

THE WILLS ACT, 1838

ACT NO. XXV OF 1838

(Rep, by Act 8 of 1868)

[8th October, 1838.]

*Passed by the Hon'ble the President of the Council of India in Council,
on the 8th October, 1838.*

I. IT is hereby enacted, that the words and expressions hereinafter mentioned 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 of devise of the custody and tuition of any child by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the "Court of Wards and liveries, and tenures *in capite* and by Knight's service and "purveyance, and for settling a revenue upon His Majesty in lieu thereof," or by virtue of an Act 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 "Knight's services," and to any other testamentary disposition, and the words "real estate" shall extend to messuages, lands, rents and hereditaments 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 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; 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 word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And it is hereby 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, &c. may be disposed by will or otherwise, and con- "cerning wards and primer seisins;" and also so much of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act 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 year 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 witnesses to nuncupative wills; and so far as the following Acts may be construed to have any operation within the territories of the East India Company, 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 and 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;” shall from the passing of this Act cease to have effect in the territories of the East India Company, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie* to which this Act does not extend.

III. And it is hereby enacted, that this Act shall only extend to the wills of persons whose personal property cannot by the Law of England pass to their representatives without Probate of Letters of Administration obtained in one of Her Majesty’s Supreme Courts of Judicature, and that the Statutes and parts of Statutes aforesaid are only repealed as far as they relate to the succession to the property of such persons.

IV. And it is hereby enacted, that it shall be lawful for every person to devise, bequeath or dispose 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 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 estates *pur autre vies*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or an incorporeal hereditament, and whether the same shall be freehold or of any other tenure, and also to all contingent, executor 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 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 at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

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

VI. Provided also, and it is hereby 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.

VII. And it is hereby 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 subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

VIII. And it is hereby 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 respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding that 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.

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

X. And it is hereby 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.

XI. And it is hereby 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 effecting 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, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will.

XII. And it is hereby enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and 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.

XIII. And it is hereby 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.

XIV. And it is hereby 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, executor or administrator, or the person entitled as his or her next of kin, under the statute of Distributions).

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

XVI. And it is hereby 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.

XVII. And it is hereby enacted, that no obliteration, interlineations 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 margin or some other part of the will opposite or near to such alteration, or at the foot or end of or 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.

XVIII. And it is hereby 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 a manner hereinbefore required, and shewing an intention to revive the same, and when any will or codicil which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless as intention to the contrary be shown.

XIX. And it is hereby 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.

XX. And it is hereby 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 immediately before the death of the testator unless a contrary intention shall appear by the will.

XXI. And it is hereby enacted, that unless a contrary intention shall appear by the will such real estate and 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 life time 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.

XXII. And it is hereby 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 any 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 estate 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.

XXIV. And it is hereby enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or any other words which may import either a want or failure of issue of any person in his life time 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 life time 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.

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

XXVI. And it is hereby 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 surpluses 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.

XXVII. And it is hereby enacted, that where any person to whom any real estate shall be devised for an estate in quasi entail, shall die in the life time 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.

XXVIII. And it is hereby 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 life time 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.

XXIX. And it is hereby enacted that notwithstanding any thing in this Act contained, 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.

XXX. And it is hereby enacted, that nothing in this Act contained shall be construed to repeal the provisions of Act. No XX. of 1837, whereby immoveable property situate within the jurisdiction of the Court of Judicature of Prince of Wales' Island, Singapore and Malacca transmitted by the last will of any person having a beneficial interest in the same is taken to be and to have been of the nature of chattels real and not of freehold as regards such transmission, provided that such will shall be executed and construed as a will of chattels real is to be executed and construed by virtue of this Act.

XXXI. And it is hereby enacted, that this Act shall not extend to any will made before the First day of February, in the year of our Lord 1839, and that every will re-executed or re-published or revived by any codicil shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived ; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the First day of February in the year of our Lord 1839.
