Wills.

An act concerning wills.

Approved April 15, 1846.

Rev. 223.
Harr. 90.
R. S. 363.

Estates for another's life devisable.

1. That all estates *pur auter vie*, shall be devisable by will in writing, signed and published by the party so devising the same in the presence of three subscribing witnesses, and proved and recorded in the manner prescribed in and by the act entitled, "An act for confirming of conveyances of lands made and to be made by wills and powers of attorney, and declaring what exemplifications of records and other things shall be holden and received for good evidence of estates of inheritance, and for transferring of uses into possession," passed the seventeenth day of March, in the year of our Lord one thousand seven hundred and thirteen–fourteen; and if no such devise thereof be made, the same or so much thereof as shall not be so devised, shall go to the executors or administrators(*a*) of the party who had the estate thereof by virtue of the grant, and shall be assets in their hands, and be applied and distributed in the same manner as the personal estate of the testator or intestate.

If not devised, to be assets for distribution.

Devises, how revocable.

2. That no devise or bequest in writing, of any lands, tenements, hereditaments or other estates whatsoever in this state, or of any estate *pur auter vie*, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing 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 all devises and bequests of any lands, tenements, hereditaments, or other estates whatsoever in this state, or of any estate *pur auter vie*, shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator or by his directions in manner aforesaid, or unless the same be revoked or altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or more subscribing witnesses declaring such revocation or alteration.(*b*)

(*a*) Although such estate vests in the administrator, yet he takes it in trust for the next of kin, after payment of debts, *Den, Watson* v. *Kelly*, 1 *Harr.* 517, 525.

(*b*) A will can only be revoked in the manner provided by statute, and cannot be changed, annulled, or in any manner affected by the verbal declarations of the testator made after its execution, *Boylan* ads. *Meeker*, 4 *Dutch.* 274. Where two wills of the same testator are found, the will of earlier date will remain uncancelled and unrevoked if the one of later date is not duly executed or is declared invalid or void, *Ibid.* A cancellation of a legacy, by the testator, by drawing lines with a pen across the words, is a sufficient revocation, *In re Kirkpatrick's Will*, 7 *C. E. Gr.* 463. A will can be cancelled in no other way than by being burned, torn, or obliterated by the testator himself, or in his presence and by his direction and consent, or by a revocation in writing, executed in the same manner as wills are required to be executed, *Mundy* v. *Mundy*, 2 *McCart.* 290. A testator asked his wife if she had brought his will from its place of deposit, according to his instructions, and at the same time informed her that he wished to burn it up. The wife replied that she had burnt it up. *Held*, that this did not amount to a revocation, the will not having been burnt, *Ibid.* The tearing off of the seal affixed to a will, and of part of the testator's signature, and the obliteration of the rest of his name and of the names of the witnesses, are a cancellation of the will, *In re White's Will*, 10 *C. E. Gr.* 501. From the finding of a will in testator's box thus cancelled, the presumption arises that the cancellation was his act, done *animo cancellandi*, and that by such act he intended to render the will null and void, *Ibid.* A testator made a will in 1850, a codicil thereto in 1854, and a subsequent will in 1858, by which he bequeathed and disposed of all his real and personal estate without exception, and which con-

Who incompetent to make will.

3. That wills or testaments, made or to be made, of any lands, tenements or hereditaments or of any estate *pur auter vie*, by any woman covert, or person within the age of twenty-one years, or any idiot, lunatic or person of non-sane mind and memory, shall not be held or taken to be good or effectual in law. [SUPRA, 638, *Sec.* 9].

Witness to will cannot take as devisee, except to pay debts, but may prove will.

4. That if any person hath attested the execution of any will or codicil, after the first day of March, in the year of our Lord one thousand seven hundred and fifty-three, or shall attest the execution of any will or codicil hereafter to be made, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments, for the payment of any debt or debts, hath been or 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 codicil, or any person claiming under him or her be utterly null and void, and such person shall be admitted as a witness to the execution of such will or codicil, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil.

Creditor may be admitted as witness to a will.

5. That in case by any will or codicil, made or to be made, 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.

Rules as to legatees proving execution of a will.

6. That if any person hath attested the execution of any will or codicil, made on or before the said first day of March, in the year of our Lord one thousand seven hundred and fifty-three, to whom any legacy or bequest is thereby given, whether charged upon lands, tenements or hereditaments, or not, and such person before he shall give his or her testimony concerning the execution of any such will or codicil, shall have been paid or have accepted or released, or shall have refused to accept such legacy or bequest upon tender made thereof, such person shall be admitted as a witness to the execution of such will or codicil, notwithstanding such legacy or bequest; and in case of such tender and refusal as aforesaid, such person shall in no wise be entitled to such legacy or bequest, but shall be forever afterwards barred therefrom; and in case of such acceptance as aforesaid such person shall retain to his or her own

tained a clause, "hereby revoking all former wills, and declaring this to be my last will and testament." After the last will had been admitted to probate, on an application to admit to probate the codicil of 1854, it was *Held*, that the last will contains both an implied and express revocation of the codicil. The revocation extends to all prior testamentary dispositions of testator's estate, real and personal, *Smith* v. *McChesney*, 2 *McCart.* 359. See *Den* v. *Vancleve*, 2 *South.* *589, *668. It is a principle, as ancient as it is familiar, that a man cannot have two wills. The last will is of necessity a revocation of all former wills, so far as it is inconsistent with them. So if one having made his will, afterwards make another will inconsistent therewith, but not expressly revoking it, this will nevertheless be a revocation, *Ibid.* This implied revocation is effected only when the last will is inconsistent with the former; for it may be a will of different goods, or different pieces of land, so that the two may be taken conjointly as the will of the testator, *Ibid.* *Den, Snowhill* v. *Snowhill*, 3 *Zab.* 448. If the latter will contain an express revocation of the former, it is immaterial whether the latter be or be not inconsistent with the former, or whether it operates as a will at all or not, *Ibid.* An agreement by a testator, after the execution of his will, to sell land therein devised, is not a revocation at law, *Hall* v. *Bray*, *Coxe* 212. Although the statute says nothing of a cancellation by mistake or accident, there can be no doubt such a cancellation would not render the will invalid. The act would want the *animus revocandi*, *Smock* v. *Smock*, 3 *Stock.* 156. If land is devised by a will to minor children, with provision to their mother to occupy during their minority, a different disposition of the fee by codicil revokes the right to occupy by the mother, *Den, Snowhill* v. *Snowhill*, 3 *Zab.* 448. A writing sought to be established as the last will of decedent, executed in due form of law, was found in a private desk of decedent, with the name of testator and the seal cut off with a sharp instrument, leaving only the letter B—the first letter of testator's name—partly remaining. *Held*, that the testator is presumed to have done the act, and that the law further presumes that he did it *animo revocandi*. *Smock* v. *Smock*, 3 *Stock.* 156. The will is presented under circumstances from which the presumption arises, that it was cancelled in a manner which the statute declares effectual—by tearing or obliterating the same by the testator himself. This presumption arises from the fact that the will was in the possession of the testator during his lifetime, and at his death was found among his papers, mutilated in a way showing a design to cancel it, *Ibid.* This presumption is greatly strengthened by proof of the fact that the testator for many years previous to his death was accustomed to cancel instruments of writing, such as promissory notes, &c., by taking off his name, sometimes by tearing it off, and sometimes by cutting it off with a sharp instrument, *Ibid.* And also by the fact that up to within a year of his death, the testator freely spoke of his will, but ceased to do so during the last year of his life, *Ibid.* 166. It is undoubtedly true that the revocatory clause is not always inoperative, and that its effect depends upon the intention of the testator, but that intention must in every case be gathered from the contents of the instruments themselves. Parol testimony is inadmissible for this purpose. It is never admissible to contradict by parol the terms of a will, or to overturn its plain provisions, *Smith* v. *McChesney*, 2 *McCart.* 360. The evidence in this case stated, and the reasons given for the conclusion, that the evidence does not overcome the presumption in favor of the alleged paper being the last will of the testatrix, and that it was not revoked or cancelled by her, *Hildreth* v. *Schillinger*, 2 *Stock.* 196. Memoranda in the margin, one opposite each cancelled part, in the handwriting of the testatrix, and signed with her name in one case, and her initials in the other, stating that she wished to erase these parts, are evidence that the cancelling was done by her, *In re Kirkpatrick's Will*, 7 *C. E. Gr.* 463, 465. If a prior will be revoked by a subsequent one, and both be improperly destroyed, the contents of the first instrument cannot be established as the testator's will, although the contents of the second will cannot be ascertained, *Day* v. *Day*, 2 *Gr. Ch.* 550. A general allusion to testator's will, in a letter found in the same box, and a conversation with the executor therein named, shortly before testator's death, in reference to a request made by the will, and which was then known by the executor, are too loose and uncertain to establish a will contrary to the cancellation by the testator himself, *In re White's Will*, 10 *C. E. Gr.* 501.

use, the legacy or bequest, which shall have been so paid, satisfied or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever; *and further*, that in case any such legatee as aforesaid, who hath attested the execution of any will or codicil, made on or before the said first day of March, in the year of our Lord one thousand seven hundred and fifty-three, shall have died in the testator's lifetime, or before he or she shall have received or released, or refused on tender his legacy, such legatee shall be deemed a legal witness to the execution of such will or codicil, notwithstanding such legacy or bequest; *provided always*, that the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and jury or of the court of equity, before whom any such witness shall be examined, or his testimony or attestation made use of in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined.

Credit of such witness.

7. That no person, to whom any beneficial estate, interest, gift or appointment, hath been or shall be given or made, which is hereby enacted to be null and void, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he or she shall have been so examined, demand or take possession of, or receive any profit or benefit of or from any such estate, interest, gift or appointment, so given or made to him or her, in or by any such will or codicil, or demand, receive or accept, from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever.

Who not to receive any benefit from the will.

8. That the clauses in this act concerning the competency or credibility of the witnesses to wills or codicils made on or before the said first day of March, in the year of our Lord one thousand seven hundred and fifty-three, shall not extend or be construed to extend, to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the law of this state, or any person claiming under either of them respectively, who was in quiet possession on the said first day of March, in the year of our Lord one thousand seven hundred and fifty-three, as to such lands, tenements or hereditaments, whereof he was then in quiet possession as aforesaid; nor to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity, commenced by the heir of such devisor, or the devisee in any such prior will or codicil, for recovering the lands, tenements or hereditaments mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree relative thereto, and which has been already determined in favor of such heir at law, or devisee in such prior will or codicil, or any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil, attested according to the law of this state; or where the estate descended, or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil attested according to the law of this state, should or might take effect, shall be deemed to be a possession within the intent of this clause of this act.

Who not to be affected by certain clauses in this act.

[SEC. 9 and 10 repealed. See title GUARDIANS, *Sec.* 1 and 2].

9. SEC. 11. That it shall and may be lawful to and for all and every person and persons, by his, her or their testament or last will in writing, to give, bequeath or dispose of all his, her or their goods, chattels and personal estate, in the same manner as he, she or they lawfully might do before the passing of this act.

Personal estate may be bequeathed.

10. SEC. 12. That it shall and may be lawful for widows to bequeath the crop of their ground, as well of their dowers as of their other lands and tenements..

Widows may bequeath crops.

11. SEC. 13. That no nuncupative will heretofore made or hereafter to be made, shall be good, where the estate thereby bequeathed shall exceed the value of eighty dollars, unless the same be proved by the oaths of three

What nuncupative will good, and how proved.

witnesses at the least, who where present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present or some of them, bear witness, that such was his or her will or words to that effect, nor unless such nuncupative will was made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more, next before the making of such will, except where such person was surprised or taken sick, being from his or her own home, and died before he or she returned to the place of his or her dwelling.(a)

And within what time.

12. SEC. 14. That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any nuncupative will, except the said testimony or the substance thereof were committed to writing within six days after the making of the said will.

When letters testamentary of such will granted.

13. SEC. 15. That no letters testamentary or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at least after the decease of the testator shall be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process hath first issued to call in the widow or next of kindred to the deceased, to the end that they may contest the same, if they please.

Written will altered by verbal will.

14. SEC. 16. That no will or testament in writing, concerning any goods or chattels or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be revoked, 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 and approved of by him or her, and proved to be so done by three witnesses at the least.

Who may prove nuncupative will.

15. SEC. 17. That all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws of this state, shall be deemed good witnesses to prove any nuncupative will or any thing relating thereto.

Of soldiers and mariners.

16. SEC. 18. That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate, as he might have done before the making of this act.

Wills of personal estate, how proved and recorded.

17. SEC. 19. That all last wills and testaments, which touch and concern the personal estate only of the testator, shall, after the same have been duly proved, be recorded in the like manner as last wills and testaments, which touch and concern the lands, tenements and real estate of the testator, are directed to be recorded by the laws of this state.

When will void.

18. SEC. 20. That every last will and testament made when the testator had no issue living, wherein any issue he might have is not provided for or mentioned, if, at the time of his death he leave a child, children or issue, or leave his wife enceinte of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate.

After-born children when to succeed to portion of father's estate.

19. SEC. 21. That if a testator having a child or children born at the time of making and publishing his last will and testament, shall at his death, leave a child or children born after the making and publishing of his said last will and testament, or any descendant or descendants of such after born child or chidren, the child or children so after born, or their descendant or descendants respectively, if neither provided for by settlement nor disinherited by the said testator, shall succeed to the same portion of the father's estate, as such child or children or descendants as aforesaid would have been entitled to, if the father had died intestate; towards raising which portion or portions, the devisees and legatees or their representatives, shall contribute proportionably out of the part devised and bequeathed to them by the same will and testament.(b)

When devise or bequest not to lapse.

20. SEC. 22. That whensoever any estate of any kind shall or may be devised or bequeathed by the testament and last will of any testator or testatrix, to any person being a child or other descendant(c) of such

(a) It is essential to a nuncupative will that it be only a verbal declaration of the testator's wishes, made in the presence of witnesses called upon by him to bear witness that such is his will. *In re Hedden's Will*, 5 *C. E. Gr.* 473. A will drawn by an attorney, a few hours before the testator's death, pursuant to his instructions, but its execution postponed till he should feel stronger, though he asserted that his will was as it had been drawn, will not be admitted to probate as a nuncupative will. *Ibid.*

(b) See *Stevens* v. *Shippen*, 1 *Stew.* 487.

(c) Nephews and nieces are not "descendants," *Van Gieson* v. *Howard*, 3 *Hal. Ch.* 462, 463.

testator or testatrix, and such devisee or legatee shall, during the life of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children who shall survive such testator or testatrix, in that case, such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix shall not lapse, but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants of such legatee or devisee, in the same manner as if such legatee or devisee had survived the testator or testatrix and had died intestate; but this provision shall not apply where the testator or testatrix shall, by the said will or codicil thereto, or other instrument, have otherwise directed in regard to the children or descendants of the said devisee or legatee dying as aforesaid

21. SEC. 23. That nothing in this act contained shall affect any case where the testator or testatrix, named in any testament, shall have died before the passing of this act, but such case shall be determined as if this act had not been passed. Act not retrospective.

A supplement to the act entitled, "An act concerning wills."

Approved March 12, 1851. P. L. 1851, p. 218.

22. SEC. 1. That all wills and testaments of persons dying after this act shall take effect, or who may have died since the fourth day of July, in the year of our Lord eighteen hundred and fifty, shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in presence of two witnesses present at the same time, who shall subscribe their names thereto, as witnesses, in the presence of the testator; and all wills and testaments of persons dying since the day above mentioned, made in the manner herein prescribed, by any person competent by law to make such will, shall be sufficient to devise, pass, and bequeath all estates and property, real or personal, and all rights of any kind, and to appoint a guardian or guardians to any child of the testator during infancy.(a) How wills to be executed and witnessed.

(a) There is no argument to be drawn from the substitution of the word "declared," in the act of 1851, for the word "published," in the act of 1814, *Mundy* v. *Mundy*, 2 *McCart.* 290. Whatever would amount to a publication would answer the requirement, that it should be declared to be the testator's will, *Ibid.* It is manifest that the authors of the act of 1851 did not intend to affect any wills executed in compliance with the requirements of the old act, *Ibid.* There must be some declaration by the testator that it is his will, and a communication by him to the witnesses that he desires them to attest it, as such. But this need not be by word; any act or sign by which that communication can be made is enough, *Ibid.* Where the scrivener says, "this is the will of A. B., and he desires you to witness it," the testator standing by, it is a sufficient publication or declaration, *Ibid.* 294. The statute requires that the will should be published in the presence of the witnesses, either wholly by the testator, or by the scrivener or other agent asking questions, and the testator expressing his assent by words, or by signs, which plainly indicate his understanding of, and acquiescence, in such publication, *Compton* v. *Mitton*, 7 *Hal.* 70. *Den, Mickle* v. *Matlack*, 2 *Harr.* 86, 88. Although the most natural and orderly course is that the publication should follow the signing, yet this is not absolutely necessary. If done at the same time as part of the same transaction, it is sufficient, *Den, Mickle* v. *Matlack*, 2 *Harr.* 86, 88. The form of attestation, "signed and sealed in the presence of," is not a sufficient publication, but this would be unimportant if the publication was proved by the testimony of the witnesses, *Combs* v. *Jolly*, 2 *Gr. Ch.* 625, 627. If the subscribing witnesses were so situated that they could and would naturally see and hear the signing and publishing, it is sufficient, *Compton* v. *Mitton*, 7 *Hal.* 70, 75. Under the statute of this state, passed in 1814, it was requisite that the witnesses should be actually present, and see the testator sign the will. This section makes the acknowledgment of his signature in the presence of the witnesses sufficient. *Mundy* v. *Mundy*, 2 *McCart.* 290. *Compton* v. *Mitton*, 7 *Hal.* 70. *Den, Mickle* v. *Matlack*, 2 *Harr.* 86. *Combs* v. *Jolly*, 2 *Gr. Ch.* 625. *In re McElwaine's Will*, 3 *C. E. Gr.* 499, 501. *Bailey* v. *Stiles*, 1 *Gr. Ch.* 220. There are four requisites to a valid will: 1. That it be in writing. 2. That it be signed by the testator. 3. That such signature shall be made by the testator, or the making thereof acknowledged by him in the presence of two witnesses. 4. That it shall be declared to be his last will in the presence of these witnesses, *In re McElwaine's Will*, 3 *C. E. Gr.* 499. It is not sufficient that the signature be made by another, though at the request, and in the presence of the testator; the signing required by the statute must be some signature making some mark or *signum* upon the paper, so as to identify and give efficacy to it by some act, and not by words merely, *Ibid.* See *Stevens* v. *Vancleve*, 4 *Wash. C. C.*, 269. Where there is no proof as to the making of the signature, such acknowledgment is sufficient evidence that the testator made it, and would prove his compliance with the requisite of signing. *Aliter*, when it is clear that he did not sign the will. *Ibid.* If the testatrix have a copy of a former will, date and names made, introducing any alterations she might wish, and execute it, and the court have the legal evidence of its execution, it will be a good will of personal property, *In re Jolly's Will*, 1 *Hal. Ch.* 456, 458. A person who is unable to write his name but makes his mark, is notwithstanding a competent witness to the execution of a will, *Compton* v. *Mitton*, 7 *Hal.* 70. The witnesses must attest the will at the request of the testator, but it is not necessary that the testator should openly make the request. His acquiescence when the witnesses are called in by another for that purpose, is sufficient. *Whitenack* v. *Stryker*, 1 *Gr. Ch.* 9. *Combs* v. *Jolly*, 2 *Gr. Ch.* 625, 628. *Mundy* v. *Mundy*, 2 *McCart.* 290, 294. The witnesses must know it is the testator's will which they are witnessing, *Mundy* v. *Mundy*, 2 *McCart.* 290, 294. *Combs* v. *Jolly*, 2 *Gr. Ch.* 625, 628. The statute does not prescribe any form in which the witnesses shall certify their attestation, *Allaire* v. *Allaire*, 8 *Vr.* 312, 325, affirmed, 10 *Vr.* 113. A will signed by the testator and subscribed by a sufficient number of witnesses, may be established by testimony *aliunde*, that the formalities which are necessary have been observed, *Ibid.* But if there be no attestation clause, or if it does not contain all the requisites to the making of a will, there must be affirmative proof of its execution in the manner and with the formalities prescribed by the statute, *Ibid.* *Mundy* v. *Mundy*, 2 *McCart.* 290. Although one of the witnesses signed before the testator, it does not affect the validity of the will, since the particular order of the several requisites to the valid execution of a testament, is not material, *Mundy* v. *Mundy*, 2 *McCart.* 290, 294. The attestation clause to a will is *prima facie* evidence of the facts stated in it; and the instrument will not be rejected because the witnesses fail to remember the mode of its execution. *Mundy* v. *Mundy*, 2 *McCart.* 290. *Compton* v. *Mitton*, 7 *Hal.* 70, 75. *Boylan* ads. *Meeker*, 4 *Dutch.* 274, 294. If the attestation clause is perfect and shows on its face that all the forms required by the statute have been complied with, and the sub-cribing witnesses, when called, admit their signatures, but through

Revocations, how executed.

23. SEC. 2. That all written revocations of wills shall be executed in the same manner as wills are hereby required to be executed, and when so made shall be sufficient to revoke any last will, or any part thereof.(*a*)

Real estate acquired after making will to pass by general or special devise.

24. SEC. 3. That real estate acquired by a testator, after making his will, shall pass by any general or special devise or sale under any power of sale contained in the will of any person dying after the fourth day of July, in the year eighteen hundred and fifty, sufficient to include it, had the same been acquired before the making of the will, unless a contrary intention be manifest on the face of the will.(*b*)

Construction of words "die without issue," etc.

25. SEC. 4. That in any devise or bequest of real or personal estate in the will of any person dying after this act shall take effect, the words "die without issue," or "die without lawful issue," or "have no issue," or any other words which may import a want or failure of issue of any person in his lifetime, or at 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 death of such person, and not an indefinite failure of issue, unless a contrary intention shall otherwise appear by the will.(*c*)

Will of personal estate of minor not good.

26. SEC. 5. That no will of personal estate, made after the fourth day of July, in the year eighteen hundred and fifty, by any person within the age of twenty-one years, shall be good or effectual in law.

Law of nuncupative wills not affected.

27. SEC. 6. That nothing in this act contained shall be held to change or affect the existing law relative to nuncupative wills.

Supplement.

P. L. 1853, p. 403.

Approved March 10, 1853.

Provisions of sec. 3 of act of 1851 extended.

28. SEC. 1. That the provisions of the third section of the act entitled "A supplement to the act entitled 'An act concerning wills,'" approved March twelfth, eighteen hundred and fifty-one, shall be construed to apply to the wills of all persons dying after the approval of the act bearing the same title, approved March seventh, eighteen hundred and fifty.

Supplement.

P. L. 1875, p. 95.

Approved April 9, 1875.

Chancellor may order legacies made a charge upon lands, the vesting of which may be contingent, paid into court.

29. SEC. 1. That where any legacy or legacies are by any last will and testament made or shall hereafter be made a charge upon lands and real estate, and said legacy or legacies now are or hereafter may be wholly or in part limited over to infants or persons not *in esse*, or who cannot be ascertained till the happening of some event named in the will, or in such manner that the vesting of said legacy may be contingent, it shall be lawful for the chancellor, upon application of the executor or executors, or any person interested in said lands, to order that said legacy or legacies

defect of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attesting clause, unless there be affirmative evidence given to disprove its statements, *Allaire* v. *Allaire*, 8 *Vr.* 312, affirmed, 10 *Vr.* 113. Where it does not appear whether the testator signed the will or acknowledged the signature to be his in the presence of the witnesses, but that after his name was signed the testator declared it to be his will and asked them to sign it as witnesses, and the attestation clause is in the handwriting of the testator and declares that it was signed in the presence of witnesses, the certificate must be taken as true, and as proof of signing in their presence, *In re Alpaugh's Will*, 8 *C. E. Gr.* 507. Such certificate must also be taken as proof that the statutory requirement that both witnesses should be present at the same time, has been complied with, *In re Kirkpatrick's Will*, 7 *C. E. Gr.* 463. The effect of the statement in the attestation, that the will was signed in the presence of the testator, is to throw the burden of proving that it was not so signed, upon the opponents of the will, *Tappen* v. *Davidson*, 12 *C. E. Gr.* 459. Where it is, at most, doubtful on the evidence, whether the will was not signed in testator's presence, the presumption arising from the statement of the attestation clause is not overcome, *Ibid.*

(*a*) See *supra*, *sec.* 2, *note* (*b*).

(*b*) *Query.* Whether this applies to a will executed before its passage, see *Van Tilburgh* v. *Hollinshead*, 1 *McCart.* 32, 36, *note*. *Condict* v. *King*, 2 *Beas.* 375, 377. *Shearing* v. *Delany*, 3 *Stock.* 317, 318. *Shreve* v. *Shreve*, 2 *Stock.* 385; 2 *C. E. Gr.* 487. A lapsed devise will pass, under this section, *Smith* v. *Curtis*, 5 *Dutch.* 345, 353. A direction to executors to convert real estate into personalty, will include after-acquired realty, *Fluke* v. *Fluke*, 1 *C. E. Gr.* 478. See also *Van Wagenen* v. *Brown*, 2 *Dutch.* 196. *Garrison* v. *Garrison*, 5 *Dutch.* 153.

(*c*) The words "dying without issue," when applied to real estate, and where there are no expressions in the will controlling their legal sense, have been uniformly construed to mean, not a definite failure of issue, which is a failure of issue at the death of the person whose issue if living would take, but an indefinite failure of issue, that is a failure by the deaths of all the descendants of such person to the remotest generation, *Den* v. *Allaire*, *Spen.* 6. *Condict* v. *King*, 2 *Beas.* 375. *Den* v. *Taylor*, 2 *South.* *413, *418. *Den* v. *Howell*, *Spen.* 411, 415. *Den* v. *Small*, *Spen.* 151, 152. *Morehouse* v. *Cotheal*, 1 *Zab.* 480. *Armstrong* v. *Kent*, 2 *Hal. Ch.* 637, 639. *Den* v. *Schenck*, 3 *Hal.* 29, 39. See *Den*, *Trumbull* v. *Gibbons*, 2 *Zab.* 117. *Seddel* v. *Wills*, *Spen.* 223, 228. Such is the general rule, but courts have felt themselves called on to depart from it whenever, from the context or any additional expression or difference of phraseology in the will, it could be inferred that the testator intended a definite failure of issue, *Ibid.* *Den* v. *Howell*, *Spen.* 415. *Den* v. *Blackwell*, 3 *Gr.* 386, 391. *Seddel* v. *Wills*, *Spen.* 223, 225. *Kennedy* v. *Kennedy*, 5 *Dutch.* 185, 188. *Den* v. *Schenck*, 3 *Hal.* 29, 39. *Armstrong* v. *Kent*, 1 *Zab.* 509, 519. The term "survivors," or words of similar import, when used in a limitation over in the event of the previous devisee "dying without issue," is such an expression as will take the case out of the general rule, *Ibid.* "Leaving no issue living," is now taken to mean a failure of issue at the death of the devisee, and not an indefinite failure, *Wallington* v. *Taylor*, *Sax.* 141, 314. See *Vreeland* v. *Blauvelt*, 8 *C. E. Gr.* 483. Where the testator directed a specified part of the share of each son to be paid to him at twenty-one, and the residue at twenty-two, and that in case of the death of any child without issue, his share should merge in the general fund, "dying without issue" construed to mean, dying without issue before the share is payable, *Wurts* v. *Page*, 4 *C. E. Gr.* 365. "Dying without issue and intestate," construed to create a life estate in the devisee, with power of disposition by will and not by deed, *Kent* v. *Armstrong*, 2 *Hal. Ch.* 637, reversing *S. C.*, 2 *Hal. Ch.* 559.

be paid into the court of chancery, and for that purpose to inquire into the situation and the merits of the said application, either in term time or vacation.

Petition, what to set forth.

30. SEC. 2. That said petition shall set forth the said will, and describe the lands charged, and shall state the persons interested in said legacy or legacies, whether such interest is vested or prospective, if they can be ascertained, and twenty days' notice of the application shall be given to those who reside in this state; if any reside out of this state, or they cannot be ascertained, such notice shall be published for twenty days in a newspaper printed in the county where the lands lie; such notices may be served personally, or by leaving the same at the place of abode of such person, and in case such person be an infant, the same shall be served on his or her father, mother or guardian, if any reside within this state.

Notice of application.

Petition to be referred to a master to inquire into merits.

31. SEC. 3. That upon proof of notice the chancellor shall refer such petition to a master to inquire into the merits of the application, who shall proceed to hear the petitioner and other parties touching the same, on eight days' notice to all who shall have entered an appearance with the clerk; said master may adjourn from time to time, and shall reduce to writing all evidence before him, and return the same with his report.

On report made chancellor may order legacy paid into court.

32. SEC. 4. That upon such report the chancellor may order the said legacy or legacies to be paid into the court, together with such additional sum or sums as the chancellor shall think reasonable to cover the expense of investing and taking charge thereof; and upon such payment into court, said lands shall be wholly clear and discharged from the lien created by said will.

Moneys to be deposited with the clerk. How invested.

33. SEC. 5. That said moneys shall be paid into the court of chancery and deposited with the clerk of the court; and all such moneys shall be kept at interest on security by bond and mortgage on real estate within this state, worth, besides destructible improvements, double the amount invested, and the interest thereof, or such part of the interest as the chancellor may direct, shall be paid to the person or persons who would for the time being be entitled to the interest in proportion to their respective shares therein; and such securities shall be taken in the name of the chancellor of New Jersey, and the interest shall be paid on the same half yearly or otherwise, directly to the persons entitled to the same, unless otherwise directed by the chancellor, who shall from time to time make such order for the investing of said money and the payment of the interest thereon as equity and justice may require.

An act for confirming of conveyances of lands, made and to be made by wills and powers of attorney, and declaring what exemplifications of records and other things shall be holden and received for good evidence of estates of inheritance, and for transferring of uses into possession.

Rev. 7.

Passed March 17, 1713-14.

R. S. 635.

Preamble.

WHEREAS, on and several years after, the first settlement of this colony, the great distance of plantations, and scarcity of inhabitants was such, that it was difficult to get more than two witnesses to be present at the signing, sealing, and acknowledging of last wills and testaments, which induced the then legislature of the province of East Jersey, now the eastern division of this province, in the year one thousand six hundred and eighty-two, to make a law declaring, that all wills in writing, attested by two credible witnesses, shall be of the same force to convey lands, as other conveyances; *and whereas*, pursuant to the said law, many wills have been made, bequeathing and devising lands, signed by the testator, and attested only by two subscribing witnesses;

What a sufficient execution of last will, in time past.

34. SEC. 1. That all last wills and testaments heretofore made in writing, signed by the testator, in presence of two subscribing witnesses, and proved according to the custom heretofore used, in either the eastern or western divisions of this province, by which any lands, tenements, or hereditaments have been given, devised, or bequeathed unto any person or persons whatsoever, every of the said last wills and testaments shall, at all times hereafter, be held, taken, deemed, and esteemed as good, valid, and sufficient title in the law, to all intents, constructions and purposes, as if the testator had conveyed the same away in his lifetime, and shall

forever bar any person or persons claiming or to claim estate under any such testator, contrary to the true intent and meaning of such will or testament; and the said will being proved as aforesaid, and the books of registers of either of the eastern or western divisions of this province in which they were entered, being proved as aforesaid, may be given, and shall be received in evidence, any law or custom to the contrary notwithstanding.

Register books, where recorded, good evidence.

What a good execution of a will in future.

35. SEC. 2. That all wills and testaments which hereafter shall be made in writing, signed and published by the testator, in presence of three subscribing witnesses, and regularly proved and entered upon the books of records or registers, in the secretary's office of this province, or any proper office for that purpose, shall and are hereby declared, and forever hereafter shall be taken, accepted, deemed, and esteemed sufficient to devise, bequeath, and convey any lands, tenements, hereditaments, or other estates whatsoever, within this province, as effectually, to all intents, constructions, and purposes whatsoever, as if the testator had conveyed the same away in his lifetime; and the books, in which they are registered or recorded, may be given in evidence, and shall be accepted of, and be sufficient evidence, at all times and places, where the said wills or testaments may be requisite to be given in evidence, any law or custom to the contrary notwithstanding.(a)

Books in which they are registered, good evidence.

Copy of wills made in Great Britain, etc., certified under seal good evidence.

36. SEC. 3. That the copies of any last will or testament whatsoever, heretofore made, or hereafter to be made, within any part of the kingdoms of Great Britain or Ireland, by which any lands, tenements, hereditaments, or other estate within this province, are devised or bequeathed, certified under the seal of such office, where such will or testament is proved and lodged, may be given, and shall be received in evidence before any of the courts of judicature within this province, and be esteemed as valid and sufficient as if the original will or testament were then and there produced and proved.

Same in colonies.

37. SEC. 4. That the copy of any will or testament, made in any other of her majesty's colonies, by which any lands, tenements, hereditaments, or other estate within this province is given, devised, or bequeathed, being proved according to the custom of such colony, certified under the great seal of such colony, may be given, and shall be received, in evidence in any of the courts of judicature within this province, and be esteemed as valid and sufficient, as if the original will or testament were then and there produced and proved.

[For remaining sections, see CONVEYANCES, *Sec.* 64 to 68].

An act respecting conveyances of lands made, and to be made by wills.

P. L. 1873, p. 129.

Approved April 3, 1873.

When probate to be conclusive evidence of formal execution of will.

38. SEC. 1. That the probate of the will of any person, resident in this state at the time of his or her decease, which has been or may hereafter be duly admitted to probate in this state, as to any real estate devised by said will, shall be conclusive evidence of the formal execution of said will (so far as the same appears by said probate), in any suit, action or proceeding not commenced within seven years from the time of such probate; *provided always*, that the time during which any person claiming as or under the heir of said testator, shall be under the age of twenty-one years, shall not be taken or computed as part of said period of seven years; *and provided further*, that nothing herein contained shall affect any suit, action or proceeding heretofore commenced and now pending.

Proviso.

(a) See *Graham* v. *Whitely*, 2 *Dutch.* 254, 258.