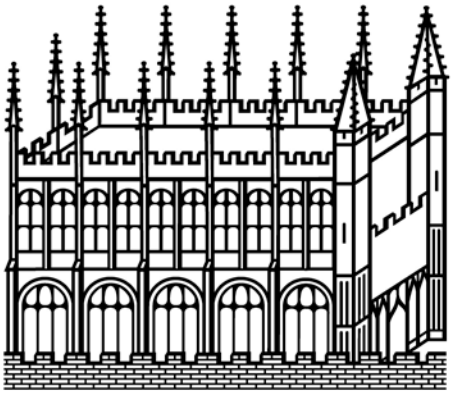

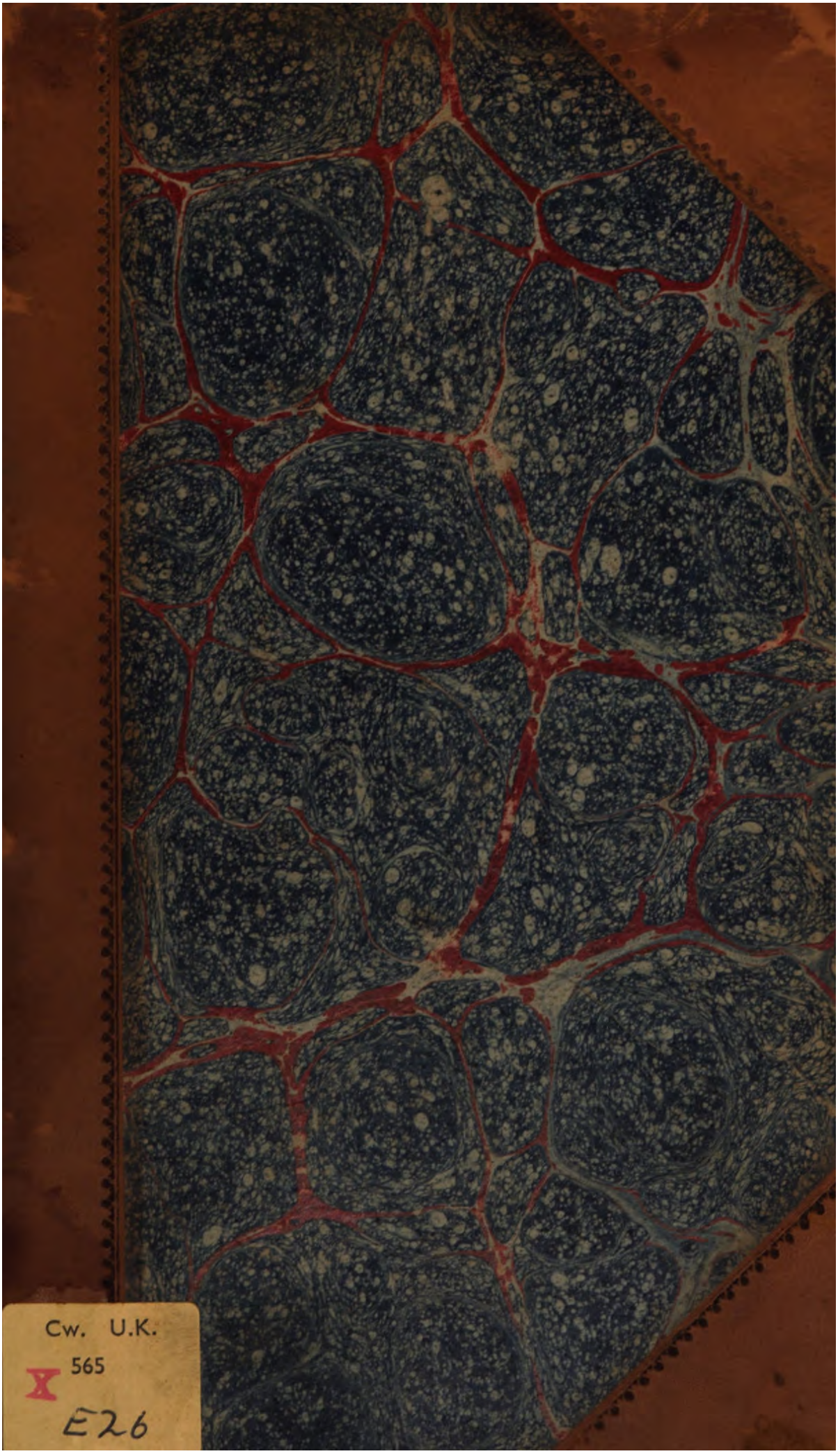

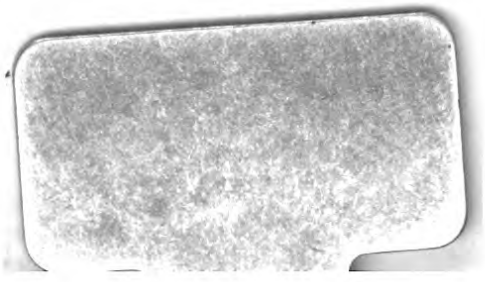

ABRIDGMENT OF CASES

IN

The Prerogative Court,

UNDER THE NEW STATUTE OF WILLS,

1 VICTORIA, c. 26.

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THE NEW STATUTE OF WILLS,

1 VICTORIA, c. 26.

BEING A DIGEST OF ALL THE DECISIONS THEREON IN THAT COURT,

AND

ARRANGED UNDER THE SECTIONS TO WHICH THEY APPLY RESPECTIVELY.

WITH

NOTES AND INDEX,

INTENDED AS A WORK OF REFERENCE AND PRACTICE, WITH RESPECT TO THE EXECUTION OF WILLS.

BY EDWIN EDWARDS, ESQ.

OF DOCTORS' COMMONS.

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PREFACE.

NOTHING having appeared on this subject (further than the Reports themselves) since Mr. Williams's last edition of the "Law of Executors," or since Dr. R. Phillimore's title of "Wills" to the last edition of "Burn's Ecclesiastical Law," and subsequent to which the decisions under the new Statute having been numerous and most important, it occurred to the writer that an abridgment or digest of all the cases under that Act up to the present time might be useful.

The cases have been abridged from the valuable Reports of Doctors Curteis and Robertson, and all the cases subsequent to the last number of the Reports from a work entitled "Notes of Cases in the Ecclesiastical Courts." The latter work has now nearly reached the end of a fourth volume, and its utility having been so generally recognised, it is too late to pass any eulogy

upon it; but as that work has been indispensable to the production of this, it is at least the duty of the debtor to acknowledge the obligation.

The present work includes all cases from the passing of the Act to the end of Easter Term, 1846.

Doctors' Commons, October, 1846.

TABLE

OF

THE CASES ABRIDGED.

THE WILLS ACT.

1 Vict. c. 26.

INTRODUCTION.

This is a remedial Statute standing on the same principles as the Statute of Frauds, which, as its name denotes, was partly passed for the object of preventing the setting up of fraudulent Wills of real estate.

The present Statute was intended to effect the same object as to Wills of personal estate, and to secure further objects, especially that the testamentary act to be done should be deliberate and that no doubt should exist as to its finality; the safeguards provided by the Act are contained in the ninth Section.

Being a remedial Statute, it must, according to the soundest rules of construction, be so interpreted as to prevent the evil and advance the remedy. (*a*)

In the cases which are digested in this Treatise, it will be observed how far the Prerogative Court has been bound, and how far guided by

(*a*) Hudson *v.* Parker, 1 Robertson.

the decisions which have taken place in the temporal Courts under the Statute of Frauds; it will be observed how strictly the Court of Probate has followed the object and intention of the Legislature in the construction, exposition, and interpretation of this most important Statute; however reluctantly probate of some Wills has been refused by the Court, every case is an example how, according to the true intent of the framers of this Act, the mischief which existed before the Statute has been suppressed, and the remedy (the protection and security of the public) has been advanced. The decisions that have taken place under this Act cannot be made too public. No one on looking into them will fail to remark how cautiously have public interest and individual security been protected.

The doubts which arose under the Statute of Frauds, and the constructions put upon that Act created the necessity of passing the present Statute, and it is said that the decisions of the Judges in the case of White *v.* the Trustees of the British Museum was the immediate cause of the passing of this Act. It is an "Act for the amendment of the Laws with respect to Wills,"—not an original Act, but to amend the law, and was intended to remove all doubt and latitude of interpretation. (*a*)

The first six Sections are either introductory, repealing other Statutes, or relate to real estate,

(*a*) Moore *v.* King.

making provisions for the disposal over real property in cases in which under the old law such power of disposal was defective. The 7th and 8th as to who may make a Will; the 9th, 10th, 11th, 12th, and 13th, how a Will may be made; the 14th, 15th, 16th, and 17th, as to the competency of attesting witnesses; the 18th 19th, 20th, 21st 22nd, and 23rd, how a Will may be altered, revoked, or revived; the 24th to 31st, as to the construction of Wills, the 32nd and 33rd, on the lapse of legacies and devises; the 34th, 35th, and 36th, how, when, and where the Act is to take effect.

It may here be observed, that by the 34th section, this Act does not extend to a Will of a date previous to the 1st of January, 1838, except (according to the decisions of the Court) as regards alterations or other act done to them subsequent to that date.

The Statute passed on the 3rd of July, 1837, and is called an "Act for the amendment of the Laws with respect to Wills," its title is 1 Victoria, c. 26.

Section the First.

I. 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

Meaning of certain words in this Act;

Section 1.

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

"Will:" 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

12 Car. 2, c. 24. 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

14 & 15 Car. 2. (I.) 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:" "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 "per-

sonal 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.

Section 1.

"Personal Estate:"

Number:

Gender.

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise two parts of his Land;" and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &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 Parlia-

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

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

Sec. 5, 6. 12, 19, 20, 21 & 22, of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3. c. 12, (I.)

Section 2.

ment of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative Wills, or to the repeal, altering, or changing of any Will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to 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

Sec. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10, (I.)

Sec. 9, of 14 G. 2. c. 20.

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

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 Attestation 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 relate to any Wills or Estates *pur autre vie* to which this Act does not extend.

Section 2.

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

55 G. 3, c. 192.

III. 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 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, 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

All property may be disposed of by Will,

Section 2.

administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his Will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a Will or otherwise, could not at law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by Will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot be now devised;

Estates pur autre vie;

contingent interests;

Section 3.

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.

rights of entry; and property acquired after execution of the Will.

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

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

Section 4.

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

Wills or extracts of Wills of customary freeholds and copyholds to be entered on the Court rolls;

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by Will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the Will by which such disposition shall be made, or so much thereof as shall con-

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

Section 5.

and the lord to the same fine, &c. when such estates are not now devisable as he would have been from the heir in case of descent.

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

Estates pur autre vie.

Section 6.

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.

No will of a person under age valid;

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

nor of a feme covert, except such as might now be made.

VIII. Provided also, and be it further enacted, That no Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act.

Section 9th.

IX. And be it further enacted, that no Will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary.

Section 9.

Nuncupative Wills.

By this section all Wills are to be in writing, therefore Nuncupative Wills are rendered invalid, except as regards any soldier being in actual military service, or any mariner or seaman being at sea. *Vide* section 11.

The language made use of in this section is clear and intelligible, and the manner prescribed for the execution of Wills is not easily misunderstood; it is not left at the option of the testator, but it is a positive provision that a Will shall be void if not executed according to that Statute, and it was decided in Lord Hertford's case, that it was not competent for him in his Will executed before 1838, to reserve to himself the power of disposing of his property by a codicil executed in any other manner than is required by this section of the Act.

Signature by a mark,

The making of a mark by the testator was considered a sufficient signing to satisfy the fifth section of the Statute of Frauds, and *that without reference to any question whether he could write at the time*, (*a*) and as the language of both Acts respecting the signature of the testator is almost identical, this decision appears equally applicable to the Statute of Victoria. *In the Goods of E. Bryce, spinster, deceased,* (*b*) the testatrix signed her Will with a mark, but her name did not appear on the Will in the usual way, (as for instance: "the mark of E. Bryce);"

(*a*) Baker *v.* Dening, 8 A. & E. 94.
(*b*) 2 Curt. 325.

Section 9.

but on the affidavit of the two attesting witnesses the Will was admitted to probate.

by sealing.

In some of the old cases under the Statute of Frauds sealing was held a sufficient signing, but this has since been overruled, and would not possibly therefore be regarded as a signing under the present Statute.

at the foot or end.

The fifth section of the Statute of Frauds enacts, that a Will of real estate "shall be in writing, and signed by the party devising;" and it was held under that Statute, that writing the name at the top was a sufficient signature, and that if a Will were in the testator's handwriting, and commenced "This is the last Will and Testament of me John Smith," this was sufficiently *signed* within the Statute, although not *subscribed* with his name. Undoubtedly the intention of the Legislature in introducing into the present Statute the words "foot or end," was to avoid any such constructive signature. It is therefore now requisite that the signature of the testator be at the foot, *or* at the end of the Will. There have been several cases in the Prerogative Court in which questions have arisen upon the point, whether or not the signature of the deceased could be considered at the foot or end.

The first was a motion for the probate of the Will of *Catherine E. T. Woodington* (*a*), widow,

(*a*) 2 Curt. 324.

deceased, which concluded in the following manner: "signed and sealed as and for the will of me, Catherine Elizabeth Thicknesse Woodington, in the presence of us Thomas Hughes, Ellen Hughes." The Court considered it to have been the intention of the testatrix, in placing her name where it stood, that it should answer the purpose of a description as well as of a signature, and such signature was held to be at the foot or end; the Court decreed probate of this Will with some hesitation, and it will be seen that the Court, in referring subsequently to this case (*a*), said, that the words made use of in this attestation clause were important, "*of me*," and made a great impression on the Court; it was sworn too that the witnesses believed that the deceased intended it for his signature, and again it was written *close at the bottom* of the Will. The Court considered it had gone as far as it could properly in this case. Section 9.

In the case of *Keating* v. *Brooks* (*b*), the first objection taken to the Will was, that it was not signed at the foot or end according to the Statute. The signature of the testatrix was not at the conclusion of the whole of what was written on the paper, but between the signature of the testatrix and the clause of attestation was a note or memorandum, in which the testatrix without

(*a*) Joseph Chaplyn, 4 No. Ca.
(*b*) 4 No. Ca. 253.

Section 9.

disposing of any part of the property, merely expressed her fear that some of the property for the reasons therein given, would not be so productive as she could have wished. The Court did not sustain this objection, the signature being at the end of the dispositive part of the paper, after the date, and, therefore, at the end of the *Will*, and that, without reference to whether such memorandum had been written before the deceased signed the Will or afterwards, the execution was good for all that preceded the signature, and that such memorandum could be excluded from the probate. Probate was therefore granted of this paper, but without the addition.

In the Goods of *Howell* (*a*), deceased, a Will was signed by the testator and duly attested, but below the signature of the deceased and of the witnesses, but before the execution was written the following clause, "And I hereby appoint Messrs. Bradford and Burt, of Swinden, and Jonas Hunt, executors." The Court allowed administration with the Will annexed to pass to the residuary legatee, without the clause appointing the executors forming part of the Will.

In the Goods of *Carver* (*b*), the Will itself (written on a printed form) ended on the first

(*a*) 2 Curt. 342.
(*b*) 3 Curt. 29.

side, where there was not room for the testator's signature, and that of the witnesses; and the testator instead of signing his name at the top of the next page, wrote it at the end of the printed form, where the testator's signature was directed to be made by the instructions in the margin of the paper; this was considered to be at the foot or end.

In the Goods of *John Bullock* (*a*), a Will was written on the lower half of the second side of a sheet of paper, the testator had folded the paper down the middle (broadways) for the purpose of concealing the contents of it from the witnesses, and was thus signed by the testator and witnesses on the lower half of the first or reverse side (the witnesses believing the Will to have been contained on the upper part of the first side). The consent of the next of kin had been obtained, and on motion for probate the Court was of opinion that although perhaps not strictly and literally signed at the foot or end, it was able, under the circumstances and with such consent, to decree probate of the Will.

In the Goods of *John Gore* (*b*), the Will was written on the first side of a sheet of paper; instead of being signed at the top of the second side, or at the bottom of the second side, as in *Carver*, deceased, the second side was left entirely blank,

(*a*) 3 Curt. 750.

(*b*) 3 Curt. 758, also in No. Ca. 2, 479.

Section 9.

and the signature of the testator, attestation clause, and subscription of the witnesses was on the third side. *The whole of the property was disposed of*, and bequeathed to the wife. The Court held that if it was not signed at the foot it was signed at the end. The object of this clause in the Act was to prevent any question as to whether a signature at the commencement was or was not sufficient, which was deemed sufficient under the Statute of Frauds, and it is now required that the signature shall be at the foot or end; in this case the signature could not be considered in the beginning, or in the middle. Probate was decreed of the paper.

In the Goods of *Sarah Gardiner* (*a*), widow, deceased, a Will written on the *first* and *third* sides of a sheet of paper, the signatures of the deceased and witnesses being on the lower part of the *second* side, which was otherwise blank, and there not being convenient room for such signatures on the *third* side was admitted to probate.

In the Goods of *Giles Davis* (*b*), the Will was signed by the testator only at the foot of the *first* page, containing all the Will, except the appointment of executors, and subscribed by the witnesses on the *second* page, after the appointment of executors. Held, to be sufficiently executed, except so far as regards the appoint-

(*a*) 2 No. Ca. 459.
(*b*) 2 No. Ca. 350.

ment of executors, and administration was granted with the Will annexed. Section 9.

In the goods of *Baker* (*a*), deceased, a Will was written on paper folded in the middle, so as to make four sides, and commencing on the *first* side concluded on the *third* side, the *second* and intermediate side being left blank, except that on the lower part of it, were the signature of the deceased, the attestation clause, and the signatures of the attesting witnesses; it appeared that they were written on the second side by reason of there having been only room for the signature of the deceased at the conclusion of the third side. The signature was held to be at the "end," though not at the "foot," and probate was granted.

In the Goods of *Esther Powell* (*b*), widow, deceased, a clause was added to a Will immediately previous to execution, and this clause beginning parallel with, reached below the signature of the deceased and of the attesting witnesses thus:

"In witness whereof I have hereunto set my
"hand (by making a mark) this 18th Sep-
"tember, 1844.

The mark
"and if any ⋈
"money remains of Esther Powell.
"after the legaces Witnesses T. A. J. F.

(*a*) 3 No. Ca. 162.
(*b*) 4 No. Ca. 391.

Section 9.

"*ar* paid to be equally divided betwixt my "appointed executors and Thos. Goodge, "of Notting Hill."

This was held to be at the end of the Will, though not at the foot.

In the Goods of *Mary Jones* (*a*), a clause qualifying the residuary bequest was written on the third side of the sheet of paper containing the Will (the Will itself being contained in the first and second sheets, and the signature of the testatrix and of the witnesses being at the end of the second side). This clause was proved to have been written at the time the Will was executed. Administration with Will annexed, together with this clause, was moved for, citing *re Powell.* The Court held this was a very different case, there the continuation of a clause was carried below the signature, and the Court considered the signature at the end, though not at the foot of the Will. *Per Cur.* "In *Powell's case* I went as far as I could go. I reject this clause, but very unwillingly."

The preceding are the only cases in which probate has been granted, where a question has been raised as to the signature of the deceased being at the foot or end: the following are cases in which probate has been rejected, where the same point was raised.

In the Goods of *Joseph Chaplyn* (*b*), deceased,

(*a*) 4 No. Ca. 533.
(*b*) 4 No. Ca. 469.

a motion was made for probate of a paper all in the handwriting of the deceased, written on three sides of a sheet of paper, with ample room for the signatures of the deceased and of the witnesses on the *third* side; but there was no signature at all except on the *fourth* side, where it occurs in the form of an attestation clause, written by the deceased before it was produced to the witnesses in the following terms: "Signed by the within named Joseph Chaplyn, the testator, in the presence of us, present at the same time, who, in his presence, have subscribed our names as witnesses hereto.—George Watson, William Underdown. Signed, sealed, and declared in the presence of the above witnesses. September 16, 1841." It was submitted by Dr. Deane, that the first question was, as to the place where the clause of attestation was written, there being a blank between the end of the Will and the clause of attestation, and that this came within the case of *Gore*, in which the Court decreed probate; the second question is, whether the deceased has *signed* his name, and it was submitted either that the whole of the attestation clause might be considered surplusage, or that the same view might be taken as in *Woodington*. The Court held, that the present was distinguished from both the cases cited. In *Gore, the whole of the property was disposed of*, and there was a signature; in this case there is neither residuary clause nor signature. In the

Section 9.

Section 9.

other case cited, the deceased wrote "signed and sealed as and for the Will and Testament *of me*, C. E. T. Woodington;" and it was sworn by the witnesses that they believed the deceased *did intend this to be the signature to the Will.* The words, too, to the attestation clause, "*of me*," were very important, and made a great impression on the Court; and again, it was written close at the bottom of the Will. The Court considered it had gone as far as it properly could in *Woodington. Per Cur.* "Is this a signature within the true construction of the Act of Parliament? Now *primâ facie* it is not so. It is true that no attestation clause is required, but the deceased thought proper to add an attestation clause, and the words 'signed by the within-named' would seem to refer to a signature before the attestation clause was written; but there is no signature. The signature is not acknowledged by the paper being merely produced by the deceased as his Will, and his desiring the witnesses to attest, what? not the signature of the deceased, which was not there, but to sign an attestation clause." The motion was therefore rejected, parties being at liberty to propound the paper if they thought proper.

In the Goods of *Louisa Davis* (*a*), the deceased, to a paper in her own handwriting, described as a second codicil, did not sign her name at the

(*a*) 4 No. Ca. 522.

foot, though her name was written in the clause of attestation, and believed by the witnesses to have been written there at the time of execution, the Court refused probate of this second codicil. *Per Cur.* "Can I assume or conjecture that the deceased, when she wrote the words 'by the said Louisa Davis,' intended them to be a substitute for her signature at the bottom of the codicil. I cannot give effect to this paper on motion. It is different when the name in the attestation clause was *clearly intended as a signature.*" Probate decreed of the first Will and codicil alone. Section 9.

In the Goods of *William Martin* (*a*), deceased, a Will was prepared and executed on one of the printed forms divided into columns, with printed directions on the heading of each column; the second column was described as a "margin for signature of testator and subscription of witnesses, in case of any alteration in the Will." The testator and witnesses having apparently understood that where a Will was altered it must be signed in the margin, and nowhere else, they had signed in such margin instead of at the foot or end. Motion rejected.

Another case in which the intentions of the deceased were defeated by misapprehension, occurred in the Goods of *Judith Wakeling* (*b*),

(*a*) 3 Curt. 754.
(*b*) 1 No. Ca. 236.

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deceased, wherein a Will was signed by the testatrix in the margin, and not at the bottom, she having misunderstood the directions of the solicitor who prepared the Will, it was submitted by Dr. Haggard, that if she did not sign at the foot or end, she signed after the Will was ended. The motion was rejected.

In the Goods of *John Scarlett* (*a*), the deceased executed his Will, purposely leaving a blank or space above the signature, in order that he might if he thought proper make an addition to his Will, and in which space additions were afterwards inserted. The executors having renounced, administration with the Will annexed was moved for as it was before such additions were made, citing *re Gore*. The Court held that the Will was neither signed at the foot or end, the deceased always contemplating an addition to it.

Signature by some other person for the testator.

In the Goods of *James Clark* (*b*), deceased, the testator being too ill to sign his Will, requested the drawer thereof to sign it for him, which he did in his own name instead of that of the testator's, having the Statute 1 Vict. c. 26, before him, and intending to follow its provisions thus: "Signed on behalf of the testator in his presence, and by his direction, by me, C. F. Furlong, Vicar of Warfield, Berks. The above signature was made for and acknowledged by

(*a*) 4 No. Ca. 480.
(*b*) 2 Curt. 329.

the testator in the presence of us, whose names are hereto subscribed. Section 9.

MARY BUTLER.
⋈
Her mark.
ANN CLARK."

This was held to be a sufficient compliance with the Act, the Statute not expressing that the signature should be made in the name of the testator.

In the Goods of *John Bailey*, deceased (*a*), a question was raised, upon motion, whether a signature by the direction of the deceased made by one of the two attesting witnesses is valid; the name of the deceased was signed by Robert Harvey, one of the subscribed witnesses, at the foot or end, by the deceased's direction, and in his presence, and also in the presence of M. S., the other subscribed witness, who was present at the same time, and who, as well as Robert Harvey, attested the Will in the presence of the deceased: the Court was of opinion, that there is nothing in the Statute which prevents the person making the signature for the testator, being one of the witnesses to attest and subscribe the Will; and probate of the paper was therefore granted.

The same question was raised in a more formal

(*a*) 1 Curt. 914.

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manner, viz., on the admission of an allegation in *Smith* v. *Harris* (*a*), in which the circumstances were similar, *viz.*, the signature to the Will was not written by the testatrix, but by another person in her presence, and by her direction, and such person was one of the attesting witnesses; it was contended, on the part of the next of kin of the deceased, against the Will, that this was not a good execution, relying on an opinion expressed in a Treatise on Wills, by Mr. Sugden, which opinion had also found its way into Mr. Williams's Law of Executors (*b*), *viz.*, "that it could not be the intention of the Legislature that the testator should acknowledge the signature of his Will, made by another person, to the very person who had signed it for him, and that no witness can attest his own act." But the Court saw no reason to depart from the opinion expressed in the former case of *Bailey*. The witness attests the direction of the testatrix, and that direction amounts to an acknowledgment, it is not necessary to show that the deceased is unable to sign her name herself, the Statute not requiring it. The Will was, therefore, admitted to probate.

It had been suggested that the word "acknowledged," made use of in this section, referred only to a signature when made by another

(*a*) 1 Robertson, 262.

(*b*) Vol. I. p. 62, 3rd Edition.

person from the direction of the testator, but the Court decided in the Goods of *Regan* (*a*) that it also referred to the acknowledgment by the testator of his *own* signature. Section 9.

The next question to be considered then is, what constitutes an acknowledgment of signature by the testator? The following are cases in which the acknowledgment has been considered sufficient within the meaning of the Act.

In the Goods of *Mary Warden* (*b*), the testatrix signed her Will, and on a subsequent day sent for two witnesses to attest the same; upon their arrival, they said that they had come as she requested for the purpose of signing their names as witnesses to her Will, which was then produced, whereupon the deceased replied, "I am very glad of it, thank God!" and they then subscribed the will as witnesses: it was held by the Court, on motion, that this was a sufficient acknowledgment. It appears therefore that a direct acknowledgment of the signature is not expressly required—virtual acknowledgment is sufficient. Acknowledgment by the testator of his signature.

In the case of *Gaze* v. *Gaze* (*c*), a testator produced a paper, (then stating it to be his Will,) all in his own handwriting, and having his name signed at the end thereof, to three persons, and requested them *to put their names under-*

(*a*) 1 Curt. 908.
(*b*) 2 Curt. 334.
(*c*) 3 Curt. 451.

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neath his: the Court held this to be a sufficient acknowledgment of the signature, being satisfied, (although there was no express evidence of the fact,) that the signature was of the handwriting of the testator.

In the case of *Blake* v. *Knight* (*a*), a Will, purporting by the attestation clause to have been signed, sealed, published, and declared by the testator as and for his last Will and Testament in the presence of three witnesses, and to have been attested by them in his presence and that of each other was disputed, on the ground that it was not proved by the evidence of the witnesses that the deceased signed the paper in their presence, or that the signature was on the paper at the time, or if it was, that the deceased acknowledged the signature in their presence. The Court held, that it was not absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the Will was actually signed in their presence, or actually acknowledged in their presence, nor is it absolutely necessary under all circumstances that the witnesses should concur in stating that these facts took place, nor is it absolutely necessary where the witnesses will not swear positively that the Court should pronounce against the validity of the Will. The Court will take into its consideration all the circumstances of the case and

(*a*) 3 Curt. 547.

judge from them collectively whether there was not, at least, *an acknowledgment of a signature which clearly existed on the face of the Will at the time of attestation.* In the present case, three years after the transaction the witnesses depose that they went to the house of the deceased, who was a lawyer's clerk, to see him sign his Will; on the witnesses coming into the room, the deceased is told that the witnesses are come to attest his Will; he produces the paper from his desk and lays it open before them; he tells them it is his Will—that it is a short Will—that he had made a mistake in the body of the Will—that he had rectified the mistake and points out to them how he has done so; he reads the attestation clause to them, and also the words, "This is the last Will and Testament of me, Edmund Blake." Everything being in the most open manner. The paper appeared signed and sealed. The witnesses are positive there never was a seal, but are not so sure as to the signature; they would neither swear positively or negatively whether there or not before they signed. The Court felt satisfied, from the circumstances, that this paper was signed by the testator before the witnesses, and that his producing the paper to the witnesses, then acknowledging it to be his Will, and it being in his handwriting, amounts to a sufficient acknowledgment of the signature. It is not abso- Section 9.

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lutely necessary that the testator point out the signature and say "This is my signature" (*a*).

In *Keigwin* v. *Keigwin* (*b*), the testatrix shewed a paper to two persons present at the same time and requested them to sign it; "I want you to sign this paper," both witnesses observed the signature of the testator affixed to the paper, and both witnesses subscribed it in her presence; (the paper was identified by the witnesses as the Will.) The question was, whether this was a sufficient acknowledgment; the Court held that it was; it is not necessary that the party should say in express terms, "This is my signature;" it is sufficient if it clearly appears that the signature of the testator be existent on the Will at the time of its production to the witnesses.

In the Goods of *William Philpot* (*c*), the Will was not signed in the presence of witnesses, but was produced to them as his Will, and was already signed; the deceased being then informed that it was requisite that two witnesses should attest, said, "Then if it is necessary, let it be done; will you put your names?" This was considered sufficient acknowledgment of his signature, and the paper was admitted to

(*a*) This case differs from Ilott *v.* Genge, in that case there was a studious concealment of the signature.

(*b*) 3 Curt. 607.

(*c*) 3 No. Ca. p. 2.

probate on motion. For another case in which probate was granted when the question turned upon acknowledgment of signature by the testator, see in the Goods of *Ashmore* abridged at page 32. Section 9.

On the other hand, there have been many cases in which the circumstances have not satisfied the Court that there has been such an acknowledgment as the Statute requires.

In the Goods of *Ann Rawlings* (*a*), the deceased signed her Will not in the presence of witnesses, and produced it to two witnesses, and said to them, "Sign your names to this paper." without saying that it was a Will, or that the signature was hers. This was held not to be a sufficient acknowledgment of her signature.

In the Goods of *Mary Harrison* (*b*), probate was refused of a paper which was produced by the deceased to three witnesses who subscribed their names thereto. The deceased did not state at the time that the paper was her Will, neither did she sign it in their presence, or acknowledge any signature to it, two of the witnesses did not observe any signature to the paper, but one deposed that she observed the signature of the deceased. The Court was of opinion, that this was not a sufficient acknowledgment of the signature to *two* witnesses present at the same time.

(*a*) 2 Curt. 326.
(*b*) 2 Curt. 863.

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But a motion was made under very similar circumstances in the Goods of *Anne Ashmore* (*a*), the decision of the Court being different; Ashmore was the later case, but there the Judge regretted that the point had never been argued, and that the property was so small that he could not direct the paper to be propounded, so that it may be said to be a question remaining for argument—whether, if a paper be produced to two witnesses with a request to sign, but without stating the testamentary nature of the document, and if the signature of the testator already affixed be observed by only *one* witness, this can be considered a virtual acknowledgment of the signature. In the present case the testatrix produced a codicil all in her handwriting to two witnesses, and requested them to sign, which they did; nothing was said as to her signature, or as to the paper being testamentary, but one of the witnesses saw and recognized the signature of the deceased made at the end of the last line of the paper; the Court held this to be a sufficient acknowledgment, observing that there have been several late cases, where, when a paper has been proved to be in the handwriting of the testator or testatrix, and the signature was clearly and visibly on the face of it, the production of the paper to two witnesses present at the same time accompanied with a request to

(*a*) 3 Curt. 756, and 2 No. Ca. 465.

them to subscribe it, has been held to be a sufficient acknowledgment of an unquestioned signature. Section 9.

In the case of *Ilott* v. *Genge* (*a*), the doctrine of what constitutes an acknowledgment with reference to cases under the Statute of Frauds on the same point, is most clearly laid down by Sir H. J. Fust. The Will was signed by the testator, and purported by the attestation clause to have been "signed, sealed, and delivered in the prese..ce of" three subscribed witnesses. But the result of the evidence was, that the deceased asked two witnesses to sign a paper for him; that the deceased was "doing something" to the paper when they entered the room; the impression of one witness was that he was folding the paper, of the other witness that he was getting it ready for them to sign; neither could swear that he was writing on the paper, or that he was using or had a pen in his hand, or that they saw him put the pen back in the inkstand; they would not swear that he wrote anything in their presence, or that the impression on their minds was that he did so; their impression was rather that he did not, than that he did. The two witnesses then signed in the presence of the testator and of each other, the Will was afterwards signed by a third witness in the presence of the testator only, but on both occasions *the paper*

(*a*) 3 Curt. 160; 1 No. Ca. 572.

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was so folded by the testator as to conceal the entire contents. It being the impression of the two witnesses that the Will was not signed in their presence, the Court cannot presume this signature against the impression of the witnesses. The paper was so folded as to *conceal* the contents and *even the attestation clause* of the Will from the witnesses. This is not therefore a case in which the witnesses are deposing against their own act. The Court not being satisfied that the Will was *signed*, the question remained, if there was an acknowledgment of a signature by the testator in the presence of the witnesses. Under the form of words used in the fifth section of the Statute of Frauds, it was held not necessary that the witnesses should see the testator actually sign, he need not acknowledge his signature to all the witnesses at the same time, the acknowledgment might be made to each witness separately, a simultaneous presence of the witnesses was not required (*a*). In other cases under the same Statute, it has been held that a request to witnesses to subscribe their names as witnesses was a sufficient acknowledgment (*b*).

(*a*) Grayson *v.* Atkinson, 2 Ves. Sen. 454; Jones *v.* Lake, 2 Atk. 176; Stonehouse *v.* Evelyn, 3 P. Wms. 254; Ellis *v.* Smith, 1 Ves. Jun. 11; Wright *v.* Wright, 5 Moore & P. 316.

(*b*) Brit. Museum *v.* White, 3 Moore & P. 689, 6 Bingham, 310; Wright *v.* Wright, 5 Moore & P. 316; Johnson *v.* Johnson, 1 Cr. & Mees. 140.

In the present Statute it is enacted, not that the Will shall be signed, but that "the signature shall be made or acknowledged." In the Statute of Frauds nothing was said as to acknowledgment of the signature by the testator. Under that Statute if a paper were acknowledged to be a Will, it was sufficient. In the present Statute it is expressly enacted that the signature must be acknowledged; it would seem to require that the witnesses should see the signature, that they should know that the paper was signed at the time, a fact which could only be known by seeing the testator sign, or hearing him say that he had signed, and "that was his signature;" it might be a question whether a declaration by the deceased, that he had signed the paper, would be sufficient for the purpose; the construction the Court puts upon the clause is, that it is not necessary for the testator to say in so many words, "This is my signature to my Will," but that *where there is an actual production of the paper, and the name of the testator is subscribed to it, and there is an opportunity given to the witnesses to see the signature and the witnesses subscribe, it is a due compliance* with the Act. But it is not sufficient merely to produce the paper to the witnesses *where it does not appear that the signature of the testator was affixed to it at the time.* And this it is which distinguished this case from those under the Statute of Frauds. The signature, not the Will, Section 9.

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must be acknowledged by the new Act, it is therefore a necessary inference that the witnesses should know that the paper was signed. The Court therefore pronounced against the validity of the Will.

Dr. Lushington, sitting as surrogate for Sir H. J. Fust, confirmed this opinion in the case of *Hudson* v. *Parker* (*a*). In that case two witnesses subscribed in the presence of the testator and of each other, the testator having previously in their joint presence acknowledged the said paper to be his Will. The witnesses did not see the testator sign his name to the paper, nor did they at the time of subscribing their names to it see his signature, the writing upon the paper being purposely concealed from them. Upon the death of the testator his signature was found at the end of the paper; a distinction was contended for between this (the present) case and *Ilott* v. *Genge*, viz., that in this case the testator had acknowledged it to be his Will. *Per Cur.* What is the plain meaning of acknowledging a signature in the presence of witnesses? What do the words import but this, 'Here is my name written. I acknowledge that name so written to have been written by me; bear witness;' how is it possible that the witnesses should swear that any signature was acknowledged unless they saw it?

(*a*) 1 Robertson, 14.

"They might swear that the testator *said* he acknowledged a signature, but they could not depose to the fact, that there was an existing signature to be acknowledged." Section 9.

"It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word "acknowledge" or by the exigency of the Act to be done. It would be quite sufficient to say, "That is my Will," *the signature being there and* SEEN at the time, for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning acknowledgment and approbation."

The Court held that there was no material distinction between this case and *Ilott* v. *Genge*, and that the Will was not executed according to the Statute on three distinct grounds:

First. There is no proof that the signature was affixed prior to the subscription of the witnesses.

Secondly. If from the circumstances such fact is to be presumed, it was not made in the mental presence of the witnesses, nor, indeed, is there any proof that they were present at all.

Thirdly. Because the witnesses never saw, nor, indeed, could see the signature, of which there was no acknowledgment, unless constructive.

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From the decision in *Ilott* v. *Genge* there was an appeal to the Privy Council; the Judicial Committee, however, affirmed the sentence of the Prerogative Court.

A further confirmation was given to this construction of the word acknowledged. In the Goods of *Frances Trinder* (*a*), deceased, in which case the deceased presented the blank part of a Will to two witnesses, and requested them to sign there, saying: "This is my last Will and Testament, I should thank you to sign it," that thereupon the witnesses signed the Will in the presence of the deceased, who did not sign it in their presence, nor did they see the signature, or any other part of the Will, and were unable to depose whether the signature was there or not at the time. Probate was refused.

It may be proper to remark here, that the power of acknowledgment of signature, which is given by the Statute to the testator, does not extend to the signature of witnesses; see below, *Moore* v. *King*.

Signature by testator after witnesses.

It appears from the cases which have been decided on the point, that if the Will be signed by the testator *after* the attesting witnesses have subscribed, it is not a sufficient compliance with this section of the Statute to entitle the Will to probate, and a motion for probate in the Goods

(*a*) 3 No. Ca. 275.

of *Olding* (*a*), deceased, of a Will executed in this manner was rejected. In the Goods of *Byrd* (*b*), motion was made for probate of a Will signed by the deceased *after* the witnesses had subscribed their names, it was submitted in support of the Will, that this case was distinguished from *Olding*, by the witnesses having subsequently to the signing by the deceased placed their seals opposite to their names, which it was suggested might be considered a re-attesting. The Court held that there was no real distinction, and rejected the motion. Section 9.

In the case of *Cooper* v. *Bockett* (*c*), it was clearly established that the signature must be made or acknowledged by the testator before the witnesses sign, and if the Will is signed by the testator *after* the witnesses it is not well executed. *Per Cur.* "The words of the section are very precise, and I think it would be attended with dangerous consequences if the Court were to hold a Will valid which has been signed in the presence of two witnesses who have attested it *before* the signature of the testator was affixed to the Will; for where is the Court to draw the line? Suppose the witnesses attested an hour before the testator signed, or a day, or a week, or any other time; *where is the Court to stop if* it gave a latitude of construction to this section

(*a*) 2 Curt. 865.
(*b*) 3 Curt. 117.
(*c*) 3 Curt. 648.

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of the Act? Suppose it were one month, or six months, or a twelve-month *before* (*a*) the testator had signed the Will; and whether it be at the time of the transaction, or some time before makes no difference. The words of the Act are prospective, 'such witnesses *shall* attest and *shall* subscribe the Will in the presence of the testator.' It does not appear to me that the requisites of the Act would be complied with if the Court were to hold that a testator might sign after the witnesses had subscribed, either at the same time, or two hours, or two weeks afterwards." In this case the will was signed by the deceased, and purported to be attested, by two witnesses—servants of the deceased; one of them admitting that he was in a state of confusion at the time deposed positively, the other witness so far as she can now recollect, that the signature was not affixed till after the attestation. But the Court distrusting the recollection of these witnesses as not supported by the circumstances, which were in favour of the Will being signed by the testator *before* the witnesses, pronounced for the Will as duly executed.

In the case of *Bayliss* v. *Sayer* (*b*), the circumstances were somewhat similar, and there was a like decision; there, the attesting witnesses,

(*a*) This word is written "*after*" in the reports, and is clearly an *erratum*.

(*b*) 3 No. Ca. 22.

both illiterate persons, deposed, after the lapse of nearly two years, one that he was quite positive, the other that he was almost, if not quite certain, that the testator had signed after they had affixed their names to the attestation clause, (which purported that the Will was signed in the presence of the witnesses); the Court admitted, after publication of the evidence, the testimony of another witness, who was present at the transaction, and deposed that the testator signed *before* the witnesses, and probate was granted of such paper, the Court not trusting to the evidence of the attesting witnesses. Section 9.

From the above cases it is therefore clear that although the Court will in many instances distrust the impression or recollection of the witnesses, the signature of the testator must be made or acknowledged before the attesting witnessses subscribe.

In the Goods of *Claringbull* (*a*), a Will signed by the deceased *after* the witnesses was revived by reference, and admitted to probate.

Joint presence of the witnesses.

But now as regards the presence of the witnesses. The words of the Act are, "Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." And the cases which follow will be illustrative of the construction put by the Court on the word "present."

It should be borne in mind, that there is some

(*a*) See below.

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distinction between the act of the testator and that of the witnesses, *viz.*, as regards the signature of the testator in the presence of the witnesses, and that of the witnesses in the presence of the testator. The language made use of in the Statute with reference to the signing of the testator, and that of the witnesses not being identical and the acts themselves being of different import, and to answer different objects. The signature of the testator must be made or acknowledged in the presence of witnesses because they are to attest it and bear witness thereof. The witnesses are to subscribe in the presence of the testator for another purpose: for the completion of the instrument (*a*).

As an instance of the diversity of the act of the testator from that of the witnesses will be mentioned below, the case of *Moore* v. *King*, wherein it was decided that an attesting witness could not acknowledge his signature previously affixed (as can a testator by the Statute); he must actually subscribe at the time of attestation.

In the case of *Newton* v. *Clarke* (*b*), the testator signed a codicil while lying in bed, there being in the room the two witnesses who attested the codicil; the curtains at the foot of the bed being drawn at the time, one of the witnesses could not actually see the testator sign his name, nor

(*a*) Per Dr. Lushington, in Hudson *v.* Parker.
(*b*) 2 Curt. 320.

could the testator see that witness subscribe the codicil as attesting it; *held* that where a paper is executed by the deceased in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign. Probate was therefore taken of this codicil. This case applies to both the signature of the testator and of the witnesses, although in adverting to it in *Hudson* v. *Parker* (*a*), Dr. Lushington, sitting as Surrogate for the Judge of the Prerogative Court, referred to it as if the testator only was prevented from seeing the signature of the witnesses, whereas the curtain hindered both the testator from seeing one of the witnesses, and that witness from seeing the testator sign the will. It would appear from this decision in *Newton* v. *Clarke*, that a signature by the deceased in *the same room* in which the witnesses are, is a signature in the presence of such witnesses within the meaning of the Act. But as would appear by the following cases, if in another room, they must be in such a position relative to the deceased as to be able to see him sign; but it must be observed that, as in the first case, viz., when in the same room there must be no concealment, and there must be a fair opportunity given to

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(*a*) 1 Robertson.

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the parties to see their signatures respectively; so in the second, viz., when in an adjoining room it must be shown that the relative position of the deceased and witnesses was such that they could see the testator sign.

In the Goods of *Ellis* (*a*), a barrister-at-law, deceased, motion was made for probate of a paper signed by the deceased, in the presence of two witnesses present at the same time, who went into an adjoining room and signed their names, from which room they could not have been seen by the deceased, and could not see him. Motion rejected.

In the Goods of *Colman* (*b*), the circumstances were somewhat similar: in that case motion was made for probate of a paper signed by the deceased in the presence of two witnesses, but subscribed by them in an adjoining room, communicating with folding doors, each of the width of about eighteen inches, and which were open at the time, being tied back by strings, but the witnesses subscribed their names to the Will, on a table, which was in such a situation that it was impossible for the deceased to have seen them. The Court rejected the motion, observing that if the deceased had been in such a position that he might have seen the witnesses subscribe their names, it might have been held to have been

(*a*) 2 Curt. 395.
(*b*) 3 Curt. 118.

done constructively in his presence, as in the case where a lady sat in her carriage whilst the Will was attested in a solicitor's office, in which she might have seen the witnesses sign the Will (*a*). Section 9.

In the Goods of *Allen* (*b*), the deceased signed her Will by a mark, in the presence of one witness, who subscribed the Will as attesting it, and on a subsequent day she acknowledged her signature in the presence of that witness and of another, who also subscribed the Will, *but the former witness did not again subscribe the Will.* Probate refused.

In the Goods of *Simmonds* (*c*), the deceased having signed his Will, acknowledged the signature in the presence of one witness, who subscribed his name to the Will, and on a subsequent day acknowledged the signature to another witness, who subscribed his name, the former witness being present at the time, but who did not then again subscribe his name. Motion for probate was rejected. The signature of the testator must be made or acknowledged in the presence of two witnesses present at the same time, and they must both *then* attest it.

In the case of *Moore* v. *King* (*d*), the testator signed a codicil in the presence of a witness (his

(*a*) Casson *v.* Dade, 1 Br. C. C. 98.
(*b*) 2 Curt. 331
(*c*) 3 Curt. 79.
(*d*) 3 Curt. 243.

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sister,) who at his desire attested and subscribed it. On a subsequent day, when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying, in the presence of both parties, and pointing to his signature, "This is a codicil signed by myself and by my sister, as you see; you will oblige me if you will add your signature, two witnesses being necessary." That party then subscribed, in the presence of the testator and of his sister, the latter, who was standing by him, pointing to her signature, and saying, "There is my signature, you had better place yours underneath it." She *did not, however, re-subscribe the Will.* There was this distinction between this case and the two preceding ones, viz., that here, the first witness, (the sister,) although she did not re-attest, did acknowledge her signature to the Will; but the Court held, that the power of acknowledging the signature to the Will, given by the Act to the testator, does not extend to the witnesses, and the codicil was therefore held not duly executed.

In the Goods of *Piercy* (*a*), motion was made for probate of a Will, signed by the testatrix, who was blind, in one room, and attested by two witnesses in an adjoining room. This motion was in the first instance rejected, it not being shewn that the testatrix could have seen them if she had had her eyesight, the Court refusing to

(*a*) 1 Rob. 278.

place the testatrix in a better position than one who could see; but on a further affidavit of the attesting witnesses being brought in, in which they both deposed positively that the testatrix could have seen them sign if she had had her eyesight, and a plan of the rooms being exhibited confirming such testimony, probate was granted.

It may be observed here that the making a mark by the witness has been held to be a sufficient signing for the purpose of attestation.

In the Goods of *Mead* (*a*), motion was made for probate of a paper, to which one of the attesting witnesses, being unable to write, the other attesting witness, since deceased, wrote her name for her. Rejected, both witnesses not having "subscribed" the Will.

The same circumstances attended the execution of a Will in the Goods of *White* (*b*), and motion for probate was rejected. Two witnesses, a man and his wife, were called to attest a Will, the man subscribes his own name and his wife's; *held* no compliance with the Statute.

In the case of *Hooley* v. *Jones* (*c*), a Will was signed by the testator, by a mark, in the presence of two witnesses present at the same time, one of the witnesses then signed the Will also by a

(*a*) 1 No. Ca. 456.
(*b*) 2 No. Co. 461.
(*c*) 2 No. Ca. 59.

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mark, the other witness did not then sign but had signed previous to execution in the following manner, to show that he was the writer of the Will,—"This was wrote by William Pritchard, Shopkeeper." The paper held invalid; said witness having subscribed previous to execution and not as an attesting witness.

In the Goods of *Anne Ashmore* (*a*), deceased, the testatrix produced a codicil all in her own handwriting, and with her signature made thereto to two witnesses present at the same time; the deceased said nothing at the time as to her signature, or as to the paper being testamentary, but one of the witnesses saw and recognised the signature of the deceased. The witnesses at her request made their marks thereto. The testatrix wrote the names of the witnesses opposite their respective marks, but by mistake wrote the surname of another person, who was not present, to one of the said marks. This was *held* first to be a sufficient acknowledgment of the signature of the testator to the witnesses, and secondly, a sufficient attestation by the witnesses.

In the Goods of *Anne Tozer* (*b*), spinster, deceased, a paper was executed in the presence of two witnesses, present at the same time, who subscribed according to the Act, but the name

(*a*) 3 Curt. 756.
(*b*) 2 No. Ca. 11.

of one of the witnesses having been badly written such signature was cut off from the Will with the knowledge and in the presence of the deceased, and the name of such witness was written by another person, but not in his presence; such paper was admitted to probate on motion as having been once properly executed, and *not revoked with intention* of revoking the same. Section 9.

In the case of *Burgoyne* v. *Showler* (*a*) is a valuable decision by Dr. Lushington, as Surrogate for Sir H. J. Fust, laying down with great precision what are the presumptions at law as to a compliance with the requisites of the 9th section of the Statute. It was held that if, upon the face of a Will to which there is no memorandum of attestation, there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses, in the absence or death of the witnesses, the *primâ facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence. If (in the same case) the subscribing witnesses do not remember the facts attendant upon the execution of the Will, the presumption is the same.

If the subscribing witnesses negative compliance with the requisites of the 9th section, the

(*a*) 1 Robertson, 5.

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Will cannot be pronounced for, unless their evidence be rebutted by showing, *first*, that the witnesses cannot be credited, or, *secondly*, that upon the statement of the facts their memories are defective.

In *Gove* v. *Gawen* (*a*), a Will was prepared by a solicitor, to which he was one of the attesting witnesses, and swore directly and positively that the testator signed in the presence of both of them, the other directly and positively that he did not and could not have signed in their presence. The attestation clause ran, "Signed, sealed, published, and declared by the testator, as and for his last Will and Testament in the presence of, &c.," *held* that more credit was due to the former witness who had made an affidavit to the fact within a few days after the transaction, whereas the other witness was not examined till more than two years after; so that the question was treated not as one of credit between the two witnesses, further than from their respective opportunities of recollecting the circumstances.

In *Pennant* v. *Kingscote* (*b*) the Will was pronounced against. Both the witnesses deposing against a signature, according to the requisites of the 9th section, and there being no circumstances on which the Court could found a

(*a*) 3 Curt. 151.
(*b*) 3 Curt. 642.

presumption, that the recollection of the wit- Section 9.
nesses was infirm on the subject.

When the attestation clause is not full, *i. e.* when it does not show that the requisites of the Act have been complied with, the registrars of the Prerogative Court (agreeably to the directions of the Judge) require an affidavit from the attesting witnesses, or one of them, in which the circumstances of execution must be set forth; on such affidavit, if the circumstances of execution are in compliance with the directions of the Statute, probate passes in common form the same as if a full attestation clause were upon the Will in the first instance.

Many persons in the writing of a Will have entirely omitted an attestation clause, conceiving that an attestation clause would, under the form of words used in the 9th Section, answer no purpose, *viz.*, that "no form of attestation shall be necessary," *i. e.* no particular form of attestation shall be necessary for the *validity* of a Will or codicil; but an attestation clause is of course so far necessary and indispensable, that the Court of Probate must be somehow satisfied that the requisites of that Section have been complied with, the Will being otherwise invalid; and when such evidence cannot be procured, then will the presumption at law intervene. And as no testator would wish to leave the validity of the intended disposition of his property on such an insecure and *rebuttable* foundation as a pre-

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sumption at law will build for him, care should be taken that in every testamentary paper the clause of attestation should be *full*, i. e. *fully* setting forth that the requisites of the 9th Section have been complied with.

As an attestation clause has been given in the last edition of *Burns' Ecclesiastical Law*, which might lead to the inconveniences above alluded to, it may not be considered beyond the province of this work, to give such a form of attestation clause as would be held satisfactory to the registrars of the Prerogative Court.

" Signed by the said Testator, as and for his last Will and Testament, in the joint presence of us, who, in his presence, and in the presence of each other, have subscribed our names as witnesses."

Where a signature is not made by the testator, but by some person for him, it is presumed that the following would be the most satisfactory form.

" Signed by John Smith, in the presence of, for, and by the direction of A. B., the testator, and acknowledged by the said testator in the joint presence of us, who, in his presence and in the presence of each other, have subscribed our names as witnesses (*a*)."

In the Goods of *Ayling* (*b*), deceased, motion

(*a*) For cases of signature by other persons, for the testator, see above, p. 24.

(*b*) 1 Curt. 913.

was made for administration, as in case of intestacy, under the following circumstances. On the Will there was the signature of the deceased, and the names of two witnesses, but it appeared on their affidavit that they were not both present at the same time, as required by the 9th Section; the Court refused to decree administration to pass, of the effects of the deceased as dead intestate, unless the Will be propounded, for on affidavits *ex parte* there might be collusion. All the Court will do is to reject a prayer for probate, leaving the parties to take out administration if they think proper. Section 9.

In the goods of *E. Noyes*, Spr. (*a*), one of the witnesses was dead; and an affidavit, to supply a defective attestation clause, by the surviving attesting witness, " to the best of the deponent's recollection and belief" that the Will was properly executed, was considered sufficient, and the Will was admitted to probate.

In the Goods of *Ann Mustow* (*b*), deceased, the attestation clause was not perfect, and both witnesses, though they admitted their signatures to the Will, refused to make any affidavit; [the Court cannot compel them to make an affidavit.] The property being so small, the Court could not direct the Will to be propounded, and decreed administration with the Will annexed

(*a*) 4 No. Ca. 284.
(*b*) 4 No. Ca. 289.

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of the paper, regretting that he could not compel these witnesses to give evidence.

In the case of *Keating* v. *Brooks* (*a*), the paper on the face of it appeared to have been executed in the presence of the two attesting witnesses, whose names were subscribed. One of the attesting witnesses had deposed that her name had been forged, and that the paper propounded was not the Will she had subscribed, but the other attesting witness deposed to the contrary; it was *held* that the circumstances and evidence went to corroborate the testimony of the latter witness, and the will was pronounced for.

In the Goods of *H. F. Seagram* (*b*), a will was executed at Bathurst, in the British Colony of Gambia, in Africa, without an attestation clause, but merely the word "Witnesses," and the two names attached. One of the witnesses was at sea and not expected to return for some months, and it was not known where the other was. Probate was allowed to be taken on motion without the usual affidavit as to execution.

In the Goods of *Thompson* (*c*), a will was destroyed by mistake of an executor after the death of the testator. Probate of a Schedule of Legacies as part of the Will limited until a more authentic copy be brought into the Registry, was refused, on the ground that the proof of due

(*a*) 4 No. Ca. 253
(*b*) 3 No. Ca. 436.
(*c*) 1 No. Ca. 211

execution of the will was deficient, neither witness recollecting that the testator signed or acknowledged his signature, nor did they know it was his Will, the Court having no means of knowing that the provisions of the Statute have been complied with. Section 9.

The preceding cases from p. 13 to p. 54, are the only cases which have come before the Court of Probate, in which questions have arisen as to testamentary papers being sufficiently *executed*, according to the intentions of the Legislature, under the ninth (the most important) section of this Statute. It must be observed that they are not arranged according to the dates in which they respectively came before the Court; but it has been the object of the Editor, to arrange and dispose them as much as possible in such an order as that the different questions which have a relation one to the other, in regard to either circumstances or points of law, may be placed in juxta-position.

But, however, before leaving this Section, it is proposed to treat under it the doctrine of Incorporation of other instruments in a duly executed Will or codicil, such other instrument being referred to, attached to, or otherwise identified with the Will or codicil. Incorporation.

Before this point was regularly argued, a few cases on *ex parte* motion came before the Court for probate of papers as part of a Will, in which

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the Court refused to grant probate of the papers intended to be incorporated, on the ground that it had not been produced to the witnesses nor attested by them.

In the Goods of *J. Sotheron*, widow, (*a*) motion was made for probate of some unattested instructions as part of a Will, being referred to in the Will, and signed and identified by the testatrix, but the motion was rejected as not having been produced to the witnesses, and not being attested.

But in a case (*b*) before that, also on motion, probate was granted of a Will and two codicils, the first codicil not being duly attested, but the second was, and referred to the former, and it was held thereby to operate as a due execution thereof.

As these cases came to be more frequent, the real principle with respect to incorporation was recognised and laid down by the Court, and the cases which follow are unquestioned authorities on the subject.

In the Goods of the *Countess of Durham* (*c*), widow, deceased, probate was moved for two instruments, as together containing the Will of the deceased. A duly executed Will specifically referred to the revoked Will of her husband, deceased, not in her possession at the time, but

(*a*) 2 Curt. 831.
(*b*) J. F. Smith, 2 Curt. 796.
(*c*) 3 Curt. 57.

so that there could be no mistake as to its identity, and *on that ground* the Court granted probate of both these papers. Section 9.

In the Goods of *T. Dickins* (*a*), a deed of settlement was admitted to probate as part of a Will, being therein sufficiently referred to as to entitle it to incorporation; but on the executor deposing on affidavit that the deed referred to was in his possession, and that it related to copyhold and freehold estates, on the sale or mortgage of which, it would be absolutely necessary for him to produce the original deed; a notarial copy was received instead of the original, and probate granted.

In the Goods of *Francis Willesford* (*b*), probate was granted of an unexecuted paper as part of the Will of the testator, there being sufficient reference in the Will to such paper, and the paper being sufficiently identified as the paper referred to, *viz.*:—the Will and codicil were found sealed up, with the said paper attached to the Will by a pin, and endorsed, "This is the paper referred to in my Will as hereunto annexed, F. W."

The case of the *Countess Ferraris* v. *Lord Hertford*, (*c*) is a valuable decision on the question of incorporation; there were several points raised in that case, but one of them referred

(*a*) 3 Curt. 60.
(*b*) 3 Curt. 77.
(*c*) 3 Curt. 468.

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directly to the subject now under consideration. Lord Hertford, the testator, directed by his Will, dated in 1823, that *future* codicils signed by him should be incorporated with and form part of the Will, whether such codicils were duly executed or not. The testator had also made several codicils to the said Will, some duly executed, others only signed by him. Subsequently to the first of January, 1838, he made and signed a codicil (B), but the same was not duly executed. *Subsequently* to this, by a codicil (C), duly executed and attested, he ratified and confirmed his Will and "*codicils.*" The questions were, *first;* whether by the before mentioned direction in the Will of 1823, the testator could give effect to informally executed codicils since 1838; and if not, *secondly*, whether the codicil (B) was so ratified by, or incorporated with the codicil (C) as to cover the defective execution;—as to the first point, *Per Cur.* "Looking by analogy to the decisions in Courts of Equity and Law as to the disposition of real property, that notwithstanding the Statute of Frauds has said that all devises of lands shall be invalid unless they were executed in the presence of witnesses, yet, nevertheless, it has been held by Courts of Common Law and Equity, that a codicil or paper unattested may be held sufficient under certain circumstances; that is, that a paper duly executed, may so clearly and indisputably refer to an unexecuted paper, that

such a paper, whether of a testamentary form and character or not, may be so clearly and indisputably referred to as to be considered as identified with and to form part of the Will duly executed, just in the same manner as if it had been repeated *totidem verbis* in the Will itself. Section 9.

"That I think is the general result of the cases. It would be quite useless for the Court to go through all the cases that were cited in the argument; the general result is this,—that with regard to the incorporation of papers, a paper imperfect in itself may be so identified in an instrument validly executed, that it may be considered as a part of it, and consequently that the defect of authentication by the attestation of witnesses subscribed to the paper is cured." But the Court held further, that the paper intended to be incorporated *must be in existence*—it must be already written; that the ninth section is a positive provision, and it is *not at the option of the testator*, but that no Will shall be valid if not executed according to that Statute. (Under the term Wills, codicils are included) (*a*), therefore, if the testator had so described any *previously written* papers, so that there could be no doubt as to the identity of them, the Court would have given effect to them; but as the papers were *in futuro* and had to be written, the reservation of

(*a*) Not so much by the construction of the Court as stated in the report of the judgment, as by the Act itself. See Sec. 1.

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such power is illegal, and no man can legally claim it.

"As to the *second* point, whether the codicil (B) was revived by the codicil (C) confirming his 'said Will and codicils,' if these codicils had been written on the same sheet of paper, the execution of the latter would have confirmed the former, as in the Goods of *Smith* (see above, p. 56); but in this case the Court could not consider that it was *clearly manifested beyond mistake* upon the face of this paper, that it was the intention of the testator to give effect to unexecuted codicils by the word 'codicils.' The Court is not at liberty to indulge in conjecture;" the Court was of opinion, that this paper not being so distinctly referred to, so as to leave the Court in no doubt as to what the intention of the testator was, upon the authority of *Smart* v. *Prujean* (*a*), and upon the principle laid down in that case was not entitled to probate; and the Court cannot put that construction on the word codicils so as to include papers not executed according to the provisions of the Statute. The rule and general principle being this,—that where there is nothing in the context of a Will from which it is apparent that the testator used the words otherwise than in their strict and primary sense, the words shall be interpreted in that sense and in no other; and

(*a*) 6 Vesey, 565.

that the strict and primary sense of the word codicil being a testamentary instrument which would become valid *per se* immediately on the death of the testator; and that this script could not be called a codicil, and consequently this paper was not pronounced for. In this case the rule laid down was positive and well defined, namely, that to admit an informally executed paper to probate, there must be such a reference in a duly executed paper so *clear, distinct,* and described with such certainty, as that the Court can have no doubt as to its identity, and also that a paper intended to be incorporated *must be in existence.* Section 9.

In *Ingoldby* v. *Ingoldby* (*a*), the testator died a bachelor in January, 1846; his Will was dated 18th February, 1841, and with two codicils,—the one codicil dated September, 1845, *but attested by only one witness;* the other dated January, 1846, was duly executed: the question was, whether this latter codicil could give effect to the former, and whether there was in it a sufficient reference to cover the defective execution. The words relied upon in support of this point occurred in the second codicil, namely, such codicil was described as "*another codicil to my Will.*" The Court held, that under the circumstances the reference was sufficient to

(*a*) 4 No. Ca. 493.

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incorporate the paper, there being *no other* codicil to which the testator could have referred. *Per Cur.* "There is a distinction between this case and that of the Marquis of Hertford, where there were codicils duly executed, and codicils not duly executed. There is only one paper here which comes under the description of a codicil; it is not indeed a codicil, because not duly executed, but it is clear that the testator intended it for a codicil. I find the first codicil is indorsed 'codicil to my last Will,' which is not an immaterial circumstance. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children, illegitimate children have taken; so here, there being no duly executed codicil, the words may have reference to an unexecuted codicil." Probate was decreed of the Will and two codicils.

In *Jordan* v. *Jordan* (*a*), parts of testamentary papers were revoked, but being referred to in a later Will, were held to be incorporated therewith, and admitted to probate.

In the Goods of *Claringbull* (*b*), the Will was signed by the deceased *after* the attesting witnesses, but on the same sheet of paper was a codicil duly executed and referring to the Will,

(*a*) 2 No. Ca. 388.
(*b*) 3 No. Ca. 1.

the defect in the execution of the Will was considered to be supplied, and both papers were admitted to probate. Section 9.

In the case of *Sheldon* v. *Sheldon* (*a*), Dr. Lushington, as Surrogate for Sir Herbert J. Fust, gave a most elaborate and distinct decision upon the principles and practice of incorporation of papers, and with reference to such practice as it was before the new Statute. In that case the testator in a codicil to his Will referred to a deed whereby he reserved to himself a power over the trusts of the deed. The following is an abridgment of what fell from the Court: Prior to the present Statute of Wills, all papers proved by *parol evidence* to be intended to be final after death, were admitted to probate without any hindrance arising from shape or form: *a fortiori* were they admitted to probate when sufficiently referred to in a paper in the deceased's own handwriting, which was of itself entitled to probate. Title to probate did not depend on the validity or invalidity of the instrument referred to, the sufficiency of the reference was the sole point.

By the present Statute of Wills it is no longer allowed to declare by parol evidence any deed or paper to be part of a Will, but it is still possible to incorporate into a duly executed Will or Codicil any document then in existence, but

(*a*) 1 Rob. 81.

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such incorporation must be effected by a paper executed by the testator and two witnesses. The paper to be incorporated need not be void or valid *per se*, and whether of itself void or valid, is equally entitled to probate. The *title* to probate depends upon the clearness and sufficiency of the words of incorporation—the *necessity* for taking probate will depend on the validity or invalidity of the instrument to be incorporated.

In the present case, the question was whether there could be any reasonable doubt as to the sufficiency of the words of incorporation: the Court *held* that the deed was identified sufficiently by the date; and the words "I ratify and confirm," were enough to incorporate it with the Will.

In the Goods of *R. M. Bacon* (*a*), a schedule of books referred to in a Will was admitted to probate as incorporated with, and as forming part of the Will. The reference in the Will was, "All my other books I give to my six children to be divided amongst them according to a catalogue signed by me." The list of books was found in the same drawer as the Will, and was headed "Schedule of the division of my library of books agreeably to the terms of my Will."

In the Goods of *Thomas Smartt* (*b*), a memo-

(*a*) 3 No. Ca. 644.
(*b*) 4 No. Ca. 38.

randum without date or signature, in the testator's handwriting, referred to in his will and headed "This paper is the memorandum referred to in my Will," being proved to have been in existence at the time of the execution of the Will, and there being no doubt of the identity of the paper, was admitted to probate. Section 9.

In the Goods of *Elizabeth Hill* (*a*), the testatrix executed a Will in June 1845, in the presence of and attested only by *one witness*, in November, 1845, she executed a codicil described as a "Codicil to her last Will," in the presence of two witnesses, &c., &c., according to the provisions of the Statute—the codicil did not refer more specifically to the Will by date or otherwise, and in revoking a legacy contained in the Will, such legacy was misrecited, viz.: "Whereas in my Will aforesaid, I bequeathed to P. F. the sum of £500, I now revoke that bequest," the legacy to P. F. was £550 and not £500; no other Will could be found. It was held, with consent of the party interested, that the reference was sufficient, and probate was granted of both papers.

In the Goods of *Emma Darby* (*b*), spinster, deceased, the testatrix bequeathed by her Will in a certain event, a part of her estate to such of the residuary legatees named in the Will of her

(*a*) 4 No. Ca. 404.
(*b*) 4 No. Ca. 427.

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late father as shall be then living, and the child or children of such of them as shall be then dead, equally to be divided between them, share and share alike; the child or children of any residuary legatee named in her said father's Will who shall be then dead, leaving issue, taking the share of his, her, or their deceased parent. Dr. Haggard moved for probate of the Will of the testatrix alone, without that of her father being incorporated with it, citing *re Dickens* (see above p. 57), in that case the whole Will depended on the deed, but here there is no reference to any deed, and the Will of the father is in the registry of this Court—but the Court directed that an office copy of the Will of the father must form part of the probate.

In the Goods of *Pewtner* (*a*), deceased, the dispositions in the Will of the testator were directed to be in conformity with the trusts in a deed. Probate was moved for the Will without the deed forming part of the same. The trustees in the deed being executors of the Will, and that consequently as executors of the trusts of the Will, they would recognise the deed, and stand possessed of the property as executors or trustees without requiring the production of the deed, which being long, would materially increase the expense of the probate. The Court

(*a*) 5 No. Ca. 479.

held that although sometimes driven to the necessity of decreeing probate of the Will alone where the deed is in the hands of another party who will not part with it, the Court has no power to enforce its production, and cannot help itself; the Court decreed in this case that the deed must be included in the probate. Section 9.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner 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 or solemnity. Appointments by Will to be executed like other Wills, and to be valid, although other required solemnities are not observed.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act. Soldiers and mariners Wills excepted.

By this section an exception as to the restrictions contained in the ninth section is made in favour of soldiers and seamen, and it becomes therefore necessary to observe from the cases which have been before the Court first, how

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they (soldiers and seamen) are affected by it, and who are affected by the description given in the Statute.

Soldiers and seamen *how* affected by this section.

By the Statute of Frauds nuncupative Wills were laid under several restrictions, which it is not necessary to mention here. Nuncupative Wills being by the new Act rendered generally invalid, but from those restrictions any soldier being in actual military service, and any mariner or seaman being at sea were excepted by the twenty-third section of that Statute. By the present statute nuncupative Wills are invalid, but the same exception has been extended, or rather continued in the same words by this (the 11th) section of the latter Statute.

This section declares only that soldiers and seamen may make a will as they might have done before the passing of this Statute; it is presumed, therefore, that any enactment which might be considered favourable to them in this Act, would extend to them, and that persons answering such description would have the benefit of it.

Who are affected by the description given in this Statute.

In the Goods of *Richard Hayes* (*a*), the deceased was the purser of a man-of-war, and motion was made for probate of an unattested codicil made by him at sea, and probate was allowed of the paper. The case of the *Earl of Euston* v. *Lord Henry Seymour* was cited; it appears that the term "Mariner, or Seaman,"

(*a*) 2 Curt. 338.

will include any person in her Majesty's navy, Section 11.
though superior officers of the ship, and being *at sea* within the exception made in the Statute; in the case cited an admiral was included in the words "Mariner or Seaman." Sir William Wynne remarking that it was his opinion that it included the whole profession, "because he did not know where to stop." *Per Cur.* (Sir H. J. Fust). "Some of the reasons assigned for the exception (which was not merely to protect illiterate persons) applied just as well to the commander-in-chief as to a common seaman. The same sudden emergency might arise to render it necessary for the individual to dispose of his property by word of mouth in the one case as in the other, and whilst at sea the one might be *inops consilii* as well as the other. It is difficult to say where the line of exclusion is to be drawn. I am of opinion, according to the construction of the term given by Sir W. Wynne, and according to the reason of the thing that the term mariner or seaman does not exclude any person in her Majesty's navy, though superior officers of the ship being 'at sea,' from the exception contained in the Act."

In the Goods of *E. J. Lay* (*a*), deceased, a sailor of her Majesty's ship Calliope, whilst she was in the harbour of Buenos Ayres, obtained

(*a*) 2 Curt. 375.

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leave to go on shore, where he met with an accident, and died there in consequence of it five days afterwards, but having between the day of such accident and the day of his death written on a watch-bill his Will in pencil, which though unattested was certified by the officers of the ship, this was *held* to be the Will of a seaman *at sea*, although the deceased having had leave to go on shore, was not actually on board ship at the time the Will was made. The Court distinguished this case from that of Lord Seymour (*a*), in which case the deceased lived on shore at Jamaica, and executed the Will there, and only occasionally going on board his ship.

This is as much as has been before the Court on the construction of the words "at sea;" very much more remains on this section respecting the Wills of soldiers, and more particularly as regards the words "actual military service."

In the Goods of *C. E. Phipps* (*b*), an unattested Will made by an officer on service at Berbice, was allowed to pass as that of a soldier "in actual military service," under the exception contained in this section at the prayer of the party whose interest was prejudiced by such Will. The deceased was with his regiment at

(*a*) Cited above; before Sir W. Wynne, 21st July, 1802.

(*b*) 2 Curt. 368.

his death, and it was stated at the War Office that the deceased would be there considered in actual military service. Section 11.

It will be observed how much more strictly the words "actual military service," have been construed in subsequent cases in which the point was fully argued; it appears that previous to this case on motion, that probate passed in two cases upon an affidavit from a clerk in the War Office, that the parties deceased were at the time their Wills were made in actual military service.

In the Goods of *H. D. Donaldson* (*a*), the term soldier was held to extend to persons in the military service of the East India Company; the deceased was, in this case, a surgeon in the East India Company's service.

In the case of *Drummond* v. *Parish* (*b*), the question as to what "was actual military service" was fully discussed, and in the report to that case are collected all the authorities on the subject. The deceased was both at the time of his death, and at the date of the paper propounded, a major-general in the army on full pay, holding the appointment of director general of the Royal Artillery, residing at Woolwich, and in the receipt of *full* pay, subject in all respects to martial law, and liable to be called into foreign

(*a*) 2 Curt. 386.
(*b*) 3 Curt. 522, and 2 No. Ca. 318.

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service whenever occasion might require. It was contended by Dr. Haggard, in support of the Will, that the proper and intelligible distinction between a soldier in actual military service and a soldier not so, is a soldier on full pay or on half pay; but the Court, in a most elaborate judgment, stating it to be a matter of importance that the question should be solemnly determined overruled the distinction contended for, and pronounced against the Will as not being the Will of a soldier in "actual military service." *Per Cur.* "Being of opinion, from the result of the investigation of the authorities that the principle of the exemption contained in the 11th section of the Act was adopted from the Roman law, I think it was adopted with the limitations to which I have adverted, and that by the insertion of the words *actual military service*, the privilege as respects the British soldier is confined to those who are *on an expedition.*"

In the case of *Whyte* v. *Repton* (*a*), the deceased was at the date of his Will, and at the time of his death an officer in her Majesty's service, and quartered with his regiment in barracks at New Brunswick, a distinction contended for by counsel in support of the Will between the case of *Drummond* v. *Parish* and the present, *viz.*, that here the deceased, by being from home and abroad, was *in expeditione*, but the Court

(*a*) 3 Curt. 818.

overruled the distinction contended for, *holding* that being in barracks in St. John's, New Brunswick, a colony of her Majesty, was the same to all intents of the Act as being in barracks at Woolwich, and consequently pronounced against the paper. Section 11.

In the Goods of *Norris* (*a*), the deceased was a sergeant in a regiment of foot, and whilst with his regiment at Malta, under orders for the West Indies, wrote a letter disposing of his property; *held* by Dr. Lushington as Surrogate for Sir H. J. Fust, not to be the Will of a soldier in actual military service.

In the Goods of *Hill* (*b*), the deceased was a major-general in her Majesty's army, and was at the date of his Will, and until his death, in command of the Mysore division of the army, and resident at the head quarters at Bengalore, in India; he died whilst on a tour of inspection of the troops under his command; it was contended by Dr. Addams, who moved for probate of the paper, that the circumstances of this case were distinguished from *Drummond* v. *Parish*, in as much as war was actually going on in the country, but the Court rejected the motion, requesting that the paper might be propounded in an allegation.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions Act not to affect certain provisions of

(*a*) 3 No. Ca. 197.
(*b*) 4 No. Ca. 174.

Section 12.

11 G. 4, & 1 W. 4, c. 20, with respect to Wills of petty officers and seamen and marines.

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 relate to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

Publication not to be requisite.

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

Will not to be void on account of incompetency of attesting witness.

XIV. And be it further enacted, That if any person who shall attest the execution of a Will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such Will shall not on that account be invalid.

Gifts to an attesting witness to be void.

XV. And be it further enacted, That if any person shall attest the execution of any Will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far

only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will. Section 15.

In the Goods of *Mitchell* (*a*), a legatee, at the request of the testator, signed her name to the Will, no one else being present. The testator subsequently executed the Will duly in the presence of two other witnesses who attested. Motion to strike out the name of the legatee was rejected; the Court said the proper time to make the objection would be upon a suit being brought for the legacy.

In the goods of *Ryder* (*b*), deceased, a witness attested a Will which appointed him universal legatee, in trust for the benefit of the widow; there being no executor named in the Will, administration was moved for, with the Will annexed to him as universal legatee in trust; the question was whether he was disqualified by the 15th section of the Statute. It was held that the Legislature contemplated only a bene-

(*a*) 2 Curt. 916.
(*b*) 2 No. Ca. 462.

Section 15.

ficial interest, and administration with the Will annexed was decreed to him as prayed.

Creditor attesting to be admitted a witness.

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

Executor to be admitted a witness.

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

Will to be revoked by marriage.

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

It will be observed, on consideration of the cases under the 34th Section of the present Act, that alterations made in a Will since 1838, must be made in reference to, and in conformity with,

the provisions of the Act, and that alterations made after 1838 in a Will dated prior to the Statute, brought such Will within the requisites contained in it; but in the Goods of *Alfred Shirley*, deceased, the question was under the 18th and 34th Sections, whether a marriage in 1839 revoked a Will made in 1806, there being no issue of the marriage; the Court held on motion that it did not, and granted probate, but regretted that the case was decided in an *ex parte motion*.

Section 18.

Revocation by marriage.

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

No Will to be revoked by presumption.

For the state of the law upon the subject of implied revocation before the present Act, the reader is referred to Mr. Williams's Law of Executors, Sect. V. Ch. III.

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

No Will to be revoked but by another Will or codicil, or by a writing executed like a Will, or by destruction.

Section 20. direction, with the intention of revoking the same.

In the case of *Hobbs* v. *Knight* (*a*), the deceased executed a Will in January, 1835, in the presence of two witnesses; after January, 1838, the deceased cut his signature from the Will, but the paper was uninjured in other respects. Another paper was found bearing date February, 1838, signed by the deceased; but not being attested, was consequently invalid. It was held, *first*, notwithstanding the 34th Section, that it was not the intention of the Legislature that Wills executed before the first of January, 1838, should be exempted from the provisions of the Statute with respect to any act done to such Wills after that time, and therefore that the Statute applied to the excision of the signature in this case. The *second* question was, whether such cutting off of the signature was a revocation of the Will under the 20th Section, which provides, that no Will or codicil, or any part thereof, shall be revoked otherwise than by marriage, or "by the burning, tearing, or otherwise destroying the same." It was argued, that as certain modes of revocation had been thus pointed out, the Court could not go beyond the express terms, the words being confined to "burning, tearing, or otherwise destroying," omitting the terms "cancelling and obliterating" used in the Statute of Frauds, and that the cutting in this

(*a*) 1 Curt. 768.

Will was not tearing; but the Court held this to be a complete revocation, the signature being essential to the existence of the Will and the entirety of the instrument according to Section 9, and the signature being destroyed with intention, the Will could not be said to exist. Section 20.

In *Stephens* v. *Taprell*(*a*), a Will duly executed was found cancelled in the following manner, *viz.*—the body of the Will was struck through with a pen, the signature of the testator was crossed out, the attestation clause, and the names of the witnesses were likewise run through with a pen: the question was, whether this will was "destroyed," within the meaning of the twentieth section—*held:* the word "cancelling" being advisedly omitted from the Act that it was not intended by the Legislature that cancellation should be a mode of revocation, and probate passed of this Will.

The case of *Henfrey* v. *Henfrey* (*b*), was on petition. The testator left two substantive Wills. The latter disposed of the whole of his property giving it to his widow, without appointing executors, and not expressly revoking the former Will, nor the appointment of executors therein, was held to have revoked the other *ex necessitate*, and to be alone the Will of the testator;

(*a*) 2 Curt. 458.
(*b*) 2 Curt. 468.

Section 20.

this was affirmed on appeal to the judicial committee.

In *Thorne* v. *Rooke* (*a*), the question was if parol evidence could be admitted in order to shew that two codicils were not intended to operate together, but that the latter was a revocation of the former. The allegation propounding the Will and submitting such evidence was rejected, on the ground that on the face of the papers themselves there was no ambiguity, that there was no absurdity arising out of either insertion or omission. The rule that unless there is doubt or ambiguity on the face of the papers, the Court cannot interfere to pronounce that the declaration of the one is revocatory of the other, applies equally to the Court of Probate as to the Court of Construction; and further, where there is this ambiguity, the Court does not interfere unless it finds that the evidence offered to be produced is sufficient and satisfactory to explain the ambiguity or remove the difficulty that may arise on the construction of the papers. *Per Cur.* " The new Statute is not more favourable to the admission of parol evidence. The Statute tends very much to exclude revocation; indeed as to revocation by implication they are, with one exception, that of marriage,

(*a*) 2 Curt. 799.

entirely swept away, and a subsequent marriage is now an absolute revocation of a previous Will." Section 20.

In the Goods of *Colberg* (*a*), a Will duly executed was torn by the testator soon after execution in a fit of anger, but repenting immediately afterwards, he declared he did not mean to revoke it, such paper was considered *prima facie* to have been revoked, but on the consent of the next of kin, was admitted to probate, the Court holding that the testator had not done all that he had intended to do, as in *Doe* d. *Perkes* v. *Perkes* (*b*).

In the Goods of *Farington* (*c*), a Will of 182 2 was revoked by a pencil writing without date. Sir John Dodson moved for probate of the Will of 1822, the executor therein named having in his affidavit stated that he had reason to believe that this paper was written about the beginning of 1841. The party principally benefited by the pencil writing did not propound it, but had consented to probate of the Will of 1822. The motion was at first rejected, but being renewed with a further affidavit of the executor, stating the grounds on which he formed his belief that the paper was written since 1838, *viz.*, that the deceased had always entertained great regard and esteem for him up

(*a*) 1 No. Ca. 90.
(*b*) 3 B. & A. 489.
(*c*) 1 No. Ca. 237.

Section 20.

to the year 1840, but that then he manifested great but unreasonable irritability and displeasure against him, these circumstances were considered to afford presumption that the pencil writing was made after 1838. Probate was decreed of the Will of 1822.

In the Goods of *Lambert* (*a*), part of a Draft Will which was executed by the deceased by way of precaution, was cut away without evidence as to date when done. Probate was moved for the draft Will as altered, as if done before 1838, but the Court held it to be a revocation *pro tanto*, whether done before or after the Act, for under section 20 a Will may be revoked in part as well as in the whole, by burning, tearing, or otherwise destroying with intention to revoke.

It would appear from what fell from the Court in *Hobbs* v. *Knight*, that if the signature of the witnesses even were cut off from the Will with intention, &c., that such act would be considered "tearing or otherwise destroying," within the meaning of the Act, and being sufficient to destroy the entirety of the instrument would operate as a revocation of the Will, but of course it must be done *animo revocandi*.

In *Birkhead* v. *Bowdoin* (*b*) the names of the witnesses were torn from a Will, which was referred to in a subsequent Will duly executed;

(*a*) 1 No. Ca. 131.
(*b*) 2 No. Ca. 66.

it was proved that these signatures were torn off without intention of revoking entirely, but that such Will should operate as a list of legacies; and as no *animus cancellandi* accompanied the act of tearing off the signatures, so much of the former Will was admitted to probate. Section 20.

In the Goods of *Tozer* (*a*), spinster, deceased, motion was made for probate of a paper which was regularly executed in the presence of witnesses, present at the same time, who subscribed according to the Act, but the name of one of the witnesses having been badly written, such signature was cut off from the Will, with the knowledge and in the presence of the deceased, and the name of such witness was written by another person, but not in his presence; such paper was admitted to probate on motion having been once properly executed and *not revoked with intention.*

In the case of *Upfill* v. *Marshall* (*b*), a Will dated February, 1837, of both real and personal property was altered by a codicil, June, 1837. In July, 1838, the Will was republished by the testator, in the presence of witnesses, by passing over the signature with a dry pen, and the following memorandum was then written at the end of the Will: " This writing was republished by the said J. Smith, as and for his last Will

(*a*) 2 No. Ca. 11.
(*b*) 3 Curt. 636.

Section 20.

and Testament, in the presence of us," and signed by two witnesses. It was held that parol evidence was admissible to show *quo animo* the memorandum was made, the ambiguity not being in the language of the instrument, but being as to the fact of the *animus* or intention in which the Will was republished. Parol evidence was held admissible, not to alter or control the sense, but to shew the motive of republication, " and therefore by the proof of facts and circumstances, the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and be thereby better able to understand his meaning" (*a*); and it appearing upon such evidence that the testator had purchased real property since the date of the Will, and that a republication was therefore necessary so far as regards the realty, and the testator not having then expressed an intention of revoking the codicil, it was held that the codicil was not revoked by the republication of the Will.

In the case of *James* v. *Roberts* (*b*), the testator made a Will and codicil in 1837, and also wrote several unfinished and inoperative papers; subsequently in 1843, three weeks before his death, after a paralytic seizure, he dictates to his medi-

(*a*) Lord Brougham, in Guy *v.* Sharpe.
(*b*) 3 No. Ca. 309.

cal attendant, whom he then informed that he had no valid Will, a paper described as his last Will and Testament, containing a legacy to one individual and an appointment of executors, and two days afterwards a codicil, described as a " codicil to my last Will and Testament, dated the 7th day of January, 1843," containing some trifling legacies, but not expressly revoking the paper of 1837, nor disposing of the bulk of the property. It was held that notwithstanding that two days later the deceased wrote a letter which seemed to imply that he considered the Will of 1837 as subsisting, that the Will of 1843 was a substantive Will revoking that of 1837, and that the deceased, as to the bulk of his property, was dead intestate. This case was treated by the Court as a question of intention, but that the letter was not so direct a recognition of the Will of 1837 as to override the evidence of the medical attendant and the act of the deceased himself. Section 20.

In the Goods of *Allan* (*a*), the deceased had executed a Will, of which he retained possession, and afterwards a codicil thereto, which he gave into the custody of another; he destroyed the Will in the presence of two witnesses, the codicil (not in his possession) remaining uncancelled at his death; the parties benefitted by the said codicil having renounced administration with

(*a*) 3 No. Ca. 640.

Section 20.

said codicil annexed, motion was made for administration as dead intestate. *Per Cur.* "There is a codicil duly executed by the deceased in 1843, and never cancelled, how is that revoked?" (*Haggard:* "It was not in his possession at the time he destroyed the Will.") *Per Cur.* "The Act says that no Will or codicil shall be revoked but by another Will or codicil, or by some writing declaring an intention to revoke it, or by burning, tearing, or destroying, with such intention. If you are willing to take administration of the effects of the deceased as dead intestate you may, the Court will not decree it."

In *Plenty* v. *West* (*a*), a paper duly executed in the handwriting of the testator, who had been formerly a solicitor, purporting to be the "last Will," and to dispose of "all his estate and effects as hereafter mentioned," but the only personal estate specified were his "household goods." Probate of a prior Will which contained a complete disposition, together with this later paper, was refused. And although such former paper was not in terms revoked, and notwithstanding a partial intestacy, the latter paper was alone admitted to probate.

In the Goods of *Duff* (*b*). In a tin box were found a Will dated November, 1844, a Will dated 1835, and a codicil 1836. By the Will of

(*a*) 4 No. Ca. 103.
(*b*) 4 No. Ca. 474.

1844, the deceased revoked all former Wills and the appointment of executors; but in the concluding paragraph of that Will he refers "to a former Will put up herewith, that in so far as any of the provisions therein contained may be applicable to existing circumstances, at the time of my death they may be carried into effect; and I recommend them accordingly with this view to the consideration of my executors." Probate was moved for the Will of 1844 alone, but the Court could not accede to the motion, and probate passed of both papers as together containing the Will. Section 20.

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

Section 21.

Unattested alterations.

In the Goods of *John Livock* (*a*), the testator after the first of January, 1838, erased the word *three* or *five*, whichever it was, and substituted the word *one*, in a Will made in 1837. It was held, that alterations made since 1838, in a Will dated before 1838, notwithstanding the 34th Section, must be made according to the requisites of the 21st Section. Probate was moved for in this case with the word *one*, but the Court held, that the word *one* could not possibly stand, and decreed probate in blank without the word *one*.

In the Goods of *Rippin* (*b*), the testator duly executed his Will, bearing date November, 1838. The deceased, in December, 1838, gave his Will to J. D. to peruse, and to give his opinion on it. J. D., on reading it, particularly observed a legacy of "fifty" pounds to a servant of the testator, and suggested an alteration of such legacy; the word "thirty" was found substituted for "fifty" without being attested, and the word "fifty" being entirely erased, so that it could not be made out. Probate of the Will was moved for as it originally stood; but it was held by the Court that the legacy of "fifty" pounds not being apparent upon the face of the Will, the Court could not supply it by parol testimony, and that therefore the legacy was lost altogether,

(*a*) 1 Curt. 906.
(*b*) 2 Curt. 332.

and probate must pass in blank. This case was overruled, see 3 Curt. 121, and below, p. 91. Section 21.

In the Goods of *Sir Charles Ibbetson*, deceased, the testator, after the due execution of his Will, obliterated and erased certain parts thereof. Probate decreed to pass with the obliterated and erased passages, if they can be made out by persons accustomed to inspect writings, if not, probate to pass with those parts in blank. Probate eventually passed of such parts in blank, it having been impossible to discover what such parts were.

This was the construction the Court of Probate put upon the words "except so far as the words or effect of the Will before such alteration shall not be apparent" when the point was first brought to its notice, namely, that the meaning of the word "apparent" was apparent on the face of the paper; but it will be seen by the following case such doctrine was overruled by the judicial committee of the Privy Council, in the case of *Brooke* v. *Kent* (*a*).

That case came originally before the Prerogative Court on motion, the circumstances being as follows:—The testator, after the first of January, 1838, erased certain words in a Will executed in July, 1837, and wrote a memorandum, stating what the words erased originally were, but such memorandum was unattested. Motion

(*a*) The motion in 2 Curt. 343; the appeal 1 No. Ca. 93.

Section 21.

for probate of the Will as it originally stood was rejected, that being the construction the Court put upon this section in *Rippin and Ibbetson;* but the Court requested that the Will might be propounded, so that the opinion of the Superior Court might be taken. This was done, and the allegation propounding the Will as it originally stood being rejected by the Prerogative Court, an appeal was prosecuted to the Privy Council (*a*). It was held, *first*, that the Prerogative Court had decided rightly, that (notwithstanding the 34th section of the Statute) all Wills made before January, 1838, were not altogether and for ever out of the operation of the Act, but that if a Will dated before the first of January, 1838, be re-executed, republished, or revived by a codicil subsequent to that date, it comes within the Statute; and that alterations, obliterations, or erasures made since 1838, to a Will dated before the Statute, must be governed by the Statute.

As to the second point.

By the 20th Section, an intention to revoke is absolutely necessary to effect a revocation; a similar effect was given by *construction* to the Statute of Frauds, although the words "with the intention of revoking the same" are not to be found in that Statute. In the same manner (*i. e.* by construction) to the 21st Section of the present Act, intention must accompany acts of

(*a*) The committee consisted of Lords Brougham and Denman, Mr. Baron Parke and Dr. Lushington. The judgment delivered by Dr. Lushington.

obliteration, interlineation, and alteration, as it accompanies the acts mentioned in the 20th Section. Such intention is to be ascertained by the same rules as under the Statute of Frauds, and by the same species of evidence. In this case there was sufficient pleaded to shew absence of intention to revoke absolutely, the intention having been to revoke by substitution; such revocation having been ineffectual, and the facts pleading the alteration being admitted on the other side, the will was admitted to probate in its original state. Section 21.

In the Goods of *Rippin* (*a*), the motion was renewed in consequence of this decision in *Brooke* v. *Kent*, and evidence *aliunde* being produced to shew what the Will was before altered, the Court granted probate as it formerly stood.

In the case of *Townley* v. *Watson* (*b*), the testatrix *animo revocandi* obliterated several passages of her Will entirely, so that none of the obliterated passages could be distinguished upon the face of the Will; it was *held* that this was a complete revocation, and that parol evidence was not admissible to shew what the words originally were, that it was a *complete revocation* within the meaning of the 21st section. *Per Cur.* "I think it is impossible to read the words, and not say that it was the intention of the Legisla-

(*a*) See above, same case, 3 Curt. 121.

(*b*) 3 Curt. 761.

Section 21. ture, that if a testator shall take such pains to obliterate certain passages in his Will, and shall so effectually accomplish his purpose, that these passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament. The construction which has been put upon the 21st Section by the Judicial Committee is this: That, as in the prior section, (the 20th) where a Will is to be revoked by burning, tearing, or otherwise destroying the same, the Act must be done with an *intention* to revoke; so in the 21st section, the Legislature must be assumed to have meant, that an obliteration, interlineation, or other alteration shall be made, *animo revocandi*, i. e. *with an intention to revoke, not to substitute.* *Brooke* v. *Kent* turned entirely on the absence of intention to revoke, and that intention may be made out precisely as in the other cases." The Court pronounced for probate without the obliterated passages. This case was not appealed.

It appears clear, therefore, that in case of an *absolute revocation*, parol evidence is not admissible; parol evidence is admissible only in case of *contingent revocation*, where it must necessarily be a question of intention.

In all the cases cited above, the alterations, obliterations, &c. have been made subsequently

to the execution. But the question that is more frequently brought before the Court, is whether the alterations were made before or after the execution of the Will. If the attesting witnesses cannot depose to them, it is the practice of the Court to look to the probabilities of the case, from the circumstances which attend it, and if it can be inferred from the context of the document, from its appearance, the colour of the ink, the disposition of the property, or any other circumstance by which it may be fairly presumed that they were made before execution on the consent of the parties prejudiced by the alteration being obtained, probate is decreed of the paper as altered. See in the Goods of *Phillips* (*a*). Section 21.

In the Goods of *Cross* (*b*), deceased, unattested alterations, without evidence as to date, were admitted to probate on the presumption, that as some of them must have been made before execution, all of them were made at the same time.

In the Goods of *Oliver* (*c*), deceased, an unattested alteration was unobserved by the attesting witnesses. The Will was made by the executrix and residuary legatee therein named; on her affidavit, that the alteration was made by her and the initial of the testator placed to it

(*a*) 1 No. Ca. 37.
(*b*) 1 No. Ca. 189.
(*c*) 1 No. Ca. 308.

Section 21.

before execution, the Court, on motion for probate with the alteration, admitted the Will to probate in *facsimile*, leaving the whole question open.

In *Mogg* (*a*), deceased, alterations were made in a Will of 1841, after the Will was executed, but before the execution of a codicil; it was held, that the codicil republished the Will as altered, and probate was decreed of the Will as it stood.

In the Goods of *R. Jones* (*b*), an addition was made to a Will, containing an appointment of executors, and was written below the attestation of the witnesses, was signed by the testator, and under his signature, were the words "witnessed by the above persons," but the witnesses were unable to depose whether it was there at the time of execution. Probate of such addition was refused.

In the Goods of *Pennington* (*c*), spinster, alterations were made in a Will dated 1833, of an unmarried testatrix, who had a power of appointment; the alterations were unattested, and believed to be in her handwriting, but there was no evidence as to when they were made, beyond that they were not in the Will at the time of execution. There was nothing to lead to a presumption as to their being done before or after 1838. The alterations had relation to the power of

(*a*) 1 No. Ca. 323.
(*b*) 1 No. Ca. 396.
(*c*) 1 No. Ca. 399.

appointment. Probate was moved for the Will as it originally stood, but the Court decreed probate of the Will in its present state, leaving a Court of Equity to say what should be its construction and effect. Section 21.

In the Goods of *Edward Jacob, Esq.* (*a*), (an eminent equity barrister), unattested alterations were discovered in his Will without evidence as to when done; but on presumption, from the tenour and contents of the Will, from the knowledge of the deceased as to what was required by the Act if they were made after execution, probate was decreed as altered.

In the Goods of *Ann Chanter* (*b*), widow, the Will was dated 1842, and exhibited several obliterations, interlineations, and alterations, and no evidence whatever could be procured as to whether these alterations were made before or after execution. Proxies of consent from the parties prejudiced by the alterations were brought in, and motion was made for probate of the Will as altered but rejected by Dr. Lushington. The motion was renewed before Sir H. J. Fust, upon additional affidavits, setting forth the fact that the deceased had been informed, and was acquainted with the proper mode of executing wills, and correct in transacting business, and the case of *Jacob* was

(*a*) 1 No. Ca. 401.
(*b*) 3 No. Ca. 438.

Section 21.

cited, and was also rejected. *Per Cur.* "The alterations are conspicuous on the face of the paper, and if they had been there at the time of execution, they must have been observed by the attesting witnesses, conspicuous as they now appear. If the deceased was so well acquainted with the mode of executing, she would have taken care to have had them verified. Such presumption strengthened by the appearance of the paper. Motion for probate of the will as altered rejected.

In the Goods of *Ramsbottom* (*a*). There was an obliteration in a temporary Will of 1844. The words being almost illegible, no evidence being attainable, whether made before or after execution, and nothing from which the Court could collect at what period of time the alterations were made, except that the word "signed" was written under the obliterated passages as if at the time he was going to sign his name immediately below it, and from which it was probable that the signing and obliteration were contemporaneous acts, probate was decreed as altered.

From the cases given above, p. 88 to p. 96, it will be observed that if any circumstances will afford a presumption that the unattested alterations were made before the execution of the instrument, the Court pronounces for the papers as altered.

(*a*) 4 No. Ca. 316.

In the Goods of *George Stow* (*a*), there was nothing to shew that alterations were made after execution, and the surviving witness was utterly unable to depose whether or not they were made previous to execution, and motion was made for administration with the Will annexed as altered, and the Court acceded to the prayer. The following fell from the Court with regard to alterations and interlineations in Wills. "Very great doubts exist elsewhere, and differences of opinion as to whether, where no information can be furnished, they should be held to have been made before or after the execution; parties, therefore, taking probate must beware of what they do. I am of opinion, that where there is nothing to shew that the alterations were made after execution, the presumption is that they were made before; but I understand great doubts are entertained elsewhere." (*b*) Section 21.

(*a*) 4 No. Ca. 477.

(*b*) Dr. Lushington expressed a contrary opinion whilst sitting as Surrogate for Sir H. J. Fust, in the case of *Burgoyne* v. *Showler*, 1 Robertson, 13, and No. Ca. Vol. III. p. 201. "In the absence of all evidence, the inference of *law* is, that these alterations were made after the execution of the Will. The twenty-first section of the Statute has said, that alterations made subsequent (*a*) to execution are to be noticed by the testator

(*a*) In the reports this passage is printed "*prior* to execution," and must be an error; the Act says nothing of alterations made before execution.

Section 21.

In the Goods of *Joseph Wilson* (*a*), motion was made to supply a legacy omitted by the mistake of the drawer of the Will. Rejected, the Court holding that under the present Act it was not at liberty to supply the omission.

In the case of alterations, additions, &c., being made in a Will since the execution, and such Will being confirmed by a duly executed codicil, the Court will grant probate of the Will with the alteration or addition, the codicil being held to republish the Will. See in the Goods of *Barke* (*b*), widow, deceased, in the Goods of *Wollaston* (*d*).

Before leaving this Section, a question of practice may be here mentioned, namely, that the Court will not decide respecting the date of alterations in a Will on motion *ex parte* if

and the witnesses at the time of execution, and the presumption of law is, that the act would have been complied with in this respect if the alterations were made *before* execution." In another case (on motion) on the same day, In the Goods of *Saumarez* (*c*), Dr. Lushington expressed himself to the following effect: "I apprehend the general principle to be this, that where any alteration or interlineations appear on the face of a Will executed under the Statute, which are not attested, the presumption is against their being made at the time of execution; for this reason, if it was the other way it would be in favour of all alterations and go to repeal the Statute."

(*a*) 2 Curt. 853.

(*b*) 4 No. Ca. 44.

(*c*) Note to No. Ca. vol. 3, p. 208.

(*d*) 3 No. Ca. 599.

opposed, however strong the presumption may be. See in the Goods of *Jackson*, 1 No. Ca. 92. Section 21.

XXII. And be it further enacted, That no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown. No Will revoked to be revived otherwise than by re-execution or a codicil to revive it.

The case of *Major* v. *Williams* (*a*) was under this section, together with the 20th. The testatrix had duly executed a Will, and subsequently thereto two other Wills, in both of which two other Wills was contained a clause revoking all former Wills. She afterwards destroyed the two later Wills. It was held, that the first Will was not revived by the destruction of the two latter, and that parol evidence is inadmissible to shew an intention to revive. *Per Cur.* "I have no discretion to exercise in this case. There have undoubtedly been cases decided over and over

(*a*) 3 Curt. 432.

Section 22.

again under the Statute of Frauds, holding that parol evidence was admissible to prove the revival of a once revoked instrument. It was this that led to the introduction of the 20th and 22nd Sections into the present Wills Act. There must be a *re-execution;* there are no other means of shewing an intention to revive. Destruction of the revoking instrument is not sufficient; it is not a re-execution of the revoked Will under the present Act."

Revival by subsequent codicil.

In *Neate* v. *Pickard* (*a*), a Will bearing date 1835, and a codicil dated 1839, were revoked by the marriage of the testator in 1843, a few days after which he executed a codicil, purporting to ratify and confirm his Will, without express reference to any particular Will. This was held to revive the Will, though no date was referred to, for though there had been a Will of prior date it was not forthcoming, and therefore both papers were pronounced for. It was further held in the same case that alterations on the face of a Will so revived, were held to be republished by the codicil. If a Will has been revoked wholly, when revived, it is revived as it was at the time of republication.

In the Goods of *Tegg* (*b*), the deceased made alterations in the first codicil to his Will after the execution of it, without having the alterations

(*a*) 2 No. Ca. 406.
(*b*) 4 No. Ca. 531.

attested, but a second codicil being duly executed, the Court *held* it gave effect to the first codicil in its altered form. Section 22.

In the Goods of *William Chapman* (*a*), deceased, parol evidence was excluded under the following circumstances, testator left

A Will, 29th January, 1842.
A codicil, 24th February, 1842.
A codicil, August 2nd, 1842.
A Will, May 30th, 1843.
A codicil, 10th June, 1843.
A codicil, 24th August, 1843.

The codicil of the 10th June, 1843, purported to be a codicil to the Will of 1842, the codicil of August 24th, 1843, purported to be a codicil to the Will of 1843. Affidavits were offered, shewing that the reference in the codicil of June 1843, to the Will of 1842, was made by mistake to such Will, instead of to the Will of 1843, and probate was moved for the Will and two codicils of 1843, or for the Will of 1843 with the last codicil. The Court, Dr. Lushington as Surrogate for Sir H. J. Fust, admitted the Will of May 1843, together with the codicil of August 1843 alone to probate; *holding* that the legal effect of the codicil of June 1843, (without reference to parol evidence) was to revive the Will of 1842, and that the codicil of August revoked the Will of 1842 and the reviving

(*a*) 1 Robertson, 1.

Section 22.

codicil of June 1843, and reinstated the Will of May 1843. This was the legal effect *upon the face of the papers.* As to the next question whether or not parol evidence could be received, the Court decided that it could not, and that consequently the affidavits to explain or correct the reference made in the codicil of June 1843, such reference being therein stated to have been made by mistake to the wrong Will, were rejected by the Court, the rule laid down in *Walpole* v. *Cholmondely* (*a*), applying to a Will of personalty since the New Wills Act. If a clause is inserted in a Will by mistake, parol evidence may be received for the purpose of that clause being expunged, by shewing it was never intended that it should form part of the Will; so the Court may receive parol evidence to explain a word in a Will, but not to substitute one word for another (*b*).

Receivable.

Inadmissible.

In the Goods of *Scriven* (*c*), the Will dated 1842 was not duly attested according to the ninth section, but a further writing was on the same sheet of paper, denominated a codicil, and duly attested; in the codicil there was no reference to the Will, it could not be considered as a republication, but there appearing in such latter

(*a*) 7 Term Rep. 138.

(*b*) In the Goods of *Wilson,* see above, p. 98, the Court could not supply a legacy omitted by the mistake of the drawer of the Will.

(*c*) 2 No. Ca. 152.

writing the words, "I do now further desire," both papers were admitted to probate, not as a Will and codicil, but as parts of one continuous Will. Section 22.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate, or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death. A devise not to be rendered inoperative by any subsequent conveyance or act.

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

XXV. And be it further enacted, That, unless a contrary intention shall appear by the Will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such Will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in A residuary devise shall include estates comprised in lapsed and void devises.

Section 25.

the residuary devise (if any) contained in such Will.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

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

A general gift shall include estates over which the testator has a general power of appointment.

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

described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will. Section 27.

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

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the Will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

Section 29.

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.

No devise to trustees or executors, except for a Term or a presentation to a church, shall pass a chattel interest.

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

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the

whole legal estate, which the testator had power to dispose of by Will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied. Section 31.

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

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

Section 33.

The following is a case under the 33rd section, respecting the lapse of a legacy, and with reference to the 34th section.

In *Skinner* v. *Ogle* (*a*), a Will, dated 1818, had a codicil written at the foot of it dated January 1839, such codicil simply revoked a bequest in the Will, but did not in terms republish the Will. The testator's daughter, who was the sole executrix and residuary legatee, intermarried some time after the execution of the Will, and died before the death of the testator, a widow, leaving two children, minors, and having made a Will, appointing her cousin executrix and guardian to her children. The question was whether the codicil did or did not in effect republish the Will, so as under the 34th section of the Act to bring it within the operation of this, the 33rd section. It was *held* by the Court, that as in the 34th section mention was made of republication and revival as distinct Acts, that the distinction was that a Will *republished* had not become void; that a Will *revived* had become void. In this case the Will was not revoked, and did not require to be revived, and that therefore it was not a question of intention, proof of which is only required where a Will has been revoked. The Will was republished by the general rule of law, which is that every codicil is a republication of

(*a*) 4 No. Ca. 74.

a Will, and in order to defeat this presumption at law there must be shewn intentional revocation. The Court *held* therefore that the codicil brought the Will within the provisions of the present statute, so that under the 33rd section the interest of the daughter of the testator did not lapse, but survived to her children living at the death of the testator. Administration with the Will annexed was therefore granted to the executrix and guardian. Section 33.

XXXIV. And be it further enacted, That this Act shall not extend to any Will made before the first day of January One thousand eight hundred and thirty-eight, and that every Will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January One thousand eight hundred and thirty-eight. Act not to extend to Wills made before 1838, nor to estates pur autre vie of persons who died before 1838.

Several cases have been already given under other sections of the Statute by which it has been observed, that the construction the Court has put upon this section is, that as to alterations, revocations, or other act done to any Will since 1838, although the Will itself may bear date before 1838, it will come within the provisions of the

Section 34. Statute with respect to such Act, under the section which relates to it. It is needless to repeat those cases, the reader will find them under the separate sections treating of the Act by which the cases are respectively affected, which it is conceived is their more proper place, the 34th section applying to every other section of the Act, and in fact to every case in this book.

It was observed in *Skinner* v. *Ogle*, the case next above this, that every codicil is of necessity a republication of a Will, and in that case under a Will of 1818, legacies were held not to have lapsed as they would have done previous to the Statute, by reason that the Will of 1818 was republished by a codicil of 1839.

By the 18th section marriage is a revocation of a Will, but the Court held in *Shirley* (*a*), deceased, that marriage without issue in 1839 did not revoke a Will made in 1806.

In *Lord Hertford's* (*b*) case, the testator, by a Will of 1823, directed his executors to pay legacies which he should give by any subsequent testamentary paper, whether witnessed or not; it was held that such clause could not give effect to legacies bequeathed by an unattested paper made since 1838.

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

(*a*) 2 Curt. 657.
(*b*) 3 Curt. 468.

Craigie v. *Lewin* (*a*), the executor named in a holograph Will in the Scotch form, of a Scotchman by birth, but holding a commission in the military service of the East India Company, and dying in London was cited in the Prerogative Court to prove the Will, or shew cause why administration should not be granted of the effects of the deceased as dead intestate, the executor *protested* to appearing to such citation, by reason that confirmation had been granted of such Will by a Court in Scotland a competent *forum*. *Protest overruled* on the ground that the domicil of *origin* does not revive until an *acquired* domicil is finally abandoned. The deceased, a native Scotchman, having by employment in the military service of the East India Company acquired a domicil in India, *held* that by his return to Scotland *animo manendi* his original domicil did not revive, the party still holding his commission, and being liable to be called upon to return to India, and intending to return if called upon to do so. The principle is this: a domicil once acquired remains until another is acquired or *that first* one is abandoned; length of time is not important, one day will be sufficient provided the *animus* exists, if a person goes from one country to another with the intention of remaining that is sufficient; whatever time he may have lived there, is not enough unless there be an intention

Section 35.

(*a*) 3 Curt. 435.

Section 35.

of remaining. The question in this case was decided, not upon whether the deceased was of English or Scotch domicil, nor whether he was Indian or English, (the law of Wills for India and England being the same (*a*),) but on the ground that the domicil of the testator *was not Scotch.*

In the case of *Maltass* v. *Maltass*, reported in 3 Curt. 231, will be found a valuable decision on the law of Wills respecting British subjects domiciled in Turkey. The following is the marginal note to that case:—

By the law of Turkey, no subject of that country can make a Will. By treaty between Great Britain and the Ottoman Empire, an English subject domiciled in Turkey may make a Will. J. M. was the son of an Englishman who had died domiciled at Smyrna. J. M. himself had never been in England, except for the space of six years, and then only for the purpose of education; he died at Smyrna, having made a Will in the form of an English Will, but not executed and attested according to the 1st Vict. c. 26. Probate of such paper was refused. (*b*)

(*a*) An Act was passed by the Legislature for India, adopting this Statute into their code of laws.

(*b*) *Vide* Robertson, p. 67, where another Will of this deceased was propounded, date 1834, and was a question upon the law of domicil, considered as regulating testacy and intestacy in the case of a British subject

Section 35.

It may be further remarked under this section, that a Will is not valid unless executed according to the law prevailing in the country where the testator is domiciled; and the fact of the property being locally situated in another country, and of the Will being duly executed according to the law of that country, will make no distinction.

It is not the *lex loci rei sitæ* which will apply as to whether the Statute will take effect or not, but the law of domicil, nor will it make a distinction as to where the paper was executed (*a*).

The 36th is the usual concluding section: "That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of Parliament."

long resident, as a merchant, at Smyrna, and dying there, having regard to the treaties between Great Britain and the Ottoman Empire.

(*a*) See Lord Hertford's case, 3 Curt. 468.

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THE END.

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