive Part of the Will.

A bare acknowledgment of the testator's handwriting was sufficient to make the attestation and subscription of the witnesses good, within the Statute of Frauds, though such acknowledgment conveyed no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of signing. Therefore, where the identity of the instrument was established beyond dispute, a will of lands, subscribed by three witnesses, in the presence of, and at the request of the testator, was held to be sufficiently attested, though none of the witnesses saw the testator's signature, and only one of them knew what the paper was. (White *v.* Trustees of British Museum, 6 Bingh. 310.)

Execution by Acknowledgment of Signature.

It has been held under the present act, that acknowledgment may be expressed in any words, which will adequately convey that idea, and if the signature be proved to be then existent, no particular form of expression is required, either by the word "acknowledge," or by the exigency of the act. It seems sufficient to say "that is my will," the signature being there, and visible at the time. And it is not necessary that a testator should state to the witnesses that the signature is his. (Ilott *v.* Genge, 3 Curt. 172; Hudson *v.* Parker, 1 Rob. 25.)

Thus, In the goods of Warden (2 Curt. 335), the deceased, on being told that the two persons, who came into her room, had come as she requested, for the purpose of signing their names as witnesses to her will, replied, "I am very glad of it, thank God," and this was held a good acknowledgment of her signature, made some time before.

"Put your names below mine" (Gaze *v.* Gaze, 3 Curt. 451,) was held a good acknowledgment; and so where the witnesses

could not depose to the fact of the signature being on the will at the time of their subscription, but there was evidence to shew, that the signature had been written some time before the witnesses subscribed, the will was held to have been well executed by acknowledgment. (In the goods of Attridge, 13 Jur. 88).

But a mere request that the witnesses should sign, without saying the will or signature was the deceased's, is not sufficient. (In the goods of Rawlins, 2 Curt. 327). And where the witnesses saw no writing on the paper, and were not informed what they were witnessing, probate was refused. (Ilott *v.* Genge, 3 Curt. 172.) In affirming the sentence in this case, on appeal, Lord Lyndhurst said, "assuming that the will was signed by the deceased before the witnesses were called in, we are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by the testator." (4 Moo. P. C. C. 271.) The words of the act, however, require, not that the will, but that the signature, should be acknowledged before the witnesses. It would seem therefore to be immaterial whether the witnesses were aware, or not, of the character of the instrument which they were subscribing, but the signature must have been visible. Accordingly, where there was no proof that the signature was affixed prior to the subscription of the witnesses, the deceased having produced the will to the witnesses, merely using words implying that the paper was his will, and had not shown them any signature upon the paper, which was so folded that, if there, it could not be seen, it was held that there was no acknowledgment. (Hudson *v.* Parker, 1 Rob. 17.) Where Dr. Lushington, who sat for Sir H. J. Fust, observed, p. 25, "What is the plain meaning of acknowledging a signature in the presence of witnesses? What do the words import but this? Here is my name written, I acknowledge that name so written to be written by me, bear witness. How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it. They might swear that the testator said he acknowledged a signature, but they could not depose to the fact, that there was an existing signature to be acknowledged."

It seems scarcely necessary to observe, that the signature or mark of the testator, which is to be acknowledged, must be at the foot or end of the will; no acknowledgment, however formal and specific of the signature, if placed elsewhere, will make the will valid.

Authentication of the Will.

The next point for consideration is the mode provided for the authentication of the instrument; whether any, and if any, how many witnesses shall be present when the deceased signs, or acknowledges his signature to the will, and what part those witnesses, if called in at all, shall take in the transaction. This subject, which is one of chief importance, and upon which the practice of different countries varies, received deserved attention from the commissioners, who, in discussing the several modes of authentication, or proof of the will, remark:—"A written instrument must be proved either by the evidence of an attesting witness, or by proof of the handwriting of the party, and other circumstances. Opinions respecting handwriting must always be liable to error, and the superiority, in other respects, of the testimony of a person, who was actually present at the execution of the instrument, is obvious. The necessary concurrence of disinterested persons in any transaction, affords some security against imposition, and a considerable chance of detecting it. Indeed the difference between the value of the two descriptions of evidence is considered so great, that the courts require every written instrument which is attested, whether any attestation is necessary or not, to be proved by the witness, and will not receive any other evidence, unless the witness be dead, or his attendance cannot be procured.

3. Signature to be made or acknowledged in the Presence of Witnesses.

"The practice of executing written instruments in the presence of witnesses, and obtaining their attestation, affords the evidence of experience in favour of this mode of authentication. Attestation is not essential to the validity of a deed, and yet a deed, whether ancient or modern, is rarely found without it. Even contracts and other instruments of inferior importance are frequently signed in the presence of subscribing witnesses. Transfers, under powers of attorney, of stock in the public funds, and shares in many public companies, are not allowed to be made unless the power of attorney be attested by two witnesses; and appointments in pursuance of powers, of real or personal pro-

perty, whether by deed or will, are usually required, by the terms of the power, to be attested by two or more witnesses.

"There is no written instrument, which stands so much in need of the protection afforded by the attestation of witnesses, as a will. If it is considered expedient for deeds, it must be allowed to be much more necessary for wills. Deeds are usually made between several parties, and are acted upon immediately, or while the parties are alive; they must have been executed at a time generally known, are often protected by valuable considerations and antecedent treaties, and usually affect only a part, and sometimes only a small part, of the property of the persons by whom they are made. Whereas, on the contrary, a will does not appear until after the death of the only person, who is necessarily aware of its existence; it may by possibility have been executed at any time during the life of a testator, that a fabricator may think it most safe to fix upon, and it usually disposes of the whole property of the testator. Forgery is not the only, and far less the most usual, question affecting the validity of a will. The incapacity of the testator, or the circumstances of fraud or coercion under which a false will may have been obtained, and which may be attempted to be disproved by perjury, render the validity of a will one of the most complicated and perplexing subjects of litigation, and make it particularly necessary to require the protection of attesting witnesses. The attestation of witnesses secures their direct testimony in favour of the will as long as they live, and in case of their deaths affords the security of their handwriting. We are sensible that this protection is abridged by the case, Trustees of the British Museum *v.* White, (6 Bing. 310, and cases there cited), deciding that a witness to a will need not be informed of the nature of the instrument he attests, but we are unwilling, by altering the law in this respect, to add to the chances of mistake in executing wills, and to impose on purchasers the necessity for inquiry, as to a circumstance necessarily difficult of proof."

These considerations induced the commissioners to recommend that every will should be executed before witnesses; and they seem weighty enough to overbalance any supposed advantage, which it is sometimes conceived would be conferred

on testators, if holograph wills were admitted without attestation; particularly when we remember the just and frequent complaints of the state of things under the old law. Thus Lord Hardwicke, in Ross *v.* Ewer, (3 Atk. 163):—"There is nothing that requires so little solemnity as the making of a will of personal estate according to the ecclesiastical laws of this realm; for there is scarcely any paper writing which they will not admit as such." Lord Alvanley, in Coxe *v.* Basset (3 Ves. 160): "It is now almost absolutely necessary that the legislature should come to some regulation as to the form necessary for wills of personal estate, from the habit the spiritual court has got into of granting probate of all the loose papers that can be found, and sending them to the Court of Chancery to be construed." Lord Loughborough, in Beauchamp *v.* Lord Hardwicke, (5 Ves. 285): "It is really very unfortunate that there is no solemnity necessary for wills of personal estate." And Lord Eldon, in Matthews *v.* Warner, (4 Ves. 208): "If such a thing as this is to be proved as a will, it calls loudly upon the legislature to make some regulation as to the disposition of personal property, so that there should be something of solemnity, certainty, and precision, in order to give away that property, and defeat the natural right of the relations."

Number of Witnesses required.

In dealing with the next question, the number of witnesses, they considered, that where more than one witness is required, there is the greater probability, that a witness will be living at the death of the testator, and a greater difficulty is opposed to the fabrication of a will. If a will be forged, the same person may write the false will, and affix his own signature as a witness. The protection against forgery is greatly increased by requiring a second witness, on account of the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information, or not being able to elude a discovery of the fraud by a searching cross-examination. More than two witnesses are not required, but the number is not restricted; and as two is the ordinary number of witnesses to deeds and other instruments, the danger of mistakes may be prevented, by not requiring, for one kind of instrument, a greater number of witnesses, than is usually obtained for others.

The act does not point out any place where the witnesses are to subscribe, and, in the absence of such direction, it seems that they may place their names, or marks, on any part of the will. Where the will was written, and signed by the testator on the first side of a sheet of letter paper, and there was room left for the names of the witnesses near that of the testator, but instead of putting their names near his, they wrote them beneath an indorsement on the fourth side, the subscription was held good. In the Goods of Chamney, 1 Rob. 757.

4. Attestation of the Witnesses in the Presence of the Testator and of each other.

For the due execution of a will according to the Statute of Frauds, it was not requisite that the witnesses should attest in the presence of each other, or that one should be seen by the other. It was sufficient if the testator acknowledged his signature on his will at three several times to different witnesses. (Cook *v.* Parsons, Prec. Chan. 184; Ellis *v.* Smith, 1 Ves. jun. 11; Westbeech *v.* Kennedy, 1 Ves. & B. 362.) This construction militated against the object of the statute, and has been regretted by several eminent judges. Lord C. J. Willes, in Ellis *v.* Smith, said in reference to this, "an inlet is made for great frauds and impositions; but when they attest it *simul et semel*, they are a check on each other, and prevent such frauds." And in the same case Sir John Strange said, "I think it a dangerous determination, and destructive of those barriers the statute erected against perjury and frauds." And Lord Hardwicke observed that the authorities go too far, and open a way to frauds. And it is evident that great additional security against forgery and fraud is obtained by requiring, that the witnesses should be present at one time. In case of forgery it is easier to get two accomplices at different times, than both together. It is important that the competency of the testator, at the time of the execution of his will, should be satisfactorily established; and if the transaction must be witnessed by both witnesses at one time, they must then agree in the same story, and perjury will be more easily detected by cross-examination.

The commissioners therefore proposed that every will should be signed by the testator in the presence of, or the signature acknowledged to, two witnesses present at one time; and that they should subscribe their names in the presence of each other, or that one, having signed first, should acknowledge his signa-

ture, and be present when the attestation was signed by the other.

But they did not think it necessary to recommend that the provision of the Statute of Frauds, which required that the witnesses should subscribe in the presence of the testator, should be continued. For under the Statute of Frauds that had been disregarded so far, that the courts had not required that the testator should actually see the witnesses sign, but had considered it sufficient if he could have seen them (Casson *v.* Dade, 1 Br. C. C. 99; Shires *v.* Glascock, 2 Salk. 688; Davy *v.* Smith, 3 Salk. 395); and yet several fair wills had been adjudged void, where witnesses signed in an adjoining room, and even where the testator might, if he had thought proper, have seen them, merely by changing his position. (Doe *v.* Manifold, 1 M. & S. 294; Winchelsea *v.* Wauchope, 3 Russ. 441.)

They deemed it important, that no long interval should elapse between the execution, and the attestation of a will, because that would afford an opportunity for the substitution of a false will, and therefore create a doubt, whether the attestation was written upon the will, which had been executed by the testator. But if it were required, that both witnesses shall be present at the time, when the will is signed, and acknowledged, and shall attest it in the presence of each other, the signature of the witnesses would usually be made either in the presence of the testator, or before they lost sight of the will. And they considered whether any regulation could be made for affording further security in this respect, but stated, they were not able to devise any provision, which would not occasion evil, or inconvenience of more importance, than the advantage it would afford. Nor did it appear to them that the additional security, which might be obtained by requiring the witnesses to sign in the testator's presence, was of so much importance as the burthen and danger of imposing such a restriction.

The legislature, however, did not altogether adopt these propositions; and whilst it has added to the solemnities required by the Statute of Frauds, by making it necessary that the signature or acknowledgment should be made in the joint presence of the witnesses, has re-enacted the provision that the witnesses should subscribe the will in the presence of the testator.

As the language of both statutes with respect to "presence" is the same, the decisions (Doe *v.* Manifold, 1 M. & S. 294; Shires *v.* Glascock, 2 Salk. 688; Casson *v.* Dade, 1 Br. C. C. 99; Cater *v.* Price, Dougl. 241, and others), under the Statute of Frauds, are applicable to the present act; and similar principles have guided the decisions of the Prerogative Court. (In the goods of Newman, 1 Curt. 914; In the goods of Ellis, 2 Curt. 395; In the goods of Colman, 3 Curt. 118). In Newton *v.* Clarke (2 Curt. 323), Sir H. J. Fust was of opinion that under the act, where a paper is executed by the deceased in the same room where the witnesses are, and they attest the paper in that room, it is an attestation in the presence of the testator, although they should not actually see him sign, nor the testator actually see the witnesses sign. In this case it appears that the testator was lying in bed with the curtains open on both sides, but closed at the foot, where the table stood at which the witnesses signed, so that he might have seen them sign. In Tribe *v.* Tribe (1 Rob. 775; 13 Jur. 793), where the attestation and subscription took place also in the same room, Newton *v.* Clarke was relied on; but Sir H. J. Fust took the distinction, that in the latter case the testator might have seen, whereas in Tribe *v.* Tribe the evidence was, that the deceased could by no possibility have seen the witnesses, and holding that she might consequently as well have been absent, he pronounced against the will upon that, as well as upon another ground.

In Hudson *v.* Parker (1 Rob. 23), Dr. Lushington says on this point,—"The previous part of the clause having required the signature to be affixed 'at the foot of the will,' the section goes on, 'and such witnesses shall attest, and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.' First, then, as to the plain meaning of these words, that the signature of the testator shall be made in the presence of two witnesses, will the statute be satisfied if the signature be made in their presence, if they are in ignorance of the fact? I am of opinion, under such circumstances, that the statute is not complied with. It is obvious that the solution of this question must mainly depend on the meaning which the legislature intended to convey by the use of the word '*presence*' in this and in other clauses of the statute.

"What could possibly be the object of the legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own evidence. If the witnesses are not to be mentally as well as bodily present, they might be asleep, or intoxicated, or of unsound mind. Again, how is the signature so made to be proved, except by parol evidence? to exclude which was one great object of this statute.

"In support of this view of the question, let us call to mind how the word 'presence' is received in its common acceptation. Loquendum est ut vulgus (4 Rep. 47.) If in the course of common conversation a person wishes to support the truth of a statement, does he not say, 'such a one was *present*, and he will vouch for the truth.' If a statement be questioned, does not a person say, 'I was present, and can attest its correctness.' And does not the whole world understand by this, mental, not bodily, presence? Would not a contrary construction lead to absurdity, and defeat the plain intention of the statute?

"Then, if the witnesses are to be cognizant of the making of the signature, when the execution is in that form, must they not see, and be cognizant of, the signature, when the will is to be executed in the alternative form, by acknowledging the signature? The alternative form of execution by acknowledgment is to answer the same purpose; it is to be equivalent in effect to actual signing; and ought not the acknowledged signature to be proved by the same mode of evidence, namely, by the subscribing witnesses?"

The witnesses must sign in each other's Presence.

We come now to the class of cases, which has decided that the signature must be made, or acknowledged, in the joint presence of the two witnesses, before the subscription of those witnesses, and that the witnesses shall sign in the presence of each other, and may not acknowledge their signatures, but must make some actual mark on the paper with their own hands.

One of these points was first raised on motion In the goods of Allen (2 Curt. 331). The deceased there made her mark in the presence of one witness only, who subscribed, and afterwards, on a subsequent day, the deceased acknowledged her mark in the presence of the same witness, who did not then subscribe, and of another who did. Sir H. J. Fust ob-

served, that the natural construction of the words of the act, which are in the future tense, seemed to be, that when the signature was made or acknowledged, the witnesses shall *then* attest it, not one at one time and one at another. In Moore *v.* King (3 Curt. 243), the question was more formally disposed of. The testator had signed a codicil in the presence of a witness (his sister), who attested and subscribed it. At a later hour on the same day he showed this paper to his medical attendant, saying, "This is a codicil to my will, signed by myself and by my sister, as you will see at the bottom of the paper; you will oblige me if you will also add your signature, two witnesses being necessary," whereupon the medical attendant placed the paper near the bedside of the deceased and subscribed his name. The other witness, standing beside him at the time, pointing to her name on the paper, said, "There is my signature, you see; you had better place yours underneath." Sir H. J. Fust held, that the act was not complied with, unless both witnesses shall attest and subscribe after the testator's signature shall have been made, or acknowledged to them when both actually present at the same time. The decision of the Privy Council in Casement *v.* Fulton (5 Moo. P. C. C. 130) upon the corresponding clause, the seventh in the Indian Will Act, which is the same with the present section, with the omission of the words "attest and," before the word "subscribe," was to the same effect; and the following important observations occur at p. 140 of the judgment:— "It is not, perhaps, so important that the witnesses should both sign in each others presence; nevertheless it is of importance, for it gives an additional security against fraud or mistake, the signature being an act, the acknowledgment only a word. But be the reason what it may, if the law has said that the witnesses must sign in each others presence, we are bound; and there can be no reasonable doubt raised that the words of the act amount to this requisition. The testator is to sign or acknowledge in the presence of the witnesses present at the same time; he is not to sign or acknowledge before the witnesses present at different times; but here he has acknowledged before the witnesses present at the same time. Then must the witnesses who subscribe be present at the same time?

We think the words admit of no other construction, for they are 'and such witnesses shall subscribe.' Now this forms one sentence with the preceding words, 'present at the same time', and 'such' must plainly be read such present witnesses, or such witnesses so being present at the same time. 'Such' describes not merely the names of the witnesses, but all that is previously enacted respecting them. The quality of these witnesses is their being present at the same time; therefore we cannot limit the meaning of the large word of reference, 'such,' to the mere names or persons of the witnesses; it must embrace what had just been said of their presence—it must mean 'the witnesses, &c. present at the same time.'" See Pennant *v.* Kingscote (3 Curt. 642), where the evidence failing, the Court refused probate, and Faulds *v.* Jackson, before the Privy Council in June, 1845, in which the question was, whether a witness saw the deceased's signature, and not whether the witnesses signed in the presence of each other; the evidence, however, seemed to show that the second witness did not sign the will until the first had left the room; yet their Lordships, dealing merely with the question of the testator's signature, held the will to have been well executed, and did not notice the mode in which the witnesses signed. This case, therefore, can hardly be said to be a departure from the opinion expressed in Casement *v.* Fulton.

After the Signature of the Testator is made,

The requisites of the section will not be complied with where the deceased signs after the subscription of the witnesses. (In the goods of Olding, 2 Curt. 865; In the goods of Byrd, 3 Curt. 117.)

the making or acknowledging of which they shall attest,

With respect to the words "shall attest and shall subscribe," Dr. Lushington, in Hudson *v.* Parker (1 Rob. 26), made the following observations:—"Here are two things which the witnesses are to do—they are to attest and they are to subscribe. Mark the words shall attest and shall subscribe; the word shall is repeated; subscription alone will not do, it will not satisfy the statute; and it is a well-established rule, that you are to give, if possible, a rational meaning to every word of a statute. Then, if attest means something more than subscription, what does it mean? To attest is to bear witness to a fact. Take a common example. A notary-public attests a protest. He bears witness, not to the statements in that protest,

but to the fact of making those statements; so, I conceive, the witnesses in a will bear witness to all that the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence. The statute does say that no form of attestation shall be necessary; still the witnesses must attest, although the outward work of attestation may be subscription only. If more be wanted to explain the meaning of the word *attest*, the old form of attestation clause will show that it comprehended more than bare subscription of the will itself." In Doe *v.* Burdett (10 Cl. & Finn. 340), Coleridge, J., defines attestation to be presence as a witness, and taking cognizance of the transaction; and Patteson, J., says, "the word attested, if it have any meaning at all, must import something more than merely being present and seeing what is done."

and then make an actual Mark on the Paper with their own Hands.

With respect to subscription, it has been held, as we have had already occasion to notice (p. 90), that the witness may not acknowledge his signature; and in Playne *v.* Scriven (1 Rob. 770; 13 Jur. 712), the question whether the statute was satisfied by the witness tracing over his name with a dry pen, was the point directly in issue. The deceased had duly signed her will in the presence of H. and G., who both subscribed it, but immediately afterwards, and before they left the room, she desired H. to strike out the name of G., as G. had a legacy in the will, and to fetch another witness. This was done; and then the deceased, in the presence of H. and the new witness, acknowledged her name; the new witness subscribed, and H. drew a dry pen over his own name. Sir H. J. Fust held that this amounted to a mere acknowledgment by H., and holding the second execution to be defective, decreed probate of the will upon the first execution.

And where two persons, husband and wife, were asked to attest a will, and the husband wrote his name and also that of his wife, she being present, the attestation was held not to be in compliance with the statute. (In the goods of White, 2 Notes of Cases, 461, 1843; In the goods of Mead, 1 Notes of Cases, 456, 1847.) But where a will was subscribed by one witness, and he held and guided the hand of the second witness, who could neither read nor write, and this took place in the presence

and at the request of the testator, the subscription was held sufficient. (Harrison *v.* Elwin, 3 Q. B. 117.)

No Form of Attestation necessary.

The commissioners were of opinion, that the law which rendered it unnecessary to state in the attestation, that the forms required by the Statute of Frauds were complied with, should not be altered, and that a will should be sufficiently executed, if the name, or mark of the testator, and two other names, or marks, being those of the witnesses, appeared upon it, although there were no express attestation, or the attestation might be improperly expressed.

Practice of the Court of Probate where Clause of Attestation is wanting or defective.

However, the Prerogative Court always requires from the subscribing witnesses, an affidavit setting out the circumstances of execution, where the attestation clause is wanting, or imperfect, and does not recite all the required formalities of execution. (In the goods of Cooper, 11 Jur. 1070). And here the court will often have to deal with the instrument where the witnesses, 1. May be dead; 2. Absent; or, 3. Have forgotten the whole transaction; or, 4. Be unwilling to give evidence; or, 5. One witness may give his evidence in the affirmative, the other in the negative. The general principle applicable to these cases was considered in Burgoyne *v.* Showler (1 Rob. 5), where it was said that when the will upon the face of it appears to be duly executed, but the attestation clause is not in the strict form, the presumption is *omnia rite esse acta*. That if the two subscribing witnesses are dead, or utterly forgetful of all the facts, the law will presume the will to be duly executed; but if the witnesses profess to remember the transaction, and state that the will was not duly executed, and this negative evidence is not rebutted by proof of circumstances showing that the witnesses are not to be credited, or that from the facts and circumstances, which they state, their recollection fails them, then the will must be pronounced against.

Accordingly, in Pennant *v.* Kingscote (3 Curt. 647), where there were no circumstances on which the court could rely, and one of the attesting witnesses had a strong impression that the will was signed in his presence, but after he and his fellow witness had subscribed the will, and the other deposed that the deceased did not sign in his presence, probate was refused; but in Gove *v.* Gawen (3 Curt. 157), the court relying upon the

evidence of the drawer of the will, who was one of the subscribing witnesses, held the will to have been duly executed, though the other witness deposed against its having been signed in their joint presence. And in Young *v.* Richards (2 Curt. 371), where the subscribing witnesses differed, the court rescinded the conclusion of the cause, for the purpose of examining other witnesses present at the execution. So In the goods of Attridge, (13 Jur. 88), the witnesses not remembering whether the will was signed when they subscribed, evidence was admitted to show that the deceased's name was written on the paper some time before it was produced to the witnesses. In Cooper *v.* Bockett (4 Moo. P. C. C. 419), the evidence rather inclined to show, that the testator signed after the witnesses, but the Lords of the Judicial Committee, looking to all the circumstances in the case, and having called before them, and examined a person accustomed to compare writings, who stated that, in his opinion the testator's signature was first written, pronounced for the will. In the goods of Johnson, (2 Curt. 341), the witnesses were in India; and it was presumed by the court that the act had been complied with; whilst In the goods of Mustow (4 N. C. 289), the will was considered valid, although the attesting witnesses refused to make any affidavit as to the circumstances of execution. See Blake *v.* Knight (3 Curt. 547). In Doe *v.* Davies (9 Q. B. 648), the lessor of the plaintiff claimed under a will dated in 1828, and appearing to be attested by three witnesses: two of them were dead, and their handwriting was proved; the third witness, a marksman, could not be identified. A witness of the same name was produced, who was supposed by the lessor of the plaintiff to have attested the will; but he was in extreme old age, and had no memory on the subject. The will did not appear to have been disputed for sixteen years after the testator's death. The judge left these and other circumstances to the jury as presumptions that the will had been properly attested, and the jury accordingly so found. In delivering the judgment of the court, refusing the rule, Lord Denman said: "In this case a rule nisi to enter a nonsuit, or for a new trial, was moved for on the ground that there was no evidence to be left to the jury of a will being attested according to statute 29 Car. II. c. 3, s. 5. We are of

opinion that the direction was right, and that the verdict should stand. It has been decided that direct evidence of all the requisites required by statute 29 Car. II. c. 3, s. 5, is not indispensable to prove the validity of a will, and that the attestation in the presence of the testator may be inferred from circumstances; Croft *v.* Pawlet (2 Str. 1109); Hands *v.* James (2 Com. Rep. 531). And if the jury may infer the presence of the testator without direct evidence, we see no reason why they may not infer that an apparent signature was real, and not forged, also without direct evidence. If the law were otherwise, many wills might be defeated, if they should be undisputed until the direct witnesses of their validity should have been removed by time. On the other hand, it is not probable that the jury or the judge would dispense with the production of direct evidence unless the omission was satisfactorily explained."

Execution of Will by a Blind Person.

The present act does not disturb the general law as to a blind man's will. A blind man must, as far as his want of sight will permit him, comply with the directions of the statute. He must therefore sign, or acknowledge his signature, or (if the will is signed for him by some other person in his presence and by his direction) the signature of his delegate, to the two witnesses present at the same time, and they must sign in his presence; and although if they are in the same room with him he cannot see them, yet as there is no exception in favour of a blind man's will, they must sign in such a position, that, if he enjoyed the organs of sight, he could see them. (In the goods of Piercy, 1 Rob. 278). But the will need not be read over to him in the presence of the witnesses; it will be sufficient in such a case to prove, that instructions were given, and that the will executed was prepared in accordance with those instructions. (Edwards *v.* Fincham, 4 Moo. P. C. C. 198; 3 Curt. 63. See Longchamp *v.* Fish, 2 New Rep. 415).

So many complaints have been made of the hardships inflicted upon legatees by this section, and the construction which its enactments have received in the courts, where they have been discussed, that it may be satisfactory to repeat here the reasons which influenced the commissioners in their recommendations, when they came to consider whether there were any wills which should be admitted without the proposed forms, as exceptions to the general rule.

Reasons for requiring all Wills to be executed according to Section 9.

"According to the laws of some countries, a will written entirely by the testator is received in evidence, without any other formality; while a will merely signed by him requires some further attestation. We must admit that the security afforded by the handwriting of the testator is very great; the danger of forgery is much diminished, because no one would attempt to imitate the handwriting of a whole will, where an imitation of the signature would be sufficient; and a guard is afforded against incapacity, because the manner in which the will is expressed, and the appearance of the writing, will show the competency or incompetency of the testator; yet upon the whole we think the mischiefs of making this exception from the general rule would preponderate over the benefits. Any deviation from the uniformity of a rule increases the probability of a mistake; on the other hand the inconvenience of requiring the presence of two witnesses is very trifling, and it will be unnecessary to let them know that they are attesting a will.

"We have thought it necessary also to consider whether there is any case in which a will should be allowed to take effect, because circumstances had rendered it impossible for a testator to execute it with the forms we have recommended.

"We do not approve of the provisions of the Statute of Frauds respecting nuncupative wills. They have rendered it extremely difficult to make a valid nuncupative will of property exceeding the value of 30*l.*, and very few have since been established. If it be proper in any case to allow a nuncupative will to be made in a practicable manner, the case ought not to depend on the value or nature of the property. There is no sufficient reason, why a will of personal estate not exceeding 30*l.* should be admitted, when a will of property of greater amount in the same form is excluded; or why the gift of a leasehold estate should be good, when the devise of a freehold estate is invalid.

"It appears to us, that the only cases, in which there is good reason for dispensing with the forms, generally required for the due execution of a will, are those, where a person, in his last sickness, has not sufficient time and opportunity to make a written will, and to have it duly attested, and where the death of the testator happens unexpectedly from accident, or sudden illness, in a place where he cannot obtain sufficient assistance to

enable him to make a regular will. We admit that in many of these cases the impossibility of making a will must be attended with injury to the family of the testator; but in establishing any general rule, it is impossible to prevent all cases of individual hardship, and if nuncupative or irregular wills were allowed in such cases, the property of every person, who died away from his family, would be liable to be fraudulently taken from them by the perjury of persons, who were, or might pretend to have been, near him at the time of his death. The temptation to crime, and the loss, and litigation, which might be produced by allowing any such exception from the general rule, would probably be found to be greater evils, than the disappointment occasioned, in some cases, by the want of means to make a regular will."

Perhaps it may not be uninteresting before passing on to the next section, to state shortly the laws which prevail in some of the continental states with respect to wills, that some idea may be formed how far our own law, when compared with that of other countries, is inconvenient, or liable to the charge of inflicting any particular hardships in certain cases.

Wills under the Code Civil.

Under the Code Civil, B. 3, T. 2, Ch. 5, s. 1, there are three kinds of wills: holograph, those made by public act, and those made, as the expression there is, "dans la forme mystique."

The holograph will must be written throughout, dated, and signed by the testator, but no other formality is required.

That made by public act must be, by act signed, before two notaries, in the presence of two witnesses, or before one notary, in the presence of four witnesses. In either case, the contents must be dictated by the testator, and written by a notary, and be all read over to the testator in the presence of the requisite number (two or four) of witnesses. It must be signed by the testator, or if he state that he cannot sign, there must be express mention made in the act of such his statement, and of the cause, which prevented his signing.

The witnesses must also subscribe; but in country places it appears sufficient if one of the witnesses, two notaries being present, or two of the witnesses, one notary only being present, subscribe.

When a testator wishes to make a will and keep its contents

secret, it must be made in forme mystique; he must sign the disposition, whether he has written it himself, or caused it to be written by another The paper containing such disposition, or the envelope, if there be one, must be closed up and sealed, and the testator must present it thus closed, and sealed, to the notary, and to six witnesses at the least, or shall cause it to be closed up, and sealed, in their presence; and he shall declare that the contents of such paper are his will, written and signed by himself, or written by another, and signed by him: the notary shall thereupon draw up the act of subscription, which shall be written on the paper, or on the envelope; this act shall be signed as well by the testator, as by the notary, and the witnesses. All this must be done at once and without interruption; and in case the testator, by any impediment happening subsequently to the signature of the will, becomes unable to sign the act of subscription, mention must be made of his statement declaring that the paper contains his will, and it shall not be necessary, in such case, to add to the number of witnesses.

If the testator was unable to sign the will when he caused it to be written, a seventh or additional witness must be called in to attest the act of subscription with the other witnesses, and mention shall be made in the act of the reason why such witness was called.

Persons who are unable to read are not allowed to make a will in forme mystique.

Where a testator cannot speak, but is able to write, he may make a will in such form, but it must be written throughout, dated and signed with his own hand, and he must tender it to the notary and to the witnesses, and at the head of the act of subscription, he shall write, in their presence, that the paper which he so tenders is his will; after which the notary writes the act of subscription, in which mention is to be made of the testator's having written these words in the presence of the notary and of the witnesses.

The witnesses must be males, of full age, subjects of France, and in the enjoyment of civil rights. And where the will is made by public act, the witnesses must be persons, who take no benefit under the will, either directly to themselves, or to their relations, or connections, to the fourth degree inclusive. Nor can the clerks of the notaries employed be witnesses.

With respect to Prussia, all the Rhine provinces, except a small part of the government district of Coblentz and the district of Greifswald, where the gemeines Recht, or common law, prevails, are under the regulations of the Code Civil with regard to wills. The rest of the Prussian states, including, it is believed, the conquests of Frederick, are governed by the Preussische Landrecht, the general rule of which is, that every testamentary disposition, whether verbal, in which case it is reduced into a "protocol" by the legal officer, or in writing, when it must be signed by the testator, and must be made before a public officer appointed for the district. But a testator may give his will sealed up to the officer, who then makes a "protocol," which the testator subscribes, and the officer subscribes and seals the same with his official seal; and every will must be kept in the custody of the officer of the district, an acknowledgment of its being so deposited being given to the testator. Under the Prussian Law.

The public officer is bound to ascertain the identity, capacity and power of disposition of the testator.

The will is not void in consequence of its being made before the wrong officer; but the officer so acting out of his jurisdiction is punishable.

The revocation of a will is effected by withdrawing it from the public office, or on the proper execution of a new will.

See Allgemeines Gesetzbuch für die Preussischen Staaten, and, for Austria, Eickhorn, Deutsches Privatrecht, and Mittermaier, Grundsätze des gemeinen Deutschen Privatrecht.

There are four ways of making wills in Portugal, applicable indifferently to real or personal estate:— Under the Portuguese Law.

1st. By a public instrument written by a notary public in his book of notes (i. e. a register), at the dictation of the testator, before five witnesses, who must be males above fourteen, and signed by all. If the testator cannot write from infirmity, or otherwise, one of the witnesses signs for him.

2nd. The testator may write his own will, or get another to write it for him; and this being read over before five witnesses, the testator and all the witnesses must sign it.

If he cannot write, he must have six witnesses, one of whom must sign for him, stating the fact.

This particular instrument must be established by evidence.

The witnesses are to be examined in the presence of the next of kin or heirs (they are regarded alike), and agree as to the facts of execution, when the judge decrees that it is proved. If any of the witnesses have died, the survivors may prove.

3rd. A testator may write his own will, or get another to do it, and have it certified by a notary, who need not read it.

The notary may write it as a private individual, and certify it as a public officer.

This certificate must state, first, the date when and the place where it (the certificate) is made; secondly, whether the testator is known to the notary, or the witnesses; thirdly, it must contain a declaration that the testator delivered the paper to the notary before witnesses, asking him to certify it; fourthly, it must bear the signatures of the testator and of five witnesses, and of the notary and his public mark (or seal).

If the testator cannot hold a pen, one of the witnesses must sign for him, stating the fact, or the notary may state it in the body of the certificate.

If the testator is a marksman, a witness must also sign for him.

The notary is to begin his certificate at the end of the will, if there is a blank space; if there is not, his signature and seal should be on some part of the will.

The certificate being completed, the notary must attach it to the will, seal it up, and indorse it, and deliver it to the testator.

The notary should also enter the particulars of the certificate in his note book, and get the testator and witnesses to sign it.

The notary (with the permission of the testator) may look to see if there are any interlineations or erasures. These are noticed in the certificate.

Any declaration made by the testator in the certificate has the same force as if contained in a public instrument (first kind).

A codicil may be certified in the same manner, but requires only four witnesses, male or female, besides the notary. All sign the certificate.

4th. A person dangerously ill may declare his will vivâ voce to six persons capable of taking an oath.

If the person dies of that illness, the disposition must be re-

duced to a public form (i. e. published), by the examination of the witnesses before the judge in the presence of the heirs.

If he recovers, his disposition is void. A single witness may invalidate it.

If the nuncupative disposition be a codicil, by which no heir is created, or disinherited, five, or sometimes three, witnesses will do.

A will of the third kind may be made nuncupative by the testator at the point of death reading it, or having it read before six witnesses, and declaring it to be his last will.

But a will of the third kind, invalid for want of some formality, is not good on account of the witnesses having heard the testator declare it to be his will. It must be read before them.

The answers of a dying man to a person asking him questions are not considered as a nuncupative will, although there may be present the requisite number of witnesses for such will. He must intend to declare his will.

A codicil is defined to be a testamentary instrument disposing of a single object, or directing some work to be performed.

The testamentary power commences with males at fourteen, and females at twelve. Except where the male or female is living under the authority of the father, and then it commences at twenty-five.

Married women may make wills as if they were sole.

A gift to the medical or religious attendant of the sick person in the last illness is good. Of course it is liable to be set aside for fraud.

Gifts of land in mortmain are void.

Bequests of land and personalty are regarded alike, and so are descents.

Husbands may bequeath to their wives, and vice versâ.

If a person has lineal ascendants or descendants, he cannot dispose of more than one-third of his property.

Appointments by Will to be executed like other Wills, &c.

X. And be it further enacted, that 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 re-

spects 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.

Wills made in exercise of a power.

It has been already observed, that, previous to the present act, the donor of the power might prescribe such ceremonies, in the execution of the power, as he thought proper, and that these ceremonies must be strictly complied with. The present section, founded upon the recommendation of the commissioners, has entirely changed the law in this respect; and whatever may be the solemnities prescribed by the instrument conferring the power, a will, made in exercise of such power, will be valid, if executed in compliance with the requisites of the ninth section.

Formerly were not proved in the Spiritual Court.

Where the property is freehold, or any other than personal estate, the will does not require probate; but where the property appointed by the will is personal, it was held in the early cases that the spiritual courts had no jurisdiction, the will being in the nature of an appointment, to be carried into execution in a court of equity, and the spiritual courts were therefore prohibited from proving the will, (Brook *v.* Turner, 1 Mod. 211,) where it was said, "In this case the spiritual court has no jurisdiction at all. They have the probate of wills; but a feme covert cannot make a will. If she disposeth of anything by her husband's consent, the property of what she so disposeth passeth from him to her legatee, and it is the gift of the husband. If the goods were given into another's hands in trust for the wife, still her will is but a declaration of the trust, and not a will properly so called; but of things in action that a feme covert has as executrix, she may make a will by her husband's consent, and such a will, being properly a will in law, ought to be proved in the spiritual court" (per North, C. J.), and a prohibition was granted. And Taylor *v.* Rains (7 Mod. 148), Shardelow *v.* Naylor (1 Salk. 313; Holt, 102), where Holt, C. J., said, "this is not a will, neither ought the ordinary to prove it; if he does, a prohibition lies. Where a woman executrix marries, then she may make

a will, if her husband consents; otherwise she cannot. So if a woman, having debts due to her, marries, she may make a will quoad these, and the ordinary may prove it." Where the husband, antecedent to the marriage, covenanted with his intended wife, that she should have a power to dispose by will of her estate and effects; subsequent to the marriage, the wife was made executrix to the last will and testament of A.; the wife afterwards made her will of the goods and effects she had as executrix, and constituted B. executor thereof: upon a declaration in prohibition and demurrer to the plea put into it, the question was whether the spiritual court had a power to grant a probate thereof, or whether it should not operate as an appointment, to be carried into execution by a court of equity? And as to this point the court took this difference, where the will subsisted upon the agreement of the parties antecedent to the marriage, there the will is in the nature of an appointment, which is to be carried into execution by a court of equity; but where the wife is made executrix to another person, there the spiritual court may grant a probate of her will; for she may continue the executorship by constituting a person executor to the first testator, and she may by law make a disposition of choses in action, which she was possessed of as executrix, because in auter droit; and the spiritual court may prove such will. (Daniel *v.* Goodwin, Sugd. Pow. App. 589, No. 20.) Mr. Powel, in his edition of Swinburne, p. 155, says that the probate itself was not so exclusively of ecclesiastical cognizance, but that a trust might be considered as created by a will, executed under a power, and to which probate had been refused.

However, it is now settled that probate is necessary, and the courts of equity will not read an appointment by will, until it is duly proved, as a proper will, in the spiritual court. (Stone *v.* Forsyth, Doug. 707; Cothay *v.* Sydenham, 2 Br. C. C. 391; and Stevens *v.* Bagwell, 15 Ves. 153); in which case Sir W. Grant said, "Though formerly it was held, that the will of a married woman, not only need not, but ought not, to be proved, and that the probate was of no authority; yet it is now settled that neither courts of law, nor courts of equity, will act upon such will, if it has not been first proved in the Ecclesiastical Court." The probate does not preclude the necessity of

But now Probate is necessary.

establishing the instrument, as an appointment, upon any claim under it in a Court of Equity, for the Ecclesiastical Court can only decide that the act is testamentary, and has no jurisdiction to determine whether an instrument is a good execution of a power. (Watt *v.* Watt, 3 Ves. 246; Ex parte Tucker, 1 Mann. & Grang. 519.) But it is conclusive upon the question, whether the instrument is to be taken as a valid testamentary instrument. (Douglas *v.* Cooper, 3 Myl. & K. 378; 2 Sugd. Pow. 18.)

The doctrine was thus stated by Lord Eldon in Rich *v.* Cockell (9 Ves. 376):—"Where a feme covert had the power by will, according to the terms of the instrument requiring witnesses, to dispose of personal estate, it was necessary to prove, first, that the instrument was in the nature of a will; secondly, if so, that it was attested eo modo, in which the power required it to be attested. For the former purpose it has been hitherto deemed necessary, that this Court should be satisfied by the judgment of the Ecclesiastical Court, that the instrument is in the nature of a will; but this Court has never been contented with that judgment as to the circumstances of attestation; for, after that proof in the Ecclesiastical Court, this Court always requires the witnesses to be examined in order to prove that it is her act, and will not trust the Ecclesiastical Court with this conclusion, that, because it is her act, and in nature testamentary, therefore this Court is of necessity to hold it an appointment. Though in the terms of the power, as well as from the nature of the power, the attestation of witnesses is not necessary, still the question here is, whether it is her direction or appointment. Upon the point whether her signature is to be proved here, I think it ought; and I do not see the distinction, upon which, if in the case I put, the attestation must be proved, the Court will not also require the fact of signature to be proved again, where the essence of the appointment consists in that fact. But it does not rest there; for if there are no witnesses, the rule of evidence requires it, if this objection is insisted on. I mention this, to intimate, that I do not acquiesce in the reasoning, upon which it is concluded to be unnecessary, that it should be proved as an appointment here."

Effect of Probate.

What then, it may be inquired, is the duty of the Courts of

Practice of the Court of Probate.

Probate in respect to the wills made by married women in virtue of a power? And the recent case of Este *v.* Este (15 Jur. 159) suggests the further question—has the act of Victoria in any manner affected the practice of the Court of Probate? The issue, if the term may be used, raised, and to be determined in the Court of Probate, is whether the instrument in question be a will, or not. This must depend upon the instrument itself; and if the words of Lord Eldon, above cited, are to be taken as an authority bearing upon the Court of Probate, it would seem that the powers of that Court are practically limited to a judgment upon the paper, whether it be in the nature of a will, or not, and whether it be executed, as a will is by law required to be executed.

In Allen *v.* Bradshaw (1 Curt. 121), Sir H. J. Fust says—"It is undoubtedly true, that this Court is always anxious to carry the intentions of testators into effect; but then it must first ascertain, that the alleged testator has a legal capacity to make a will, before it can inquire as to the intention, with which the testamentary act was executed. It cannot grant probate of the will of a married woman, when that fact appears, without requiring the production of the instrument, under which she has acquired a privilege, to which she was not before entitled, and when it is satisfied, that she has the potestas testandi, the Court must then see, that she has complied with the requisite formalities.

"Formerly, indeed, the Court did not take upon itself to enter with any great minuteness into the construction of the powers, under which wills of this kind were executed, or as to the due compliance with their conditions; but it seems now to be considered that the Court of Probate is bound to decide, in the first instance, whether the power has been duly executed, before it gives the instrument the sanction of its seal."

Before the present Act.

Acting upon these principles, the Court rejected an allegation propounding a paper as the will of a married woman, the terms of the power requiring such will to be by her signed, and published in the presence of, and to be attested by, two or more credible witnesses, and the will purporting only to have been signed. In other words, the Court of Probate put a construction upon the instrument conferring the power, and upon that construction refused probate

of the paper as not made in compliance with the terms of the power.

The arguments of counsel are not reported, but all the authorities cited in the course of the judgment are from the equity and common law reports, and the learned judge proceeded throughout on the ground, that the Court of Probate was bound to look to the terms of the instrument giving the power.

This case occurred in 1835, and was followed by Tatnall *v.* Hankey in 1838, reported in 2 Monthly Law Mag. 286, in the Prerogative Court, and on appeal in the Privy Council (2 Moo. P. C. C. 342). Lady Drummond, a widow, the testatrix, was donee of property for life, with a power of appointment by will, or writing in nature of a will. She made a will, purporting to dispose of her own property, and also to execute thereby the power according to the form prescribed by the donor of the power. Two descriptions of persons, therefore, were interested in the event of this instrument being invalid—her own next of kin, if it should be invalid, as a will absolutely, in respect to her own property; and the persons to whom the fund, over which she had the power, would go, in the event of the power not being duly executed. The executors took a general probate. The trustees of the fund being then called upon to transfer the fund to the appointees under the will, applied to the Master of the Rolls for such a declaration of the due execution of the power as would operate as a discharge. The Master of the Rolls, however, referring to the fact of Lady Drummond's long residence abroad, declined to make any decree, and referred the parties to the Court of Probate as the proper forum to decide, whether the will was valid by the law of her domicile. Upon this, the surviving executor of the person interested in the event of the appointment failing, cited the executors to bring in the probate and propound the will, &c., or show cause why the probate should not be revoked, and declared null and void, and the deceased pronounced to be dead intestate, so far as concerned the appointment, by reason of the power not being executed according to the law of the domicile. To this decree the executors appeared under protest, and Sir H. J. Fust thought that the shape, in which the case came before him, left him no alternative, but to decide whether, or not, the power was well executed, to do that was not within the province of the Court,

nor would the decision of the Court be binding on the parties, and he pronounced for the protest, on the technical ground that the Court had no jurisdiction on the prayer, so made, to call in the general probate, &c. But the learned judge at the same time intimated an opinion, that the Court would not hold the paper to be valid, unless executed according to the law of the domicile. From this decision both parties appealed, and in giving the decision of their Lordships, reversing the judgment, Lord Brougham, after stating that no Court, except a Court of Probate, can decide whether an instrument purporting to be an execution of a power is testamentary or not; and referring to Ross *v.* Ewer (3 Atk. 156); Henley *v.* Philips (2 Atk. 48); Stone *v.* Forsyth (Dougl. 707), as governing this question, remarked, that the last mentioned case was important, since it showed, that a Court of Probate did not deem itself precluded from looking at the power, to see its construction, and looking at its construction it had seen its date, and had refused probate of the will, on the ground that it was dated the day before the power. He then continued: "The question is whether the Court of Probate, which thus examines the due execution of a power by a party not legally testable, can go a step further, and inquire into its execution, where the party is not in any way incapacitated from making a will, being a feme sole, of sound mind, memory and understanding." Then, after referring to the inconveniences which would result from the want of jurisdiction in the Court of Probate, and to Allen *v.* Bradshaw and other cases, as to the effect of the exercise of that jurisdiction, he concluded: "In Jenkins *v.* Whitehouse (1 Burr. 431) Lord Mansfield states that which appears to me to embody the very doctrine, and principle, upon which their Lordships will now go; he says, 'the fact that the paper was her (the testatrix's) will, in case she had a power to make one, must be established by the Ecclesiastical Court.' It is not necessary, therefore, for us to say, that the Ecclesiastical Court is here called upon to look at the power: it is neither called on to construe the power, nor the instrument executing it; but it is called upon to look at that which the testatrix assumes to do, viz., to execute a power given her in her father's will, and to declare, whether the instrument propounded is in its nature testamentary, whether it is, in fact, a will, if she had the power to make a will."

This judgment decided, what indeed could scarcely be said to be doubtful, that the Court of Probate could alone declare a writing to be testamentary, and expressly, as far as the case itself went, declared that the Court of Probate was not called upon to look at the power, either as to its creation, constitution, or execution, but only that it was bound to say, if the testatrix had the power, the paper was, or was not testamentary. The question for the Court of Probate is confined to the paper propounded as a will; upon that it is bound to pronounce an opinion, but it need not look at the power, upon which the will depends, for any effect it may have upon the property purporting to be disposed of.

However, In the goods of Biggar (2 Curt. 336), Sir H. J. Fust held, that according to the judgment of the Privy Council in Tatnall *v.* Hankey, the Court of Probate was bound to decide as to the validity of the execution of a power. And in Barnes *v.* Vincent (9 Jur. 260), where the power required the will to be signed, published, and attested, and the attestation went only to signing and sealing, he rejected an allegation propounding the will, thus deciding that the instrument purporting to execute the power did not comply with the terms of the power.

This case was appealed (10 Jur. 233; 5 Moo. P. C. C. 201), and according to the Report, counsel were directed to confine themselves to the question, whether, supposing no other objection to the will had existed, except that raised on the execution of the appointment, the Court below ought not to have admitted the will to probate, and left the question of the execution to be dealt with by the Court which might have to deal with the property passing under the will. This decision, therefore, bears expressly upon the jurisdiction, which the Court of Probate is called upon to exercise in respect to wills made under powers. Lord Brougham delivered the judgment. He first noticed the practice prevailing in the Court of Probate, which granted probate when it held the power to authorize the testamentary act, and to have been duly executed; and refused probate when those things did not appear in their judgment to concur. He then commented upon the unsatisfactory state in which this practice left the law, since, if probate were granted, it was

certain that the grant did not bind the Court of Construction, which might have to deal with the property. "The Court of Construction might, notwithstanding the probate, which had been decreed upon the supposition of the power being sufficient, and duly executed, reject the instrument altogether, and that, upon the express ground of the power not having been lawfully created; or when given conditionally, and the condition not having been performed; or when given contingently, and the contingency not having happened; or on the ground of the power not authorizing the testamentary act, or though authorizing it, and in all other respects sufficient, yet having been insufficiently pursued in the execution. Here then was the proof that the sentence of the Court of Probate, admitting the paper to probate, was any thing rather than conclusive, and that it was held inconclusive, on the ground of the power, which had formed the ground of the sentence admitting to probate. While on the other hand, if probate were refused, the Court of Construction never could know anything of the will at all; since when a power is to be executed by a last will, probate must be obtained of it, before any Court can look at it, or know of its existence. If this practice were to prevail, the Court of Construction alone would be competent conclusively to decide that the power had been duly executed, alone competent conclusively to reject the execution as defective, or the power as insufficient; and yet not competent to declare the power and execution sufficient, if the Court of Probate should have declared the contrary." A state of things which, his Lordship said, was exactly as if a Court of appellate jurisdiction should have jurisdiction to decide, if the Court below had given judgment for the plaintiff, but not competent to decide, if that Court had given judgment for the defendant.

Lord Brougham having then referred to the class of cases in which equity would relieve against a defective execution of a power, said, "Surely these considerations are sufficient to show, that the safest, and most consistent course is to grant probate, wheresoever the paper professes to be made, and executed under a power, and is made by one, whose capacity, and testamentary intention is clear, and no other objection occurs, save those connected with the power, for example, no objection under the provisions of the late Wills Act, and leave

the Court, which has to deal with the rights under that instrument, to decide, whether or not it is authorized by that power, and by its execution." In answer to the objection, that a paper may purport on the face of it to be the will of a feme covert, and that as such she is intestable, and therefore unless a power is alleged, the probate must be refused, and that consequently the Court of Probate, before which such allegation is made, has no choice, but must look to see the power, under which the will is alleged to have been made, before it can decide whether that paper is testamentary, or not; his Lordship said, "There seems no insuperable objection to holding that, on a power being alleged, the probate should be granted, because this in reality decides nothing; it only saves the point for the Courts, which can competently deal with the question, and avoids the glaring inconvenience and inconsistency of such a decision as we have already described. Their Lordships are therefore of opinion that this is the proper course to pursue, and that the contrary practice being at variance with principle, inconsistent in itself, pregnant with inconvenience, and even working a failure of justice, ought henceforth to be departed from."

And at the close of the judgment Tatnall *v.* Hankey was thus referred to. "Finally, it is fit to refer to the decision of this Court in Tatnall *v.* Hankey, for the purpose of removing all idea of the present determination being any departure from, or showing any inconsistency with, that judgment of their Lordships. There the Master of the Rolls had given his opinion upon the power, and had holden it to be well executed, but recommended the parties to take probate in respect of the alleged foreign domicile of the testatrix. They accordingly propounded the will, and the Ecclesiastical Court repudiated its jurisdiction, on the ground that although the requisites of the Neapolitan law, the lex loci domicilii, had not been complied with, yet those of Mr. Boone's will creating the power had been complied with, but that the Courts of law, and equity had alike declared, that the Court of Probate had not jurisdiction to deal with the question. Now what was the decision of this high Court upon the appeal from that judgment? We held that the Court of Probate could alone declare a writing to be testamentary; but we expressly said that in the case before us, it was not necessary to say that the Court of Probate was called

on to look at the power, either as to its creation, constitution, or execution, but only that it was bound to say if the testatrix had the power, her paper was testamentary; a decision, which is manifestly in accordance with the present." The decree of their Lordships reversed the judgment below, retained the cause, and directed evidence to be taken to prove the execution of the *will*, taking into no consideration whatever the execution of the *power*.

This judgment was stated to be in concurrence with the opinions of Lord Lyndhurst, Lord Cottenham, Lord Campbell, Sir Edw. Sugden, and Vice-Chancellor Knight Bruce, and is clearly a direct authority for holding that, in cases not within the present act, for the will in question was of a date antecedent to 1838, the duty of the Court of Probate is confined to determining whether, or not, the instrument propounded as testamentary be so irrespective of all points arising upon the execution of the power; and that the will of a married woman, alleged to be made in virtue of certain powers, is to be looked at by the Court of Probate in the same manner, and subject precisely to the same considerations, and objections, and none other, as the will of a person sui juris testable.

Since the present Act.

The same principles which governed this judgment in Barnes *v.* Vincent seem applicable to cases coming within the present act, for the question must remain the same, namely, is the instrument propounded testamentary? It is true, that under the old law, writing and testamentary capacity were all that was necessary to constitute a will of personalty; now the requisites of the ninth section of the act must be complied with; still the words of the decree above referred to remain applicable to the duty now imposed upon the Court of Probate, and if so, that Court is to act upon evidence taken to prove the execution of the will, taking into no consideration whatever the execution of the power. What is there in the act which enables the Court of Probate to construe a power, or take into consideration the execution of a power, a jurisdiction which Barnes *v.* Vincent decides it ought not to have exercised under the old law? If the Court of Probate, in the assumed exercise of such jurisdiction, should now reject a paper propounded, will not the same inconveniences arise, as those referred to in Barnes *v.* Vincent, and will not all objections to probate being granted on

the mere allegation of a power, and on proof of due execution under the 9th section, be met by the same reasoning, with which similar objections were met in that case? The duty of the Court of Probate, therefore, seems to be limited to an inquiry into the paper as a will, with which it must deal precisely, as it would with a paper purporting to be the will of a person, not under an a-priori legal incapacity, and the Court is shut out from all discussion, as to the execution of the power, when the will is alleged to be that of a married woman, made in virtue of a power.

In a very recent case (Este *v.* Este, 15 Jur. 159), the question was directly raised before Sir H. J. Fust. A will of a married woman was there propounded in an allegation in common form, merely reciting that she made the said will in and by virtue of certain powers vested in her, &c. The admission of the allegation was opposed, on behalf of the husband, on the ground, that the instrument conferring the power was not pleaded, and annexed. Barnes *v.* Vincent was relied on, as an authority for the course of pleading followed. But Sir H. J. Fust directed the allegation to be reformed, by pleading and annexing this instrument, upon two grounds, first, that Barnes *v.* Vincent did not apply, as the will there was not within the present act, and one of the reasons for that judgment, that Courts of Equity would in certain cases relieve against a defective execution, could not affect an execution defective under the statute; and secondly, that it was only by looking at the deed, that the Court could be satisfied, that it had the right parties before it, namely, the persons interested in an intestacy.

But may it not be said, that since by the law of England the personal property of a married woman vests in her husband, he is the only person interested in an intestacy, so far as that question can be discussed in a Court of Probate. Who may be the persons entitled, in default of the execution of the power, is often a very difficult question, but it is a question of construction, depending solely upon the terms of the settlement, or other instrument conferring the power; it would seem, therefore, to be a question, which ought to be discussed, not before the Court of Probate, but before the Court of Construction, which alone can determine the matter. The question before

the Court of Probate, in these cases, cannot be what interest passes by virtue of the decree of the Court, since no interest whatever does pass (*ante*, p. 69), and in pronouncing for the paper, as a will, that Court decides nothing as to the rights, or interests, of any of the parties, whom it necessarily leaves to prosecute their claims, if requisite, before a Court of Construction. Again the argument drawn from the fact, that Courts of Equity cannot now relieve against the defective execution of a power to be exercised by will would seem of little weight, since the Court of Probate cannot pronounce for or against a will, made by virtue of a power, except as it may have been executed, or not, in compliance with the requisites of the act. It should be added, that the decision in Este *v.* Este was not appealed from, and the proceedings, on the part of the husband, against the will were abandoned.

Since the decision in Barnes *v.* Vincent, the practice has been, not to require the production of the settlement or other instrument conferring the power, in virtue of which the will of a married woman is made; but to have it alleged, in acts of court, that the deceased, whilst under coverture, and in virtue of certain powers and authorities given to and vested in her, in and by an indenture or will (the date of and parties to which are set forth), executed her last will and testament in writing, &c., whereupon limited probate or general administration with such will annexed, as the case may be, is decreed, so far only as concerns all the right, title and interest of the said testatrix in and to all such personal estate, and effects as she, by virtue of the indenture, &c., had a right to appoint, or dispose of, and hath in and by such her will appointed, or disposed of accordingly, but no further, or otherwise. This practice has not been as yet affected by the decision in Este *v.* Este.

In respect to the proposition, adopted in this section, that wills under powers should be within the general rule, the Commissioners observed, that although wills made in the execution of powers were liable to be burthened with all such formalities, and conditions, as the person by whom the power is created may require, yet in most cases such formalities were required only in consequence of the state of the law, which, where no solemnities are mentioned, allowed a power not relating to freehold estate to be exercised by a will in any form.

But if wills, in exercise of powers, were required to be made in the same manner as other wills, no practical advantage would arise from allowing any other solemnities to be imposed, and it was of great importance to prevent the litigation occasioned by questions, whether the particular solemnities required by the power had been duly complied with.

Soldiers and Mariners' Wills excepted.

XI. Provided always and be it further enacted, that 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.

29 Car. 2, c. 3, s. 23, is the corresponding section in the Statute of Frauds, which remained in force till the present act came into operation, except in respect to the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines and marines, so far as relates to their wages, pay, prize and bounty money, and allowances, as to which, see the next section.

In Wynne's Life of Sir Leoline Jenkins, p. 33, Sir Leoline is said to have had some hand in preparing the Statute of Frauds, especially that proviso in it which exempts the wills of soldiers and seamen from the strict formalities required in the wills of other persons, leaving them to the full privilege of the old Roman military testament.

In almost all countries, however, an exception to the general rule has been allowed in favour of military wills; and the commissioners, when considering this question, remarked that they were not aware that any inconvenience had arisen from the liberty given by the 23rd section of the Statute of Frauds. It might be urged that such persons are fully aware of the danger they incur, and therefore had no excuse for having neglected the arrangement of their affairs; but some degree of improvidence must be allowed for in persons who enter into the professions of soldiers and seamen, and they saw no sufficient reason for discontinuing the exception which had so long been made in favour of the objects of their latest preference.

Exception includes Officers,

The words soldier and mariner have been held to include

officers. In Drummond *v.* Parish (3 Curt. 522) the deceased was a major general. In the goods of Hayes (2 Curt. 338) the deceased was a purser in the Royal Navy; and in Seymour's case (cited 2 Curt. 339), the deceased was an admiral. Soldiers in the East India Company's service (In the goods of Donaldson, 2 Curt. 386), and mariners in the merchant service (Morrell *v.* Morrell, 1 Hagg. 51; In the goods of Milligan, 13 Jur. 1011), are also included.

Persons in the Military Service of East India Company, and Mariners in the Merchant Service.

Under this section, a will, without any of the formalities required by the 9th section, and even a nuncupative will, if made by a soldier in actual military service, or mariner at sea, will be valid. In Morrell *v.* Morrell (1 Hagg. 51) administration, with a nuncupative will annexed, was granted to the sole legatee, no executor being named. In the goods of Hayes (2 Curt. 338) probate was decreed of an unattested codicil.

In some of the earlier cases under the present act, probate of informal papers passed upon affidavit from a clerk in the War Office, that the persons deceased were at the times when their wills were made in actual military service; but In the goods of Phipps (2 Curt. 368) Sir H. J. Fust observed, in reference to this kind of evidence, and the practice founded on it, that he was not prepared to say that our regiments in the colonies, or in garrison at home, were in actual military service; nor could he think that it was the intention of the legislature to except every officer under such circumstances from the operation of this act. That he should allow probate of the paper to pass under the peculiar circumstances of the case, although he should not do so unless the father of the deceased, who was entitled to the whole of the property in the event of an intestacy, had himself prayed probate of the paper, and there was no one against whom it could be propounded.

This point was afterwards very fully argued in Drummond *v.* Parish (3 Curt. 522). The allegation propounding the paper, after reciting the present section, pleaded "that the deceased, at the date of his will, and at the time of his death, was a major-general in her majesty's army, and held the appointment of director-general of the Royal Artillery, and received the full pay and allowances of such appointment; that the duties of his office extended to the troops of the Royal Artillery abroad as well as in England; that he was liable to

Meaning of actual Military Service,

be tried by court-martial, and was subject in all respects to military law; that he was accordingly liable to be sent abroad upon foreign service whenever it might be required, and was as completely to all intents and purposes in the actual service of her Majesty as if he had been in the command of or serving with a British regiment on foreign service." Sir H. J. Fust, in a very learned judgment, in the course of which he commented on the rules of the civil law, and the codes of several countries in Europe, respecting the testamentary privilege of soldiers, came to the conclusion that the principle of exemption contained in the section was adopted from the Roman law, and that by the insertion of the words *actual military service*, the privilege, as respects the British soldier, is confined to those who are on an expedition, and he rejected the allegation.

This decision has very materially limited the exemptions under this section, in respect to the words actual military service.

In the goods of Hill (1 Rob. 276), the facts sworn to by the military secretary were, "that the deceased was a major-general in her Majesty's army, and left England in 1841 for the purpose of assuming a divisional command in the East Indies; that in November, 1841, he was appointed to, and in the following month assumed, the command of a division, and continued to hold such command, and to have his ordinary place of residence at the head-quarters of such divison till the period of his death, and was actually resident there in May, 1843 (the date of the paper intended as a will); that he died in January, 1845, whilst on a tour of inspection of the troops under his command; that during the whole period from December, 1841, till his death, he was in the active performance of the duties of such military command, and was at any moment liable to have been called on to march with his division, or any other body of troops, to whatever point the exigencies of the wars, which were during such time carrying on in India, might have required, and was during the whole of the time subject to martial law, and, according to the rules of the army and in military understanding and acceptation, in actual military service." But the Court, holding itself bound by Drummond *v.* Parish, rejected a motion for probate of a letter signed by the deceased, but not witnessed.

The essoin de servitio regis appears to have been subject to a similar limitation, since it was not allowed for "one constantly in the king's service, unless while he was actually employed on some expedition." (1 Reeves's Hist. E. L. 408.)

and of the words "being at Sea."

The words "at sea" have also received a strict construction. In Seymour's case (2 Curt. 339; 3 Curt. 530), the deceased was commander in chief of the naval force at Jamaica, but lived on shore at the official residence, his family and establishment being on shore, and it was held that he did not come within the exception of mariner at sea. In the goods of Lay (2 Curt. 375), the deceased went on shore on leave, on the 4th of November, and in consequence of an accident died on shore on the 9th. Directly after the accident he wrote on a watch bill in pencil his will, which was unattested, and Sir H. J. Fust, distinguishing the case from Seymour's, said, this is the will of a seaman at sea, although the deceased, having had leave to go on shore, was not actually in the ship at the time the will was made. Another principle which may be drawn from the cases referred to in this section is, that, in order to come within the exception, the informal will must be made, and the soldier die on the expedition, and the informal will must be made, and the mariner die, at sea, and before he has an opportunity of making a formal will on shore. The Motherbank (Passmore *v.* Passmore, 1 Phillim. 216); and Margate Roads (In the goods of Milligan, 13 Jur. 1011), are sea for this purpose. But it may be presumed that inopia consilii cannot be, as has been sometimes suggested (2 Curt. 340), the only reason of the privilege, since if that were so, it would not extend to minors, who are held to come within the exception. (In the goods of Farquhar, Waddilove's Digest, 337.) This decision, however, was on motion, and perhaps some doubt may be felt, whether the present section is an exception to the law enacted by the seventh section. The reasons assigned for the exception, as the improvidence and want of assistance, to which the persons concerned are supposed liable, fail in the case of minority. The commissioners did not, apparently, consider the question of minority, but confined their attention to wills informal in their execution, ante, p. 114. And the corresponding section of the Statute of Frauds gave no privilege in respect of age, which might, indeed, not be deemed necessary, when the age for making a will of personalty was fourteen.

Still the words of the present section are so large, that there seems great difficulty in applying them to the ninth section only, and not extending them to the seventh; and the doubt would not have been raised here, had it not been from the bearing, which the subject has upon the doctrine of inopia consilii, as the foundation of the privilege in question. So far as officers are concerned, it has been suggested that the law may well consider them of full age as to capacity, since important public duties and great responsibility may, in the course of service, be imposed upon, and required of them before they are twenty-one.

The exception, it will be observed, extends to personal property only.

Act not to affect provisions of 11 Geo. 4 & 1 W. 4. c. 20, with respect to Wills of Petty Officers, &c.

XII. And be it further enacted, that this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

The commissioners, having considered whether the formalities generally required might be dispensed with in any and what cases, next considered whether there were any cases in which formalities beyond those required by the general rule, might advantageously be made essential to the validity of wills, and thinking that the wills of the persons referred to in this section required additional protection, they recommended that the restrictions required by 11 Geo. IV. & 1 Wm. IV. c. 20, should not be discontinued.

The twenty-third section of the Statute of Frauds, as we had occasion to observe in considering the last section, contained an exception in favour of mariners at sea, with respect to the testamentary disposition of their movables, wages and personal estate; but the perpetual impositions practised on petty officers and seamen in the navy, with respect to their pay and prize-money, induced the legislature to adopt a new policy, and to divest them of a privilege which, instead of being beneficial, was perverted to purposes the most injurious. Several statutes were accordingly passed from time to time, to impose forms and ceremonials for their protection; these were all repealed and consolidated by the act referred to in the present section, which enacts as follows, in regard to the execution and probate of such wills.

Mode of executing Letters of Attorney, and Wills of Petty Officers, Seamen, and Marines.

S. 48. "And whereas it is expedient to establish regulations for the prevention of forgery and fraud, which have been heretofore much practised in relation to the pay of the Royal Navy, Be it further enacted, that no will made by any petty officer or seaman, non-commissioned officer of marines or marine, before his entry into his majesty's service, shall be valid to pass any wages, prize money, or other monies payable in respect of services in his majesty's navy, and that no letter of attorney made by any such person who shall be or shall have been in the said service, or by the widow, next of kin, executors, or administrators of any such person shall be valid or sufficient to entitle any person to receive any wages, prize money, or other allowance of money of any kind for the service of any such person in his majesty's navy, unless such letter of attorney shall be therein expressed to be revocable; and that no such letter of attorney shall be valid or sufficient to entitle any person to receive any such wages or other monies, nor shall any will made or to be made by any petty officer or seaman, non-commissioned officer of marines or marine, who shall be or shall have been in the naval service of his majesty, be valid or sufficient to pass any such wages, prize money, or other monies, unless such letter of attorney or will respectively shall contain the name of the ship to which the person executing the same belonged at the time, or to which he last belonged; nor unless such letter of attorney, if made by an executor or administrator, shall contain the name of the ship to which his or her testator or intestate last belonged;

and also in every case a full description of the degree of relation ship or residence of the person or persons to whom or in whose favour, either as attorney or attornies, executor or executors, the same shall be made; and also the day of the month and year, and the name of the place when and where the same shall have been executed; nor shall any such letter of attorney or will be valid for the purposes aforesaid, unless the same respectively shall, in the several cases hereinafter specified, be executed and attested in the manner hereinafter mentioned, (that is to say) in case any such letter of attorney or will shall be made by any such petty officer or seaman, non-commissioned officer of marines or marine, while belonging to and on board of any ship of his majesty as part of her complement, or borne on the books thereof as a supernumerary, or as an invalid, or for victuals only, the same shall be executed in the presence of and be attested by the captain, or (in his absence) by the commanding officer for the time being, and who in that case shall state at the foot of the attestation the absence of the captain at the time, and the occasion thereof; and in case of the inability of the captain, by reason of wounds or sickness, to attest any such will or letter of attorney, then the same shall be executed in the presence of and be attested by the officer next in command, who shall state at the foot of such attestation the inability of the captain to attest the same and the cause thereof; and if made in any of his majesty's hospital ships, or, in any naval or other hospital, or at any sick quarters either at home or abroad, the same shall be executed in the presence of and be attested by the governor, physician, surgeon, assistant surgeon, agent, or chaplain of any such hospital or sick quarters; or by the commanding officer, agent, physician, surgeon, assistant surgeon, or chaplain for the time being of any such hospital ship; or by the physician, surgeon, assistant surgeon, agent, chaplain, or chief officer of any military or merchant hospital, or other sick quarters, or one of them; and if made on board of any ship or vessel in the transport service, or in any other merchant ship or vessel, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain in his majesty's navy, or some commission officer or chaplain belonging to his majesty's land forces or royal marines, or the governor, physician, surgeon, or agent of any hospital in his majesty's naval or mili-

tary service, if any such shall be then on board, or by the master or first mate thereof; and if made after he shall have been discharged from his majesty's service, or if such letter of attorney be made by the executor or administrator of any such petty officer or seaman, non-commissioned officer of marines or marine, if the party making the same shall then reside in London, or within the bills of mortality, the same shall be executed in the presence of and be attested by the inspector for the time being of seamen's wills and powers of attorney, or his assistant or clerk; or if the party making the same shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his majesty's service are paid, the same shall be executed in the presence of and be attested by one of the clerks of the treasurer of the navy resident at such port or place; or if the party making such letter of attorney or will shall then reside at any other place in Great Britain or Ireland, or in the islands of Guernsey, Jersey, Alderney, Sark, or Man, the same shall be executed in the presence of and be attested by one of his majesty's justices of the peace, or by the minister or officiating minister or curate of the parish or place in which the same shall be executed; or if the party making the same shall then reside in any other part of his majesty's dominions, or in any colony, plantation, settlement, fort, factory, or any other foreign possession of his majesty, or any settlement within the charter of the East India Company, the same shall be executed in the presence of and be attested by some commission or warrant officer, or chaplain of his majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval storekeeper at one of his majesty's naval yards, or a minister of the Church of England or Scotland, or a magistrate or principal officer residing in any of such places respectively; or if the party making the same shall then reside at any place not within his majesty's dominions, or any of the places last mentioned, the same shall be executed in the presence of and be attested by the British consul or vice-consul, or some officer having a public appointment or commission, civil, naval, or military, under his majesty's government, or by a magistrate or notary public of or near the place where such letter of attorney or will shall be executed; nor shall any will of any petty officer, seaman, non-commis-

sioned officer of marines or marine, be deemed good or valid in law to any intent or purpose, which shall be contained, printed, or written in the same instrument, paper, or parchment, with a power of attorney: Provided always, nevertheless, that if it shall appear to the satisfaction of the treasurer of his majesty's navy, in the case of any will or letter of attorney executed on board any of his majesty's ships, that in the attestation thereof the captain's signature hath by accident or inadvertence been omitted, and that in all other respects the execution has been conformable to the provisions and to the intent and meaning of this act, it shall be lawful for the inspector of seamen's wills and powers to pass the same as valid and sufficient."

Exceptions as to Wills made by Prisoners of War.

49. "Provided always, and be it further enacted, that every letter of attorney, or will, which hath been, or which hereafter shall be made by any petty officer or seaman, non-commissioned officer of marines or marine, while any such person hath been or shall be a prisoner of war, shall be valid to all intents and purposes, provided it shall have been executed in the presence of and be attested by some commission officer of the army, navy, or royal marines, or by some warrant officer of his majesty's navy, or by a physician, surgeon, or assistant surgeon in the army or navy, agent to some naval hospital, or chaplain of the army or navy, or by any notary public, but so as not to invalidate or disturb any payment which hath been already made under any letter of administration, certificates or otherwise, in consequence of the rejection of any such wills by the inspector of seamen's wills, for want of the due attestation thereof according to the directions of any former act of parliament.

Wills, &c. to be noted in the Muster Book.

50. "And be it further enacted, that all officers commanding ships shall, upon their monthly muster books or returns, distinguish which of the persons therein named have made any letter of attorney or will during that month, or other space of time from the preceding return, by inserting the date of such letter of attorney or will opposite the party's name, under the heads of "letter of attorney," or "will," or both, as the case may require, and shall likewise transmit to the treasurer of the navy, at the time such returns are transmitted to the Navy Office, a list to the same effect of all such persons.

Letters of Attorney and Wills, to be examined by the Inspector.

51. "And be it further enacted, that before any letter of attorney or will shall be attempted to be acted upon or put in force, the same shall be sent to the treasurer of the navy, at the Navy Pay Office, London, in order that it may be examined by the inspector of seamen's wills and letters of attorney, who, or his assistant, shall, on the receipt thereof, duly register the same in a numerical and alphabetical manner, in separate books to be kept for that purpose, specifying the date, the place where executed, the name and description of the party making the same, the names and additions of the persons described therein either as attornies or executors, and also of the witnesses attesting the same, and shall mark the same with the corresponding numbers in the ship's books; and the said inspector shall take due means to ascertain the authenticity of every such letter of attorney and will, and in case he shall have reason to suspect its authenticity, he shall give notice in writing to the attorney or executor, as the case may be, that the same is stopped, and the reason thereof; and shall also report the same to the treasurer of the navy, and shall enter his caveat against such letter of attorney or will, which shall prevent any money from being received thereon until the same shall be authenticated to the satisfaction of the said treasurer; but if there shall be no reason upon such examination to doubt its authenticity, the said inspector or his assistant shall sign his name thereto, and also put a stamp thereon in token of his approbation thereof, and as to such letters of attorney forthwith send to the person therein named as attorney a check specifying the number of such letter of attorney, the name and description of the person granting the same, the name and addition of the person in whose favour the same is granted, the date and place when and where executed, and the names of the witnesses attesting the same, which check shall be a sufficient authority for the attorney to demand and receive payment of and to give acquittances for all such wages, pay, or other allowances of money, to which the person granting the same was entitled for his service on board any of his majesty's ships.

Mode by which Executors are to obtain Probate.

55. "And be it enacted, that when any petty officer or seaman, non-commissioned officer of marines or marine, who shall have belonged to any ship of his majesty, shall have died, leaving a will, no wages, prize-money, or other allowance of

money shall be paid over to or recovered by his executor or executors, except upon the probate of the will, to be obtained in the following manner, videlicet, after such will shall have been so transmitted, registered, and approved as hereinbefore directed, the inspector shall cause to be issued to the person named therein as executor a check in lieu thereof, containing directions to return the same, with his or her signature thereto, upon the testator's death, to the treasurer of his majesty's navy, which check shall be in the form heretofore used in such cases, or in such other form as the treasurer of the navy shall deem most expedient and conducive to the purposes of this act, and shall have the requisite certificates in blank subscribed thereto, to be filled up as hereinafter mentioned, and in the event of the testator's death, the minister or curate of the parish in which the party named as executor shall then reside, shall, upon the application of the executor, examine him and such two inhabitant householders of the parish as may be disposed to certify their personal knowledge of the holder of the check, touching his claim, and that they are satisfied of his being the person therein described as executor, and the said executor shall subscribe his name to the application, and the two householders their names to the certificate for that purpose subjoined to the check (the blanks therein being first filled up agreeable to truth), in the presence of the minister or curate, for which respective purposes the said executor and householders shall attend at such time and place as shall be appointed by the minister or curate, who being, upon the examination of the several parties, satisfied with their answers, and that the person holding the check is the executor therein named, and that the two persons certifying as before required are inhabitant householders of the parish, and having seen the said parties sign the application and certificate respectively (which he is hereby required to do), shall add thereto a description of the height, complexion, colour of eyes and hair, age, and any particular marks about the person of the party claiming as executor, and, after the several blanks shall have be filled up agreeable to truth, shall certify to the several particulars by subscribing his signature thereto; and the said executor shall, before signing the application, pay to the said minister or curate a fee of two shillings and sixpence for his trouble on the occasion, and the said appli-

cation and certificates being in all things completed according to the directions therein and hereby given, the same shall be transmitted by the said minister or curate by the general post, addressed to the treasurer of the navy, London; and the said original will having been passed in the manner directed by this act, the inspector shall note thereon the amount of the wages due to the deceased, as calculated on the search to be obtained from the Navy Office, and shall then forward such will to a proctor, in order to his obtaining probate thereof; and in case the executor shall not reside within the bills of mortality, the inspector shall also forward to such proctor a letter addressed to the minister, in the usual or other requisite form, for the purpose of its being transmitted to him, with the commission for administering the necessary oaths to the party as executor; and such proctor, having received the will and the said letter of the inspector (in case such letter shall be necessary), shall immediately sue out the previous commission or requisition, or take such other steps as may be necessary towards enabling the executor to obtain probate, and shall inclose in the said letter a copy of the will and the commission or requisition, with instructions for executing the same, and forward the same to the minister by the general post, agreeably to the address put thereon by the inspector.

Sums not exceeding 20*l.*, due to deceased Petty Officers, to be paid on certificate.

69. "In order to avoid the expense which the relatives of deceased officers, seamen and marines may be otherwise obliged to incur to obtain payment of small sums due for the services of such deceased persons, be it enacted, that in all cases when any monies not exceeding twenty pounds shall be due on account of any wages, prize-money, or other allowances payable on account of the services of any deceased petty officer, seaman, non-commissioned officer of marines or marine, it shall be lawful for the inspector of seamen's wills, after having, by the requisite previous steps as before directed, ascertained the right of any claimant to probate of the will, or to administration of the effects of the deceased, to issue a check or certificate to that effect, in such form as by the treasurer of the navy shall be deemed expedient; and to the same end, in all cases when any monies not exceeding in the whole the sum of thirty-two pounds shall be payable on account of any pay or half-pay, or

pension of any deceased officer of the navy or royal marines, or of any pension to any deceased widow of an officer, or on account of any allowance from the compassionate fund to any deceased person, it shall be lawful for the said treasurer of the navy, or for the paymaster of royal marines, as the case may be, after having ascertained in a satisfactory manner the right of any claimant to probate of the will, or to letters of administration of the effects of the deceased, and that the deceased has not left any other assets to be administered than the arrears of pay, half-pay, pension or allowance, not exceeding thirty-two pounds as aforesaid, to issue a certificate to that effect, in such form as shall be deemed expedient; and upon such check or certificate of the inspector, and upon such certificate of the treasurer of the navy and paymaster of royal marines respectively, payment of the monies so due, not exceeding the respective sums of twenty pounds and thirty-two pounds as aforesaid, shall be made to the parties named in such checks and certificates respectively, either personally, or, if they shall desire it, by remittance bill, in the manner by this act provided with respect to payments by remittance; and all payments made under such checks and certificates, not exceeding the respective sums aforesaid, shall be as effectual and legal as if the same had been made under any probate of a will or letters of administration duly granted by the proper court, and shall be allowed to the said treasurer and paymaster of royal marines in their respective accounts."

The fees payable on these probates, or letters of administration, are now regulated by 2 & 3 Will. IV. c. 40.

Publication not to be requisite.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

In Ross *v.* Ewer (3 Atk. 161), Lord Hardwicke was of opinion that publication was in the eye of the law an essential part of the execution of a will of freehold lands, and not a mere matter of form. However, in Moodie *v.* Reid (7 Taunt. 361), Lord C. J. Gibbs expressed a decided opinion that publication was not an essential part of a will, not being, as he conceived, necessary to devises by custom at common law, nor made so by

the statutes of Hen. VIII. and Car, II.; and subsequent judges have virtually adopted the latter opinion, they having decided that a will of freehold lands may be duly executed by a testator without any formal recognition of, or allusion to, the testamentary act; indeed without his uttering a syllable declaratory of the nature of the instrument. (1 Jarm. on Wills, 71; White *v.* Trusteesof British Museum, 6 Bingh. 310.)

After referring to Lord Hardwicke's opinion in Ross *v.* Ewer, the commissioners remark that there may be a doubt, when an instrument has not been attested, whether it is finally determined upon as complete, or whether it is intended to be kept as a subject for consideration. Some act may therefore be necessary to show a final intention to give effect to it; but the act of signing or acknowledging it in the presence of witnesses is as complete a declaration of intention as could be made by any form of words, and there appears to be no occasion for the addition of any further ceremony; besides, the testator has the power of revoking or altering the will whenever he may think proper. Publication therefore appeared to them to be unnecessary, and the present section, in accordance with that opinion, has made publication entirely unnecessary to the validity of any testamentary instrument.

In point of fact, the meaning of the word publication does not appear to have been very well ascertained. In Curteis *v.* Kenrick (3 M. & W. 472), Lord Abinger observed that the law has given no definition of the meaning of the word published when applied to a will. It certainly could not mean that the whole contents of the will should be made known to the witnesses. If it mean anything less than that, there was no reason why delivery should not be publication. Delivery is a publication, to those who are present, of the completion of the instrument, the signing and delivery of which they are called upon to attest. If the case therefore had been original, he would have been disposed to think that delivery was equivalent to publication. But there was sufficient authority to be found for this opinion, that of Lord Chief Justice Gibbs, in Moodie *v.* Reid (7 Taunt. 361); next, that of the Vice-Chancellor, in the case of Simeon *v.* Simeon (4 Sim. 555); also in the case of Lampriere *v.* Valpy (5 Sim. 108); and that of Lord Lyndhurst, in Ward *v.* Swift (1 C. & M. 171).

Will not void by Incompetency of Witness.

XIV. And be it further enacted, that 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.

Statute of Frauds. Credible witnesses.

The Statute of Frauds required the witnesses to be "credible." Upon this expression several questions were raised. First, as to the meaning of the word "credible" and whether it was synonimous to competent. So with respect to the time when the witness must be credible, or competent, whether at the moment of execution, or at the time of examination.

Lord Mansfield thought the word credible had a clear, precise meaning, a signification universally received; and that it was not a term of art appropriated only to legal notions, never used as synonimous to competent, and when applied to testimony, presupposed the evidence given. (Windham *v.* Chetwynd, 1 Burr. 414.) Whilst Lord Camden was of opinion that "credible" meant competent, and that the witnesses must be endowed with this qualification of credibility at the time of attestation. "A will," he observed, "is a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death; and the only question that can be asked in this case is, was the testator in his senses when he made it? And consequently the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are so called in emphatically. The statute says three credible witnesses. What is their employment? I say, to judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to refuse their attestation. In all other cases the witnesses are passive; here they are active, and in truth the principal parties to the transaction. The testator is entrusted to their care." (Doe *v.* Kersey, 4 Burn, E. L. 118, 9th ed.)

And some judges were of opinion that a subscribing witness was restored to his competency, if all his interest had been released, or extinguished at the time of the examination; whilst others held, that if he was interested at the time of attestation,

nothing ex post facto could give effect to his attestation. (1 Phill. Evid. 151, n.)

In Holdfast *v.* Dowsing (2 Str. 1253) the Court of King's Bench would not allow a legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish for the establishment of the will.

The decision in Holdfast *v.* Dowsing is said to have alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For if the will was attested by a servant, to whom wages were due,—by the apothecary or attorney, whose very attendance made them creditors, or by the minister of the parish, who had any demand for tithes or ecclesiastical dues—and these are the persons most likely to be present in the testator's last illness—and if in such case the testator had charged his real estate with the payment of his debts,—the whole will and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which re- 25 Geo. 2, c. 6.
stored both the competency and the credit of such legatees, by declaring void all legacies (and this extended to devises of lands and every interest given to the witnesses) in favour of the persons who were the witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit, like that of all other witnesses, to be considered, on a view of all the circumstances, by the court and jury before whom such will should be contested. (2 Bl. Comm. 377.)

Great authorities have differed in opinion, whether the act of Geo. II. extended to all wills, or only to wills of freehold estates (Lees *v.* Summersgill, 17 Ves. 508; Emanuel *v.* Constable, 3 Russ. 436; Brett *v.* Brett, 3 Add. 210; Foster *v.* Banbury, 3 Sim. 40); but the prevailing opinion was, that it did not apply to wills of personal estate; for as such wills did not require an attestation, the ground for vacating the gift to the witness failed.

And it was decided, that the act extended only to persons beneficially interested, and not to a devisee or executor in trust

(Bettison *v.* Bromley, 12 East, 250; Phipps *v.* Pilcher, 6 Taunt. 220; 1 Madd. 144; Goodtitle *v.* Welford, Dougl. 139); and that it only applied where the witness took a direct interest under a will, and not where his interest arose consequentially. Thus where one of the three attesting witnesses to a will was the husband of a devisee in fee of a freehold estate, who would jure uxoris have derived an interest in the devised lands, it was held that the devise was not within the statute, and consequently the attestation was insufficient. (Hatfield *v.* Thorp, 5 B. & Ald. 589.)

Effect of the Section.

The second section of the present act repeals the statute of Geo. II. except so far as relates to colonies and plantations in America; but the provisions of that statute are re-enacted and enlarged in the fifteenth and sixteenth sections; and it will be remembered that the ninth section has omitted the word credible. So that by the present law, provided the testamentary instrument be executed in compliance with the ninth section, it will be valid, although the witnesses at the time of the execution of the will, or afterwards, may be incompetent to be admitted as witnesses to prove the execution, and whether such incompetency arise from interest, or be founded on infamy of character.

Different considerations, depending upon distinct grounds, apply to the case of witnesses who may be considered incompetent by reason of some permanent or temporary defect (as lunacy, intoxication or stupor); such persons cannot be deemed, in any rational sense of the words, capable of being present at and attesting the act of another. (See 1 Jarm. Wills, 102.)

In regard to the competency of witnesses, other than subscribing witnesses, whether arising from interest, or infamy of character, the law has been very materially altered since the passing of the present act.

Incompetency by reason of Interest,

No rule can be more reasonable, in a general view, than that which requires the testimony by which any fact is to be established, to be free from that bias which an interest in the event might even imperceptibly give to the mind of the witness. But this rule, though so admirable in its principle, is perhaps, of all the rules of evidence, the most flexible in its application. The variety of influences to which the human mind is subject, may be considered as interests which it more

or less anxiously consults. The voice of nature may be supposed to give a bias to the testimony of those who stand in the relation of blood. A child is interested in preserving the character and defending the property of its parent; but this is a species of interest which the law does not apprehend to be likely to supersede the rights of truth and justice, and therefore a child, by our law, may be a witness for or against his father. The testimony of a friend may in some instances be considered as the testimony of a man on his own behalf, but the law does not reject such testimony; it may, indeed, in such instances, be influenced by a more powerful motive than the prospect of acquiring or preserving wealth; but it is a consideration which does not disqualify the witness, however it may weigh in estimating his credit. What then, it may be asked, is intended by the interest which excludes the testimony of a man whose testimony is in other respects unimpeachable? It is a melancholy reflection, that though the law of England conceived the claims of truth to be sufficiently strong to repress the feelings of nature, and the not less powerful dictates of friendship, it did not till recently dare trust the interests of justice to that species of influence, which the smallest present actual, or supposed pecuniary benefit might excite. (2 Fonbl. Eq. 457.)

This rule of evidence acted with peculiar hardship in relation to wills; for the persons by whom a testator is frequently surrounded, when he executes his will, are friends and servants, whom he naturally wishes to be present, because he can rely upon their knowledge of his capacity, and their inclination to support his will; and at the same time they are among the persons to whom he is desirous of leaving some tokens of remembrance. Nor could the law which excluded the testimony of such persons have any effect in preventing fraud; for a bribe can be given to a dishonest witness as effectually by a sum of money or a security, which a jury (or a judge) may not be able to discover, or by a codicil, as by a bequest in the will. On the contrary, where there is a gift to an honest witness, the amount of his interest will appear, and can be taken into consideration by those before whom the cause is tried. In fact the law had very little of the effect intended by it; for

if the witness was expected to give important evidence, he was made competent by the payment of his legacy, or by releasing, and supposing to be a dishonest witness, he then gave his evidence, having already received, and not expecting his bribe.

or Crime, removed by 6 & 7 Vict. c. 85,

However, by 6 & 7 Vict. c. 85, it was enacted, that witnesses should not be excluded from giving evidence by incapacity from crime or interest, and this act was, after some doubt, held to be applicable to the Courts of Probate. (Sanders *v.* Wigston, 1 Rob. 460; 10 Jur. 1040.) Under this act it was held, that a legatee was a competent witness for the defendant, who claimed as devisee under a will, by which the devised lands were charged with the payment of legacies. (Doe *v.* Nicholl, 13 Q. B. 126.) But there was in the act a proviso against rendering competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord, or any other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate behalf any action may be brought or defended, either wholly or in part. This provision is repealed from 1st November, 1851, by 14 & 15 Vict. c. 99, s. 1; and by sect. 2 it is enacted, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as thereinafter excepted, be competent and compellable to give evidence either vivâ voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or proceeding.

and 14 & 15 Vict. c. 99.

This section, clearly applicable to the Courts of Probate, will materially affect the practice of these courts, and render the persons propounding or opposing any testamentary instrument competent witnesses. It is remarkable, that the 14 & 15 Vict. c. 99, s. 1, does not go on to repeal that part of the proviso in 6 & 7 Vict. c. 85, against rendering competent the husband or wife of any party; it seems therefore that the incompe-

tency, as witnesses, of persons in that relation to each other remains as it stood before the former act. (Cullum *v.* Seymour, 13 Jur. 711.)

In a case, which was determined before these two acts were passed, an attesting witness to a codicil subsequently became the husband of a legatee therein, she propounded the codicil, and he joined in the proxy; he was held to be an incompetent witness in support of the codicil, and liable to give in his answers as a party in the cause (Mackenzie *v.* Yeo, 2 Curt. 509). This case is important; for as a party in the cause, he would now be held a competent witness under the 14 & 15 Vict. c. 99, and consequently it is an authority to this extent, that where a woman propounds a paper, her husband, who, by joining in the proxy, has become a party to the suit, may be examined as a witness, though, where the husband is propounding, the wife, who does not join in the proxy, may not be so examined.

Gifts to an attesting Witness to be void

XV. And be it further enacted, that 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 such devise, legacy, estate, interest, gift or appointment mentioned in such will.

Statute 25 Geo. II. c. 6, s. 1, did not contain the words, "or to

whose wife or husband" (Hatfield *v.* Thorp, 5 B. & Ald. 589) in the earlier part, or the words " or to prove the validity or invalidity thereof," towards the close of the section. With these exceptions, the present section corresponds with 25 Geo. II. c. 6, s. 1; and consequently the case of Doe *v.* Mills (1 Moo. & Rob. 288) is an authority applicable to the construction of the act of Victoria. It was there held by Lord Denman and Bolland, B., as judges of the Court of Common Pleas at Lancaster, that the statute of Geo. II. made void a devise to an attesting witness, although there were three other attesting witnesses to the will. (Wms. Exors. 847). But, as the act of Geo. II. was passed to explain the 29 Ch. II. c. 3, which related only to wills requiring the attestation of witnesses, it did not affect a bequest in a will of personalty (Emanuel *v.* Constable, 3 Russ. 436), an attestation in such case being, before the present act, unnecessary. When the same form of execution was required by the ninth section for all wills, the necessity for some alteration, in all cases, with respect to subscribing witnesses taking an interest under the will they attested, was obvious. The fourteenth section accordingly provides for the validity of the instrument, notwithstanding the incompetency of the attesting witnesses, either at the time of execution, or at any time afterwards, to prove the execution. And the present section, in the particular case of a gift to an attesting witness, annuls the gift, and renders the witness competent. The former prevents the disability of the witness from defeating the will, the latter enables him to establish it.

Devise or Bequest to an attesting Witness void;

In the goods of Mitchell (2 Curt. 916), the Court was moved to strike out the name of a witness, who was also a legatee, but refused to do so, on the ground that the proper time for taking the objection would be, when a suit was brought for the legacy. The deceased in this case signed his will first in the presence of this witness only, and subsequently acknowledged his signature in the presence of two other attesting and subscribing witnesses. The legatee therefore was only a witness on the face of the instrument, and not in fact a witness to the execution.

but the Devise or Bequest must be beneficial,

The interest given to the witness must be strictly beneficial, so that a legatee in trust, who may be a subscribing witness, will not be barred from taking administration with the will

annexed, his interest being merely of an equitable nature. (In the goods of Ryder, 2 N. C. 462.)

and contained in the very Instrument attested.

The devise, or legacy, however, in the will or codicil, will not be void unless it be contained in the very instrument attested by the devisee or legatee; so the attesting witness to a codicil will be entitled to any benefit he may take under the will, or other codicil, which he may not have attested.

The subsequent Marriage of Devisee or Legatee with an attesting Witness does not subject Devises, &c. to forfeiture.

From the wording of the section, it is clear, that if the witness subsequently marries a person who may take a benefit under the instrument so attested, the benefit will not be lost; the object of the enactment was to prevent any fraud being practised upon the testator; but it cannot be supposed that marriage of a legatee with an attesting witness, twenty years perhaps after the execution of the will, would subject the legacy to forfeiture.

Creditor attesting to be admitted a Witness.

XVI. And be it further enacted, that 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.

See ante, sections 14, 15.

This section is an enlargement of the 25 Geo. II. c. 6, s. 2, which enacted, "that in case by any will or codicil any lands, tenements or hereditaments are or shall be charged with any debt or debts, and any creditor whose debt is so charged, hath attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil.

Executor to be admitted a Witness.

XVII. And be it further enacted, that 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.

An executor could be a witness in support of the will, where an action was brought by or against a devisee of real property, even in a case where the executor took a beneficial interest in the personalty under the will. Thus in Doe *v.* Teague (5 B. & C. 335), which was ejectment against a devisee of land, the question turned upon the sanity of the testator at the time of making the will, and it was held that an executor, who took a pecuniary interest under the will, was a competent witness for the defendant to support it. The principle was, that the verdict in such case would only have the effect of establishing the will, as to the real property, and it would not be any evidence in the Ecclesiastical Court upon a question whether it were a good will as to the personalty. So in Lowe *v.* Jolliffe (1 Wm. Black. 365), an executor in trust, who had acted under the will, was permitted to prove the testator's sanity. (Tomlinson *v.* Wilkes, 2 Brod. & B. 397; Hall *v.* Laver, 3 Y. & Coll. 197.) In this last case it was held, that an executor in trust, who had not proved the will, was a competent witness to increase the testator's estate; and see Cook *v.* Fountain (3 Swanst. 585.)

Practice in the Court of Probate before 14 & 15 Vict. c. 99.

Where the mere execution of the will is the question, and there is no suit, the Court of Probate admits the executor to prove the execution. (In the goods of Clark, 2 Curt. 329.) But in a cause respecting the validity or invalidity of a will, the executor, unless he had renounced in due time, was not admitted a witness. Thus in Munday *v.* Slaughter (2 Curt. 72), the will was propounded by Munday and Berry, two of the executors; Butterfield, the other executor, renounced his executorship on the 21st of November, but the proxy of renunciation was not recorded till the 3rd of December; on the 21st and 22nd of November, he conveyed and assigned all his interest under the will to Munday, the assignment specifically reciting the pendency of the suit, with reference to which it was made. It also appeared that Butterfield had, before renouncing, intermeddled in the affairs of the testator. Sir H. J. Fust said, that if he had been aware of the intermeddling, he might not

have allowed Butterfield to renounce, but as he had done so, he was a competent witness, under the 17th section. In Young *v.* Richards (2 Curt. 371), the evidence of the wife of one of the executors, who was a party in the cause, and consequently liable for costs, was rejected.

Effect of that Act.

But since the passing of 14 & 15 Vict. c. 99, the executor, as well as all other persons having an interest under, or adverse to the will, and whether parties to the suit, or not, are competent witnesses; ante, p. 132.

Will to be revoked by Marriage.

XVIII. And be it further enacted, that 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, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

It followed, from the definition of a will (ante, p. 21), that testamentary instruments were always capable of being revoked, either expressly, or by implication arising from some act affording ground to presume that the intention of the testator was changed. Previous to the Statute of Frauds, wills of every description might be revoked by a subsequent inconsistent will, by a mere parol declaration of the testator, by cancelling, or by any other act, from which the intention to revoke might be inferred. But it was provided, by the sixth section of that statute, that no devise of lands should be revocable, otherwise than by some other will, or codicil, in writing; or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his direction and consent, but that all devises and bequests of lands and tenements should remain and continue in force, until the same be burnt, cancelled, torn, or obliterated, by the testator, or his direction, in manner afore-

Revocation of a Devise of Lands under the Statute of Frauds by subsequent Will or other Writing.

said, or unless the same be altered by some other will, or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same, any former law or usage to the contrary notwithstanding.

The difference, which probably arose from inadvertence, between this section of the statute and the preceding section, which regulated the execution of wills of freehold estates in fee simple, was, that this section required a writing for revoking to be signed by the testator in the presence of the witnesses, and did not require the attestation to be signed in the presence of the testator; while by the 5th section, a will was not required to be signed by the testator in the presence of the witnesses, and was required to be attested in the presence of the testator. This difference in the two sections did not lead to much practical inconvenience, because the words, which required a signing by the testator in the presence of witnesses, were held not to apply to another will or codicil, but only to some other writing, and a mere revocation in writing was a matter of very rare occurrence.

By Burning, &c.

The Statute of Frauds, by declaring that a devise should be revocable by burning, cancelling, tearing, defacing or obliterating the will, did not alter the existing law. Such acts are not in themselves conclusive revocations, but must be considered as equivocal acts, affording only a presumption of an intention to revoke, which may be rebutted by a parol or other evidence, showing that they were done under an erroneous impression, or without serious intention.

Dependent relative Revocation.

Another inconsistent will or codicil, although not signed by the testator in the presence of the witnesses, was held to be a revocation of a prior will; but if invalid as a will or codicil, in consequence of not having been subscribed by the witnesses in the presence of the testator, it did not operate as a revocation, although it declared an intention to revoke the will, and was signed by the testator, in the presence of the witnesses; for the revocation was considered to have been made with the object only of giving effect to the subsequent will or codicil. Whenever a revocation, whether made by another will or codicil, or by some other writing, or in any other manner, was intended to be made for the purpose of giving effect to another will, and the will intended to be substituted was void, the revocation was

void also. If a subsequent will or codicil was not wholly inconsistent, then, unless it declared an intention to revoke the prior will, it operated only as a revocation pro tanto, and the two instruments were considered as forming together one will, or as a will and codicil. (Onions *v.* Tyrer, 1 P. Wms. 343; Doe *v.* Evans, 10 Ad. & E. 228; Doe *v.* Beynon, 12 Ad. & E. 431; Wms. Exors. pt. 1, bk. 11, ch. 3, § 1, 2.)

Presumption from destruction, &c. of Duplicate.

Where there were duplicates of a will, the cancelling or destruction of one part afforded a slighter presumption of an intention to revoke, than the cancelling or destruction of both, and other circumstances might make the presumption still weaker. If both parts were in the possession of the testator, the presumption was slighter than if one was out of his reach; and it was still slighter, if he had altered one part, and afterwards cancelled it, leaving the other unaltered. Where the tearing or cancelling was begun animo revocandi, and left incomplete, it might be presumed that the testator repented, and stopped before he had completed the act of revocation. (Pemberton *v.* Pemberton, 13 Ves. 290.)

Partial Revocation.

It was determined, that a testator might cancel his will in part, by obliterating some of the devises contained in it, subsequently to its execution, and it was often very difficult to ascertain the effect of such obliterations. When, for instance, an estate was devised to two or more persons, as tenants in common, and the name of one of the devisees was struck out, the share which he would otherwise have taken might or might not have been intended to pass to the other devisees. When the gift of a particular estate was obliterated, it was doubtful whether the remainder was accelerated or destroyed, or the particular estate descended to the heir.

Where testators altered their wills without any republishing, the new gifts of freehold estates were void for want of attestation; but a question arose whether the gifts, which had been cancelled or obliterated, were revoked. In Short *v.* Smith (4 East, 419), the testator had struck out the name of one of several trustees, and substituted another by an interlineation, which was void for want of attestation. The court expressed an opinion, in accordance with the rules applicable to the revocation or cancelling of a will with the intention of making another, that the devise to the trustee, whose name was obli-

terated, was cancelled only on condition that the gift to the substituted trustee took effect. But where there was no connexion between the obliteration and unattested alteration, there was no reason for considering one dependent upon the other; for instance, where a testator might strike out a devise of an estate to one person, and give a different property to another. Cases so numerous under this head occurred to the commissioners, in which it would be difficult to determine whether there was any connexion between the two gifts, that they thought an attempt to establish a distinction between the cases would be productive of doubt and litigation.

Besides the modes of revocation mentioned in the Statute of Frauds, the revocation of wills was occasioned by, or implied from other circumstances, on the ground that they afforded evidence of a change in the intention of the testator.

Revocation by Ademption.

Where a testator, after making his will, sold or conveyed any estate which was the subject of a specific devise, the devise was necessarily rendered inoperative, because the subject of it was no longer the property of the testator.

Where a partial interest was disposed of by the testator, the devise was revoked only to the extent of such interest, and took effect with respect to the residue of the property. Thus a lease, or mortgage for years, made subsequently to the execution of the will, was only a revocation pro tanto of the devise.

Equity followed the rule of law; and therefore agreements to sell, or to settle the estate, although they were not revocations at law, were revocations in equity, and the devisee who took the legal estate, became a trustee for the persons entitled under the agreement.

Where the whole estate was conveyed for a particular purpose, as by way of mortgage (Hall *v.* Dunch, 2 Chit. Rep. 154; Perkins *v.* Walker, 1 Vern. 97), or to secure the payment of debts (Vernon *v.* Jones, 2 Vern. 241), so that although the estate was wholly disposed of at law, the testator retained an interest in equity, the transaction, although a complete revocation at law, was only a partial revocation in equity.

In applying the doctrine, that a mortgage effects a partial revocation only, it was held immaterial whether the testator had the legal estate, or was equitable owner only (Tucker *v.* Thurstan, 17 Ves. 131); whether the mortgage conveyance

was made by fine, or any other mode of assurance (Rider *v.* Wager, 2 P. Wms. 334; Jackson *v.* Parker, Amb. 687); whether the mortgagee was the devisee himself (Peach *v.* Phillips, Dick. 538; Baxter *v.* Dyer, 5 Ves. 656), or a stranger; and whether the estates of the mortgagee were to vest in possession immediately on its execution, or not until the death of the mortgagor (Hodgkinson *v.* Wood, Cro. Car. 23; 1 Jarm. Wills, 135.)

But it should seem, that a mortgage is inaccurately termed a revocation pro tanto, and that the term revocation is very inaptly applied in any of those cases in which the devise is defeated by the testator's subsequent disposition by deed of the devised property, which are all examples of ademption rather than of revocation.

The revocations just described were essential to the nature of a will; but there were other revocations of wills of freehold estates, which always defeated the intention of the testator, and produced serious inconveniences.

Revocation by Alteration of the Estate.

The most frequent, and most important of the revocations of this description, were those which depended upon the rule, that a devise should not take effect unless the estate which the testator was entitled to when he made his will continued unaltered until his death; post, p. 177.

And even where the conveyance of a freehold estate had no limited or definite object, or was made for a mistaken or unnecessary purpose, and though its whole effect was instantly to revest the property in the testator himself, who was in of his old estate, yet the momentary interruption of the testator's seisin, thus occasioned, produced a complete and total revocation of the previous devise. (Burgoigne *v.* Fox, 1 Atk. 576; Bennett *v.* Vade, 2 Atk. 325; Harmood *v.* Oglander, 8 Ves. 106.)

Where however the interruption of the testator's seisin was occasioned by the tortious act of a stranger, and not by any act of the testator, who acquired the estate again, the devise was not affected. (Bunter *v.* Coke, 1 Salk. 237; Attorney General *v.* Vigor, 8 Ves. 282.) But if the disseisee were out of possession at the time of the making the will, or at the death, the devise was inoperative.

Partition not a Revocation.

Partition was the only alteration of estate which did not

revoke the will; and it was an anomalous case, for the testator was not entitled, at the date of his will, to the undivided share which he acquired by the partition in the estate allotted to him in severalty, and there is little difference in this respect between an exchange which is, and a partition which is not, a revocation; however, if upon the partition any conveyance was made beyond what was necessary to give effect to the partition, the will was revoked. So that if the testator conveyed his estate, and took back a divided part of the estate for the same interest as he was entitled to in his undivided share, the conveyance was not a revocation, but if the divided share was limited so as to give him a power of appointment, or an interest differing in any respect from his old estate, the will was revoked. (Risley *v.* Baltinglass, T. Ray. 240; Webb *v.* Temple, 1 Freem. 542.)

Equitable Estate not altered by a change in the legal Estate.

Equitable estates were not considered to be altered by the acquisition or alteration of the legal estate, as by a change of the trustees in whom the legal estate was vested, or the conveyance to the testator in fee of an estate which he had contracted to purchase when he made his will. But whatever would at law amount to a revocation with respect to the legal estate, was in equity a revocation as to the equitable estate.

This state of the law, with respect to the principles, upon which revocation was made to depend, was subject to much inconvenience and difficulty.

Revocation by mere Intention to alter the Estate.

Revocation, occasioned by an actual alteration of the estate, might be justified, as a necessary technical consequence of the rule, which required that the testator should continue to have until his death the same estate, as he was entitled to at the date of his will. These cases have no reference to any intention to revoke the will. But it appears impossible to suggest any good reason for another class of cases, in which the Courts, contrary to the provision of the Statute of Frauds, and, on the ground of a presumed alteration of intention, held wills to be revoked by evidence of an intention to alter the estate, although such intention was never completely carried into effect. Thus a feoffment without any livery, or a bargain and sale without enrolment, a defective recovery, or any other instrument, which had no effect as a conveyance, until some other act was done to complete it, and a contract for sale, which had been rescinded, were held to operate as revocations. But where a deed was im-

perfect, or where it was perfect in itself as a deed, but incapable of taking effect by law, as purporting to be a conveyance in mortmain (Matthews *v.* Venables, 2 Bing. 136); and also, it appears, when void in equity on the ground of fraud (Hawes *v.* Wyatt, 3 Br. C. C. 156; but see Hick *v.* Mors, Ambl. 215, and the observations of Lord Eldon in Attorney General *v.* Vigor, 8 Ves. 283, and of Lord Alvanley in Ex parte Ilchester, 7 Ves. 374), it did not operate as a revocation. It is difficult, however, to find any satisfactory reason for distinguishing these cases from those, where subsequent void devises, as a devise to a charity, or a devise contrary to the rule against perpetuities, have been held to be revocations of prior inconsistent wills.

The revocations which were occasioned by an alteration in the estate of the testator, and also those which were implied from an intended alteration of his estate, manifestly defeated the intention of the testator, and had been disapproved of by enlightened judges. Lord Hardwicke said in Parsons *v.* Freeman (3 Atk. 747), "the cases have been determined on very nice and artificial reasons." Lord Mansfield observed in Roe *v.* Griffits, (4 Burr. 1960), that "the rules are not founded upon truly rational grounds and principles, nor upon the intent, but upon legal niceties and subtlety;" and in Doe *v.* Pott, (Dougl. 722), that "all revocations which are not agreeable to the intention of the testator, are founded on absurd and artificial reasoning, the absurdity of Lord Lincoln's case is shocking;" and in Swift *v.* Roberts, (3 Burr. 1491), "that constructive revocations, contrary to the intention of the testator, ought not to be indulged, and that some overstrained revocations of that sort had brought a scandal on the law."

Revocation by Marriage of Woman's Will;

A woman's will was revoked by her marriage; and where the will of a woman was thus revoked, it did not revive by the subsequent death of her husband in her lifetime. (Doe *v.* Staple, 2 T. R. 695; Cotter *v.* Layer, 2 P. Wms. 624.)

of Man's Will by Marriage and the Birth of a Child.

The will of a man was revoked by his subsequent marriage, and the birth of a child. This rule, which could not be reconciled with the provisions of the Statute of Frauds, was well established. It was first introduced by the spiritual courts, and is not considered to have been settled with respect to devises of lands until the year 1771. In Christopher *v.* Christopher,

it is said to be founded on a presumption, that a testator could not intend his will should take effect after such a change had occurred in his circumstances, and has been described by a judge, Lord Kenyon, in Doe *v.* Lancashire, (5 T. R. 49), who extended the rule to the case of a posthumous child, as a tacit condition annexed to the will at the time of making it, that if such events happened, it should have no operation.

Evidence of Intention in support of the Will,

It was a very doubtful question, whether parol evidence of intention was admissible to support the will in such cases, with respect to freehold estates, although it was admitted in the Courts of Probate with respect to personal property. Lord Mansfield gave a decided opinion that it must be received. (Brady *v.* Cubitt, Dougl. 31.) Lord Alvanley appears to have thought that the evidence must be admitted, though he disapproved of it. (Gibbons *v.* Caunt, 4 Ves. 848.) Lord Ellenborough declared that he left the question untouched, but it may be collected from his judgment, that the inclination of his opinion was in favour of the admission of the evidence. (Kenebel *v.* Scrafton, 2 East, 541.) On the other side are the opinions of Lord C. J. Eyre and Buller (Goodtitle *v.* Otway, 2 H. Black. 522): Lord Kenyon (Doe *v.* Lancashire, 5 T. R. 61); and Lord Rosslyn (5 Ves. 663.)

and, if circumstances admitted, till Marston *v.* Roe, which made the Revocation depend on the Rule of Law.

Evidence of circumstances, showing the revocation to be unnecessary, was admitted, and made the foundation of several exceptions to the rule. Thus it was held that the will was not revoked where both the wife and children were provided for by the will (Kenebel *v.* Scrafton, 2 East, 541); where either the wife or the children were provided for by the will (Brown *v.* Thompson, 1 Eq. Ca. Abr. 413; but see Lord C. J. Tindal's remarks upon this case in Marston *v.* Roe, 8 Ad. & E. 61); where the wife or children were provided for by a settlement (Ex parte Ilchester, 7 Ves. 348); where the will did not include all the property, and leave them unprovided for (Brady *v.* Cubitt, Dougl. 31); or where there were children by a former marriage, one of whom was the heir, the will was not revoked as to the real estate (Sheath *v.* York, 1 V. & B. 390); for the only effect of revoking such will would be to let in the heir, to the exclusion of the after-born children, and upon no rational principle can the testator be supposed to have intended to revoke his will on account of the birth of other

children, those children not deriving any benefit whatever from the revocation.

But this question was finally settled in Marston *v.* Roe, (8 Ad. & E. 14), in the Exchequer Chamber, where the judges unanimously concurred in the opinion, that the revocation of the will took place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and consequently that no evidence of intention was admissible.

Revocation of Devises of Estates pur autre vie.

There appears to be no provision in the Statute of Frauds which is applicable to the revocation of devises of estates pur autre vie. Sect. 5, which prescribed the mode of devising freehold estates in fee-simple, was followed by sect. 6, which regulated the revocation of devises. A subsequent clause, sect. 12, created the power of devising estates pur autre vie, and there was no further provision respecting revocation, except with respect to personal estate. It was doubted whether the revocation of wills as to estates *pur autre vie* was within the 6th section, and if the doubt were well founded, a will with respect to such estates might have been revoked by parol, in the same manner as wills with respect to other property might be revoked before the statute.

But wills as to estates pur autre vie were revocable, in the same manner as other wills, by a subsequent inconsistent will or codicil, or by implication or presumption; and where the estates were limited to heirs as special occupants, the rules respecting revocation were most similar to those relating to the revocation of devises of freehold estates in fee simple; and where the estates were not limited to the heirs, they were most similar to those relating to the revocation of wills with respect to personal property.

Of Wills relating to Copyholds and Customary Estates.

Wills relating to copyholds and customary estates were not within the Statute of Frauds (Doe *v.* Harris, 8 A. & E. 1), and might be revoked by mere parol declarations. In other respects the revocation of such wills was governed by the same rules, as the revocation of devises of estates in fee simple, except that a revocation was not implied from an alteration of the estate in some cases, where the ultimate reversion was taken back by the testator. (Thrustout *v.* Cunningham, 2 W. Black. 1046; Vawser *v.* Jeffery, 3 B. & Ald. 462.)

Of testamentary Appointments, of Guardians.

A testamentary appointment of a guardian might also be revoked by parol (Ex parte Ilchester, 7 Ves. 348), and by subsequent inconsistent appointment, or by implication.

Of Appointments by Will.

The revocation of appointments by will was governed by the same rules as the revocation of other wills, with respect to the same description of property. And it has been decided, in conformity with the rules relating to other wills, that an appointment by will was not revoked by a subsequent inconsistent appointment, which was ineffectual for want of due execution. (Eilbeck *v.* Wood, 1 Russ. 564; Matthews *v.* Venables, 2 Bing. 136.)

Revocation of a Will of Personalty under the Statute of Frauds.

The Statute of Frauds, 22nd section, enacted, "that no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed, by any words or will by word of mouth only, except the same be in the lifetime of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him and proved so to be done by three witnesses at the least." This put an end to mere parol revocations of wills with respect to personal property, which could only be revoked by writing, or by a subsequent inconsistent will or codicil, or by implication from burning, cancelling, tearing or obliterating. In Walcott *v.* Ochterlony (1 Curt. 589), Sir H. J. Fust held that a present intention to revoke, written down at the time, approved of by the deceased, and by his direction communicated to the person in whose custody the will happened to be, was a good revocation under this section of the Statute of Frauds. The report is silent as to the proof by three witnesses.

By Ademption;

A will of personal estate was necessarily rendered inoperative as to a specific bequest, where the testator afterwards parted with the property given, this took place by ademption of the legacy; but the will was not revoked by a mere alteration, or intended alteration of the estate, where the testator obtained again the same property.

of a Woman, by Marriage; of a Man, by Marriage and the Birth of a Child.

The will of a woman as to personalty was revoked by her marriage, and the will of a man with respect to the same kind of property by marriage and the birth of a child, although there were children of a prior marriage. (Holloway *v.* Clarke, 1 Phillim. 341.) But if the second wife and her issue were

provided for by settlement, the will was not revoked. (Talbot *v.* Talbot, 1 Hagg. 705.) So if the second wife and her issue had property settled upon them under her father's will, and the husband knew of such will, his will in favour of children of a prior marriage was not revoked. (Johnson *v.* Wells, 2 Hagg. 561.)

And the will of a man was not revoked by marriage alone, or by the birth of a child alone, although where there was a marriage, and a child was born, and died in the testator's lifetime, it was determined in the Courts of Probate that his will was revoked. (Emerson *v.* Boville, 1 Phillim. 342.)

This variety of rules relating to the revocation of wills, with respect to different kinds of property and purposes, was attended with inconveniences similar to those which arose from the rules requiring different modes of execution. It frequently happened that a will was revoked as to personal and copyhold property, while the revocation did not extend to estates in fee-simple, as in Doe *v.* Harris (8 Ad. & E. 1); and thereby the will became partially void, and the general arrangement intended by the testator was frustrated. (Sheddon *v.* Goodrich, 8 Ves. 501) (*a*).

The reasons which the commissioners gave for proposing that the rules relating to wills, with respect to different descriptions of property, should be rendered uniform in other respects, induced them to recommend that all wills should be revocable in the same manner.

They proposed that no will should be expressly revoked otherwise than by another inconsistent will or codicil, or some other writing executed and attested in the same manner as should be required for the validity of a will.

With respect to implied revocations, they proposed that a will might be revoked by burning, cancelling, tearing or obliterating it, with the intention of revoking, by the testator, or in his presence and by his direction.

They also recommended that the law which made the marriage of a woman a revocation of her will should be continued; but, in the case of a man's marriage, they were of opinion, that the

(*a*) The account above given of the law with respect to revocation, and the remarks upon the state of the law, are in great measure taken from the Fourth Report of the Real Property Commissioners.

rule that marriage, and the birth of children, operated as a revocation, was inconvenient, and ought to be abolished.

Thus there were four modes proposed in which a will could be revoked:—

1st. By another inconsistent will, or writing, executed in the same manner as the original will.

2ndly. By cancellation, or any other act of the same nature.

3rdly. By the disposition of the property by the testator in his lifetime.

4thly. In the case of a woman by marriage.

Of these propositions the legislature adopted the first, in its full extent; but the second was materially modified, since cancellation is not specified as a mode of revocation of the will by the act of Victoria, and the decisions have determined that it is not an act coming within the meaning of burning, tearing, or otherwise destroying.

The third proposition is, perhaps, rather to be classed as an act of ademption, than a mode of revocation

And the fourth was extended to the case of a man's marriage.

Revocation of a Will by Marriage.

To return to the enactment in the 18th section. The principle, upon which it has been said that the will of a woman was revoked by her marriage, is, that since it is in the nature of such an instrument to be ambulatory during the testator's lifetime, and marriage disables the woman from making any other will, the instrument thereby ceases to be any longer ambulatory, and must therefore be void as a will. (Forse and Hembling's case, 4 Rep. 61 b.) This reason does not apply to the case of a man's will; yet cases of great hardship might have been suggested, and indeed occurred, under the old law, as the consequence of the rule that a man's will remained unrevoked by his subsequent marriage. In Doe *v.* Barford (4 M. & S. 10), a case is mentioned by Lord Ellenborough, where a sailor made his will in favour of a woman with whom he cohabited, went to the West Indies, and married a woman of considerable substance, and died, it was held that the will took every shilling of the property away from the widow.

The enactment in the present section, which provides for the change in a man's position effected by marriage, and protects the wife from being injured by a disposition he may have made years before he contemplated the marriage, and which he may

have forgotten, cannot but work beneficially; nor is any hardship imposed upon the man, since he may the moment after his marriage re-execute any former will, or execute an entirely new will.

The words of the section are so clear and express that no difficulty can occur with respect to any will made since the 1st January, 1838, for all such wills, though made in anticipation of, and expressly providing for the marriage, will be revoked by the marriage.

Unless the Will is prior to 1838.

But where the will was made previous to 1838, and the marriage took place subsequent to the 1st of January in that year, the will was held, on motion, not to be revoked, (In the goods of Shirley, 2 Curt. 657); where a distinction was taken as to the effect of a subsequent marriage upon a will dated before 1838, and the effect of alterations made in, or other act done to such will.

When it is liable to Revocation on the ground of an Alteration of Circumstances.

Upon this point it has been remarked, that if the language employed in the present and 34th sections were exactly and strictly construed, it would seem to follow, that if a will were made before the 1st of January, 1838, and the testator were to marry after that date, the statute would not apply, and the will would not be revoked thereby; while on the other hand such a will might be revoked by a presumption of an intention, on the ground of an alteration in circumstances taking place at any time during the life of the testator, though after the 1st of January, 1838. (Duppa *v.* Mayo, 1 Saund. 279 b, n. e.)

The principle laid down in Marston *v.* Roe (8 Ad. & E. 14) that a tacit condition is annexed to a will, that at the time of making that will it shall not have any effect, provided the deceased marry and have a child of the marriage, was held applicable to similar cases in the Court of Probate; (Israel *v.* Rodon, 2 Moo. P. C. C. 51; Walker *v.* Walker, 2 Curt. 854; Matson *v.* Magrath, 1 Rob. 680; 13 Jurist, 350); but the point cannot be raised under the present act.

Extent and Reason of the Exception.

The exception preserves the will where its revocation would not be immediately beneficial to the new relations acquired by the marriage; "The only effect of annulling the will in a case within the exception would be, not to vest the property in the new family of the testator, but to carry it over to the person

entitled in default of appointment. But it is not necessary that the property in default of appointment *must* go to the new family, if there be any, but only that it *may;* for if a man (and it is the same as to a woman) have a general power of appointment, with a limitation, in default of appointment, to himself in fee, and having a son by his first marriage, make his will, and then marry again, his will will be revoked; and yet if he die intestate, the estate will descend to the son by the first marriage, in exclusion of the issue of the second. Where, in default of appointment, the estate is limited to a particular class, as purchasers, for example, to all or any of the children of a first marriage, the second marriage will not revoke the will, because, although in default of appointment, the heir may take, yet it will not be in the character or with the quality of heir. The 19th section of the act provides, that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances. As marriage is held to be a revocation, the exclusion of other circumstances was quite proper. Cases may occur of wills under powers, where the limitations, in default of appointment, are such that the estate would not go to the heir, and therefore the marriage will not revoke the will under the affirmative enactment; but if the negative clause had not been introduced, the subsequent birth of a child might, under a change of circumstances, have revoked the will under the old law." (1 Sugd. Pow. 190.)

There were two cases in the Prerogative Court in 1846 (Bartholomew *v.* Dunboyne, and In the Goods of Starling), in which the effect of the exception in this section seemed likely to become a question, but they were both determined upon other grounds, and no case seems to have since occurred.

No Will to be revoked by Presumption.

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

The only events which were considered in other courts to cause such a change of circumstances, as to effect a revocation of the will, were marriage, and the birth of a child, but the Courts of Probate seem to have gone further; since there it has been held, that a will made by a married man, having certain

children, was revoked, by the subsequent birth of other children left unprovided for, aided by other circumstances, concurring clearly to show that it was not the intention of the deceased, that the will should operate. (Johnston *v.* Johnston, 1 Phillim. 447). The judgment reviewed the authorities, which were supposed to have held marriage to be a necessary condition, and the conclusion arrived at was, that the Courts did not go beyond requiring such an alteration of circumstances, arising from *new moral duties* accruing subsequent to the date of the will, as by necessary implication created an *intention* to revoke. Hence that the birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the ground-work of presumed intention, and may be accompanied by circumstances furnishing as indisputable proof of real intention, as if the will had been made previous to the marriage, and consequently that subsequent marriage was not an essential requisite.

The nineteenth section has expressly provided against such a decision for the future, and whatever changes may take place in the testator's family subsequent to the will, no revocation can thereby be effected.

In what Cases Wills may be revoked.

XX. And be it further enacted, that 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.

The difference between sections 5 and 6 of the Statute of Frauds was noticed p. 137, the difficulties and inconveniences, which were sometimes the consequence of that difference (Pow. Dev. 590), are removed by the present section, which requires

the same form of execution for a writing merely intended to revoke a will, as for the will itself.

This clause of the section has also put an end to the practice of the Court of Probate, which allowed a will of personalty to be revoked by a subsequent unfinished will, which the testator was prevented, by the act of God, from completing. Thus in Carstairs *v.* Pottle (2 Phillim. 35), Sir J. Nicholl stated the rule, "that where there is a regular will, and another paper began as a new will, which the testator has been prevented, by the act of God, from completing, the two papers may be taken together as the will of the deceased, and operation pro tanto be given to the latter paper, provided the proof of final intention be clear, but it will not wholly revoke the former paper." (Masterman *v.* Maberly, 2 Hagg. 235; Gillow *v.* Bourne, 4 Hagg. 192; Brine *v.* Ferrier, 7 Sim. 549; Blewitt *v.* Blewitt, 4 Hagg. 410). See ante, p. 8, as to distinction between "unfinished" and "unexecuted" papers.

Where the new will contains a revoking clause, a difficulty can scarcely arise, and it is better expressly to revoke all former wills, than to leave them open to the inquiry, whether they are wholly superseded by the new one. It is safer to incorporate the revocation in the introductory words of the will, than to leave it to be effected by a separate clause, which the draughtsman may forget to insert. (Jarm. Conv. vol. ix. 429, n. (*b*)).

Revocation by subsequent Codicil or Will containing no revoking Clause.

But where the subsequent will contains no express revoking clause, the question of revocation under the present law, as it was under the old law, will in every case be one of intention, of which evidence must be sought in the contents of the several instruments, subject to certain general principles of construction. Thus where a devise in a will is clear and unambiguous, a revocation of it by codicil must be expressed in terms equally clear and unambiguous. If the devise in the will is clear, it is incumbent on those who contend it is not to take effect, by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt, as the original intention to devise; for if there is only a reasonable doubt, whether the clause of revocation was intended to include the particular devise, then such devise ought to stand. (Doe *v.* Hicks, 1 Moo. & Sc. 759; 1 Cl. & Fin. 20). And a codicil

disposing of a subject devised by the will, will be held to disturb the devise in the will, only so far as is necessary to give effect to the disposition in the codicil. (Duffield *v.* Duffield, 3 Bligh. 344; Cookson *v.* Hancock, 2 My. & C. 606; Sandford *v.* Sandford, 11 Jur. 322; 1 De G. & S. 67.) Where, however an intention to make a new disposition can be collected from the codicil giving a residue, it will operate against a disposition of the residue by the will, although the gift in the codicil is of the residue not thereinbefore, or by the will, disposed of. (Hardwick *v.* Douglas, 7 Cl. & Fin. 795.)

But with respect to several subsisting wills, as distinguished from codicils, the character of last will belongs exclusively, as a general rule, to such one as was executed last. (Goodright *v.* Glazier, 4 Burr. 2512; Harwood *v.* Goodright, Cowp. 92.) But even in this case the Courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper. (Weld *v.* Acton, 2 Eq. Ca. Abr. 777, pl. 26.) And where, from the absence of every kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void; but this unsatisfactory expedient is never resorted to, until all attempts to educe, from the several papers, a scheme of disposition consistent with both have been tried in vain. (Phipps *v.* Earl of Anglesey, 7 Br. P. C. 443; Jarm. Wills, ch. vii.)

To a considerable extent these principles are applicable to the cases which come before the Courts of Probate.

In the Court of Probate.

In the goods of Lewis (14 Jur. 514), the testator left a will and several codicils; upon the death of one of his sons, he had executed a codicil, in which he used the words, "Whereas I have by a former will and codicil given to my late son 80*l.* per annum, payable from the rents of my houses; also the sum of 1000*l.*, and the sum of 50*l.*; I do hereby revoke such codicil, in consequence of the death of my late son, H. L., and give to my son, F. L., the said sum of 50*l.*," and the former codicil contained other bequests than those to H. L., it was held, that it was revoked only so far as those bequests to H. L. were concerned.

And the Courts of Probate will always incline to grant probate of the several papers, if possible, that the effect of them

may come before the Courts of Construction; for the mere fact of making a subsequent will is not held to work a total revocation of a prior one, unless the two be incapable of standing together; as where a testator left two wills, by the first he divided his property between his wife and another person, and appointed executors: by the second he gave everything, except a small legacy, to his wife, and appointed no executor, and it was held that the latter paper was executed as a will, and not as a codicil, and being a perfect instrument, and disposing of all the property, it was, although without express revocation of the former will, or the appointment of executors, ex necessitate a revocation of the former will. (Henfrey *v.* Henfrey, 2 Curt. 468; 4 Moo. P. C. C. 33; Duppa *v.* Mayo, 1 Saund. 277 d, notes.) And although a partial intestacy may follow from the revocation of a prior will, yet if the testator appoints executors, and calls the subsequent paper, on the face of it, his last will, the court will hold the prior will revoked. (Plenty *v.* West and Budd, 9 Jur. 458; 1 Rob. 264.)

The appointment of Executors in a subsequent Will is a Revocation of a prior Will.

The appointment of executors, in a subsequent will, as effecting a complete disposition, is a revocation of a prior will in which different executors were named.

This case (Plenty *v.* Budd) came before Lord Langdale, and was sent by him, for the opinion of the Court of Common Pleas (6 C. B. 201), where it was argued at great length. The testamentary papers left by the deceased were a will of 1837, two papers dated in 1838, and a will in 1839, but this will of 1839 related entirely to real estate, and was not before the Court of Probate, which pronounced the papers of 1838 to be alone entitled to probate. The Court of Common Pleas, having to deal with these instruments, was of opinion, that the instrument executed in the year 1839 was the only instrument which had any validity, as far as the legal rights of the parties were concerned. These two decisions are consistent, for the will of 1839 began with the words, "This is the last will and testament of me, relating to all my freehold and copyhold lands, tenements, hereditaments, and all my real estate whatsoever," and ended with the words, "I appoint W. executor of this my will, so far as the same is necessary to the performance of the parts relating to my real estate." So that the disposition of the personal property made by the will of 1838 was untouched.

Revocation by a Writing declaring an intention to Revoke.

The intention may be presumed, as we have seen, from the contents of a subsequent will or codicil, but a writing, as distinguished from a will, or codicil, in order to effect a revocation, must declare the intention to revoke. It is not likely that a paper for this purpose will be executed, except in cases where the will to be revoked is out of the possession of the testator, but such an instrument must, it would seem, be proved.

The corresponding words of the Statute of Frauds, sect. 6, were, "burning, cancelling, tearing or obliterating by the testator himself, or in his presence, and by his direction and consent."

Revocation by Burning, &c.

The principle of revocation contained in these terms is thus expanded and explained in Bibb *v.* Thomas (2 W. Black. 1044). A revocation under the statute may be effected either by framing a new will amounting to a revocation of the first, or by some act done to the instrument itself, viz., burning, tearing, cancelling or obliteration by the testator, or in his presence, and by his direction and consent. But these must be done animo revocandi, Onions *v.* Tyrer (1 P. Wms. 343); Hide *v.* Hide (1 Eq. Cas. Abr. 409), each must accompany the other; revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these, and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will or instrument itself be totally destroyed or consumed, burnt, or torn to pieces. The present case (the testator had called for his will, slightly torn and thrown it on the fire; but it fell off, and was put into her pocket, and preserved by the woman who attended him; he afterwards said he had destroyed it, believing such to be the case,) falls within two of the specific acts described by the statute. It is both a "burning and a tearing." Throwing it on the fire with an intent to burn, though it is only very slightly singed and falls off, is sufficient within the statute. But something must be done which can be considered a burning or tearing, such injury with intent to revoke as destroys the entirety of the will, so that it may be said that the instrument no longer exists as it was; and where the testator, intending to destroy his will, threw it on

the fire, and another person snatched it off, a corner of the envelope only being burnt, and such person afterwards pretended to have burnt the will, and was believed by the testator to have done so, it was held that the will was not revoked. (Doe *v.* Harris, 6 Ad. & E. 209.) In Doe *v.* Perkes, (3 B. & Ald. 489), the testator had in anger torn the will twice through, when his arms were arrested by a bye-stander, and his anger mitigated by the submission of the person who had provoked him; he then proceeded no further, and after having fitted the pieces together and found that no material word had been obliterated, he said, "it is well it is no worse;" the case was distinguished from that of a complete cancellation, and the court refused to disturb the verdict which found that there was a change of intention before the completion of the act.

These cases, which were decided under the Statute of Frauds, have been considered applicable to the construction of the present statute, (Hobbs *v.* Knight, 1 Curt. 768); and In the goods of Colberg (2 Curt. 832), which was in some respects similar to Doe *v.* Perkes; but the words "cancelling" and "obliterating," which occur in the former statute, are omitted in the act of Victoria, and the words "otherwise destroying" are substituted. It is therefore necessary to inquire what construction these words have received, and whether cancellimg and obliterating are still modes of revocation. In Hobbs *v.* Knight (1 Curt. 768), the testator had cut out his signature, the will was dated before 1838, but it was held in the circumstances of the case to come within the act of Victoria, the question was whether this was a destruction; and it was held that the signature being an essential part of the will, under section 9, the excision of that was a destruction, and consequently a revocation of the will. In the course of his judgment Sir H. J. Fust also intimated his opinion, that although obliteration was omitted from the 20th section, yet comparing that with the 21st section, which gives effect in certain cases to obliteration, if the testator obliterated his name, so that it could not be made out, such obliteration would work a revocation of the whole will, as would also the obliteration of the names of the subscribing witnesses.

Or otherwise Destroying.

But a partial obliteration of the will and signature, by striking it through with a pen, and crossing out the name of the

testator, is no revocation, since the word cancelling is omitted in the statute, and the words "otherwise destroying," point to acts ejusdem generis with burning and tearing. (Stephens *v.* Taprell, 2 Curt. 458; Bigge *v.* Bigge, 9 Jur. 192.)

The principles to be drawn from these several decisions, applicable to wills as well of personalty, as of realty, appear to be these: 1st. There must be the intention to revoke; 2ndly. Such an act done to the instrument as shall amount to burning, tearing, or otherwise destroying: and, 3rdly. The intention and the act must be complete; if the intention only be complete, still, in accordance with Doe *v.* Harris, the revocation will not be effected; if the act be merely inchoate, and the intention changes before the completion of the act, then Doe *v.* Perkes is an authority for holding that the will, though torn, is not revoked; whilst if in this last case the act of tearing had effected a complete destruction before the intention changed, the will so destroyed could not have been set up again, per Abbott C. J. in Doe *v.* Perkes, ubi sup. p. 491.

Effect of the Section upon Duplicate Wills where one part is wholly or in part unrevoked.

Where a will is executed in duplicate, and the testator keeps one part himself, and deposits the other with some other person, and destroys the part in his own custody, the modern authorities have ruled that it is to be presumed he intended to revoke both (Colvin *v.* Fraser, 2 Hagg. 266); and this would seem to be applicable to the present law. Having noticed this presumption, where the testator had one part in his possession, Lord Erskine, in Pemberton *v.* Pemberton (13 Ves. 310,) was of opinion that if the testator himself has possession of both, the presumption holds, though weaker; and farther, that even if having both in his possession, he alters one, and then destroys that which he had altered, there is also the presumption, but still weaker. Pemberton *v.* Pemberton was relied on in Roberts *v.* Round (3 Hagg. 548), where the deceased kept both parts; one she had altered, and upon the other had written the word "*mine*;" Sir J. Nicholl said, "what upon the face of the instrument are the sound legal construction and presumptions? Suppose that the mutilated instrument alone had been found, and that no duplicate had ever existed: this mutilation of the first sheet, leaving the signature untouched, would not be a total revocation; it would be a revocation of those particular devises only, (Larkins *v.* Larkins, 3 B. & P. 16); but there

being two in the deceased's possession, the presumption of law would be, that, by the preservation of one duplicate entire, she did not intend a revocation of these particular devises, otherwise she would have mutilated both duplicates. The construction then to be put upon this act of mutilation is, that at most it was a preparation for a projected alteration, to which she had not finally made up her mind, or which she had abandoned, and therefore she preserved entire the duplicate, which she had always retained in her possession, and on which she had written the word "mine." The unaltered part was accordingly admitted to probate.

But under the present law it would seem impossible to contend successfully that the mere destruction of an altered part of a will, originally executed in duplicate, could have any effect at all upon the subsisting unaltered part; for the alterations, if not executed under section 21, can have no effect, and if so executed, the will thus altered becomes a new will; and if in this new character it has revoked the unaltered part, its own destruction will not have the effect of reviving by section 22 the part which its execution has already annulled.

The Revocation must be the Act of a capable Person,

The principle being, that questions of revocation are all, to some extent, questions of intention, (Smith *v.* Cunningham, 1 Add. 448), whether the point be raised on the construction of some subsequent instrument, which does not comprise a revoking clause, or upon some act of the testator in reference to the instrument itself, it follows that the act of revocation must be the act of a capable person, and must not be done under any mistake, either in respect to the paper itself, or to the circumstances upon which the act of revocation may be founded.

Hence, if the testator, in a fit of insanity, destroy his will, the will is not thereby revoked; (Scruby *v.* Fordham, 1 Add. 74; Borlase *v.* Borlase, 4 Notes of Cases, 188); or if the revocation be brought about by force, fraud, or undue influence, so that the free agency of the testator is interfered with; and the same principles, which in this respect apply to the inception and execution of a testamentary paper, will in like manner apply to its annulling, when once completed.

and not done by mistake.

Again, if the testator, intending to put sand upon his will, should pour ink over it, so as totally to obliterate it, (Burtonshaw *v.* Gilbert, Cowp. 52); or meaning to destroy some other

paper, should destroy his will, (In the goods of Thornton, 2 Curt. 913) the will is unrevoked. And where the will was in the first instance duly executed, but the name of one of the subscribed witnesses, a legatee under the will, was immediately afterwards struck out, to preserve her legacy, and a second, but imperfect execution, then took place, the will was held good upon the first execution, there being no intention to revoke. (Playne *v.* Scriven, 1 Rob. 772; 13 Jur. 712.)

The present act does not interfere with cases of dependent relative revocations, where a false impression of a fact is the foundation of the change of intention shown in a later will or codicil, and the operation of the latter is contingent upon the existence or non-existence of the fact. (Onions *v.* Tyrer, 1 P. Wms. 345; Winsor *v.* Pratt, 5 Moore, 484; Doe *v.* Evans, 10 A. & E. 228; are still authorities under this head, post, p. 166.)

Burning, &c. in the Presence, and by the Direction of the Testator.

Where a testator desires another person to destroy his will, such destruction, if not effected in the presence of the testator, will not amount to a revocation (Ritherdon *v.* Stockwell, 12 Jur. 779), where the testator had attempted to delegate a power to destroy his will after his death. This point was directly adverted to by Shadwell, V. C., to the effect that the destruction of a testamentary paper, not in the testator's presence, was not a destruction of its probative quality, however it might be a destruction de facto. (Rook *v.* Langdon, 1844, MS. note.) A similar case to Wallcott *v.* Ochterlony (1 Curt. 589), cannot therefore occur under the present law; hence there will be some danger in leaving a will in the custody of another, since although such will might be easily revoked by a writing duly executed under the present section, yet in the absence of such writing, difficulty may arise in disposing of the still subsisting instrument, and this though the testator may have left written instructions for the purpose of its being destroyed.

Wills lost, &c., but not revoked, how proved or established.

The fact of these directions must necessarily be matter of evidence, and of course where a will has been destroyed without the directions of the deceased, or been lost, or destroyed after his death, the will is not revoked. (Martin *v.* Laking, 1 Hagg. 245; Foster *v.* Foster, 1 Add. 465.) Where this is the case, probate will be decreed of a draft, or copy of the will, limited, if necessary, till such time as the original can be produced. And lost wills of real estate may be established by

means of a copy. (Ellis *v.* Medlicott, 4 Beav. 144, where see the three preceding cases and the following case.)

But where a will is traced into the hands of the testator, and not found after his death, the presumption is that he destroyed it himself animo revocandi. (Lillie *v.* Lillie, 3 Hagg. 184; Wargent *v.* Hollings, 4 Hagg. 245; Welch *v.* Phillips, 1 Moo. P. C. C. 299.)

Generally the Revocation of a Will revokes the Codicils to that Will.

Whether the revocation of a will revokes a codicil is a question involving considerable difficulty; the general principle is, that the will and the codicils, however numerous, constitute but one instrument, and therefore the will being revoked, the codicils will fall with that on which they depend. (See Coffin *v.* Dillon 4 Hagg. 361.)

In Wade *v.* Nazer (1 Rob 627; 12 Jur. 188), the testator had executed a will in 1843, revoking all former wills; afterwards he executed a codicil, confirming his will, except as altered by the codicil. In 1846, fearing the will was not well executed, he re-executed it, but did not in any way refer to the codicil. The re-execution was held to apply to the codicil as part of the will. But there are cases in which the codicil appears to be quite an independent instrument, unconnected with the will, and in such cases, though the will may have been pronounced against, the codicil has been upheld. (Tagart *v.* Hooper, 1 Curt. 289.) The Court of Probate will look to the intentions of the deceased, as to what instruments shall operate as and compose the will. (Greenhough *v.* Martin, 2 Add. 239; Hale *v.* Tokelove, 14 Jur. 817.) The facts in this last case were very complicated. The earliest testamentary paper was a will made in 1842, destroyed animo revocandi before 1846, but of which a draft remained. The next was a codicil executed in 1844, which referred to the will of 1842, not by date, but by inference, from its contents, and made a new disposition of the property, in effect completely revocatory of that will. In June, 1845, the testatrix made a second will, at which time, and subsequently, she declared that she had destroyed the will of 1842. But in February, 1845, a codicil had been prepared for the testatrix, which, under the advice of her solicitor, who knew nothing of the will of June in that year, she executed in January, 1846. This codicil referred to no will by date, was described as a codicil to the last will, and did refer to the

Exceptions to the general Rule.

contents of the will of 1842, and contained the words "I confirm my said will, except so far as the same is altered by this codicil." In March, 1846, she executed a further codicil, also described as a codicil to her last will, but containing no words from which it could be implied that the will of 1845 was revived, or the will of 1842 revoked. The will of 1845, and the codicils of 1846 were propounded. Dr. Lushington was of opinion that he could only construe the codicil of January, 1846, to revive and confirm the will of 1842, because to that will alone the words of the codicils referred: but as that will had been destroyed animo revocandi, he thought the codicil could not, in effect, revive it. It did not follow, because the codicil was inoperative to revive the earlier, that it applied to a later will; nor did it follow, because the later will was in existence, when the codicil was made, and the codicil was inoperative to revive the earlier will, but did not specifically revoke the later will, that it remained unrevoked. He therefore held the codicils of 1846 alone entitled to probate. The draft of the will of 1842 was not propounded; but Dr. Lushington expressed a strong opinion against its being entitled to probate.

The result of these cases seems to be, that the revocation of a will does not necessarily effect the revocation of a codicil to that will, and that a codicil may be entitled to probate apart from the will to which it refers, although by reference to such will, the codicil may have the effect of revoking a later will, whilst the reference to the earlier will shall not necessarily operate as a revival of such will.

No Alteration in a Will shall have any effect unless executed as a Will.

XXI. And be it further enacted, that 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 witnesses 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.

The preceding section provided for the revocation of the whole instrument, the present is confined to a partial revocation, or other alteration.

Alterations in the Will before the present Act.

Previous to the act of Victoria, the effect of an erasure or obliteration, as an act of revocation only, was the same in respect to realty and personalty, and the devise, or bequest, was revoked pro tanto (Larkins *v.* Larkins, 3 B. & P. 16, 109; Roberts *v.* Round, 3 Hagg. 552); but where the effect of such obliteration, or other alteration, was to make a new gift, there was an important distinction between realty and personalty, where the alteration was not properly executed. For in respect to property coming within the Statute of Frauds, as the new devise was not executed according to the provisions of that statute, it failed; but in regard to other property, the alteration was effectual for all purposes, since no form of execution was in that case necessary, and any writing, amounting to evidence of a new gift, was sufficient. The effect of the present clause is to put an interlineation, or other alteration, as to a bequest of personalty, on the same footing on which an interlineation as to realty stood before the act.

Pencil Alterations.

A pencil erasure was an equivocal act, the effect of which must be judged of from the collateral facts and the nature of the alteration. It might be final, or it might be deliberative; but primâ facie it was deliberative. (Parkin *v.* Bainbridge, 3 Phillim. 321; Lavender *v.* Adams, 1 Add. 406; Edwards *v.* Astley, 1 Hagg. 490; Hawkes *v.* Hawkes, 1 Hagg. 321; Ravenscroft *v.* Hunter, 2 Hagg. 65.)

In Mence *v.* Mence (18 Ves. 348), there was a residuary clause, and a pencil line drawn through the residuary clause so far as it related to the disposition of the property, but the words descriptive of the property were left standing; and in the

margin opposite the residuary clause, the testator had written also in pencil, "This is to be particularly noted," giving as the reason, that he meant to make a different disposition of some portraits and other specific articles; and near the words in the residuary clause giving the power to apply part of the legacies for the advancement of the legatees, he had written in pencil, "This should be modified." Sir W. Grant, having the erasure and the notes before him, came to the conclusion that the testator intended to revoke the residuary bequest, and that the cancellation was as effectual as an express revocation. But that decision was founded upon the circumstances of the case, and is not to be understood as intended to lay down any abstract rule. (Francis *v.* Grover, 5 Hare, 48.)

Effect of Section.

The present act, by imposing certain formalities, will prevent questions of this kind from being discussed for the future, and the effect of an erasure as a revocation, and of an interlineation, will in all cases depend not upon the material with which, or the manner in which, the erasure or interlineation is made, nor even upon the intention of the testator, but upon his compliance with the 21st section.

Alterations presumed to have been made after Execution.

A very material question arises with regard to the time when, in the absence of direct evidence of the fact, the unexecuted alteration shall be presumed to have been made. In the case of deeds, interlineations are presumed to have been made before execution; for every deed expresses the mind of the parties at the time of its execution, and to presume it to have been altered afterwards, would be to presume a fraudulent or criminal act. But it is not so in the case of a will; that instrument is supposed to indicate the mind of the testator at the time of his death, and may well be altered from time to time, as the intentions of the testator may change; the reason of the thing seems consequently to lead to the presumption that the alterations were made after execution (Doe *v.* Catamore, 15 Jur. 728). In the earlier cases, however, when the act had been but a short time in operation, some uncertainty existed in this respect; but the principle is now settled, since it has been held by the Judicial Committee of the Privy Council (K. Bruce, V. C., dissenting), that the inference of law is, that the alterations are made after the execution of the will, and conse-

quently are invalid (Cooper *v.* Bockett, 4 Moo. P. C. C. 419; 10 Jur. 931). In giving judgment in that case Lord Brougham observes, "If, indeed, we for a moment consider the consequences of holding a contrary doctrine, we must at once be convinced how fatal this would be to the authority of documents, how entirely subversive of the rights of the parties, and how completely abrogatory of the statute. A party might change the sums of all the legacies left in a will; he might change the parties legatees; he might change the parcels and the devisees in a will of lands; and all this might be effected without the least knowledge on the part of the testator, who, having given one gift to one person, might be made to give another to the same, or the same to another person. Even if a testator himself made the alteration after the execution and attestation, it would be a bequest or devise not witnessed; and it is obvious to remark that he might be of sound and disposing mind at the one period, when the factum took place, and wholly incompetent when he made the alteration. The whole protection thrown round parties by the statute would thus be taken away." (See also Burgoyne *v.* Showler, 1 Rob. 13.)

Reasons for this Presumption,

This decision was said to be founded on the strictest principle, and in sound sense, by Lord Cranworth, in Simmons *v.* Rudall (15 Jur. 163), and was much discussed, and fully assented to, in Doe *v.* Palmer (15 Jur. 836).

Considering that the family of the testator, into whose hands the will usually falls after his death, are frequently his residuary legatees, and no fraud could be practised more easily, or with less probability of detection, than that of striking out with a pen some of the specific legacies or devises, it certainly appears to be most convenient and safe to hold that, where a will is found with unattested obliterations, it should be considered to be wholly unaltered, except that if any words could not be read, nor made out in evidence, in consequence of the obliterations, the will should take effect as if such words did not form part of it.

But this presumption may of course be strengthened, or rebutted, by direct evidence; by circumstances raising a contrary presumption, as by the context in the will itself; and by declarations made by the testator himself.

which may be strengthened or rebutted by direct Evidence, by Circumstances, by Declarations of the Testator made before Execution.

By direct evidence, where the subscribed or other witnesses depose to the fact of the alteration having been made before execution, or otherwise, and this is a matter of every-day occurrence; by circumstances raising a contrary presumption, as the context, nature of the alteration, character of the writing, and so forth (In the goods of Norton, 13 Jur. 1108); and lastly, by declarations of the testator himself, when made before the execution of the will. How far evidence of this kind was admissible to rebut the presumption was much considered in Doe *v.* Palmer (15 Jur. 836). The evidence there relied upon consisted of declarations by the testator, frequently made before, and nearly down to the time, when the will was executed, that he intended to make provision by his will for A. B., coupled with the fact, that, without the alteration, the will, which disposed of the whole of his property, made no provision for A. B. The will and the alteration were in the testator's handwriting. This evidence was held to be admissible, and was, in the judgment delivered by Campbell, L. C. J., compared with written or verbal instructions from the testator to his solicitor to prepare the will in its altered form, and with the production of the draft of the will, corresponding with the will in its altered form, in which case, the instructions, and the draft, would be evidence, that the alteration was made before execution. But declarations made by the testator, after the execution of the will, to the effect that the alteration was made previously, would be inadmissible.

Where the obliterated Words are not apparent, Evidence admitted to show what the Words were,

The section, however, enacts, that no obliteration, &c., made after execution 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; upon this, it has been decided, that, although the words be so perfectly obliterated that they cannot be made out by inspection of the paper itself, evidence dehors the instrument may in some cases be given to show what they were, and the doctrine of dependent relative revocations has been applied to this part of the section. Thus, in Brooke *v.* Kent (3 Moo. P. C. C. 334), the testator erased with a knife the word "two" and wrote the word "one" in its place, and the word "four" was also erased and "two" written instead. At the end of his will he wrote this memorandum:—"The erasure in the twenty-third line of the sixth sheet, the word 'two' taken out and the

if other Words are substituted.

word 'one' put in its place; and in the first line of the seventh sheet, the word 'four' taken out and the word 'two' put in its place; and the fifth line of the seventh sheet, the word 'four' taken out and the word 'two' put in its place;

By me,

WM. BROOKE,

June 26, 1838."

The words in the will for which the words "one" and "two" respectively were substituted, were too completely effaced to be legible.

Dr. Lushington, who delivered the judgment, after referring to the words of the 20th and 21st sections, said, "The first point for consideration as to this (21st) section is, whether 'intention' must not accompany the acts mentioned in it, in the same way as intention must accompany the acts mentioned in the 20th section: unless this construction be given to the 21st section, as must necessarily be given to the 20th, some very absurd consequences would follow. Burning or tearing a will without intention would not revoke the instrument or any part, but obliteration without intention might render ineffectual the most important part of it: the legislature never could intend that intention should be indispensable to give effect to burning or tearing, and not to obliteration with ink, or something similar.

"In all those cases under the Statute of Frauds, and this act, intention is indispensable; under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done sine animo revocandi, and only for the purpose of making immediately some new disposition or alteration; and if, from want of compliance with the statutory regulations, such new disposition or alteration could not take effect, then the burning, tearing or obliterating in no degree revoked the will, but it remained in full force, as if nothing had been done to it. Similar principles must be applied to cases arising under the present statute."

Following this decision, the Prerogative Court, in the case of erasures, where one word is substituted for another, admits evidence dehors the instrument, to show what the original was (Soar *v.* Dolman, 3 Curt. 121; In the goods of Rushout, 13 Jur. 458).

But where there is no substitution, and merely an erasure or obliteration, it seems that a different principle will apply; for in such a case the act itself is an evidence of an intention to revoke, and the revocation will be complete if the words be not apparent on the face of the will itself. In Townley *v.* Watson (3 Curt. 767), the allegation pleaded the draft of the will, and the evidence of the solicitor, who had prepared both the draft and the will, was tendered in proof of the original words, which were so erased or obliterated that they could not be made out by persons accustomed to decypher, or by artificial means, from the paper itself, and the allegation was rejected; but the Court observed, that, if it could be pleaded in the allegation that the words obliterated were capable of being distinguished on the face of the will, it would refer the allegation to proof, and then pronounce its judgment according to the testimony which might be offered at the hearing. In several cases the evidence of engravers has been admitted, for the purpose of making out the obliterated words, and for other similar purposes (Cooper *v.* Bockett, 4 Moo. P. C. C. 419). In Lushington *v.* Onslow (12 Jurist, 465), the words were made out and pleaded in the allegation, and the act of obliteration was, in argument, compared to cancellation, which was not a mode of revoking under the statute.

But not where the Alteration is by Erasure or Obliteration, without any substituted Words.

Three modes are pointed out by which validity may be given to the alteration, though made after execution, either by re-execution with the formalities required by the 9th section, or by placing the signature of the testator and subscription of the witnesses in the margin or other part of the will opposite to or near the alteration, in which case the alteration is sufficiently identified without express words of reference; or at the foot or end of a memorandum referring to the alteration, and written on some part of the will.

Alterations rendered valid by Re-execution; by Signature of Testator, and Subscription of Witnesses near Alteration, or at the Foot or End of Memorandum on the Will referring to Alteration.

It has been sometimes suggested that the joint presence of the subscribing witnesses was not required by either of the latter modes of giving effect to an alteration; possibly the strict sense of the words may to a certain extent warrant the suggestion; but the reference to the ninth section immediately preceding, and the use of the definite article "the" in the expression "subscription of the witnesses," point to a joint presence as at least the safer course; the signature of the testator

may, it should seem, be acknowledged as well as made in the presence of the witnesses under this section, either in the margin or at the conclusion of the memorandum.

In the goods of Wingrove (15 Jur. 91) a question of practice arose under this section, as to the necessity of an affidavit from the witnesses, whose subscription was in the margin, verifying the time and other circumstances in reference to the alteration; Sir H. J. Fust was of opinion, that no such affidavit was necessary, where the terms of the statute were strictly complied with. It may be doubted whether the same principle will apply to the case, in which the will having been signed by the name of the testator, his initials merely, and those of the witnesses, are made in the margin; but it would seem that no affidavit ought to be required, if the attestation clause contains a memorandum referring to the alterations, or if a separate memorandum referring to the alterations be written on some part of the will, and the signature of the testator, and subscription of the witnesses, be made at the foot or end of, or opposite to, such memorandum, in accordance with the directions of the statute. (In the goods of Martin, 1 Rob. 712.)

Where a will had interlineations, and a codicil executed after the interlineations were made, contained the words "It is my wish that the interlineations in my will may stand as part thereof," probate was decreed of the will, with the interlineations. (In the goods of Mills, 11 Jur. 1070.)

Alterations in Wills made before 1838.

When the alterations, or obliterations, appear in a will made before 1838, the question is, whether they were made before that date; for if made subsequently, they would fall within the act, and be of no effect unless executed in compliance with the present section; and in the absence of evidence that the alterations or obliterations were made either before or since that date, the Court will draw its conclusions from the particular circumstances of the case. In Pechell *v.* Jenkinson (2 Curt. 273), probate of an unattested codicil without date was granted, there being nothing to show that it was signed after 1838, the will to which the codicil referred was dated in 1830, and the testatrix died in January, 1839.

In a will of realty, dated prior to 1838, which bore upon the face of it certain obliterations which were favourable to the heir-at-law, and the heir-at-law did not ask for an issue, K.

Bruce, V. C., decreed against the obliterations, the evidence leading to the conclusion that they were not made before the execution of the will (Wynn *v.* Heveringham, 1 Coll. 630).

In Utterson *v.* Utterson (3 Ves. & B. 122), the testator made an express codicil for the purpose of excluding his son, and interlined his will to the same effect. The interlineation he left standing, the codicil was cancelled by drawing a pen across it. Sir W. Grant, M. R., thought, independently of the evidence of reconciliation, that the act of obliteration spoke clearly a change of intention as to the exclusion, and consequently that the interlineation was cancelled by the obliteration of the codicil.

Upon this case Mr. Jarman (1 Wills, 127, n. (*h*)) has remarked, that testators should be dissuaded from making or altering their wills (as they are often disposed to do) under the influence of any temporary excitement, occasioned by the ill-conduct of a legatee; and, still more, from recording their resentment in their wills. This caution is the more necessary now, since the present section has made the alteration of a will, by striking out any part, which may have been originally there, a matter requiring a great degree of care. In some cases application has been made to the Court to strike out of the will passages reflecting on the conduct of persons, but the utmost length to which the Court has gone, is, to exclude the offensive passages from the probate, and from the copy kept in the Registry. (Curtis *v.* Curtis, 3 Add. 33; In the goods of Wartnaby, 1 Rob. 423.)

How revoked Will shall be revived.

XXII. And be it further enacted, that 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 showing 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 shown.

The state of the law, and the authorities bearing upon the question of republication, previous to the year 1838, are discussed very fully in the notes to Duppa and Mayo (1 Saund, 275d; Jarm. on Wills, ch. 8; and Wms. Exors. pt. 1, bk. 2. ch. 4). Under the Statute of Wills, such an allowance of the will as amounted to republication, might be made by parol, though the will itself must have been in writing (Jackson *v.* Hurlock, Amb. 494); but the animus republicandi was necessary (Abney *v.* Miller, 2 Atk. 599). And this was the case with respect to wills of personalty before the act of Victoria: for where a woman made her will before marriage, and survived her husband, the will was held to be republished, the deceased having, on one occasion, called for the paper, and pointing to it said, "This is my will, the will I shall abide by;" and on other occasions also, after the death of her husband, declared that she had made a will, and intended the same to operate, and that her affairs were to be settled according to the directions contained in such will, which she identified with the will propounded, by naming the executor therein appointed, and the place where she had made the will (Long *v.* Aldred, 3 Add. 48; Braham *v.* Burchell, 3 Add. 243; Miller *v.* Brown, 2 Hagg. 209). This, however, applied only to those cases where there was no revocation, and all that was required was to show adherence; for where a testator left a will of 1819, and also a will of 1823, which contained a clause of revocation, and in his last illness produced and read before several persons the will of 1819, and declared that it was his last will, and what he wished to be carried into effect; and after his death, the will of 1819 was found carefully deposited and locked up, and that of 1823 also at the bottom of the same drawer, soiled and crumpled, but not cancelled, amongst old and useless papers. This was considered not to be like the case of a later cancelled will, because there the very act of cancellation was a revocation, and laid a foundation for the inference, that the testator intended the former will to operate; but in the case referred to, there was a latter revocatory will entire, and in force, as a revocation of the former, though the devises and bequests might have lapsed. If it had been merely a will of realty, it

Express Republication before the Act.

clearly could not have been contended that there had been a republication of the former will, because the words of the 6th section of the Statute of Frauds are express. It was clear, also, under sect. 22 of that statute, that the latter will could not have been revoked by mere declarations, unaccompanied by some writing; but there was no declaration reduced into writing during deceased's lifetime. The will of 1823 was accordingly pronounced for. (Daniel *v.* Nockolds, 3 Hagg. 777).

But under the Statute of Frauds, to republish a devise of lands, the paper in which such devise was contained must have been re-executed in the presence of three witnesses; and where the will itself was so republished, the case was not very doubtful; but the difficulty which arose, was in respect to a constructive republication by codicil.

Constructive Republication.

Upon this subject, Sir W. Grant, M.R., in Pigott *v.* Waller (7 Ves. 117), observes, after referring to Lytton *v.* Lady Falkland, "A similar question arose three years afterwards, in the eleventh year of Queen Anne, in Lord Lansdown's case, which contained a strong circumstance of constructive republication, the codicil containing several references to the will; but it was held by Lord Parker, and the whole Court of King's Bench, that since the statute, there can be no republication by implications, but the will must be re-executed. In Hutton *v.* Simpson, the same doctrine is recognized. Then came Acherley *v.* Vernon (3 Br. P. C. 107), in which the doctrine of constructive republication was introduced, for the first time, since the statute. A direct republication or re-execution is an unequivocal act, making the will operate precisely as if it was executed upon the day of the republication. But a reference to the will proves only, that the devisor recognizes the existence of the will, which the act of making a codicil necessarily implies, not that he means to give it any new operation, or to do more by speaking of it, than he had already done by executing it. Why his speaking of it should make the will speak, as it is said, is not very easily discernible as a question of intention. It has not ceased to exist; therefore, if he speaks of it at all, he must speak of it as existing upon the last day as well as the first. But can that show that he means it to exist in any other form, or with any other effect, than he originally gave it?" Notwithstanding these expressions, Sir W. Grant, pressed by the con-

venience of adhering to settled rules, and in deference to former decisions, held the codicil a republication in the case before him; and the rule, that the codicil, if not neutralized by internal evidence of a contrary intention, republished a will, to which it referred, was well established.

With respect to wills of personal estate, the question of republication was not, generally speaking, very material, for the residuary bequest embraced all the property of which the deceased died possessed; but in regard to wills of freehold estate, the rule, that the will operated upon such lands only as the devisor had at the time of the execution, gave a great importance to republication, whether express or constructive; for since the effect of republication was to make the will speak and operate from the time of its being so republished, lands intermediately acquired were thus brought within the will.

But the effect of a codicil to extend the devise to intermediately acquired lands, might be negatived by the contents of the codicil itself (Bowes *v.* Bowes, 2 Bos. & P. 500; Hughes *v.* Turner, 3 Myl. & K. 666; Ashley *v.* Waugh, 4 Jur. 572; Monypenny *v.* Bristow, 2 Russ. & M. 117; Smith *v.* Dearmer, 3 Y. & J. 278. See section 24).

The word "republish" does not occur in this section, nor elsewhere in the act, except in section 34, but "revive" is used instead; the distinction between the terms may not be very wide, but perhaps it is more accurate to speak of reviving, rather than republishing a revoked will (Skinner *v.* Ogle, 9 Jur. 432). However that may be, as under the old law republication might be express or constructive, so under the present act, revival may be express by re-execution of the will itself, or constructive, by a duly executed codicil, showing an intention to revive the same. Re-execution is an unequivocal act, and will depend upon precisely the same principles which govern the original execution, that is, the capacity of the testator, and compliance with the formalities required by the 9th section. It has been doubted (Lush on Wills, 45, 2nd ed.), whether the testator must not sign the will again, on the ground that an acknowledgment of the former signature, before fresh witnesses, would not be strictly a re-execution; but since the 9th section recognizes an acknowledgment of the testator's signature, previously made, as one of the modes of execution, the word re-

Revival, express or constructive, since the Act.

execution in the present section would probably be held to be satisfied by an acknowledgment of the original signature, if made for the purpose of re-executing the will, in the presence of subscribing witnesses; and there does not seem to be any reason why a more confined sense should be put upon the word "re-execute," in the present section, than is put upon the word "execute," in the 9th section.

The cases in which the provisions of the present section have, for the most part, been the subject of discussion, are those in which a testator has left several wills, and then executed a codicil, referring to one or other of them, and the question has been, which of these wills was revived by the codicil. Upon this point it has been held, that the law is not altered, and these cases come within the principle, and are subject to the same rules of construction and of evidence, as those acted upon in Lord Walpole *v.* Lord Orford (3 Ves. 402), that a codicil, by expressly referring to, and recognizing a prior will, as the actual subsisting will, revokes a posterior will, and revives the prior will, and that express reference cannot be controlled by parol evidence. In the goods of Chapman (1 Rob. 1), Payne *v.* Trappes (11 Jur. 854; 1 Rob. 583); but if the reference be not so express, and a latent ambiguity exist, evidence will be admissible to show which will the testator has described. Thus in Thompson *v.* Hempenstall (13 Jur. 814), where many of the authorities are cited, the testator, by his last will, "revoked all former wills, codicils, and testamentary dispositions, except a will bearing date the 13th December, 1831, which will relates exclusively to the reversion in fee of the Tong Castle Estate." One of his former wills bore date the 13th December, 1831, but did not relate exclusively to the reversion of the Tong Castle estate. Another former will bore date the 22nd May, 1839, and did relate exclusively to that reversion in fee: Dr. Lushington held, that the reference, taken with the whole context of the three wills, and with the evidence of the state of the testator's family, clearly designated the will of the 22nd of May, 1839; and that the will of the 13th December, 1831, was not entitled to probate.

In another case the testator had, in 1833, made a will, the principal dispositions of which were to reserve a sum of 2000*l.* to each of his three then unmarried daughters, the deceased hav-

ing, on the marriage of each of his other three daughters, given to each of them a similar sum, and then to divide the residue of his property among five of his said daughters, the sixth having been otherwise provided for. In December, 1835, one of the unmarried daughters intermarried with P. M., when the testator settled upon her the sum of 2000*l.*; and, on the 25th January, 1836, made a codicil to his said will, whereby he revoked the legacy of 2000*l.* thereby given to this daughter; and on the 14th July, 1837, he executed a new will, placing her on the same footing as her other married sisters, in respect to her interest in the bulk of his property, and leaving his remaining two unmarried daughters provided for as in the former will of 1833, which was not forthcoming, and which there was reason to believe was destroyed when the will of 1837 was executed. His last will was placed at his bankers', and there remained till after his death. Upon the death of his wife, in 1843, he gave his solictor instructions to prepare a codicil to his will, then stated by him to be at his bankers'; but the codicil of January, 1836, was given to the solicitor in the presence, and by the desire of the deceased, as containing the date of the said will; and accordingly, in this last codicil, which was executed on the 28th October, 1843, it was stated to be a further codicil to a will bearing date the 29th April, 1833, instead of a codicil to the will bearing date the 14th July, 1837. The fact, that no will of the date referred to could be found, while there was a subsisting will of a different date, was considered a sufficient ground for admitting evidence of the testator's intention, upon which, the will of 1837, and codicil of 1843, were admitted to probate. (Quincey *v.* Quincey, 11 Jur. 111.)

The latter clause of the section seems intended to provide for such a case as Crosbie *v.* M'Doual (4 Ves. 610). In which case the testator left a will and several codicils, the fourth codicil inter alia recited and revoked part of the will, the fifth and last codicil was made merely for the purpose of changing an executor, but concluded with the words, "I do hereby confirm my said will in all other respects." The question was, whether the fourth codicil, so far as it was inconsistent with the will, was revoked in consequence of the reference by the fifth to the will, and Sir R. P. Arden, M. R., observing, that if a man ratifies

and confirms his last will, he ratifies and confirms it with every codicil that has been added to it, held that the revoked part of the will was not revived by the fifth codicil, the effect of the fourth codicil remaining.

A revoked Will not revived by Destruction, &c., of revoking Will.

This section, by expressly enacting that where a will has been revoked, it can be revived only by re-execution or by codicil, has finally settled the question, whether the destruction of a later will, which itself revoked a former will, revived such former will. Swinburne and other text writers considered that a will once valid, but revoked by a subsequent will, revived on the destruction or cancellation of the revoking instrument, and it was held, that such destruction or cancellation ipso facto revived the former will. (Goodright *v.* Glazier, 4 Burr. 2512; Harwood *v.* Goodright, 1 Cowp. 91.) Subsequent decisions, however, modified this doctrine, and it was determined that the legal presumption was neither adverse to, nor in favour of the revival of a former uncancelled will; (Moore *v.* Moore, 1 Philim. 375; Usticke *v.* Bawden, 2 Add. 116); and that such presumption might depend primâ facie on the nature and contents of the wills themselves, exclusive of circumstances dehors the wills. If the latter will contained a disposition quite of a different character, the law might presume such a complete departure from the former intention, that the mere cancellation of the latter instrument might not lead to a revival of the former, but intestacy might be inferred. If, however, the two wills were of the same character, with a mere trifling alteration, it might be presumed, because it was the rational probability, that when the testator destroyed the latter, he departed only from the alteration, and reverted to the former disposition, which remained uncancelled (Kirkcudbright *v.* Kirkcudbright, 1 Hagg. 325), or the case might turn upon parol evidence, or be determined generally from the circumstances of each individual case. (James *v.* Cohen, 3 Curt. 770; Welch *v.* Phillips, 1 Moo. P. C. C. 299.) Under the present section, all presumption either in favour of, or against a revival, is done away with, and the courts have no discretion to exercise. (Major *v.* Williams, 3 Curt. 432.)

Cases may be suggested in which it will perhaps be necessary to consider the 20th and 22nd sections together, where, for instance, a man makes his will, and then a codicil revoking

a particular bequest in the will; after which he makes a further codicil merely affecting some other disposition in the will, and in all other respects ratifying and confirming his will. By section 20 the first codicil clearly revoked the bequest in the will, but can it be maintained that the second codicil has the effect of revoking, under section 20, the first codicil, or shows, under section 22, an intention to revive the revoked bequest in the will? The cases already referred to, Crosbie *v.* M'Douall, Smith *v.* Cunningham, and Greenhough *v.* Martin, occurring indeed before the present act, tend to show that the first codicil would not, in such a state of facts, be revoked, notwithstanding the apparent inconsistency of submitting the will and both codicils to probate.

Reference to and Incorporation of other Papers.

There is a class of cases, which may perhaps be noticed in connexion with the revival of a revoked will, inasmuch as the validity of the papers concerned is made to depend upon the execution of a subsequent instrument, and the reference to them which may be made in such subsequent instrument. As where the testator left a duly executed will and two codicils, respectively dated before 1838, subsequent to which date he wrote other codicils, which were signed by him, but not attested, on the same sheet of paper as the will and two former codicils; he then duly executed a further codicil, in which were the words, "By this codicil to my will I bequeath, &c., independently of all other bequests in my said will;" this last codicil was found apart from the other papers; it was held that the word "will" was applicable to the will and first two codicils only, and could not be extended to the unexecuted papers, and probate of the will and three codicils was thereupon granted. (Haynes *v.* Hill, 13 Jur. 1058; Utterton *v.* Robins, 2 Nev. & M. 819; Doe *v.* Evans, 1 Cr. & M. 42; Gordon *v.* Reay, 5 Sim. 274.)

As to the incorporation of unexecuted testamentary papers, and other instruments, see Smart *v.* Prujean (6 Ves. 561), In the goods of Lady Durham (3 Curt. 57), Ferraris *v.* Lord Hertford (Ib. 493, S. C. on appeal, 4 Moo. P. C. C. 366).

In these cases there is an important practical distinction between the right and the necessity of including the instruments referred to in the probate. The right of the paper to be incorporated in no degree depends upon the validity or invalidity of such

paper per se, but upon the clearness and sufficiency of the words of incorporation. On the other hand, the necessity of taking probate will depend upon the validity or invalidity of the instrument to be incorporated. For instance, if a man by will simply ratifies a deed valid per se, there is no necessity for taking probate of that deed, yet the title to probate remains; but if the will ratifies an instrument inoperative or invalid per se, then the title and the necessity co-exist. Again, if the will referring to a valid deed directs that the property dealt with in the will shall be settled on similar trusts, and there be litigation, then the deed must form part of the probate, since a court of law will not give effect to such will, unless the instrument referred to be included in the probate (Sheldon *v.* Sheldon, 1 Rob. 81).

When a Devise not to be rendered inoperative, &c.

XXIII. And be it further enacted, that 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.

Before the present statute, the estate devised must have remained in the same condition until the testator's death, for any the least alteration, or new modelling, of the estate, after the date of the will, was an actual revocation. (Arthur *v.* Bokenham, 11 Mod. 157; Sparrow *v.* Hardcastle, 3 Atk. 798; and see Hodges *v.* Green, 4 Russ. 28; Rawlins *v.* Burgis, 2 Ves. & B. 382; Ward *v.* Moore, 4 Madd. 368; Brain *v.* Brain, 6 Madd. 221; Bullin *v.* Fletcher, 2 My. & C. 432.)

With respect to specific legacies, the only rule to be adhered to, was to see whether the subject of the specific bequest remained in specie at the time of the testator's death; for if it did not, then there was an end of the bequest. (Humphries *v.* Humphries, 2 Cox, 185). But now a devise, or bequest of a specific subject of property will pass whatever interest in that subject may be disposable by the testator at his death.

Upon this section, Sir E. Sugden says (1 Vend. & P. 304, 10th ed.), "In a case like that of Arnald *v.* Arnald (1 Br. C. C. 401), where a testator devises his estate to trustees to sell, and pay the money to certain legatees, and afterwards sells the estate himself, which, under the old law, was an ademption, the distinction would seem to be this, that if the money has not been received by the testator, it will pass to the legatees, because, notwithstanding the act done by the testator, namely, the sale, the will is still to operate on the estate, or interest in the estate, which the testator has power to dispose of by will at his death; and he has power, at that time, to dispose, by will, of the purchase money, and has a lien on the estate for it, which he can also dispose of, and the case of the legatees is rather strengthened than weakened by the 24th section. But, if the testator has received the money, the ademption appears to be beyond the reach of the statute; the testator has no longer any interest in the property given by his will, although his general personal estate is increased by the sale, and the case does not seem to be aided by the 24th section."

If the Ademption is complete, the Will is so far revoked.

The question, then, in each case, would seem to be, whether the act done by the testator has worked a complete ademption, for if the ademption is complete, and all interest has passed from the testator, the will is so far revoked. Where the testatrix devised certain freehold houses to trustees, in trust to sell the same, as soon as conveniently might be, after her decease, and directed the trustees to stand possessed of the proceeds, upon certain trusts, for the children of Mrs. Stonehouse and Mrs. Taylor, and for J. Peacock and his children, and gave the residue of her personal estate to the trustees, in trust, for B. The testatrix sold the houses after the date of her will, and conveyed them to the purchaser. But the purchaser, being unable to pay 350*l.*, part of the purchase money, the testatrix consented to accept a deposit of the title deeds of the houses, as a security for the money remaining unpaid. It was argued, that, under the present section, the interest, which the testatrix had in the houses, at the time of her death, by virtue of the equitable mortgage, and the money secured by the mortgage, passed to the trustees in trust; but Shadwell, V. C., said, "It is clear that, according to any construction, which can be put upon the act of parliament, the will has been revoked, as to the devise in trust to sell. Then

the act says, that no conveyance, or other act, made or done subsequently to the execution of a will, of or relating to 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 at the time of his death. So that there is an express exception of the case, where the testator shall have revoked the will; and on the ground of that exception, my opinion is, that the property in question is taken out of the operation of the general enactment, contained in the clause of the act, which has been relied on. That clause applies to cases where testators, having devised their estates, make conveyances of them, which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee, and afterwards take a reconveyance of them to themselves, and a trustee to uses to bar dower; but the clause does not apply to cases like the present, where the thing meant to be given is gone. The will in this case, though revoked by the sale, has operation on the property in another form; for by the sale, the testatrix changed the nature of the property from realty to personalty, and the money produced passes as part of her general personal estate. (Moor *v.* Raisbeck, 12 Sim. 123.)

So where a testatrix devised a real estate, and afterwards sold it, but the purchase was not completed until after her death, the question was, whether the purchase money belonged to her legal personal representatives, or to the devisees; and on behalf of the former it was contended, that by the contract for sale, the vendor parted with her estate, and must constructively be considered as a trustee of the estate for the purchaser, and the latter as a trustee of the purchase money for her; that she became entitled to the purchase money, but had no beneficial interest in the estate at her death, and the statute did not apply, for by the sale the devise was adeemed, and became inoperative. The counsel for the devisees argued, that nothing but a revocation, under the 18th and 19th sections of the statute, prevented the operation of the will on a devised estate, or such estate or interest as the testator may, at his death, have power to dispose of by will. That the lien on the estate for the unpaid purchase money, was a beneficial interest in the estate,

which the testatrix had the power of devising at her death, and which, therefore, passed to the devisees, and there could be no ademption, while there was an interest, upon which the will could operate. After observing that revocation, in the manner directed by the act, was not the only mode, in which a will might be rendered inoperative, Lord Langdale said, "The question depends upon the rights and interests of the testatrix, at the time of her death. What was really hers in right and equity, was not the land, but the money, of which alone she had a right to dispose; and though she had a lien upon the land, and might have refused to convey till the money was paid, yet that lien was a mere security, in or to which she had no right, or interest, except for the purpose of enabling her to obtain the payment of the money. The beneficial interest in the land, which she had devised, was not at her disposition, but was by her act wholly vested in another, at the time of her death; and the case is clearly distinguishable from cases, in which testators, notwithstanding conveyances made after the dates of their wills, have retained estates, or interests in the property, which remain subject to their disposition." He accordingly held, that the deceased had no beneficial interest in the land at her disposition, that the will only passed that which was at her disposition, and the devisees of the land had no interest in the purchase money. (Farrar *v.* The Earl of Winterton, 5 Beav. 1.)

A Will to speak from the Death of the Testator.

XXIV. And be it further enacted, that 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 the will.

The preceding section bears upon those cases, in which, notwithstanding the testator's dealing with the property, which was the subject of disposition, he still at the time of his death had some interest remaining in it; the present section extends to property, both real and personal, acquired after the making of the will.

The operation of this section, as well as that of the 23rd, is

in terms confined to the real and personal estate comprised in the will. Hence the enactment leaves untouched questions turning upon identity of person. So that if a testator give an estate or legacy to his son John, the gift will take effect in favour of his son of that name (if any) at the date of the will, and of him only; and if such son should die in the testator's lifetime, and he should afterwards have another son of the same name, who should survive him, such after-born son will not be an object of the gift.

The application of the principle of construction enacted by this section to specific bequests and devises, is not free from difficulty, and there is great difference of opinion on the subject.

Effect of Section upon after-acquired Property in the Place of and answering the Description.

On the one hand, it has been said, that if a testator bequeath or devise property, and afterwards sells it, and purchases other property answering the description of which he is possessed at his decease, the bequest or devise will comprise the new acquisition by force of the enactment, which makes the will speak from the death (1 Jarm. Wills, 289); whilst another learned writer (xi. Jarm. Conv. 459, n. (*a*)), is of opinion, that if the subject-matter of the gift is described in a manner, which imports that it is, at the date of the will, in existence as a thing known to and possessed by the testator, if in short it is individualized, then it must be held that the will does show an intention to exclude the operation of the 24th section.

"Thus a gift of 'my black horse,' or 'my house in Russell Square,' is meant to pass a single horse or house, viz. the one then possessed by the testator; and the intent to pass that is inconsistent with an intent to pass a different one. This would be clear, if the testator, retaining the house or horse which he had at the date of the will, should afterwards acquire others; when the gift would not, it is conceived, be void for uncertainty, but would pass that horse or house which the testator had when he made his will."

Upon after-acquired Property in Addition to and not in the Place of that specifically devised or bequeathed.

The decisions upon the section, Doe *v.* Walker (12 M. & W. 591); Cole *v.* Scott (12 Jur. 509; 16 Sim. 259, S.C., on appeal; 14 Jur. 25; 1 Mac. & Gord. 518), have but little bearing upon the point, inasmuch as the newly-acquired property in those cases was in addition to and not in substitution of other property. In Doe *v.* Walker, the testator, in 1837, being then seised of lands in Great Bowden, made his will, duly executed, and devised, inter alia, all the lands, of which

he was seised in possession, or reversion, in Great Bowden. Afterwards, in July, 1838, he made a codicil, duly attested, referring to his will, and appointed J. C. an additional trustee and executor. He died in 1842, having, after the execution of the codicil, purchased, and had conveyed to himself in fee, two other estates in Great Bowden, of which he died seised in fee simple. The question was, whether the will and codicil together passed only such estates in Great Bowden as were devised by the will, or such estates in that place as the testator had at his death. If the codicil, said Parke, B., who delivered the judgment of the Court, had contained nothing but the devise of all his lands in Great Bowden, &c., "*and described in and devised by the recited will*" to C. as an additional trustee, we should have probably thought that the case fell within the authority of Bowes *v.* Bowes (7 T. R. 482; 2 Bos. & P. 500); Hughes *v.* James (3 My. & K. 666); Monypenny *v.* Bristow (2 Russ. & M. 117); and Ashley *v.* Waugh (4 Jur. 572), and concluded that the testator meant only to pass the same property to the three trustees which he had before given to the two. But as the testator in the codicil did not stop there, but went on to ratify and confirm his said will in all other respects than those in which he had altered it by the previous provisions in the codicil, he was considered to have made a new will of the date of the codicil, which, coming within the present act, would contain a devise of all the lands of which he was seised in Great Bowden, and be construed as speaking with respect to those lands, as if it were executed immediately before the death of the testator, and pass the property purchased after the codicil.

Contrary Intention, as shown by the Word "now," or in some other way in the Will.

In Cole *v.* Scott the question directly raised was, whether the word *now*, in the expression "*I am now seised*," was sufficient indication of the testator's intention to exclude after-purchased estates. The will in this case also contained the following clause:—"I give, &c., all such manors, messuages, &c., as well freehold as copyhold and leasehold, as are now vested in me, or, as to the said leasehold premises, as shall be vested in me at the time of my death." In support of the argument, that after-acquired estates passed, Doe *v.* Walker and Auther *v.* Auther (13 Sim. 422), were cited, and it was contended that "*I am now seised*" was an expression only a little more emphatic than "*I am seised.*" But the Vice-Chancellor of England and Lord Cottenham, looking at the whole of the will,

were of opinion that the intention of the deceased, in using the word *now*, was clearly to exclude after-purchased estates. The principle of that decision being, that, since the act provided that a certain rule should prevail, "unless a contrary intention shall appear by the will," it was not at all necessary to find that contrary intention expressed in so many words, or in some way quite free from doubt; but if, on the fair construction of the will in question, adopting those rules of construction which were usually adopted in construing wills, it is found that the contrary intention does appear, the result will be to take the case out of the section of the act. "The question," Lord Cottenham observed "is, whether, in the terms he has used, the testator has not used the word '*now*' with reference to the time he was making his will; I think it quite clear that he has. I find this will with a date to it, showing therefore the period when it was executed, and I find that in it the testator gives 'all the estates of which I am now seised or possessed.' The word '*now*' has no meaning in itself; and if there is no date by which to construe it, some period must be fixed upon to which it can refer. Here, however, the date does appear, and the word *now* can only have reference to the time specified in the will, that time being the date of the will, namely, the 29th of April, 1843. It appears therefore to me just the same as if the testator had said, 'all the freehold and leasehold estates of which I am, on this 29th of April, 1843, seised and entitled.' If those had been the words, of course there could not have been a doubt; but the words used are in effect the same. What is the difference whether the date is repeated, or whether the word *now* shows that the date is referred to? This is one view of the case, that is, merely referring to the very words to be found in this particular clause. But the case does not stop there; for the testator uses the word *now* in two other parts of the will, in each of which he evidently and clearly alludes, not to the time the will may come into operation by his death, but to the particular period at which he is making his will. Am I, then, in taking a fair view of the expressions used in order to see what is intended, and in trying to put a fair construction on the word *now*, which is found in the particular clause, to disregard the same word used with reference to other gifts in other parts of the will? It would be departing from the ordinary rules of construction to do so. It appears to me beyond

all doubt and question, that in using the word *now*, the testator meant the day on which he made his will, and no other period. Then the case comes within the act. The act says, if the contrary intention appears, the provision as to the death of the testator is not to apply. I am of opinion that here the contrary intention does appear.

"With reference to the question of personalty, it is as clear as can be. The act, in effect, puts the case of real and personal property on the same footing; and though wills of mere personalty, as a general rule, speak from the day of the death, and are not referable to the state of the property at the time of making the will, yet if there are expressions in the will showing it is intended to describe property with reference to the day of the date of the will, and not to the day of the death, the intention so expressed will prevail. It prevails undoubtedly in cases of personalty, and by the act it is the same as to real estate."

Applying these last observations to the case of a devise, or specific bequest, it appears that the gift will take effect, if a subject answering the description of the devise, or bequest, be the property of the testator at the time of his death, although he may have disposed of the original subject; unless by the introduction of the word now, or of some similar expression, or on the fair construction of the will, an intention making the description of the gift referable to the date of the will, can be shown in the will.

Where there is nothing in the will controlling or confining the meaning of the general word estate, real estates subsequently acquired will pass by the words "all my estate and effects whatsoever, and wheresoever, and of what nature or kind soever they may be." (Stokes *v.* Solomons, 15 Jur. 483).

Whether, when stock was specifically bequeathed, the legacy was irretrievably adeemed by the sale of that stock, and could not be revived by a new purchase of similar stock by the testator, is said to have been doubtful under the old law. (1 Rop. Leg. 330, 4th ed.) That doubt is removed by the present section, which imputes to the testator an intention to make his words apply to the property possessed by him at his death.

So where a testator by will disposed of all his estate and effects, and all effects due to him from the estate of the late J. H., and afterwards executed a deed settling the effects so

due upon certain trusts, and in such manner as he should by any deed or deeds, instrument or instruments in writing, or by his last will or testament, or any codicil thereto, direct, limit, or appoint, and he died without executing any further instrument, the will was held to be a good execution of the power under the present and 27th sections. (Stillman *v.* Weedon, 12 Jur. 992; 16 Sim. 26.)

But the section will not extend an express gift of a particular freehold estate to a leasehold, the fee of which is purchased by the testator after the making of the will. The testator "devised all that his freehold estate at or near, &c., which he purchased of B. with the appurtenances;" subsequent to which he purchased the reversion of a small piece of land, part of the estate purchased of B., but held under a term of years. It was held that this piece of land did not pass by the devise of the freehold estate, but formed part of the residuary freehold estates. (Emuss *v.* Smith, 2 De G. & Sm. 722.)

This section, if extended to *all* specific bequests, has been considered likely to be productive of some singular results, and its operation will, it is supposed, probably be subjected to exceptions tending to confine it to cases, in which, under the old law, the intention of the testator was generally defeated. (Hayes & Jarm. Forms of Wills, Introd. 33.)

What a residuary Devise shall include.

XXV. And be it further enacted, that, 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.

A residuary bequest of the personal estate operated upon every part of such property, which the testator possessed at his death, and which was not sufficiently disposed of, or the be-

quest of which failed, or was void from lapse, or other cause. (Brown *v.* Higgs, 4 Ves. 708; Shanley *v.* Baker, 4 Ves. 732). And any accession to the personal estate, after the death of the testator, could be claimed by the next of kin, as undisposed of, against a general residuary disposition (4 Ves. 717, note; Montgomerie *v.* Woodley, 5 Ves. 522).

But as every devise of land, whether in particular or general terms, was, before the present act, of necessity specific, from the circumstance, that a man could devise only that which he had at the time of devising (Brydges *v.* Chandos, 2 Ves. Jr. 427); it was held, that a residuary devisee of land was as much a specific devisee as a particular devisee was. (Howe *v.* Dartmouth, 7 Ves. 147). Hence, he could take those lands only, which were not expressed to be given by the will; and the heir was entitled to the lands, the devise of which might have failed or be void.

Effect of Section.

The present section, particularly when taken in connexion with the third and twenty-fourth sections, has removed this distinction, and, in furtherance of one leading object of the act, assimilated the law in its application to a general or residuary devise or bequest of real and personal estate. The third section, it will be remembered, extended the devising power of a testator to all the real estate, which he should be possessed of at the time of his death; the twenty-fourth enacted that the will, with reference to the real and personal estate comprised in it, shall speak and take effect, as if executed immediately before the testator's death; and the twenty-fifth section provides that the residuary devise shall include, unless a contrary intention shall appear by the will, all such real estate, or interest therein, comprised, or intended to be comprised, in any devise, which shall fail or be void. Whence it follows, as a general rule, that where a will, which can be brought within the present act, contains a general, or residuary devise, which takes effect; such will takes from the heir every part of the real estate, though it may have been acquired since the will, or the specific devise thereof may, from any cause, be incapable of taking effect. For instance, estates, which are the subject of an ineffectual devise, will pass by the residuary devise in the will, and not go to the heir (Culsha *v.* Cheese, 7 Hare, 237), whose

right can be saved only by an intention, appearing by the will, that the residuary or general devisee shall not take.

This enactment, it may be presumed, will in most cases prevent the intention of testators from being defeated, for it can rarely happen that the testator should intend a void or lapsed devise to enure to the benefit of the heir, and prejudice of the residuary devisee, without expressing such intention in his will, and so bring the case within the exception admitted in the clause.

The general rule, that a residuary clause passes a lapsed legacy, is founded upon the principle, not that the rule effects what the testator intended, since he probably contemplated nothing beyond the particular legacy taking effect, but that the residuary clause is understood to embrace every thing not otherwise effectually given; because the testator is supposed to take away from the residuary legatee only for the sake of the particular legatee, and upon failure of the particular intent, effect is given to the general intent. (Easum *v.* Appleford, 5 My. & C. 61). This reasoning, always probably as a question of intention applicable to the case of a residuary devisee, is recognised in fact by the present enactment.

See generally on this section, and questions connected with it, Jarm. Wills, Chs. 18, 19 and 20; Johnson *v.* Woods, 2 Beav. 409; Flint *v.* Warren, 12 Jur. 810; Fitch *v.* Weber, 6 Hare, 145.

What a general Devise shall include.

XXVI. And be it further enacted, that a devise of the land of the testator, or 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 customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, 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.

A rule as to leaseholds was established by Rose *v.* Bartlett (Cro. Car. 292; Chapman *v.* Hunt, 1 Ves. sen. 270), that if a man has lands in fee and lands for years, and devises all his lands and tenements, the fee-simple lands pass only, and not the lease for years: and if a man has a lease for years and no fee-simple, and devises all his lands and tenements, the lease for years passes, for otherwise the will would be merely void. This rule which was not rejected by the circumstance that the will was inoperative as to the freehold estates, from defect of execution, has been frequently referred to and discussed, and does not appear to have been intentionally or substantially varied; but when the words describing the subject of the devise have not been simply lands and tenements, or the testator has, in addition to the words simply describing the subject of the devise, used other words descriptive of the nature or extent of his interest in the thing given, and that interest as described is applicable to leaseholds, or has used words plainly connecting property which was leasehold with the lands, or tenements, or hereditaments, the principal subject of the devise, the additional words have been held to warrant the conclusion that leaseholds were within the description of the thing devised. So that under the old law the presumption was against including leaseholds in a general devise: by the present section, however, the presumption will be the other way, and a general devise will include the leasehold estates of the testator, unless a contrary intention shall appear by the words of the will: gradually, therefore, the rule of construction in Rose *v.* Bartlett, with its various distinctions, will cease to be a subject of practical consideration. (1 Jarm. Wills, 627).

Effect of Section.

This enactment was much considered in Wilson *v.* Eden (11 Beav. 237; S. C. 12 Jur. 488). There the subject of the devise was described as the testator's "manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments," situate as in the will mentioned. Lord Langdale inclined to think that the words "messuages and lands," forming part of the description, would, if every thing else had concurred, have been sufficient to pass leasehold lands; but

those words, and the sequence describing the situation, did not constitute the whole description, which the testator had given of the subject of the devise; he had added to them, "all my other real estates in the counties of Durham and York and elsewhere in Great Britain, and all my estate and interest therein." The word "other," in this clause, was relative; it had relation to the subjects or things described in the former part of the sentence; it imported that the subjects next described were additional to, and besides, and in that respect, different from the subjects just before described. If the word "other" had been immediately followed by the words my lands in the counties of Durham, and so on, it might perhaps have been properly held, that the word "lands," as contained in the earlier part of the sentence, meant only the subject of the devise, without regard to the extent of the testator's estate or interest in it, or that the word "lands" (other circumstances permitting) meant leaseholds as well as freeholds; but the relative word "other" was immediately followed by the words "my real estates in the said counties;" and as it was thus plain, that, by the last clause of the sentence, the testator meant only to devise real estate, because he had so expressly described it, as there was nothing to show that in the last clause he meant a subject of devise differing in nature, and quality, from the subject of devise expressed in the former part of the description, as the word "other" expressing a relation, a difference or addition, showed the connection of the two parts of the description, and was fully satisfied without the implication of any difference in quality, his lordship was (though with some reluctance in coming to a conclusion on so narrow a ground) of opinion that, upon the true construction of the testator's description of the subject of his devise, the effect was to pass real estates only, and consequently, that leasehold estates did not pass. It did not appear to him that this was effected by the present act, (within which the will was brought by a codicil executed in 1841). According to the view which he took of the devise, it was to be considered as a devise of real estate; it was not simply a devise of the testator's land, or of his land in a particular place, or in a particular occupation, or a devise in a general manner applicable to any land, whatever might be its quality, or the testator's estate, or interest in it. Neither was

it a devise, which would describe a leasehold estate, if the testator had no freehold estate, which would be described by it. Taking it most favourably for the devisee, it was, as if the testator had devised all his land, or all his lands, farms, and messuages, and other real estate; and in such a case, he conceived that the word "land," which might be thought ambiguous, and, without qualifying expressions, might be deemed to include lands, in which the testator had only a leasehold interest, would have its ambiguity removed, and by reason of the words "other real estate," would be limited to its original and proper legal meaning. (See also Stone *v.* Greening, 13 Sim. 390; Morrell *v.* Fisher, 4 Exch. Rep. 591; Parker *v.* Marchant, 5 Mann. & G. 498).

What a general Gift shall include.

XXVII. And be it further enacted, that 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 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 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 the will.

The rule under the old law, where the power was not referred to in the will, was, that the property, comprised in the power,

must be mentioned, in order to manifest that the disposition was intended to operate upon such property; and the donee must have done such an act, as showed that he had in view the subject, of which he had the power to dispose. Hence, if there was not, on the face of the will, any reference to the power, the defect required to be supplied by very clear internal evidence of the intention to pass the property. Webb *v.* Honnor, (1 Jac. & W. 352), where the power was over personal estate; and Denn *v.* Roake, (6 Bingh. 475), in which case freehold estates were the subject of disposition. Alexander, C. B., who delivered the opinion of the judges in the last case, referring to the rule of law above stated, observed, "There are many cases upon this subject, and there is hardly any subject, upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with Sir E. Clere's case in the reign of Queen Elizabeth, to be found in the Sixth Report, and are continued down to the present time; and I may venture to say, that, in no one instance, has a power, or authority been considered as executed, unless by some reference to the power, or authority, or to the property, which was the subject of it, or unless the provision, made by the person intrusted with the power, would have been ineffectual, or had nothing to operate upon, except it were considered as an execution of such power, or authority." (See also Standen *v.* Standen, 2 Ves. Jr. 589; Langham *v.* Nenny, 3 Ves. 467; Bennett *v.* Aburrow, 8 Ves. 609; Doe *v.* Johnson, 7 Mann. & G. 1047).

Effect of Section.

The present section, however, has changed the rule, by enacting that a general devise of real estate shall extend to such estates as the testator may have a power to appoint, and shall operate as an execution of the power; and a general bequest of personal property, or of personal property described in a general manner, shall include personal estate, which the testator may have power to appoint, and operate as an execution of the power, unless in either case a contrary intention shall appear by the will.

In this instance, therefore, as in others already adverted to, the presumption of law and the rule of construction is reversed; and the intentions of testators will probably be defeated less frequently than heretofore, when, as suggested in Hannock *v.* Horton, (7 Ves. 399), the old rules obliged the courts to act

against what probably might have been the intention nine times in ten. And see Lord Wynford's judgment in Roake *v.* Denn (4 Bl. N. S. 22.)

It will be observed that this section is confined to general powers, and does not extend to particular powers, which still depend upon the old rules. (1 Sugd. Pow. 369; Cloves *v.* Awdry, 12 Beav. 604).

The 23rd and 24th sections have a very important bearing upon the present section. If, for instance, before the present act, a testator exercised a power by will, and it happened that the power was either not well created, (Dobbins *v.* Bowman, 3 Atk. 408), or was defeated by the happening of a contingent event, subsequently to the will, (Cross *v.* Hudson, 3 Br. C. C. 30), the devisor's interest at the time of the will, although contingent, and not vested, was held to come in aid of his disposition. Now, the testator's interest at the time of his death will pass by the will. (1 Sugd. Pow. 424).

Again: formerly where a man had power to charge estates, which power he afterwards discharged, and a similar power was reserved to him over other estates, if the first power was executed by will before the raising of the second power, the will would not have been deemed an execution of the second power, although it had been republished subsequently to the creation of that power; for the will spoke only of the first power, which was as much gone as if it had never existed. (Holmes *v.* Coghill, 7 Ves. 499; 12 Ves. 206). And it was considered doubtful whether the second power would have been executed if it had even embraced the same estate as the first power.

Now, however, the second power, if it embraced the same estate as the first power, would be deemed executed under the enactment, that every will be construed, with reference to the real and personal estate comprised in it, to speak, and take effect as if it had been executed immediately before the testator's death. The words in this section, "which he may have power to appoint," are to be taken in connexion with those, which determine at what time the will speaks. And there is the further provision in section 24, that no act done subsequently to the execution of a will of, or relating to any real, or personal estate therein comprised (unless an act, amounting under the

act to a revocation,) 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 death. (1 Sugd. Pow. 427; Stillman *v.* Weedon, 16 Sim. 26; 12 Jur. 992.)

In Pidgely *v.* Pidgely (1 Coll. 255), a general bequest of personalty was held to operate as an execution of a power; the will, however, in this case, also contained the words "direct, limit, and appoint," which showed an intention in the testator to execute the power.

How a Devise without Words of Limitation shall be construed.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any 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.

The principle upon which this clause is founded is, that a devise of real estate, without words of restriction, shall be construed in the most enlarged sense, unless a contrary intention be shown by the will.

Proceeding upon a general axiom in English law, that nothing shall be taken from the heir by implication, the rule of construction, previous to the act of Victoria, and still applicable to wills not within that act, was that a devise of messuages, lands, tenements, or hereditaments, without words of limitation, conferred on the devisee an estate for life only; and this, notwithstanding the will might, in other parts, afford strong reasons for believing that the testator did not intend to give an estate for life. It is evident that such a rule of construction, founded entirely upon technical reasoning, in most cases defeated the intention; and the Courts adopted the principle of laying hold of any circumstances which could afford a pretext for enlarging the life estate. (See Jarm. Wills, ch. 33; and Watk. Conv. 353, n., for a list of words which have been adjudged to give an estate in fee simple to the devisee; Doe *v.* Roberts, 11 Ad. & E. 1000.)

The present section reverses the rule, and an estate in fee,

or other the whole disposable estate or interest of the testator, will now pass unless a contrary intention shall appear by the will; and the onus probandi will thus lie upon those who contend for the restricted construction. "This enlargement of the operation of an indefinite devise may," it is said by a writer of very great authority, "be considered as one of the most salutary of the new canons of interpretation which have emanated from the legislature. (2 Jarm. Wills, 194.)

This section applies to gifts under powers, but does not apply to the creation of powers, unless they are created by will; where, as a general devise without words of inheritance will pass the fee, it may well be held to give the power over the fee to the person in whom a power of appointing the property is vested, although the power itself does not contain words of inheritance, or words equivalent to them. For example: a gift by will of my house will pass the fee; therefore a gift by will of my house to such persons generally, or to such children as A. or B. shall appoint, will give the power to B. over the fee. So a devise of my house to A. to the use of such persons generally, or to such children of A. as B. shall appoint, will give the fee to A. to serve the power, and the power will be as extensive as the gift, and consequently enable the appointment of the fee. (1 Sugd. Pow. 479).

How the Words "die without Issue," or "die without leaving Issue," shall be construed.

XXIX. And be it further enacted, that 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 his 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.

If a gift was made to A., and on failure of issue, or if A. died without issue then to B., such a bequest over, whether it be of real estate, or of personalty, being taken in the legal signification of the terms to mean after a general failure of issue, a failure of issue at any time, was void for remoteness, and the absolute interest was given to the first taker, unless there appeared something in the will indicating a different intention. The proof of a different intention was cast upon the party who attempted to distort the words of the bequest from their legal signification. (Candy *v.* Campbell, 2 Cl. & Finn. 421.) But as this rule was founded upon the policy of the law to prevent property from being indefinitely tied up, and the legal sense of the phrase was not in accordance with the general and popular acceptation of the words, these were made to yield to a clear manifestation of intention in the context, or in other parts of the will, to use them in the restricted sense of issue living at the death; and in respect to personalty they were held to yield more readily to expressions tending so to confine them, than when they were applied to real estate.

This rule, and the anxiety of the judges to discover grounds for departing from it, and putting a restrictive and less artificial interpretation upon the words, led to distinctions and various exceptions, which were the occasion of considerable discussion and doubt. The present enactment is, it appears, leading to the gradual extinction of this source of litigation.

See as to the doctrine of implication of estates tail, and other points of construction affected by this section, Jarm. on Wills, chs. 40, 41.

It will be observed that the section contains an exception, and a proviso; the effect of these was much considered in a

recent case; where the gift was of the residue of his property to the testator's brothers, John and James, "to be divided equally," with a request to John, that should he die without lawful issue, the property bequeathed to him should revert back to the testator's nephews, sons of his brother James. Lord Chancellor Sugden said, "the point raised is, that the words introducing the bequest over would, by implication, have given to John an estate tail in real estate, and therefore the absolute interest in personalty; and I assume that they would have done so before the late Statute of Wills. That act, however, contains this provision: "That in any devise or bequest of real or personal estate, the words 'die without issue' (which is the same thing as die without lawful 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 his 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. If the act had stopped there, this being a gift over in case John should die without issue, which words may import either of the two constructions mentioned in the act, it is plain that they must be construed to mean a failure of issue at the time of the death of John. But then come the words, "unless a contrary intention shall appear by the will: 1st. By reason of such person having a prior estate tail; or, 2ndly. Of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue; or, 3rdly. Otherwise." If a gift is to a man in tail, and for want of issue over, there the contrary appears: for the whole line of issue is provided for by the antecedent gift; and the words introducing the gift over must refer to the same interest; therefore, in such a case, the words "for want of issue" mean an indefinite failure of issue. So, if upon the true construction of the will, without making use of any implication arising from the words introducing the gift over, the first taker takes an estate tail, the words will equally import an indefinite failure of issue. But we are not to infer an intention from the use of the very words; therefore, if there be a gift to one for life, and if he die without issue over; there a contrary intention does not appear: for in such a case, the

supposed estate tail is an estate arising by implication only, from the use of those very words. In the present case, supposing that it were a devise of real estate, John would not take an estate tail unless by implication, arising from those very words: therefore the case does not fall within the exception in the act. Then, as to the words "or otherwise," there is nothing in this case to show "otherwise" an intention that John should take an estate tail; for no such intention is to be collected from this will, except from the indefinite use of the words introducing the gift over, and which the act excludes from consideration." The Chancellor's opinion, therefore, was, that the children of James were interested in the moiety of the residue of the personal estate bequeathed to John. (In Re O'Bierne, 1 Jones & La T. 352.)

In a recent case, the testator died leaving two children, and possessing freehold and leasehold estates; by his will he gave the residue and remainder of his estate and effects, according to the nature of the same estates respectively, in trust for all and every his child and children, in equal shares and proportions, and the several heirs of their respective bodies, and in case there shall be a failure of issue of any such children, then as to the share or shares of him, &c., whose issue shall so fail, to the use of the other, or others of them as tenants in common. It was admitted that strictly speaking there could not be a bequest of personalty to a person in tail, but it was held, that, taking the intention of the testator from the whole will, and referring to the words "or otherwise" in the 29th section, one of such children was entitled in fee to half of the freeholds, and absolutely to one half of the leaseholds. (Green *v.* Green, 14 Jur. 74; and see Harris *v.* Davis, 1 Coll. 416.)

No Devise to Trustees or Executors, except, &c. shall pass a Chattel Interest.

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) 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.

Trustees under an unlimited Devise, &c. to take the Fee.

XXXI. And be it further enacted, that 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.

The object of these two clauses is to define the nature and duration of the estate, or interest, which executors or trustees under a will shall take; and they are intended to effect a very important alteration, by excluding the construction under which an indefinite devise to trustees was held susceptible of enlargement or restriction, according to the exigencies of each individual case; the general rule, previous to the present act, having been, that whenever there was a limitation to trustees, although with words of inheritance, the trustees were to take only so much of the legal estate, as the purposes of the trust required. (Barker *v.* Greenwood, 4 M. & W. 421.)

It was said indeed that the intention of the testator, as expressed in, or to be gathered from the expressions in the will, governed the application of the rule; but the distinctions, founded upon purely technical reasoning, were so minute, that the real intentions of testators were probably more often defeated than carried out. Yet these distinctions had been so firmly established by repeated decisions, that the legislature alone appeared competent to afford a remedy by positive

enactment. That some remedy was needed may well be inferred from the difficulty of application, and inconvenience of the recognized doctrine.

By section 30, where real estate, other than a presentation to a church, is devised to a trustee, the fee-simple, or other the whole estate or interest, over which the testator has a disposing power by will, will pass, unless a definite term of years, absolute or determinable, or an estate of freehold shall expressly or by implication be given to him. That is, if it be the testator's intention that the trustee shall take an estate or interest less than his own, he must expressly or by implication so limit the estate or interest; and the legal inference no longer is in accordance with Cordall's case (Cro. Eliz. 316), that, where the purposes of the trust can be answered by a less estate than a fee-simple, an interest greater than is sufficient to answer shall not pass to the trustees or executors, but the reverse.

Section 31, however, whilst closely resembling the preceding section, does not admit the exceptions there contained: hence one of these two sections seems to be in some respects superfluous; and in other respects the two sections appear repugnant to, or qualify and control each other, and decision alone can determine the true construction to be given to the two sections taken together. See generally as to this section, Jarm. Wills, ch. 34; and Sugd. Wills, 127; Sweet on 1 Vict. c. 26, p. 154.

The proposition that the Statute of Uses operates as well upon uses created by will, as upon those created by deed, is assumed in these sections (1 Sugd. Pow. 171); and they do not affect the question whether trustees take a mere naked power, or an estate.

Devises of Estates Tail shall not lapse.

XXXII. And be it further enacted, that 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.

Gifts to Children or other Issue who leave Issue living at the Testator's Death shall not lapse.

XXXIII. And be it further enacted, that 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.

These two sections are founded upon the recommendation of the Real Property Commissioners, p. 73 of the Fourth Report. The rule that gifts lapsed, if the person to whom they were made died in the lifetime of the testator, sometimes operated with great hardship, and defeated in many cases the intention of the testator. When an estate is devised to a person in tail, with remainder to another, it is manifestly the intention of the testator that the tenant in tail and his issue should take, and that the person to whom the remainder is given should not take until all the issue of the intended tenant in tail have failed, and yet if such intended tenant in tail died in the testator's lifetime leaving issue, and the testator was not aware of his death, or neglected to alter his will, the issue were wholly excluded in consequence of the gift to the parent having lapsed, and the remainderman obtained the testator's estates. The hardship was very apparent in the usual case of a devise to the eldest and every other son successively, according to seniority, in tail; if an elder son died in the testator's lifetime leaving issue, such issue were excluded, and the estate went to the younger branch of the family. In another usual case, where a testator gave his

property among his children, and a daughter or other child died before him leaving a family, such family were disappointed. In all these cases, if the issue or family were to become entitled to the property given to their parent, the person to whom the remainder or residue was given would still be entitled to the property intended for him by the testator, and would have no reason to complain. It is true that the event of death might always be provided for, but it was found in practice that such provision was rarely made. A testator does not contemplate that the immediate objects of his bounty, and especially his children, will die before him; he does not like to encumber his will with provisions which appear to be unnecessary; and he imagines that if the event should happen, he shall be able to alter his will. His legal advisers think the chance that such an event will happen, and will not be provided for, is too slight an inducement for the trouble of inserting clauses to meet it; and in truth it would often be difficult to determine how far such provisions should be carried. In most cases a testator would probably prefer the families of the persons to whom he gives estates of inheritance in land, or an absolute property in personalty, to the persons entitled in remainder, or his residuary legatees; and it is certain that whenever he has a contrary intention, he can make the gifts contingent on the event of such persons surviving him, or revoke them in case of their death, with fewer words and greater ease than he could provide against the event of a lapse. For these reasons the commissioners proposed that devises of estates in tail to persons, who died in the lifetime of the testator, leaving issue, and devises and bequests to children and grandchildren of the testator, who died in his lifetime, leaving issue living at the time of his death, should not lapse, but should take effect as if the death of the testator had happened before the deaths of such tenants in tail, or children or grandchildren. It is in the case of an estate tail the issue should take, and in the case of a devise of real, or a bequest of personal property, the property devised or bequeathed should pass to the real or personal representatives as part of the estate of the deceased devisee or legatee.

But although the existence of issue at the death of the testator is necessary to prevent a lapse under the 33rd section,

such issue will not stand in the place of the deceased devisee or legatee in respect to the subject-matter of the devise or bequest, which will fall into the general estate of the deceased devisee or legatee, and be disposable by his will, notwithstanding his death before the decease of the testator. This construction, first noticed in 1 Hayes' Introd. to Conv. 406, was put upon the words of the section by Sir J. Wigram, V.C., in Johnson *v.* Johnson (3 Hare, 157). The testator, by will dated January, 1842, gave certain real and personal property to his son, and died in August, 1842. The son, by will and codicil dated in 1841 and 1842, gave, &c., with the exception of several legacies, all his estate to his wife. He died in July, 1842, leaving his widow executrix enceinte of a daughter, on behalf of whom it was urged that the true construction of the section was to treat it as substituting the issue for the parent, so that the legacy to the parent shall not lapse by his death. That the argument for the widow, who claimed under the will of the deceased legatee, failed, inasmuch as that will must, under section 24, take effect as if executed immediately before his death, but he had not then any interest in this property, contingent, executory or future under section 3, and it was therefore impossible that any such interest could pass by his will. If the issue of the legatee were held not to take by way of substitution, the other and more reasonable construction would be, that the next of kin of the deceased legatee should take under the Statute of Distributions. But Sir J. Wigram was of opinion, that upon the construction of the 33rd section taken alone, a legatee within that section would take the same provisions under his father's will, and with the same powers and incidents of property, as if he had actually survived the testator; and that it was not intended that the issue of such legatee should take the bequest independently of the legatee. The existence of the issue, he thought, was the motive of this provision of the legislature, but the issue was not the object of it.

It is not necessary, in order to let in the act, that the legatee should be alive at the time when the will is made; but it will be sufficient that the will be either made since, or brought within the act, and the legatee die since 1837. Where, for instance, the father, by will dated in 1833, bequeathed a share of his residuary estate to his son, J. W., who died in 1838, having by

his will in 1824 bequeathed all his estate, real and personal, to his wife, and appointed her executrix, and she proved his will; and in 1839 the father made a codicil, and thereby ratified his will, (see post section 34,) and died in 1843; it was held that the words "shall die" meant shall die after the act came into operation, and consequently that the act applied, and the gift of residue, so far as it was personal estate, passed under the son's will to his executrix; so far as it was real estate, descended to the heir-at-law of the son; his will being made before 1838, and so not passing after-acquired real estate. (Winter *v.* Winter, 5 Hare, 306; 11 Jur. 10; Mower *v.* Orr, 7 Hare, 473; 13 Jur. 421). In this case the will was made since 1838, and after the death of the son. (Skinner *v.* Ogle, 1 Rob. 363; 9 Jur. 432; Wild *v.* Reynolds, 5 N. C. 1.) This last case has sometimes been referred to as not in accordance with the others, but the children there died before the act came into operation, and the decision does not therefore clash with those of Sir J. Wigram.

This construction is materially assisted by the joint operation of sections 3 and 33; which, as we have seen, make the will of the father speak from the death of the testator; and section 33 in effect declares that in the circumstances contemplated by that section, the child (legatee, or devisee,) shall be taken to have died on a day later than his natural death, and immediately after the death of the testator. (Johnson *v.* Johnson, ubi supra.)

A child en ventre sa mere will be sufficient to satisfy the words of the statute; this was the case in Johnson *v.* Johnson, (ubi sup.); and see Doe *v.* Clark, (2 H. Blacks. 399.)

But although the first section of the statute enacts that the word "will" shall extend to an appointment by will, or by writing in the nature of a will, in exercise of a power, this section will not, it appears, apply to a testamentary appointment, since the words of the section are "devised and bequeathed," and property passing by the execution of a power is neither devised nor bequeathed. Nor could the legislature have intended, whilst enacting that the devise or bequest should not lapse, to vary the rights of the parties whom the donor of the power had declared to be entitled in default of appointment. (Griffiths *v.* Gale, 12 Sim. 327.)

It has been suggested that the section does not touch the case of a gift to one of several persons as joint tenants; for as the share of any object dying in the testator's lifetime would survive to the other or others, such event occasions no "lapse," to prevent which is the avowed object of both the clauses under consideration, the 32nd and 33rd. And that the same reasoning applied to a gift to a fluctuating class of objects, who are not ascertainable until the death of the testator, though made tenants in common. Thus, suppose a testator to bequeath all his personal estate to his children simply in equal shares, it should seem that the entire property would, as before the statute, belong to the children, who survive the testator, without regard to the fact of any child having, subsequently to the date of his will, died in the testator's lifetime, leaving issue who survive him. And as gifts to the testator's children, as a class, are of frequent occurrence, their exclusion from this provision of the statute will greatly narrow its practical operation. (1 Jarm. Wills, 313.)

In respect to a gift to one of several persons as joint tenants, the fact of the gift being to joint tenants, and so letting in the right of survivorship, would seem to be one of the cases in which a contrary intention would appear by the will, independent of any reasoning from the use of the word "lapse."

But as the enactment does not stop with simply declaring that the devise or bequest shall not lapse, but goes on to direct that such devise or bequest shall take effect as if the death of the devisee or legatee had happened immediately after the death of the testator, it may perhaps be argued that the case of gifts to children as a class is, by the introduction of these words, brought within the provisions of the act; and the rule, which in such case formerly carried the whole property to the survivors, be met or avoided by the new enactment, that the predeceased child shall be taken to have survived the testator.

This point was not before the court in Mower *v.* Orr, (7 Hare, 473), but the learned judge who decided that case thought the words of the statute were large enough to take in all cases in which the issue intended to be benefited died leaving issue. To exclude the case of gifts to children as a class, will not merely narrow the practical operation of the section, but militate against the intention of the legislature, so far as

that can be gathered from the recommendations of the commissioners, ante, p. 200. It may therefore be hoped that the enactment is capable of a wider construction; but see 1 Hayes' Introd. to Conv. 406; and Hayes and Jarman, Concise Forms of Wills, 28.

There is some difficulty in applying the same construction to the words "such issue" occurring in these two clauses. In the 32nd section the requisites of the act will be satisfied, and the lapse prevented, though the same issue do not exist at both periods, namely, at the death of the devisee, and at the death of the testator. But in the 33rd section the words "such issue," followed by the words "of such person," seem to refer exclusively to the very issue left by the deceased devisee or legatee. A liberal construction might, it is said, be adopted in this last clause by considering the word "issue" to be used as nomen collectivum, and not merely as designating the particular individual or individuals living at the death of the devisee or legatee. (1 Jarm. Wills, 312; and Hayes and Jarm. Concise Forms of Wills, 28.)

To what Wills and Estates this Act shall not extend.

XXXIV. And be it further enacted, that this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that 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 shall be so re-executed, republished or revived; and that this act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

In attempting to discover the true construction of this section there are difficulties in every view of the case. Some such provision as that in this section was absolutely necessary; otherwise all wills made prior to the passing of the act, would immediately have been subject to its operation, and a very large portion would have become null and void. Again, it

was necessary that some time should be suffered to elapse, to give persons an opportunity of becoming acquainted with the enactments of a statute, which affected so very large a portion of the nation. Again, it might be considered a hardship to compel persons, who had already disposed of their property by will according to the existing law, or who might do so within so short a period after the passing of the statute, as to be in excusable ignorance of its provisions, to incur the trouble of republishing their wills according to the new law.

But the time fixed by the legislature being the 1st of January, 1838, the statute having received the royal assent on the 3rd of July, 1837, the question was, whether all wills and codicils made before that date are altogether and for ever out of the operation of the act, or if not wholly, only in part, and in what part, and for how long. It is clear that all wills and codicils, made before the 1st of January, were not altogether and for ever out of the operation of the act, and to be governed by the old law, for if they were, they might be re-executed according to the old law, or republished according to the old law, or revived or altered by a codicil executed according to the old law; but section 34 provides for the contrary; for every will or codicil, though made before the 1st of January, if re-executed, republished or revived by codicil, shall be deemed to bear date at the time it was so re-executed, republished or revived by codicil, and if such re-execution, republication or revival by codicil takes place after the 1st of January, 1838, the whole instrument bears date at such time, and consequently is out of the exception and within the act; and wills dated before the 1st of January, 1838, will come within the act if re-executed, republished or revived by codicil subsequent to that date. (Brooke *v.* Kent, 3 Moo. P. C. C. 334.) In that case it was held, that obliterations and alterations made subsequent to the 1st of January, 1838, in a will of previous date, are within the statute, and must, to be effectual, be executed according to the provisions of the act.

On the other hand, a will of lands made before 1838 and revoked, may be revived after that date by a codicil attested by only two witnesses. (Andrews *v.* Jones, 3 Q. B. 177; 4 Jur. 572.)

The consequences of re-execution, republication or revival

by codicil after 1838 of any will of anterior date, and so bringing the whole within the operation of the statute, are most important. Thus under section 10 the imperfect execution of a power of appointment will be rectified; under section 18 the whole will be subject to revocation by marriage; and at the same time by section 19 saved from revocation by reason of any presumption of an intention on the grounds of an alteration in circumstances. The heir, by section 25, will be deprived of any benefit from lapsed or void devises, which will fall to the residuary devisee, while sections 32 and 33 will operate to prevent lapses in many cases; and many parts of the instrument will become subject to a construction totally different from that which they would have received, had the will remained under the old law.

But a defective re-execution, or an imperfectly executed codicil, will not affect, nor render inoperative a previously valid will. For instance, an unattested and valid will of personalty, made before 1838, will not be brought within the act of Victoria, and rendered inoperative, by a codicil referring to it, or by a re-execution, since that date, either of which may be imperfectly executed.

As to the use of the word republish in this section, and the distinction between republishing and reviving a will, see ante, p. 172.

XXXV. And be it further enacted, that this act shall not extend to Scotland. Not to extend to Scotland.

The colonies are not bound by an act of parliament unless particularly named; but some doubt seems to have been felt in reference to this statute in one case, which however was ultimately disposed of in accordance with the general principle. (In the goods of Smith, 14 Jur. 1100.)

As to the law of the East Indies with respect to the execution of wills, see Casement *v.* Fulton (5 Moo. P. C. C. 130.)

XXXVI. And be it enacted, that this act may be amended, altered or repealed by any act or acts to be passed in this present session of Parliament. Act may be amended.

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