LAWS OF THE UNITED KINGDOMTHE WILLS ACT, 1837.
(7 Will. 4 & I Vict. c. 26.)

An Act for the amendment of the Laws with respect to Wills [1073]

[3rd July, 1837.]

The short title was given to this Act by the Short Titles Act, 1896 (c. 14).
As to the effect on this Act of the Law of Property Act, 1922 (c. 16), see the Law of Property Act, 1924 (c. 5), s.9, Sched. 9 (3), Vol. 15, title REAL PROPERTY pp. 169, 174.

[1.] Meaning of certain words in this Act.-The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the court of wards and liveries and tenures in capite and by knights service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof," 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 ward and liveries, and tenures in capite and by knight's service," and to any other testamentary 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" 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

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extend and be applied to a female as well as a male. [1074]

Appointment by will in exercise of a *power.* As to what form of document amounts to an appointment by will in exercise of a power, see *Re Barnett, Dawes v. Ixer,* [1908] 1 Ch. 402. See also s.27, and notes, p.446, post.
"Personal estate." - See Re Grassi , Stubberfield v. Grassi, [1905] 1 Ch. 584, 590.
As to the extent to which a general devise of personal estate will operate as an exercise of a power of appointment, see *Chandler* v. *Pocock* (1880), 15 Ch. D. 491; affirmed on appeal, 16 Ch. D. 648; and s.27, and notes, p. 446, *post.*
For Stat. (1660) 12 Car. 2, c. 24 (abolition of old tenures), see Vol. 15, title REAL PROPERTY, p. 58.

[*S. 2 rep. 37 & 38 Vict. c. 35 (S.L.R.). By this section the following enactments were repealed, except as to any wills or estates pur autre vie to which this Act does not extend: 32 Hen. 8, c. I ; 34 & 35 Hen. 8 c. 5; 10 Car. 1, sess. 2, c. 2-(Irish Act); 29 Car. 2, c. 3, ss. 5, 6, 12, 18 to 21; 7 Will. 3, c. 12 (Irish Act), ss. 3, 9, 15 to 18; 4 & 5 Ann. c. 3, s. 14; 6 Ann. c. 10 (Irish Act), s. 14; 14 Geo. 2, c. 20, s. 9; 25 Geo. 2, c. 6 (except as to his Majesty's colonies and plantations in America) 25 Geo. 2, c. 11 (Irish Act); 55 Geo. 3, c. 192.*]

3. All property may be disposed of by will.-It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after 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, and 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 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

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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 become vested, and whether he may 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. [1075]

"Every person" These words do not extend to persons under legal disability by reason either of infirmity of mind or want of age. A person who is lunatic or, *non compos mentis* cannot during the continuance of his unsoundness of mind make a will, but a will made by him during a lucid interval will be valid (*White v. Driver* (1809), 1 Phillim. 84.

As to testamentary capacity in relation to lunatics generally, see Halsbury's Laws of England, Vol. 28, p. 532, and the English and Empire Digest, Vol. 33, pp. 141 et seq.

As to want of age, see s. 7, p. 440, *post*.

Aliens formerly had no power to acquire and hold real estate in England, and consequently no power to make a will of such property; but now real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural born British subject (see British Nationality and Status of Aliens Act, 1914 (c. 17), s. 17, Vol. 1, title ALIENS, p. 194; and see Halsbury's Laws of England, Vol. 1, p. 307, and Vol. 28, p. 535),

"Will"- S. 1 provides that in the Act 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 (see *Re Barnett, Dawes v. Ixer,* [1918] 1 Ch. 402). Formerly a distinction was made in the use of the terms "will" and "testament." The distinction is said to be that "will", is a general term, and that where lands or tenements are devised, though no executor is appointed, the instrument is properly called a will, and. that where it concerns chattels only and appoints an executor, it is called a testament (see Halsbury's Laws of England, Vol. 28, p. 505, n.).The distinction, however, was never rigidly adhered to.

"All real estate." There is a devisable interest in land held

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under a possessory title (see *Asher v. Whitlock* (1865), L.R. 1 Q.B. 1, and *Calder v. Alexander* (1900), 16 T.L.R. 294).

"All personal estate, etc." - This section does not make any kind of personalty bequeathable which was not bequeathable before, but only, as regards that kind of property, regulates the form of executing wills. It does not empower a testator to bequeath a chose in action so as to pass the right to sue. For instance, it does not enable a testator to bequeath a promissory note made to him so as to pass the right to sue in respect of it to the legatee. In such a case the right to sue would be in the executor (see *Bishop v. Curtis* (1852), 18 Q.B. 878).

"Customary freehold, etc."-See Preliminary Note, p. 433, ante.

"Contingent, executory or other future interests in any real or personal estate." -A *spes successionis,* or mere expectation or hope of succeeding to property is not within these words (see *Re Parsons, Stockley v. Parsons* (1890), 45 Ch.D. 51, and *Re Mudge*, [1914] 1 Ch. 115).

For the power of the father or mother to appoint testamentary guardians, see now the Guardianship of Infants Act, 1925 (c. 45), s.5, Vol. 9, title INFANTS AND CHILDREN, p. 822; and in the case of those privileged under s.11 of this Act, p. 442, *post,* see the Wills (Soldiers and Sailors) Act, 1918 (c. 58), s.4, p. 456, *post.*

Formerly there was a doubt whether the Act extended to the case of a testator dying without heirs and whether in such a case there would not be an escheat, unless the will were executed and attested in accordance with the old law. That doubt, however, has been set at rest by s. 178 of the Law of Property Act, 1925 (c. 20), Vol. 15, title REAL PROPERTY p. 359, which provides that this section shall authorise and be deemed always to have authorised any person to dispose of real property or chattels real by will, notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next-of-kin him surviving.

4. Fees and fines payable by devisees of customary and copyhold estates.- Provided always 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:

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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 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. [1076]

See s. 85 of the Copyhold Act, 1894 (c. 46), Vol. 3, title COPYHOLDS, p. 626.
As from January 1, 1926, copyhold and customary tenures were abolished, see the Law of Property Act, 1922 (c. 16), s.128, and notes, *ibid.* p. 633.

5. Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls; and the lord to be entitled to the fine. 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 by 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. [1077]

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See note to s.4, *ante*.

6. Devolution of estates pur autre vie not disposed of by will.- 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 see 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 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. **[1078]**

The only legal estates now capable of subsisting in land being an estate in fee simple absolute or a term of years absolute, estates *pur autre vie* can now only subsist in the equitable interest in land, legal life estates being abolished (Law of Property Act, 1925 (c.20), s.1(1), (2), (3), Vol. 15, title REAL PROPERTY, p.177).

As to special occupancy, see s.1(1) of the Administration of Estates Act, 1925 (c.23), Vol. 8, title EXECUTORS AND ADMINISTRATORS, p.306, by virtue of which real estate to which a deceased person is entitled for an interest not ceasing on his death devolves from time to time on the personal representative of the deceased, in like manner as before the commencement of that Act chattels real devolved from time to time on the personal representative of a deceased person.

7. No will of a person under age valid.-No will made by any person under the age of twenty-one years shall be valid. **[1079]**

As to a will by a soldier or sailor though under twenty-one, see s.11 of this Act, and the Wills (Soldiers and Sailors) Act, 1918 (c.58), ss. 1, 3(2), p. 455, *post*.
S. 24, p. 445 post, provides that with reference to the real estate and personal estate comprised in a will shall speak and take effect as if it had been executed immediately before the death of the testator, but this provision does not enlarge the testator's capacity to make a will, and a will made by an infant

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does not become valid by reason of his attaining the age of twenty-one years before his death.

8. Will of a femme covert. - Provided also, 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. **[1080]**

In early times a married woman was incapable of a will. Her will of land was declared void by statute (Stat. (1542-3) 34 & 35, Hen. 8, c. 5 (now repealed)).Her will of personalty was equally invalid, not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence separate from that of her husband, and no separate contracting or disposing powers. In course of time, however, the rule was modified, and at the time of the passing of this Act, a married woman had some, if also restricted, testamentary powers. But since 1837 a married woman's capacity to make a will has been very greatly increased, in consequence of statutory enlargement of the subjects of separate estate, and of the provisions of, s.3 of the Married Women's Property, Act, 1893 (c. 63), Vol. 9, title HUSBAND and WIFE p. 385, which extended the operation of s.24 of this Act, p. 445, post, to the wills of married women made during coverture.

By the Married Women's Property Act, 1882 (c. 75), Vol. 9 title HUSBAND AND WIFE, p. 374, it was provided: (s.1) that a married woman should, in accordance with the provisions of that Act, be capable of disposing by will of any real or personal property as her separate property in the same manner as if she were a feme sole; and (s.2) that every woman who married after the commencement of that Act (January 1, 1883) should be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which should belong to her at the time of marriage, or should be acquired by or devolve upon her after marriage. And by s.37 of the Law of Property Act, 1925 (c. 20), Vol. 15, title REAL PROPERTY p. 214, it was provided that a husband and wife are for all purposes of acquisition of any interest in property under a disposition coming into operation after the commencement of that Act to be treated as two persons.

The Married Women's Property Act, 1893 (c. 63), s.3, Vol. 9, title HUSBAND AND WIFE, p. 385, provided that s.24 of this Act, p. 445, post, should apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will

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should not require to be re-executed or republished after the death of her husband.
By the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s.194, Vol. 9, title HUSBAND AND WIFE p. 402, a wife who has obtained a decree of judicial separation is in. the position of a feme sole in respect of property which she may acquire, and similar provisions are made in respect of a wife who has obtained a protection order under the Matrimonial Causes Acts, 1857 (c. 85), s.21, and 1864 (c. 44), s.1, *ibid.* pp. 387, 390.
Although none of the Acts above referred to confers in terms on married women any general power of testamentary disposition having regard to the great enlargement of the subject of separate estate effected by the Married Women's Property Acts and the extension of s.24 hereof, p.445, *post*, to the wills of married women made during coverture, a married woman, so far as mere capacity to make a will is concerned, is practically in the same position as if she were single, and she can make a will which will be effectual in the event of her dying in the lifetime of her husband to pass a separate estate, and in the event of surviving her husband, to pass all property of or to which at the time of her death she may be seised, possessed, or entitled, other than property in which she has a mere life interest or a share in joint tenancy, and can by such will exercise any power of disposition by will which may be vested in her.
See further, Halsbury's Laws of England, Vol. 28, p.534 and the English and Empire Digest, Vol. 27,p.134.

9. Every will shall be in writing, and signed or acknowledged by the testator in the presence of two witnesses at one time, who shall attest the will. - No will shall be valid unless it shall be in writing, and executed in manner herein-after 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. **[1081]**

For exception from formalities in the wills of soldiers and sailors, see notes to s.11, p. 442, *post*.
"In writing."; As to whether a bequest "for the purposes indicated," the purposes being committed to paper by one of the proposed trustees in a separate memorandum, was a violation of the rule that the will must be in writing, see *Blackwell v. Blackwell* (1929), 145 T.L.R. 208.

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As to what documents may form a will, see the English and Empire Digest, Vol. 44, pp. 227-248.

"At the foot or end thereof."-Those words were explained and their meaning extended by the Wills Act Amendment Act, 1852 (c. 24), s.1, p. 449, *post*. A will is sufficiently signed if the signature be placed in such a position as will fall within the terms of the amending Act. It is preferable nevertheless that it should be signed at the foot or end thereof, as it is then seen that it is only intended as a signature.

The testator may sign by placing a mark instead of actually writing his name (See *In the Goods of Bryce* (1839), 2 Curt. 325); and signature by mark is sufficient whether the testator is able to write or not (*In the Goods of Glover* (1847), 5 Notes of Cases 553, *per* Cur.). The stamped name of the testator is sufficient, whether the stamp be applied by the testator or by some other person by his direction and in his presence (see *Jenkins v. Gaisford and Thring* (1863), 3 Sw. & Tr. 93).

It has been held that when another person signs for the testator he may sign his own name instead of the testator's (see *In the Goods of Clark* (1839), 2 Curt. 329). It would, however, be safer not to rely on this doctrine.

The signature must be made or acknowledged in the presence of the witnesses simultaneously and not at different times (see *Brown v. Skirrow*, [1902] P. 3).

Acknowledgment by gestures in the joint presence of the witnesses is sufficient (see *In the Goods of Martha Davies* (1850), 2 Rob. Eccl. 337). To constitute a sufficient acknowledgment the witnesses must at the time of acknowledgment see, or have the opportunity of seeing the signature, and it should be explained to them that the document they are asked to sign is a testamentary instrument (see *Pearson v. Pearson* (1871), L.R. 2 P. & D. 451). On signature and acknowledgment generally, see the English and Empire Digest, Vol. 44, pp. 249-266.

An attesting witness may sign by mark (see *In the Goods of Ashmore* (1843), 3 Curt. 756) ; and the hand of an attesting witness may be guided by the hand of the other witness or of a third person (see *Harrison v. Elvin* (1842), 3 Q.B. 117). A witness cannot sign in the name of another person (see *In the Goods of Leverington* (1886), 11 P. D. 80). One attesting witness cannot sign for another (see *In the Goods of White* (1843), 2 Notes of Cases, 401) nor can a third person sign for a witness (see *In* the *Goods of Cope* (1850), 2 Rob. Eccl. 335). Passing a dry pen over a written signature is not sufficient (see *Playne v. Scriven* (1849), 1 Rob.

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Eccl. 772). Though no form of attestation is necessary, it is safer and more convenient that such a clause should be added to every will. It is desirable that the signatures of the witnesses should appear together and near the signature of the testator. A codicil must be executed in the same way as a will; see definition of "will" in s. 1, p. 436, *ante*.
On attestation generally, see the English and Empire Digest, Vol. 44, pp. 266-274.

10. Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed. -No appointment made by will, in exercise of any power , shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution of solemnity. **[1082]**

A power to be exercised by instrument in writing could always be exercised by will (see *Orange v Pickford* (1858), 4 Dr. 363). It was decided, however, in the case of West v. Ray (1854), Kay 385, that where a power of appointment is to be exercised by a writing under the hand and seal of the donee, it cannot be exercised by a will executed with only the formalities required by this Act, because the essential requisition of the power is that it should be executed under hand and seal, and the statute applies to a power of which the essential requisition is that it should be exercised by will, and the formalities are comparatively unimportant.
See, generally, the English and Empire Digest, Vol. 37, p.419, and Vol. 44, pp. 519 *et seq*.

11. Saving as to wills of soldiers and mariners.-Provided always, 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. **[1083]**

The statutory provisions relating to wills of soldiers, airmen, sailors and seamen are dealt with in the Statute of Frauds, 1677 (c.3), s.22, p. 436, *ante;* in this section; in the Navy and Marines (Wills) Acts, 1865 (c.72), and 1897 (c.15), pp. 452, 454, *post;* in the Merchant Shipping Act, 1894 (c.60),s.177, Vol. 18

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title SHIPPING, p.227, and in the Wills (Soldiers and Sailors) Act, 1918 (c.58), p.455, *post*.

By this section the privilege covers soldiers on actual military service, mariners or seamen being at sea. This was extended in two respects by the Wills (Soldiers and Sailors) Act, 1918 (c.58). By s.2 of that Act, p.455, *post* s.11 of this Act is to extend to any member of His Majesty's naval or marine forces not only when he is at sea, but also when so circumstanced that if he were a soldier he would be on actual military service. Further, by s. 5 (2) of the same Act, p.456 *post*, the term "soldier" is, for the purposes of s. 11 of this Act, to include a member of the Air Force.

The will of such a person is not invalid by reason of the testator being under twenty-one (the Wills (Soldiers and Sailors) Act, 1918 (c.58), ss. 1, 3(2), p. 455, *post*), and a power of appointment may be exercised by an infant soldier *(Re Wernher, Wernher v. Best,* [1918] 2 Ch. 82). It may be made in writing or by word of mouth (*In the Estate of Yates, decd.*, [1919] P. 93). It is not necessary to prove that he knew he was making a will, or that he had power to make a will while a minor or by word of mouth. It is enough if he intended deliberately to give expression to his wishes as to the disposition of his property in the event of his death (*Dalrymple v. Campbell,* [1919] P. 7); *Re, Beech, Beech v. Public Trustee,* [1923] P. 46, at p. 56). If in writing, it may be written in pencil, have only one witness or no witness at all (*In the Goods of Farquhar* (1846), 4 Notes of Cases, 651, 652; *In the Good of Sanders* (1865), L.R. 1 P. & D. 16).

There are certain restrictions, however, on this freedom from formality in respect to wills by members of the naval or marine forces and by members of the merchant service, where they purport to deal with wages payable by the Admiralty or the Board of Trade. As to the former see the Navy and Marines (Wills) Acts, 1865 (c. 72), and 1897 (c. 15), pp. 452, 454, *post,* and as to the latter, see the Merchant Shipping Act, 1894 (c. 60), s. 177, Vol. 18, title SHIPPING, p. 227.

The will of a seaman or marine is invalid if combined with a power of attorney (s.4 of the Navy and Marines (Wills) Act, 1865 (c. 72), p. 453, *post*), and by s. 6 of the same Act, provision is made relating to wills by seamen or marines when prisoners of war.

Wills of soldiers and sailors, etc., were formerly effective to pass only personal property but are now operative on realty as well., by virtue of the Wills (Soldiers and Sailors) Act, 1918 (c. 58), s.3, p. 455, *post*. By s. 4, *ibid.* p. 456, *post,* power is given to appoint testamentary guardians.

S. 15 of this Act, p. 443, *post,* invalidating gifts to attesting witness, has no application to wills made under the privilege of

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this section (11) (see *Re Limond, Limond v. Cunliffe,* [1915] 2 Ch. 240), and where witnesses had attested a soldier's will, it was held that it was none the less privileged under s.11, and that gifts to the witnesses were good (*ibid.*).
Return to civil life prior to death does not operate as a revocation of the will (*In the Goods of Coleman,* [1920] 2 I.R. 332); formalities are not required to effectuate revocation (*In the estate of Gossage Wood v. Gossage,* [1921] P. 194).
As to who is a soldier or a sailor for the purposes of this privilege, and what constitutes being on "actual military service," or "being at sea," see the English and Empire Digest, Vol. 39, pp. 332 *et seq* Vol. 44, pp. 304, 305.

[*S. 12 rep. 28 & 29 Vict. C. 112, s. 1.*]

13. Publication of will not requisite.- Every will executed in manner herein-before required shall be valid without any other publication thereof. **[1084]**

"Publication" was a declaration by the testator in the presence of witnesses that the instrument produced to them was his will. Its place is now taken by the proper attestation by two witnesses.

14. Will not to be void on account of incompetency of attesting witness.-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. **[1085]**

As to the competence of witnesses, see Halsbury's Laws of England, Vol. 13 pp. 569, 570.

15. Gifts to an attesting witness, or his or her wife or husband, to be void.- 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

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will. [1086]

As to the application of this section to the will of a soldier or sailor made under the privilege reserved by s. 11, see the notes to that section, p. 442, *ante*. The mere fact that witnesses are supernumerary witnesses does not save them from the disqualification under the section, if in fact they are attesting a will which is executed under the affirmative provisions of the Act (see *Randfield v. Randfield* (1860), 8 H.L. Cas. 225, 232).
Where a solicitor is appointed trustee of a will and empowered to make professional charges, he will, if he attests such will, lose his right to profit costs, since such right could only be claimed under the will as a beneficial interest under it *(Re Pooley* (1888), 40 Ch.D. 1). But a devisee loses nothing by marrying a witness after the execution of the will (*Thorpe v. Bestuick* (1881), 6 Q.B.D. 311); and this, no doubt, applies equally to a legatee.
The section contemplates a beneficial interest to the party, and a witness may therefore be an executor or trustee of the will. As to an executor, see *Griffiths v. Griffiths* (1871) L.R. 2 P. & D. 300, and s. 17, hereof, *post*; and as to a trustee, see *In the Goods of Ryder* (1843), 2 Notes of Cases, 462.
The husband or wife of a creditor whose debt is charged on the property by the will may be a witness without impairing the creditors rights ; see s. 16, *post*.
A witness, to a codicil may take a devise under the will even if the codicil confirms the will, or if it revokes legacies given by the will, so as indirectly to increase his share of the residue (*Gurney v. Gurney* (1855) 3 Drew. 208; *Tempest v. Tempest* (1856) 2 K. & J. 635).

16. Creditor attesting a will charging estate with debts shall be admitted a witness.-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. [1087]

See note to s. 15 *ante*.

17. Executor shall be admitted a witness.- 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

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thereof. [1088]

See note to s. 15 *ante*.

18. Wills to be revoked by marriage, except in certain cases.-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). [1089]

The marriage of a native-born or a naturalised English subject would not operate as a revocation if such marriage would be invalid according to English law (*Mette v. Mette* (1859), 1 Sw. & Tr. 416; and a will made in contemplation of a particular marriage is not now revoked by the solemnisation of the contemplated marriage (Law of Property Act 1925, (c. 20) s. 177 Vol. 15, title REAL PROPERTY p. 359)

As to a will coming within the exception in this section see *Re Paul, Public Trustee v. Pearce,* [1921] 2 Ch. 1.

For the revocation of a will by marriage on the validity of a subsequent nuncupative will, see *In the Estate of Wardrop (John) (decd.)*, [1917] p. 54.

See generally the English and Empire Digest, Vol. 44, pp. 318-320.

19. No will to be revoked by presumption from altered circumstances. -No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. [1090]

See *Re Wells Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 616.

20. No will to be revoked otherwise than as aforesaid or by another will or codicil or by destruction thereof. -No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is herein-before 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. [1091]

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The cancellation of a will is an equivocal act and of no effect unless there is an intention to revoke (*Smith v. Cunningham* (1823), 1 Ad. 448). Where a will has been torn up without the testator's authority, he cannot, by any subsequent ratification of the destruction, render the act a valid revocation of the will. If a testator under such circumstances desires that the act of destruction, performed without his authority at the time, should prevail, he has it. in his power effectually to revoke his will in accordance with the Act. He can either execute a document expressly revoking his will or he can make a fresh will dealing with his property in any way 'he chooses (*Gill v. Gill,* [1909] P. 157, 161, 162).

Where the revocation of a will is dependent on a condition which is not fulfilled, such revocation is inoperative (*In the Estate of J. R. Southerden, Adams v. Southerden,* [1925] P. 177).

See also *Re Robinson, Lamb v. Robinson,* [1930] W.N. 166 (will invalid [sic] under s.15, p. 443, *ante*—whether effective to revoke earlier will).

For revocation of wills of soldiers, sailors, etc., see s. 11, and note, p. 442, *ante.*

As to revocation generally, see Halsbury's Laws of England, Vol. 28, pp. 562-575, and the English and Empire Digest, Vol. 44, pp. 315-365.

21. No alteration in a will after execution except in certain cases, shall have any effect, unless executed as a will. —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. **[1092]**

When a will is altered after execution, the testator and witnesses must place their names or initials (*see In the Goods of Blewitt* (1880), 5 P. D.,116) opposite or near to such alteration in the margin or elsewhere, or a memorandum referring to the alterations must be written at the end or some other part of the will, and the testator and witnesses must place their names "at the foot or end of" or "opposite to" the memorandum. If alterations are made

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before execution, it is, although the Act does not require it, prudent to affix the signatures to them or to refer to them in the attestation clause, if any.
See also Halsbury's Laws of England, Vol. 28, pp. 559-561, and the English and Empire Digest, Vol. 44, pp. 305-315.

22. No revoked will shall be revived otherwise than by re-execution or a codicil., etc.-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 herein-before 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. **[1093]**

"Unless an intention to the contrary shall be shown."-This means, unless there is an intention to revive the part revoked before the revocation of the whole. For revival generally, see Halsbury's Laws of England, Vol. 28, pp. 575, 576, and the English and Empire Digest, Vol. 44, pp. 365-370.

23. Subsequent conveyance or other act not to prevent operation of will.-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. **[1094]**

The section does not apply to cases where the thing meant to be given is gone. Thus, where a testatrix devised all her freehold messuages in S. to trustees in trust to sell and stand possessed of the proceeds in trust for A, and gave the residue of her personal estate to the trustees in trust for B, and after the date of her will sold the houses and conveyed them to the purchaser, and he deposited the conveyance and the title deeds thereof with her, to secure part of the purchase-money, it was held that the security and the money due on it did not pass under this section to the trustees in trust for A, but to the trustees in trust for B (*Moor v. Raisbeck* (1841) 12 Sim. 123, 139). So, also, where a testatrix devised a real estate and afterwards sold it and the purchase was not completed until after her death, it was held that

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the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase-money, and notwithstanding this section (*Farrar v.* Winterton (Earl) (1842), 5 Beave 1).
In the course of his judgment in the last-mentioned case, Lord Langdale said:
"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."
For modes of failure of a gift, see, generally, the English and Empire Digest, Vol. 44, pp. 403-416.

24. Wills shall be construed, as to the estate comprised, to speak from the death of the testator.-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. **[1095]**

This section only applies to the real and personal estate comprised in it, and not to the objects of the testator's bounty (*Re Coley, Hollinshead v. Coley*, [1903] 2 Ch. 102 ; *Amyot v. Dwarris* [1904] A.C. 268). Previously to the passing of the Act a gift of a testator's real and personal estate was construed as passing the real estate belonging to the testator at the time when the will was made only, and the personal estate which belonged to the testator at the time of his death (Jarm. on Wills, 5th Edn., p. 290). Since the Act, a will must, unless it shows a contrary intention, be construed as if the condition of things to which it refers was that immediately before the testator's death (*Higgins v. Dawson* [1902] A.C. 1, *per* Lord HALSBURY, at p. 7; *Re Reeves, Reeves v. Pawson,* [1928] 1 Ch. 351; and see Halsbury's Laws of England, Vol. 28, pp. 680, 681, 691, 692, and the English and Empire Digest, Vol. 44, pp. 534-536, 645-654).
"Unless a contrary intention shall appear by the will."-The contrary intention must be found in the will (*Boyes v. Cook* (1880), 14 Ch.D. 53, 57); but it is not necessary that such contrary intention should be expressed in so many words, or in some way quite free from doubt; but it is to be gathered by adopting, in reference to the expression used by the testator, the ordinary. rules of construction applicable to wills (*Cole v. Scott* (1849) 1 Mac. & G. 518; and see *Re Wells, Hardisty v. Wells*

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(1889), 42 Ch. D. 646; *Re Evans, Evans v. Powell* [1909] 1 Ch. 784; *Emuss v. Smith* (1848), 2 De, G. & Sm. 722; *Saxton v. Saxton* (1879), 13 Ch. D. 359; *Douglas v. Doughlas* (1854), Kay 400; *Re Bancroft, Bancroft v. Bancroft,* [1928] 1 Ch. 577; and, generally, the English and Empire Digest, Vol. 44, pp., 647, 648. As to the introduction of the word "now" into the gift, see *Cole v. Scott* (1849), 1 Mac. & G. 518 at p. 528, and, generally, the English and Empire Digest Vol. 44, pp. 648, 649.

The section now applies to the wills of married women (see note to S. 8, p. 440, *ante*).

25. Residuary devises shall include estates comprised. in lapsed and void devises.- 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. **[1096]**

The section applies only to the case where the residuary devise is so worded as to apply universally to all land of the testator that is not otherwise disposed of (*Springett v. Jennings* (1871), 6 Ch.App. 333, 338), and not to the case where the gift is only of a particular residue, as such a gift is in effect specific (*Re Brown* (1855), 1 K. & J. 522, per PAGE WOOD, V.C. at p. 526).

26. A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands, in the absence of a contrary intention.-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. **[1097]**

With regard to copyholds and their extinction since January 1, 1926, see Preliminary Note, p. 433, *ante*.
With regard to leaseholds, see *Re Holt, Holt* v. *Holt*, [1921] 2 Ch. 17, and, generally, the English and Empire Digest, Vol. 44, pp.

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660, 661.

"Contrary intention."—See note to s. 24, p. 445, *ante* and *Wilson v. Eden* (1852) 16 Beav. 153; *Prescott v. Barker* (1874), 9 Ch.App. 174, and *Re Guyton and Rosenberg* [1901] 2 Ch. 591.

27. A general gift of realty or personalty shall include property over which the testator has a general power of appointment.—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. **[1098]**

The section extends only to general powers and not to particular or restricted powers (*Cloves v. Awdry* (1850), 12 Beav. 604); see, generally, on this section, the English and Empire Digest, Vol. 37, pp. 435-445. For the exercise of powers by will made abroad, see *Re Lewal, Gould v. Lewal* [1918] 2 Ch. 391; *Re Strong, Strong v. Meissnner* (1925), 95 L.J. Ch. 22, and, generally, the English and Empire Digest, Vol. 11, pp. 381-386.

The effect of this section is that, in the absence of a contrary intention appearing by the will, a general devise of real estate includes any real estate over which the testator may at his death (see ss. 23, 24, p. 445, *ante*, and *Stillman v. Weedon* (1848), 16 Sim. 26) have a general power of appointment and operates as an exercise of the power, and a general bequest of personal estate includes any personal estate over which the testator may at the like period have a general power of appointment, and operates as an exercise of such power. For the exercise of such a power by a British subject living abroad, see *Re Simpson*, [1916] 1 Ch. 502.

In the exercise of particular or restricted -powers (and of general powers before this Act came into operation) the power must be referred to in the will or the property over which the power extended must be mentioned to show that the testator intended that his disposition should operate upon such property, or there must be in the will some other clear internal evidence of an intention to exercise the power.

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For the exercise by will of a non-existent power, the creation of the power subsequent to the will, and the confirmation of the will including the exercise by a codicil, see *Re Bower, Bower v. Mercer* (1929), 141 L.T. 639.
See also *Wrigley v. Lowndes,* [1908] P. 348; *Re Wilkinson's Settlement Butler v. Wilkinson,* [1907] 1 Ch. 620; and, generally, the English and Empire Digest, Vol. 37 pp. 446-460.

28. A devise of real estate without any words of limitation shall pass the fee, etc.-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. **[1099]**

As to what amounts to a contrary- intention, see *Re Gannon, Spence v. Martin,* [1914] 1 I.R. 86, and, generally, the English and Empire Digest, Vol. 44, pp. 952, 953. The provisions of this section have since been in effect extended to conveyances *inter vivos*; see s.60 of the Law of Property Act, 1925 (c. 20), Vol. 15, title REAL PROPERTY, p. 237; and see ss. 30, 31, p. 448 *post.*

29. The words "die without issue," or "die without leaving issue," etc., shall mean a want or failure of issue in the lifetime or at the death of the person, except in certain cases.-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. **[1100]**

In wills made before January 1, 1838, the words "die without issue" were construed to mean the death of the person spoken of, and failure of his issue at the time of his death or at any time afterwards, unless the context shows the meaning to be confined to

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a failure of issue at the time of his death and the rule applied both to real and personal estate (Hawk, Wills, 2nd Edn. p. 257). The object of the section is to redress the inconvenience arising from the words "dying without issue" or similar words having acquired a legal meaning different from the popular meaning (*Greenway v. Greenway* (1859), 1 Giff. 131).
The express exceptions and proviso which are mentioned in the latter part of the section are intended to define the cases in which an intention contrary to the rule may appear by the will (*ibid.* p. 136). For a consideration of this section, see Halsbury's Laws of England, Vol. 28, pp. 833-840, and for cases, see the English and Empire Digest, Vol. 44, pp. 1118-1150.

30. Devise of realty to trustees or executors shall pass the fee, etc., except in certain cases.-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. **[1101]**

See note to s. 31, *post*.

31. Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, shall take the fee, etc.- 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. **[1102]**

Before the Act came into operation a devise of real estate would in the absence of words of limitation pass only a life estate unless there were expressions in the will showing clearly an intention that some other or greater estate should pass.
It must be borne-in mind that the only legal estate or interest that can now be created or subsist in land is an estate in fee simple absolute in possession or a term of years absolute (Law of

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Property Act, 1925 (c. 20), s.1(1), Vol. 15, title REAL PROPERTY, p. 177). See also *Re Collins, Towers v. Collins,* [1929] 1 Ch. 201, and *Re Barrat Body v. Barrat,* [1929] 1 Ch. 336; *Re Dawson's Settled Estates,* [1928] 1 Ch. 421.

32. Devises of estates tail shall not lapse where inheritable issue survives, etc.—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 heritable 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. **[1103]**

Entailed interests may now be created by way of trust in personal as well as in real property, and all statutory provisions relating to estates tail in real property apply to entailed interests in personal property (see Law of Property Act, 1925 (c. 20), s.130(1), Vol. 15, title REAL PROPERTY, p. 308).
As to the power of a tenant in tail in possession to dispose of property by specific bequest or devise, see the Law of Property Act, 1925 (c. 20), s.176, Vol. 15, title REAL PROPERTY, p. 358.

33. Gifts to children or other issue who leave issue living at the testator's death shall not lapse.—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. **[1104]**

Apart from this section, a devise or bequest lapses, i.e. fails, if the devisee or legatee dies in the testator's lifetime. See, generally, the English and Empire Digest, Vol. 44, pp. 492-502.
Property saved from lapse by the section will pass, generally, by the will of the "child or other issue" who dies before the testator just as if he had lived to possess it (*Johnson v. Johnson* (1843), 3 Hare 157). But if the devise or bequest of the "child or other issue" is made to the original testator himself, it fails, and the property devolves as if the "child or other issue" had died intestate (*Re Hensler, Jones v. Hensler* (1881), 19 Ch.D.

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612).

This section does not apply where the devise or bequest is to the testator's children as a class (*Browne v. Hammond* (1858), 70 E. R. 400; *Re Harvey's Estate, Harvey v. Gillow*, [1893] 1 Ch. 567).

See, generally, the English and Empire Digest, Vol. 44, pp. 502-506.

The testator may insert a provision in his will against the possibility of lapse (*Re Morris, Corfield v. Weller* (1916), 86 L. J. Ch. 456; the English and Empire Digest, Vol. 44, pp. 501, 502.

34. Act not to extend to wills made before 1838, or to estates pur autre vie of persons who die before 1838.-This Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight; and every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished or revived ; and 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. **[1105]**

As to republication generally, see Halsbury's Laws of England, Vol. 28 pp. 577-579 and the English and Empire Digest, Vol. 44, pp. 370-382

35. Act does not to extend to Scotland.-This Act shall not extend to Scotland. **[1106]**

[*S. -36 rep. .37 & 38 Vict.ca. 35 (SLR.).*]

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