

## WILLS ACT, 1936.

### No. 2302 of 1936.

An Act to consolidate certain enactments relating to wills.

[Assented to 5th November, 1936.]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows :

1. This Act may be cited as the "Wills Act, 1936", and shall come into operation on a day to be fixed by the Governor by proclamation. Short title.

2. The following enactments are repealed :— Repeals.

No. 16 of 1842—An Act for adopting a certain Act of Parliament intituled "An Act for the Amendment of the Laws with respect to Wills" in the administration of Justice in South Australia in like manner as other laws in England are applied therein.

The Imperial Act 7 Will. 4 and 1 Vict., c. 26—An Act for the Amendment of the Laws with respect to Wills.

No. 15 of 1862—Wills Amendment Act, 1862.

No. 620 of 1895—An Act to amend the Law with respect to Wills.

No. 1208 of 1915—Wills (Naval and Military Services) Amendment Act, 1915.

3. (1) In this Act, unless the context otherwise requires or some other meaning is clearly intended—

"personal estate" includes leasehold estates and other chattels real and money, 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, prior to the coming into operation of The Intestate Real Estates

Interpretation.  
and application  
of Act.  
U.K. 7 Will. 4  
and 1 Vict.  
c. 26, ss. I.,  
XXXIV.,  
16, 1842,  
s. II.

Distribution Act, 1867, devolved by law upon the executor or administrator and any share or interest in any such personal estate :

“real estate” includes messuages, lands, rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal, or personal, and any estate right or interest (other than a chattel interest) therein :

“will” includes testament codicil appointment by will or by writing in the nature of a will in exercise of a power and a disposition by will and testament or devise of the custody and tuition of any child by virtue of the Imperial Act passed in the twelfth year of the reign of King Charles the Second, Chapter 24, and any other testamentary disposition.

(2) Except where this Act otherwise provides, this Act shall apply to every will made on or after the first day of January, eighteen hundred and thirty-eight. 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 will or codicil was so re-executed, republished, or revived.

(3) This Act shall not extend to any estate *pur autre vie* of any person who has died before the first day of January, eighteen hundred and thirty-eight.

*Property which may be disposed of by will.*

4. (1) Every person may devise, bequeath or dispose of by his will executed in manner hereinafter required all real estate and all personal estate to which he is entitled either at law or in equity at the time of his death and which if not so devised, bequeathed or disposed of would devolve upon the heir at law of him or (if he became entitled by descent) of his ancestor or upon his executor or administrator.

(2) The power given by this section shall extend to—

(a) any estate *pur autre vie* whether there is or is not any special occupant thereof and whether the estate is freehold or of any other tenure and whether it is a corporeal or incorporeal hereditament :

(b) every contingent, executory or other future interest in any real or personal estate whether the testator is or is not ascertained as the person or one of the persons in whom that interest may become vested,

All property  
may be  
disposed of by  
will.

U.K. 7 Will. 4  
and 1 Vict.  
c. 26, s. III.

s. 3. (2) *Re the will of J. McKECHNIE* (1870) 4 S.A.L.R. 56; *McKECHNIE v. McKECHNIE* (1871) 5 S.A.L.R. 119. Held (in both cases) that the Wills Act, 1842, related back to wills made on or before 1st January, 1838.

and whether he is entitled to that interest under the instrument by which it was created or under any disposition thereof by deed or will; and

- (c) every right of entry for condition broken and every other right of entry:
- (d) any such estate interest right or other real or personal estate as mentioned in this section to which the testator is entitled at the time of his death, notwithstanding this he became so entitled subsequently to the execution of his will.

*Testamentary capacity.*

5. No will made by any person under the age of twenty-one years shall be valid.

No will of a minor valid.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. VII.

6. (1) A will made by any person who, at the time when it was made, was not under eighteen years of age, and

Extension of testamentary capacity to certain persons in the naval and military forces.

- (a) was or had been a member of the Australian Imperial Forces or of any other naval or military force raised in the Commonwealth of Australia by the Minister of Defence for service in the war in which His Majesty was engaged, in the years 1914 to 1918; or

1208, 1915, ss. 2 and 3. Cf. U.K. 28 & 29 Vict. c. 72; 7 & 8 Geo. 5 c. 58.

- (b) during that war, was or had been a member of any of the Naval or Military Forces of the Commonwealth and was under the provisions of any Act of the Commonwealth, liable to be required to serve as such member, beyond the limits of the Commonwealth and those of the Territories under the authority of the Commonwealth,

shall, notwithstanding any other provision of this Act, or of any other Act, and whether that will was made during that war or after its termination, be as valid as if that person were not under the age of twenty-one years.

(2) This section shall have the same effect as if it had come into operation on the fourth day of August nineteen hundred and fourteen.

7. Subject to the Married Women's Property Act, 1883-4, 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 first day of August, eighteen hundred and forty-two.

Wills of married women.  
16, 1842, s. VIII. Cf. U.K. 7 Will. 4 & 1 Vict. c. 26, s. VIII.

s. 7. The Married Women's Property Act, 1883-4, has been repealed and superseded by the Law of Property Act, 1936.

*Execution and attestation of wills.*

Requirements  
as to writing  
and execution  
of will.

U.K. 7 Will. 4  
and 1 Vict.  
c. 26, s. IX.

**8.** No will shall be valid unless it is in writing and executed in the following manner:—

- (a) 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
- (b) The signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (c) The witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

When signature  
to a will to be  
deemed valid.

15, 1862, s. 1.  
U.K. 15 & 16  
Vict. c. 24,  
s. 1.

**9.** (1) Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as mentioned in the last preceding section, be deemed to be valid within the meaning of this Act, if the signature is so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by his signature to the writing signed as his will.

(2) No such will shall be affected by the circumstance—

- (a) that the signature does not follow, or is not immediately after the foot or end of the will; or
- (b) that a blank space intervenes between the concluding word of the will and the signature; or
- (c) that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names, or one of the names of the subscribing witnesses; or
- (d) that the signature is on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or

s. 8. In the estate of LILY ROWE (deceased) (1913) S.A.L.R. 168. Where the testatrix approved her will when read to her in the presence of two nurses, and the nurses (one of whom was a minor) signed the will as witnesses, but a third nurse struck out the minor's signature and inserted her own, and there was no evidence as to when the testatrix's signature was affixed to the will, held that the testatrix had acknowledged her signature to the will in the presence of the two nurses first mentioned.

(e) that there appears to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written, to contain the signature.

(3) The enumeration of the above circumstances shall not restrict the generality of subsection (1) of this section; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made.

**10.** (1) No appointment made by will in exercise of any power shall be valid unless the will is executed in manner hereinbefore required.

Appointments by will to be executed like other wills, &c.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. X.

(2) Every will executed in manner hereinbefore required shall so far as respects the execution and attestation thereof be a valid execution of a power of appointment by will notwithstanding it has been expressly required that a will made in exercise of that power should be executed with some additional or other form of execution or solemnity.

**11.** 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.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XI.; 7 & 8 Geo. 5 c. 58, ss. 1, 2.

**12.** Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Publication not requisite.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XIII.

**13.** Every will made out of the State by a testator who has died or dies after the twenty-second day of October, eighteen hundred and ninety-five (whatever may be the domicile of the testator at the time of making the will or at the time of his death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in the State to probate if it is made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled when it was made, or by the laws then in force in that part of His Majesty's dominions where he had his domicile of origin.

Wills made out of the State to be admitted if made according to the law of the place where made, &c.  
620, 1895, s. 1.  
U.K. 24 and 25, Vict. c. 114, s. 1.

s. 11. In *re* FRANCIS HAVEY (deceased) (1918) S.A.L.R. 169. A soldier in camp pending departure overseas for military service is on actual military service. This section preserves to a soldier on actual military service the power to make an oral will of personal estate.

Wills made in the State to be admitted if made according to local usage.

620, 1895, s. 2.  
U.K. 24 and 25 Vict.  
c. 114, s. 2.

**14.** Every will made within the State by a testator who has died or dies after the twenty-second day of October, eighteen hundred and ninety-five (whatever may be the domicile of the testator at the time of making it or at the time of his death) shall, as regards personal estate, be held to be well executed, and shall be admitted in the State to probate if it is executed according to the forms required by the laws for the time being in force in the State.

Saving of section 23 of Administration and Probate Act, 1919.

**15.** Nothing in either of the last two preceding sections shall be held to restrict the operation of section 23 of the Administration and Probate Act, 1919.

Will not void by incompetency of witness.

U.K. 7 Will. 4 and 1 Vict.  
c. 26, s. XIV.

**16.** If any person who attests the execution of a will is at the time of the execution thereof or at any time afterwards incompetent to be admitted a witness to prove the execution thereof, the will shall not on that account be invalid.

Gifts to an attesting witness to be void.

U.K. 7 Will. 4 and 1 Vict.  
c. 26, s. XV.

**17.** If any person, 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 a charge or direction for the payment of any debts) is given or made by a will, attests the execution of that will—

(a) that devise legacy estate interest gift or appointment shall so far only as concerns the person so attesting the execution of the will or the wife or husband of that person or any person claiming under that person or wife or husband be void; and

(b) the person so attesting shall be admitted as a witness to prove the execution of the will or to prove the validity or invalidity thereof notwithstanding the devise legacy estate interest gift or appointment mentioned in the will.

Creditor attesting to be admitted a witness.

U.K. 7 Will. 4 and 1 Vict.  
c. 26, s. XVI.

**18.** If by any will any real or personal estate is charged with any debt and any creditor whose debt is so charged or the wife or husband of any such creditor attests the execution of that will, that creditor notwithstanding the charge shall be admitted a witness to prove the execution of that will or the validity or invalidity thereof.

Executor to be admitted a witness.

U.K. 7 Will. 4 and 1 Vict.  
c. 26,  
s. XVII.

**19.** 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 that will or the validity or invalidity thereof.

*Revocation of wills.*

**20.** Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir executor or administrator, or the person entitled as his or her next of kin under the Statute of Distributions).

Will to be revoked by marriage.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XVIII.

Amended  
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**21.** 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.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XIX.

**22.** No will or codicil or any part thereof shall be revoked otherwise than—

In what case wills may be revoked  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XX.

(a) by marriage as provided by this Act ; or

(b) by another will or codicil executed in manner hereinbefore required ; or

(c) by some writing declaring an intention to revoke the will codicil or part thereof and executed in the manner in which a will is hereinbefore required to be executed ; or

(d) by the burning tearing or otherwise destroying the will codicil or part thereof by the testator or by some person in his presence and by his direction with the intention of revoking it.

**23.** No will made by a testator who has died or dies after the twenty-second day of October, eighteen hundred and ninety-five, shall be held to be revoked, or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same.

Change of domicile not to invalidate will.  
620, 1895, s. 3.  
U.K. 24 and 25 Vict. c. 114, s. 3.

*Alterations in wills.*

**24.** 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 are not apparent unless the alteration is executed in the manner in which a will is hereinbefore required to be executed ; but the will with the alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses are made in the margin or on some other part of the will opposite or near to the alteration or at the foot or end of or opposite to a memorandum

No alteration in a will shall have any effect unless executed as a will.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXI.

s. 24. In *re* RADFORD (1886) 20 S.A.L.R. 74. Where an alteration to a will is not attested, probate must issue as if the alteration had not been made.

referring to the alteration and written at the end or some other part of the will.

*Revival of wills.*

How revoked will shall be revived.

U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXII.

**25.** (1) No will or codicil or any part thereof which has been 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 will codicil or part thereof.

(2) When any will or codicil which has been partly revoked and afterwards wholly revoked is revived, the revival shall not extend to so much of the will or codicil as was revoked before the revocation of the whole thereof unless an intention to the contrary is shown.

*Construction of wills.*

When a devise not to be rendered inoperative, &c.

U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXIII.

**26.** 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 the will is revoked as aforesaid shall prevent the operation of the will with respect to such estate or interest in that real or personal estate as the testator had power to dispose of by will at the time of his death.

A will to speak from the death of the testator.

U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXIV.

**27.** 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 appears by the will.

What a residuary devise shall include.

U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXV.

**28.** Unless a contrary intention appears by the will, any real estate or interest in real estate comprised or intended to be comprised in any devise in a will, which devise fails or is void by reason of the death of the devisee in the lifetime of the testator or by reason of the devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

What estates a general devise shall include.

U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXVI.

**29.** 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 leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold

s. 27. In *re BICKFORD; BICKFORD AND ANOTHER v. BICKFORD AND OTHERS* (1934) S.A.S.R. 131. The court applied s. XXIV. of Wills Act, 1837, in interpreting a bequest of shares in a company. Held, that as the testatrix at the time of her death, held no shares such as were specified in the bequest, the bequest could not operate.

estates of the testator or his leasehold estates or any of them to which such description extends, as the case may be, as well as freehold estates, unless a contrary intention appears by the will.

**30.** (1) A general devise 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 extends (as the case may be) which he has power to appoint in any manner he may think proper and shall operate as an execution of that power unless a contrary intention appears by the will.

What property subject to a power of appointment a general gift shall include.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXVII.

(2) 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 extends (as the case may be) which he has power to appoint in any manner he may think proper and shall operate as an execution of that power unless a contrary intention appears by the will.

**31.** Where any real estate is devised to any person without any words of limitation, that devise shall be construed to pass the whole estate or interest (whether the fee simple or any other estate or interest), which the testator had power to dispose of by will in that real estate unless a contrary intention appears by the will.

How a devise without words of limitation shall be construed.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXVIII.

**32.** (1) 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 that person and not an indefinite failure of his issue unless a contrary intention appears by the will by reason of that person having a prior estate tail or of a preceding gift being without any implication arising from such words a limitation of an estate tail to that person or issue or otherwise.

How the words "die without issue" or "die without leaving issue" shall be construed.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXIX.

(2) This section shall not extend to cases where the words mentioned in subsection (1) import if no issue described in a preceding gift is born or if there is no issue who lives 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, &c., shall pass a chattel interest.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXX.

**33.** Where any real estate is devised to any trustee or executor that devise shall be construed to pass the whole estate or interest (whether the fee simple or any other 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 is thereby given to him expressly or by implication.

Trustees under an unlimited devise, &c., to take the fee.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXXI.

**34.** Where any real estate is devised to a trustee without any express limitation of the estate to be taken by the trustee and the beneficial interest in the real estate or in the surplus rents and profits thereof is not given to any person for life or that beneficial interest is given to any person for life but the purposes of the trust may continue beyond the life of that person, that devise shall be construed to vest in the trustee the whole legal estate (whether the fee simple or any other 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 are satisfied.

Devises of estates tail shall not lapse.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXXII.

**35.** Where any person to whom any real estate is devised for an estate tail or an estate in quasi entail, dies in the lifetime of the testator leaving issue who would be heritable under such entail and any such issue are living at the time of the death of the testator the devise shall not lapse but shall take effect as if the death of that person had happened immediately after the death of the testator unless a contrary intention appears by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.  
U.K. 7 Will. 4 and 1 Vict. c. 26, s. XXXIII.

**36.** Where any person being a child or other issue of the testator to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of that person dies in the lifetime of the testator leaving issue and any such issue of that person is living at the time of the death of the testator, the devise or bequest shall not lapse, but shall take effect as if the death of that person had happened immediately after the death of the testator unless a contrary intention appears by the will.

Validity of certain wills.  
620, 1895, s. 4.  
U.K. 24 and 25 Vict. c. 114, s. 4.

**37.** Nothing in sections 13, 14 or 23 shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if those sections had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by those sections.

s. 36. In *re* CORNISH (1913) S.A.L.R. 162. Held that, as a gift was made to children as a class, and there could be no lapse, s. 36 did not apply.