

No. V.

IMPERIAL ACT
ADOPTION.

An Act for adopting a certain Act of Parliament intituled “*An Act for the amendment of the Laws with respect to Wills*” in the Administration of Justice in New South Wales in like manner as other Laws of England are applied therein. [6th August, 1839.]

Preamble.

7 W. IV. and 1 Vict.
ch. 26.

Adopted and applied
in the administration
of justice in New
South Wales.

Commencement of
Act.

WHEREAS a certain Act of Parliament was passed in the year one thousand eight hundred and thirty-seven intituled “*An Act for the amendment of the Laws with respect to Wills*” and whereas it is expedient to adopt and apply the said recited Act of Parliament in the administration of justice in New South Wales Be it therefore enacted by His Excellency the Governor of New South Wales with the advice and consent of the Legislative Council thereof That the said recited Act of Parliament shall be and the same is hereby adopted and directed to be applied in the administration of justice in the said Colony and its Dependencies from and after the time hereinafter mentioned in like manner as other laws of England are therein applied.

2. And whereas it is expedient that the said recited Act of Parliament should not commence or take effect in the Colony of New South Wales until the first day of January next ensuing Be it enacted That the said recited Act of Parliament shall not commence or take effect in the Colony aforesaid before the first day of January one thousand eight hundred and forty and that every clause and provision in the said recited Act shall on from and after the said day of January have only the same effect in the Colony of New South Wales as the same have had in Her Majesty’s Kingdom of England from and after the first day of January one thousand eight hundred and thirty-eight.

ACT OF PARLIAMENT REFERRED TO.

ANNO PRIMO VICTORIÆ REGINÆ.

CAP. XXVI.

An Act for the amendment of the Laws with respect to Wills. ENGLISH WILLS ACT ADOPTED.
 [3rd July, 1837.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same That the words and expressions hereinafter mentioned which in their ordinary signification have a more confined or a different meaning shall in this Act except where the nature of the provision or the context of the Act shall exclude such construction be interpreted as follows (that is to say) the word "will" shall extend to a testament and to a codicil and to an appointment by will or by writing in the nature of a will in exercise of a power and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of an Act passed in the twelfth year of the 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 Wards and Liveries and Tenures in capite and by Knights 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 extend and be applied to a female as well as a male.

2. And be it further enacted That an Act passed in the thirty-second year of the reign of King Henry the Eighth intituled "*The Act of Wills Wards and Primer Seisins*" whereby a man may devise two parts of his land and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth intituled "*The Bill concerning the explanation of Wills*" and also an Act passed in the Parliament of Ireland in the tenth year of the reign of King Charles the First intituled "*An Act how lands tenements &c. may be disposed by Will or otherwise and concerning Wards and Primer Seisins*" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second intituled "*An Act for prevention of Frauds and Perjuries*" and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third intituled "*An Act for prevention of Frauds*"

Meaning of certain words in this Act.

"Will."

12 Car. 2 c. 24.

14 and 15 Car. 2 (1.)

"Real estate."

"Personal estate."

Number.

Gender.

Repeal of the Statutes 32 H. 8 c. 1 and 34 and 35 H. 8 c. 5.

10 Car. 1 Sess. 2 c. 2 (1.)

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

7 W. 3 c. 12 (1.)

English Wills Act Adopted, 1 Vic. c. 26.

4 and 5 Anne c. 16
s. 14.

6 Anne c. 10 (I.)

14 G. II. c. 20 s. 9.

25 G. II. c. 6 (except
as to Colonies).

25 G. II. c. 11 (I.)

55 G. III. c. 192.

All property may be
disposed of by will.

Frauds and Perjuries" as relates to devises or bequests of lands or tenements or to the revocation or alteration of any devise in writing of any lands tenements or hereditaments or any clause thereof or to the devise of any estate *pur autre vie* or to any such estate being assets or to nuncupative wills or to the repeal altering or changing of any will in writing concerning any goods or chattels or personal estate or any clause devise or bequest therein and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne intituled "*An Act for the amendment of the Law and the better advancement of Justice*" and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne intituled "*An Act for the amendment of the Law and the better advancement of Justice*" as relates to witnesses to nuncupative wills and also so much of an Act passed in the fourteenth year of the reign of King George the Second intituled "*An Act to amend the Law concerning Common Recoveries and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second intituled 'An Act for prevention of Frauds and Perjuries'*" as relates to estates *pur autre vie* and also an Act passed in the twenty-fifth year of the reign of King George the Second intituled "*An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England and in His Majesty's Colonies and Plantations in America*" except so far as relates to His Majesty's Colonies and Plantations in America and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second intituled "*An Act for the avoiding and putting an end to certain doubts and questions relating to the attestations of Wills and Codicils concerning Real Estates*" and also an Act passed in the fifty-fifth year of the reign of King George the Third intituled "*An Act to remove certain difficulties in the disposition of Copyhold Estates by Will*" shall be and the same are hereby repealed except so far as the same Acts or any of them respectively relates to any wills or estates *pur autre vie* to which this Act does not extend.

3. And be it further 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 or customary heir of him or if he became entitled by descent of his ancestor or upon his executor or administrator and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold notwithstanding that the testator may not have surrendered the same to the use of his will or notwithstanding that being entitled as heir devisee or otherwise to be admitted thereto he shall not have been admitted thereto or notwithstanding that the same in consequence of the want of a custom to devise or surrender to the use of a will or otherwise could not at law have been disposed of by will if this Act had not been made or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only or any other special custom could not have been disposed of by will according to the power contained in this Act if this Act had not been made and also to estates *pur autre vie* whether there shall or shall not be any special occupant thereof and whether the same shall be freehold customary freehold tenant right customary or copyhold or of any other tenure and whether the same shall be a corporeal or incorporeal

English Wills Act Adopted, 1 Vic. c. 26.

poreal hereditament and also to all contingent executory or other future interests in any real or personal estate whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will and also to all rights of entry for conditions broken and other rights of entry and also to such of the same estates interests and rights respectively and other real and personal estate as the testator may be entitled to at the time of his death notwithstanding that he may become entitled to the same subsequently to the execution of his will.

4. Provided always and be it further enacted That where any real estate of the nature of customary freehold or tenant right or customary or copyhold might by the custom of the manor of which the same is holden have been surrendered to the use of a will and the testator shall not have surrendered the same to the use of his will no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted except upon payment of all such stamp duties fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will or in respect of presenting registering or enrolling such surrender if the same real estate had been surrendered to the use of the will of such testator Provided also that where the testator was entitled to have been admitted to such real estate and might if he had been admitted thereto have surrendered the same to the use of his will and shall not have been admitted thereto no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof except on payment of all such stamp duties fees fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate and also of all such stamp duties fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will or of presenting registering or enrolling such surrender had the testator been duly admitted to such real estate and afterwards surrendered the same to the use of his will all which stamp duties fees fine or sums of money due as aforesaid shall be paid in addition to the stamp duties fees fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

As to the fees and fines payable by devisees of customary and copyhold estates.

5. And be it further enacted That when any real estate of the nature of customary freehold or tenant right or customary or copyhold shall be disposed of by will the lord of the manor or reputed manor of which such real estate is holden or his steward or the deputy of such steward shall cause the will by which such disposition shall be made or so much thereof as shall contain the disposition of such real estate to be entered on the Court rolls of such manor or reputed manor and when any trusts are declared by the will of such real estate it shall not be necessary to enter the declaration of such trusts but it will 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

Wills of customary freeholds and copyholds to be entered on the Court rolls and the lord to be entitled to the same fine &c. when such estates are not now devisable as he would have been from the heir.

English Wills Act Adopted, 1 Vic. c. 26.

- 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.
6. And be it further enacted That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature the same shall be chargeable in the hands of the heir if it shall come to him by reason of special occupancy as assets by descent as in the case of freehold land in fee-simple and in case there shall be no special occupant of any estate *pur autre vie* whether freehold or customary freehold tenant right customary or copyhold or of any other tenure and whether a corporeal or incorporeal hereditament it shall go to the executor 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.
7. And be it further enacted That no will made by any person under the age of twenty-one years shall be valid.
8. Provided also and be it further enacted That no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of this Act.
9. And be it further enacted That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary.
10. And be it further enacted That no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required and every will executed in manner hereinbefore required shall so far as respects the execution and attestation thereof be a valid execution of a power of appointment by will notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.
11. Provided always and be it further enacted That any soldier being in actual military service or any mariner or seaman being at sea may dispose of his personal estate as he might have done before the making of this Act.
12. And be it further enacted That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of His Majesty King George the Fourth and the first year of the reign of His late Majesty King William the Fourth intituled "*An Act to amend and consolidate the Laws relating to the pay of the Royal Navy*" respecting the wills of petty officers and seamen in the Royal Navy and non-commissioned officers of marines and marines so far as relates to their wages pay prize money bounty money and allowances or other monies payable in respect of services in Her Majesty's Navy.
13. And be it further enacted That every will executed in manner hereinbefore required shall be valid without any other publication thereof.
14. And be it further enacted That if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof such will shall not on that account be invalid.

Estates "*pur autre vie*."

No will of a minor valid.

Nor of a feme covert.

Every will to be in writing and signed in the presence of two witnesses.

Appointments by will to be executed like other wills &c.

Soldier's and mariner's wills excepted.

Act not to affect provisions of 11 G. IV. and 1 W. IV. c. 20 with respect to wills of petty officers &c.

Publication not to be requisite.

Will not void by incompetency of witness.

English Wills Act Adopted, 1 Vic. c. 26.

15. And be it further enacted That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise legacy estate interest gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made such devise legacy estate interest gift or appointment shall so far only as concerns such person attesting the execution of such will or the wife or husband of such person or any person claiming under such person or wife or husband be utterly null and void and such person so attesting shall be admitted as a witness to prove the execution of such will or to prove the validity or invalidity thereof notwithstanding such devise legacy estate interest gift or appointment mentioned in such will.

Gifts to an attesting witness to be void.

16. And be it further enacted That in case by any will any real or personal estate shall be charged with any debt or debts and any creditor or the wife or husband of any creditor whose debt is so charged shall attest the execution of such will such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will or to prove the validity or invalidity thereof.

Creditor attesting to be admitted a witness.

17. And be it further enacted That no person shall on account of his being an executor of a will be incompetent to be admitted a witness to prove the execution of such will or a witness to prove the validity or invalidity thereof.

Executor to be admitted a witness.

18. And be it further enacted That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir customary heir executor or administrator or the person entitled as his or her next of kin under the statute of distributions).

Will to be revoked by marriage.

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

No will to be revoked by presumption.

20. And be it further enacted That no will or codicil or any part thereof shall be revoked otherwise than as aforesaid or by another will or codicil executed in manner hereinbefore required or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed or by the burning tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

In what cases wills may be revoked.

21. And be it further enacted That no obliteration interlineation or other alteration made in any will after the execution thereof shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will but the will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will.

No alteration in a will shall have any effect unless executed as a will.

22. And be it further enacted That no will or codicil or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required and 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

How revoked will shall be revived.

English Wills Act Adopted, 1 Vic. c. 26.

revocation of the whole thereof unless an intention to the contrary shall be shewn.

When a devise not to be rendered inoperative &c.

23. And be it further enacted That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised except an act by which such will shall be revoked as aforesaid shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A will to speak from the death of the testator.

24. And be it further enacted That every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will.

What a residuary devise shall include.

25. And be it further enacted That unless a contrary intention shall appear by the will such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator or by reason of such devise being contrary to law or otherwise incapable of taking effect shall be included in the residuary devise (if any) contained in such will.

What a general devise shall include.

26. And be it further enacted That a devise of the land of the testator or of the land of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner and any other general devise which would describe a customary copyhold or leasehold estate if the testator had no freehold estate which could be described by it shall be construed to include the customary copyhold and leasehold estates of the testator or his customary copyhold and leasehold estates or any of them to which such description shall extend as the case may be as well as freehold estates unless a contrary intention shall appear by the will.

What a general gift shall include.

27. And be it further enacted That a general devise of the real estate of the testator or of the real estate of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper and shall operate as an execution of such power unless a contrary intention shall appear by the will and in like manner a bequest of the personal estate of the testator or any bequest of personal property described in a general manner shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper and shall operate as an execution of such power unless a contrary intention shall appear by the will.

How a devise without words of limitation shall be construed.

28. And be it further enacted That where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate unless a contrary intention shall appear by the will.

How the words "die without issue" or "die without leaving issue" or "have no issue" shall be construed.

29. And be it further enacted That in any devise or bequest of real or personal estate the words "die without issue" or "die without leaving issue" or "have no issue" or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue unless a contrary intention shall appear by the will by reason of such

English Wills Act Adopted, 1 Vic. c. 26.

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.

30. And be it further enacted That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate unless a definite term of years absolute or determinable or an estate of freehold shall thereby be given to him expressly or by implication.

No devise to trustees or executors except &c. shall pass a chattel interest.

31. And be it further enacted That where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life or such beneficial interest shall be given to any person for life but the purposes of the trust may continue beyond the life of such person such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied.

Trustees under an unlimited devise &c. to take the fee.

32. And be it further enacted That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail and any such issue shall be living at the time of the death of the testator such devise shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator unless a contrary intention shall appear by the will.

Devises of estates tail shall not lapse.

33. And be it further enacted That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue and any such issue of such person shall be living at the time of the death of the testator such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

34. And be it further enacted That this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight and that every will re-executed or 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 January one thousand eight hundred and thirty-eight.

To what wills and estates this Act shall not extend.

35. And be it further enacted That this Act shall not extend to Scotland.

Not to Scotland.

36. And be it enacted That this Act may be amended altered or repealed by any Act or Acts to be passed in this present Session of Parliament.

Act may be amended.