

1937

## c 164 Wills Act

Ontario

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3. *WILLS, EXECUTORS AND TRUSTEES.*

## CHAPTER 164.

## The Wills Act.

## INTERPRETATION.

Inter-  
pretation.

## 1. In this Act,

"Land,"

- (a) "Land" shall include messuages, and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be paid out in the purchase of land, and any share of the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency;

"Mortgage."  
Imp. Act,  
30-31 V.  
c. 69, s. 2.

- (b) "Mortgage" shall include any lien for unpaid purchase money, and any charge, incumbrance, or obligation of any nature whatever upon any land or tenements of a testator or intestate, and "mortgagee" shall have a meaning corresponding with that of mortgage;

"Mort-  
gagee.""Personal  
estate."

- (c) "Personal estate" shall include leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein;

"Real  
estate."

- (d) "Real estate" shall include messuages, land, rents and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal

or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein;

- (e) "Will" shall include a testament, and a codicil, <sup>"Will."</sup> and an appointment by will, or by writing in <sup>Imp. Act,</sup> the nature of a will in exercise of a power, and <sup>1 V. c. 26,</sup> also a disposition by will and testament, or devise <sup>s. 1.</sup> of the custody and tuition of any child, by virtue of *The Infants Act*, and any other testamentary <sup>Rev. Stat.</sup> disposition. <sup>c. 215.</sup> R.S.O. 1927, c. 149, s. 1.

#### WILLS BEFORE 1ST JANUARY, 1874.

2. Where a will made before, and not re-executed, republished or revived after the 1st day of January, 1874, by any person dying after the 6th day of March, 1834, contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land acquired by the devisor, after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof. R.S.O. 1927, c. 149, s. 2.

When real estate subsequently acquired may pass by the will.

3. Where land is devised in any such will it shall be considered that the devisor intended to devise all such estate as he was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise. R.S.O. 1927, c. 149, s. 3.

What estate deemed to pass by devise.

4. Any will affecting land executed after the 6th day of March, 1834, and before the 1st day of January, 1874, in the presence of and attested by two or more witnesses shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if the witnesses subscribed their names in presence of each other, although their names were not subscribed in presence of the testator. R.S.O. 1927, c. 149, s. 4.

Witness need not subscribe in the presence of the testator.

5. After the 4th day of May, 1859, and before the 1st day of January, 1874, every married woman might, by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried. R.S.O. 1927, c. 149, s. 5.

Will by married woman between 4th May, 1859, and 1st January, 1874.

## WILLS AFTER 1ST JANUARY, 1874.

Operation of  
succeeding  
sections.

6. Unless herein otherwise expressly provided, the subsequent sections of this Act shall not extend to any will made before the 1st day of January, 1874; but every will re-executed or republished, or revived by any codicil, shall for the purposes of those sections, be deemed to have been made at the time at which the same was so re-executed, republished or revived. R.S.O. 1927, c. 149, s. 6.

Imp. Act.  
1 V. c. 26,  
s. 34.

Application  
of sections  
21, 22, 25  
and 26.

7. Sections 21, 22, 25 and 26 shall not apply to the will of any person who died before the 1st day of January, 1869, but shall apply to the will of every person who died since the 31st day of December, 1868. R.S.O. 1927, c. 149, s. 7.

Rev. Stat.  
cc. 163, 153.

Power to  
dispose of all  
property.  
Imp. Act,  
1 V. c. 26,  
s. 3.

Estates pur  
autre vie.

Contingent  
interests.

Rights of  
entry.

Property  
acquired  
after the  
will.

8. Subject to the provisions of *The Devolution of Estates Act* and of *The Accumulations Act*, every person may devise, bequeath, or dispose of by will, executed in manner herein; after mentioned, all real estate and personal estate to which he may be entitled, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heirs or upon his executor or administrator, and the power hereby given shall extend to estates *pur autre vie*, whether there is or is not any special occupant thereof, and whether the same are corporeal or incorporeal hereditaments, and also to all contingent, executory, or other future interests in any real estate or personal estate, whether the testator is or is not ascertained as the person, or one of the persons, in whom the same may become vested, and whether he is entitled thereto under the instrument by which the same 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 estate 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. R.S.O. 1927, c. 149, s. 8.

Widow's  
right to  
dispose of  
crop. 20 Hy.  
3, (St. of  
Merton) c. 2.

9. A widow may, in like manner, bequeath the crop of her ground as well of her dower as of other her real estate. R.S.O. 1927, c. 149, s. 9.

Wills by  
infants in-  
valid. Imp.  
Act, 1 V.  
c. 26, s. 7.

10. Save as provided by subsection 2 of section 13 no will made by any person under the age of twenty-one years shall be valid. R.S.O. 1927, c. 149, s. 10.

Execution.  
Imp. Act,  
1 V. c. 26,  
s. 9.

11.—(1) No will shall be valid unless it is 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. Attestation.

(2) Every will, so far only as regards the position of the signature of the testator, or of the person so signing for him, shall 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 such signature to the writing signed as his will, and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance 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 by the circumstance 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 by the circumstance 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, and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature 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. R.S.O. 1927, c. 149, s. 11. Position of signature.  
Imp. Act.  
15-16 V.  
c. 24, s. 1.

**12.** No appointment made by will, in exercise of any power, shall be valid unless the same is executed in manner hereinbefore required, and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity. R.S.O. 1927, c. 149, s. 12. Exercise of appointments by will. Imp. Act, 1 V. c. 26, s. 10.

**13.—(1)** 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 1st January, 1874. Wills of personality of soldiers and sailors. Imp. Act, 1 V. c. 26, s. 11.

Testamen-  
tary capacity  
of soldier or  
sailor  
although  
a minor.

(2) Any such soldier, mariner or seaman shall be deemed to have been since the 4th day of August, 1914, of testamen-  
tary capacity and to have been capable of making a valid  
disposition by his will of any of his property whether real or  
personal, notwithstanding that he was at the time of the  
execution of his will under the age of twenty-one years.  
R.S.O. 1927, c. 149, s. 13.

Publication  
unnecessary.  
Imp. Act,  
1 V. c. 26,  
s. 13.

**14.** Every will executed in manner hereinbefore required  
shall be valid without any other publication thereof. R.S.O.  
1927, c. 149, s. 14.

Effect of  
incompe-  
tency of  
witness.  
Imp. Act,  
1 V. c. 26,  
s. 14.

**15.** If any person who attests the execution of a will is,  
at the time of the execution thereof, or becomes at any time  
afterwards, incompetent to be admitted as a witness to prove  
the execution thereof, such will shall not on that account be  
invalid. R.S.O. 1927, c. 149, s. 15.

Gifts, etc.,  
to witness  
invalid.  
Imp. Act,  
1 V. c. 26,  
s. 15.

**16.** If any person attests the execution of any will to  
whom, or to whose wife or husband, any beneficial devise,  
legacy, estate, interest, gift, or appointment of or affect-  
ing any real estate or personal estate, other than and except  
charges and directions for the payment of any debt, is thereby  
given or made, such devise, legacy, estate, interest, gift, or  
appointment shall, so far only as concerns such person attest-  
ing the execution of such will, or the wife or husband of  
such person, or any person claiming under such person or  
such 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 the validity or invalidity thereof,  
notwithstanding such devise, legacy, estate, interest, gift,  
or appointment mentioned in such will. R.S.O. 1927, c. 149,  
s. 16.

Creditor as  
witness.  
Imp. Act,  
1 V. c. 26,  
s. 16.

**17.** In case, by any will, any real estate or personal estate  
is charged with any debt, and any creditor, or the wife or  
husband of any creditor, whose debt is so charged attests the  
execution of such will, such creditor, notwithstanding such  
charge, shall be admitted as a witness to prove the execution  
of such will, or the validity or invalidity thereof. R.S.O.  
1927, c. 149, s. 17.

Executor as  
witness.  
Imp. Act,  
1 V. c. 26,  
s. 17.

**18.** No person shall, on account of his being an executor  
of a will, be incompetent to be admitted as a witness to  
prove the execution of such will, or the validity or invalidity  
thereof. R.S.O. 1927, c. 149, s. 18.

Execution  
out of  
Ontario by a  
British  
subject.

**19.—(1)** Every will made out of Ontario by a British  
subject, whatever may be his domicile at the time of making  
the same or at the time of his death, shall, as regards per-  
sonal estate, be held to be well executed for the purpose of  
being admitted to probate in Ontario, if the same was made

according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the law then in force in that part of His Majesty's Dominions where he had his domicile of origin.

(2) Every will made within Ontario by a British subject whatever may be his domicile at the time of making the same or at the time of his death, shall, as regards personal estate, be held to be well executed and shall be admitted to probate in Ontario if the same was made and executed according to the forms required by the law of Ontario.

Imp. Act,  
24 and 25 V.  
c. 114.

Execution by  
British sub-  
ject in  
Ontario.

(3) No will 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.

(4) Nothing in this section shall invalidate any will, as regards personal estate, which would have been valid if this section had not been passed, except as such will may be revoked or altered by any subsequent will made valid by this section.

Saving.

(5) This section, except subsection 2, shall extend only to wills made by persons dying after the 17th day of March, 1902, and subsection 2 shall extend only to wills made by persons dying after the 19th day of March, 1910. R.S.O. 1927, c. 149, s. 19.

Application  
to wills of  
persons dy-  
ing after  
17th March,  
1902.

**20.**—(1) Every will made by any person dying on or after the 13th day of April, 1897, shall be revoked by the marriage of the testator, except,—

Revocation  
by marriage.  
Imp. Act,  
1 V. c. 26,  
s. 18.

(a) where it is declared in the will that the same is made in contemplation of such marriage;

(b) where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband and filed, within one year after the testator's death, in the office of the surrogate clerk at Toronto;

(c) where the will is made in the exercise of a power of appointment and the real estate or personal estate thereby appointed would not in default of such appointment pass to the testator's heirs, executor or administrator, or the person entitled as the testator's next of kin under *The Devolu-*  
*tion of Estates Act.*

Exceptions.

Rev. Stat.  
c. 163.

(2) The will of any testator who died between the 31st day of December, 1868, and the 13th day of April, 1897, shall be held to have been revoked by his subsequent marriage, unless such will was made under the circumstances set forth in clause c. R.S.O. 1927, c. 149, s. 20.

Wills of  
persons  
dying be-  
tween 31st  
Dec., 1868,  
and 13th  
April, 1897.



Change in  
circumstan-  
ces. Imp.  
Act, 1 V.  
c. 26, s. 19.

**21.** No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. R.S.O. 1927, c. 149, s. 21.

Revocation,  
how effected.  
Imp. Act,  
1 V. c. 26,  
s. 20.

**22.** No will, or any part thereof, shall be revoked otherwise than as aforesaid provided by section 20, or by another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction with the intention of revoking the same. R.S.O. 1927, c. 149, s. 22.

Oblitera-  
tions, inter-  
lineations,  
etc.  
Imp. Act,  
1 V. c. 26,  
s. 21.

**23.** 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 such alteration is 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 are made in the margin or in 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 in some other part of the will. R.S.O. 1927, c. 149, s. 23.

Revival.  
Imp. Act,  
1 V. c. 26,  
s. 22.

**24.** No will, 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 same, and where any will which has been partly revoked, and afterwards wholly revoked, is revived such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown. R.S.O. 1927, c. 149, s. 24.

Operation of  
the will as to  
any interest  
left in  
testator.  
Imp. Act,  
1 V. c. 26,  
s. 23.

**25.** No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real estate or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real estate or personal estate, as the testator had power to dispose of by will at the time of his death. R.S.O. 1927, c. 149, s. 25.

Will to speak  
from death.  
Imp. Act,  
1 V. c. 26,  
s. 24.

**26.**—(1) 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.



(2) This section shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband. R.S.O. 1927, c. 149, s. 26.

**27.** Unless a contrary intention appears by the will such real estate as is comprised or intended to be comprised in any devise in such will contained which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will. R.S.O. 1927, c. 149, s. 27.

**28.** A 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, 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 his leasehold estates, or any of them, to which such description will extend as well as freehold estates, unless a contrary intention appears by the will. R.S.O. 1927, c. 149, s. 28.

**29.** 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 will extend, 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 appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend, 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 appears by the will. R.S.O. 1927, c. 149, s. 29.

**30.** Where any real estate is devised to any person without any words of limitation such devise shall, subject to *The Devolution of Estates Act*, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will. R.S.O. 1927, c. 149, s. 30.

**31.** Where any real estate is devised by any testator, dying on or after the 5th day of March, 1880, to the heir

Imp. Act,  
56-57 V. c.  
63, s. 3.

Disposition  
of lapsed de-  
vise. Imp.  
Act, 1 V.  
c. 26, s. 25.

Disposition  
of leaseholds  
under a  
general de-  
vise of real  
estate. Imp.  
Act, 1 V.  
c. 26, s. 26.

Disposition  
of property  
over which  
testator has  
a general  
power of  
appointment  
under gen-  
eral devise  
or bequest.  
Imp. Act,  
1 V. c. 26,  
s. 27.

Estate pass-  
ing under  
devise with-  
out words of  
limitation.  
Imp. Act,  
1 V. c. 26,  
s. 28.  
Rev. Stat.  
c. 163.

Meaning of  
"heir" in a  
devise of real  
estate.

or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" or "heirs" shall be construed to mean the person or persons to whom the real estate of the testator, or of such other person as the case may be, would descend under the law of Ontario in case of an intestacy. R.S.O. 1927, c. 149, s. 31.

Import of words "die without issue," or to that effect. Imp. Act, 1 V. c. 26, s. 29.

**32.** In any devise or bequest of real estate or personal estate, the words "die without issue", or "die without leaving issue," or "have no issue," or any other words which 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 appears by the will by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; but this Act shall not extend to cases where such words import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. R.S.O. 1927, c. 149, s. 32.

Saving.

Estate passing under devise to trustee or executor.

**33.** Where any real estate is devised to a 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 is thereby given to him expressly or by implication. R.S.O. 1927, c. 149, s. 33.

Imp. Act, 1 V. c. 26, s. 30.

When devise to a trustee shall pass the whole estate beyond what is requisite for the trust. Imp. Act, 1 V. c. 26, s. 31.

**34.** Where any real estate is 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, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to *The Devolution of Estates Act*, 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 are satisfied. R.S.O. 1927, c. 149, s. 34.

Rev. Stat. c. 163.

When devises in tail not to lapse. Imp. Act, 1 V. c. 26, s. 32.

**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 inheritable under such entail, and any such issue are 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 hap-

pened immediately after the death of the testator, unless a contrary intention appears by the will. R.S.O. 1927, c. 149, s. 35.

**36.**—(1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the life-time of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are 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 appears by the will.

When gifts to issue or certain other relatives not to lapse by reason of death in life-time of testator.

(2) The provisions of this section shall apply to a devise or a bequest to children or other issue or to brothers or sisters as a class. R.S.O. 1927, c. 149, s. 36.

Application of section to bequest to class.

**37.**—(1) Where any person has died since the 31st day of December, 1865, or hereafter dies, seised of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum of money by way of mortgage, and such person has not by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

Primary liability of real estate to satisfy specific charge.

Imp. Act, 17-18 V. c. 113, s. 1.

(2) In the construction of a will to which this section relates, a general direction that the debts, or that all the debts, of the testator shall be paid out of his personal estate, or a charge or direction for the payment of debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in subsection 1 contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

Consequence of general direction for payment of debts out of personalty or residue. Imp. Act, 30-31 V. c. 69, s. 1. and 40-41 V. c. 31, s. 1.

(3) Nothing herein shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying or otherwise, and nothing herein shall affect the rights of any person claiming under any will, deed or document made before the 1st day of January, 1874. R.S.O. 1927, c. 149, s. 37.

Saving of mortgagee's rights.